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Recent Developments in Aviation Liability Law

Frederick P. Alimonti

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RECENT DEVELOPMENTS IN AVIATION LIABILITY LAW

Frederick P. Alimonti*  **

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** This Article is attributable to the outstanding efforts of my colleagues and
  co-authors from Haight, Gardner, Holland & Knight and other offices in the Hol-
  land & Knight family to whom I owe my deepest thanks. Although many of us
  straddled the fence from time to time, the general topical breakdown follows:
  Camille R. Nicodemus (General Issues); Priya G. Bhatt (Warsaw Convention);
  Elizabeth Flavin and Florian Scheibeck (Non-Warsaw Carrier Liability); Richard
  J. Colosimo (Manufacturer Liability); James V. Marks (Insurance); Chad S. Rob-
  erts (Airport Liability); and Jonathan M. Epstein (Miscellaneous Issues). Finally,
  my special thanks to Randal R. Craft, Jr. for his enthusiastic support (and staff-
  ing!) of this endeavor.
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I. INTRODUCTION

It was with considerable trepidation that I accepted the task of assembling this year’s “Recent Developments” paper. As the length of this paper suggests, it has been a busy year for aviation law just within our nation’s courts, and I have not even addressed legislative and international developments such as the IATA Accords with Intercarrier Agreement and the Family Assistance Act, both of which stand to radically alter the landscape of aviation law and liability for years to come.

In the course of preparing this paper, the tremendous scope of “aviation law” was once again made plain. I would not dare be so bold as to suggest that I have mastered any of the topics herein, and, as noted, I am indebted to my colleagues for their outstanding efforts in bringing this paper to fruition. I hope I have avoided most editorial biases. Nonetheless, many of the cases and language quoted and paraphrased in this paper may be bad memories best left undisturbed to some of you, while others may find reviewing these same authorities a most pleasant diversion. Obviously, this largely depends on your background and on which side of the “v.” you are typically to be found. I hope all readers will forgive what may seem like a brutish handling of their cases. Sorting out what to cover and to what extent was not easy, and no doubt some will feel neglected and others, dissected. I thank the Board of this Symposium and the Staff at SMU for the honor of presenting this paper.

II. GENERAL LEGAL ISSUES

A. PERSONAL JURISDICTION

Numerous cases arose out of the crash of American Eagle Flight 3379 near Morrisville, North Carolina in 1994. One of these actions, recently decided, involved the issue of personal jurisdiction over three out-of-state corporations.1 In Josefson, Jetstream Aircraft Limited, Jetstream Aircraft, Inc., and British Aerospace P.L.C. were joined as defendants. The plaintiff alleged that these defendants had manufactured and leased the accident aircraft to Flagship Airlines and further alleged that the manuals that accompanied the aircraft contained misleading information that contributed to the accident.2 The plaintiff

1 See Josefson v. Flagship Airlines, Inc., 25 Av. Cas. (CCH) ¶ 18,146 (M.D.N.C. 1997).
2 See id. at ¶ 18,148.
argued that sufficient contacts between the defendants and North Carolina were established because the defendants provided product support in North Carolina, sent parts to North Carolina, and knew that the aircraft would likely travel to North Carolina. The defendants argued that these facts were insufficient to confer jurisdiction because the defendants were not registered or qualified to do business in the state, had no registered agents there, maintained no personnel in the state, and had not consented to suit in North Carolina.

The court initially examined the North Carolina long-arm statute, which provided for a liberal exercise of personal jurisdiction. The statute permitted jurisdiction over a non-resident defendant who had caused injury within the state if “[p]roducts, materials or things processed, serviced or manufactured by the defendant were used or consumed, within th[e] State. . . .” The district court noted that the North Carolina long-arm statute extended to the full jurisdictional limit permissible under federal due process law and proceeded to analyze the question under the federal “minimum contacts” and “fair play and substantial justice” tests. The district court held that jurisdiction over the defendants would not be constitutional because the defendants’ only contacts with the state (the occasional delivery of parts and one visit by a technical representative), were wholly unrelated to the plaintiff’s claim. The entire claim consisted of allegations of deficiencies in the aircraft’s manual, and the plaintiff failed to establish any direct contact between the defendants and the state of North Carolina on that issue.

The plaintiff also argued that the foreseeability that the aircraft would move through the stream of commerce into North Carolina subjected the manufacturer to jurisdiction. The court noted that this “stream of commerce” theory had been expressly rejected in the circuit. Hence, the mere foreseeability that the aircraft might travel and potentially crash in North Carolina did not provide constitutionally sufficient minimum contacts to establish personal jurisdiction over defendants in that state.

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3 See id. at ¶ 18,147.
4 See id. at ¶ 18,146-47.
5 See id. at ¶ 18,147.
6 Id.
7 See id.
8 See id. at ¶ 18,148.
9 See id.
B. Subject Matter Jurisdiction

Subject matter jurisdiction under the commercial activity exception of the Foreign Sovereign Immunities Act (FSIA)\(^\text{10}\) was examined in *Seisay v. Compagnie Nationale Air France*.\(^\text{11}\) The plaintiff Tinga Seisay, former General Counsel of Sierra Leone to the United States, alleged that he was wrongfully denied permission to board an Air France flight from Paris to New York due to irregularities in his transportation documents.

Although the plaintiff was a permanent resident of the United States, the plaintiff boarded his scheduled Air France flight to Paris from Ghana under a Sierra Leone passport. Upon arrival in Paris, the plaintiff was scheduled to transfer to an Air France flight to New York. In lieu of a Green Card, the plaintiff offered an Immigration and Naturalization Service document entitled "Notice of Interview."\(^\text{12}\) Air France determined that this document was not a proper travel document and that the plaintiff lacked the necessary documentation to enter the United States. On that basis, Seisay was denied boarding. The plaintiff alleged that Air France's failure to transport him to New York constituted a breach of contract. He also alleged that he had been falsely imprisoned by virtue of Air France's actions.\(^\text{13}\)

Air France moved for summary judgment on two grounds:

1. Air France's tariff expressly exonerated Air France from liability for refusing to transport passengers with inadequate travel documents; and
2. the plaintiff's tort claims were barred pursuant to the FSIA.

In opposing Air France's motion, the plaintiff sought leave to amend the complaint to add additional causes of action related to warranty, misrepresentation, fraud, deceit, negligence, and civil rights violations. All of the proposed additional causes of action related to the same transaction and occurrence that was the subject of the initial complaint.

In defense of the breach of contract claim, Air France sought to rely on its tariffs on file with the Department of Transportation (DOT). The court noted that tariffs on file with DOT form part of the contract of carriage between the passenger and the

\(^{11}\) No. 95 Civ. 7660 (JFK), 1997 U.S. Dist. LEXIS 11009 (S.D.N.Y. July 30, 1997).
\(^{12}\) See id. at *3.
\(^{13}\) See id. at *4.
airline.\(^{14}\) Rule 45 of Air France’s tariffs specifically requires passengers to comply with all necessary laws, rules, and regulations related to obtaining the necessary documents for international travel. The rule further provides that the “[c]arrier is not liable to the passenger for any loss or expense due to the passenger’s failure to obtain the required documents, whether or not the carrier provides carriage to passenger.”\(^{15}\)

Because it was undisputed that Air France refused to board the plaintiff due to deficiencies in his travel documents, and it was solely the plaintiff’s obligation to obtain these documents, Air France’s motion for summary judgment on the breach of contract count was granted.\(^{16}\)

Resolving the plaintiff’s claim for false imprisonment required an examination of the commercial activity exception to foreign sovereign immunity, specifically the requirement that a plaintiff’s injury be “based upon” a commercial activity carried out by the sovereign.\(^{17}\) It was undisputed that the majority of Air France’s shares were owned by the Republic of France and that Air France accordingly was entitled to foreign sovereign immunity status under the FSIA.\(^{18}\)

The plaintiff alleged that his injury was “based upon” Air France’s activity in the United States, which consisted of selling him his ticket in New York, where Air France operated a ticket office. Air France did not contest either of these facts but countered that the plaintiff’s claim was based upon activity wholly unrelated to the New York commercial activity. The court agreed with Air France.\(^{19}\)

In \textit{Nelson}, the Supreme Court distinguished claims based upon a commercial activity and those merely having a connection with the commercial activity.\(^{20}\) Plaintiff Nelson had been recruited by the Saudi Arabian government to work in a Saudi hospital. He alleged that he was tortured by Saudi police after repeatedly advising hospital officials of safety hazards posed by


\(^{15}\) Id. at *8-9.

\(^{16}\) See id. at *10 (citing Khalessilzadeh v. Scandinavian Airlines Sys., 19 Av. Cas. (CCH) ¶ 18,413 (C.D. Cal. 1986) (other citations omitted)).


\(^{20}\) See Nelson, 507 U.S. at 353.
the hospital’s oxygen and nitrous oxide systems. The Court held that Nelson’s claims were not based upon Saudi Arabia’s recruitment in the United States (the commercial activity) but rather the actions of Saudi police in Saudi Arabia.\textsuperscript{21} Accordingly, the Court found that the plaintiff’s tort claims did not fall within the commercial activity exception of the FSIA, and thus, the Court lacked federal subject matter jurisdiction.\textsuperscript{22}

Applying the reasoning of Nelson, the Southern District of New York held that any alleged confinement performed by Air France related to commercial activities in Paris, not those that occurred in New York.\textsuperscript{23} As such, the court held that it was insufficient to establish merely that commercial activity eventually led to the injurious conduct. Rather, the plaintiff was required to establish that the elements of his cause of action were “based upon” the commercial activity. Because the elements of the plaintiff’s false imprisonment claim could be established independently of Air France’s commercial activities in New York, the court held that the commercial activity exception to foreign sovereign immunity did not apply; therefore, the court lacked subject matter jurisdiction over the plaintiff’s false imprisonment claim.\textsuperscript{24}

All of the causes of action the plaintiff sought to add to his complaint via his proposed amendment related to the same transaction and occurrence as the false imprisonment claim. Accordingly, the court held that the proposed amendments “would be futile” because none of these claims could be based upon Air France’s commercial activity in New York.\textsuperscript{25} Leave to amend was denied, and Air France’s motion for summary judgment was granted in all respects.\textsuperscript{26}

C. Forum Non Conveniens

In a recent case, the Southern District of New York granted the defendant airline’s motion to dismiss based on forum non conveniens. In \textit{Tiwari v. BWIA International},\textsuperscript{27} the plaintiff, a passenger on a BWIA flight from Guyana to New York, was arrested

\textsuperscript{21} See id. at 357-58.
\textsuperscript{22} See id. at 358-63.
\textsuperscript{23} See Seisay, 1997 U.S. Dist. LEXIS 11009, at *17.
\textsuperscript{24} See id. at *18.
\textsuperscript{25} Id. at *19.
\textsuperscript{26} See id. at *19-20.
\textsuperscript{27} 25 Av. Cas. (CCH) ¶ 18,429 (S.D.N.Y. 1997).
for possession of cocaine in her baggage. After the plaintiff checked her bags, she was stopped by police officers who had recovered a toothpaste tube filled with cocaine from her luggage. The plaintiff denied that the toothpaste tube or cocaine belonged to her, and the charges against her were ultimately dismissed. Having been arrested and jailed in Guyana for approximately two weeks during the criminal proceedings, she brought an action in New York against the airline alleging negligent handling of her luggage and seeking damages for psychological harm.

The court first noted that a plaintiff's choice of forum should rarely be disturbed unless the balance of public and private interests strongly favors the defendant. The private interests considered by the court included ease of access to proof, availability of witnesses, and other practical matters. The private interests weighed heavily against New York as a convenient forum because the physical evidence and the likely witnesses were all located in Guyana. The witnesses could not be compelled to testify in New York, and the Guyana police retained custody of the physical evidence.

The public interest considerations included the relation between the locality and the controversy. New York had no relation to the incidents leading to the litigation, and the court found that the plaintiff's New York residency was insufficient to mandate retaining the action in New York. Thus, the court granted the defendant's motion to dismiss the action and required the defendant to agree to submit to jurisdiction before the Guyana court.

D. LIMITATIONS

An instructive analysis of the statute of limitations applicable to claims under the Federal Air Carriers Access Act (ACAA) can be found in Vaughn v. Northwest Airlines, Inc. The case in-
volved, among other claims, an alleged violation of the ACAA, which prohibits discrimination against the disabled in air transportation. The plaintiff, suffering from a connective tissue disorder and physical weakness, alleged that Northwest Airlines personnel refused to assist her in loading and unloading her carry-on baggage, which resulted in injuries to her shoulders and arms. She brought suit in Minnesota more than two years after the incident.

Defendant Northwest Airlines moved to dismiss the action on the ground that the applicable statute of limitations was one year and that the plaintiff's claim was untimely. The ACAA did not provide a statute of limitations for the plaintiff's claim.

The court noted that federal time limitations are to be judicially crafted from an analogous statute of limitations in the law of the forum state when the federal statute provides no limitations period. The defendant argued that the most closely analogous statute was the Minnesota Human Rights Act (MHRA), which prohibits discriminatory practices affecting the disabled, among others. The plaintiff argued that Minnesota's six-year statute of limitations for personal injury actions should apply. She relied on several United States Supreme Court decisions that modified the federal borrowing approach for violations of certain federal civil rights statutes. Those cases analogized certain discrimination causes of action to personal injury actions and permitted federal courts to apply state tort limitations in certain cases.

The Minnesota court reasoned, however, that the Supreme Court's decisions with respect to section 1983 discrimination causes of action should not be extended to every federal civil rights statute. The Court noted that section 1983 applied to numerous potential causes of action and a variety of remedies, making an analogy to state law difficult and justifying resort to state personal injury limitations. The ACAA statute, however, applies specifically to discrimination against the disabled in air

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38 See id. at 738.
40 See Vaughn, 558 N.W.2d at 739-42.
41 See id.
transportation and thus could be closely analogized to the MHRA.

The court held that the applicable ACAA statute of limitations was the one-year statute of limitations under the MHRA and that the plaintiff's claim was time-barred.\textsuperscript{42}

E. MULTIDISTRICT LITIGATION

In the wake of the TWA Flight 800 accident, numerous cases were filed across the nation in both state and federal courts. By motion to the Judicial Panel on Multidistrict Litigation, defendant Trans World Airlines (TWA) sought transfer and consolidation of all federal cases to the Southern District of New York for coordinated pretrial proceedings.\textsuperscript{43} Although the accident occurred off the coast of Long Island and thus arguably in the Eastern District of New York, TWA took the position that the accident occurred over the Atlantic Ocean and thus did not occur "in" any district.\textsuperscript{44} TWA therefore argued for transfer to the Southern District of New York, which was in proximity to the airport from which the plane departed as well as the crash site and was a more convenient location than Eastern Long Island for the many foreign and out-of-state plaintiffs because of the Southern District location in downtown New York City. The Panel agreed with the position of TWA and consolidated the actions in the Southern District, noting that the court "in Manhattan provides the most convenient and accessible forum for participants" in "this litigation that is truly international in scope."\textsuperscript{45}

F. CHOICE OF LAW

In \textit{In re Aircrash Near Roselawn, Indiana on October 31, 1994}, the Northern District of Illinois addressed the question of which state's law of damages should be applied to the plaintiffs' claims.\textsuperscript{46} In a previous decision, the district court had held that Indiana law applied to the compensatory damages of five of the plaintiffs in this consolidated action, all residents of Indiana.\textsuperscript{47}

\begin{itemize}
\item \textsuperscript{42} See id. at 742.
\item \textsuperscript{43} See \textit{In re Air Crash Disaster off Long Island, New York on July 17, 1997}, MDL Docket No. 1161 (Feb. 19, 1997).
\item \textsuperscript{44} Defendant Boeing Company sought consolidation in the Eastern District. See id. at 1.
\item \textsuperscript{45} Id. at 2.
\item \textsuperscript{46} 948 F. Supp. 747 (N.D. Ill. 1996).
\item \textsuperscript{47} See id. at 749.
\end{itemize}
The defendants therefore sought a ruling in this case that Indiana law should govern the damage claims of all the other decedents and plaintiffs. At issue were compensatory damage claims for pre-impact fear and terror, such causes of action being unavailable under the law of Indiana. Many of the remaining plaintiffs' decedents were residents of Illinois, which permits recovery for pre-death mental distress. Thus, the plaintiffs argued for the application of Illinois law, the law of Texas (the American Airlines defendant's principal place of business), or the creation of a new "federal common law."

In determining which state's choice of law principles to apply, the district court distinguished between those cases in which jurisdiction was based on diversity and those cases in which jurisdiction was based on the Foreign Sovereign Immunities Act (FSIA). Turning first to the FSIA cases, the court noted that there was no Supreme Court or Seventh Circuit precedent on the issue of choice of law rules in an FSIA case. Reviewing other precedent, the court noted that the Second Circuit looked to the choice of law rule in the forum state, and the Ninth Circuit looked to federal common law or the "most significant relationship test" for FSIA cases.

The district court did not resolve this conflict, reasoning that under either choice of law approach the result would be the same. Most of the forum states for the actions at bar applied the Second Restatement, that is the most significant relationship test, which did not differ from the federal common law test. The court held that the most significant relationship test applied to the FSIA cases.

In analyzing the choice of law rules applicable to the diversity cases, the court noted that the choice of law rules of the forum state should apply, resulting in application of the rules of the transferor court. There were only two cases in which jurisdiction was based on diversity. In the case originating from North

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48 See id.
49 See id. at 750.
50 See id.
51 See id. at 750-51.
52 See id. at 752-53.
53 See id. at 753.
54 There was one exception, the state of New York, which applies a complex governmental interest analysis stemming from Neumeier v. Kuehner, 286 N.E.2d 484 (N.Y. 1972).
55 See In Re Aircrash Near Roselawn, 948 F. Supp. at 753.
56 See id. at 754.
Carolina, the district court held that North Carolina’s choice of law rule was the *lex loci delicti* rule, or the place of wrong.\textsuperscript{57} The court held that the injury was the last element of the tort at issue and therefore applied Indiana substantive law to that plaintiff’s claims as the law of the state where the accident occurred.\textsuperscript{58}

In the diversity case originating from Oklahoma, the court found that Oklahoma applied the most significant relationship test.\textsuperscript{59} Thus, that test applied to all the FSIA cases and the Oklahoma diversity case.

The court then analyzed the application of the most significant relationship test to the facts. The most significant relationship test requires consideration of four factors: (1) place of injury; (2) place of wrongful conduct; (3) domicile of the parties; and (4) place where the parties’ relationship was centered.\textsuperscript{60} The American Airlines defendants argued that the place of injury should be applied under that test, and the plaintiffs argued that the state of domicile of the plaintiffs’ decedents has the greatest interest.\textsuperscript{61}

The court reviewed much of the existing authority on the application of the most significant relationship test and found that the plaintiff’s domicile is generally considered to have the greatest interest in ensuring that its residents are appropriately compensated for their injuries.\textsuperscript{62} The court noted that the place of injury, the Indiana crash site, was somewhat fortuitous and that none of the plaintiffs or defendants were Indiana residents.\textsuperscript{63} The court also noted that applying the law of the plaintiff’s domicile fostered predictability and the protection of the plaintiff’s justified expectations. Thus, the substantive law of the decedents’ domiciles was applied to the claims for compensatory damages for pre-impact fear.\textsuperscript{64}

Interestingly, the choice of law problem arose again in the *Roselawn* air crash litigation when the issue of punitive damages came before the court.\textsuperscript{65} In that related decision, the Northern District of Illinois was presented with the question of what law to

\textsuperscript{57} See id.
\textsuperscript{58} See id. at 755.
\textsuperscript{59} See id.
\textsuperscript{60} See id. at 756.
\textsuperscript{61} See id.
\textsuperscript{62} See id. at 757.
\textsuperscript{63} See id.
\textsuperscript{64} See id. at 757-58.
\textsuperscript{65} See id. at 747.
apply to the plaintiffs' claims for punitive damages against the airline defendants. The court once again applied the Northern District of Illinois substantive law to determine which substantive law should apply. The court analyzed the conflicts of law issue by considering two factors: (1) the defendant's principal place of business and (2) the place where the misconduct occurred. The court noted that the state of the place of injury could be considered as a "tiebreaker." As to the airline defendants (the owners and operators of the aircraft), the plaintiffs argued that the law of Texas, the airline's principal place of business, should apply. The defendants argued that some of the alleged misconduct took place in other states and that the law of the place of injury should be applied as a tiebreaker. The district court found that most of the relevant conduct took place in Texas, and the conduct that took place elsewhere was outweighed by the significant contacts between the flight and Texas. The crew was trained in Texas, the operations and flight manuals were created in Texas, the flight was dispatched from Texas, and weather and flight conditions information was provided by American Airlines in Texas. Accordingly, the court applied the law of Texas, which permitted the plaintiffs' punitive damages claims.

As to the aircraft defendants (the aircraft manufacturers), the plaintiffs also sought application of Texas law to their damages claims even though these defendants were domiciled in France. The court found that the most significant conduct at issue, the designing, testing, and manufacture of the aircraft, occurred in France, which was also the principal place of business of the defendants. Thus, the district court held that the substantive law of France should apply to the punitive damages claims against these defendants and that French civil law did not recognize punitive damages.

G. Res Judicata and Collateral Estoppel

In Hillary v. Trans World Airlines, the court was presented with an interesting set of facts that raised issues related to res judicata and statutes of limitations. The plaintiff was allegedly injured

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66 See id. at 750.
67 See id. at 751-52.
68 See id. at 757.
69 See id. at 756.
70 See id.
71 123 F.3d 1041 (8th Cir. 1997).
when a TWA employee dropped a case containing a metal typewriter on the plaintiff’s head, causing numerous injuries.\textsuperscript{72} The plaintiff initially filed an action in the Eastern District of Louisiana, which had diversity jurisdiction.\textsuperscript{73} TWA moved for summary judgment on the grounds that the plaintiff’s claim was time-barred by the one-year statute of limitations.\textsuperscript{74} The plaintiff opposed the motion and moved in the alternative for a voluntary dismissal without prejudice.\textsuperscript{75}

While these motions were pending, the plaintiff filed a second suit in the Eastern District of Missouri where the applicable statute of limitations was five years.\textsuperscript{76} Then, the Louisiana district court granted TWA’s motion to dismiss and denied the plaintiff’s motion for voluntary withdrawal.\textsuperscript{77} That decision was upheld by the Fifth Circuit.\textsuperscript{78}

Later, in the Missouri action, TWA’s motion for summary judgment on the ground of res judicata was granted by the district court.\textsuperscript{79} On appeal to the Eighth Circuit, the plaintiff argued that the preclusive effect of the district court’s ruling in Louisiana should be determined based on state law because the circuit court was sitting in diversity.\textsuperscript{80} Noting its disagreement with the majority of circuits on this issue, the Eighth Circuit agreed that Louisiana state law applied.\textsuperscript{81} Nonetheless, the court found that the second action was barred because it arose out of the same transaction or occurrence and because Louisiana law gave preclusive effect to dismissals based on statutes of limitation.\textsuperscript{82}

The plaintiff also argued that her claim should not be barred because Louisiana law provided a safeguard for litigants that precluded the application of res judicata in “exceptional circumstances.”\textsuperscript{83} The Eighth Circuit held that the plaintiff’s attorney’s failure to apprise himself of the Louisiana statute of limitations before filing the first action did not constitute the exceptional

\textsuperscript{72} See id. at 1042.
\textsuperscript{73} See id.
\textsuperscript{74} See id.
\textsuperscript{75} See id.
\textsuperscript{76} See id.
\textsuperscript{77} See id. at 1042-43.
\textsuperscript{78} See id. at 1043.
\textsuperscript{79} See id.
\textsuperscript{80} See id.
\textsuperscript{81} See id.
\textsuperscript{82} See id. at 1043-44.
\textsuperscript{83} See id. at 1044.
The court also held that the decisions of the Louisiana district court and the Fifth Circuit not to grant the plaintiff's motion for voluntary withdrawal were unreviewable by the Eighth Circuit. 84

In *Salley v. USAir, Inc.*, the Eastern District of New York held a finding of the Workers Compensation Board to have a preclusive effect on the same issue raised in civil litigation. 85 In that case, the plaintiff, traveling aboard a USAir flight on business, was struck on the left side of the head and neck by a bag, which fell from the overhead compartment. 86 The plaintiff filed a workers compensation claim and was awarded lost wages by the Workers Compensation Board. Approximately six months after the incident, the plaintiff developed multiple sclerosis and attempted to add a claim for these damages to the Workers Compensation proceeding. 87 Expert testimony differed on whether the onset of the disease was related to the injury aboard the aircraft, and the Board found against the plaintiff on the issue. The plaintiff appealed to the Board Panel, which affirmed the decision. 88

Thereafter, the plaintiff filed a civil suit against USAir, and USAir moved for partial summary judgment on the multiple sclerosis claim on the grounds of collateral estoppel. 89 Plaintiff requested that the court hold its decision in abeyance pending a reopening of the Workers Compensation Panel decision. 90 This motion was granted, and the plaintiff was examined by an independent physician appointed by the Workers Compensation Board. The physician determined that the injury and the onset of the disease were unrelated. 91 At the compensation hearing, plaintiff's counsel attempted to completely withdraw the Workers Compensation claim in an attempt to avoid the preclusive effect of collateral estoppel. 92 The Workers Compensation Panel held that the plaintiff's appeal of the original Workers Compensation Board decision could be withdrawn, but such ac-

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84 See id. at 1045.
85 See id.
86 25 Av. Cas. (CCH) ¶ 18,329 (E.D.N.Y. 1997).
87 See id. at ¶ 18,330.
88 See id.
89 See id.
90 See id. at ¶ 18,330-31.
91 See id. at ¶ 18,332.
92 See id. at ¶ 18,333.
93 See id.
tion did not affect the underlying decision of the initial Workers Compensation Board proceeding. The district court in the civil action held that the finding of the Workers Compensation Board that the plaintiff’s injury aboard USAir was unrelated to her multiple sclerosis was binding on that issue. In its opinion, the Eastern District of New York harshly criticized the plaintiff’s counsel’s tactics and granted USAir’s motion for summary judgment on the grounds that the plaintiff was collaterally estopped from litigating her claim for damages based on the multiple sclerosis. The court held that the administrative determination of the Workers Compensation Board presented the plaintiff (having chosen that forum and presented substantial evidence therein) with a full and fair opportunity to litigate that claim.

In Parmater v. Amcord, Inc., the principle of res judicata was applied to prevent a separate action on behalf of the same decedent to be litigated in a new forum. The case involved a private aircraft accident in which the pilot, his wife, and three children were killed. The decedents were residents of Iowa, and an Iowa court appointed Norwest Bank of Des Moines as executor of the estate of Nancy Champion. A wrongful death action was filed in Iowa court on behalf of the decedent and ended in a court-approved final settlement.

Subsequently, the Iowa court appointed the decedent’s mother as “special administrator” of the estates of Nancy Champion and her three children for the purpose of pursuing claims on behalf of the decedents in Alabama. The Alabama court held that both suits were brought on behalf of the same dece-

94 See id.
95 See id. at ¶ 18,334.
96 The court stated that the plaintiff’s counsel’s attempt to withdraw the Workers Compensation claim only after the independent physician’s opinion went against plaintiff’s theory was “a crafty and unjustifiable attempt to circumvent the doctrine of collateral estoppel in order to grasp for a third opportunity to litigate this issue. . . .” Id. at ¶ 18,334.
97 See id. at ¶ 18,332.
99 See id. at *1.
100 See id.
101 See id. at *1-2.
102 See id. at *3.
dent and arose out of the same nucleus of facts. Thus, the second suit was precluded by the principle of res judicata.

H. Evidence

In a recent decision by the Federal District Court for the Southern District of Florida, the court granted a qualified privilege to safety data collected by pilots and the airline industry. In Cali, the plaintiffs demanded discovery of documents prepared pursuant to the American Airlines Safety Action Partnership (ASAP) program. The ASAP Program is a voluntary pilot self-reporting initiative designed to encourage pilots to report incidents and possible violations of Federal Aviation Regulations. Created in 1994 by the Federal Aviation Administration, the Allied Pilots Association, and American Airlines, the program was designed to collect data with respect to pilot difficulties, including possible deviations from safety regulations. The information obtained was used to identify areas of concern, which were addressed by the issuance of pilot advisories, procedural changes, and individual skill enhancement recommendations to prevent further incidents. The airlines argued that the guarantee of confidentiality in this reporting system created a strong incentive for pilots to bring possible problems to the attention of American Airlines, the pilots' union, and the FAA.

In the wake of the crash at the Cali airport, the plaintiffs sought discovery of these internal safety audit documents. American Airlines sought protection of the ASAP materials, arguing that the documents either fell within the "self-critical analysis" privilege or that the court should recognize a new common-law privilege for materials created as part of the ASAP program.

The Southern District of Florida held that the ASAP documents did not fall within the self-critical analysis privilege, a doctrine sometimes applied to protect physician peer-reviews or

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103 See id. at *5-6.
104 See id. at *7-8.
106 See id. at 1531.
107 See id.
108 See id.
109 See id.
110 See id. at 1532.
internal corporate evaluations of compliance with environmental regulations.\textsuperscript{111} While the self-critical analysis privilege had been recognized in some courts, other courts had rejected the doctrine in similar circumstances.\textsuperscript{112} In cases where the privilege is recognized, however, it has typically applied only to protect documents prepared for purely internal reviews.\textsuperscript{113} The information gathered from American Airlines’ pilots was shared with the FAA and the APA. Thus, the Southern District of Florida found that the self-critical analysis privilege did not attach.\textsuperscript{114}

However, the court found compelling reasons to recognize a limited federal common law privilege for the ASAP materials.\textsuperscript{115} Applying the principles enunciated in the United States Supreme Court decision \textit{Jaffee v. Redmond},\textsuperscript{116} the court examined and balanced four factors: the private interests, the public interests, any potential evidentiary benefit from the denial of a privilege, and the recognition of the privilege in the state courts.\textsuperscript{117} The court noted that the private interests, those of the FAA, American Airlines, and its pilots, weighed heavily in favor of finding a privilege. All of them had an interest in the reported violations so that apparent problems could be addressed with proper training, new procedures, and advice to pilots.\textsuperscript{118} The court held that the public interest also weighed in favor of the creation of a privilege. The public’s interest in improving the safety of air travel was served by the program, the efficacy of which depended largely on the guarantee of confidentiality.\textsuperscript{119} As to the third factor, the evidentiary benefit from the denial of the privilege, the court found that the benefit would probably be minimal because the very evidence sought would probably be unavailable absent the privilege.\textsuperscript{120} Finally, as to the fourth factor, the court noted that the application of
the self-critical analysis privilege in analogous contexts showed that the privilege was recognized to a degree in the state courts, and the court stated that this was a factor that should be given some weight.\textsuperscript{121}

Thus, the court recognized a new federal common law privilege that protects documents created as part of the ASAP safety audit program.\textsuperscript{122} The privilege, however, is not absolute but is a qualified privilege, which can be overcome if a plaintiff meets the burden of showing "the importance of the inquiry for which the privileged information is sought; the relevance of that information to its inquiry; and the difficulty of obtaining the desired information through alternative means."\textsuperscript{123} Even upon such a showing, however, disclosure of ASAP documents will not be required unless a court determines that the "[p]laintiffs' interests overcome the powerful interests that weigh in favor of preserving the confidentiality of the ASAP documents."\textsuperscript{124} Thus, the court placed a heavy burden on a plaintiff to overcome the presumption of privilege for the ASAP documents.

