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## Front Matter

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## RECENT DEVELOPMENTS IN AVIATION LAW

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## I. INTRODUCTION

**F**EDERAL AND STATE COURTS in the United States issued a number of noteworthy aviation decisions in late 2012 and 2013. This article addresses these rulings, their significance and implications, and identifies trends to watch going forward.

The discussion portion of the article is broken into subsections covering the following topics: (1) federal preemption; (2) the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention); (3) the Convention for Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention); (4) forum non conveniens; (5) Continental Connection Flight 3407 litigation; (6) the General Aviation Revitalization Act (GARA); (7) the Restatement (Third) of Torts; (8) removal to federal court and remand to state court; and (9) personal jurisdiction in the internet age. No attempt has been made to examine all recent cases relating to each topic. Rather, the authors have selected and analyzed a mix of prominent decisions by influential appellate courts and interesting, controversial, or non-traditional decisions by federal and state trial courts.

Federal preemption remains an evolving, hotly contested, and closely watched issue in aviation law. In 2012 and 2013, the Ninth Circuit Court of Appeals, the District Court for the Eastern District of Pennsylvania, and a New York state appellate court all rendered noteworthy preemption decisions.<sup>1</sup> The Supreme Court ruled in April 2014 on the appeal of the Ninth Circuit's decision in *Ginsberg v. Northwest, Inc.*,<sup>2</sup> but its opinion was limited to the issue of preemption of state law contract claims under the implied covenant of good faith and fair dealing.<sup>3</sup> There remains a split between federal circuit courts regard-

<sup>1</sup> See generally *Ginsberg v. Nw., Inc.*, 695 F.3d 873 (9th Cir. 2012), *rev'd*, 134 S. Ct. 1422 (2014); *Gilstrap v. United Airlines*, 709 F.3d 995 (9th Cir. 2013); *Lewis v. Lycoming*, 959 F. Supp. 2d 552 (*Lewis II*) (E.D. Pa. 2013); *Biscione v. JetBlue Airways Corp.*, 103 A.D.3d 158 (N.Y. App. Div. 2012).

<sup>2</sup> *Ginsberg*, 695 F.3d 873 (9th Cir. 2012).

<sup>3</sup> See *Nw., Inc. v. Ginsberg*, 134 S. Ct. 1422, 1433–34 (2014).

ing federal preemption of products liability claims,<sup>4</sup> and a decision in the Eastern District of Pennsylvania has broken with precedent in the influential Third Circuit holding that the Federal Aviation Act preempts state law standards of care for such claims.<sup>5</sup>

With respect to forum non conveniens jurisprudence, the Supreme Court refused to grant certiorari to review a decision dismissing the claims of foreign plaintiffs despite a showing no adequate alternative forum existed,<sup>6</sup> while the Eastern District of Pennsylvania refused to dismiss the claims of foreign plaintiffs that had an adequate alternative forum after weighing the private and public interests at play.<sup>7</sup>

Precedent regarding GARA also continues to evolve. While the Sixth Circuit Court of Appeals addressed whether a maintenance manual is a “part” under GARA,<sup>8</sup> the law regarding manuals under GARA remains unclear. Also, the Second Circuit has continued a trend in narrowly construing the fraud exception to the GARA statute of repose.<sup>9</sup>

These recent developments and others are discussed in detail below.

## II. DISCUSSION OF CASES

### A. FEDERAL PREEMPTION

#### 1. *Ginsberg v. Northwest, Inc.*

In December 2013, the Supreme Court held oral arguments on the appeal of the Ninth Circuit’s decision in *Ginsberg v. Northwest, Inc.*<sup>10</sup> *Ginsberg* involves an action brought by a former member of Northwest’s frequent flier program whose membership was revoked.<sup>11</sup> The plaintiff alleged a common law breach

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<sup>4</sup> See Thomas H. Sosnowski, *Narrowing the Field: The Case Against Implied Field Preemption of State Product Liability Law*, 88 N.Y.U. L. REV. 2286, 2313 (2013).

<sup>5</sup> See *Lewis II*, 957 F. Supp. 2d at 559.

<sup>6</sup> See *Bapte v. W. Caribbean Airways*, 134 S. Ct. 792, 792 (2013).

<sup>7</sup> See *Lewis v. Lycoming*, 917 F. Supp. 2d 366, 377 (*Lewis I*) (E.D. Pa. 2013).

<sup>8</sup> See *Crouch v. Honeywell Int’l, Inc.*, 720 F.3d 333, 341–44 (6th Cir. 2013).

<sup>9</sup> See *Ovesen v. Mitsubishi XYZ Corps.*, 519 F. App’x 722, 723–24 (2d Cir. 2013).

<sup>10</sup> 695 F.3d 873 (9th Cir. 2012). On April 2, 2014, the Supreme Court issued its holding on the case, reversing the Ninth Circuit’s decision and ruling that the plaintiff’s claim under Minnesota’s implied covenant of good faith was preempted. See *Ginsberg*, 134 S. Ct. 1422, 1433–34 (2014).

<sup>11</sup> See *id.* at 874–75.

of the implied covenant of good faith and fair dealing.<sup>12</sup> The district court held that the plaintiff's claim was preempted by the Airline Deregulation Act (ADA),<sup>13</sup> and granted the defendant's motion to dismiss.<sup>14</sup>

On appeal, the Ninth Circuit concluded that the ADA did not preempt the plaintiff's common law contract claim and reversed the district court's dismissal of the action.<sup>15</sup> The court found that Congress's "manifest purpose" in passing the ADA was to improve industry efficiency and "not to immunize the airline industry from liability for common law contract claims."<sup>16</sup>

The two key statutory provisions at issue in *Ginsberg* are a preemption clause added to the ADA in 1978 and a savings clause contained in the Federal Aviation Act (FAA) of 1958.<sup>17</sup> The preemption clause prohibits states from enacting or enforcing "a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier."<sup>18</sup> The savings clause preserves common law and statutory remedies.<sup>19</sup>

In analyzing the scope of the ADA's preemption clause, the Ninth Circuit relied heavily on the Supreme Court's decision in *American Airlines, Inc. v. Wolens*,<sup>20</sup> in which the Court held, based upon similar facts, that the ADA preempted a consumer fraud claim but *not* a breach of contract claim.<sup>21</sup> Central to the Supreme Court's holding in *Wolens* was the Court's reasoning that "a state does not 'enact or enforce any law' when it uses its contract laws to enforce private agreements."<sup>22</sup> The Supreme Court also pointed to the "institutional limitations" of the Department of Transportation, such as its lack of any contract dispute resolu-

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<sup>12</sup> See *id.* at 874.

<sup>13</sup> 49 U.S.C. § 41713(b)(1) (2006).

<sup>14</sup> See *Ginsberg*, 695 F.3d at 874.

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

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

<sup>17</sup> See *id.* at 876.

<sup>18</sup> 49 U.S.C. § 41713(b)(1).

<sup>19</sup> *Id.* at 876. The savings clause contained in the FAA provides that "nothing in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." *Id.* (quoting 49 U.S.C. former § 1506). It has since been revised as follows: "[a] remedy under this part is in addition to any other remedies provided by law." 49 U.S.C. § 40120(c).

<sup>20</sup> 513 U.S. 219 (1995).

<sup>21</sup> *Ginsberg*, 695 F.3d at 877.

<sup>22</sup> *Id.* at 878.

tion regime, to demonstrate that Congress did not intend to preempt common law contract claims.<sup>23</sup>

The Ninth Circuit thereafter considered the plain language of the ADA's savings clause and noted that the ADA's preemption clause does not expressly preempt common law breach of contract claims.<sup>24</sup> The Ninth Circuit reasoned that already-extant common law state contract doctrines, such as the implied covenant of good faith and fair dealing, would be consistent with the framework created by these two clauses, provided that such remedies do not significantly impact the ADA's purpose of federal deregulation.<sup>25</sup> The absence of pervasive regulation of common law contract disputes relating to contracts enacted under the ADA further suggested to the Ninth Circuit that preemptive intent was lacking.<sup>26</sup>

According to the Ninth Circuit, "[a] claim for breach of the implied covenant of good faith and fair dealing does not interfere with the ADA's deregulatory mandate."<sup>27</sup> Citing *Wolens*, the court rejected Northwest's contention that allowing the plaintiff's claim to stand would expand the contract's terms or present a "large risk of nonuniform adjudication."<sup>28</sup> Moreover, Northwest made the decision, in a deregulated economic environment, to invest in the disputed frequent flier program, and therefore had to adhere to its contractual obligations under the covenant of good faith and fair dealing.<sup>29</sup>

The final section of the Ninth Circuit's decision in *Ginsberg* explained its disagreement with the district court's finding that the plaintiff's claim for breach of the covenant of good faith and fair dealing related to both "prices" and "services."<sup>30</sup> Rather, the ADA's legislative history suggested to it that "Congress intended the preemption language only to apply to state laws directly 'regulating rates, routes, or services.'"<sup>31</sup> To the Ninth Circuit, a state law claim for breach of the implied covenant of good faith and fair dealing had too peripheral an effect on deregulation to fall within the ADA's preemptive scope as intended by Congress.

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<sup>23</sup> *Id.* at 878–79.

<sup>24</sup> *See id.* at 880.

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

<sup>26</sup> *Id.* (citing *Montalvo v. Spirit Airlines*, 508 F.3d 464, 470 (9th Cir. 2007)).

<sup>27</sup> *Id.* at 880.

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

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

<sup>30</sup> *See id.* at 881.

<sup>31</sup> *Id.*

All eyes then turned to the Supreme Court. The Ninth Circuit presented a cogent argument against preemption of the plaintiff's implied covenant claim. But in April 2014 the justices decided otherwise, unanimously holding that the claim was preempted by the ADA because it sought to expand the contractual obligations voluntarily adopted by the parties.<sup>32</sup>

Justice Alito authored the decision wherein the Court first addressed whether the ADA's preemption provision applies to common law claims such as the implied covenant.<sup>33</sup> The Court determined that the implied covenant is a "provision[ ] having the force and effect of law," thereby bringing it within the language of the ADA's preemption clause.<sup>34</sup>

The Court next asked whether a breach of the implied covenant "relates to rates, routes, or services."<sup>35</sup> The Court sidestepped the Ninth Circuit's legislative history analysis on this issue, concluding that the plaintiff's claim clearly related to "rates" and "services" because the plaintiff's reason for seeking reinstatement into the frequent flier program was to obtain reduced rates and enhanced services.<sup>36</sup>

Finally, the Court turned to the central issue presented by the case: whether the plaintiff's "implied covenant claim [was] based on a state-imposed obligation or simply one that the parties voluntarily undertook."<sup>37</sup> Under Minnesota law, which was controlling, the implied covenant is a state-imposed obligation because it applies to all contracts (i.e., parties cannot contract out of the covenant).<sup>38</sup> Citing *Wolens*, the Court reasoned that the claim was therefore preempted because it enlarged the contractual obligations voluntarily adopted by the parties.<sup>39</sup>

The Court was unwilling to hold that *all* state law claims under the implied covenant of good faith and fair dealing were preempted regardless of the jurisdiction. Rather, a state's implied covenant may still escape preemption under the ADA if it is not mandatory for all contracts.<sup>40</sup>

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<sup>32</sup> *Nw., Inc. v. Ginsberg*, 134 S. Ct. 1422, 1433–34 (2014).