In \textit{Ridge v. Cessna Aircraft Co.},\textsuperscript{125} the Fourth Circuit affirmed a jury verdict against Cessna Aircraft, finding no error in the Middle District of North Carolina's decision to admit evidence of prior accidents at trial.\textsuperscript{126} The case involved the in-flight breakup of a Cessna Model 210 in which the pilot and two passengers were killed.\textsuperscript{127} At trial, in an attempt to prove that a design defect in the tail of the aircraft caused the accident, the plaintiff introduced evidence of other accidents involving the same Cessna model.\textsuperscript{128} Cessna argued that the pilot, certified only as a VFR pilot,\textsuperscript{129} negligently flew into the clouds, became disoriented, and lost control of the plane.\textsuperscript{130} The jury found for the plaintiff, the pilot's surviving spouse.

On appeal, Cessna argued that the plaintiff failed to show that the prior accidents were sufficiently similar to the Ridge acci-
dent and that the evidence was unfairly prejudicial. The Fourth Circuit stated that any dissimilarities in the incidents went to the issue of weight, not admissibility. The court also held that the district court did not err in holding that the evidence was not prejudicial. The Fourth Circuit noted that the evidence of prior accidents was probative on the issue of notice to Cessna, and Cessna had the opportunity to rebut or discredit the plaintiff's evidence.

Cessna also sought review of the district court's refusal to instruct the jury on the law of negligence per se. Cessna argued that the VFR pilot put himself in an instrument flight situation for which he was not trained in violation of regulations and that this constituted negligence per se. The court found that the regulations at issue provided only general guidelines and standards of conduct and were therefore insufficient to establish a particular duty, the violation of which would constitute negligence per se. The Fourth Circuit also found that the questions submitted to the jury in a special verdict form sufficiently covered the question of the pilot's negligence.

In another recent case involving evidence of negligence, the Second Circuit reversed several evidentiary rulings of the Eastern District of New York. The case involved an elderly passenger who was knocked down and seriously injured at the baggage retrieval area of LaGuardia Airport, New York City. The plaintiff alleged that Delta Air Lines negligently failed to take measures to control crowds at the baggage carousel or to provide a means for the elderly or disabled to retrieve their luggage safely. The district court restricted the testimony of both the plaintiff and Delta personnel as to the crowded and dangerous conditions at the time of the accident by ruling that the testi-

131 See id. at 129.
132 See id. at 130.
133 See id.
134 See id.
135 See id.
136 See id.
137 See id. at 130-31.
138 See id. at 131. The jury verdict form required the jury to decide whether the pilot was negligent in flying the plane in bad weather and whether he was negligent in failing to follow certain emergency procedures.
140 See id. at 78.
141 See id.
mony was irrelevant. In addition, the district court held that the plaintiff could not establish a negligence cause of action because there was no evidence of prior accidents, and such evidence was necessary for the plaintiff to show that the accident was foreseeable and that Delta had therefore breached its duty of reasonable care. Finally, the district court excluded the plaintiff’s expert as unqualified. The district court granted judgment in favor of Delta as a matter of law.

The Second Circuit reversed the district court, finding that the lower court’s ruling on several issues was in error. The Second Circuit held that the exclusion of the plaintiff’s testimony and that of Delta personnel as to the conditions at the baggage carousel prevented the introduction of probative evidence. Testimony about the crowded and dangerous conditions at the baggage carousel were relevant to showing that the defendant could reasonably have taken precautionary measures to reduce the dangers apart from altering the baggage delivery system itself. The court further held that the absence of evidence of prior accidents was not fatal to the plaintiff’s claim. While such evidence would certainly be relevant, the plaintiff could have established negligence and probable cause through other means. Finally, the Second Circuit held that the exclusion of the plaintiff’s expert as unqualified was in error. The district court had refused to qualify plaintiff’s expert because he had no expertise in the field of airline terminal or baggage claim area design. The plaintiff’s expert held a Masters degree in mechanical engineering with expertise in the area of the interaction between machines and people. The Second Circuit held this expertise to be sufficient, noting that it would be unlikely to find an expert in airport terminal design who did not work for the airline industry. The requirement of that degree of specificity to qualify as an expert was tantamount to permitting the industry indirectly to set its own standards, the Second Cir-

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142 See id. at 79.
143 See id. at 78.
144 See id. at 79.
145 See id. at 78.
146 See id.
147 See id. at 80.
148 See id.
149 See id.
150 See id. at 82.
151 See id.
Thus, the Second Circuit vacated the district court's judgment and remanded for further proceedings.\textsuperscript{153}

\textit{Machline v. National Helicopter Corp. of America,}\textsuperscript{154} addresses the extent to which the plaintiff, the Administrator of the estate of a wealthy entrepreneur, could recover alleged non-salary lost future earnings.

\textit{Machline} arose out of the August 12, 1994, crash of a chartered helicopter en route to Atlantic City, New Jersey.\textsuperscript{155} Matias Machline, his wife, and the helicopter pilot all perished in the accident. Matias Machline was the majority shareholder and founder of Sharp S.A., which sold and manufactured Sharp products in Brazil. The \textit{ad damnum} in the complaint was $200 million, and the level of damages initially alleged by the plaintiff's economist exceeded $4 billion. The issue before the court was the extent the plaintiff could recover for lost prospective inheritance attributable to the lost future earning of the decedent. Defendants moved to exclude the report of the plaintiff's economist on various legal grounds, including that the alleged losses were speculative as a matter of law and that the alleged lost future income was actually corporate profits not personal to the decedent.

The court ruled that New York law applied and broke down the plaintiff's theories of recovery into four categories:

1. Claim for lost comparable salary;
2. Claim for lost virtual salary;
3. Claim for lost income from specific entrepreneurial ventures; and
4. Lifetime wealth projection.\textsuperscript{156}

The plaintiff argued that Machline was undercompensated for his services, that the salaries of similar entrepreneurs should be utilized as a basis for determining the true value of the decedent's services, and that this loss should form the basis for determining the lost income to the estate. The court disallowed this theory of recovery on the ground that only the actual compensation of the decedent was relevant, stating that "[w]hat decedent could have fairly received as salary is not as relevant or appropri-
“Virtual Salary” was proffered by plaintiff as an alternative method of proving the true value of Machline’s services to his companies. The plaintiff argued that the true value of decedent’s value to his company, that is, what Machline would have “put into” the company, would have resulted in increased share values and that decedent’s demise had resulted in a loss of share value. The court ruled that losses and gains in corporate profits were not personal to the decedent and excluded this theory of recovery.

The third theory of recovery, entrepreneurial ventures, was also excluded. The plaintiff argued that the decedent was on the verge of consummating lucrative transactions from, inter alia, future telecommunications joint ventures, including proposed bids for cellular phone service contracts in newly-privatized regions. The court ruled that the early stages of the proposed ventures and the difficulty of ascribing any future profits of these ventures to Machline personally rendered them too speculative to go to the jury.

Finally, turning to alleged lost accumulations of wealth, the court ruled that this theory was inadmissible in its current form, but permitted the plaintiff an opportunity to resubmit his claims under certain guidelines. Among these guidelines were the requirements that such alleged accumulations be personal to the decedent, not the product of passive investments that would be passed on to the heirs, and that it be based upon non-speculative projections discounted to present value. The plaintiff’s economist had, effectively, taken a beginning (1961) and endpoint (1994) measure of Machline’s net worth and performed a straight line extrapolation based upon this alleged rate of accumulation to project Machline’s earnings to age seventy-five. (Machline was sixty-one at the time of the accident.) The court ruled that this method was “unduly speculative and broad in scope.”

“Obviously if the Decedent’s wealth peaked sometime prior to his demise and was declining at the date of death, one cannot appropriately ask the jury to project future growth.” The court ruled that if the plaintiff could show a “consistent in-

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157 Id. at ¶ 15,262.
158 See id. at ¶ 15,263-64.
159 See id. at ¶ 15,264.
160 Id. at ¶ 15,266.
161 Id.
cremental increase in Machline’s net worth for the fifteen years preceding his death” and if such growth was personal to Machline and satisfied other standard requirements for lost accumulations such as those outlined above, such evidence would be permitted to go to the jury.\(^{162}\)

Although not an aviation case, *General Electric Co. v. Joiner* has implications on appeal for all cases involving expert testimony and Daubert-like evidentiary motions — no strangers to aviation cases.\(^{163}\) *Joiner* was a product liability case in which the plaintiff alleged that work exposure to certain products and chemicals, including PCBs, had promoted his small cell lung cancer.\(^{164}\) The district court ruled that the scientific evidence introduced to prove causation did not pass muster under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*\(^{165}\) Because the plaintiff could not prove his case absent this evidence, the court granted summary judgment for defendant. The Eleventh Circuit reversed and applied a “particularly stringent standard of review” in light of the preference of admitting evidence.\(^{166}\)

General Electric argued that the Eleventh Circuit had committed reversible error in applying this higher standard rather than the “abuse of discretion” standard of review. Joiner argued that the circuit had not in fact deviated from the “abuse of discretion” standard, but had simply conducted a more careful analysis under this standard.

The Supreme Court held that the abuse of discretion standard applied to the gatekeeper role of the district court under *Daubert* and reversed the ruling of the court of appeals.\(^{167}\) A court may not categorically distinguish between rulings allowing and disallowing evidence and thus shift its standard of review.\(^{168}\) The Court also rejected the argument that the standard should shift when the evidentiary ruling proved to be outcome determinative.\(^{169}\) In so ruling the Court distinguished between the review of facts on a summary judgment motion, in which all disputed facts are resolved in favor of the nonmoving party and

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\(^{162}\) *Id.*

\(^{163}\) 118 S. Ct. 512 (1997).

\(^{164}\) *See id.* at 516.


\(^{166}\) *Joiner v. General Elec. Co.*, 78 F.3d 524, 539 (11th Cir. 1996).

\(^{167}\) *See Joiner*, 118 S. Ct. at 518.

\(^{168}\) *See id.*

\(^{169}\) *See id.* at 517.
The latter are not factual in nature and remain reviewable under the abuse of discretion standard notwithstanding their ultimate role in the grant of summary judgment. The Supreme Court further ruled that the district court's decision withstood analysis under the abuse of discretion standard and reversed the ruling of the Eleventh Circuit.

I. PUNITIVE DAMAGES

Letz v. Turbomeca Engine Corp. and Barnett v. La Societe Anonyme Turbomeca France, commonly referred to as the Turbomeca cases, involved huge compensatory and punitive damage awards arising from a May 27, 1993, accident involving a single engine helicopter on a medevac flight.

On May 27, 1993, Sherry Letz was involved in a automobile accident in Bethany, Missouri. She was treated in a local hospital and scheduled for air transfer for treatment by specialists. The “medevac” helicopter flight departed Kansas City at 6:00 a.m. and crashed after an engine failure at approximately 6:25 a.m. over Cameron, Missouri. The helicopter was powered by a Arriel 1B engine that had a TU 76 modified nozzle guide vane. The engine had been manufactured by Turbomeca, S.A. (TSA) and installed in the helicopter by Turbomeca Engine Corporation (TEC). The nozzle guide vane directs airflow between the first and second stage turbine disc blades in the engine. A crack in the TU 76 modified nozzle (the Nozzle) caused the engine failure that resulted in the accident.

The court of appeals in Letz noted that TSA knew of a cracking problem in the TU 76 nozzle in June 1985 after an in-flight failure in the Congo, a second in-flight failure that occurred in April 1986, and by the summer of 1986, “the highest ranking officers of TSA knew that the TU 76 cracking problem had the potential to cause in-flight shutdowns.”

In 1987 and 1988, as a result of reported failures in the Nozzle, Turbomeca was actively engaged in a search for a replacement design. In 1988 two replacement designs were certified by

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170 See id.
171 See id.
172 See id. Justice Stevens dissented in this aspect of the Court's ruling. See id. at 521-23.
174 963 S.W.2d 639 (Mo. Ct. App. 1997).
175 See id. at 645.
176 Letz, 1997 WL 727544, at *2.
French aviation authorities. Meanwhile, the Nozzle problems and shut-downs caused by the Nozzle continued to occur both in the United States and abroad. TSA records showed that six in-flight engine stoppages caused by Nozzle failures had been reported, beginning in 1989. By early 1991 replacement nozzles were available. However, Turbomeca opted only to recommend that the Nozzle be replaced at the next regularly-scheduled overhaul of the engine rather than issue an immediate recall of the Nozzle. A series of service letters were sent to the owners of helicopters with the Nozzle installed advising of the availability of the replacement and that the operators of the engine should check for abnormal noises during engine shutdown and perform inspections of the engine modules if these noises were detected. None of these bulletins reported that Nozzle failures had caused in-flight shutdowns. After the availability of the replacement nozzles, several additional in-flight shutdowns caused by cracks in the Nozzle occurred worldwide.

The appellate court in Letz held that the defense had failed to preserve the issue of the appropriateness of submitting punitive damages issues (technically, in Missouri, “Aggravating Circumstances” damages) for appeal by not moving for a directed verdict on that issue at the close of evidence. However, this did not foreclose “Plain Error Review.” This standard of review required the court to view all evidence in the light most favorable to the plaintiff, drawing all reasonable inferences in favor of the verdict.

Missouri’s wrongful death statute allows the trier of fact to consider “the mitigating or aggravating circumstances attending the death...” These aggravating circumstances damages (alternatively referred to herein as punitive damages) are intended to punish the wrongdoer. In order to reach the jury, plaintiff must introduce evidence of willful misconduct, wantonness, recklessness, or indifference to the consequences on the part of the defendant.

The court found sufficient evidence of knowledge of the danger posed by the Nozzle to warrant the award of aggravating circumstances damages. Among the evidence adduced at trial were reports of prior failures, “comprehensive technical papers”

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177 Id. at *3-4.
179 See Letz, 1997 WL 727544, at *4.
180 See id. at *6.
circulated at the highest levels with TEC and TSA describing the Nozzle problems, records of cracks in the Nozzle discovered by TEC mechanics beginning in 1987, and at least ten incidents of engine failure and loss of power prior to the fatal accident involving Ms. Letz.\textsuperscript{181} The court concluded that the plaintiff had introduced substantial evidence of Turbomeca's knowledge of Nozzle failures and that TSA and TEC had "manifested indifference to or consciously disregarded the safety of others."\textsuperscript{182}

Sufficient evidence, therefore, was offered by the Letzes to show TSA and TEC's knowledge of the defective part; the danger it posed in the Arriel 1B gas turbine engine; and the wanton-ness, recklessness, and indifference to the consequences of selling and failing to recall a defective engine part manifested by the companies. Manifest injustice, therefore, did not result from submission to the jury of the issue of aggravating circumstances.\textsuperscript{183}

Among the other holdings of the appellate court in \textit{Letz} were that counsel for Turbomeca had failed to preserve their due process argument related to the punitive damages instruction to the jury,\textsuperscript{184} that defendant had waived its objection to the introduction of a photograph of the decedent's tombstone subsequently withdrawn from evidence by the court,\textsuperscript{185} that the trial court had not abused its discretion in denying a mistrial for the temporary introduction of this photograph,\textsuperscript{186} and that the trial court had not abused its discretion in admitting the evidence of cost savings to Turbomeca of not recalling the Nozzle.\textsuperscript{187}

The court of appeals also ruled that the trial court had not abused its discretion in admitting into evidence faxes sent by TSA to the FAA after the accident outlining previous Nozzle failures.\textsuperscript{188} Although these facsimiles were sent to the FAA after the accident, the court ruled that they were nonetheless relevant on the issue of aggravating circumstances damages because they related to the conduct and knowledge of TEC prior to the accident.\textsuperscript{189} Because TEC's knowledge and actions or inactions with

\textsuperscript{181} See \textit{id.}
\textsuperscript{182} \textit{Id.}
\textsuperscript{183} See \textit{id.}
\textsuperscript{184} \textit{Id.} at *7.
\textsuperscript{185} \textit{Id.} at *10.
\textsuperscript{186} \textit{Id.} at *12.
\textsuperscript{187} \textit{Id.} at *15.
\textsuperscript{188} \textit{Id.} at *16.
\textsuperscript{189} See \textit{id.}
respect to Nozzle failures prior to the accident was relevant to
the plaintiff's claim for aggravating circumstances damages, the
court ruled them properly admitted.190

However, in reviewing the lump sum award of $70 million, the
court found it to be excessive as matter of law.191 A remittitur is
warranted under Missouri law when "the verdict is excessive be-
cause the amount of the verdict exceeds fair and reasonable
compensation for plaintiff's injuries and damages."192

The jury had returned a $70 million lump sum verdict without
differentiating between the punitive and compensatory ele-
ments. Thus, the court had to determine appropriate levels for
both types of damages in order to determine whether the over-
all sum was excessive. After reviewing several comparable
awards and decisions, the appellate court held that the maxi-

mum sustainable compensatory award for the death of Ms. Letz
was $2.5 million.193 Thus, $67.5 million of the jury's award was
designated as punitive in nature.

Having calculated the extent of the punitive award, the court
examined several issues relevant to the award, such as the de-
gree of the wrongful conduct, the defendant's character and af-
fluence, the age and health of the injured party, awards given in
comparable circumstances, and the superior opportunity of the
jury to appraise the damages.194 The court in Letz had little diffi-
culty in agreeing that an award in the millions of dollars range
for punitive damages was not unreasonable. The conduct cited
by the court that warranted "a substantial punitive damages
award" against TSA and TEC included their knowledge of the
propensity for the Nozzle to fail in flight and that it had caused
accidents, their failure to warn of the danger posed by the fail-
ure and to recall the Nozzle or mandate its replacement, and
the lengthening of the overhaul period for the engine, thus ex-
tending the period of time in which the Nozzle could remain in
use.195

In ultimately calling for remittitur, the court appeared to have
been most swayed by the ratio of the compensatory to punitive
damages and its comparison of "similar cases."196 The court

190 See id.
191 See id. at *20.
192 Id. at *18 (quoting Mo. Rev. Stat. § 537.068 (1994)).
193 See id. at *19.
194 See id. at *20-21.
195 Id. at *21.
196 See id. at *23.
concluded that the award of $67.5 million was “grossly” excessive.\textsuperscript{197} The punitive damages were ordered remitted to $26.5 million or retried.\textsuperscript{198}

Similar issues were addressed in \textit{Barnett v. La Societe Anonyme Turbomeca France}.\textsuperscript{199} Barnett was the pilot of the helicopter. The jury awarded the estate of Barnett $175 million in compensatory and $175 million in punitive damages, which was later reduced by the trial court to $25 million in compensatory and $87.5 million in punitive damages.

As in \textit{Letz}, the court first examined and upheld several evidentiary rulings of the trial court\textsuperscript{200} and ultimately ordered a new trial or remittitur on the issue of damages. For example, in one such ruling the court held that an internal memorandum and a French Airworthiness Directive published after the accident were admissible. Although subsequent remedial measures are inadmissible in a negligence case, they are admissible in Missouri in a strict product liability action. Because both actions were pleaded, the court ruled that these documents were properly admitted although a limiting instruction would have been appropriate if requested.\textsuperscript{201} The court also rejected the defendants’ argument that it had been improper to introduce evidence of the defendants’ gross yearly sales as part of the proof of defendants’ net worth for purposes of assessing punitive damages. Under Missouri law, evidence of worth or financial condition was a relevant consideration and could, the court ruled, be weighed by the jury.\textsuperscript{202}

With respect to damages, both parties agreed that the economic loss attributable to Barnett’s death was approximately $650,000. Thus, over $24.3 million of the compensatory damages award was deemed by the court to have been for non-economic damages.\textsuperscript{203} After examining the family circumstances of Barnett, the suffering of the decedent, and the losses to the five individual plaintiffs, the appellate court reduced the compensatory award to $3.5 million.

\textsuperscript{197} See id.
\textsuperscript{198} See id.
\textsuperscript{199} 963 S.W.2d 639 (Mo. Ct. App. 1997).
\textsuperscript{200} Barnett also included an instructive chart outlining the critical events and communications relating to the Nozzle. \textit{Id.} at 646-51.
\textsuperscript{201} See id. at 651-52.
\textsuperscript{202} See id. at 655.
\textsuperscript{203} See id. at 658.
After upholding the propriety of sending the punitive damages case to the jury, the court in Barnett ruled that the amount of punitive damages should be remitted to $26.5 million or retried.\textsuperscript{204} This reduction was based on an analysis similar to that applied in Letz.\textsuperscript{205} The court then considered whether a credit should be applied to the punitive award based upon the award in Letz.\textsuperscript{206} The applicable statute permitted the reduction of a punitive damages award when the defendant had already been required to pay punitive damages in another case for the same conduct. Counsel for Barnett argued that because the Letz judgment had not been paid, no credit was permissible under the applicable statute.\textsuperscript{207} The court noted that the credit statute did not provide guidance in a situation involving closely spaced trials and verdicts relating to the same accident simultaneously on appeal.\textsuperscript{208} While reversing the trial court's decision granting a credit, the court compromised in keeping with the "spirit" of the statutory credit law by ordering a remittitur of punitive damages identical to that of Letz for a punitive award in the amount of $26.5 million.\textsuperscript{209}

III. LIABILITY OF AIR CARRIERS IN WARSAW CONVENTION CARRIAGE

A. EXCLUSIVITY

Article 17 of the Warsaw Convention makes air carriers liable for death or bodily injuries suffered by passengers while on board the aircraft or during the course of any of the operations of embarking or disembarking.\textsuperscript{210} Many courts are in agreement that Article 17 creates a substantive cause of action for wrongful death or personal injuries.

However, courts are in disagreement over the question of whether the cause of action created by Article 17 is exclusive. As described below, both federal and state courts have entered the fray in the past year. At the center of the dispute is the language

\textsuperscript{204} Id.
\textsuperscript{205} See id.
\textsuperscript{206} See id. at 667-68.
\textsuperscript{207} See Mo. REV. STAT. § 510.263(4) (1994).
\textsuperscript{208} See Barnett, 963 S.W.2d at 667.
\textsuperscript{209} See id. at 668.
of Article 24, which provides that "any action for damages, however well-founded, can only be brought subject to the conditions and limits set out in this Convention." Depending upon which court is addressing the issue, the above language demonstrates the exclusivity or the non-exclusivity of the Convention's cause of action.

The plaintiff in *Potter v. Delta Air Lines, Inc.* twisted her ankle while attempting to reach her seat at the end of an aisle aboard the first leg of a Delta flight from the United States to Europe. Her path was blocked by the reclined seat of a passenger in the preceding row whom she wished not to disturb (because of his confrontation with another passenger earlier during the flight).

The plaintiff filed an action in a Texas state court alleging only state law negligence claims against the airline. The airline removed the action in part on the basis of federal question jurisdiction (under the Warsaw Convention) to the United States District Court for the Western District of Texas. The district court denied the plaintiff's motion to remand and granted summary judgment in Delta's favor on all claims on the ground that Potter had failed to prove that her injury was caused by an "accident" under the terms of the Convention. On appeal, the United States Court of Appeals for the Fifth Circuit affirmed this ruling, specifically holding that the incident of a rude man blocking an aisle is not an "accident" within the meaning of the Warsaw Convention.

The Fifth Circuit next concluded that Mrs. Potter could not pursue a separate remedy under state law even though the Warsaw Convention provided her with no remedy whatsoever. The court reasoned that the primary goal of the Warsaw Convention is to foster uniformity in the law governing air carrier liability, and this goal would be frustrated were plaintiffs like Mrs. Potter allowed to assert state law claims against carriers, even where an "accident" under Article 17 had not taken place. The dangers of allowing plaintiffs recourse to state law included the specter of plaintiffs "forum-shop[ping] for jurisdictions with friendly substantive laws on recovery of damages for personal injury," which would clearly "undermine the Conven-

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211 *Id.* art. 24.
212 98 F.3d 881 (5th Cir. 1996).
213 See *id.* at 883.
214 See *id.* at 883-84.
215 See *id.* at 887.
216 See *id.* at 884.
tion's goal of uniformity." The Fifth Circuit, therefore, held: "[A]rticle 17 of the Convention creates the exclusive cause of action and the exclusive remedy for all international transportation of persons performed by aircraft for hire," and the Court affirmed the dismissal below of Mrs. Potter's claims.

The plaintiff in the case of Lavandenz De Estenssoro v. American Jet, S.A. brought wrongful death and survival claims against the airline in California state court for damages arising out of the death of a passenger in an airplane crash near Quito, Ecuador. The plaintiffs' claims fell within the scope of Article 1 of the Convention, although they were plead exclusively under state law. The defendants removed the action to the United States District Court for the Central District of California on the basis of the Warsaw Convention. The issue before that court on plaintiff's motion to remand was the same as in Potter. Does the Warsaw Convention create an exclusive cause of action which preempts state law claims and provides removal jurisdiction? While noting the split of authority on this issue, the De Estenssoro court determined that the language of Article 24(1) of the Convention is "unambiguous" in allowing injured plaintiffs recourse to state law. The court reasoned that the inclusion of the words "any action, however founded," in particular, in Article 24 provides evidence that the drafters of the Warsaw Convention intended to create a set of conditions and limitations applicable to "all the various causes of action created by local law..." Because the court found the Warsaw Convention was not exclusive and, furthermore, the plaintiff's complaint raised only state law claims, the court remanded the case to a California state court due to a lack of federal subject matter jurisdiction. However, the district court also noted that, in accordance with the language of Article 24, the plaintiff's state law claims remained subject to the Convention's provisions relating to limited-liability.

The case of Air Express International, Inc. v. Aerovias De Mexico S.A. was also remanded back to state court after the district court ruled the plaintiff's breach of contract and negligence

\[217\] Id. at 886.
\[218\] Id.
\[220\] Id. at 817.
\[221\] Id. (citing Benjamins v. British European Airways, 572 F.2d 913, 921 (2d Cir. 1978)).
\[222\] See De Estenssoro, 944 F. Supp. at 944.
claims under Florida state law were not preempted by the Convention.228 The plaintiff in this case was a corporation that brought suit in a Florida state court to recover for cargo that the carrier allegedly lost somewhere en route from Florida to Mexico. The state court held that Article 1 of the Convention covering all international transportation of baggage performed by aircraft for hire applied.224

The airline removed the action to federal district court on the ground that the Convention created the exclusive cause of action for the corporation’s injuries and thereby preempted the corporation’s carefully pleaded state law claims. The district court disagreed. The district court noted that the majority of federal judges from the Southern District of Florida had decided against the Convention’s exclusivity, and it followed their decisions to conclude that the Convention caps the amount of damages recoverable under either federal or state law but does not prevent a plaintiff from bringing claims under state law.225

The Illinois appellate court in Koehler v. Scandinavian Airlines Systems ruled that contract-based claims by passengers are preempted by the Warsaw Convention, while noncontractual claims are not.226 While traveling from Chicago to Germany, the Koehlers were detained and arrested by Scandinavian Airlines in Copenhagen, Denmark, for refusing to pay an extra fare for bringing their pet dog aboard the flight. They sued in Illinois state court and alleged only state law claims, including breach of contract, false arrest, defamation, and emotional distress.

In the lower court, the parties argued over whether the Convention applied and which of its provisions determined the answer to this question. The Koehlers argued that a court must first look to Article 17 to decide that question and that, since the incident causing their injuries did not occur “on board the aircraft or in the course of . . . embarking or disembarking” (as described in Article 17), the Convention simply did not apply.227

The lower court rejected this argument and agreed, instead, with the airline that the proper order of inquiries was, first, whether the Koehlers were engaged in international transportation within the meaning of Article 1 and, if so, then whether

224 See id.
225 See id.
227 Id. at 115.
they sued in the proper forum under Article 28. Since the Koehlers were injured during international transportation, the lower court held Article 1 applied. The lower court next granted the airline's motion for summary judgment and dismissed all of the Koehlers' claims based on the fact that they had brought suit in the wrong forum under Article 28.

The appellate court affirmed in part and reversed in part the lower court's decision.228 The court affirmed the grant of summary judgment in favor of Scandinavian Airlines on the Koehlers' breach of contract claim because this claim fell within the scope of, and was preempted by, Article 1 of the Convention covering contract claims. The appellate court reversed the grant of summary judgment on the Koehlers' remaining claims, because those claims were "not the type of injuries the Convention was intended to cover."229

In support of this conclusion, the appellate court quoted a delegate from Italy during the drafting of the Convention. In response to a suggestion that the Convention be amended to include a provision covering a carrier's total nonperformance of the contract of carriage, the Italian delegate is reported to have stated that such an amendment was unnecessary because "the injured party [in such case] has a remedy under the law of his or her home country."230 The appellate court, reasoned based on the above comment, that the Koehlers similarly should be allowed a remedy under their home country's laws because no provision of the Convention covered their tort claims.231

In *Tseng v. El Al Israel Airlines, Ltd.*, the United States Court of Appeals for the Second Circuit reached the opposite conclusion from that of the *Potter* court on the issue of exclusivity.232 The plaintiff in *Tseng* was subjected to a security search including a body search by El Al after she gave unsatisfactory responses as to why she was traveling to Israel. The search proved to be unnecessary. The plaintiff filed suit alleging mental anguish and emotional distress.

The Second Circuit held that the district court had erred in holding that the security search was an "accident" within the

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228 See id. at 118.
229 Id. at 117.
230 Id. at 117 (quoting Wolgel v. Mexicana Airlines, 821 F.2d 442, 444 (7th Cir. 1987)).
231 See Koehler, 674 N.E.2d. at 11.
meaning of Article 17 of the Convention.\textsuperscript{233} Because El Al was not liable to Ms. Tseng under the Convention, the next issue was whether Ms. Tseng could bring state law claims for false imprisonment and assault against the airline. The Second Circuit permitted her to do so.\textsuperscript{234}

First, the court reasoned that the text and drafting history of the Convention indicate that the Convention was not intended to preclude state law causes of action where its provisions do not apply.\textsuperscript{235} In addition, a ruling contrary to the one reached would have meant "carriers [could] . . . escape liability for their negligence—or even their intentional torts . . . ."\textsuperscript{236} The court reasoned that denying plaintiffs recourse to state law in cases where the Convention is inapplicable would have the undesirable effect of deterring airlines from taking measures to prevent passenger injuries of the kind Ms. Tseng allegedly suffered.\textsuperscript{237}

B. Injuries and Events Within the Scope of the Convention

Under Article 17 an air carrier is liable for passenger injuries that are caused by an "accident" during international air transportation or during the course of embarking or disembarking.\textsuperscript{238} However, not all injuries or events qualify as accidents under Article 17. The term "accident" is not defined in the Convention, but in \textit{Air France v. Saks} the United States Supreme Court defined the term to mean "an unexpected or unusual event or happening that is external to the passenger."\textsuperscript{239} Much of the case law arising out of Article 17 attempts to construe and apply the above definition.

The definition of "accident" was at issue in the case of \textit{Krys v. Lufthansa German Airlines}\textsuperscript{240} where a passenger traveling from Miami to Frankfurt, Germany, began to feel physically ill a few hours into the flight. The Lufthansa crew responded by requesting any qualified medical personnel aboard the flight to examine the passenger. A physician did so and indicated that the

\textsuperscript{233} See id. at 103.
\textsuperscript{234} See id. at 104.
\textsuperscript{235} See id.
\textsuperscript{236} Id. at 106-07.
\textsuperscript{237} See id. at 108.
\textsuperscript{238} See Warsaw Convention, supra note 210, § 17.
\textsuperscript{239} 470 U.S. 392, 405 (1985).
\textsuperscript{240} 119 F.3d 1515 (11th Cir. 1997).
passenger's symptoms were "nothing to worry about." 241 Although the plane's flight-path kept it close to many airports along the East Coast during the early hours of the ten-hour flight, the flight crew continued the flight and did not make an unscheduled landing based, ostensibly, on the physician's opinion. The flight landed in Germany over five hours later when the plaintiff was rushed to a hospital, and the doctors concluded he had in fact suffered a heart attack.

The plaintiff filed suit in federal court in Florida alleging that the crewmembers' negligence in responding to his symptoms aggravated his medical condition. The key legal issue before the district court was whether the events giving rise to the plaintiff's injuries constituted an "accident" under the Convention. The district court ruled that the events during the flight did not constitute an "accident." The United States Court of Appeals for the Eleventh Circuit affirmed this ruling. 242

An important question was how to define the relevant "event" for purposes of analyzing whether an "accident" had taken place. Both the district court and the Eleventh Circuit rejected the airline's argument that the relevant "event" was the crewmembers' alleged negligence. 243 Instead, it was concluded that the relevant "event" was actually the airline's act of continuing the flight to its scheduled destination. Described in such a way, the "event" was in no way "unusual or unexpected" under Saks so as to fall within the scope of the Convention. 244

Because the Convention did not apply in Krys, the case proceeded as a common-law negligence action, in which damages were no longer limited to $75,000. The district court found the airline acted negligently when it failed to monitor independently and evaluate the medical condition of the passenger and awarded compensatory damages of $1.8 million to Mr. Krys and $600,000 to Mrs. Krys for her derivative injuries. The verdicts were sustained on appeal. The airline argued to no avail in the lower court that it reasonably relied upon the physician's diagnosis that the passenger was not in danger. While calling the

241 Id. at 1517.
242 See id. at 1522.
243 A flight crew's negligence would qualify under the Supreme Court's decision in AirFrance v. Saks, 470 U.S. 392, 405 (1985), as an "unusual or unexpected" event that is "external to the passenger." Hence, under the airline's theory, the Warsaw Convention would have applied and the airline would be entitled to avail itself of the limited liability provisions of the Convention.
244 See id. at 1522.
question a “close” one, the Eleventh Circuit ultimately found support for the ruling from plaintiff’s expert, a captain familiar with aviation industry standards, who testified that the airline’s conduct was substandard.245

As noted above, the plaintiff in the case of Tseng v. El Al Israel Airlines, Ltd. was subjected to a security search by the airline after she gave unsatisfactory responses as to why she was traveling to Israel.246 The Second Circuit concluded that the security search conducted by the airline was not an “accident” within the meaning of Article 17 of the Convention.247

First, a security search is not an “unusual or unexpected event,” and airline passengers are presumed to expect security searches as a characteristic risk of air travel.248 In addition, security searches are part of normal airline procedures and are mandated by many governments including the Federal Aviation Administration.249 Finally, the Second Circuit reasoned that “[t]he Convention does not aim to derogate from the efforts of international air carriers to prevent violence and terrorism, efforts which are widely recognized and encouraged in the law.”250

C. DAMAGES RECOVERABLE

The case of Saavedra v. Korean Airlines Co. originated from the crash of Korean Air Lines Flight KE007 over the Sea of Japan on September 1, 1983.251 A consolidated liability trial ordered by the Judicial Panel on Multidistrict Litigation had earlier established KAL’s liability, including the airline’s “willful misconduct,” in connection with the airplane crash.252 Once the common liability issues were decided, the victim’s relatives pursued individual actions for damages in different jurisdiction.

The plaintiff in this case filed suit in federal court in California seeking damages under the Death on the High Seas Act (DOHSA)253 and the Warsaw Convention for the death of multi-

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245 See id. at 1537.
246 122 F.3d 99 (2d Cir. 1997).
247 See id. at 104.
248 See id. at 103.
249 See id.
250 Id.
251 93 F.3d 547 (9th Cir.), cert. denied, 117 S. Ct. 584 (1996).
ple decedents in the crash. After a trial, the jury awarded considerable damages including: (1) with respect to the first decedent, $200,000 for loss of support, $150,000 for survivors' grief, and $1,500,000 for the decedent's predeath pain and suffering; and (2) with respect to the second decedent, $1,813,391 for loss of support, $115,140 for past and future services and inheritance, $526,000 for survivors' grief, $16,500 for funeral and memorial expenses, and $100,000 for the decedent's predeath pain and suffering. No damages were allowed for loss of society.

On appeal, the United States Court of Appeals for the Ninth Circuit accepted KAL's argument that the jury's awards for survivors' grief and predeath pain and suffering—which are forms of nonpecuniary damages—were improper in light of the Supreme Court case of Zicherman v. Korean Air Lines Co.,\textsuperscript{254} which arose from the same accident. In Zicherman, the United States Supreme Court held that damages may not be recovered directly under the Warsaw Convention and, instead, must be determined by reference to the applicable domestic law.\textsuperscript{255} DOHSA was the applicable domestic law for cases arising out of the Korean Air Lines disaster, which occurred over international waters.

Because the damages for survivors' grief awarded by the lower court were not recoverable directly under the Warsaw Convention, DOHSA would have to provide support for the awards. However, by its terms, DOHSA precludes awards for nonpecuniary damages. Accordingly, the awards for survivors' grief were vacated.

Similarly, the Ninth Circuit in Saavedra decided that nonpecuniary damages for the decedents' predeath pain and suffering are also prohibited under DOHSA.\textsuperscript{256} Although some courts in the past have allowed such damages to be recovered by supplementing DOHSA with general maritime law, the Ninth Circuit expressly disapproved of this practice and stated: "We . . . decline Saavedra's invitation to circumvent Congressional wisdom by allowing [predeath pain and suffering] damages that DOHSA precludes."\textsuperscript{257} Thus, the juries' awards for damages for predeath pain and suffering were also vacated. The verdict in both actions was collectively reduced by approximately $2,276,000.

\textsuperscript{254} 516 U.S. 217.
\textsuperscript{255} See id. at 230-31.
\textsuperscript{256} See Saavedra, 93 F.3d. at 553.
\textsuperscript{257} Id. at 554
The case of *Dooley v. Korean Air Lines Co.* also arose from the crash of Korean Air Lines Flight KE007 over the Sea of Japan.\(^{258}\) As in *Saavedra*, what damages are recoverable under the Convention was at issue. The *Dooley* district court, granting summary judgment in favor of the airline, ruled that, in light of *Zicherman*, nonpecuniary damages in the form of predeath pain and suffering were simply not allowed in a wrongful death action under DOHSA as brought by the plaintiffs. The United States Court of Appeals for the District of Columbia affirmed this ruling.\(^{259}\)

The plaintiffs argued on appeal that DOHSA can be supplemented by the general maritime law, which allows for the recovery of predeath pain and suffering damages. As did the Ninth Circuit in *Saavedra*, discussed *infra*, the D.C. Circuit rejected the argument. First, the D.C. Circuit relied upon the Supreme Court's decision in the case of *Mobil Oil Corp. v. Higginbotham*,\(^{260}\) where the Supreme Court instructed the lower federal courts "not to extend the general maritime law to areas in which Congress has already legislated."\(^{261}\) Another reason the *Dooley* Court disfavored supplementing DOHSA was that the result would be to rewrite the statute: DOHSA, by its terms, only allows the surviving, dependent relatives of the decedent to recover damages, but it is well-settled that damages for predeath pain and suffering are for the benefit of the decedent.\(^{262}\) In light of the *Zicherman* and *Higginbotham* cases, the D.C. Circuit refused to alter the statutory class of beneficiaries in the manner suggested by plaintiffs.\(^{263}\)

In *Oldham v. Korean Air Lines Co.*,\(^{264}\) the D.C. Circuit decided it could not consider Korean Airlines' (KAL) claim that damages for predeath pain and suffering were unavailable as a matter of law in three KAL Flight KE007 damages cases. KAL failed to challenge the propriety of these awards in its initial appellate brief. However, the court considered as timely KAL's argument that the evidence was insufficient to support the amount of the awards in two of the cases, which totaled $300,000. The court affirmed the award in each case based upon the evidence presented at trial, showing that the KAL Flight KE007 passen-


\(^{259}\) See id. at 1485.


\(^{261}\) *Dooley*, 117 F.3d at 1481.

\(^{262}\) See id. at 1482-83.

\(^{263}\) See id.

\(^{264}\) 127 F.3d 43 (D.C. Cir. 1997).
gers remained conscious until the plane hit the water and probably suffered all the while due in part to the effects of a rapid decrease in cabin air pressure.

However, the D.C. Circuit vacated the awards totaling over $1 million for loss of society damages in the three cases before it. It noted that the Supreme Court in Zicherman expressly ruled that such damages were not available under DOHSA. In addition, the D.C. Circuit made a number of noteworthy damages rulings in each of the three cases before it in Oldham. In the first case, the court reversed the damages awards to the surviving relatives after ruling that the relatives were not shown to have been financially dependent upon the decedent as required by DOHSA.

In the second case, the court, in part, struck the award of $1.3 million for lost inheritance due to the lower court’s failure to deduct $450,000 from the calculation of the decedent’s income, which figure represented the amount of the jury’s award for loss of support, financial contributions and gifts to the three surviving children of the deceased parents. The issue of the proper amount of the award for lost inheritance was remanded to the lower court for further consideration. In this second case, the court also vacated awards for lost parental guidance for two children on the ground that they were adults.

Finally, in the third case, the court affirmed the lower court’s directed verdict, holding that the surviving spouse of the decedent failed to adequately prove he suffered any damages in the form of lost support. The court also affirmed the jury’s award of $63,016 for the loss of net accumulated assets to the estate of the deceased.

The differing positions adopted by the courts in Gray v. Lockheed Aeronautical Systems Co. has caused a split in the circuits as to the availability of damages for predeath pain and suffering in a DOHSA case. On June 15, 1998, the Supreme Court of the United States granted certiorari, vacated the judgment, and remanded to the Eleventh Circuit for further consideration.

See id. at 50.
See id. at 50-51.
See id. at 54.
See id. at 55-56.
See id. at 57.
See id. at 58.
125 F.3d 1371 (11th Cir. 1997).
The case of *In re Aircrash Disaster Near Roselawn Indiana on Oct. 31, 1994,* (Roselawn V), arose from the crash of American Eagle Flight 4184 in which all 68 passengers aboard the aircraft perished. At least six of those passengers were traveling from points outside the United States to Indiana, and thus were engaged in international air transportation. The Warsaw Convention applied to the claims brought on behalf of those passengers.

In *In re Aircrash Disaster Near Roselawn, Indiana on Oct. 31, 1994,* (Roselawn IV), a case arising out of the same air crash disaster, the United States District Court for the Northern District of Illinois ruled that the applicability of the Warsaw Convention would not affect the question of what law governed the damage claims in some passengers' cases, including the numerous pending claims for pre-impact pain and suffering. The court noted that the Warsaw Convention had no bearing on what law applied to these claims because the Supreme Court in *Zicherman* had previously decided that courts in Warsaw cases must apply "the law that would govern in the absence of the Warsaw Convention" on questions related to damages. In most of the cases before the Roselawn IV court, the applicable law was held to be that of the domicile of the deceased passengers.

In Roselawn V, the airline defendants sought to revisit the issue raised in Roselawn IV concerning whether the Warsaw Convention affected the availability of damages. The airline defendants argued that the case law interpreting the Warsaw Convention prohibited any recovery for the pre-impact fear. The district court in Roselawn V, however, declined to overrule its prior ruling. The court looked in part to *Eastern Airlines, Inc., v. Floyd,* where the Supreme Court held that carriers cannot be liable under the Warsaw Convention to passengers who do not suffer "death, physical injury, or physical manifestation of injury." Nothing in *Floyd* required a denial of recovery for the decedents' pre-impact fear and terror in the Roselawn cases,

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275 Id. (quoting Zicherman, 116 S. Ct. at 636).
276 Roselawn V, 954 F. Supp. at 176.
277 Id.
279 Roselawn V, 954 F. Supp. at 177 (quoting Floyd, 499 U.S. at 552).
where each of the decedents suffered the physical injury of death.

The district court in *Roselawn V* also rejected the airline’s argument that inequities might result from its decision to allow pre-impact damages.\(^{280}\) The airline defendants pointed out that inequities would result if the “happenstance of getting scratched on the way down the evacuation slide . . . enable[d] one passenger to obtain a substantially greater recovery than that of an un-scratched co-passenger who was equally terrified by the plane crash.”\(^{281}\) While noting the possibility of such inequity, the court was ultimately swayed by the Supreme Court’s statement in *Zicherman*, that damages “is not an area in which the imposition of uniformity was found feasible.”\(^{282}\)

The case of *Hunt v. TACA International Airlines, Inc.*\(^{283}\) arose when TACA Airlines Flight 110 made an emergency landing in Mexico after one of its engines failed over the Gulf of Mexico. Mr. Hunt, a passenger, allegedly suffered head and back injuries while on board the flight and died months afterwards from a brain condition known as Creutzfeld-Jakob disease. Three years prior to this incident, Mr. Hunt had suffered post-traumatic stress syndrome after another TACA Airlines flight on which he was traveling crashed at Guatemala City.

Mrs. Hunt sued the airline for the wrongful death of her husband, claiming that the second accident resulted from negligence of a TACA airlines mechanic, who left a socket from a socket wrench in the engine while performing repairs during a stopover. Mrs. Hunt alleged that the airline was legally responsible for her husband’s death under the following chain of events: (1) the second accident caused Mr. Hunt to suffer physical injuries to his head and back; (2) those physical injuries exacerbated his post-traumatic stress disorder suffered in the previous TACA Airlines accident; (3) this trauma caused him to suffer a brain injury; and (4) this brain injury led to the onset of the fatal Creutzfeld-Jakob disease.\(^{284}\)

Mrs. Hunt claimed a myriad of damages for herself and on behalf of the decedent. The damages sought on behalf of the decedent included past and future medical expenses, lost wages,

\(^{280}\) *Id.* at 179.

\(^{281}\) *Id.* (quoting Jack v. Trans World Airlines, Inc., 854 F. Supp. 654, 668 (N.D. Cal. 1994)).


\(^{284}\) See *id.* at *3-4.
physical pain and suffering, mental anguish, loss of ability to enjoy life, loss of ability to pursue happiness, fear of flying, and emotional disturbance. For her own damages, she claimed loss of Mr. Hunt's society, loss of his consortium, and loss of his services.

The airline first countered that Mrs. Hunt's claims were preempted by the Convention. On this point, the district court agreed and cited the precedent of the Fifth Circuit Court of Appeals in *Potter v. Delta Airlines*. Because the Warsaw Convention applied, the airline next argued that, under the Supreme Court's decision in *Eastern Airlines v. Floyd*, Mrs. Hunt was precluded from recovering damages for purely psychological injuries suffered by Mr. Hunt.

However, the district court was not convinced that the airline was entitled to summary judgment on this issue because Mr. Hunt did not suffer "purely psychological injuries," which clearly would have been precluded under *Floyd*, but, rather, Mrs. Hunt claimed that Mr. Hunt first suffered physical injuries during the flight which, in turn, led to his mental trauma. Under this particular chain of events, the *Floyd* decision did not preclude a recovery for any mental injuries Mr. Hunt may have suffered.

Finally, the court in *Hunt* dismissed Mrs. Hunt's punitive damages claim on the ground that such damages are not recoverable under the Warsaw Convention.

### D. WILLFUL MISCONDUCT

Certainly among the most publicized aviation cases of the year (at least as of this submission) was the September 11 decision of the United States District Court for the Southern District of Florida in *In re Air Crash Near Cali, Colombia on December 20, 1995*. In that decision, authored by District Judge Stanley Marcus, the court kept the issue of willful misconduct from the jury and ruled that the evidence garnered by plaintiffs in pretrial discovery proved plaintiffs were entitled to summary judgment on this issue as a matter of law. In the words of the court, "[s] imply put, no reasonable jury could find that the acts of the

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285 See id. at *6.
288 Id. at *9-10.
pilots of Flight 965—and in particular the pilots' decision to continue their descent at night from a grievously off course position in mountainous terrain—amounted to anything less than willful misconduct."\textsuperscript{290} The court continued, "even giving the Defendant every benefit of the doubt, and drawing every reasonable inference in its favor, the record cannot fairly be read to support any other result."\textsuperscript{291}

On December 20, 1995, American Airlines Flight 965, a Boeing 757 en route to Cali, collided with terrain while off course on its approach to Bonilla Aragon Airport, Cali, Colombia. One hundred fifty-one passengers died in the accident along with the six-person cabin crew and the two pilots. Four passengers survived. The principal acts of the flight crew alleged to constitute willful misconduct were:

1) The pilots' alleged violation of American Airlines' policy and federal aviation regulations by continuing the descent of the aircraft when the plane was known to be off course;

2) The pilots' alleged attempts to deviate from their flight plan to fly a shorter approach into Cali in violation of American Airlines' policy;

3) The pilots' alleged failure to identify a navigational way-point before entering it into the flight management computer; and

4) The pilots' alleged failure to follow ATC instructions.

American Airlines did not seriously contest that the pilots had made mistakes, but argued that the mistakes made did not rise to the level of willful misconduct. Further, even if negligent, the pilots acts were superseded by the negligent acts of Honeywell, the manufacturer of the flight management computer (FMC), and Jeppesen-Sanderson, the producer of the navigational database used in conjunction with the flight management computer.

A critical issue in the analysis of the conduct of the cockpit crew was their interface with the FMC. The Boeing 757 that was operated as Flight 965 is commonly referred to as a "glass cockpit" aircraft. In other words, many of the traditional analog flight instruments have been replaced by computerized controls and digitized flight displays. Not only is the display of the instruments different, but information received from various navigational aids can be interpreted by the FMC and displayed on the

\textsuperscript{290} Id. at 1109.
\textsuperscript{291} Id.
electronic horizontal situation indictor (EHSI), which provides a graphical representation of the aircraft’s position. In “L-NAV” mode, the pilots can simply program in a particular approach or arrival route, and the aircraft will automatically fly hands-off. In an alternative mode, the FMC and EHSI can be used as visual guides for the pilots’ manual operation of the aircraft. American Airlines Flight 965 was originally scheduled to land on Runway 1 at Cali Airport but was later routed to Runway 19. Cali Airport lies in a valley approximately forty-three miles long and twelve miles wide surrounded by mountains. The approaches to Runways 1 and 19 are designed to keep the aircraft in the center of the valley and away from mountainous terrain.

Some of the most critical pieces of evidence offered by the plaintiffs in proving their claim of willful misconduct were American Airlines’ own internal operating procedures and training materials. American Airlines provided extensive guidance and admonitions to pilots operating in South America. Among the more critical internal regulations were those cautioning pilots in South America not to rely upon ATC to route the aircraft safely around dangerous mountainous terrain. American Airlines’ South American operating guidelines stressed the criticality of maintaining situational awareness and always knowing the position of the aircraft in this geographic area. Other guidelines provided by American’s Pilot Reference Guide for Latin America addressed the importance of verifying position utilizing all available means, including the direct “raw” data from navigational aids and cross-checking with en route charts and approach plates. Specifically, pilots in Latin America were required to “cross-check every available indication and know where you are before you accept a descent.”

Another specific rule (Rule #1) promulgated by American Airlines prior to the accident required that pilots take responsibility for the safety of the aircraft, even when coordinating and communicating with Latin American air traffic controllers. The elaborating text of this rule advised pilots that controllers in Latin America perform more of an advisory function than those in the United States and cannot be relied upon to assure adequate clearance from terrain. For example, pursuant to Rule #1 even if given a direct clearance from ATC, crews were instructed to reject this clearance unless they were operating in visual flight

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292 Id. at 1113 (citation omitted).
rules, "and the sun is shining." Absent these conditions, pursuant to Rule #2, American crews were required to insist upon completing only published approaches and departures into Latin American airports. American Airlines Rule #3 prohibited pilots in Latin America from descending unless they knew the exact position of the aircraft and the safe minimum altitude for their geographic location.

The preceding "rules" and other internal operating procedures of American Airlines provided the backdrop for the court’s finding of willful misconduct because it was the continuation of the flight in apparent violation of these procedures that formed the primary basis for the ultimate ruling of the court. The critical conduct of the flight crew that was ultimately held to constitute willful misconduct was the alleged decision of the crew to continue their descent below 15,000 feet while they were held to have known the aircraft to be off course and not on the published approach route.

Four "waypoints" were critical to the approach of Flight 965 into Cali Airport: the northernmost navaid, the Tulua VOR (Identifier ULQ); a fix known as D21 CLO; an NDB beacon known as a Rozo; and the Cali VOR (Identifier CLO). The Cali VOR is the closest of these navaids, located nine miles south of the airport. Tulua is the furthest, located approximately forty-three miles to the north of Cali VOR. The Rozo NDB is located approximately twelve miles to the north of the Cali VOR.

The approach route established by ATC for Flight 965 is known as the Rozo 1 STAR (Standard Terminal Arrival Route) and VOR DME approach to Runway 19. The Rozo 1 STAR begins at the Tulua VOR, ending at the Rozo NDB. The VOR DME approach to landing essentially extends and compliments the Rozo 1 STAR.

The first miscommunication that set into motion the events leading to the accident occurred when the crew of Flight 965 sought permission to fly directly to the Rozo NDB, bypassing the Tulua VOR that marks the beginning of the Rozo 1 STAR approach. The Colombian air traffic controller cleared the air-

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293 Id. at 1114.
294 The court did make note of several other facts that were potentially negligent that also could, in combination, rise to the level of willful misconduct. However, constrained by the summary judgment standard, the court limited its analysis to the issues over which reasonable minds could not differ as to the recklessness, or willful misconduct, of the airline. See id. at 1144-45.
295 See id. at 1145.
craft direct to Rozo; however, it was disputed whether “direct” in the parlance of Colombian ATC meant an uninterrupted course to Rozo or a course via the published approach, which would have required the aircraft to first overfly Tulua. In any event, the crew of Flight 965 assumed that they had been given permission to fly direct to Rozo and attempted to program the flight management computer to accomplish this task. Unfortunately, upon entering the designator “R,” the crew inadvertently entered into the computer a beacon known as a Romeo, located 132 miles to the northeast of the aircraft in the vicinity of Bogota. Upon entering this identifier, the FMC commanded the aircraft to turn to the left toward the east and mountainous terrain. The valley for the approach to Cali is oriented in a north/south direction. Apparently, it was undisputed that the flight crew failed to verify that the correct waypoint had been entered in the FMC. Eventually, the crew manually tuned the Rozo NDB on another navaid and then attempted to fly to the Tulua VOR, consistent with the published approach.

The aircraft descended approximately 5000 feet from the time of the initial incorrect designation of Romeo to the crew’s decision to fly to Tulua. The crew then considered flying directly to the Cali VOR but never entered this command into the FMC. At this point, the aircraft was correcting for the initial incorrect left turn to Romeo and was proceeding west, back toward the valley approach to the runway. The position of the aircraft at this time was approximately thirty-eight miles north of Cali at an altitude of 10,000 feet. The crew had difficulty reconciling their position with the bearing to Tulua VOR indicated on their instruments. The crew then abandoned its efforts to approach Tulua and altered course direct to Rozo, apparently in response to what they interpreted to be an ATC authorization to do so. ATC later instructed the aircraft to “report at five thousand on a final to One One, Runway One Niner.” The crew apparently interpreted this as authorization to descend to 5000 feet. While continuing their descent, and still ten miles east of the approach airway to Runway 19, the aircraft impacted near the summit of El Deluvio, a mountain peak on the east side of the valley. The pilots had continued their descent until an automatic warning sounded from the ground proximity warning system. Although the plaintiffs alleged that numerous actions on the part of the flight crew either standing alone or cumulatively

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296 See id. at 1121.
amounted to willful misconduct, the focus of the court’s decision was the decision of the flight crew to continue the descent of the aircraft despite the fact that they had allegedly lost situational awareness and were not certain of the precise position of the aircraft. Thus, even accepting American Airlines’ argument that air traffic control had authorized a descent to 5000 feet, the court ruled that the crew was required to reject this authorization unless they were certain of their aircraft’s position on the published approach route.

A threshold issue for the court in *Cali* was the appropriateness of a grant of summary judgment under the circumstances. The court noted that it was not aware of a single case in which summary judgment had been granted in favor of a plaintiff finding willful misconduct as a matter of law. After the usual references to the appropriate summary judgment standard, notwithstanding the absence of any precedent for such a ruling, the court nonetheless determined that any case subject to the Federal Rules of Civil Procedure could, under appropriate circumstances, be adjudicated upon a summary judgment motion. The court rejected the notion that “if no reasonable juror could disagree that a defendant’s employees engaged in willful misconduct, a plaintiff nevertheless must be compelled to take his claim to trial.”

Some courts have held that proof of willful misconduct requires a determination as to the state of mind of the defendant. As such, these issues should, arguably, be left to the trier of fact. What made the *Cali* case “unique,” according to the court, was not only the pervasiveness of the pilots’ misconduct, but what it characterized as express admissions by American Airlines relating to this misconduct. The standard for willful misconduct in the Eleventh Circuit was established by *Butler v. Aeromexico*. Under the test established in *Butler*, a party may prove willful misconduct by establishing the intentional per-

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297 See id. at 1129.
298 See id. at 1134.
299 See id. at 1123.
301 See *Cali*, 985 F. Supp. at 1123.
302 Id.
304 *Cali*, 985 F. Supp. at 1124.
305 774 F.2d 429 (11th Cir. 1985).
formance of an act with either (1) knowledge that the act will probably result in injury or damage, (2) reckless disregard of the consequences of the act, or (3) a deliberate purpose not to be discharged from a duty related to safety.306

The court in Calì noted that the so-called objective and subjective tests relating to willful misconduct were, in fact, inextricably interwoven because even a “subjective” state of mind could be established by objective circumstantial evidence.307 Circumstantial evidence of a subjective state of mind, the court noted, did not differ materially from objective proof of willful misconduct.308 According to the court, even the subjective standard advocated by American Airlines and adopted by the D.C. Circuit in Saba v. Compagnie Nationale Air France309 nonetheless permitted proof of the “subjective” state of mind of an actor by circumstantial evidence.310

Ultimately, the court’s decision regarding whether to conduct an objective or subjective analysis of reckless disregard hinged upon an interpretation of the three Butler factors noted above.311 Because, according to the court, imposing a subjective requirement on element two would effectively render element one superfluous, this element had to be analyzed under an objective standard.312 The court in Calì also noted, among other things, the practical difficulties of proving a subjective state of mind in instances of pilot error where the responsible pilots have perished.313 Accordingly, the court held that a plaintiff may prove willful misconduct under the reckless disregard standard by proving that “the defendant’s conduct amounted to an extreme deviation from the standard of care under circumstances where the danger of likely harm was plain and obvious, even if the defendant’s employees (because they deliberately blinded themselves, deluded themselves, or simply ‘fell asleep’) - never fully apprehended the danger created by their conduct.”314 Apparently, wanting to cover all the bases, the court

306 Id. at 430 (citing Koninklijke Luchtvaart Maatschappij N.V. v. Tuller, 292 F.2d 775, 778-79 (D.C. Cir. 1961)).
308 See id. at 1126.
309 78 F.3d 664 (D.C. Cir. 1996).
311 See id. at 1131.
312 See id. at 1132.
313 Id. at 1129.
314 Id.
noted that even under a subjective standard, summary judgment on the issue of willful misconduct was appropriate.\footnote{315 See id.}

The court focused its factual analysis on the actions of Flight 965's crew relating to their decision to continue descending notwithstanding the off course position of the aircraft. According to the court, "no other act so convincingly, and so powerfully, supports the entry of summary judgment."\footnote{316 Id.}

According to American Airlines' flight manual and Federal Aviation regulations, an aircraft on an instrument approach may not descend below its last assigned altitude until established on a published approach. In addition, American Airlines procedures for Latin America prohibited an aircraft from descending, even with ATC authorization, when the crew is not aware of the geographic position of the aircraft.