<sup>33</sup> *Id.* at 1429.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 1430 (internal quotation marks omitted).

<sup>36</sup> *Id.* at 1430–31.

<sup>37</sup> *Id.* at 1431.

<sup>38</sup> *Id.* at 1432.

<sup>39</sup> *Id.* at 1426, 1432.

<sup>40</sup> *Id.* at 1432–33.

While the Court's holding leaves the door slightly ajar for such implied covenant claims, its practical effect may be complete preemption since airlines can simply contract out of a state's implied covenant in its frequent flier agreement. If so, consumers without any other claims are left with little recourse except to join a different frequent flier program.<sup>41</sup> In addition, the Department of Transportation retains the authority to punish unfair and deceptive practices in air transportation.<sup>42</sup>

## 2. *Gilstrap v. United Air Lines, Inc.*

In *Gilstrap v. United Air Lines, Inc.*,<sup>43</sup> employees of United Air Lines either refused to provide or only grudgingly provided a plaintiff suffering from a physical disability with a wheelchair on multiple occasions, and once unilaterally rescheduled her flight because she was unable to stand in line.<sup>44</sup> The plaintiff's complaint asserted a number of California state law claims, including negligence for failing to accommodate her disability and negligent infliction of emotional distress for treating her disrespectfully, as well as a discrimination claim under the Americans with Disabilities Act.<sup>45</sup> United moved to dismiss the plaintiff's state law claims as preempted by the Air Carrier Access Act (ACAA), and the plaintiff's Americans with Disabilities Act claims because the airport terminal was not covered by that statute.<sup>46</sup> The district court granted United's motion as to both sets of claims.<sup>47</sup>

The Ninth Circuit reversed in part, and remanded the case to the district court for further proceedings.<sup>48</sup> Following the Third Circuit's holding in *Abdullah v. American Airlines, Inc.*,<sup>49</sup> the Ninth Circuit held that the state law standards of care for the plaintiff's state law negligence claims were preempted by the ACAA's pervasive federal standards of care for transporting disabled passengers,<sup>50</sup> but state law remedies were available for violations of those federal standards.<sup>51</sup> In contrast, the court held

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<sup>41</sup> *Id.* at 1433.

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

<sup>43</sup> 709 F.3d 995 (9th Cir. 2013).

<sup>44</sup> *Id.* at 998.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 999.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1012.

<sup>49</sup> *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999).

<sup>50</sup> See 14 C.F.R. § 382 (2014).

<sup>51</sup> *Gilstrap*, 709 F.3d at 1006–07.



the plaintiff's negligent infliction of emotional distress claims not to be preempted because of the lack of pervasive regulation of treatment of passengers in the ACAA.<sup>52</sup> The court left resolution of these claims to the district court on remand.<sup>53</sup> In addition, the Ninth Circuit affirmed dismissal of the plaintiff's claim under the Americans with Disabilities Act, agreeing with the district court that the statute expressly exempts airport terminals from its application.<sup>54</sup>

### 3. *Lewis v. Lycoming* (*Lewis II*)

In *Lewis v. Lycoming* (*Lewis II*),<sup>55</sup> Judge Harvey Bartle of the Eastern District of Pennsylvania broke with other Third Circuit district courts and held that the Third Circuit's finding of federal preemption over the aviation claims in that case did not extend to the plaintiffs' state law products liability, negligent design, and negligent manufacture claims.<sup>56</sup>

The plaintiffs in *Lewis II* brought wrongful death claims against the manufacturers of various components of a Schweizer 269C-1 helicopter that crashed during a training flight near Blackpool England in September 2009, killing both a flight instructor and his student.<sup>57</sup> The defendants brought a motion on the pleadings to dismiss the plaintiffs' claims as preempted by the Federal Aviation Act.<sup>58</sup> The defendants, relying heavily on *Abdullah*, argued that the Federal Aviation Act and the regulations thereunder evidenced Congress's intent to preempt the entire field of aviation.<sup>59</sup>

The court in *Lewis II* found to be dicta the Third Circuit's expansive language in *Abdullah* indicating that the Federal Aviation Act preempted the entire field of aviation, including all state law standards of care.<sup>60</sup> It explained, "[t]he issue of whether the [Federal Aviation Act] preempts state products liability law was not before the court in *Abdullah*. Although we carefully take into account the full scope of the opinion in *Abdullah*,

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<sup>52</sup> *Id.* at 1008.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 1011-12.

<sup>55</sup> 957 F. Supp. 2d 552 (E.D. Pa. 2013).

<sup>56</sup> *Lewis II*, 957 F. Supp. 2d at 557-58.

<sup>57</sup> *Id.* at 553.

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

<sup>59</sup> *Id.* at 554.

<sup>60</sup> *Id.* at 557-58.

its holding applies only to ‘careless or reckless operation of an aircraft.’”<sup>61</sup>

The *Lewis II* court was particularly persuaded by the legislative history of GARA<sup>62</sup> and its support of a theory of limited preemption of state law products liability and tort claims.<sup>63</sup> GARA preempts any state law cause of action “for damages for death or injury to persons . . . arising out of an accident involving a general aviation aircraft . . . against a manufacturer of the aircraft” or a component of the aircraft brought more than 18 years after the aircraft was first delivered or the component was first added to the aircraft.<sup>64</sup> The court considered the legislative history behind this limited preemption, finding that “the Committee was willing to take the unusual step to preempting state law in this one extremely limited instance. . . . And in cases where the statute of repose has not expired, State law will continue to govern fully, unfettered by Federal interference.”<sup>65</sup> The court in *Lewis II* noted that the Third Circuit did not address GARA in *Abdullah*, and indeed had no reason to do so because that case dealt with negligent operation, not design, of an aircraft.<sup>66</sup> The court concluded:

It is not possible in our view to read GARA in a way consistent with field preemption by federal law in the aircraft products liability context as espoused by the defendants. If Congress intended field preemption, there would have been no reason for it to enact a narrow express preemption provision in the nature of a statute of repose.<sup>67</sup>

The court also noted that its view was supported by GARA’s legislative history.<sup>68</sup> Furthermore, the court concluded that “[s]tate products liability, negligence, and breach of warranty claims for aircraft design or manufacture will only help, not harm, Congress in obtaining its goal of maximum [aviation] safety,” particularly in a case like this one where no federal regulation specifically addressed the design and manufacture of the fuel servo that was alleged to be defective.<sup>69</sup>

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<sup>61</sup> *Id.* at 558 (quoting *Abdullah*, 181 F.3d at 371).

<sup>62</sup> 49 U.S.C. § 40101 note (2006).

<sup>63</sup> See *Lewis II*, 957 F. Supp. 2d at 556.

<sup>64</sup> 49 U.S.C. § 40101 note.

<sup>65</sup> *Lewis II*, 957 F. Supp. 2d at 556 (quoting H.R. REP. NO. 103-325(II) (1994), reprinted in 1994 U.S.C.C.A.N. 1644) (emphasis omitted).

<sup>66</sup> See *id.* at 557–58.

<sup>67</sup> *Id.* at 558.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 559.

The *Lewis II* court's holding that the Third Circuit's broad statement of preemption of all state-defective law standards of care in *Abdullah* was dicta and inapplicable to products liability or design claims was a significant break with the trend among Third Circuit district courts. While other district courts had criticized the breadth of the language in *Abdullah*, they had nevertheless held that products liability and negligent design claims were preempted by the Federal Aviation Act.<sup>70</sup> It remains to be seen if the holding in *Lewis II* signals a shift in the approach of courts within the Third Circuit to preemption of aviation products liability claims. This may largely depend on whether the *Lewis II* decision is appealed and reviewed by the Third Circuit. Whatever the result, it has the potential to impact preemption jurisprudence nationwide. Many federal circuit courts have followed the Third Circuit's decision in *Abdullah* to find broad preemption of state law aviation claims by the Federal Aviation Act, and a change of Third Circuit law could greatly impact those jurisdictions.<sup>71</sup>

#### 4. *Biscone v. JetBlue Airways Corp.*

In late December, 2012, the Second Department of the New York Supreme Court's Appellate Division—New York's intermediate appellate court—issued a noteworthy preemption ruling in *Biscone v. JetBlue Airways Corp.*<sup>72</sup>

The plaintiff in *Biscone* commenced a putative class action seeking to recover for false imprisonment, negligence, intentional infliction of emotion distress, fraud and deceit, and breach of contract as a result of being confined with other passengers on a JetBlue aircraft on the tarmac at John F. Kennedy Airport for 11 hours.<sup>73</sup> JetBlue moved to dismiss the plaintiff's complaint on the basis that the plaintiff's tort claims were preempted by the ADA and the Federal Aviation Act.<sup>74</sup> The trial court granted JetBlue's motion to dismiss all but one of the

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<sup>70</sup> See *Pease v. Lycoming Engines*, No. 4:10-CV-00843, 2011 WL 6339833, at \*11 (M.D. Pa. Dec. 19, 2011); *Sikkelee v. Precision Airmotive Corp.*, 731 F. Supp. 2d 429, 438–39 (M.D. Pa. 2010); *Domanski v. US Airways Grp., Inc.*, 620 F. Supp. 2d 725, 729 (E.D. Pa. 2009); *Duvall v. Avco Corp.*, No. 4:CV 05-1786, 2006 WL 1410794, at \*2 (M.D. Pa. May 19, 2006).

<sup>71</sup> See, e.g., *Montalvo v. Spirit Airlines*, 508 F.3d 464, 468 (9th Cir. 2001); *Greene v. B.F. Goodrich Avionics Sys.*, 409 F.3d 784, 795 (6th Cir. 2009).

<sup>72</sup> 103 A.D.3d 158 (N.Y. App. Div. 2012).

<sup>73</sup> *Id.* at 160–61.

<sup>74</sup> *Id.* at 61.

plaintiff's tort claims after concluding that all other claims were closely related to the provision of services by an airline; only the claim for negligence causing physical injury was not dismissed.<sup>75</sup>

On appeal, the plaintiff challenged the trial court's determination, maintaining that "the confinement of passengers in a grounded aircraft for an 11-hour period against their will is not related to the provision of services, as interpreted by the ADA's preemption clause, since passengers do not bargain for or anticipate such lengthy confinement against their will."<sup>76</sup> Additionally, she contended that the conduct giving rise to her tort claims was "too attenuated" from the ADA's deregulatory mandate to result in preemption.<sup>77</sup>

In opposition, JetBlue argued that the plaintiff's claims "relate, at their core, to an airline's services."<sup>78</sup> In support of its position, JetBlue cited the Second Circuit's decision in *Air Transport Ass'n of America v. Cuomo*<sup>79</sup> striking down a New York passenger bill of rights law directly concerning the provision of services during lengthy tarmac delays.<sup>80</sup>

To understand the scope of Congress's preemptive intent when it included the preemption clause in the ADA, the Appellate Division began by surveying the legislative history of the federal regulatory framework for airline transportation and relevant case law.<sup>81</sup> It noted that Congress amended the Federal Aviation Act through enactment of the ADA, which was based on the premise that "maximum reliance on competitive market forces would best further efficiency, innovation, and low prices as well as variety and quality of air transportation."<sup>82</sup> The court further noted that the ADA "did not repeal or alter the saving clause in the FAA," which has since been re-codified at 49 U.S.C. § 40120(c) and currently states that "[a] remedy under this part is in addition to any other remedies provided by law."<sup>83</sup>

The court then discussed Supreme Court cases addressing the ADA's preemption clause and its language "related to a price,

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<sup>75</sup> See *id.* at 163.