First applying an "objective" standard of recklessness, the court held that it was undisputed that American Airlines' policy forbids pilots from continuing a descent if they are off a published arrival route or unsure of their location.\footnote{317 See id. at 1132.} "No reasonable jury could conclude that the pilots of Flight 965 complied with either of these rules."\footnote{318 Id.} A disputed portion of the CVR transcript clearly suggests that air traffic control affirmatively cleared Flight 965 to 5000 feet, and American Airlines argued that this justified the continued descent of the aircraft. However, notwithstanding heated contention of this issue, the court ultimately relegated this argument to irrelevancy by concluding that regardless of the authorization from air traffic control, the pilots of Flight 965 had an affirmative duty to reject any such authorization when they knew themselves to be off course.\footnote{319 See id. at 1134.} According to the court, Flight 965 continued to descend from 17,000 feet to almost 8000 feet from the initial incorrect "Romeo" designation to ultimate impact, never abating this descent.\footnote{320 See id. See id. at 1134.} "There is simply no basis to describe this choice as a minimal departure from the standard of care embodied in American Airlines policy and the FAR's. It was an act of grievous malfeasance that powerfully supports a finding of recklessness."\footnote{321 Id.}
Addressing the "critical" question of whether the flight crew was aware of the danger of descending under their circumstances, the Cali court reviewed extensive flight data and recorded cockpit conversation and concluded that the flight crew had numerous indicators in the cockpit that they were off course. In addition, a comparison of the heading of the aircraft after the incorrect designation of "Romeo" to those designated on the published approach would also have confirmed the aircraft to be off course. These indicators, combined with American Airlines' procedures relating to flight operations and, particularly, operations in Latin America, led the court to conclude that the pilots, objectively, must have known of the precarious predicament of being off course under the circumstances.

On the issue of objective recklessness, the court held:

In short, given the substantial number of clues indicating that flight 965 was off course and well to the east of the airway, there is simply nothing for a jury to decide on the issue of objective recklessness. On this record, no reasonable juror could conclude that the pilots did not commit prolonged and extreme violations of multiple standards of care in the face of plain and obvious dangers associated with landing amid rugged mountainous terrain at the Cali airport. The flight plan, the charts examined by the pilots, the EHSI map and the instruments in the cockpit made it altogether obvious that, once the left turn began, the aircraft was no longer on the published route, and had not yet rejoined the route for the duration of the flight. The plane's continued descent under these circumstances, at night, amid high terrain that the pilots knew posed potentially grave danger to incoming aircraft that drifted out of the valley, was reckless as a matter of law.322

Notwithstanding the objective standard held applicable to Eleventh Circuit determinations of willful misconduct, the court also examined the "recklessness" of the pilots from a subjective perspective. In brief, the court imputed to the pilots knowledge of American Airlines' various procedures and precautions related to instrument approaches in Latin America and notice of the various cockpit indications that would have shown that the aircraft was off course throughout the continued descent.323 The court held: "No reasonable juror, even drawing all inferences in favor of the Defendant, could accept the proposition that the pilots never apprehended that the aircraft was pro-

322 Id. at 1138.
323 See id.
foundly off course while they knowingly and intentionally elected to continue the descent.”324 The court placed extensive reliance on a series of communications between the pilot, co-pilot, and air traffic control that occurred between 21:38:54 and 21:40:56 on the CVR transcript. During this exchange, the crew was apparently engaged in an effort to place the aircraft back on the published approach. Reading this portion of the CVR transcript as a whole, the court concluded that no reasonable juror could disagree that the flight crew knew not only that they were off course, but “did not even know precisely where they were in the sky.”325 Concluding its “subjective” analysis, the court held:

The critical, and ultimately fatal, error by the pilots of Flight 965 was their deliberate decision to continue to descend as they undertook the task of restoring the aircraft to the published route. And the test for subjective recklessness does not require proof that the pilots intended to kill themselves or the passengers; it simply requires a showing that the pilots recognized that their intentional acts created a significant risk of harm.326

The court continued in its ultimate holding:

To summarize, no reasonable juror, presented with the record before this Court, could find that the pilots’ decision to continue the aircraft’s descent despite being significantly off course, at night, in an area known for dangerous terrain, did not constitute the intentional performance of an act “with knowledge that the . . . act would probably result in injury or damage” or an act performed in “reckless disregard of the consequences,” as we construe that phrase. The facts and inferences suggested by the Defendant simply lack the measure of persuasiveness that might permit a jury to enter a verdict for American Airlines, at [. . .] least with respect to this crucial issue. As a result, the Plaintiffs are entitled to a determination that the pilots of Flight 965 demonstrated “willful misconduct” as that standard has been interpreted by the binding precedent of this Circuit.327

The court in Cali then reviewed American Airlines’ arguments relating to proximate cause.328 American argued that the conduct of third parties, Jeppesen, Honeywell, or Colombian Air

324 Id. In supporting this conclusion, the district court pointed to various statements made by American Airlines’ witnesses and counsel in which, in the court’s view, it was conceded that descending off course, at night, in the Cali area, was a willful and reckless act. See id. at 1138-42.
325 Id. at 1142.
326 Id. at 1143.
327 Id. at 1143-44.
328 See id. at 1150-51.
Traffic Control constituted the sole proximate cause of the accident, or, alternatively, an intervening superseding cause. Although the court recognized that these defendants could have contributed to the accident and that their conduct may constitute additional proximate causes of the accident, it rejected American’s contention that the conduct of any of these entities could have superseded the decision of the American Airlines’ crew to continue its descent while off course. Accordingly, American was held unable to establish that any of the third parties’ conduct wholly superseded the “willful misconduct of the pilots.”

The last portion of the Cali decision addresses the liability claims of the aircraft’s cabin crew. The Warsaw Convention did not apply to these claims. Accordingly, and not surprisingly, the court concluded that American Airlines was liable to this class of plaintiffs under a lesser negligence standard.

The Ninth Circuit examined the issue of willful misconduct in Koirala v. Thai Airways Int’l, Ltd. Koirala concerned Thai Airways International Flight TG-311, which crashed into a mountainside while attempting to land at the airport in Kathmandu, Nepal, causing the death of all 113 passengers. The Kathmandu airport has the reputation of being one of the most difficult airports in the world at which to land because it is surrounded by mountains, and the air traffic controllers there have no radar. The weather was poor on the night of the crash. When the crew attempted to configure the plane for landing, they discovered that the wing flaps did not extend properly, rendering a landing too dangerous to attempt. The wing flaps later extended properly but by that time the plane was too far north and too high to begin a descent toward the runway. The crew then made a request for clearance to turn left and fly to “Romeo Point,” a navigational position located approximately forty miles south of the airport, from which a landing approach could be attempted. The request was repeated numerous times but ignored by air traffic controllers.

329 See id. at 1150.
330 Id.
331 The court held that Worker’s Compensation was not a bar to the claims because American had apparently not paid compensation death benefits to the families of the cabin crew, which, under Florida law, the plaintiffs alleged, constituted a waiver of the employer’s immunity from a common law suit. See id. at 1151.
332 126 F.3d 1205 (9th Cir. 1997).
A few minutes later, ATC authorized the aircraft six separate times over the course of approximately seven minutes to head to Romeo Point to attempt a landing approach. Instead of turning 180 degrees, the crew unknowingly turned the aircraft full circle and continued heading north toward the mountains surrounding the airport. Despite the fact that all the navigational instruments indicated the aircraft was heading north, the crew continued to believe the plane was heading south toward Romeo Point. Minutes later, the plane crashed into a mountain.

Wrongful death suits under the Warsaw Convention were filed in California federal district court by the relatives of the Flight TG-311 passengers. The district court applied United States law[^333] to find that the Flight TG-311 crew had engaged in "willful misconduct" in failing to monitor their navigational instruments which displayed a northerly course for six minutes before impact.[^334] Applying the "clearly erroneous" standard of review,[^335] the Ninth Circuit affirmed the lower court.[^336]

Under the Ninth Circuit’s formulation, “willful misconduct” means, in part, a flight crew “intentional[ly] perform[ed] an act in such a manner as to imply reckless disregard of the probable consequences.”[^337] Here, although no evidence was presented on the question of whether the flight crew did or did not look at their instruments, the court of appeals determined that the district court could have found from the evidence that “frequently checking navigational instruments to verify heading [was] a task so fundamental to basic flying safety, [that] the sheer fact the crew for nearly six minutes did not realize they were flying in the wrong direction indicates they must have ig-

[^333]: Although the parties contested the application of United States maritime law in the district court, they agreed on appeal that United States law applied. Therefore, the court of appeals declined to review sua sponte the district court’s choice-of-law ruling, but the court did note that the Supreme Court’s decision in Zicherman v. Korean Air Lines Co., 116 S. Ct. 629 (1996), which came down after the district court’s decision, may have affected the soundness of the district court’s choice-of-law analysis. See Koirala, 126 F.3d at 1208.

[^334]: See Koirala, 126 F.3d at 1208.

[^335]: The first question answered on appeal was the standard that applied to the Court of Appeals’s review of the lower court’s willful misconduct finding. The Court of Appeals held the clearly erroneous standard, not de novo review, applied because it determined a finding of willful misconduct must inevitably be based upon factual assessments of evidence, which trial courts are clearly in a better position to make than appellate courts. See id. at 1210.

[^336]: See id. at 1212.

nored this duty," thus implying their reckless disregard. The plaintiffs' expert, a captain, testified at trial that ignoring instruments for over six minutes was "almost incomprehensible." His testimony further supported the determination that the crew acted with reckless disregard.

However, numerous plaintiffs' claims were dismissed in *Koirala* because the plaintiffs were not dependents of the decedents, as required for recovery under the applicable United States maritime law. The lower court permitted the estates of the decedents who had no surviving beneficiaries to amend their complaints to seek damages for lost future earnings of the decedent, in accordance with United States maritime law. The ninth circuit affirmed.

*Tavarez v. American Airlines, Inc.* concerned consolidated cases arising from the recent evacuation of American Airlines Flight 587 at John F. Kennedy Airport in New York on February 20, 1996. After boarding the flight, which was bound for the Dominican Republic, the passengers were quickly evacuated through emergency exits and down chutes to escape thick smoke. Numerous passengers filed suit in the United States District Court for the Southern District of New York, claiming they were injured during the incident and that their injuries were caused by the airline's willful misconduct in failing to provide evacuation instructions in Spanish to the passengers of the plane, the majority of whom were native Spanish-speakers.

Under the case law of the Second Circuit, "willful misconduct" is determined by the totality of the circumstances. The district court in this case ruled that willful misconduct was not proven by the plaintiffs under the totality of the circumstances. First, minutes before the incident, the crew showed passengers a safety video wholly in Spanish. Furthermore, at least two flight attendants on board the aircraft spoke Spanish. Although one flight attendant testified at his deposition that he could not recall whether he gave instructions in Spanish during

838 *Koirala*, 126 F.3d at 1211.
839 *Id.* at 1211.
840 *See id.*
841 *See id.* at 1209, 1214.
843 *See id.* at *1-2* (citing *In re Air Disaster at Lockerbie, Scot.* on Dec. 21, 1988, 37 F.3d 804, 823-24 (2d Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995)).
844 *See id.* at *4*.
the evacuation, he also stated that he commanded passengers using body language, which was understood by all, for some of the time during the evacuation. Under these circumstances, and given the fact that numerous plaintiffs failed to show a causal relationship between their injuries and the evacuation, the court granted the airline's motion for partial summary judgment limiting each passenger's recovery to a maximum of $75,000 under the Convention.\(^{345}\)

E. Cargo and Baggage

Article 18 of the Warsaw Convention makes air carriers liable for loss of, or damage to, checked baggage or any goods if the occurrence which caused the damage took place during international transportation by air.\(^{346}\) Just as the Convention establishes a limit on the amount of a carrier's liability for personal injuries and death, Article 22 sets a per pound limit on the amount of a carrier's liability for losses, damages, or delay of baggage or goods. However, in order to avail itself of this limitation, the carrier must comply with certain notice and other requirements set forth principally in Articles 8 and 9. The cases below describe the nature of these requirements and the effect if the carrier fails to comply with them.

In the case of *Tokio Marine & Fire Insurance Co. v. United Air Lines, Inc.* the plaintiff was the insurer of two international shipments of watches being transported by United Air Lines.\(^{347}\) It was alleged that nine cartons were missing. These cartons later showed up at the home of a United Air Lines employee. Plaintiff filed suit under the Convention and state law. In one of its affirmative defenses, United Air Lines alleged that its liability was limited by the Convention. The airline moved for summary adjudication on this affirmative defense.\(^{348}\)

The plaintiff argued that the carrier was not entitled to avail itself of the limited liability provisions of the Convention because it failed to comply with the requirements of Articles 8 and 9. Article 9 provides that an air carrier is not entitled to avail itself of the Convention's limited liability provisions if the air waybill does not comply with the notice requirements of Article

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\(^{345}\) See id. at *5.

\(^{346}\) Warsaw Convention, *supra* note 210, art. 18.


\(^{348}\) See id. at 1529.
8. Under Article 8, the air waybill must state, among other things, the applicability of the Warsaw Convention. In this case, the federal district court held that Article 8's notice requirements were satisfied because the front of the air waybill: (1) notified plaintiff that the carrier's liability might be limited, and (2) expressly incorporated the conditions on the reverse side providing further details regarding the carrier's limited liability under the Convention. The plaintiff's other arguments in the case were dismissed without merit, and United Air Lines' motion for summary adjudication on its affirmative defense was granted by the court.

In the case of General Electric Co. v. Circle Air Freight Corp., General Electric (GE) contracted with Circle Air Freight Corp. (CAC), a freight forwarder, to transport a shipment to England. CAC in turn contracted with Air France to act as the direct carrier. When the shipment arrived damaged, GE filed suit seeking damages from the direct carrier, Air France, and from the indirect carrier, CAC. GE attempted to argue that CAC could not avail itself of the limited liability provisions of the Convention because the CAC air waybill violated Article 8 by listing only CAC's address. Article 8 requires the waybill to state, among other things, the name and address of the "first carrier." GE argued that Air France, not CAC, was the first carrier and since Air France's address was not listed on the waybill, the waybill was thereby defective. The federal district court rejected this argument after noting that CAC was chronologically the first carrier with whom a contract for the shipment of the goods was made.

GE also argued that the agreed stopping place for the goods was Paris, France, and that this layover was omitted from the CAC air waybill, rendering the bill defective. The court rejected this argument because the CAC air waybill incorporated by reference the Air France waybill, which in turn provided sufficient notice of the stopover in Paris, France.
Finally, GE contended that CAC could not avail itself of the Convention’s limited liability provisions because CAC technically accepted the shipment prior to issuing a waybill in violation of Article 9. In reality, CAC issued a waybill the morning after GE handed over the shipment to CAC. Considering the purpose of Article 9 and viewing other provisions of the Convention and the Convention as a whole, the court did not read the language of Article 9 so literally as to require that the waybill be executed instantaneous[ly] at the time the shipment is handed over to the carrier. Among other reasons, the court indicated that such a reading of the Convention would place “commercially unfeasible restrictions on the behavior of shippers and carriers that . . . neither would desire.”

In the case of *Feeney v. America West Airlines*, the plaintiffs purchased round-trip tickets for travel from Cabo San Lucas, Mexico to Denver, Colorado, with a stopover in Phoenix, Arizona. Aero California transported them to and from Cabo San Lucas and Phoenix, while America West Airlines transported them to and from Phoenix and Denver. On the return trip, the plaintiffs checked seven pieces of luggage with Aero California, and received seven baggage claim checks listing Denver as their final destination and also listing their connecting flights with America West. When they arrived in Denver, the plaintiffs received only six of the seven pieces of baggage.

After receiving $640 from America West for the lost baggage, representing the carrier’s maximum liability under the Convention, the plaintiffs filed suit in Colorado state court against America West and sought over $5000 in damages. They argued that they received improper notice regarding the carrier’s limited liability, and therefore the Convention did not apply or limit their claims. The appellate court, however, affirmed the trial court’s ruling that the notice requirement contained in Article 4 of the Convention was satisfied by language on the plaintiffs’ tickets stating that the Convention may be applicable.

The plaintiffs next argued that America West was not entitled to avail itself of the Convention’s limitation on liability because America West did not actually check their baggage. This argument was rejected by the appellate court, which affirmed the

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357 *See id.* at *21.
358 *See id.* at *22.
360 *See id.* at 111-13.
trial court’s ruling that America West was deemed to have checked the plaintiffs’ baggage by virtue of the fact that Aero California actually checked the baggage, and the transportation performed by America West and Aero California was “undivided” for purposes of the Convention.\textsuperscript{361}

F. Limitations of Action

Article 29 of the Warsaw Convention provides for a two-year statute of limitations for damages actions.\textsuperscript{362} Compliance with this statute of limitations is generally a condition precedent to filing suit under the Convention. Whether the Convention’s two-year statute of limitations should be tolled in accordance with local procedures is the frequent subject of litigation in federal courts, as described in the cases below.

The plaintiff in \textit{New Pentax Film, Inc. v. Trans World Airlines, Inc.} was a film company that checked as baggage a motion picture that was to be shown at an upcoming film festival.\textsuperscript{363} The film was temporarily lost en route from Italy to the United States and arrived too late to be shown at the festival.

Shortly thereafter, the airline filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. The filing of the petition imposed an automatic stay barring all debt collection efforts against the airline. Due to the airline’s failure to inform the film company of its bankruptcy, the film company missed the deadline for filing a proof of claim with the bankruptcy court. However, the airline entered into a stipulation with the film company to lift the automatic stay and thereby provide the film company with the means to assert a claim for damages in connection with the delay in transporting the film. The parties’ stipulation was approved by the district court on December 17, 1993.\textsuperscript{364} On the same day, the plaintiff filed a complaint seeking damages from the carrier for the temporary loss of the film.

The carrier asserted numerous defenses in its answer, including one that the plaintiff’s action was time-barred by the Warsaw Convention. Article 29 of the Warsaw Convention requires a party to commence an action for damages within two years after

\textsuperscript{361} See \textit{id.} at 113-14.
\textsuperscript{362} Warsaw Convention, \textit{supra} note 210, art. 29.
\textsuperscript{363} 936 F. Supp. 142 (S.D.N.Y. 1996).
\textsuperscript{364} See \textit{id.} at 145.
the date on which the goods should have arrived. In this case, the film company's complaint was filed more than two years after the film was to be delivered. On the film company's motion seeking summary judgment on the carrier's defense, the issue before the court was whether the statute of limitations under the Convention was tolled for the period during which the bankruptcy stay was in effect, barring the film company from suing.

The court relied upon a provision of the Bankruptcy Code that specifically addressed the issue at hand. This provision extends filing deadlines if they expire on a date during which an automatic stay under the Bankruptcy Code is in effect. Because the film company's deadline for filing suit under the Convention expired on such a date, the court held that the bankruptcy provision applied and that suit was timely commenced under the Convention because suit was filed immediately after the stay was lifted pursuant to the parties' stipulation.

The court rejected the airline's argument that the bankruptcy provision was "inconsistent" with and therefore preempted by the Warsaw Convention. The court noted that the bankruptcy provision, a federal statute, and the Warsaw Convention, a federal treaty, were on "equal footing." Under the applicable "last in time" rule, it was the bankruptcy provision (which was enacted forty years after the Convention) that must prevail. In addition, the airline's challenge of the adequacy of the plaintifff's written notice of damages was rejected by the court, while the issue of whether the airline complied with the notice requirements of Article 4 (so as to allow the airline to rely on the Convention's limitation on liability) was deemed ill-suited for resolution on the plaintifff's summary judgment motion.

In the case of Fishman v. Delta Air Lines, Inc., a minor child traveling aboard a Delta flight was burned when a flight attendant placed a hot cloth, cup, and water near the child's ear. The child's mother brought suit individually and on her daughter's behalf. The federal district court first held that plaintifff's

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365 Warsaw Convention, supra note 210, art. 29.
368 See id. at 147.
369 See id.
370 See id. at 149-51.
negligence claims were preempted by the Convention.\textsuperscript{372} The
next issue was whether the two-year statute of limitations in Article 29 barred the suit, which was brought more than two years after the incident aboard the aircraft.

The plaintiffs argued that, in accordance with New York state law, the statute of limitations period under the Convention should be tolled for the period during which the child was an infant.\textsuperscript{373} The court noted that this argument applied only to the minor's claims, not the mother's. The argument was rooted in Article 29(2) of the Convention, which states: "The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted."\textsuperscript{374}

Upon examining the legislative history of the Convention, the court found it was the desire of the delegates to "remove . . . [Warsaw actions] from the uncertainty which would attach were they to be subjected to the various tolling provisions of the laws of the member states."\textsuperscript{375} The court concluded that the language in Article 29(2) cited by plaintiffs was designed to allow forum courts to apply local law simply to determine when an action under the Convention was commenced, not to toll the period of limitation.\textsuperscript{376} The court also distinguished the plaintiffs' cited cases, \textit{Joseph v. Syrian Arab Airlines}\textsuperscript{377} and \textit{Flanagan v. McDonnell Douglas Corp.},\textsuperscript{378} both of which held that the Convention's two-year statute of limitations is subject to tolling. The \textit{Fishman} court noted that the courts in those cases did not consult the legislative history of the Convention.\textsuperscript{379} Furthermore, they did not consider the fact that allowing the statute of limitations to be tolled would contravene the Convention's primary goal of establishing uniformity in the law of air carriers' liability.\textsuperscript{380} Accordingly, the court declined to follow those courts and, instead, dismissed both of the Fishman plaintiffs' actions as time-barred.\textsuperscript{381}

\textsuperscript{372} See id. at 229-30.
\textsuperscript{373} See id. at 230; N.Y. C.P.L.R. 208 (McKinney 1990).
\textsuperscript{374} Warsaw Convention, \textit{supra} note 210, art. 29(2).
\textsuperscript{376} See id.
\textsuperscript{377} 88 F.R.D. 530 (S.D.N.Y. 1980).
\textsuperscript{379} \textit{Fishman}, 938 F. Supp. at 232.
\textsuperscript{380} See id.
\textsuperscript{381} See id.
The plaintiff in *Castro v. Hinson* brought suit on behalf of herself and her minor children, each of whom allegedly suffered physically and mentally when an American Airlines flight took off in bad weather. The aircraft encountered severe turbulence, and the flight crew warned of the possibility of making an emergency landing on the water. After holding that the plaintiffs' state law claims were preempted by the Convention, the next issue before the federal district court was whether the Convention's two-year statute of limitations barred the suit, which was brought nearly three years after the flight landed safely at its destination.

As in *Fishman*, the plaintiffs argued that the two-year statute of limitations should be tolled for the period of a minor child's infancy. For the same reasons as *Fishman*, the court in *Castro* rejected the tolling argument.

The plaintiffs also argued that the two-year statute of limitations should not apply because their damages were caused by the carrier's willful misconduct. Article 25 provides that a carrier cannot avail itself of "the provisions of the convention which exclude or limit his liability" if the damage is caused by willful misconduct. Plaintiffs argued that the statute of limitations contained in Article 29 of the Convention was precisely the type of provision that excludes or limits liability referred to in Article 25; therefore, Article 29's statute of limitation must be lifted in accordance with Article 25 since the plaintiffs' damages were alleged to have been caused by American Airlines' willful misconduct. The court rejected this argument after noting that in the case of *In re Air Disaster At Lockerbie, Scotland, on December 21, 1988*, the Second Circuit stated that Article 25 does not operate to lift every limit on the carrier's liability, such as Article 29's statute of limitations.

In *Rhodes v. American Airlines, Inc.*, the plaintiff sought damages from American Airlines for injuries sustained when he swallowed a fishbone while eating an in-flight meal. The federal district court granted the airline's summary judgment motion to dismiss the action, which the plaintiff had brought more than

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383 959 F. Supp. at 163.
384 Warsaw Convention, supra note 210, art. 25.
385 928 F.2d 1267 (2d Cir. 1991).
386 See *Castro*, 959 F. Supp. at 164.
two years after the date his flight arrived at its destination. The court cited Article 29's requirement that suit be brought within two years after the date of arrival. Mr. Rhodes attempted to avoid the Convention's two-year statute of limitations by arguing that swallowing a fishbone does not constitute an "accident" under the Convention and therefore the Convention did not apply. The court rejected this argument.

IV. NON-WARSAM LIABILITY OF AIR CARRIERS

A. Preemption of State Law Claims by the ADA

Until 1978, the Civil Aeronautics Board (CAB) regulated the airline industry under the Federal Aviation Act of 1958 (FAA). The FAA empowered the CAB to regulate fares and take administrative action against deceptive trade practices. In section 1506 of the FAA, the "saving clause," Congress preserved existing state law remedies against the airlines, stating in pertinent part: "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."

Subsequently, in 1978, without repealing the FAA in its entirety, Congress enacted the Airline Deregulation Act (ADA), which substantially deregulated domestic air transport. The ADA abolished the CAB and transferred its enforcement powers to the Department of Transportation (DOT). Section 105 of the ADA, the "preemption clause," stated in relevant part that states shall not enact or enforce "any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier."
The scope of the ADA preemption clause remains the subject of some debate. For example, whether certain state actions constitute “enactments” or “enforcement,” whether certain state standards or rules “relate to rates, routes or services,” and whether the scope of the phrase “rates, routes or services” is capable of varying interpretations. Two recent Supreme Court pronouncements on the scope of the ADA preemption clause resolved some, but not all, aspects of these issues. For example, in Morales, the Court ruled that the ADA preempted state enforcement of the Air Travel Industry Enforcement Guidelines (the Guidelines), which were adopted by the National Association of [State] Attorneys General (NAAG).396

In Morales, the NAAG adopted the Guidelines in order to govern “the content and format of airline advertising, the awarding of premiums to regular customers. . . . and the payment of compensation to passengers who voluntarily yield[ed] their seats on overbooked flights.”397 The NAAG informed the airlines that it intended to prosecute them for violations of the fair advertising provisions of the Guidelines despite the fact that DOT and the Federal Trade Commission (FTC) objected to the Guidelines on preemption and policy grounds.398 Subsequently, the airlines sought and received a judgment declaring that the ADA preempted the Guidelines and a preliminary injunction restraining the states from taking “any enforcement action” that would restrict “any aspect” of the airlines’ fare advertising or operations relating to rates, routes, or services.399 The Court found that the ADA preempted the fare advertising provisions of the Guidelines and affirmed the award of declaratory and injunctive relief with respect to those provisions.400

The Court reasoned that Congress intended the ADA to have a broad preemptive purpose because the ordinary meaning of

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396 See Morales, 504 U.S. at 391.
397 Id. at 379.
398 See id. at 379-80.
399 See id. at 380.
400 See id. at 391. With respect to the injunction, the court reasoned that injunctive relief was available because the threatened enforcement actions were imminent, and thus, the airlines maintained no adequate remedy at law. However, the Court restricted the scope of the injunction, as stated, finding it overly broad. For example, the injunction preempted “any” state suit involving “any aspect” of the airlines’ rates, routes, and services. Thus, the Court vacated the injunction to the extent that it restrained the operation of state laws related to matters other than fare advertising, as the states threatened to enforce only those provisions regarding fare advertising. See id. at 381-83.
"relating to" was consistent with "having a connection with, or reference to." The Court also reasoned that the Guidelines related to rates, routes, or services by referring to airfares and by virtue of the fact that restricting fare advertising would reduce the airlines' incentive to price competitively and have an adverse effect upon fares. In addition, the Court found that the contemplated enforcement actions clearly constituted "state enforcement," although the Court noted that "[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect.

The Supreme Court next considered the preemptive effect of the ADA in American Airlines, Inc. v. Wolens. In Wolens, the plaintiffs, participants in American's frequent flyer program, challenged the carrier's retroactive changes in program terms and conditions, arguing that application of those changes to previously accumulated mileage credits violated the Illinois Consumer Fraud and Deceptive Business Practices Act and constituted a breach of contract.

The Court found that the ADA preempted the plaintiffs' consumer fraud claims but not the breach of contract action. The Court reasoned that the state fraud claims were preempted because the claims were "paradigmatic of the consumer protection legislation" preempted in Morales. In addition, while the Court accepted that all of the plaintiffs' claims "related to" "services" or "rates," it reasoned that adjudication of a state law breach of contract claim did not constitute the type of "enactment or enforcement" prohibited by section 1305(a)(1). As the Court stated, "[w]e do not read the ADA's preemption clause . . . to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings.

The Court additionally stated that the ADA's preemption clause, read together with the FAA's savings clause, permitted states to adjudicate routine breach of contract actions because the Court

401 Id. at 383.
402 See id. at 387-89.
403 Id. at 390. (alteration in original) (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 100 n.21 (1983)).
405 Wolens, 513 U.S. at 225.
406 See id. at 228, 232.
407 Id. at 227.
408 See id. at 228-29.
409 Id. at 228.
would be confined to the parties’ bargain and would not be free to enlarge or enhance the airlines’ obligations concerning rates, routes, or services by enforcing state laws or policies external to the agreement.\footnote{See id. at 232-33.}

In the wake of \textit{Morales} and \textit{Wolens}, courts have had difficulty delineating the scope of the ADA preemption clause and have reached conflicting results where similar issues were presented.\footnote{See infra notes 423-92 and accompanying text.} The discussion that follows provides a small sampling of cases on this topic and demonstrates the courts’ uncertainty in resolving the ADA preemption issue.