<sup>76</sup> *Id.* at 165.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> 520 F.3d 218, 222 (2d Cir. 2008).

<sup>80</sup> See *Biscone*, 103 A.D.3d at 165.

<sup>81</sup> See *id.* at 167.

<sup>82</sup> *Id.* at 167 (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (internal alterations omitted)).

<sup>83</sup> *Id.*

route, or service.”<sup>84</sup> Those cases were *Morales v. Trans World Airlines, Inc.*,<sup>85</sup> *American Airlines, Inc. v. Wolens*,<sup>86</sup> and *Rowe v. New Hampshire Motor Transportation Ass’n*.<sup>87</sup> The court concluded that the the Supreme Court had yet to “explicitly interpret[ ] the meaning of ‘service’ as used in the ADA’s preemption provision.”<sup>88</sup>

The federal courts of appeals are split on the meaning of the term.<sup>89</sup> The Ninth and Third Circuits have read it narrowly.<sup>90</sup> In *Charas v. Trans World Airlines*, the Ninth Circuit concluded that “service” referred to “the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail,” but did not encompass “an airline’s provision of in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities.”<sup>91</sup> The Fifth, Seventh, and Eleventh Circuits, however, agree that “service” in the airline context “include[s] items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition the transportation itself.”<sup>92</sup> The Fourth Circuit has held that boarding procedures fall within the meaning of the term.<sup>93</sup> Meanwhile, the Second Circuit held in *Air Transport Ass’n of America, Inc. v. Cuomo* that the ADA preempted New York’s Passenger Bill of Rights as “‘requiring airlines to provide food, water, electricity, and restrooms to passengers during lengthy ground delays relates to the service of an air carrier.’”<sup>94</sup>

Despite the legal patchwork regarding the meaning of “service,” the Appellate Division identified “a general understanding that the ADA’s preemption provision does not preempt all state-law tort claims.”<sup>95</sup>

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<sup>84</sup> *See id.*

<sup>85</sup> *Morales*, 504 U.S. at 374.

<sup>86</sup> 513 U.S. 219 (1995).

<sup>87</sup> 552 U.S. 364 (2008).

<sup>88</sup> *Biscone*, 103 A.D.3d at 170.

<sup>89</sup> *See id.*

<sup>90</sup> *Id.* at 170.

<sup>91</sup> *Id.* (quoting 160 F.3d 1259, 1261 (9th Cir. 1998)).

<sup>92</sup> *Id.* at 170–71 (quoting *Hodges v. Delta Airlines*, 44 F.3d 334, 336 (5th Cir. 1995)).

<sup>93</sup> *See id.* at 171 (citing *Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998)).

<sup>94</sup> *Id.* (quoting *Air Transport Ass’n of Am., Inc. v. Cuomo*, 520 F.3d 218, 222 (2d Cir. 2008)).

<sup>95</sup> *Id.* at 172.

Turning to the plaintiff's claims, the court applied the test articulated by then-District Judge (now Justice) Sotomayor in the case *Rombom v. United Air Lines, Inc.*<sup>96</sup> "to determine whether a state-law claim relates to a service within the meaning of the ADA."<sup>97</sup> The *Rombom* test involves three steps: (1) is the activity giving rise to the claim an airline service? (2) does the claim "affect[ ] the airline service directly"? and (3) is "the underlying tortious conduct . . . reasonably necessary to the provision of the service[?]"<sup>98</sup> If the answer to any of these steps is no, then the state law claim survives.<sup>99</sup>

The Appellate Division determined that all three prongs of the *Rombom* test were satisfied. First, "the provision of food, water, clean air, and toilet facilities, as well as the ability to deplane after a prolonged period on the tarmac, all relate to and implicate an airline service."<sup>100</sup> Second, the plaintiff's claims "directly address the provision of those services."<sup>101</sup> And finally, the allegedly tortious conduct "was reasonably necessary to the provision of the service."<sup>102</sup>

Specifically addressing the factual basis of the plaintiff's false imprisonment claim, the Appellate Division determined that JetBlue's confining the plaintiff on the aircraft for an extended period of time against her will directly affected the service of maintaining safety by controlling passenger movement.<sup>103</sup> These facts were sufficiently different to distinguish *Biscone* from cases found not be preempted which concerned airlines improperly causing passengers to be detained.<sup>104</sup>

The Appellate Division also determined that the plaintiff's claim for intentional infliction of emotional distress was preempted, as the conduct forming the basis for the claim related to JetBlue's supplying "adequate water, food, restroom facilities and breathable air at proper temperatures," among other things, which a majority of federal circuits had determined "expressly relate[d] to airline services."<sup>105</sup>

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<sup>96</sup> 867 F. Supp. 214 (S.D.N.Y. 1994).

<sup>97</sup> *Biscone*, 103 A.D.3d at 174-75.

<sup>98</sup> *Id.* at 174 (quoting *Rombom*, 867 F. Supp. at 221-22).

<sup>99</sup> *See id.*

<sup>100</sup> *Id.* at 175.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* (quoting *Rombom*, 867 F. Supp. at 222) (internal quotation marks omitted).

<sup>103</sup> *Id.* at 176.

<sup>104</sup> *See id.* at 175-76.

<sup>105</sup> *Id.* at 177 (internal quotation marks omitted).

However, the Appellate Division did hold that the ADA did not preempt the plaintiff's personal injury claims and in support cited the Fifth Circuit's decision in *Hodges v. Delta Airlines*,<sup>106</sup> a personal injury suit in which the plaintiff was injured by a case of rum that fell from an overhead bin.<sup>107</sup>

Lastly, the Appellate Division concluded that the plaintiff's cause of action for fraud and deceit was also preempted by the ADA.<sup>108</sup> Statements by JetBlue personnel "that the aircraft would take off or return to the gate shortly" were "directly related to the provision of an airline service" and could not be considered "outrageous and beyond the scope of normal airline operations."<sup>109</sup>

5. In re Air Crash Near Clarence Center, New York, on February 12, 2009

For a discussion of a noteworthy preemption decision in litigation arising from the 2009 crash of Continental Connection Flight 3407, see Section E below.

## B. THE MONTREAL CONVENTION

### 1. *White v. Emirates Airlines, Inc.*

In its late 2012 decision *White v. Emirates Airlines, Inc.*,<sup>110</sup> the Fourth Circuit considered whether a flight crew's response to a passenger's medical emergency constituted an "accident" under Article 17 of the Montreal Convention (Article 17).<sup>111</sup> The court held that the flight crew's conduct was not unusual or unexpected under the circumstances and thus did not constitute an "accident."<sup>112</sup>

The decedent passenger collapsed in the lavatory while her flight from Dubai was on descent into Houston.<sup>113</sup> A flight attendant discovered her approximately five minutes later, and the lead flight attendant began administering emergency aid approximately ten minutes before the plane was to land.<sup>114</sup> There was "no genuine dispute that the flight crew (1) removed [the

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<sup>106</sup> 44 F.3d 334 (5th Cir. 1995).

<sup>107</sup> *Biscone*, 103 A.D.3d at 172-73 (discussing *Hodges*, 44 F.3d at 336).

<sup>108</sup> *See id.*

<sup>109</sup> *Id.*

<sup>110</sup> 493 F. App'x 526 (2012).

<sup>111</sup> *Id.* at 532.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 527.

<sup>114</sup> *Id.* at 527-28.

passenger] from the lavatory and placed her on the floor; (2) administered oxygen through a mask; and (3) alerted the captain, who notified medical personnel at the airport.”<sup>115</sup> Other specifics concerning the passenger’s care prior to landing at Houston were disputed.<sup>116</sup> Upon landing, EMS assumed responsibility but the passenger lost consciousness shortly thereafter.<sup>117</sup> EMS administered CPR but did not use a defibrillator.<sup>118</sup> The passenger died in a nearby hospital two days later, with probable causes listed as “myocardial infarction, cardiogenic shock, metabolic acidosis, and respiratory failure.”<sup>119</sup>

The plaintiffs in *White* filed suit pursuant to Articles 17 and 21 of the Montreal Convention.<sup>120</sup> Emirates thereafter moved for, and the district court granted, summary judgment on the basis that the plaintiffs failed to put forth enough evidence that decedent’s death was caused by an “accident” within the meaning of the Montreal Convention to raise a genuine issue of material fact.<sup>121</sup>

The Montreal Convention was intended to replace the Warsaw Convention and related instruments with a single framework to govern “the international air-carriage of passengers, baggage, and cargo.”<sup>122</sup> The United States is a party to the Montreal Convention, which governed the plaintiffs’ claims.<sup>123</sup> In *El Al Israel Airlines Ltd. v. Tsui Yuan Tseng*,<sup>124</sup> the Supreme Court held that a passenger is prohibited from bringing “an action for personal injury damages under local law when her claim does not satisfy the conditions for liability under the [Montreal] Convention.”<sup>125</sup> Article 17 subjects air carriers to liability for “accidents” causing injury to passengers while they are boarding, onboard, or disembarking an aircraft.<sup>126</sup> The English translation of the text states: “The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition

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<sup>115</sup> *Id.* at 528.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *See id.*

<sup>122</sup> *Id.* at 529.

<sup>123</sup> *See id.*

<sup>124</sup> 525 U.S. 155 (1999).

<sup>125</sup> *White*, 493 F. App’x at 529 (quoting *Tseng*, 525 U.S. at 176) (internal quotation marks omitted).

<sup>126</sup> *See id.*



only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of the embarking or disembarking."<sup>127</sup> The drafters of the Montreal Convention envisioned that Article 17 would be "construed consistently" with precedent interpreting the Warsaw Convention and its related instruments.<sup>128</sup>

The Montreal Convention does not define the term "accident" for purposes of Article 17 but the Supreme Court has offered guidance in two major decisions: *Air France v. Saks*<sup>129</sup> and *Olympic Airways v. Husain*.<sup>130</sup> The Fifth Circuit in *White* considered both decisions as well as precedent from other circuits and various district courts in its analysis.<sup>131</sup>

The plaintiff in *Saks* experienced pressure in one ear as her flight landed and was subsequently diagnosed with permanent hearing loss in the ear.<sup>132</sup> The Supreme Court concluded that she had not sustained an "accident" within the meaning of Article 17 because her injury was not "caused by an unexpected or unusual event or happening that is external to the passenger."<sup>133</sup> In dicta, the Court explained that this definition requires flexible application based on the facts surrounding the injury and should be left to the trier of fact where contradictory evidence is presented,<sup>134</sup> and that a plaintiff-passenger need only prove that "some link in the chain [of causation] was an unusual or unexpected event external to the passenger."<sup>135</sup> However, where the "injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident and Article 17 of the Montreal Convention cannot apply."<sup>136</sup>

The Supreme Court revisited its *Saks* holding in 2004 in *Husain*, where the plaintiff's decedent died from an asthma at-

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<sup>127</sup> *Id.* at 529 (quoting Convention for the Unification of Certain Rules for International Carriage by Air, art. 17(a1), May 28, 1999, T.I.A.S. 13038, U.N.T.S. 350 [hereinafter Montreal Convention]).

<sup>128</sup> *Id.* (quoting Montreal Convention, *supra* note 127, art. 17(1)).

<sup>129</sup> 470 U.S. 392 (1985).

<sup>130</sup> 540 U.S. 644 (2004).

<sup>131</sup> See *White*, 493 F. App'x. at 529-32.

<sup>132</sup> *Id.* at 529 (discussing *Saks*, 470 U.S. at 405).

<sup>133</sup> *Id.* (quoting *Saks*, 470 U.S. at 405).

<sup>134</sup> See *id.* at 529-30 (discussing *Saks*, 470 U.S. at 405).

<sup>135</sup> *Id.* at 530 (quoting *Saks*, 470 U.S. at 406) (internal quotation marks omitted).

<sup>136</sup> *Saks*, 470 U.S. at 405-06.

tack aboard an international flight.<sup>137</sup> Prior to the flight, the plaintiff specifically requested that her husband be seated in a non-smoking area of the cabin as cigarette smoke aggravated his asthma.<sup>138</sup> When they were seated only three rows away from the smoking area, the plaintiff requested that her husband be moved farther.<sup>139</sup> Despite there being available seats, the flight attendant refused and said the flight was full.<sup>140</sup> The Court held that the flight attendant's rejection of the plaintiff's explicit request to be moved was an "unexpected or unusual" event in the chain of causation and therefore constituted an "accident" for purposes of Article 17.<sup>141</sup> In the *Husain* decision, the Court also clarified *Saks* by explaining that "it is the cause of the injury—rather than the occurrence of the injury—that must satisfy the definition of 'accident.'"<sup>142</sup>

The plaintiffs in *White* maintained that their case was similar to *Husain* in that the flight crew's response to the medical emergency was an unexpected or unusual event or happening that was external to the passenger.<sup>143</sup> In particular, the flight crew refused the plaintiff's request for medical assistance and deviated from the defendant's policies in caring for the decedent passenger.<sup>144</sup> The defendant argued that no "accident" could have occurred within the meaning of Article 17 unless its response to the emergency "was so thoroughly deficient as to be considered unexpected or unusual under the circumstances."<sup>145</sup>

The Fifth Circuit first considered the plaintiffs' argument that the flight crew refused to use a defibrillator or administer CPR despite the plaintiff's request that they do so.<sup>146</sup> The plaintiffs relied on the district court decision *Yahya v. Yemenia-Yemen Airways*,<sup>147</sup> in which the court found that, if proved, a flight crew's refusal to divert a flight after being informed of a passenger's life-threatening condition and the passenger's eventual death prior to landing was an "event" of the sort required for a finding

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<sup>137</sup> *White*, 493 F. App'x at 530 (discussing *Husain*, 540 U.S. at 646–47).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* (discussing *Husain*, 540 U.S. at 647).

<sup>140</sup> *Id.* (discussing *Husain*, 540 U.S. at 647–48).

<sup>141</sup> *Id.* (quoting *Husain*, 540 U.S. at 657) (internal quotation marks omitted).

<sup>142</sup> *Id.* (quoting *Husain*, 540 U.S. at 650) (internal quotation marks omitted).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *See id.*

<sup>147</sup> No. 08-14789, 2009 WL 3424192 (E.D. Mich. Oct. 20, 2009).

of an "accident" under Article 17.<sup>148</sup> The plaintiffs also relied on the Ninth Circuit's decision in *Prescod v. AMR, Inc.*,<sup>149</sup> where the court held that an airline's losing a passenger's medical bag, after assuring her she could keep it and then taking it from her, constituted an "accident" when the passenger subsequently died from not being allowed to access her medical supplies.<sup>150</sup>

The Fifth Circuit was not persuaded and saw *Husain, Yahya*, and *Prescod* as distinguishable because the flight crew in *White* did provide medical assistance.<sup>151</sup> It found that the plaintiff was not a medical professional and that "the crew's decision not to comply with his requests was not unexpected or unusual" since the decedent passenger was breathing when she was found in the lavatory.<sup>152</sup> The court noted its determination was bolstered by the fact that EMS personnel also did not use a defibrillator on the decedent after she was removed from the plane.<sup>153</sup> However, the court's reasoning is somewhat puzzling because EMS did administer CPR.<sup>154</sup>

The court also questioned whether the plaintiff inquired about using a defibrillator or administering CPR, or requested that they be used.<sup>155</sup> Notwithstanding, there is a fair argument, based upon the Supreme Court's dicta in *Saks* requiring flexible application of the standard, that the trier of fact should have been called upon to determine whether the flight crew's conduct constituted an accident on this factual record. Ultimately, however, the Fifth Circuit seemed to believe that its determination was warranted in light of the plaintiff's status as a layman rather than a medical professional and the flight crew's attempt to respond to the situation.<sup>156</sup>

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<sup>148</sup> See *White*, 493 F. App'x at 531 (discussing *Yahya*, 2009 WL 3424192, at \*6).

<sup>149</sup> 383 F.3d 861 (9th Cir. 2004).

<sup>150</sup> See *White*, 493 F. App'x at 531 (discussing *Prescod*, 383 F.3d at 868-80).

<sup>151</sup> See *id.* at 531.

<sup>152</sup> *Id.* Plaintiff Carriker testified that he asked the crew to perform CPR or use the defibrillator, but the lead flight attendant testified that he did not try either because Wilson was breathing. *Id.*

<sup>153</sup> See *id.*

<sup>154</sup> See *id.* at 528.

<sup>155</sup> *Id.* at 531.

<sup>156</sup> See *id.* The Fifth Circuit explained that its conclusion on this issue was consistent with decisions by other circuits, including *Hipolito v. Northwest Airlines, Inc.*, 15 F. App'x. 109 (4th Cir. 2001) and *Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997). However, in *Hipolito*, the plaintiff's decedent received attention from medical doctors on-board the flight and the Court found that a malfunctioning oxygen bottle was not an "external, unusual event under the Warsaw Convention." *Hipolito*, 25 F. App'x. at 112. In *Krys*, the passenger was also

The Fifth Circuit next rejected the plaintiffs' argument that the flight crew's failure to adhere to the defendant's policies in caring for the decedent was "an unexpected or unusual event."<sup>157</sup> The plaintiffs cited the District Court for the Southern District of New York's decision in *Fulop v. Malev Hungarian*<sup>158</sup> in support of their position.<sup>159</sup>

The court in *Fulop* denied the defendant airline's motion for summary judgment on the plaintiff's Article 17 claim and thereby left open the possibility that an airline's failure to adhere to its own flight diversion policies in case of a medical emergency may constitute an "accident" in certain instances.<sup>160</sup> However, the Fifth Circuit in *White* found that the plaintiffs' reliance on *Fulop* was misplaced, as it had previously declined to follow *Fulop* in *Blansett v. Continental Airlines, Inc.*<sup>161</sup> The plaintiff in *Blansett* suffered from deep vein thrombosis and experienced a stroke while aboard the flight.<sup>162</sup> He claimed that the airline's failure to provide pre-flight warnings and instructions on this risk, as other airlines did despite the absence of federal regulations requiring as much, amounted to an "accident."<sup>163</sup> The Fifth Circuit found that even though *Blansett* addressed deviation from industry standards and not an airline's own policies, alleged in *White*, its reasoning in *Blansett* still applied.<sup>164</sup> Accordingly, the central inquiry was whether the deviation was an "unexpected or unusual event or happening that is external to the passenger."<sup>165</sup>

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examined by a doctor onboard and thus the flight crew's response to the situation and decision not to divert the plane was not an "accident" because they were informed by the doctor's initial determination that the passenger was not in danger. See *Krys*, 119 F.3d at 1515.

<sup>157</sup> *White*, 493 F. App'x. at 532–35. Carriker maintained that Emirates failed to monitor Wilson's breathing and pulse rates consistent with airline policy, and failed to request assistance from a medical professional on the flight. *Id.* at 532.

<sup>158</sup> 175 F. Supp. 2d 651 (S.D.N.Y. 2001).

<sup>159</sup> See *White*, 493 F. App'x at 532–33.

<sup>160</sup> See *id.* (discussing *Fulop*, 175 F.2d at 665). The U.S. District Court for the Southern District of New York stated in *Fulop* that "the ordinary traveler reasonably would expect that . . . in handling life-threatening exigencies, airlines . . . would be particularly scrupulous and exacting in complying with their own industry norms, internal policies and procedures, and general standards of care." *Id.*

<sup>161</sup> See *id.* at 533 (citing *Blansett v. Cont'l Airlines, Inc.*, 379 F.3d 177 (5th Cir. 2004)).

<sup>162</sup> *Id.* (discussing *Blansett*, 379 F.3d at 179).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 534.

<sup>165</sup> See *id.* (citing *Saks*, 470 U.S. at 405).

In *White*, the Fifth Circuit agreed with the magistrate judge that the flight crew's response was not unusual or unexpected.<sup>166</sup> The flight crew had limited time to respond because the flight was in its final descent and the crew was also responsible for safeguarding the other passengers.<sup>167</sup> There was no need to contact MedLink and explore diverting the flight at that time, and thus, under the circumstances, there could be no finding of an "accident" under Article 17.<sup>168</sup>

The Fifth Circuit's holding in *White* sets a high bar for plaintiffs to survive summary judgment on an Article 17 claim based upon a flight crew's allegedly inadequate response to a medical emergency.

### C. THE WARSAW CONVENTION

#### 1. *Ginena v. Alaska Airlines, Inc.*

In *Ginena v. Alaska Airlines, Inc.*,<sup>169</sup> the captain of a flight from Vancouver, British Columbia to Las Vegas, Nevada diverted to land in Reno, Nevada following reports from a distraught flight attendant that she had "lost control of the first-class cabin" due to the plaintiffs' disrespect, verbal abuse, and refusal to remain in their seats.<sup>170</sup> The plaintiffs were removed from the aircraft in Reno, turned over to law enforcement, and required to take a separate flight that arrived in Las Vegas three hours later than their original flight.<sup>171</sup> After the aircraft was diverted, an Alaska Airlines employee provided inaccurate details about the incident in an email to the U.S. Marshal's office, including overstating the number of passengers involved and mentioning the passengers' Middle-Eastern descent.<sup>172</sup> The plaintiffs brought suit, claiming delay under the Warsaw Convention and defamation for the statements in the email to the Air Marshal.<sup>173</sup> At trial, the jury found for Alaska Airlines on both claims.<sup>174</sup>

The plaintiffs moved for a new trial, arguing that the court improperly instructed the jury by failing to focus on their removal from the flight and delivery to law enforcement, and that

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 534–35.

<sup>169</sup> No. 2:04-CV-01304, 2013 WL 3155306 (D. Nev. June 19, 2013).

<sup>170</sup> *Id.* at \*1–2.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at \*2.

<sup>173</sup> *Id.* at \*3.