1. \textit{State Claims Preempted}

In \textit{Sam L. Majors Jewelers v. ABX, Inc.}, the plaintiff utilized the defendant’s services to ship several items of jewelry, including a gold Rolex watch, a diamond necklace, and enamel earrings, from Texas to New York.\footnote{117 F.3d 922 (5th Cir. 1997).} The plaintiff completed an airbill for each shipment that excluded the carrier from liability for “gems or stones” and incorporated by reference a “service guide,” which provided that the carrier was not liable for the loss of jewelry. The plaintiff brought suit under Texas law in Texas state court, and the case was removed to federal court.\footnote{See id. at 923-24.}

The court first considered whether removal was proper.\footnote{See id. at 924.} The court concluded that the amount in controversy was insufficient to support diversity jurisdiction.\footnote{See id.} The court also found that the cause of action did not arise under a federal statute and that jurisdiction was not supported by complete preemption.\footnote{See id.} The court reasoned that the plaintiff’s cause of action did not arise under a federal statute because there was no express or implied private right of action under the FAA or ADA to recover the value of damaged or lost cargo.\footnote{See id. at 924-26.} In addition, the court reasoned that the ADA did not “completely preempt” the plaintiff’s claims, sufficient to invoke federal question jurisdiction, because the defendant raised the ADA as a defense, and defenses generally do not give rise to federal question jurisdiction.\footnote{See id.}
However, the court ruled that the plaintiff's cause of action arose under federal common law. The court reasoned that federal common law historically provided a basis for suits against carriers for lost shipments and that the FAA “savings clause” preserved these suits. The court also read Wolens to permit a federal cause of action against a carrier for negligent loss of cargo.

Second, the court considered whether the carrier was liable for the lost shipments and concluded that it was not liable because the airbill limited its liability. The court reasoned that the airbill, using sufficiently plain and conspicuous language, expressly prohibited shipping jewelry, and the plaintiff, an experienced shipper, had notice of this.

2. State Claims Not Preempted

In Barbakow v. USAir, Inc., the United States District Court for the Southern District of Florida considered whether the ADA preempted claims by private passengers to recover for injuries proximately caused by an air carrier’s breach of the duty of reasonable care in providing cabin services. In Barbakow, the plaintiff passenger claimed that a flight attendant dropped a soft drink on her foot, causing serious injuries. The plaintiff brought state tort claims against the carrier who sought removal to federal court by arguing that section 1305(a)(1) of the ADA preempted the plaintiff’s state law claims.

The court concluded that the ADA did not preempt the plaintiff’s claims. The court began with the presumption that state law should not be superseded by the ADA absent express Congressional intent to the contrary because states have traditionally occupied the field of common law tort. The court also reasoned that section 1305(a)(1) did not completely preempt state law because complete preemption would render other sections of the ADA, such as the insurance requirements of Section

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419 See id. at 929.
420 See id. at 927-28.
421 See id. at 929 n.15.
422 See id. at 929-30.
423 See id. at 930-31.
425 See id.
426 See id.
427 See id. at 1149.
428 See id. at 1146.
nullity. In addition, the court reasoned that Congress did not intend to affect the existing state common law remedies for tortious conduct by a carrier in providing its choice of services, but rather intended to regulate the type, quality, or method of services provided.\footnote{429}

In Haavistola v. Delta Airlines, the Delaware Superior Court also considered the issue of whether the ADA preempted state law tort claims.\footnote{430} In Haavistola, the plaintiff brought state law tort claims against the carrier for injuries sustained when an un­ruly passenger kicked her in the abdomen and loosened a staple inserted three weeks previously during surgery.\footnote{432} The court canvassed various conflicting authorities on the preemption issue and concluded that the ADA did not preempt a state’s enforcement of the duty of reasonable care under the factual setting set forth in the plaintiff’s complaint.\footnote{433} The court reasoned that the ADA preserved the FAA’s savings clause and that the ADA “left room” for state law negligence claims, as such claims did not amount to state regulation under the ADA.\footnote{434}

Similarly, in Knopp v. American Airlines, Inc., the Supreme Court of Tennessee considered whether the plaintiff’s breach of contract and negligence claims were preempted by the ADA.\footnote{435} In Knopp, the plaintiff asserted these claims against the carrier for its failure to provide her with a wheelchair while she was changing planes and for the resulting injuries sustained when she fell from the electric cart that the carrier provided.\footnote{436} In order to determine whether the ADA preempted the plaintiff’s claims, the court applied a two-part test gleaned from Morales and Wolens, which required that: “(1) the claim must be related to airline rates, routes, or services, either by expressly referring to them or having a significant economic effect upon them; and (2) the claim must involve the enactment or enforcement of a

\footnote{429} 49 U.S.C. app. § 1371(q) requires air carriers to maintain insurance that covers “amounts for which ... air carriers may become liable for bodily injuries to or the death of any person, or for loss of or damage to property of others, resulting from the operation or maintenance of aircraft.” Barbakow, 950 F. Supp. at 1147.

\footnote{430} See id. at 1148-49.


\footnote{432} Id. at *1-2.

\footnote{433} See id. at *4-29.

\footnote{434} See id. at *11, *28-29.

\footnote{435} 938 S.W.2d 357 (Tenn. 1996).

\footnote{436} Id. at 358.
state law, rule, regulation, standard or other provision." Utilizing this test, the court concluded that the ADA did not preempt the plaintiff's breach of contract or negligence claim. The court found that the breach of contract claim was not preempted because, while the provision of a wheelchair may relate to "services," the provision instead constituted the type of "privately assumed obligation" contemplated in Wolens, which may be enforced by state law. The court also found that the negligence claim was not preempted because, although the claim was related to "services" under section 1305(a)(1), allowing a state law negligence claim did not impair federal regulation of services under the ADA.

The court also reasoned that Morales and Wolens dictated that the ADA preemption clause did not "extend to personal injury suits against carriers" "on the theory that such safety concerns do not 'relate' to provisions of 'services' by carriers." In addition, the court opined that "Congress could not have intended either to leave passengers injured through airline negligence without a remedy or to turn the [DOT] into a forum for adjudication of personal injury claims." In Peterson v. Continental Airlines, Inc., the United States District Court for the Southern District of New York considered whether the FAA or the ADA preempted the plaintiff's state law claims for breach of contract, negligence, assault and battery, false arrest, false imprisonment, abuse of process, and defamation. In addition to compensatory damages, the plaintiff sought punitive damages in the amount of $10 million. In Peterson, during the confusion of boarding a seemingly overbooked flight, the plaintiff and her niece and nephew were asked to either sit in their assigned seats or to exit the airplane and be booked on a subsequent flight. Apparently, the plaintiff

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437 Id. at 360.
438 See id. at 362-63.
439 See id. at 362. In reaching this conclusion, the court relied upon the Supreme Court's reasoning in Wolens that the ADA's preemption clause does not prevent state claims that seek to enforce contractual obligations voluntarily undertaken by the airlines.
440 See id. at 362-63.
441 Id. at 361.
442 Id.
444 See id. at 248. The plaintiff presumably was able to bring her suit in federal court because she also asserted a civil rights claim for violation of 42 U.S.C. § 1983 (1994). See id. at 248-49.
refused either option and the airline arranged for the police to handcuff the plaintiff and escort her off the plane.\textsuperscript{445} The defendant made a Federal Rule of Civil Procedure 12(h)(3) motion to dismiss based on lack of subject matter jurisdiction, arguing that the FAA or the ADA preempted the plaintiff’s state law tort claims.\textsuperscript{446}

The court concluded that the ADA did not preempt the plaintiff’s state law claims and denied the defendant’s motion to dismiss.\textsuperscript{447} In reaching this conclusion, the court applied the following three-pronged test: (1) whether the activity at issue constituted an airline “service” under the ADA; (2) whether the plaintiff’s claims affected the airline service directly as opposed to tenuously, remotely, or peripherally; and (3) whether the underlying tortious conduct was reasonably necessary to provision of the service.\textsuperscript{448} The court reasoned that while the first prong was satisfied, the second and third prongs were not met because the airline acted outside the scope of its authority to provide “services,” thus not triggering the “services” inquiry, and because the issue of whether the airline acted “reasonably” was still in dispute.\textsuperscript{449} In addition, the court held that the plaintiff’s state law tort actions did not implicate the Congressional purposes behind the ADA. Her suit neither frustrated the airline’s economic deregulation goal nor significantly affected the airline’s competitive posture.\textsuperscript{450}

The defendant also argued that even if the plaintiff’s tort claims were not preempted, any claims for punitive damages must be dismissed. The court denied the motion, however, as a consequence of its earlier finding that the plaintiff’s claims were not clearly related to the provision of airline services. In dictum, the court suggested that if the plaintiff’s claims were so related, “both her tort claims and her claim for punitive damages would be preempted.”\textsuperscript{451}

\textsuperscript{445} See id. at 247-48.
\textsuperscript{446} See id. at 247, 249.
\textsuperscript{447} See id. at 252.
\textsuperscript{448} See id. at 250 (relying on Rombom v. United Air Lines, Inc., 867 F. Supp. 214, 221 (S.D.N.Y. 1994)).
\textsuperscript{449} See id. at 250-51.
\textsuperscript{450} See id. at 251.
\textsuperscript{451} Id. at 252 n.5 (citing Travel All Over The World, Inc. v. Saudi Arabia, 73 F.3d 1423 (7th Cir. 1996) (denying recovery for punitive damages for breach of private contract for airline services because punitive damages are state law addition to a private contract or bargain)).
Similarly, in *Rivera v. Delta Air Lines, Inc.*, the United States District Court for the Eastern District of Pennsylvania considered, among other things, whether the ADA or the Air Carriers Access Act (ACAA) preempted the plaintiff’s state law negligence claim against defendant Delta Air Lines, Inc. In *Rivera* the plaintiffs, Rivera, Gambrell, and Jewell purchased tickets for a Delta flight from Philadelphia to Atlanta. The plaintiffs alleged that at the time they purchased their tickets, they each had a physical condition that required them to use a wheelchair. They requested Delta to provide each of them with a wheelchair in order to board the plane. Rivera claimed that she suffered physical injuries when she tripped on a piece of metal in Delta’s terminal area, and each plaintiff asserted a claim against the City of Philadelphia for violations of the Americans With Disabilities Act, against Delta under the ACAA, and Rivera asserted a state law negligence claim against both defendants.

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453 The ACAA, 49 U.S.C. § 41705 (1994), provides that airlines may not discriminate against certain disabled individuals on the grounds listed therein.
455 See id. at *2.
456 Gambrell and Jewell did not assert any injuries. See id.
457 42 U.S.C. §§ 12131-213 (1994). The court granted the City’s Federal Rule of Civil Procedure 12(b)(6) motion to dismiss the claims against it under the Americans With Disabilities Act (the Disabilities Act) and 42 U.S.C. § 1983. See *Rivera*, 197 U.S. Dist. LEXIS 14989, at *6. The court reasoned that, under the Disabilities Act, the City did not maintain a duty to provide the plaintiffs with wheelchairs, the plaintiffs did not allege that the City had any involvement in, or awareness of, Delta’s policies or procedures with respect to requests for wheelchairs, and the City met its duty under the Disabilities Act to provide an accessible facility. See id. at *4-6. Consequently, the court also dismissed the plaintiffs’ § 1983 claim against the City, as it was predicated on the Disabilities Act claim. See id. at *6. Added to the unusual facts of this case is the fact that it involved the interpretation of two statutes, each commonly referred to by their respective specialty practitioners as the “ADA.”
458 Delta sought summary judgment on Jewell’s ACAA claim, arguing that she was not an individual with a disability entitled to protection under the ACAA. See id. at *21. The court denied Delta’s motion, finding that Jewell provided sufficient evidence to allow a jury to conclude that her physical impairment, rheumatoid arthritis, substantially limited her in the major life activity of walking, under 49 U.S.C. § 41705 (1994), as interpreted by 29 C.F.R. § 1620.2(j)(1) (1996). See *Rivera*, 1997 U.S. Dist. LEXIS 14989, at *23-26.
459 See id. at *2-3. The plaintiffs also asserted a punitive damages claim under the ACAA. See id. at *18. The court noted that whether punitive damages were available under the ACAA was “unclear” and reserved ruling on that issue, stating that “[i]f the Plaintiffs establish a factual basis for their [ACAA] claim...the court will then decide if the statute allows for recovery of punitive damages.” See id. at *19.
The court concluded that the ADA did not preempt Rivera’s state law negligence claim. The court first noted that Congress did not intend to shield airlines from common law negligence claims and that cases reaching the opposite conclusion focused too narrowly on the ADA’s “ambiguous language.” Second, the court reasoned that “the proper focus is on whether the state law action addresses matters about which airlines compete” and that a “suit for damages arising from the tortious conduct of an airline does not impede the free market competition of air carriers.” Third, the court found support in the limited meaning given to the term “services” by certain defunct CAB regulations, which termed “services” as including, for example, “bumping . . . , segregation of smoking passengers,” and the provision of “headsets, alcoholic beverages, [and] entertainment.” Fourth, the court found that while states may not regulate “services” in a way that affects airline competition, states may require airlines to exercise ordinary care. Finally, the court deduced that Congress did not intend to preempt state law negligence claims because it did not include the term “safety,” or a similar term, in the ADA’s preemption clause.

The court also concluded that the ACAA did not preempt the plaintiffs’ state law negligence claim. The court reasoned that the ADA’s preemption clause applies to the ACAA, and thus, all of the reasons that the ADA did not preempt the plaintiffs’ negligence claim dictate that the ACAA did not preempt the claim either.

3. Certain State Claims Not Preempted, Others Preempted

In Gee v. Southwest Airlines, consolidated on appeal for argument, several plaintiffs “sought damages against various airlines based on in-flight events ranging from loathsome behavior by fellow passengers to objects dropping on them from overhead bins.” For example, in Gee, the plaintiffs brought tort actions in a California state court against the carrier for its contribution

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460 See id. at *17.
461 See id. at *13.
462 Id. at *13-14.
463 Id. at *14.
464 See id.
465 See id. at *15.
466 See id. at *17-18.
467 See id. at *18.
468 110 F.3d 1400, 1402 (9th Cir. 1997), cert. denied, 118 S. Ct. 301 (1997).
to harassment perpetrated by fellow passengers. The action was removed to the United States District Court for the Northern District of California.\footnote{See id. at 1403.} In addition, in \textit{Gadbury v. Delta Airlines}, the plaintiff brought a state tort action in Oregon state court against the carrier for injuries sustained when a service cart swung open and struck him in the knee.\footnote{See id.} This case was removed to the United States District Court for the District of Oregon.\footnote{See id.} Further, in \textit{Rowley v. American Airlines}, a paralyzed plaintiff brought state tort actions in the United States District Court for the District of Oregon for injuries sustained when the carrier failed to provide her with an aisle seat, return her scooter to the door of the airplane, or reassemble her scooter after the carrier had disassembled it for stowage.\footnote{See id.} Finally, in \textit{Costa v. American Airlines}, the plaintiff brought state claims in California state court against the carrier for injuries sustained when another passenger opened the overhead bin, and a suitcase fell on the plaintiff's head.\footnote{See id.} That action was removed to the United States District Court for the Central District of California.\footnote{See id.}

In order to resolve whether the plaintiffs' claims were preempted by the ADA, the court crafted a distinction between actions of an airline relating to "services," which the court found were preempted by the ADA, and actions relating to "operation and maintenance" of an aircraft, which the court found were not preempted by the ADA.\footnote{See id.} In creating this distinction, the court reasoned that claims "relating to" "services" were clearly preempted by the language of section 1305(a)(1), while section 1371(q) demonstrated Congressional acceptance of state law claims related to the "operation and maintenance" of an air-

\begin{itemize}
\item \footnote{See id. at 1403.}
\item \footnote{See id.}
\item \footnote{See id.}
\item \footnote{See id. Rowley was able to bring the action in federal court because she also brought compensatory and punitive damage claims under the ACAA. See id. The court below allowed Rowley's compensatory damage claims and the jury found the carrier liable under the ACAA, but granted Rowley zero compensatory damages. See id. On appeal, as to Rowley's ACAA punitive damage claim, the court concluded that, even if the ACAA allowed for the recovery of punitive damages, Rowley did not allege the type of wanton and malicious conduct that is required to recover punitive damages. See id. at 1408.}
\item \footnote{See id. at 1404.}
\item \footnote{See id.}
\item \footnote{See id. at 1406.}
\end{itemize}
craft, as that section requires airlines to maintain insurance to cover liabilities arising out of “operation and maintenance.”

The court concluded that the Gee (passenger harassment) and Rowley (mishandling of transportation needs of a disabled passenger) state tort claims were preempted by the ADA.\textsuperscript{476} The court reasoned that those claims were preempted because they “related to” “services.”\textsuperscript{477} Conversely, the court concluded that the Gadbury (injury from service cart) and Costa (overhead bin injury) claims were not preempted by the ADA.\textsuperscript{478} The court reasoned that their state law claims related, at least in part, to the “operation and maintenance” of the aircraft and, invoking the presumption against preemption absent express Congressional intent to the contrary, held that the ADA did not explicitly preempt such claims.\textsuperscript{479}

B. LIABILITY OF CARRIERS FOR INTERFERENCE WITH CHILD CUSTODY

Where one parent maintains child custody and the other parent violates a custody order through use of an airline carrier, an issue arises as to whether, and to what extent, the carrier may be held liable for its contribution to the violation. For example, in Pittman v. Grayson, the plaintiff’s ex-wife violated a court order by boarding one of Icelandair’s international flights with their daughter, and the court considered whether Icelandair could be held liable for conspiracy to deprive the plaintiff of his right to custody.\textsuperscript{480}

\textsuperscript{476} See id. at 1406. In reaching this conclusion, the court adhered to Harris v. American Airlines, Inc., 55 F.3d 1472 (9th Cir. 1995), which held that the ADA preempted the plaintiff’s state tort law claims alleging that the carrier intentionally inflicted emotional distress and negligently continued to serve an inebriated passenger who harassed her, because they “related to” the provision of “services.” See Gee, 110 F.3d at 1404, 1406. Even though the court adhered to Harris, it criticized the decision as no longer consonant with Wolens, stating that Wolens “significantly backtracks from the expansive language of Morales.” Id. at 1405. According to the court, Wolens suggested that Morales should not be so broadly construed as to preempt personal injury negligence claims brought under state law. See id.

\textsuperscript{477} See id.

\textsuperscript{478} See id. at 1406-08. However, to the extent that Costa based his claim on the California Civil Code, the court concluded that the ADA preempted his claim. Thus, the court noted that, on remand, the lower court should evaluate Costa’s tort claims under the common law standard of care. See id. at 1408.

\textsuperscript{479} See id. at 1407-08.

\textsuperscript{480} No. 93 Civ. 3974, 1997 U.S. Dist. LEXIS 9287, at *1 (S.D.N.Y. July 2, 1997).
In *Pittman*, the plaintiff had obtained a court order prohibiting his ex-wife from removing their daughter from Florida and telephoned the defendant carrier to inquire into whether his ex-wife had a reservation for a flight to Iceland and to inform the carrier of his suspicion that his ex-wife planned to take their daughter to Iceland on one of its flights. In violation of the court order and consonant with the plaintiff's suspicions, the plaintiff's ex-wife and daughter boarded one of the defendant's flights to Iceland. The carrier allowed the pair to board the flight, despite the fact that the names on their tickets did not match the names on their passports, and the ticket agent also made false entries on the weight and balance code to make it appear that the party traveling consisted of a male, a female, and a child, rather than a female and two children.

The court found, first, that Icelandair was entitled to a new trial, at a minimum, because the court charged the jury in error. The court noted that the trial court charged the jury as follows: "[I]f an airline has actual notice that there is a court order prohibiting the parent from transporting the child to the place that is the plane's destination, it would be wrongful for the airline to transport the child." The court reasoned that this charge was error because the corollary to the charge, that an airline maintains a right to deny any individual the right to travel because of a suspicion that there may be some court order prohibiting that travel, violates not only the principle that a common carrier is bound to receive all proper persons for carriage but also the spirit of the fundamental constitutional right to travel.

Second, the court found that the evidence was insufficient to justify imposing liability on Icelandair for its role in transporting the plaintiff's daughter and granted Icelandair's motion for a judgment as a matter of law. Recognizing the existence of the tort of interference with parental custody rights and the fact that those who aid a parent in removing a child from the country in...
order to frustrate the other parent's right to custody may also be liable to the injured parent, the court delineated that a plaintiff alleging such a tort must establish (1) that the defendant was aware of the wrongful nature of the fleeing parent's conduct and (2) that the defendant performed some act to further that unlawful purpose.\textsuperscript{489} The court reasoned that, while the ticket agent may have been aware that the plaintiff's ex-wife was fleeing the country, the evidence was insufficient to establish that the agent knew that she was fleeing in order to deprive her ex-husband of his custody rights.\textsuperscript{490}

Similarly, in \textit{Hyatt v. Trans World Airlines, Inc.},\textsuperscript{491} the court considered whether Trans World Airlines, Inc. (TWA) was liable for failure to comply with an "Unaccompanied Minor Child Care Service Request" (the form) and for releasing the plaintiff's minor children to the custody of their father, as opposed to the custody of their grandfather, as the mother had requested in the form.\textsuperscript{492} In \textit{Hyatt}, the children were scheduled to visit their father during the Christmas break consistent with a divorce decree modification that granted him custody during that time.\textsuperscript{493} However, the mother changed the flight plans so that the children would arrive two days early and completed the form, requesting that TWA release the children into the custody of their grandfather at the termination of the flight.\textsuperscript{494} The father, having learned of the change in plans, greeted the flight along with his new wife and two police officers, and the police directed the grandfather to a waiting area while remanding the children to the father's custody.\textsuperscript{495}

The mother and grandfather (and, in certain causes of action, the mother on behalf of the children, collectively "the plaintiffs") brought state law claims for compensatory and, where applicable, punitive damages against (1) TWA, for fraud and breach of contract, (2) the new wife, for tortious interference with the mother's contract with TWA and intentional infliction of emotional distress, (3) the police, for tortious interference with the mother's contract with TWA and the false imprisonment of the children and grandfather, and (4) the City of St.

\textsuperscript{489} See \textit{id.} at *9-11.
\textsuperscript{490} See \textit{id.} at *12-16.
\textsuperscript{491} 943 S.W.2d 292 (Mo. Ct. App. 1997).
\textsuperscript{492} See \textit{id.} at 292.
\textsuperscript{493} \textit{Id.} at 294.
\textsuperscript{494} See \textit{id.}.
\textsuperscript{495} See \textit{id.}
Louis, as the employer of the police, for the false imprisonment of the children and the grandfather.\textsuperscript{496}

The court summarily disposed of all of the plaintiffs' claims.\textsuperscript{497} First, as to the plaintiffs' fraud claim, the court held that the plaintiffs' allegations were not sufficient to support a cause of action for fraud because TWA's representations concerning the identity of the person to whom it intended to release the children were not false at the time that they were made.\textsuperscript{498} Second, as to the plaintiffs' claim for breach of contract, the court found that no contract existed between the mother and TWA because the father purchased the children's tickets, and, although the mother paid fifty dollars to change the date of departure, she did not allege in the trial court that this additional charge created a separate contract between her and TWA.\textsuperscript{499} Third, as to the plaintiffs' claims for tortious interference, the court reasoned that, as no contract existed between the mother and TWA, no one could have tortiously interfered with such a contract.\textsuperscript{500} Fourth, as to the plaintiffs' claim for intentional infliction of emotional distress, the court stated that the plaintiffs failed to plead that the new wife's conduct in taking the children from the airport to a place unknown to the plaintiffs was "extreme and outrageous," an essential element of such a cause of action.\textsuperscript{501} Finally, as to the plaintiffs' claims for false imprisonment, the court held that there was no evidence that the grandfather was not free to leave the waiting area, and the police were legally justified in remanding the children to the father's custody based upon the divorce decree modification.\textsuperscript{502} Moreover, the City of St. Louis was not liable under respondeat superior because the police were not liable.\textsuperscript{503}

\textbf{C. AIRLINE "PRODUCTS LIABILITY"}

The court in Silva v. American Airlines, Inc., discussed the potential liability of an airline under the products liability law of Puerto Rico.\textsuperscript{504} In Silva, the United States District Court for the

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\item[496] See id. at 294-95.
\item[497] See id. at 299.
\item[498] See id. at 295-96.
\item[499] See id. at 296-97.
\item[500] See id. at 297-98.
\item[501] See id. at 298.
\item[502] See id. at 298-99.
\item[503] See id. at 299.
\item[504] 960 F. Supp. 528 (D.P.R. 1997).
\end{itemize}
\end{footnotesize}
District of Puerto Rico considered whether the plaintiff presented sufficient evidence concerning her products liability and general negligence claims to survive a motion for summary judgment made by the defendant.\textsuperscript{505} The plaintiff was injured when, after sitting in seat 29F, a seat located immediately behind one of the emergency exits and providing extra leg room, she stood up at the conclusion of the flight to deplane and hit her head on the overhead bin located over her seat.\textsuperscript{506} In support of her claim that the overhead bin was defectively designed, defectively manufactured, or lacked a necessary warning, the plaintiff introduced the testimony of a civil engineer and a former flight attendant, as expert witnesses under Federal Rule of Evidence 702 (Rule 702).\textsuperscript{507}

The court first concluded that neither witness qualified as an expert witness under Rule 702 and the test enunciated by the Supreme Court in \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc}.\textsuperscript{508} The court reasoned that the civil engineer had never served as an expert witness with regard to aircraft design, had no experience in the design, manufacture, or operation of an aircraft, and, even if he were qualified to testify regarding defective design, his opinions on aircraft safety measures and hazards were purely speculative, as they lacked a scientific basis.\textsuperscript{509} In addition, the court noted that "[t]o qualify to provide expert testimony in this case, an expert must have specifically worked with, tested or in some fashion studied aircraft interior safety hazards and warnings."\textsuperscript{510} The court found that the former flight attendant had neither specialized knowledge nor experience in

\begin{itemize}
\item \textsuperscript{505} \textit{Id}. at 529.
\item \textsuperscript{506} \textit{See id}. at 530.
\item \textsuperscript{507} \textit{See id}. at 530-32, 533. Rule 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." \textit{Fed}. \textit{R. Evid}. 702.
\item \textsuperscript{508} \textit{See id}. at 531-32; \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc}. , 509 U.S. 579 (1993). The following requirements are necessary to qualify an expert witness: (1) the expert must be qualified to testify as an expert by knowledge, skill, experience, training, or education; (2) the expert's testimony must concern scientific, technical, or other specialized knowledge; and (3) the proposed testimony must assist the trier of fact to understand the evidence or to determine a fact in issue. \textit{See Silva}, 960 F. Supp. at 530.
\item \textsuperscript{509} \textit{See id}. at 531.
\item \textsuperscript{510} \textit{Id}. 
\end{itemize}
the design, manufacture, or operation of an aircraft, and found that his testimony was purely speculative.\textsuperscript{511}

Second, the court ruled that the plaintiff did not provide sufficient evidence to demonstrate a material issue as to whether the defendant violated Puerto Rico's products liability law and thus granted the defendant's summary judgment motion.\textsuperscript{512} The court noted that, under a defective design theory, a plaintiff must show that (1) the product failed to behave in a safe manner as an ordinary user would have expected in its intended or foreseeable use; or (2) the design of the product was the proximate cause of the damages, and the defendant failed to prove that, in the balance of interests, that the benefits of the design outweighed the inherent risks of the product.\textsuperscript{513} In addition, the court noted that a manufacturing defect is one in which the product fails to match the average quality of like products.\textsuperscript{514} Furthermore, the court stated that a defendant provides inadequate warning where the defendant, knowing of a danger and a need to warn in order to assure the safest use of its product, including any use reasonably foreseen by the defendant, fails to provide adequate warnings or instructions in light of that danger.\textsuperscript{515} The court reasoned that the plaintiff did not present any competent scientific analysis of the overhead bin, the seating arrangement, or how the bin and seat could be better designed. In addition, the court noted that the bins were “low-hanging” for easy access and the court put responsibility on the passengers to avoid hitting the “obvious[ly]” placed bins.\textsuperscript{516} As the court stated, “American Airlines is not liable for damages caused

\textsuperscript{511} See id. at 532. Although the plaintiff had not presented the former flight attendant as a lay witness, the court noted that the former flight attendant could have qualified as such because his opinion regarding the frequency with which passengers hit their head on the overhead bin above seat 29F was well-founded on personal knowledge and capable of cross-examination. See id. at 551-32. In so noting, the court listed the following requirements necessary to admit the opinion testimony of a lay person: (1) the witness must have personal knowledge of the facts from which the opinion is derived; (2) there must be a rational connection between the opinion and the facts upon which it is based; and (3) the opinion must be helpful in understanding the testimony or determining a fact in issue. See id. at 531 (citing Swajian v. General Motors Corp., 916 F.2d 31, 36 (1st Cir. 1990)).

\textsuperscript{512} See id. at 534.

\textsuperscript{513} See id.

\textsuperscript{514} See id.

\textsuperscript{515} See id. at 533.

\textsuperscript{516} Id.
by a structure that is easily perceived at a glance every time one boards an airplane."\textsuperscript{517}

\section*{D. Loss of Baggage}

The proper measure of damages for the loss of personal property is not always clear. The following case clarifies the proper measure under Tennessee law. In \textit{Crawford v. Delta Airlines, Inc.},\textsuperscript{518} the Court of Appeals of Tennessee considered the measure of damages for lost baggage. The plaintiff traveled from Ft. Lauderdale to Atlanta on Trans World Airlines (TWA) and from Atlanta to Memphis on Delta and checked four bags with TWA in Ft. Lauderdale. The plaintiff’s bags never arrived in Memphis, and the plaintiff submitted a lost baggage claim form to Delta. When Delta did not reimburse the plaintiff in the full amount of her claim, she brought a claim for loss of personal property in the Circuit Court of Shelby County and argued that her damages were the “cost new” of the four pieces of luggage and their contents.\textsuperscript{519} In the trial court, Delta moved for a directed verdict on the ground that the plaintiff failed to prove her damages.\textsuperscript{520} However, the court denied Delta’s motion, and the jury awarded the plaintiff the entire “cost new” of her lost property.\textsuperscript{521} On appeal, Delta contended that the trial court should have entered a directed verdict in its favor as to damages.\textsuperscript{522}

The appeals court noted that, while the plaintiff presented evidence of the “cost new” of the lost items, the proper measure of damages for lost property was the “actual value” or “value to the owner” of the property, taking into account the original cost, the cost of replacement, the condition of the goods, the use to

\textsuperscript{517} Id. at 534.
\textsuperscript{519} See id. at *2-3.
\textsuperscript{520} See id. at *2. In the trial court, Delta also argued that its liability, if any, was limited to $1250, as established by domestic tariff rules adopted by the airlines and incorporated by reference in its tickets. See id. at *1.
\textsuperscript{521} See id. at *2, 9. The jury also found that the plaintiff did not receive adequate notice of the limitation of liability. See id. at *2.
\textsuperscript{522} See id. at *2. Delta also argued, on appeal, that the trial court erred (1) in holding as a matter of law that TWA was acting as an agent for Delta and (2) in refusing to limit Delta’s liability to the sum of $1250, as provided by the tariff. As the court dismissed the plaintiff’s suit on the ground that the trial court should have directed a verdict in Delta’s favor as to damages, the court did not resolve these additional issues. See id.
which they were being put, and all other relevant facts. The appeals court agreed that the trial court should have directed a verdict in Delta's favor as to damages because the plaintiff did not present evidence regarding any of these factors and dismissed the plaintiff's complaint.

E. LIABILITY OF MAINTENANCE SHOPS AND MECHANICS

In Fant v. Champion Aviation, Inc., the Supreme Court of Alabama discussed the liability of maintenance shops and mechanics for the negligent repair of an airplane. In Fant, Champion Aviation, Inc. (Champion) sought out the plaintiff's business, and the plaintiff hired Champion to remove, rebuild, and replace his airplane engine. The parties agreed that a certain experienced mechanic, who was also an authorized inspector, would perform the work. However, Champion hired another less experienced mechanic to perform the work, and that mechanic improperly reused fiber locking nuts to attach the propeller and failed to properly adjust the torque on the propeller bolts. As a result, all but one of the bolts sheared off during a flight, causing substantial damage to the airplane. The plaintiff brought claims of negligence, wantonness, fraud, and breach of contract against Champion, alleging that Champion failed to disclose that it had hired another less experienced mechanic to perform the work and that the mechanic was negligent in conducting the repairs. The jury reached a verdict in favor of the plaintiff, and the Jefferson Circuit Court granted the defendant's motion for a new trial and denied its motion for a judgment notwithstanding the verdict (JNOV). Both parties appealed.

The Alabama Supreme Court reversed the trial court's grant of a new trial and affirmed the trial court's denial of the JNOV motion, thereby affirming the jury's verdict. First, the court found that there was sufficient evidence from which the jury could have found that Champion maintained a duty to disclose that it had substituted an unsupervised inexperienced mechanic for an experienced one. The court reasoned that the plaintiff

523 See id. at *8-9.
524 See id. The court also taxed the costs of the appeal to the plaintiff. See id. at *9.
525 689 So. 2d 32, 32 (Ala. 1997).
526 Id. at 34.
527 See id.
528 See id. at 37.
relied upon the defendant to repair his airplane correctly and that the defendant knew the repairman was inexperienced. Second, the court ruled that the jury could have found a breach of contract, reasoning that although the plaintiff never paid the contract price after the accident, the parties exchanged promises and thereby established a contract. Third, the court concluded that the jury could have found wantonness and fraud because there was substantial evidence that the defendant knew the repairman was inexperienced, that the accident was caused by a loose propeller, and that the repairman failed to disclose that he improperly reused fiber locking nuts to attach the propeller.

V. LIABILITY OF MANUFACTURERS AND SUPPLIERS

In addition to the general cases immediately following, recent cases in the broad area of manufacturers' and suppliers' liability can be divided into three broad categories. The first category concerns the General Aviation Revitalization Act's statute of repose for certain claims relating to general aviation aircraft. The government contractor's defense comprises the second category, as courts continue to struggle with defining the elements of this defense and setting its limits. The third group of cases revisits the economic loss doctrine and its application to the complex products that aviation manufacturers build and service.

A. GENERAL

The preemptive effect of airworthiness regulations was one issue addressed by the court in In re Aircrash Disaster Near Roselawn, Indiana on October 31, 1994. The case, consolidated by the Judicial Panel on Multidistrict Litigation, concerns the events surrounding the crash of American Eagle Flight 4184. In a motion for summary judgment, the airline defendants, including various AMR entities, American Airlines, Inc. and Simmons Airlines, Inc., argued that Federal Aviation Administration (FAA) airwor-
thiness standards preempted state law product defect claims. The defendants also argued that the regulatory scheme is extensive and pervasive. Finally, the defendants claimed that in deciding to purchase the plane they relied on the airworthiness certificate issued by the FAA. The court summarily dismissed the argument, citing United States v. S.A. Empresa de Viacao Aerea Rio Grandense (VARIG Airlines).

The Alabama Supreme Court discussed the level of proof required to show “wanton misconduct” under the Alabama Extended Manufacturer’s Liability Doctrine (AEMLD) in Cessna Aircraft Co. v. Trzcinski. A Cessna Aircraft Co. (Cessna) crop duster, piloted by the plaintiff, crashed after coming in contact with power lines. The shoulder harness failed at the time of impact at a point where two shoulder straps joined a retracting strap that was connected to an inertial reel-type locking mechanism. The plaintiff suffered permanent blindness as a result of the crash. Investigation showed that the shoulder harness was defective in that it lacked two rows of stitching where the straps overlapped. Because of that finding, Cessna admitted liability under the AEMLD. The case went to trial solely on the issues of the plaintiff’s compensatory damages and the availability of punitive damages.

The touchstone of punitive damages in Alabama is “wantonness,” and the standard of proof is “clear and convincing evidence.” The court noted that wantonness is not merely a higher degree of negligence; rather, it is a “qualitatively different tort concept of actionable culpability” that requires some proof of conscious culpability. “Clear and convincing evidence” is defined by statute in Alabama as “[e]vidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion.”

Notably, the plaintiff offered no proof that Cessna was aware that its manufacturing process would create defective harnesses

533 See id. at *6-7.
534 467 U.S. 797 (1984) (holding that the United States is not liable, by operation of the discretionary function exception, under the Federal Tort Claims Act, for the negligence of the FAA in certificating an aircraft type).
535 682 So. 2d 17 (Ala. 1996).
536 Id. at 19 (citing Ala. Code § 6-11-20 (1975)).
537 Id. at 20.
538 Id. at 19 (citing Ala. Code § 6-11-20(b)(4) (1975)).
or that it failed to undertake safety engineering with respect to the shoulder harness. In fact, the evidence showed that Cessna tested its harness to a standard in excess of that required by the FAA. Finally, the FAA had previously issued a “production certificate to Cessna allowing them to produce the shoulder harnesses according to the manner in which the defective harness had been produced.” While this evidence did not impact Cessna’s liability for compensatory damages caused by the defective harness, it did persuade the Alabama Supreme Court to reverse the trial court’s denial of Cessna’s motion for judgment as a matter of law on the issue of punitive damages.

The reasonableness of the design of a helicopter seatbelt was at issue in Pickett v. RTS Helicopter. The plaintiff’s decedent, a helicopter pilot, died in an arguably survivable helicopter accident. The plaintiff alleged that the pilot would have survived the accident had his seatbelt not failed. When the belt failed, the decedent was ejected from the helicopter into the rotor blades.

The crash of the helicopter had been caused by a loss of cyclic control immediately after takeoff due to alleged inadequate maintenance. The seatbelt failed because a “take-up bar” had been installed backward, allowing the belt to slip and come undone during the accident. The seatbelt had been originally manufactured by Pacific Scientific Company (PSC), and the plaintiff alleged that PSC’s design was defective because it permitted the belt to be disassembled and then reassembled with the take-up bar in the reverse position. Better designs, the plaintiff alleged, could not be reassembled backward or could not be disassembled at all. There was no evidence of incorrect original manufacture, and the take-up bar had been disassembled and serviced prior to the accident. PSC had issued warnings regarding the dangers of this improper installation. It was not disputed that the owner and operator of the helicopter had received these warnings. The district court granted summary

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539 Id. at 22.

540 Although the court does not explicitly refer to its standard of review for a denial of a motion for judgment notwithstanding the verdict, or “JNOV,” the court describes its careful review of “all of the evidence pertaining to the wantonness claim.” Id. at 22. This language indicates a de novo standard of review, as is common for issues of law.

541 128 F.3d 925 (5th Cir. 1997).
judgment in favor of helicopter owner RTS and the belt manufacturer PSC under the Louisiana Product Liability Act.\textsuperscript{542}

PSC's design of the belt was held not to have been a proximate cause of the accident. Rather, the proximate and intervening cause was held to have been the negligent reassembly of the take-up bar. The actual misassembly, the court ruled, broke the chain of causation from the design of the belt and precluded any finding of liability against PSC.\textsuperscript{543} With regard to RTS, the court held that its lack of any actual custody and control over the helicopter precluded liability for the accident.\textsuperscript{544}

B. GENERAL AVIATION REVITALIZATION ACT

The General Aviation Revitalization Act of 1994 (GARA) establishes a federal statute of repose.\textsuperscript{545} Whereas a statute of limitation operates to limit, primarily for reasons of fairness to defendants and judicial economy, the number of years following an injury during which suit may be brought, a statute of repose limits the availability of tort actions against a manufacturer after a specified number of years has passed since the product's manufacture, sale, or delivery. Some of the policy considerations that support a statute of repose are subsidizing manufacturing industries, fairness to manufacturers, and facilitating markets for the sale of used goods. GARA provides an eighteen-year statute of repose. If eighteen years have passed since the manufacture or first delivery of the product, GARA preempts any state law that would permit a tort action against the manufacturer of a general aviation aircraft. GARA does contain some limited exceptions, such as when the manufacturer has misrepresented safety information to the Federal Aviation Administration, when the claimant is a passenger for purpose of receiving emergency medical treatment, when the claimant is not aboard the aircraft, and when a written warranty applies. GARA provides a “rolling,” rather than an absolute, statute of repose. Specifically, the eighteen-year period begins to run anew for a particular component or part, as that part is replaced or added to the aircraft.

The court in \textit{Wright v. Bond-Air, Ltd.} held that GARA does not so completely preempt state law as to support removal to federal


\textsuperscript{545} See \textit{Picket}, 128 F.3d at 929.

\textsuperscript{544} See \textit{id.} at 933.

The underlying accident in the case occurred on February 5, 1995, when the plaintiff's husband died in the crash of a twin engine Model 310L aircraft he was piloting. The plane had been manufactured and sold by Cessna in 1967.

The plaintiff sued Cessna in state court alleging negligence and breach of warranty claims. Cessna removed the case to federal court on the basis that the claims arose under federal law. The federal court then granted the plaintiff's motion to remand, finding that GARA does not create a federal cause of action, GARA does not completely occupy the field of negligence law, and GARA does not completely preempt state law negligence and warranty claims.

The court analyzed the removal by applying the "well-pleaded complaint rule." The first inquiry is whether a federal law creates the cause of action. If so, then federal question jurisdiction exists. If not, then the court must determine whether some substantial question of federal law is necessarily involved in resolving the plaintiff's state law claims. In Wright, Cessna conceded that GARA does not create a cause of action, leaving the "substantial federal question" issue as the only ground for removal.

In determining whether a "substantial federal question" existed, the Wright court applied the test formulated by the Supreme Court in Merrell Dow Pharmaceuticals, Inc. v. Thompson. Specifically, courts required to determine whether a fed-
eral issue is substantial enough to confer federal question jurisdiction should consider "the nature of the federal interest at stake, be sensitive with regard to judgments about congressional intent, judicial power, and the federal system, and be cognizant of the need for prudence and restraint in the jurisdictional inquiry." After completing this analysis, the court rejected the defendant's argument that a review by a federal trial court was the best way to preserve the strong federal interest in uniformity. In *Merrell Dow*, the Supreme Court recognized that its power of review over state court decisions on federal issues provided sufficient oversight.

In analyzing the first factor, the nature of the federal interest, the *Wright* court focused on three issues. GARA does not create a federal cause of action and only serves to preempt a narrow class of state statutes of limitation and repose. It does not preempt a state's substantive negligence or warranty law. Indeed, the court found no support for the notion that Congress intended for federal courts to develop a body of federal common law.

The applicability of GARA's statute of repose to United States claims of defective design or marketing was considered by the United States District Court for the Southern District of Texas in *Alter v. Bell Helicopter Textron, Inc.* In *Alter*, two people died in the crash of a Bell 206 helicopter in Israel on November 24, 1993. In support of its motion for summary judgment, Bell submitted proof that the helicopter was manufactured and delivered by August 30, 1975. Because of the proof submitted by Bell that more than eighteen years had passed between the date the aircraft was first delivered and the date of the accident, the court held that GARA's statute of repose was triggered and the plaintiff's claims for negligent design, manufacture, and testing were barred.

The plaintiffs also asserted a failure to warn claim. The helicopter was accompanied by maintenance manuals, which were reissued and revised approximately twice per year since the sale of the helicopter. The plaintiffs argued that each new manual constituted a separate "component part" for which a new eighteen-year period must pass before GARA will operate to bar a

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552 Wright, 930 F. Supp. at 304 (internal quotation marks omitted).
553 See id.
554 See id. at 305.
556 See id. at 538, 541-42.
claim. The district court followed the Tenth Circuit's decision in *Alexander v. Beech Aircraft Corp.* and held that the manual was not a "part" "originally in or added to" the helicopter. Accordingly, the court held that revisions of such manuals are not replacement parts under GARA. The court also reviewed federal decisions from other jurisdictions, supporting its holding, interpreting various state statutes of repose.

The *Alter* court also denied the plaintiffs' second argument that even if GARA denied recovery for any design flaw in the aircraft, the failure of the operator's manual to warn of such a design flaw was not barred by GARA. The plaintiffs apparently never explicitly made the claim that GARA does not bar actions for failure to warn because the court never addressed that issue. Instead, the court viewed the failure to warn claim as mere artful pleading, phrased in such a way as to try to bring it within the statutory exception for replacement parts. The court held that the two claims were essentially identical, and the plaintiff could not salvage the failure to warn claim simply by articulating it in an apparently non-preempted manner.

Finally, the plaintiffs questioned the applicability of GARA to accidents that occur in a foreign country, citing cases such as *Boureslan v. ARAMCO, Arabian American Oil Co.* The court distinguished those cases by noting that they refer to statutes that create claims whereas GARA eliminates certain claims. The court opined that GARA did not seem to have been designed to have a different effect solely on the basis of where an accident occurred.

**C. GOVERNMENT CONTRACTOR DEFENSE**

Although not all of the cases discussed below are aviation cases per se, they are nevertheless relevant to the aviation practitioner because of their treatment of the applicability of the government contractor defense in failure to warn cases and the

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557 952 F.2d 1215 (10th Cir. 1991) (holding that operator handbook was not a replacement part under GARA).
558 Alter, 944 F. Supp. at 538.
559 See id. at 538-40.
560 See id. at 541.
562 See *Alter*, 944 F. Supp. at 541.
uniqueness of certain issues, such as the availability of the defense where the United Nations is the governmental body.

The seminal case analyzing the military contractor defense is Boyle v. United Technologies Corp. In Boyle, the Supreme Court held that when certain conditions are satisfied, a government contractor could, in effect, share the immunity from suit enjoyed by the federal government. In order to avail itself of this immunity, the contractor must be controlled by the government to such an extent that the contractor functions primarily as the government’s instrument for manufacturing a product to specifications set by the government. The Supreme Court in Boyle established a three-pronged test to determine whether a contractor may avail itself of the government contractor defense in a case alleging defective design:

1) the United States approved reasonably precise specifications;
2) the equipment conformed to those specifications; and
3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Issues related to both the extent of the government contractor defense and available damages were addressed in Gray v. Lockheed Aeronautical Systems Co. The plaintiffs in Gray were the surviving relatives of three naval crew members who died after ejecting from a Lockheed S-3 Viking Aircraft on October 7, 1989. On that date, in the course of a carrier catapult launch, the aircraft suffered a hydraulic failure in one of two separate engine-driven hydraulic systems. The pilot was unable to recover from a banked turn, and the aircraft continued to roll toward an inverted position. Due to the low altitude, the ejection seat parachutes had insufficient time to deploy. All three crew members died in their ejection seats when the seats impacted the ocean at high speed.

When the first hydraulic system failed, all of the aircraft’s hydraulic functions, including the actuation of the flight control surfaces, were powered by the second of the two redundant hy-

564 Id. at 511-13.
565 Id. at 512.
566 125 F.3d 1371 (11th Cir. 1997).
567 The S-3 Viking is an antisubmarine aircraft capable of detecting submarines through various electronic devices and then engaging submarines with onboard weapons.
The ailerons, which control the aircraft’s longitudinal stability and provide the pilot with the ability to roll the aircraft, were designed so that in the event of hydraulic failure a manual back-up system would engage, giving the pilot a direct mechanical link-up with the ailerons. This shift from hydraulic to mechanical control is accomplished by an Emergency Flight Control System (EFCS). The EFCS was designed to engage when hydraulic pressure in the system dropped below 800 psi. At below 800 psi, a shut-off valve in the aileron servo should “trip,” reducing hydraulic pressure to the servo to zero psi, and causing springs to expand and “latch-up” a direct hydraulic linkage from the pilot’s control stick to the ailerons. The aileron servo had been manufactured by subcontractor Bertea Corporation.

The post-accident investigation of the servo suggested that the servo had begun to latch-up at 1400 psi, not the specified 800 psi. The pin that was supposed to move in and latch-up showed signs of wear that indicated it had been fluctuating in and out of the latch in the course of the latch-up process. Additionally, the pin and latch were found to be beyond the “.0001 tolerance” required by the specifications, a circumstance that the plaintiffs argued would slow the speed of latch-up.

The district court found that the above conditions caused the EFCS to “chatter” between the powered/hydraulic modes of operation and ultimately to cause “free-stick,” the situation in which the movements of the control stick in the cockpit had no effect on the position of the aileron. The servo failed to transition to manual mode, and the aileron remained frozen in a right roll position from which the pilot could not recover. This roll continued until the aircraft impacted the ocean. The district court ruled in favor of the plaintiffs, disallowing Lockheed’s government contractor defense under the Boyle test.568

The Eleventh Circuit addressed all three prongs of Boyle, notwithstanding the fact that the district court had never reached prong three, the manufacturer’s duty to warn. The applicable standard of review was abuse of discretion. With regard to factor one, the government’s approval of reasonably precise specifications, the Eleventh Circuit upheld the district court’s conclusion that the government had not provided reasonably

precise specifications to Lockheed. The government-approved specifications consisted of a general narrative description of the servo and the design requirements, such as automatic reversion to manual control in the event of a dual hydraulic failure. The Eleventh Circuit noted that the actual design process extended beyond these initial requirements to specific engineering analysis developed during actual production.

Although it apparently could have stopped with the first Boyle prong, the Eleventh Circuit also upheld the district court's ruling with respect to the second prong, compliance with precise specifications. A noteworthy aspect of the circuit court's analysis of the second prong is its implicit link to the first. The court noted that proof of compliance with specifications could consist of evidence that the military was "actively involved throughout the design, review, development and testing of the [equipment at issue]." This is not unlike a situation described in the analysis of the first Boyle prong where there is a "continuous back and forth" between the military and contractor. Finding no evidence of this continuous give and take, the circuit court affirmed the findings of the district court that Lockheed had not complied with the limited specification approved by the military because the servo did not meet the requirement that it revert to manual operation without a hazardous lag. Other identified failures to meet specifications were the failure of the pin and latch to meet design size tolerances and the higher-than-specified pressure at which the servo attempted to transition to manual operation.

Going yet one step further than the district court, the Eleventh Circuit undertook a brief analysis of the third Boyle prong, adequate warnings of dangers known to the manufacturer but not the government. The critical issue in this portion was the unwritten operational requirement that the control stick be

569 See id. at 1578.
570 See id. The Eleventh Circuit also held that, notwithstanding the subcontracting of the servo to Bertea, Lockheed nonetheless remained responsible for the design and testing of the servo. See id. at 1379.
571 See id.
572 Id. at 1378 (quoting In re Air Disaster at Ramstein Air Base, Germany on Aug. 29, 1990, 81 F.3d 570, 575 (5th Cir.), amended, 88 F.3d 340 (5th Cir.), cert. denied sub nom., Chase v. Lockheed Corp., 117 S. Ct. 583 (1996)).
573 See Gray, 125 F.3d at 1377-78 (quoting Harduvel v. General Dynamics Corp., 878 F.2d 1311, 1320 (11th Cir. 1989)).
574 See id. at 1379.
within sixty degrees of center for manual control to "latch-up." The Eleventh Circuit held that some affirmative warning was required to advise pilots that they must act affirmatively to engage the manual reversion system.575

A second issue before the circuit court was the available causes of action under the Death on the High Seas Act (DOHSA).576 The court affirmed the ruling that the plaintiff could bring a strict liability claim under DOHSA and that the plaintiffs had proved this claim. The court applied Section 402A of the Restatement (Second) of Torts and held that the chattering of the servo and the freeze of the ailerons in the right-bank position constituted an unreasonably dangerous condition. Because the design did not comply with contract requirements and certain components did not meet design specifications, the S-3 servo in the accident aircraft was held to be defective in both design and manufacture.577

The district court’s finding of negligence on the part of Lockheed was also affirmed. Lockheed’s subcontractor Bertea had developed the acceptance test protocol (ATP) for the S-3 aileron servo. Notwithstanding this division of labor, and presumably based upon Lockheed’s liability as the manufacturer of the finished product, Lockheed was held liable under a negligence theory for failing to develop an adequate ATP for the aileron servo.578

The Eleventh Circuit undertook an extensive analysis of the damages available to plaintiff under applicable law. They are summarized briefly below.

DOHSA Survival Damages. Acknowledging previous rulings by the Supreme Court to the effect that survival damages were not available under DOHSA, the Eleventh Circuit nonetheless held that these damages were available under general maritime law.579 Unlike Zicherman v. Korean Airlines,580 the issue faced did not relate to an award of loss of society damages to the decedent’s DOHSA beneficiaries. Rather, the Eleventh Circuit addressed the possible availability of damages based upon the pain and suffering of the decedent. The court viewed this claim as

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575 See id. at 1380.
577 See Gray, 125 F.3d at 1380.
578 Unlike the strict liability claims, the negligence claims were held to be available through general maritime law, not DOHSA. See Gray, 125 F.3d at 1379.
579 See Gray, 125 F.3d at 1381.
separate and distinct from that for wrongful death under DOHSA and focused on whether DOHSA precluded such a recovery.

The Eleventh Circuit in Gray first acknowledged that the Ninth and District of Columbia Circuits had ruled differently in cases that arose out of the downing of KAL 007. The Eleventh Circuit expressly rejected the holding of the D.C. Circuit in Dooley that the inclusion of a survival remedy in the contemporaneously enacted Jones Act evidenced an intention of Congress to exclude such a recovery from DOHSA. Turning to the wording of DOHSA and its legislative history, the court held that Congress had expressed no intention with regard to the availability of survival damages in a DOHSA case. The court in Gray ultimately sided with the First, Third, Fifth, and Eighth Circuits and recognized that a survival remedy "survived" under DOHSA and could be pursued under general maritime law. The Eleventh Circuit affirmed the damages awards of the district court.

Gauthe v. Asbestos Corp. is the first of four cases dealing with the applicability of the government contractor defense in failure to warn cases. The district court remanded a case that had been removed under the Federal Officer Removal Statute. The case involved a survival action based on the death of Earlven Gauthe as a result of exposure to asbestos while employed at a shipyard owned by Avondale Industries. The claims made by

581 The cases distinguished by the Eleventh Circuit were Saavedra v. Korean Air Lines Co., 93 F.3d 547 (9th Cir.), cert. denied, 117 S. Ct. 584 (1996) and Dooley v. Korean Air Lines Co., 117 F.3d 1477 (D.C. Cir. 1997), aff'd, 118 S. Ct. 1890 (1998) (both ruling that DOHSA effectively preempted claims for survival damages as an exclusive remedy for all damages related to a death on the high seas). See Gray, 125 F.3d at 1381.
583 See Gray, 125 F.3d at 1385.
585 The Eleventh Circuit remanded for the determination of the award of pre-judgment interest. Evidently, interest had not been awarded in the court below, but the record was unclear as to the basis for refusing it. Although generally available in a maritime case, the district court had the discretion to decline to make such an award if the application for interest had been untimely. See Gray, 125 F.3d at 1386.
the plaintiff included three variations of the failure to warn theory of liability. The plaintiff did not allege a design defect claim.

The defendants alleged that the government contractor defense applied to the case and served as a basis for removal under 28 U.S.C. § 1442 (1994). The Fifth Circuit recognizes the federal officer defense as a valid exception to the well-pleaded complaint rule. A person who can present a colorable government contractor defense and meets the other requirements for federal officer removal can thus remove a case.

The court applied the three-pronged test for federal officer removal formulated in Mesa v. California but only examined the third prong, the existence of a causal nexus between the plaintiffs' claims and the acts performed by the defendant under color of federal office. The court found no evidence that "the Government restricted or prohibited [the defendant's] ability to notify individuals of the presence of asbestos in the workplace." The court found that the defendant's freedom to provide warnings did not support its claim that the government contract prevented it from warning the plaintiffs' decedent. The court held that this freedom negated the causal nexus between the acts required by the government, of the defendant and the plaintiff's claims.

Finally, the court addressed whether the government contractor defense was colorable in this case. Boyle v. United Technologies, Inc., the case in which the Supreme Court recognized the government contractor defense, involved allegations of design defect, not failure to warn. The Wright court distinguished this case from Boyle on the basis of the Wright plaintiff's allegations of failure to warn claims only. With no discussion, the court simply opined that "stretching" the defense to include warning claims was "not indicated."

McCormick v. C.E. Thurston & Sons, Inc. is another government contractor defense case that resulted in a grant of the plaintiffs' motion to remand. Paul C. Cochran was a Navy officer who contracted fatal mesothelioma from exposure to asbestos during

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590 Id.
a long period of service aboard the U.S.S. *Nimitz*. The court remarked that the location of his exposure was not clear. The claims were brought in the circuit court for the City of Newport News under the Jones Act, the Death on the High Seas Act, and the general maritime law. The defendant removed the case to the Eastern District of Virginia under the Federal Officer Removal Statute.

While its preliminary analysis of the government contractor defense followed that in *Gauthe*, the *McCormick* court's discussion was barely longer. The court merely referenced a prior unpublished decision (from another case) of the Eastern District of Virginia from October, 1988. In that decision, the court held that "the government contractor defense is not available in 'failure to warn' cases." With that terse statement of the law, the court remanded the case to state court.

This next case contradicts the prior two by holding that failure to warn claims are subject to the government contractor defense and even expands the defense to encompass both service contracts and goods or services provided to the United Nations. In *Askir v. Brown & Root Services Corp.*, the plaintiff was the owner of a large compound (over one million square meters) in Mogadishu, Somalia that included offices, a hotel, restaurants, and other facilities. His property, along with property in several other locations, was occupied by elements of the United States military in December 1992 following their deployment to Mogadishu in support of Operation Provide Relief. The American troops then turned the facilities over to the United Nations on May 4, 1993, after the American forces transitioned control of the operation to the United Nations. The defendant Brown & Root performed contractual logistical services, including repairs and other services, for both the United States Army and the United Nations. In performing those services, Brown & Root occupied at least some portion of the plaintiff's property. The plaintiff alleged that the defendant, along with the United States and the United Nations, owed him for the rental value of the property during the time the property was occupied.

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598 *McCormick*, 977 F. Supp. at 402 (citation omitted).
600 See id. at *5-10.
Brown & Root argued that the plaintiff's claims were barred by application of the government contractor defense. The court analyzed the defense and focused on its historic relationship with the principle of sovereign immunity. The court then found that the defense applied not only to military procurement contracts but also to performance contracts. The issue then became whether the defense should be extended to include performance contracts with the United Nations.

Under the United Nations Convention, the international body has immunity from suit except where it has expressly waived immunity. The court held that reasons similar to those that supported the extension of the sovereign immunity umbrella to protect government contractors applied in the case of UN contractors. In this particular case, the court found the facts especially compelling because of the special province of sovereigns in carrying out military operations.

The court briefly applied the three prongs of the Boyle formulation of the defense to the facts of the case. The first prong, "reasonably precise specifications" from the government for the defendant's activities, and the second prong, action undertaken at the direction and control of the government, transfer easily to the performance context. The court recognized that the third prong, which requires the supplier to warn the government of all the dangers of which it was aware, did not apply to the performance contract in this case. The result would seem to establish an abbreviated test for analyzing the applicability of the government contractor defense to performance contracts: the first prong requires "reasonably precise specifications," and the second requires that the defendant acted under the direction and control of the governmental entity. With the increased use of civilian maintenance and other contractors in support of aviation-related operations, it will be interesting to see if this modified Boyle analysis is adopted elsewhere.

Failure to warn was treated more thoroughly in Yeroshefsky v. Unisys Corp., which further expanded the government contractor defense in the District of Maryland. The plaintiff's claims arose out of a repetitive stress injury that he claimed he suffered

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601 See id. at *16-17.
602 See id. at *18.
603 See id. at *19.
604 See id.
while operating the multi-positional letter sorting machine as an employee of the United States Postal Service.

First, the court determined that although the defense began as the “military contractor defense,” several courts had expanded the doctrine to include non-military contractors. In fact, the court noted that the Supreme Court based its recognition of the doctrine on the discretionary function exemption to the Federal Tort Claims Act.

Second, the court addressed the applicability of the defense to failure to warn claims. Finding no Fourth Circuit precedent on point, the court examined the positions of the other circuits, each of which applied different standards before the defense is recognized. The court identified the Second, Ninth, and Eleventh Circuits as requiring that the government’s specifications to the contractor specifically prohibit warnings. The Third Circuit was described as allowing the defense to succeed as to warning if the manufacturer establishes the defense with respect to a design defect claim and the specifications are silent on the issue of warnings.