<sup>174</sup> *Id.*

the defamation verdict was against the weight of the evidence.<sup>175</sup> The district court rejected the plaintiffs' jury instruction argument, noting that the instructions proposed by the plaintiffs only referenced the delay generally and did not clarify the reasons for delay.<sup>176</sup> Furthermore, the appeals court concluded that the trial court's instruction was at worst harmless error because the issue of whether delivery of the plaintiffs to law enforcement was justified did not bear on the ultimate issue in the case.<sup>177</sup> In addition, the court upheld the verdict on the defamation claim because there was no evidence that Alaska Airlines acted with actual malice in sending the inaccurate email to the Air Marshal.<sup>178</sup>

#### D. FORUM NON CONVENIENS

##### 1. *Lewis v. Lycoming (Lewis I)*

The plaintiffs in *Lewis v. Lycoming (Lewis I)*<sup>179</sup> brought claims of wrongful death, products liability, and negligent design against manufacturers of various components of a Schweizer 269C-1 helicopter that crashed during a training flight near Blackpool England in September, 2009, killing both a flight instructor and his student.<sup>180</sup> The defendants brought a joint motion to dismiss the plaintiff's complaint under forum non conveniens, arguing that England was the proper forum with much greater connections to the crash than the United States.<sup>181</sup>

To succeed on a motion to dismiss for forum non conveniens, a defendant must first show that an adequate alternative forum exists as to all defendants.<sup>182</sup> Then the court must determine the amount of deference to give the plaintiff's choice of forum, giving less deference to a plaintiff who chooses a jurisdiction other than his home forum.<sup>183</sup> Finally, if there is an alternative forum, the defendants must still establish that the private and public interest factors weigh heavily in favor of dismissal.<sup>184</sup>

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at \*5-6.

<sup>177</sup> *Id.* at \*6.

<sup>178</sup> *Id.* at \*9.

<sup>179</sup> 917 F. Supp. 2d 366 (E.D. Pa. 2013).

<sup>180</sup> *Id.* at 369-70.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 369.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

The plaintiffs argued that England was not an adequate alternative forum because defendant Precision Airmotive had declared bankruptcy and the plaintiffs could not bring suit against them in England without violating the automatic stay.<sup>185</sup> The court held that since the stay remained in place against Precision it could not render a decision as to Precision, and would instead decide the motion as to the other defendants.<sup>186</sup> Furthermore, the court found that an adequate alternative forum existed as to all defendants, including Precision if the bankruptcy stay was lifted.<sup>187</sup>

The court next addressed the level of deference to apply to the plaintiffs' choice of forum. Even though the plaintiffs were not U.S. citizens, the assumption that their choice of forum was not convenient was overcome by evidence put forth by the plaintiffs that the defendant manufacturers of the engine and airframe of the crashed helicopter were located in Pennsylvania.<sup>188</sup>

Finally, the court addressed the private and public interest factors. The relative ease of access to sources of proof weighed in favor of the plaintiffs.<sup>189</sup> First, the most important evidence related to the plaintiffs' products liability claims, the aircraft wreckage, had been shipped to the United States, making it inefficient and expensive to transport it back to England for any subsequent suit.<sup>190</sup> The defendants argued that they would be deprived of evidence relating to the training of the pilots and maintenance of the aircraft located in England.<sup>191</sup> In contrast, the plaintiffs would be deprived of more important key evidence related to their products liability claims if the case were tried in England because some evidence of design of the helicopter's magnetos could only be obtained from a nonparty manufacturer located in the United States, and could not be obtained in a suit in England.<sup>192</sup>

The availability of compulsory process to ensure attendance of unwilling witnesses balanced equally between both parties.<sup>193</sup> While the defendants might need to call non-party fact witnesses

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<sup>185</sup> *Id.* at 370.

<sup>186</sup> *Id.* at 370-71.

<sup>187</sup> *Id.* at 371.

<sup>188</sup> *See id.*

<sup>189</sup> *See id.* at 372.

<sup>190</sup> *Id.* at 371.

<sup>191</sup> *Id.* at 372.

<sup>192</sup> *Id.* at 371-72.

<sup>193</sup> *Id.* at 373.

in England, the plaintiffs would need to call witnesses from the non-party designer of the helicopter's magneto.<sup>194</sup> The ability to view the crash site did not weigh in favor of the defendants because it could be presented to the fact-finder through pictures and video, and physical travel to the site would not aid the fact-finder in determining anything about defect in the aircraft.<sup>195</sup>

The other practical concerns that made trial easy, expeditious, and inexpensive weighed in favor of the defendants.<sup>196</sup> The defendants argued that in the United States, they would not be able to implead other potential tortfeasors located in England beyond the court's jurisdiction, including aircraft owners and maintainers.<sup>197</sup> Even though the plaintiffs argued that the statute of limitations for such claims in England had expired, thus providing the third parties with a defense against such claims even if brought in English courts, the court credited the defendant's argument that the statute of limitations had not yet conclusively expired under English law.<sup>198</sup>

The court then turned to public interests. It rejected the argument that there would be any administrative difficulties due to court congestion because the court planned to resolve the case without undue delay.<sup>199</sup> The interest in resolving local controversies locally weighed only slightly in favor of the defendants.<sup>200</sup> While the United States has an interest in ensuring that domestic companies manufacturing parts and products do not engage in tortious conduct causing harm, this interest is not as strong as England's interest in protecting its people from unsafe products.<sup>201</sup>

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<sup>194</sup> *Id.* at 372–73.

<sup>195</sup> *Id.* at 373.

<sup>196</sup> *Id.* at 374.

<sup>197</sup> *Id.* at 373.

<sup>198</sup> *Id.* at 373–74. Under English law, the statute of limitations for tort claims like the ones brought in this case expires the later of three years after “(i) the date of death or (ii) the date of knowledge of the deceased’s personal representative.” *Id.* at 374 (quoting Limitation Act 1980 § 11(5)). “Knowledge” refers to whether the “personal representative knew or ought reasonably to have known . . . that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, and . . . the identity of the defendant.” *Id.* (quoting Limitation Act 1980 § 14). The court credited the defendants’ argument that since the report of the Air Accidents Investigation Branch regarding this accident was not published until December 2010, the statute of limitations would not expire until December 2013. *See id.*

<sup>199</sup> *Lewis I*, 917 F. Supp. 2d at 374.

<sup>200</sup> *Id.* at 375.

<sup>201</sup> *Id.* at 374–75.



The avoidance of unnecessary problems in conflict of laws weighed in favor of the plaintiffs.<sup>202</sup> There was a false conflict of law because Pennsylvania's interest in deterring manufacturers from placing defective products in the stream of commerce did not conflict with England's interest in protecting its citizens from unsafe products, suggesting that Pennsylvania law should apply.<sup>203</sup> After considering all of the factors, the court concluded that the defendants "failed to meet their heavy burden to establish that the 'balance of [the private and public interest] factors tips decidedly in favor of trial in a foreign forum.'"<sup>204</sup>

This case appears to be a relatively unusual instance in which foreign plaintiffs bringing claims related to a crash occurring in a foreign jurisdiction succeeded in keeping their claims in a U.S. court. It remains to be seen if the holding in this case will be an isolated occurrence, or whether it suggests that foreign plaintiffs may fare better when they have wreckage located in the United States and multiple defendants located within the territorial jurisdiction of the forum.

## 2. *Galbert v. West Caribbean Airways*

In *Galbert v. West Caribbean Airways*,<sup>205</sup> heirs to victims of a 2005 crash in Venezuela of a West Caribbean Airways flight from Panama to Martinique brought suit for wrongful death in the District Court for the Southern District of Florida.<sup>206</sup> The district court dismissed the plaintiffs' claims on grounds of forum non conveniens, concluding that Martinique was the proper forum for the litigation.<sup>207</sup> The Eleventh Circuit affirmed, and the Supreme Court denied certiorari.<sup>208</sup>

After the highest French Court determined that there was no jurisdiction in Martinique under the Montreal Convention, the plaintiffs moved to vacate the district court's prior order dismissing their case.<sup>209</sup> The district court denied the plaintiffs' motion because the plaintiffs failed to make a sufficient showing to warrant vacating its prior order under Federal Rules of Civil

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<sup>202</sup> *Id.* at 376.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 377 (quoting *Windt v. Qwest Commc'ns Int'l, Inc.*, 529 F.3d 183, 192 (3d Cir. 2008) (citations omitted)).

<sup>205</sup> 715 F.3d 1290 (11th Cir. 2013).

<sup>206</sup> *Id.* at 1292.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 1292–93.

<sup>209</sup> *Id.* at 1293.

Procedure 60(b)(6),<sup>210</sup> the Eleventh Circuit again affirmed,<sup>211</sup> and the Supreme Court again denied certiorari without comment.<sup>212</sup>

This case illustrates the unwillingness of courts in the United States to open the doors of the courthouse to foreign plaintiffs to litigate claims against foreign defendants, even when they may not have an adequate alternative forum. This case is an interesting contrast to *Lewis I* discussed above, where a district court denied a forum non conveniens motion brought by U.S. defendants, even though the plaintiffs were foreign citizens and there was an adequate alternative forum.

#### E. CONTINENTAL CONNECTION FLIGHT 3407 LITIGATION

2013 brought two significant rulings in litigation arising from the February 12, 2009 crash of Continental Connection Flight 3407 near Buffalo, New York, which resulted in fifty fatalities. The first ruling was the District Court for the Western District of New York's November 6, 2013, decision granting in part and denying in part the plaintiffs' request for discovery.<sup>213</sup> The plaintiffs sought discovery concerning the defendant's pilot hiring, training, selection, and supervision, and the defendant's safety records and processes, all of which related to the plaintiffs' claims that the defendant carelessly and recklessly put the pilot in command of the flight due to financial pressure despite knowing that he lacked the skill, care, caution, and judgment required to operate the Q400 aircraft.<sup>214</sup> The plaintiffs argued that the pilot had a grossly deficient piloting record with red flags that included failing at least three flight exams and a history of serious training problems prior to and with the defendant, and further argued that the pilot did not meet the

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<sup>210</sup> *Id.* at 1294. Rule 60 of the Federal Rules of Civil Procedure provides that, "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6).

<sup>211</sup> *Galbert*, 715 F.3d at 1295.

<sup>212</sup> *See* *Bapte v. W. Caribbean Airways*, 134 S. Ct. 792 (2013).

<sup>213</sup> *In re Air Crash Near Clarence Ctr., N.Y.*, on Feb. 12, 2009, No. 09-md-2085, 2013 WL 5964480, at \*8 (W.D.N.Y. Nov. 8, 2013).