After reviewing the above-noted decisions, the Yeroshefsky court held that the Sixth Circuit’s test stated in Tate v. Boeing Helicopters had the most compelling rationale. In that case, the court refashioned the Boyle test and formed three similar prongs. The first prong required that “the United States exercised its discretion and approved the warnings, if any,” the second prong that “the contractor provided warnings that conformed to the approved warnings,” and the third prong that “the contractor warned the United States of the dangers in the equipment’s use about which the contractor knew, but the United States did not.” The district court reasoned that the government’s approval of the warnings present on the product should be more important in the analysis than whether the government specifically prohibited the relevant warning. This fo-

606  See id. at 715-17 (collecting cases).
608  See Yeroshefsky, 962 F. Supp. at 716 (discussing Boyle).
609  See id., at 717-18 (collecting cases).
610  See id.
611  See id. at 718.
612  55 F.3d 1150 (6th Cir. 1995).
613  See Yeroshefsky, 962 F. Supp. at 716.
614  Tate, 55 F.3d at 1157.
cus returns to the “essence of Boyle,” the discretionary function exception to the Federal Tort Claims Act. In applying the adopted Tale test to this case, the court found that the government had issued exacting specifications, followed by the defendant, and was perhaps even more cognizant of possible dangers than any of the manufacturers who participated in the design of the machine. Each step of the design, testing, and production of the machine was carried out according to procedures developed by the Postal Service and from which the defendant could not deviate.

D. Economic Loss Doctrine

The economic loss doctrine in products liability cases operates to bar a suit in tort, relegating a potential plaintiff to a contract remedy, most often based on warranty. Simply put, when a product defect causes injury to the product only, the owner of the product may not sue the manufacturer in tort. At the other end of the spectrum of possible cases, when the product defect causes a personal injury as a result of a “sudden occurrence,” such as an explosion, the owner may sue in tort. Damage caused to “other property” of the owner will often serve as a sufficient basis to allow an action to proceed in tort. Thus, there are two major issues that are raised in cases presenting facts in between these extremes: where “the product” ends and “other property” begins, and what effect the “sudden occurrence” has on the right to bring an action in tort.

The doctrine has received much renewed attention following the Supreme Court’s decision in East River Steamship Corp. v. Transamerica Deleval, Inc., which discussed both of the above issues at length. In East River, engines on four identical supertankers suffered mechanical breakdowns causing damage to the engines only. The resulting financial injury to each vessel operator, however, was substantial because the vessels were taken out of operation. The court held that the doctrine applied in that case to bar an action in tort because each engine failure only damaged “the product itself.” Some courts have applied an exception to the doctrine that allows tort recovery if the product

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615 Yeroshefsky, 962 F. Supp. at 718.
616 See id.
617 476 U.S. 858 (1986) (adopting application of economic loss doctrine to admiralty law).
618 See id. at 860.
failure is sudden. The theory behind this exception is that such a failure could easily cause injury to a person. The second issue, "separate products," arose out of the plaintiff's argument that the malfunctioning component of each engine and the engine itself were two products. This theory would have allowed the plaintiff to recover in tort under the majority rule. The court adopted the majority rule but refused to accept this definition of "product."

In AIG Aviation, Inc. v. Bell Helicopter Textron, Inc., the Ninth Circuit addressed the economic loss doctrine in the context of Hawaii's state law. The plaintiff, Kenai Air Hawaii, Inc., appealed the district court's grant of summary judgment to Bell Helicopter. The case arose because a defective crosstube caused damage to Kenai's Helicopter 67N. Sometime prior to the accident, Kenai switched identical crosstubes between two helicopters, one of which was Helicopter 67N. Kenai argued that the economic loss doctrine did not prevent it from recovering from Bell in tort because the crosstube and the helicopter were separate products. They were separate, the plaintiff argued, because the crosstube on 67N at the time of the accident was not the crosstube on the aircraft when it was purchased. The court rejected this argument, citing Petroleum Helicopters, Inc. v. Avco Corp., and held that the exchange of identical parts among several products does not create a "product and 'other property.'" The alternative would allow buyers to circumvent the economic loss doctrine and avoid limitations on a warranty remedy. Instead, the court defined the product as "the object of the bargain" between the parties.

Bell Helicopter again successfully applied the economic loss defense in Gui Zhi v. Bell Helicopter Textron, Inc. In Zhi the U.S. District Court for the Northern District of Texas ruled that, under Texas law, the economic loss doctrine applied to both negligence and strict liability claims. Gui Zhi arose out of a 1996

619 See id. at 869-70 (citing Russell v. Ford Motor Co., 575 P.2d 1383, 1387 (Or. 1978)).
620 110 F.3d 67 (9th Cir. 1997) (unpublished opinion reported in full at No. 95-16855, 1997 U.S. App. LEXIS 5390 (9th Cir. Mar. 20, 1997)).
621 930 F.2d 389 (5th Cir. 1991) (applying economic loss doctrine to accident caused by defective flotation device when buyer purchased several helicopters at same time with identical flotation devices and later exchanged devices between helicopters).
623 Id.
helicopter accident in which a Bell-manufactured helicopter was destroyed, resulting in the loss of the helicopter and the future revenue it might have generated. The accident had been caused by a failure in the tail rotor shaft in the helicopter. The aircraft’s owner, China Southern Airlines, sought both compensatory and punitive damages under theories of negligence, strict liability, and breach of contract.

The court noted that Texas had adopted the economic loss rule and that the rule extended to claims for strict product liability. Damage to the product itself, the court held, “is essentially a loss to the purchaser of the benefit of the bargain... In a transaction between a commercial buyer and a commercial seller, when there has been no physical injury to persons or other property, injury to the defective product itself is an economic loss governed by the Uniform Commercial Code.”

The plaintiff argued that the loss of the entire helicopter satisfied the “other property” exception to the economic loss doctrine because the failed “product” was the helicopter’s shaft assembly, which had damaged other property consisting of the helicopter itself. The district court rejected this argument and ruled that the finished product for purposes of the economic loss doctrine was the entire helicopter.

China Southern also asserted a negligent misrepresentation claim. Although the Texas Supreme Court had not addressed the application of the economic loss doctrine to that specific cause of action, the Fifth Circuit had held that there was no material difference between claims of negligent misrepresentation and those for negligent design or manufacture for economic loss purposes. In light of Texas’s general rule that the contract exclusively governs in cases of pure economic loss and to further the policies underlying the economic loss doctrine, the court ruled that the doctrine extended to claims for negligent misrepresentation. China Southern’s sole claim for exemplary damages was also excluded on the ground that they are not recoverable in contract.

Relegated exclusively to contract claims for breach of warranty, the court ruled that China Southern’s claims were barred by the applicable four year contract/warranty limitations period

625 See Jim Walter Homes, Inc. v. Reed, 711 S.W.2d 617, 618 (Tex. 1986).
626 Gui Zhi, 1997 WL 786494, at *3 (citations omitted).
and rejected plaintiff’s argument that a discovery tolling applied.

In *Trans States Airlines v. Pratt & Whitney Canada, Inc.*, the Illinois Supreme Court answered three questions certified to it by the Seventh Circuit. In the underlying case, Pratt & Whitney manufactured a PW120 engine in 1988 that was sold to Aerospatiale, who then mounted it on an ATR 42-300 airplane. That plane was sold, leased, and subleased to the plaintiff. The engine warranty ran directly to the plaintiff as a result of specific assignment language in each intermediate contract. The sales contract made the warranty the exclusive remedy of the buyer. According to the sublease agreement, the airplane had to be returned with two PW120 engines, but the plaintiff need not return the original engines as long as replacements were certified for use on the plane. In 1991, the original engine suffered a malfunction and caught fire, damaging both the engine and the aircraft.

The plaintiff filed suit and raised three theories of recovery: negligence, breach of warranty, and strict liability. The plaintiff sought costs of repair to the engine and the airframe, lost revenues, and recovery of the amounts of the passengers’ claims, which had been settled by the plaintiff, as damages. The defendant moved for summary judgment pursuant to the economic loss doctrine. Because the Seventh Circuit found Illinois tort law uncertain, it certified the following three questions to the Illinois Supreme Court: (1) For purposes of the economic loss doctrine, does Illinois recognize a “sudden and calamitous occurrence” exception?; (2) Can a product and one of its component parts ever constitute two separate products?; and (3) Did the airframe and the engine in this case constitute a single product or two products?

The Illinois Supreme Court first noted that it did not recognize a “sudden and calamitous” exception. When the damage is confined to the product itself, the mere fact that the damage occurred in a sudden and calamitous manner will not create the basis of an action in tort.

In examining the “separate products” questions, the plaintiff suggested that the court should treat the products as the parties

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628 682 N.E.2d 45 (Ill. 1997).
630 *Trans States*, 682 N.E.2d at 54-55.
treated them. The defendant instead advanced the "basis of the bargain" theory. The court rejected the plaintiff's interchangeability argument, noting that the engine in this case was the actual engine sold with the airplane and not a replacement. After reviewing cases from other jurisdictions, the court settled on the "product bargained for" approach. The court opined that this approach was the most logical, fairest, and easiest for a court to apply.\(^{631}\)

In answering the third question, relating to the status of the products in this case, the court looked to the definitions section of the sublease agreement governing the plaintiff's possession of the airplane. In that document, the term "aircraft" was defined as both airframe and engines. The court thus held that the engine and airframe in this case constituted a single product.\(^{632}\)

VI. LIABILITY OF THE UNITED STATES: THE FEDERAL TORT CLAIMS ACT

A. REQUIREMENT OF ANALOGOUS STATE CLAIM

The scope of claims covered by the Federal Tort Claims Act (FTCA) was at issue in *Sea Air Shuttle Corp. v. United States.*\(^{633}\) The issue before the court in *Sea Air* was whether Sea Air Shuttle Corporation (Sea Air) could assert a viable claim under the FTCA for the alleged unlawful deprivation of the "right" to use seaplane ramps in the Virgin Islands. Sea Air alleged that a competing carrier had wrongfully been given a right of exclusive use of the seaplane facilities in St. Thomas and St. Croix. The district court dismissed Sea Air's complaint on the ground that the First Circuit had exclusive jurisdiction to review orders of the FAA and DOT pursuant to the Federal Aviation Act.\(^{634}\) The district court held that the FTCA action was an improper collateral attack on the administrative process.

The First Circuit affirmed on other grounds. The ultimate issue before the circuit court in *Sea Air* was whether Sea Air could assert a claim under the FTCA for the alleged negligent failure of the FAA to enforce the Federal Aviation Act's prohibition against exclusive lease agreements for the use of air navigation facilities.

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\(^{631}\) See id. at 58.

\(^{632}\) See id.

\(^{633}\) 112 F.3d 532 (1st Cir. 1997).

Sea Air had been an unsuccessful bidder to a Virgin Islands Port Authority 1990 tender for lease proposals to operate inter-island air services.\(^{635}\) The winning bidder was Caribbean Airboats, Inc. (CAI).

Sea Air objected to the award of exclusive use of certain facilities to CAI, claiming that it was in violation of 49 U.S.C. app. § 1349.\(^{636}\) Sea Air continued their efforts to acquire an Air Carrier Certificate while filing an unsuccessful action in Virgin Islands Federal Court against the Port Authority and CAI. In the meantime, Sea Air sank into financial difficulties, attempted to resolve its dispute through informal channels with the Department of Transportation and eventually declared Chapter Eleven Bankruptcy. On June 29, 1992, Sea Air’s Chapter Eleven Bankruptcy was converted to Chapter Seven Liquidation. Sea Air then filed an administrative complaint with the Department of Transportation and the FAA alleging that it had suffered nearly $13 million in damages because of the FAA’s failure to act on Sea Air’s administrative complaint and prevent CAI’s exclusive use.

After that claim was denied, Sea Air instituted the instant action pursuant to the FTCA. Although the district court dismissed this action on jurisdictional grounds, it also noted that the FAA’s failure to comply with a federal statute did not create a basis for a suit under the FTCA and that the alleged failure of the FAA to enforce the prohibition against exclusive leases was a “discretionary function.” Thus, an appeal ensued.

The first issue before the First Circuit was whether the Federal Aviation Act precluded simultaneous administrative and FTCA claims. The district court had ruled solely on this basis and held that no FTCA claim was sustainable. The First Circuit declined to expressly affirm this finding. Although the court noted that it was unlikely that an FTCA claim based upon the alleged FAA inaction could be maintained, it nonetheless found some logic to Sea Air’s argument that an FTCA action was its only recourse for damages in the event of negligent conduct by FAA employees.\(^{637}\)

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\(^{635}\) The previous operator was literally wiped out of existence by Hurricane Hugo in 1989.

\(^{636}\) Recodified at 49 U.S.C. § 40103(c) (1994).

\(^{637}\) See Sea Air, 112 F.3d at 537. The relevant provision on judicial review of orders from the FAA and DOT is 49 U.S.C. § 46110(a) (1994), formerly 49 U.S.C. § 1486. This provision affords an opportunity for review of administrative orders, not an award of money damages.
However, the circuit court ruled that Sea Air's claim failed a fundamental threshold requirement under the FTCA in that there was no existing analogous claim under which a private person could be liable under similar circumstances. To reach this conclusion, the circuit court first had to distinguish the seminal case of Indian Towing Co. v. United States. In Indian Towing, the Supreme Court held that there was no "purely governmental function" exception to the FTCA. Rather, under traditional tort theory, when the government undertakes a function or duty (even one outside of those typically performed by a private person) and induces the reliance of others, the government has a duty to perform this duty non-negligently. The First Circuit in Sea Air held that unlike the "Good Samaritan" rule applied in Indian Towing, there was no analogous duty in the private sector to the FAA's regulatory duty to enforce the exclusive lease prohibition by cutting off federal funding to the offending airport facility.

Sea Air attempted to craft an argument based upon its reliance on the terms of its Air Carrier Certificate, which listed CAI's bases as authorized points of origin and departure. The court rejected Sea Air's argument that by including these bases on the certificate, the FAA had undertaken a duty to ensure Sea Air access to these facilities. Granting of this certificate, the court held, imposed no duty on the FAA to secure access to any of the approved routes or facilities. Rather, the certification is nothing "more than a green light to fly, if and when the arrangements are made with the necessary air facilities." Accordingly, it would not have been reasonable for Sea Air to rely upon the FAA to secure access to the seaplane ramps simply because Sea Air was authorized to use the ramps identified on its certificate.

In conclusion, the First Circuit noted that although money damages would not have been available, Sea Air was not without a remedy. It could have pursued a writ of mandamus on the administrative order from the court of appeals. If meritorious, a timely mandamus petition could have alleviated the loss. In a brief concluding paragraph, the circuit court also noted its agreement with the district court that Sea Air's FTCA action was

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640 See id. at 64-65.
641 Sea Air, 112 F.3d at 536-37.
642 Id. at 537.
also subject to dismissal under the discretionary function exception. According to the First Circuit, the exclusive penalty for violating exclusive lease provisions is the loss of federal funds. Any additional remedy would be subject to the discretion of the FAA. Accordingly, the FAA's failure or refusal to exercise this discretion was not actionable.

B. LIABILITY FOR THE CONDUCT OF AIR TRAFFIC CONTROLLERS

The alleged negligence of air traffic controllers was at issue in *U.S. Aviation Underwriters, Inc. v. United States (USAU)*<sup>643</sup> and *Hunter v. United States*.<sup>644</sup> USAU arose from a June 14, 1989, accident at Columbus, Ohio, International Airport. This action involved certain principals and their subrogated insurers and related only to property damage caused by the accident. USAU sued as the insurer of USAir, Inc., and Avemco Insurance Co. sued as the insurer of CMH Fliers.

On the date of the accident, a CMH Fliers-owned Grumman AA5 aircraft, Reg. No. N6506L (06L) collided with a USAir 737 after a wake turbulence encounter. The Grumman was on a training flight. An American Airlines 737 had landed forty seconds prior to the landing of 06L, generating the wake vortices.

The tower at Columbus was manned by two FAA employees and was in positive control of all aircraft in the pattern. With a Falcon business jet approximately six miles from the airport, air traffic control (ATC) instructed 06L to land on runway 28R and specifically instructed the aircraft to “keep it in tight” to avoid a conflict with the inbound jet. The student pilot at the controls of 06L testified that he interpreted this as an instruction to land on the runway as soon as possible. In complying with this instruction, the student shortened the expected length of time between his landing and that of the American 737 in front of him. In its findings of fact, the district court noted that forty seconds elapsed between the “keep it in tight” instruction and 06L’s encounter with the 737 wake turbulence. After the wake turbulence encounter, the pilots of 06L lost control of the aircraft, which ultimately skidded to rest beneath the left wing of a USAir 737. Fire erupted, damaging the USAir aircraft. The court concluded in its findings of fact that the crew of 06L failed to execute proper procedures for the avoidance of wake turbulence.

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<sup>643</sup> 25 Av. Cas.(CCH) ¶ 18,089 (S.D. Ohio 1996)
<sup>644</sup> 961 F. Supp. 266 (M.D. Fla. 1997)
and that the wake turbulence, once encountered, was beyond the recovery capabilities of "a reasonable pilot of average skill."645

The court ruled that Ohio substantive law applied to the claim and that both ATC and the pilots of 06L were legally responsible for the accident. Because the risks of wake turbulence were known to ATC, the court found the accident to be a foreseeable consequence of the following conduct on the part of ATC: (a) the close sequencing of 06L behind the American 737; and (b) the instruction to 06L to "keep it in tight." Similarly, the pilots of 06L were also held to have known of the dangers relating to wake turbulence and found to have failed to execute the proper procedures to stay above the turbulence generated by the 737. The negligence of the 06L pilots was also held to be a proximate cause of the accident. However, the negligence of the pilots was held not to have been an intervening superseding cause that broke the chain of causation from that of ATC's negligence. The court ultimately apportioned liability seventy percent to the government and thirty percent to the pilots of 06L.646

Air traffic controller negligence and wake turbulence were also at issue in Hunter.647 However, in Hunter, the government prevailed on its summary judgment motion. In this wrongful death action, the representative of decedent Neil Hunter alleged that the negligence of an air traffic controller at Orlando International Airport, consisting of failing to mandate adequate separation of aircraft, caused Hunter to lose control and crash his airplane after a wake turbulence encounter in October 1992. Unlike the typical wake turbulence scenario, this wake turbulence encounter occurred outside of the traffic pattern and at relatively high altitude.

Prior to the encounter, Hunter was piloting his experimental "Velocity" aircraft under visual flight rules en route to Meritt Island, Florida. After receiving instructions as to the location of a Delta Airlines 727 aircraft flying a parallel course and accepting an avoidance vector from ATC at Orlando, Hunter resumed his southeast course to Meritt Island. At the time he resumed his course, Hunter is reported to have been approximately 1000 feet below the 727 with one mile of horizontal separa-

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645 USAU, 25 Av. Cas. (CCH) at ¶ 18,093.
646 See id. at ¶ 18,094.
647 961 F. Supp. at 266.
Approximately 3.25 minutes after crossing the 727's flight path, Hunter transmitted a Mayday call to ATC. He apparently never recovered from an inverted flat spin and perished in the aircraft.

Florida negligence law applied. Both parties stipulated that at no time were the two aircraft either outside of visual separation or closer to each other than the 1.5 miles lateral separation and the five hundred feet vertical separation required by the ATC manual. Thus, at least inso far as the separation of the aircraft themselves was concerned, ATC had complied with published standards. However, the plaintiff alleged that ATC nonetheless could have exercised greater care in separating the aircraft in compliance with some of the more general standards from the ATC manual, such as those requiring controllers to issue safety alerts when, in their judgment, an aircraft is in unsafe proximity to terrain, obstacles, and other aircraft. The manual also requires ATC, “to the extent practical,” to clear large turbine engine-powered aircraft from areas of VFR activity. The plaintiff also alleged that the government’s assumption of duties relating to the separation of aircraft, other than those specified in the ATC manual, induced reliance and gave rise to a higher duty of care.

The government argued that ATC had complied with all applicable standards and that it was ultimately the pilot’s duty to “see and avoid” other aircraft. On the factual side, the government contended that Hunter modified the aircraft in such a way as to adversely affect its center of gravity and cause aerodynamic instability. This instability, the government claimed, rendered Hunter’s Velocity aircraft more susceptible to the effects of wake turbulence.

The court’s order granting summary judgment for the government, although not divided into distinct findings of fact and law, is easily divisible as such. As a matter of law, the court held that it was the ultimate responsibility of the pilot in command to see and avoid other aircraft, including the effects of their wake vortices. Although Hunter, after requesting a lower altitude, accepted a recommendation from ATC to descend to 7500 feet, he was not required to comply with this recommendation if he felt it jeopardized his flight. In addition, Hunter’s change of course to resume his heading to Meritt Island, which took him across the 727’s flight path, was completely autonomous. The court

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648 Id. at 268 (citing FAA Air Traffic Control Handbook ¶¶ 1-1, 2-6, 7-112).
held that, as a matter of law, ATC has no duty to warn a pilot of that which he should ordinarily know and that of which he should already be aware.649

In its factual review, the court found that Hunter had modified the aircraft by enlarging the fuel tanks, which rendered it unstable. Based upon the length of time between the Mayday call and the Velocity's crossing of the jet's flight path, the court concluded that the aft center of gravity (CG) of the aircraft (for which Hunter had not compensated by adding forward ballast) caused it to go out of control after the wake turbulence of the 727 had dissipated to a point that would not have disrupted the flight of a safely balanced aircraft. Thus, Hunter had failed to exercise due care because he flew “an aircraft with an aft CG into wake turbulence caused by a much larger commercial aircraft.”650 In conclusion, the court held that there was no breach of duty by ATC to Hunter and, even assuming a breach, there was no proximate causation. Summary judgment was entered for the defendant, the United States.

C. Proximate Cause

The United States District Court for the District of New Hampshire relied upon more traditional tort concepts in granting the government's motion to dismiss in McGrath v. United States.651 McGrath arose from the issuance of an FAA waiver for the holding of an air show at Lebanon Municipal Airport, New Hampshire. The waiver permitted certain otherwise prohibited flight activities to be performed below 1500 feet for air show purposes. As the holders of the certificate, the air show sponsors were primarily responsible for the safety of the event and assuring compliance with applicable Federal Aviation Regulations (FARs). In addition, an FAA inspector was present for purposes of surveillance and ensuring compliance with the waiver.

The air show opening festivities consisted of a sky jump where members of the “Pond Family Skydivers” would link in a skydive and later deploy an American flag along with their parachutes. While the sky jump proceeded, two biplanes were to circle the skydivers. In the course of this performance, a biplane piloted

650 USAU, 25 Av. Cas. (CCH) ¶ 18,093.
651 25 Av. Cas. (CCH) ¶ 18,040 (D.N.H. 1997).
by Mary Jane McGrath collided with skydiver Scott Pond. Both died in the accident.

John P. McGrath, as executor of the estate of Mary Jane McGrath, instituted an FTCA action, alleging that the accident was due to the FAA's failure to adequately perform its duties relating to the air show, in particular the issuance of the certificate. McGrath alleged that Scott Pond was not expected to jump from the airplane nor was he properly licensed for the demonstration or approved to participate in the air show. He claimed that the FAA was required to insist that the Pond family list all show participants. If this had been done, McGrath would have anticipated the additional sky diver and the accident would not have occurred. McGrath also alleged that the application for the Air Show Certificate had been incorrectly and inadequately completed and that proper supervision by the FAA would have resulted either in a certificate listing all of the sky divers or the disqualification of Scott Pond. In either case, he argued, the accident would have been prevented.

The district court's opinion focused on proximate causation. Although the court noted that the accident would not have occurred had the FAA not certified the air show, "there was no evidence from which a reasonable trier of fact could find that the FAA's conduct was the legal or proximate cause of the accident."652

In granting the United States' motion to dismiss, the district court held that under New Hampshire's common law, proximate cause required foreseeability on the part of the alleged tortfeasor. "Thus, in order to establish the existence of proximate cause, a plaintiff must demonstrate that his or her injury was the natural and probable result of the negligent act and that it was a reasonably foreseeable consequence of the negligent act."653

McGrath alleged that the FAA's failure to prohibit parachutists who did not have a Class C or Class D USPA license from participating, which allowed Scott Pond to take part in the jump, was a proximate cause of the accident. Had Pond been refused permission to jump, McGrath argued, the accident would not have happened. The district court ruled that the accident was not in any way attributable to the qualifications of Scott Pond. Rather, the accident was attributable to a failure in

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652 Id. at ¶ 18,042.
653 Id. at ¶ 18,043.
communication between McGrath and the Pond family skydivers relating to the number of participating parachutists.

Similarly, the FAA's alleged negligence in failing to require more detail in the application before issuing the Air Show Certificate was held not to be a proximate cause of the accident. Although the granting of the certificate satisfied the "but for" test as the refusal to issue the certificate would have prevented the accident, foreseeability presented an insurmountable obstacle. Notwithstanding the incomplete application, the court ruled that it was not foreseeable to the government that either: (1) McGrath would be affirmatively misled at the pre-show briefing with regard to the number of parachutists expected to participate in the flag jump; or (2) "if she had been told that the jump would involve three parachutists, McGrath would begin circling the performers after only two had exited the jump plane." In closing, the court noted that any number of events could be listed, the elimination of which might have broken the "chain of causation." However, plaintiffs failed to establish that any alleged conduct on the part of the FAA passed the necessary legal threshold to be a proximate or legal cause of the accident.

VII. INSURANCE

A. Qualifications of Pilots

In Schneider Leasing, Inc. v. United States Aviation Underwriters, Inc., the plaintiff, Schneider Leasing, Inc. (Schneider), brought suit against the defendant, United States Aircraft Insurance Group (USAIG) seeking to recover under the physical damage coverage of an insurance policy (Policy) for the loss of a twin-engine Beechcraft Baron airplane (Aircraft) that crashed on June 11, 1993, shortly after take-off from the Fort Madison, Iowa airport. At the time of the crash, the Aircraft was owned by Schneider and was being operated by Phillip Heimbecker (Heimbecker), a Woodbury County sheriff's deputy. Also on board were another sheriff's deputy, Jon Hermann, and a pris-

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654 See id. at ¶ 18,045.
655 Id.
656 See id. at ¶ 18,046.
657 555 N.W.2d 838, 839 (Iowa 1996).
658 The cause of the crash was disputed by the parties. Various explanations were offered, including pilot error, mechanical malfunction, and interference by Cardenas, who had a fear of flying. See id.
oner, Armondo Cardenas, who was being transported from the prison in Fort Madison to Sioux City. Both Heimbecker and Hermann were killed in the crash, and Cardenas was seriously injured.\textsuperscript{659}

On August 10, 1993, Schneider submitted a proof of loss to USAIG.\textsuperscript{660} USAIG declined coverage stating that it was not liable because Heimbecker did not meet the minimum pilot experience and certification provisions set forth in the Policy.\textsuperscript{661} Schneider then brought suit against USAIG.

USAIG moved for summary judgment claiming that the loss was not covered by the Policy because the Aircraft was being operated by a pilot who lacked the qualifications required by the Policy. In support of its motion, USAIG offered unrefuted evidence that Heimbecker failed to meet three of the Policy's seven criteria for "rental uses." First, he lacked a commercial pilot certificate. Second, Heimbecker did not have an instrument rating. Finally, Heimbecker was well short of logging the flight hours required by the Policy.\textsuperscript{662}

Schneider argued that USAIG's motion should be denied for several reasons. First, he claimed that there was a genuine issue of fact as to the cause of the crash, which was relevant because USAIG's denial of coverage was regulated by Iowa's antitechnicality statute,\textsuperscript{663} and such denial could be overcome if the condi-

\textsuperscript{659} See id.

\textsuperscript{660} See id.

\textsuperscript{661} USAIG's policy contained the following exclusion under the heading "Limitations on Use": "To be covered under this policy the aircraft must be owned, maintained or used only for the purpose shown on the Coverage Summary page and described below and flown only by a pilot or pilots described on the Coverage Summary page." \textit{Id.}

The relevant portions of the pilot description read:

\begin{quote}
WITH RESPECT TO RENTAL USES:
    * * *

C.) MULTI-ENGINE AIRCRAFT
    Any pilot holding an FAA Commercial Pilot Certificate with FAA Mul
    Multi-Engine and Instrument Rating who has flown a minimum of
    1500 hours as Pilot In Command, at least 350 hours of which shall
    have been in multi-engine aircraft and at least 25 hours in make
    and model being flown and a checkout by a Certified Flight
    Instructor.

WITH RESPECT TO CHARTER USES:
    [Any] pilot holding an FAA Pilot Certificate with proper ratings
    for the flight involved who has been approved by George Prescott.
\end{quote}

\textit{Id.} at 839-40.

\textsuperscript{662} See id.

\textsuperscript{663} Section 515.101 of the Iowa Code states as follows:
tion that made the policy inapplicable was not a cause of the loss. Second, Schneider asserted that certain terms in the Policy's "pilot qualification" provision were ambiguous. Specifically, the Policy did not define the terms "rental use" or "charter use." Schneider argued that Heimbecker's use of the Aircraft on the day of the accident could be considered a "charter flight" in which case the qualifications required for "rental use" were not applicable. Finally, Schneider contended that USAIG was estopped from asserting its policy defenses because USAIG allegedly informed Schneider that it would notify Schneider if coverage for Heimbecker became problematic, and it never did so.

The district court denied USAIG's motion for summary judgment. In doing so, it ruled that section 515.101 was applicable and that there was no "change in use" within the meaning of § 515.102(8) of the Iowa Code. The district court, however, did not consider Schneider's waiver and estoppel argument in denying the motion. The Supreme Court of Iowa granted USAIG permission to appeal in advance of final judgment.

On appeal, the Supreme Court of Iowa rejected Schneider's argument that an ambiguity existed in the Policy because it did not define the terms "rental" and "charter" uses. The court held that Schneider, as an aircraft lessor, was deemed to be familiar with the industry meaning of the term "rental" use as contrasted with "charter" use. Relying on certain extrinsic evidence offered by USAIG, the court found that a "charter" use refers to providing an aircraft and flight crew, whereas a "rental" use refers to providing only the plane. The court then determined

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Any condition or stipulation in an application, policy, or contract of insurance, making the policy void before the loss occurs, shall not prevent recovery thereon by the insured, if it shall be shown by the plaintiff that the failure to observe such provision or the violation thereof did not contribute to the loss.

664 See Schneider, 555 N.W.2d at 840.
665 See id.
666 This statute limits the effect of § 515.101, as follows: "Any condition or stipulation referring: (8) To a change in the occupancy or use of the property insured, if such change or use makes the risk more hazardous . . . shall not be changed or affected by the provision of section 515.101."
667 See Schneider, 555 N.W.2d at 839-41.
668 The Court stated that it was appropriate for it to consider extrinsic evidence to become familiar with the commercial aviation industry's specialized vocabulary because the terms used may have meanings, unknown to the general population, which are well-settled in the aviation industry. See id. at 841.
Heimbecker's use of the Aircraft was governed by the “rental” use provisions of the physical damage coverage.\(^6\)

The court also held that section 515.101 was inapplicable because USAIG's policy defense was not based upon an abrogation of the policy but on the limits placed on the coverage afforded thereunder. In other words, the court found that the limitation on which USAIG relied did not void any existing coverage under its Policy but simply placed the loss outside the coverages afforded from the inception of the contract. Accordingly, the court held that Heimbecker's failure to meet the conditions set out in the policy precluded Schneider from obtaining physical damage coverage under the Policy.\(^6\)

Nevertheless, the court found that the record presented a genuine issue of material fact concerning Schneider's claims of waiver and estoppel. As a result, the court affirmed the district court's order denying summary judgment and remanded the case for further proceedings in light of its decision.\(^6\)

In North American Specialty Insurance Co. v. Myers,\(^6\) the issue of pilot qualifications was addressed by the Sixth Circuit Court of Appeals. On December 19, 1992, John Myers (Myers) and Arthur Huffman (Huffman), a certified flight instructor (CFI), were flying a 1959 single-engine Piper Comanche airplane (Aircraft) from Otsego County Airport in Michigan to North Carolina. Shortly after take-off, the Aircraft crashed and both men were killed.\(^6\) Myers' estate brought suit against Huffman's estate. Huffman's estate brought suit against Myers' estate and Clare Colwell (Colwell), one of the owners of the Aircraft.

At the time of the accident, the Aircraft was covered by an insurance policy (Policy) issued by North American Specialty Insurance Company (Insurer) to Myers and Colwell. The binder of insurance that was issued to Myers and Colwell prior to the issuance of the Policy contained two critical provisions: (1) “Open Pilot Provisions: PVT/750TT/250RG/25M&M,” and (2)
“Special Pilot Requirements: 15 DUAL W/CFI PRIOR TO SOLO.”

The “Special Pilot Requirements” provision required Colwell and Myers to have fifteen hours of flight instruction with a CFI before either of them flew the Aircraft alone. The “Open Pilot Provisions” required that pilots subject to its conditions have a private pilot’s license, 750 hours of total flying time, 250 hours of flying an airplane with retractable gear, and 25 hours of flying time in the same make and model aircraft as the insured Aircraft.

Colwell and Myers signed the binder on November 23, 1992. On November 28, 1992, the Insurer signed the Policy and issued the pilot requirements on December 1, 1992. Colwell did not receive the Policy until January 7, 1993. “The Policy contained a section entitled ‘pilot requirements endorsement’, which stated in part that ‘this policy is not in effect while the aircraft is in flight or in motion unless the pilot of the aircraft meets all the requirements specified herein.’” The section described, in relevant part, persons permitted to fly the aircraft as:

John Myers, a private or commercial, single-engine land rated pilot to receive 15 hours of dual instruction in the insured aircraft by a FAA certified single-engine land flight instructor prior to solo in the insured aircraft.

Any FAA certified single-engine land flight instructor who has flown and logged at least 25 hours in the same make and model as the insured aircraft, only while instructing a named pilot listed above in the insured aircraft.

The Insurer sought a declaratory judgment claiming that the Policy did not provide coverage for the accident because Huffman did not satisfy the requirement of having flown and logged twenty-five hours in the same make and model aircraft as the insured Aircraft. The district court granted the Insurer’s two separate motions for partial summary judgment and the action was eventually dismissed.

On appeal, the representatives of the Myers and Huffman estates and Colwell (collectively, the Appellants) asserted that there were genuine issues of fact as to whether the Policy required Huffman to have flown and logged twenty-five hours in

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674 Id.
675 See id.
676 Id.
677 Id. at 1276-77.
the same make and model as the insured Aircraft. Specifically, the Appellants argued that the “Open Pilot Provisions” of the binder, which required pilots other than Myers and Colwell to have logged twenty-five hours in the same make and model of aircraft, did not apply to CFIs. Although the Policy explicitly required CFIs to possess these qualifications, the Appellants asserted that the Policy imposed new conditions that were not present in the binder and therefore were unenforceable.

The Sixth Circuit rejected the Appellants’ argument stating that the Policy clarified the binder to make clear that the requirements for CFIs were less than those imposed upon other pilots. The court reasoned that, because the binder contained no special section explicitly designating CFIs as proper operators and the “Special Pilot Provisions” clearly did not apply to CFIs, coverage existed when a CFI was piloting the Aircraft only if the CFI met the requirements of the “Open Pilot Provisions.” The court then found that the record contained no evidence that Huffman had logged twenty-five hours in an airplane that qualified as the same make and model as the Aircraft. Accordingly, it held that coverage did not exist for the accident if Huffman was piloting the Aircraft.

The Sixth Circuit also held that coverage would not exist if Myers had been piloting the Aircraft at the time of the accident. The court reached this conclusion after finding that the Policy required Myers “to receive 15 hours of dual instruction in the insured aircraft by a FAA certified single-engine land flight instructor.” The court determined that although the Policy did not expressly require the CFI who was training Myers to satisfy the twenty-five hour requirement, it would be unreasonable to conclude that the Policy might provide coverage if Myers was piloting the Aircraft while receiving training from a CFI who would not have been a qualified trainer if he himself had been

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678 The Myers Estate and Colwell also argued that Huffman satisfied the requirements of the Policy and that the Insurer was estopped from denying that the crash is an insured loss. See id. at 1277.
679 See id. at 1277-78.
680 The court rejected the arguments by the Myers Estate and Colwell that Huffman actually logged twenty-five hours in the same “make and model” of aircraft. The court noted that the Appellants did not introduce a written log of hours flown. See id. at 1280. The court also found that there was no evidence that the log books were altered. See id. at 1282-83.
681 See id. at 1278-80.
682 Id. at 1279.
B. Scope of Coverage Provided to an “Insured”

The issue in Insurance Co. of North America v. Baughman was the scope of coverage provided under the policies’ definition of “insured.”

On October 12, 1992, an aircraft (Aircraft) owned by Gas Systems & Services, Inc. (Gas Systems) crashed in East Point, Georgia. At the time of the crash, the Aircraft was piloted by Nils Anderson (Anderson) and was being used by the Belk-Hudson Company (Belk-Hudson) for a business trip. Belk-Hudson hired Anderson to operate the Aircraft on its behalf. Anderson and three passengers died from injuries sustained in the crash and a fourth passenger sustained personal injuries. The four passengers all were employees of Belk-Hudson.

Personal injury and wrongful death lawsuits were filed in South Carolina state court by the surviving passenger and by the representatives of the decedents’ estates (collectively, Plaintiffs) against, among others, Anderson’s estate and Belk-Hudson. Belk-Hudson’s insurers, Insurance Company of North America and United States Fire Insurance Company (collectively, Insurers) subsequently filed a declaratory judgment action in the United States District Court for the District of South Carolina seeking a declaration of the rights and obligations of the parties under two aviation insurance polices (Policies) issued to Belk-

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683 See id.
684 122 F.3d 1061, 1997 WL 565842 (4th Cir. 1997). Please note that the Rules of the Fourth Circuit Court of Appeals may limit citation to unpublished opinions.
685 The Policy defined the term “Insured” as follows:
The unqualified word Insured wherever used in the policy includes not only the Named Insured but also includes any executive officer, director, stockholder, employee or agent thereof while acting in the scope of his duties as such . . . .
The insurance with respect to any person other than the Named Insured does not apply to:
1. Any partner, executive officer, director, stockholder, employee or agent with respect to injury or death of another partner, executive officer, director, stockholder, employee or agent of the same employer insured in the course of his duties or employment.

Id.
The Policies covered, among other things, the use of "non-owned" airplanes like the one involved in the crash.\textsuperscript{688} The Plaintiffs moved for summary judgment against the Insurers on the ground that Anderson's estate was covered under the Policies as an "insured." The Insurers filed a cross-motion for summary judgment. The district court denied the Plaintiffs' motion and granted the Insurers' cross-motion. In doing so, the district court held that the Policies did not cover Anderson's estate for the claims of the victims, regardless of whether Anderson was an employee of Belk-Hudson or an independent contractor. The district court found that the Policies' definition of "insured" unambiguously excluded from coverage claims made by Belk-Hudson employees against co-employees. In addition, the district court found that the definition of "insured" did not cover independent contractors.\textsuperscript{689}

On appeal, the Fourth Circuit affirmed the district court's decision.\textsuperscript{690} In doing so, the court noted that the district court correctly determined that the Policies' definition of "insured" was unambiguous and that Anderson was not covered under that definition, regardless of whether he was an employee of Belk-Hudson or an independent contractor. The court agreed with the district court that the Policies unambiguously excluded independent contractors from coverage. Similarly, the court found that the Policies limited coverage to "the Named Insured [and] any executive officer, director, stockholder, employee or agent thereof..."\textsuperscript{691} The court also noted that, even if Anderson were an employee of Belk-Hudson, he still would not be covered under the Policies because the second sentence\textsuperscript{692} of the

\textsuperscript{687} The only compensation at issue in this case was whether the victims could recover from Belk-Hudson's insurers. The victims already had received worker's compensation benefits and were compensated under an insurance policy held by Gas Systems.

\textsuperscript{688} See id. at *2-3.

\textsuperscript{689} See id. at *5-6.

\textsuperscript{690} The Fourth Circuit also denied the Plaintiffs' Motion to Certify Questions of Law to the South Carolina Supreme Court and a Renewed Motion to Certify Issues to the South Carolina Supreme Court because it found that there was sufficient controlling precedent in the decisions of the South Carolina Supreme Court to make such certification unnecessary.

\textsuperscript{691} Id. at *6-7. The Plaintiffs conceded that Anderson must have been an employee of Belk-Hudson to qualify as an "insured" under the definition.

\textsuperscript{692} The second sentence states that "the insurance with respect to any person other than the Named Insured does not apply to: (1) any employee or agent with respect to injury or death of another... employee or agent of the same employer injured in the course of his duties of employment." Id. at 7.
C. ABSTENTION

The issue in National Union Fire Insurance Co. of Pittsburgh v. Karp was whether the district court properly abstained from deciding whether an insurer was required to indemnify and defend the estate of a person killed in an airplane crash.694

On April 12, 1993, a small airplane (Aircraft) en route from Groton, Connecticut crashed near Cortland, New York. Robert Freeman (Freeman) was piloting the Aircraft and providing flight instruction to a student pilot, Ethel Karp (Karp). Freeman, Karp, and Freeman's daughter, Stephanie, died in the crash. Two other persons on board, Matthew Massaro (Massaro) and Kerrie Rogers (Rogers), survived.

At the time of the crash, the Aircraft was insured by a liability insurance policy (Policy) issued by National Union Fire Insurance Company of Pittsburgh, Pa. (Insurer) to the Aircraft's owners. The Policy excluded from coverage those persons "engaged in . . . the operation of [a] . . . commercial flying service or flying school with respect to any occurrence arising out of such . . . operations."695

After the crash, various lawsuits were commenced in Connecticut state court on behalf of the estates of the persons killed and injured in the crash (Victims). After some dispute, the Insurer agreed to defend the pilot's estate but reserved its rights. It believed the loss was not covered because the pilot was operating a commercial flying service or flying school at the time of the accident.

Following jury verdicts in favor of the Victims, one of the representatives of a decedent's estate commenced a direct action against the Insurer in Connecticut state court (the Direct Action). The Insurer then filed an interpleader action in the United States District Court for the Northern District of New York, naming as defendants all potential claimants (Defendants) to the Policy.696 The Insurer's complaint sought (1) a declaration that the Insurer did not have a duty to indemnify or defend the pilot's estate under the Policy, and (2) in the event that

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693 See id. at *7.
694 108 F.3d 17 (2d Cir. 1997).
695 Id. at 19.
696 See id. at 19-20.
some of the Defendants were entitled to coverage, that they be
required to interplead their claims up to the Policy limit, with
the insurer discharged from further liability on the Policy. The
complaint also sought to restrain the prosecution of the Direct
Action and to enjoin all other parties from instituting actions
concerning the Policy during the pendency of the interpleader
action.\textsuperscript{697}

The Defendants moved, among other things, to dismiss the
Insurer's action for lack of subject matter jurisdiction. The De-
fendants also argued that the district court should abstain from
adjudicating the declaratory claim in the Insurer's complaint
and allow the issue of coverage to be determined in the Direct
Action.

Relying on the Supreme Court's opinion in \textit{Wilton v. Seven
Falls Co.},\textsuperscript{698} the district court determined that, although it had
subject matter jurisdiction over the Insurer's action because it
was in the nature of an interpleader, it would exercise its discre-
tion and abstain from adjudicating the coverage issues.\textsuperscript{699} The
district court reasoned that because the Direct Action was a con-
current state proceeding and the state court was better adapted
to resolve the coverage issues, it should abstain from adjudicat-
ing Insurer's claim for declaratory relief.\textsuperscript{700} The district court
also declined to enjoin the Direct Action. The district court,
however, retained jurisdiction to rule on the interpleader issues
raised in the Insurer's complaint and enjoined the other de-
fendants from prosecuting any actions against the Insurer.\textsuperscript{701}

On appeal, the Insurer argued that the district court erred in
abstaining from ruling on the coverage issues because "Wilton's
holding is limited to actions exclusively brought under the De-
claratory Judgment Act ("DJA")."\textsuperscript{702} As such, the Insurer
asserted that because its action was brought under the
interpleader statute, the district court was bound to apply the
"exceptional circumstances" standard governing abstention set
forth in \textit{Colorado River Water Conservation District v. United
States}.\textsuperscript{703} The Insurer also argued that the district court erred in

\textsuperscript{697} See id. at 20.
\textsuperscript{698} 515 U.S. 277 (1955).
\textsuperscript{699} See Karp, 108 F.3d at 20.
\textsuperscript{700} See id.
\textsuperscript{701} See id. at 21.
\textsuperscript{702} See id.
\textsuperscript{703} 424 U.S. 800 (1976) (defining the "exceptional circumstances" standard for
federal court abstention).
concluding that the Direct Action was a concurrent state proceeding.\textsuperscript{704}

The Second Circuit noted that the issues presented in this case were ones of first impression for the court. The court then affirmed the district court's decision to abstain from adjudicating the coverage issues. In doing so, the court rejected the Insurer's contention that Wilton's holding is limited to actions exclusively brought under the DJA and is not applicable to claims for declaratory relief raised in other contexts such as statutory interpleader. In this regard, the court noted that the Insurer's action was not a typical interpleader action. The court also noted that the availability of interpleader jurisdiction does not require its exercise if the action can be "fairly adjudicated" in state court. The court then stated that the coverage issues would be adequately and fairly adjudicated in the Direct Action.\textsuperscript{705}

The Second Circuit also rejected the insurer's contention that the Direct Action was not a concurrent proceeding to the federal action. The court noted that federal and state proceedings are "concurrent" or "parallel" for purposes of abstention when there is an identity of parties and the issues and relief sought are the same. The court then held that because the primary claim for declaratory relief raised by the Insurer would be raised and decided in the Direct Action, and the Insurer and the estate were parties in both suits, the Direct Action was a "concurrent" proceeding. The court therefore held that the district court did not err as a matter of law in applying the discretionary standard enunciated in \textit{Wilton} when deciding to abstain from adjudicating the coverage issues.\textsuperscript{706}

The court, however, reversed the portion of the district court's decision that enjoined other parties from joining in the Direct Action. The court concluded that restraining other parties would be unjust because the claims to be asserted were identical to the ones already asserted against the Insurer. In addition, prohibiting these parties from joining in the Direct Action may have the unjust effect of binding them to a determination of crucial coverage issues without allowing them the opportunity to participate in litigating the issue.\textsuperscript{707}

\textsuperscript{704} See \textit{Karp}, 108 F.3d at 21.
\textsuperscript{705} See id. at 20-21.
\textsuperscript{706} See id. at 22-23.
\textsuperscript{707} See id. at 23.
VIII. LIABILITY OF AIRPORT OWNERS AND OPERATORS

A. PERSONAL INJURY

The underlying facts of *Boyette v. Trans World Airlines, Inc.* are both tragic and bizarre. The case touches upon the overlapping boundaries of passenger safety liability that exist between common carriers and airport operators. In *Boyette*, the decedent, Rutherford, became severely intoxicated before and during a flight from Memphis, Tennessee to Sioux City, Iowa. The flight had an intermediate stop to change aircraft at Lambert International Airport in St. Louis, Missouri. After the stop at Lambert International, Rutherford and three of his co-workers intended to continue on the carrier's same flight to Sioux City.

After the flight arrived in St. Louis, Rutherford deplaned, walked under a yellow rope and climbed onto a luggage tug vehicle that was idling on the tarmac. When he was advised that the carrier's boarding agent had called airport security, Rutherford slid off of the luggage tug and walked into the terminal, where he commandeered an electric golf cart. Rutherford then began joy-riding around the gate area. When the carrier's boarding agent gave chase and stated that Rutherford was "going to jail," Rutherford took flight. Eventually cornered in a large alcove area of the terminal, Rutherford and a co-worker concealed themselves in an unlocked cleaning room, with no other avenue of exit except for a small door in the wall.

Rutherford's co-worker helped him climb through the door. The door opened into a trash chute, which led to a mechanical trash compactor ten feet below. Rutherford fell into the compactor where he laid injured and unresponsive. Before the carrier's boarding agent and security personnel removed Rutherford, the machine automatically cycled, fatally injuring Rutherford.

Rutherford's estate brought a wrongful death action against the carrier and the City of St. Louis. The estate claimed the carrier acted negligently by chasing Rutherford through the concourse and failing to timely remove him from the compactor. The estate claimed the city was negligent for failing to have an emergency deactivation switch in the cleaning room, failing to have warning signs disclosing that the small door led to a trash compactor, and failing to timely remove Rutherford from the machine.

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708 954 S.W.2d 350 (Mo. Ct. App. 1997).
The Missouri Court of Appeals upheld the trial court’s order of summary judgment in favor of the Defendants.

The first issue considered by the appellate court was whether the chase by the carrier’s employees through the terminal extended the duty of care owed by the carrier to its “passenger.” Rutherford and his co-workers were ticketed for a single flight from Memphis to Sioux City (which they had not yet completed), and Rutherford had consumed a large portion of his intoxicating alcohol onboard the first leg of the flight.

The Court held:

Missouri has long recognized a special relationship exists between a common carrier, like TWE [sic], and its passengers. “A common carrier has a duty to exercise the highest degree of care to safely transport its passengers and protect them while in transit.” . . . But this duty exists only so long as the special relationship of passenger and carrier exists. . . . The carrier discharges its duty once the passenger reaches a reasonably safe place. . . . In the instant case it is without dispute Rutherford safely reached the airport. Thus, TWE [sic] fulfilled the duty it owed Rutherford as a common carrier once he reached the airport terminal. At that point TWE’s [sic] duty as a common carrier was discharged.

At oral arguments the appellant suggested that even if TWE’s [sic] duty as a common carrier was discharged once Rutherford reached the airport terminal, a new duty arose once TWE [sic] initiated pursuit of Rutherford. We disagree. Even if we were to assume, arguendo, that a new duty arose once TWE [sic] initiated a pursuit of Rutherford while he was still on the golf cart, TWE [sic] showed facts demonstrating the final element necessary for a negligence cause of action—proximate cause—cannot be met.709

The court found that the decedent’s act of climbing into the trash chute to be the intervening proximate cause of his injury.710

As to the airport’s owner and operator, the City of St. Louis, the court concluded that Rutherford was in the legal status of a trespasser and held:

The appellant contends that once the City discovered Rutherford in the dumpster and saw that he was injured the City owed Rutherford a duty to rescue him from the compactor, and its failure

709 Id. at 354 (citations omitted).
710 See id.
to do so breached the duty of ordinary care that the City owed him. We disagree.

Missouri does not require the exercise of ordinary care to include a duty to rescue. . . . Thus, it cannot be said that the failure of [City personnel] to rescue Rutherford from the dumpster breached the duty to use ordinary care.\footnote{Id. at 355.}

As to the City’s failure to have an emergency deactivation switch in the cleaning room, the court held:

Trespassers take the premises, for better or worse, as they find them, assuming the risk of injury from their condition, “the owner being liable only for hidden dangers intentionally placed to injure them or for any willful, illegal force used against them.” This is the rule whether the trespasser is known or unknown.\footnote{Id. at 356 (citation omitted).}

B. AIRCRAFT—PROPERTY DAMAGE

In \textit{Knowles v. City of Granbury},\footnote{953 S.W.2d 19 (Tex. App.—Fort Worth 1997, no writ).} the plaintiff stored his general aviation aircraft in a large, locked hangar, access to which was controlled by its owner, the City of Granbury. Without the plaintiff’s knowledge, Granbury permitted children to enter the hangar as part of an exhibition, (the EAA Young Eagles Fly-In) during which the airport’s manager permitted the plaintiff’s aircraft to be used for demonstration purposes. A child was observed sitting on the aircraft’s tail section, and the aircraft was thereafter found to be damaged.

The plaintiff sued the airport manager, in his individual capacity as a sub-contractor, as well as the City. The plaintiff asserted causes of action against both defendants sounding in negligence, gross negligence, conversion, and the taking of private property for public use without just compensation. Bailment and breach of contract were also asserted against the City.

The City claimed that it was entitled to the protection of sovereign immunity for its acts and that the manager was protected by official immunity as an employee. Applying Texas law to the facts, the court held that the rental contract evidenced a waiver of sovereign immunity by the City and that the manager failed to satisfy all of the elements of the affirmative defense of official immunity.\footnote{See id.}

\footnotesize\footnote{Id. at 355.} \footnotesize\footnote{Id. at 356 (citation omitted).} \footnotesize\footnote{953 S.W.2d 19 (Tex. App.—Fort Worth 1997, no writ).} \footnotesize\footnote{See id.}
Alpha Alpha, Inc. v. Southland Aviation involved the liability of an airport operator for third-party vandalism. Alpha Alpha, Inc. (Alpha) was the owner of a general aviation aircraft severely damaged by vandals while parked overnight on a common area ramp of a public-use airport. The airport security consisted of fencing and lighting, but because the runway was open twenty-four hours a day, there was around-the-clock pedestrian access to the ramp. The plaintiff brought a cause of action based upon a “deposit” theory, which is analogous to that of common-law bailment. Existing case law in Louisiana held that under similar circumstances involving a commercial fixed base operator, a deposit cause of action was well stated.

The defendants, all of whom apparently were quasi-governmental entities, argued that the case law was distinguishable because the airport was a public use airport that had been built with public use funds, and defendants could not refuse the plaintiff use of the airport. Therefore, defendants contended, the requisite element of “mutual intent” to create a deposit was not satisfied.

The court discussed the issue of “tie-down fees” and whether they were customarily charged by the airport. The court recognized the practice of fixed-base operators to not charge tie-down fees where it is anticipated that the aircraft will purchase fuel and will otherwise be a repeat customer. The court also relied upon testimony that the “purpose of the airport was economic development. . . . Since the defendants received an economic advantage as part of the consideration for accepting the [aircraft], the trial court was not clearly wrong in finding that the defendants were compensated depositaries.”

The defendants also claimed airport security issues were preempted by federal legislation. The court distinguished the depository cause of action from that of negligence, and held that preemption applied to the negligence, but not to the deposit claim. Interestingly, the court did not address the fact that one of the elements of a deposit cause of action is “lack of due care.”

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716 See id.
717 See id.
718 Id. at 1371.
719 See id.
In *Cessna Aircraft Co. v. Metropolitan Topeka Airport Authority*, the plaintiff was a sub-tenant of an airport hangar and lost thirteen aircraft when the hangar burned. The fire was started by construction contractors hired by the defendant, who were using propane torches. The defendant leased the hangar to “Million-Air,” who in turn leased the space to Cessna. Cessna asserted a claim directly against the defendant landlord under a theory described by the Restatement (Second) of Torts § 324(A), duty to third parties.

The court upheld Cessna’s cause of action under the Restatement and rejected defendant’s argument that a Kansas sovereign immunity statute applied:

A second important point from relevant case law is that the provision for immunity for fire and police protection under the tort claims act grows out of the old rule of sovereign immunity for carrying out governmental functions. . . . What separates this case from those which address immunity for governmental functions is that [Defendant], as a landowner, undertook to provide certain security measures to its tenant and the occupant of the hangar. Once [Defendant] undertook to become a landlord and to provide such security measures, it became subject to the same rules which apply to private landlords who undertake to perform the same type of service.

The applicability of res ipsa loquitur was examined in *Carrio v. Denson*. The aircraft owned by the plaintiff suffered a prop strike and other damage when it collided on a taxiway with a scaffold. The scaffold belonged to the defendant contractor, who testified that the evening before he had left it wired to the side of a construction site approximately 150 to 200 yards away from the scene of the accident. The defendant further testified that he had no idea how the scaffold came to be located in the middle of the taxiway.

The court held that on these facts, and in the absence of any other evidence, the plaintiff’s res ipsa loquitur theory failed:

In the question of control lies the problem. While there is no dispute that [defendant] owned the scaffold and that the scaffold lying in the taxiway is what caused the accident, it does not necessarily follow that the scaffold could not have been on the taxiway without the negligence on [defendant’s] part. [Plaintiff] argues that there was no evidence that the construction project had

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721 *Id.* at 95.
been vandalized in the past, so, he says, there is no reason to think vandals moved the scaffold to the taxiway, as theorized by [defendant]. However, there was also no evidence that in the three months the scaffold had been in use at the construction site, it had ever come loose from the building and rolled away. Therefore, there is no reason to think that the night before the accident, the scaffold rolled around a pile of bricks and across 150 yards to end up in the middle of the taxiway. In fact, [defendant's] theory seems more plausible. . . . The doctrine of res ipsa loquitur does not require that a defendant be held liable merely because no explanation exists for how an accident occurred. There must be some indication that the defendant was negligent and that the accident occurred as a result of the negligence.725

IX. MISCELLANEOUS CASES

A. ERRONEOUS COLLECTION OF TAXES BY AIRLINES

In late 1995, Southwest Airlines continued to collect a ten percent ticket excise tax for flights booked in early 1996, under the expectation that the tax, which was set to lapse at the end of 1995, would be re-authorized by Congress. However, it was not reauthorized until February 1997, and two similar suits were brought against Southwest as a result. In *Sigmon v. Southwest Airlines Co.*, several plaintiffs sued Southwest to recover the ticket excise tax, attorney's fees, and exemplary damages.724 The Fifth Circuit affirmed that there was no independent private cause of action for a party to recover taxes erroneously collected by an airline.725 Although the plaintiffs were correct that no law authorized collection of the taxes and that an IRS refund was due, plaintiffs could not show that Southwest lacked a "colorable basis" for collecting the taxes in late 1995. Further, the court held that the exclusive remedy for erroneous or illegal collections must be sought against the United States and must begin with the filing of an administrative claim with the IRS for a refund.727 A similar decision was rendered in *Kaucky v. Southwest Airlines Co.*

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725 *Id.* at 123.
724 110 F.3d 1200 (5th Cir. 1997).
725 See *id.*
726 When the taxes were reimposed in February 1997, the government solved the refund issue by providing that the excise tax applied to tickets purchased before the expiration of the tax for transportation beginning after the expiration date. 26 U.S.C. §§ 4261(g) (1994); *Id.* 4271(d) (1994).
727 See *id.* at 1206.
Airlines, where the Seventh Circuit opined that allowing a private cause of action against the airlines would “throw a monkey wrench into machinery designed to confine suits for the refund of federal taxes to suits in the federal courts against the government.”

B. DEFAMATION OF TRAVEL AGENT BY AIRLINE

In *Gaeta v. Delta Airlines*, a travel agency terminated by Delta Airlines after an agency employee sent a joke/threat facsimile to the airline brought suit, *inter alia*, for breach of the implied covenant of good faith and fair dealing, defamation, and intentional and negligent infliction of emotional distress. The court granted summary judgment dismissing all the agency’s claims on the grounds that no cause of action was stated for breach of implied covenant of good faith and fair dealing for termination in instances where the contract expressly permitted the airline to cancel the agreement at any time for any reason. The libel and slander claims were dismissed because, having contacted the press, the travel agency had injected itself into the public eye becoming a “limited public figure.” Hence, it would have to show “actual malice” to state a claim. Finally, the court dismissed both claims for intentional and negligent infliction of emotional distress because there was no evidence of “outrageous” conduct or severe emotional distress.

C. FREEDOM OF INFORMATION ACT

In *United Technologies Corp. v. FAA*, United Technologies (Pratt & Whitney) sought documents used by the FAA in authorizing several companies to manufacture replacement parts for Pratt & Whitney engines. The court affirmed the FAA’s denial of the request under Exemption Four of the Freedom of Information Act (FOIA), which protects disclosure of trade secrets and commercial or financial information from disclosure to

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728 109 F.3d 349, 353 (7th Cir. 1997), *reh'g denied*, 118 S. Ct. 368 (7th Cir. 1997).
729 25 Av. Cas. (CCH) ¶ 18, 173 (N.D. Cal. 1997).
730 See id.
731 See id.
732 See id.
Pratt & Whitney argued on appeal that the confidentiality of the documents should be examined on a requestor-specific basis, and hence it should have access to design drawings for parts to be used in its engines. However, the Second Circuit reaffirmed prior jurisprudence to the effect that all requestors have equal rights of access under FOIA, and a particular requestor’s greater interest in particular documents gives that party no greater right of access than the general public. The court also found that Pratt & Whitney had no special access under the line of cases allowing a party greater access to reports or investigations where that party is the subject of the report or investigation.  

735 See United Technologies Corp., 25 Av. Cas. (CCH) ¶ 18,095.
736 See id.
737 See id.