<sup>214</sup> Plaintiffs' Memorandum of Law in Support of Their Motion to Overrule Defendants' Objections and Compel Them to Produce Documents in Response to Plaintiffs' Discovery Requests at 1, 3-7, *In re Air Crash Near Clarence Ctr., N.Y.*, on Feb. 12, 2009, No. 09-md-2085 (W.D.N.Y. Dec. 5, 2011).

defendant's minimum flight hour standard to transition to the Q400 aircraft but the defendant transitioned him anyway.<sup>215</sup>

The discovery dispute was framed by the court's earlier preemption ruling that the Federal Aviation Act "created an overarching general standard of care" and is "supplemented by the numerous specific safety [federal aviation] regulations."<sup>216</sup> The defendant objected to the plaintiffs' discovery demands on the grounds that the Federal Aviation Regulations (FARs) contain no standard of care with respect to those aspects of the defendant's operations.<sup>217</sup>

The plaintiffs' motion thus raised the issue of what standard of care applied to the plaintiffs' negligence claims with respect to the defendant's pilot hiring, training, selection, and supervision.<sup>218</sup> The plaintiffs argued that a general reckless or careless standard of care applied, whether this is based in 14 C.F.R. § 91.13 or common law.<sup>219</sup> Colgan countered that 14 C.F.R. § 91.13 only applies to operation of aircraft and thus the standard must come from specific federal regulations for pilot hiring, training selection, and supervision.<sup>220</sup>

The court first concluded that the alleged negligent and reckless conduct (pilot hiring, training, selection and supervision) directly implicated air safety and therefore, in light of the court's prior preemption decision, were governed by a federal standard of care and *not* a common law standard.<sup>221</sup> The court next agreed with the defendant that 14 C.F.R. § 91.13 only applies to the operation of aircraft, citing in support the plain language of the regulation, definitions contained in the Federal Aviation Act, and two cases from other circuits.<sup>222</sup> The court was not persuaded by the plaintiffs' contention that such an outcome would effectively deprive them of their state law remedies while allowing the defendant to escape liability.<sup>223</sup> A federal standard of care would simply replace New York's reasonably

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<sup>215</sup> *Id.*

<sup>216</sup> *In re Air Crash*, 2013 WL 5964480, at \*2; *see also In re Air Crash Near Clarence Ctr., N.Y.*, 798 F. Supp. 2d 481, 486 (W.D.N.Y. 2011) (internal quotation marks omitted).

<sup>217</sup> *See In re Air Crash*, 2013 WL 5964480, at \*1-2.

<sup>218</sup> *See id.* at \*3.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *See id.* (citing *Elassaad v. Indep. Air*, 613 F.3d 119 (3d Cir. 2010); *Williams v. U.S. Airways, Inc.*, No. 10-0399, 2010 WL 4720844 (E.D. Pa. Nov. 18, 2010)).

<sup>223</sup> *See In re Air Crash*, 2013 WL 5964480, at \*3-4.

prudent person standard, and the defendant's conduct was still controlled by the FARs.<sup>224</sup> Although more benign-sounding, the court's decision forecloses plaintiffs' remedies under the Federal Aviation Act's savings clause while stripping them of the ability to hold the defendant accountable for its pilot hiring, training, selection and supervision wherever the defendant and/or the pilot met specific, basic standards. How such a result comports with Congress's intent to enhance aviation safety is unclear.

Concerning the parties' dispute about the discoverability of certain safety-related documents, particularly the defendant's Aviation Safety Action Program (ASAP), internal safety incident documents, safety meetings and audits, the court sided with the plaintiffs. The defendant asserted that discovery into ASAP, a voluntary safety incident reporting system, and these other areas was impermissible based upon the "self-critical analysis" privilege and/or a new common law privilege.<sup>225</sup> The court rejected the concept of such a new common law privilege, agreeing with the reasoning of *In re Air Crash at Lexington, Kentucky, August 27, 2006*.<sup>226</sup> It was highly reluctant to find such a privilege absent Congressional action to protect ASAP reports and related records.<sup>227</sup> Lastly, the court found that a five-year temporal limitation for plaintiffs' demands (i.e., five years preceding the crash) was reasonable.<sup>228</sup>

The second significant ruling in the Flight 3407 litigation came from the Second Circuit, which upheld the District Court for the Western District of New York's ruling that Erie County could not recover its expenditures in responding to and cleaning up the crash from the defendant airlines.<sup>229</sup> The court agreed with the district court that New York law generally prohibits recovery for "public expenditures made in the performance of governmental functions."<sup>230</sup> The county could not show that the crash and its cleanup fell into an enumerated exception

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<sup>224</sup> *See id.*

<sup>225</sup> *See id.* at \*6.

<sup>226</sup> *See id.* at \*7 (expressly agreeing with *In re Air Crash at Lexington, Ky., Aug. 27, 2006*, No. 5:06-CV-316-KSF, 2008 WL 170528 (E.D. Ky. 2008) (holding that no statutory, regulatory or common law privilege applied to ASAP reports)).

<sup>227</sup> *See id.* at \*7.

<sup>228</sup> *Id.*

<sup>229</sup> *See generally* *Cnty. of Erie, N.Y. v. Colgan Air, Inc.*, 711 F.3d 147 (2d Cir. 2013).

<sup>230</sup> *Id.* at 148 (quoting *Koch v. Consol. Edison Co. of N.Y.*, 62 N.Y.2d 548, 560 (1984)) (internal quotation marks omitted).

to this general rule, and the court approved of the district court's decision not to treat the crash or its aftermath as a public nuisance on the basis that there was neither permanent damage nor a continuing or recurring problem.<sup>231</sup>

## F. THE GENERAL AVIATION REVITALIZATION ACT

### 1. *Ovesen v. Mitsubishi XYZ Corporations*

The Second Circuit case *Ovesen v. Mitsubishi XYZ Corporations*<sup>232</sup> arose from the crash of an MU-2 aircraft that killed the pilot, whose estate representative brought wrongful death claims against the aircraft's manufacturers.<sup>233</sup> The defendants moved to dismiss the plaintiff's claims under GARA based upon expiration of the 18-year statute of repose.<sup>234</sup> The plaintiff countered that the fraud exception to GARA applied and the manufacturers of the aircraft had failed to properly report information regarding the defect at issue from a report of the United Kingdom's Civil Aviation Authority (CAA) to the FAA.<sup>235</sup>

The court rejected the plaintiff's argument, holding that the manufacturers had no duty to report the findings of the CAA report to the FAA under 14 C.F.R. § 21.3.<sup>236</sup> The plaintiff brought a motion for reconsideration, and when that was denied, appealed to the Second Circuit Court of Appeals.<sup>237</sup> The Second Circuit issued a very brief order affirming the district court's decision for the reasons set forth in the orders of the lower court, effectively adopting the narrow reading of the requirements of 14 C.F.R. § 21.3 in relation to the fraud exception to GARA.<sup>238</sup>

This case seems to follow a trend across the country to read the fraud exception to GARA narrowly, and it reinforces the high bar plaintiffs must meet to satisfy the fraud exception.

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<sup>231</sup> *Id.* at 152.

<sup>232</sup> 519 F. App'x 722 (2d Cir. 2013).

<sup>233</sup> *Id.* at 723.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *See id.* at 724.

## 2. Crouch v. Honeywell International, Inc.

*Crouch v. Honeywell International, Inc.*<sup>239</sup> arose from the crash of a Piper Lance II in Kentucky.<sup>240</sup> The plaintiff alleged that the crash resulted from a loss of power caused by the detachment of the magneto from the engine due to a cracked mounting flange.<sup>241</sup> The rebuilt magneto was originally installed on the subject aircraft in 2005 during an engine overhaul in accordance with the Lycoming Overhaul Manual in 2005.<sup>242</sup> Defendant AVCO brought a motion for summary judgment under GARA, arguing that the 18-year statute of repose applied because the actions it took as manufacturer occurred 28 years before the crash.<sup>243</sup> The plaintiff countered that GARA did not apply because AVCO was sued in its capacity as publisher of the overhaul manual, not in its capacity as manufacturer.<sup>244</sup> The plaintiff further argued that, even if GARA did apply, revisions to the overhaul manual constituted the addition of a new part or component, triggering a new 18-year repose period, and that incomplete discovery suggested that the fraud exception to GARA applied because AVCO had misrepresented or withheld required information from the FAA regarding the defect at issue.<sup>245</sup>

The district court originally found for the plaintiff on the motion, holding that the GARA statute of repose did not apply because the overhaul manual is not a “part” under GARA, and its actions were taken as manual publisher rather than as a manufacturer.<sup>246</sup> However, upon AVCO’s motion for reconsideration, the district court reversed itself, holding that the repose period applied because AVCO was required by federal regulation to publish the overhaul manual and was thus acting as a manufacturer.<sup>247</sup> Since the manual was published more than 18 years previously, the plaintiff’s claims were barred by the statute of repose.<sup>248</sup>

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<sup>239</sup> 720 F.3d 333 (6th Cir. 2013).

<sup>240</sup> *Id.* at 336.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 337.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

The Sixth Circuit affirmed the district court's decision, although on different grounds. The appeals court agreed that AVCO was acting as a manufacturer in publishing the overhaul manual because it was required by federal regulation to do so, and this activity was covered by GARA.<sup>249</sup> As the court reasoned, "[i]f Congress did not view a manufacturer's duty to publish and update maintenance manuals as falling within its 'capacity as manufacturer,' then there would arguably have been no need for Congress to include" the GARA fraud exception, dealing with the duties of a manufacturer to continuously report failures to the FAA.<sup>250</sup>

The court determined that most case law supported the conclusion that the overhaul manual was not a replacement part for the purposes of GARA.<sup>251</sup> Unlike a flight manual, a maintenance or overhaul manual is not required by law to be on board the aircraft and is therefore not a part, so its issuance or revision did not reset the GARA statute of repose.<sup>252</sup> Even if the overhaul manual constituted a replacement part, the repose period would still have run because the plaintiff could not point to a revision that was causally related to the condition alleged to have caused the accident.<sup>253</sup>

Finally, the court concluded that plaintiff failed to properly allege any facts in its complaint to support application of the fraud exception.<sup>254</sup> While the plaintiff claimed that the evidence of fraud was newly discovered, it was clear that she had that evidence prior to AVCO's first GARA motion but did not move to amend.<sup>255</sup> The evidence, if anything, showed clear communication between the FAA and AVCO concerning the type of flange failure at issue.<sup>256</sup>

This case provides needed clarity to the law in the Sixth Circuit regarding whether failure to warn claims based on an overhaul manual will be subject to the GARA statute of repose, an area of law that remains unclear across many circuits. The holding suggests that plaintiffs in the Sixth Circuit will be limited in the types of claims they can bring against a manufacturer. In

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<sup>249</sup> *Id.* at 340–41.

<sup>250</sup> *Id.* at 341.

<sup>251</sup> *See id.* at 342.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 343.

<sup>254</sup> *Id.* at 344.

<sup>255</sup> *Id.* at 345.

<sup>256</sup> *See id.* at 346–47.

particular, claims relating to a failure to warn in an overhaul or maintenance manual likely will not survive a GARA challenge.

### G. THE RESTATEMENT (THIRD) OF TORTS

#### 1. *Sikkelee v. Precision Airmotive Corp.*

In *Sikkelee v. Precision Airmotive Corp.*,<sup>257</sup> the plaintiff's decedent was killed in the crash of a Cessna 172N.<sup>258</sup> The plaintiff brought wrongful death claims under theories of negligence and strict products liability against the manufacturers of the aircraft's engine and carburetor.<sup>259</sup> The defendant manufacturer of the aircraft's engine brought a motion for summary judgment against all the plaintiff's claims.<sup>260</sup> The court dismissed some claims but held that the plaintiff could proceed on "the negligence and strict liability design defect [and inadequate warning] theories" under the Restatement (Second) of Torts Section 402A;<sup>261</sup> these claims related to an overhaul of the engine in 2004.<sup>262</sup> The defendant then brought a motion for reconsideration and a motion for certification for interlocutory appeal on the issue of whether the Restatement (Second) of Torts (Restatement Second) or the Restatement (Third) of Torts (Restatement Third) should govern the plaintiff's claims.<sup>263</sup>

In the landmark 1966 decision of *Webb v. Zern*,<sup>264</sup> the Pennsylvania Supreme Court adopted Section 402A of the Restatement Second to govern products liability claims under Pennsylvania law.<sup>265</sup> Since that time, no decision of the Pennsylvania Supreme Court has directly repudiated adoption of Sections 1 and 2 of the Restatement Third, and the Restatement Second remains the law as applied to products liability claims in Pennsylvania state courts.

Despite the long history of applying the Restatement Second in Pennsylvania state courts, in *Berrier v. Simplicity Manufacturing, Inc.*,<sup>266</sup> the Third Circuit "predicted" that when faced with the appropriate case, the Pennsylvania Supreme Court will adopt

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<sup>257</sup> No. 4:07-cv-00886, 2013 WL 2393005 (M.D. Pa. June 3, 2013).

<sup>258</sup> *Id.* at \*1.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *See id.*

<sup>263</sup> *See id.*

<sup>264</sup> 422 Pa. 424, 220 A.2d 853 (1966).

<sup>265</sup> *Id.* at 427, 854.

<sup>266</sup> 563 F.3d 38 (3d Cir. 2009).



Sections 1 and 2 of the Restatement Third governing products liability.<sup>267</sup> *Berrier* was decided during the time period between when the Pennsylvania Supreme Court certified for appeal the issue of whether it should apply Section 2 of the Restatement Third or Section 402A of the Restatement Second to products liability claims in *Bugosh v. I.U. North America, Inc.*,<sup>268</sup> and when it later dismissed the *Bugosh* appeal for being improvidently granted.<sup>269</sup> As a result, federal district courts in Pennsylvania interpreted the Supreme Court's dismissal of the *Bugosh* appeal as an affirmative declination of application of the Restatement Third refuting the Third Circuit's prediction in *Berrier* and continued to apply the Restatement Second to products liability claims in diversity cases.<sup>270</sup>

Due to the divergence of district court practice and Third Circuit precedent, in *Covell v. Bell Sports, Inc.*,<sup>271</sup> the Third Circuit was again faced with the issue of whether Section 2 of the Restatement Third or Section 402A of the Restatement Second applies to Pennsylvania products liability claims in diversity cases, and it affirmed the holding of *Berrier* because there had not been any contrary decision by the Pennsylvania Supreme Court definitively holding that the Restatement Third should not apply.<sup>272</sup> After the Third Circuit's ruling in *Covell*, the Pennsylvania Supreme Court in *Beard v. Johnson & Johnson, Inc.*<sup>273</sup> noted the confusion between federal and state courts regarding products liability law in Pennsylvania, but declined to take the opportunity to adopt the Restatement Third approach to products liability.<sup>274</sup>

Once again, relying on the Supreme Court's inaction in *Beard*, federal district courts in Pennsylvania returned to applying the

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<sup>267</sup> *Id.* at 57.

<sup>268</sup> 596 Pa. 265, 942 A.2d 897 (2008).

<sup>269</sup> *Sikkelee v. Precision Airmotive Corp.*, 876 F. Supp. 2d 479, 489 (M.D. Pa. 2012).

<sup>270</sup> *See, e.g.*, *Thompson v. Med-Mizer, Inc.*, No. 10-CV-2058, 2011 WL 1085621, at \*7 (E.D. Pa. Mar. 21, 2011); *Durkot v. Tesco Equip., LLC*, 654 F. Supp. 2d 295, 297 (E.D. Pa. 2009); *Milesco v. Norfolk S. Corp.*, No. 1:09-CV-1233, 2010 WL 55331, at \*3 (M.D. Pa. Jan. 5, 2010).

<sup>271</sup> 651 F.3d 357 (3d Cir. 2011).

<sup>272</sup> *Id.* at 359.

<sup>273</sup> 615 Pa. 99, 120, 41 A.3d 823, 836 (2012).

<sup>274</sup> *Id.* at 120, 836.

Restatement Second to Pennsylvania products liability claims in diversity cases, in accordance with Pennsylvania State law.<sup>275</sup>

However, despite the divergence between its application of the Restatement Third and the district courts' and state courts' application of the Restatement Second, the Third Circuit declined to hear the interlocutory appeal in *Sikkelee*, noting in its order of rejection that "federal courts sitting in diversity and applying Pennsylvania law to products liability cases should look to Sections 1 and 2 of the Restatement (Third) of Torts" as it had held in *Berrier* and *Covell*.<sup>276</sup> Effectively, the Third Circuit was endorsing the deeply flawed status quo where federal courts sitting in diversity applied an entirely different standard to products liability claims under Pennsylvania state law than Pennsylvania's own state courts. More than creating federal common law, the Third Circuit has seemingly repudiated Pennsylvania state law in favor of a standard it finds more fitting in what seems to be a clear violation of tenets of federalism and the requirements of *Erie Railroad Co. v. Tompkins*.<sup>277</sup> Unfortunately, the Pennsylvania Supreme Court has not acted to make the definitive statement necessary to resolve this contradiction created by the Third Circuit. This untenable situation would seem to encourage forum shopping to seek the most favorable substantive law by plaintiffs, in choosing whether to file in state or federal court, and by defendants, in deciding whether to remove to federal court.

In *Sikkelee*, as a result of the Third Circuit's guidance that the Restatement Third should apply, the Middle District of Pennsylvania permitted the parties to file new briefings on the motion for reconsideration with the understanding that the Restatement Third applied.<sup>278</sup>

The defendant argued that the application of the Restatement Third, rather than the Restatement Second, constituted an intervening change of law.<sup>279</sup> Since it was not the actual manufacturer of the allegedly defective carburetor, the defendant

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<sup>275</sup> See, e.g., *Carpenter v. Shu-Bee's, Inc.*, No. 10-0734, 2012 WL 2740896, at \*2-3 (E.D. Pa. July 9, 2012); *Sikkelee v. Precision Airmotive Corp.*, 876 F. Supp. 2d 479, 490 (M.D. Pa. 2012).; *Konold v. Superior Int'l Indus. Inc.*, 911 F. Supp. 2d 303, 312 (W.D. Pa. 2012).

<sup>276</sup> *Sikkelee v. Precision Airmotive Corp.*, No. 4:07-cv-00886, 2013 WL 2393005, at \*2 (M.D. Pa. June 3, 2013) (quoting *Sikkelee v. Precision Airmotive Corp.*, No. 12-8081, 2012 WL 5077571, at \*1 (3d Cir. Oct. 17, 2012)).

<sup>277</sup> 304 U.S. 64 (1938) (requiring federal courts sitting in diversity to apply state law and not create any federal common law).

<sup>278</sup> *Sikkelee*, 2013 WL 2393005, at \*2.

<sup>279</sup> *Id.* at \*5.

could not be liable under the Restatement Third, which only allowed for liability of sellers or distributors of a product, as defined in Section 20.<sup>280</sup> This did not provide for liability as a de facto manufacturer as had previously been found by the court when it had applied the Restatement Second.<sup>281</sup>

The court disagreed, holding that application of the Restatement Third, as compared to the Restatement Second, did not constitute an intervening change in applicable law.<sup>282</sup> While Pennsylvania had adopted Sections 1 and 2 of the Restatement Third, there was no indication that Pennsylvania had adopted the definitions in Section 20 of the Restatement Third regarding who could be sued under Sections 1 and 2.<sup>283</sup> As a result, there was no intervening change of applicable law.<sup>284</sup>

Since the Third Circuit denied the interlocutory appeal<sup>285</sup> and the Middle District of Pennsylvania issued its subsequent decision in *Sikkelee*,<sup>286</sup> the Pennsylvania Supreme Court has recognized the need to resolve the ongoing confusion over the Restatement applicable to products liability under Pennsylvania law by granting allocatur to hear arguments in *Tincher v. Omega Flex, Inc.*<sup>287</sup> to determine “[w]hether [it] should replace the strict liability analysis of Section 402A of the Second Restatement with the analysis of the Third Restatement.”<sup>288</sup> While the Pennsylvania Supreme Court has heard argument in the *Tincher* case, it has yet to render its decision, and seems in no hurry to do so, as it granted allocatur March 26, 2013, heard oral argument in October 2013, and has still not rendered a decision.<sup>289</sup>

This case highlights how each state’s piecemeal adoption of portions of a Restatement can have an important impact upon litigation. Moreover, it also illustrates how the differences between the Restatement Third and the Restatement Second will often be brought into stark contrast by this piecemeal adoption process, resulting in some growing pains as state and federal courts each try to advance substantive products liability law in

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<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *See id.* at \*6.

<sup>283</sup> *See id.*

<sup>284</sup> *See id.*

<sup>285</sup> *Sikkelee v. Precision Airmotive Corp.*, 2012 WL 5077571, at \*1 (3d Cir. Oct. 17, 2012).

<sup>286</sup> *Id.*

<sup>287</sup> 619 Pa. 395, 64 A.3d 626 (2013).

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

states across the country. While it was not an issue of particular impact in *Sikkelee*, the fact that, at least for now, Pennsylvania state courts and federal courts are applying different substantive law to identical claims is highly problematic. It seems like the federal courts are trying to impose their own view of the proper applicable standard in products liability cases without the support of state law as interpreted by state courts, and the Pennsylvania Supreme Court has been slow to address this contradiction let alone resolve the ongoing contradiction.

#### H. REMOVAL TO FEDERAL COURT AND REMAND TO STATE COURT

##### I. *Dayton v. Alaska*

The plaintiff in *Dayton v. Alaska*<sup>290</sup> sued the State of Alaska for the wrongful death of her decedent in the crash of an Air Force C-17 during an Alaska Air National Guard practice flight.<sup>291</sup> The plaintiff brought suit in state court pursuant to Alaska Statute § 26.05.145, which provides a member of the military with a cause of action against the state for damages resulting from “intentional misconduct within the course and scope of employment or agency and with complete disregard for the safety and property of others.”<sup>292</sup> The plaintiff then brought a third party complaint against the United States and the estates of the downed aircraft’s flight crew under the Federal Tort Claims Act (FTCA).<sup>293</sup> The United States removed the case to the Federal District Court for the District of Alaska, and promptly filed an unopposed motion to dismiss pursuant to *Feres v. United States*,<sup>294</sup> arguing that “the FTCA does not waive sovereign immunity for allegedly tortious conduct that is incident to military service.”<sup>295</sup> Alaska then filed a cross-motion to dismiss, arguing that because the Alaskan Air National Guard (AANG) flight crew were employees of the United States, the *Feres* doctrine also barred the plaintiff’s claims against it.<sup>296</sup> The plaintiff filed a motion to remand, arguing that, since the United States was no longer a

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<sup>290</sup> No. 3:12-cv-00245, 2013 WL 3712408 (D. Alaska July 12, 2013).

<sup>291</sup> *Id.* at \*1.

<sup>292</sup> *Id.* at \*1 (quoting ALASKA STAT. § 26.05.145 (2008)).

<sup>293</sup> *Id.*

<sup>294</sup> 340 U.S. 135 (1950).

<sup>295</sup> *Dayton*, 2013 WL 3712408, at \*1.

<sup>296</sup> *Id.* at \*2.

party, there was no federal jurisdiction over its state law claims.<sup>297</sup>

The court held that the *Feres* doctrine did not apply to the plaintiff's claims against Alaska, and that the case must be remanded to state court because it had no jurisdiction over the plaintiff's original claim against the State.<sup>298</sup> The complaint named the State, not the AANG, as the defendant, so the fact that AANG was a hybrid state and federal entity did not matter.<sup>299</sup> The Alaska Supreme Court had previously determined in *Himsel v. State*<sup>300</sup> that "the State may be held vicariously liable under state law for the actions of a pilot if that pilot could be considered a 'borrowed employee' of the State for the purposes of the flight[.]"<sup>301</sup> As a result, the district court determined that the fact that the pilot was a federal employee did not conclusively prevent the plaintiff's suit under the *Feres* doctrine.<sup>302</sup> While the State argued that the potential application of the *Feres* doctrine justified federal jurisdiction, it is well established that anticipated defenses do not enlarge the district court's federal question jurisdiction when the plaintiff has only brought state law claims.<sup>303</sup>

Alaska also argued that the plaintiff's reliance on federal regulations in its complaint justified federal question jurisdiction.<sup>304</sup> The court rejected this argument as well, holding that the plaintiff only referenced federal regulations as evidence of the State's negligence, and mere reference to federal regulations does not create federal question jurisdiction.<sup>305</sup>

Finally, the district court refused to exercise supplemental jurisdiction over the plaintiff's claims because there was no activity on the merits of the case in federal court and there would be no time or resources saved by the case remaining in federal court.<sup>306</sup>

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<sup>297</sup> *Id.* at \*1.

<sup>298</sup> *Id.* at \*3, \*5.

<sup>299</sup> *Id.* at \*2.

<sup>300</sup> *Himsel v. State*, 36 P.3d 35 (Alaska 2001).

<sup>301</sup> *Dayton*, 2013 WL 3712408, at \*2 (citing *Himsel*, 36 P.3d at 36).

<sup>302</sup> *Id.* at \*2-3.

<sup>303</sup> *Id.* at \*3.

<sup>304</sup> *Id.* at \*4.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

## 2. Marshall v. Boeing Co.

*Marshall v. Boeing Co.*<sup>307</sup> addressed the question whether plaintiffs' state law claims were severable from a third-party action filed by defendant Boeing against Lot Polish Airlines (LOT), a foreign sovereign, and could therefore be remanded to state court.<sup>308</sup> The district court denied the plaintiffs' motion to sever and remand, finding that it had original jurisdiction over the third-party action and supplemental jurisdiction over the plaintiffs' original claims against Boeing under 28 U.S.C. § 1367(a).<sup>309</sup>

The case arose out of the emergency wheels-up landing in Warsaw, Poland, of LOT Flight 016 out of Newark, New Jersey.<sup>310</sup> The plaintiffs filed suit in the Circuit Court of Cook County for personal injuries against the aircraft's manufacturer (Boeing) and Mach II Maintenance Corp. (Mach II).<sup>311</sup> Boeing filed a third-party complaint against LOT, the operator, and LOT thereafter removed the entire action to federal court.<sup>312</sup> The plaintiffs then brought a motion to sever their original state law claims from the third-party action and remand those claims to state court, arguing that 28 U.S.C. § 1441(c) allowed for remand of their state law claims because they were not within the original or supplemental jurisdiction of the court.<sup>313</sup>

The court rejected the plaintiffs' argument and refused to sever or remand the case.<sup>314</sup> The court first noted that § 1441(c) did not apply because federal jurisdiction is not based on federal question, but based on the identity of the parties in accordance with the Foreign Sovereign Immunities Act (FSIA).<sup>315</sup> Boeing's claim against LOT was a state law claim but the court had jurisdiction pursuant to the FSIA because LOT was a foreign sovereign or sovereign instrumentality.<sup>316</sup> In addition, the court found that § 1441(c) did not apply because the district court had supplemental jurisdiction over plaintiffs' claims, as they arose from the same case and controversy as Boeing's third-

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<sup>307</sup> 640 F. Supp. 2d 819 (N.D. Ill. 2013).

<sup>308</sup> *See id.*

<sup>309</sup> *Id.* at 822–24.

<sup>310</sup> *Id.* at 820.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 821.

<sup>314</sup> *Id.* at 824.

<sup>315</sup> *Id.* at 822.

<sup>316</sup> *Id.*

party contribution claim against LOT.<sup>317</sup> The plaintiffs' claims "derive[d] from a common nucleus of operative facts" because both sets of claims related to the cause of the emergency landing at Warsaw's Chopin Airport.<sup>318</sup>

The plaintiffs maintained that it made no sense to read 28 U.S.C. § 1441 as requiring severance and remand of all state law claims in cases involving federal questions but not in claims removed under section (d) of that statute (i.e., actions against foreign states).<sup>319</sup> The district court disagreed, reiterating that jurisdiction was conferred under the FSIA and, given the factual connection between the claims, "there can be no compelling argument that Congress intended those claims to be remanded."<sup>320</sup> The court also found that policy reasons warranted treating claims removed under the FSIA differently, and that judicial economy would be best served by litigating the claims together.<sup>321</sup>

The *Marshall* case reinforces the distinction between the rare claims that fall under § 1441(c) and the vast majority of claims that will be subject to supplemental jurisdiction. This case seems to suggest that federal courts will generally choose the efficiency of trying all claims arising from a single crash together. Parties must remain mindful of the involvement of potential parties that are instrumentalities of a foreign government in analyzing whether a case is likely to end up in a federal forum.

## I. PERSONAL JURISDICTION IN THE INTERNET AGE

### 1. *Murphy v. Cirrus Design Corp.*

In *Murphy v. Cirrus Design Corp.*,<sup>322</sup> the New York Supreme Court for Erie County took a common sense approach in exercising personal jurisdiction under New York law over an out-of-state defendant based on its contacts, including an interactive website, with the aircraft's pilot/owner and New York.<sup>323</sup> The case arose from the crash of a Cirrus SR-22 aircraft near Cleveland, Ohio.<sup>324</sup> The estates of two decedents killed in the crash brought negligence and breach of contract claims against the

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<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 823.

<sup>320</sup> *Id.*

<sup>321</sup> *See id.*

<sup>322</sup> No. 2011-1824 (N.Y. Sup. Ct. Feb. 18, 2013).

<sup>323</sup> *See generally id.*

<sup>324</sup> *See id.* at 1.

UND Aerospace Foundation (Foundation) related to training the Foundation provided to the decedent pilot of the aircraft, particularly with respect to certain SR-22 systems and avionics.<sup>325</sup> The Foundation moved to dismiss the plaintiffs' complaint for lack of personal jurisdiction, arguing *inter alia* that any allegedly deficient training occurred in Minnesota and not New York.<sup>326</sup>

The court first determined that personal jurisdiction over the Foundation could be exercised pursuant to New York's long-arm provision.<sup>327</sup> It found that the Foundation, through its own conduct with the decedent, engaged in certain activities in New York as a prerequisite to allowing him to undergo transition training on the SR-22 aircraft in Minnesota.<sup>328</sup> Most notably, the Foundation required that the decedent register online the Foundation-developed training software that he received, accept an online end-user license agreement for the software, and complete training modules and quizzes using the software.<sup>329</sup> The court also found, among other contacts, that the Foundation had indirect business contact with the decedent pilot in New York via defendant Kaplan, who received specialized training credentials from the Foundation and used materials developed by the Foundation in provided training to the decedent pilot in New York on multiple occasions.<sup>330</sup>

The court made two other important determinations with respect to its long-arm jurisdiction analysis. First, it held that defendant Cirrus' New York activities—particularly the shipment to the decedent pilot of important training materials that the Foundation helped develop—were attributable to the Foundation as such activities were contemplated by agreements between Cirrus and the Foundation and the activities benefited the Foundation.<sup>331</sup>

Second, the court found that the Foundation's website, as it existed from fiscal year 2005 though fiscal year 2011, was (as the

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<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* at 4. CPLR § 302(a)(1) states in part that "a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state or contracts anywhere to supply goods or services in the state." *Id.* at 1.

<sup>328</sup> *Id.* at 2.

<sup>329</sup> *Id.* The court found that Doran's acceptance of the software's End-User License Agreement created an enforceable contract. *See id.* (citation omitted).

<sup>330</sup> *Id.* 2-3.

<sup>331</sup> *Id.* (citing *Alan J. Lupton Assocs., Inc. v. Ne. Plastics, Inc.*, 105 A.D.2d 3, 7 (N.Y. App. Div. 1984)).



plaintiffs put it) “sufficiently interactive so as to consist of purposeful activity in New York.”<sup>332</sup> It noted that the Foundation directed the decedent and other New York residents to its proprietary online training portal, required the decedent to register the aforementioned training software via the internet, and the Foundation sold merchandise and training software via its website which it would ship to New York and other states.<sup>333</sup>

The court also determined that personal jurisdiction could be exercised over the Foundation pursuant to New York’s general jurisdiction provision.<sup>334</sup> It was satisfied that the Foundation knowingly and purposefully availed itself of the privilege of doing business in New York by virtue of its direct contacts with the decedent in New York and indirectly through defendants Cirrus and Kaplan.<sup>335</sup>

The *Murphy* decision, particularly the court’s long-arm analysis concerning the Foundation’s internet contact with the plaintiff’s decedent, offers an example of a court accounting for the rapidly changing realities of business in the internet age while adhering to the traditional tenets of personal jurisdiction jurisprudence.

### III. CONCLUSION

Looking ahead to 2014, preemption is likely to remain in the spotlight. The Supreme Court’s recent decision in *Northwest, Inc. v. Ginsberg* will be closely scrutinized. Though the Court issued a narrow ruling, practitioners and court watchers will still be looking for signals regarding federal preemption of products liability claims. The bigger question remains if, when, and under what circumstances the Court will tackle this issue and the diverse legal patchwork created by the split among the circuit courts of appeals. In the interim, it will be interesting to see the impact of the District Court for the Eastern District of Pennsylvania’s decision in *Lewis II*, which supports a broader trend of courts showing deference to the traditional police powers of the states in

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<sup>332</sup> *Id.* at 4 (citing *Audiovox Corp. v. S. China Enter., Inc.*, No. 2:11-CV-051420JS-WDW, 2012 U.S. Dist. LEXIS 104656 (E.D.N.Y. July 26, 2012)).

<sup>333</sup> *Id.*

<sup>334</sup> *Id.* at 5. CPLR § 301 allows a court to exercise “such jurisdiction over persons, property, or status as might be have been exercised heretofore.” *Id.* at 1.

<sup>335</sup> *Id.* at 5.

ensuring consumer safety, and a strengthening of the presumption that state standards can coexist with federal regulations.<sup>336</sup>

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<sup>336</sup> See Steven R. Pounian & Jared L. Watkins, *Pulling Back? Courts, Preemption and Products Liability Claims*, N.Y.L.J. (Dec. 20, 2012, 12:00 AM), <http://www.newyorklawjournal.com/id=1202582073348/Pullint-Back-Courts-Preemption-and-Liability-Claims?slreturn=20140703235214>.

