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2004 SMU Aviation Case Law Update

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DAVID M. McDONALD

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I. GOVERNMENT CONTRACTOR DEFENSE

A. MAINTENANCE CONTRACTORS

THERE WERE ONLY a handful of cases in the past year dealing with the government contractor defense. Only one made it to the United States Circuit Court of Appeals level. In

Hudgens v. Bell Helicopters/Textron, Army pilots who were involved in a helicopter crash sued the manufacturer, alleging that the crash was caused by the tail fin's separation, which resulted from a crack originating near the base of the fin spar.¹ Plaintiffs sought to recover against DynCorp, who was contracted to maintain the Army's aircraft.² Although cracks had been discovered in the UH-1 line of helicopters and had become the subject of both a 1997 Airworthiness Directive issued by the FAA and a 1998 Advisory Bulletin by Bell Helicopters, the Army chose not to follow those recommendations as it is not bound by either the FAA's issuance of Airworthiness Directives or the manufacturer's Service Bulletins.³ Bell, the manufacturer, warned the Army about the possibility of such cracks and recommended additional visual inspections.⁴ The Army determined that its helicopters were not engaged in heavy lifting; therefore, they did not need to follow the recommended inspection protocols.⁵ Plaintiffs alleged "that DynCorp was negligent under Alabama law for failing to properly maintain the helicopter and/or to make necessary repairs."⁶ DynCorp moved for summary judgment on the basis of the government contractor defense.⁷ The circuit court affirmed the district court's decision that the government contractor defense extends to service contracts such as the maintenance contract between DynCorp and the Army.⁸ This case merits review as it provides an excellent summary as to the admissibility of expert testimony and affidavits in support of and in opposition to a summary judgment.

B. APPLICATION TO FEDERAL OFFICER JURISDICTION

In *Teague v. Bell Helicopter Services, Inc.*, the United States District Court for the Northern District of Texas, while considering a petition to remand the case back to state court, held that the potential application of the government contractor defense was sufficient to create federal jurisdiction and avoid remand.⁹ In this case, an employee's survivors filed suit against the dece-

¹ 328 F.3d 1329, 1330 (11th Cir. 2003).

² *Id.* at 1331.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 1331-32.

⁶ *Id.* at 1332.

⁷ *Id.*

⁸ *Id.* at 1345.

⁹ No. 4:03-CV-004-A, 2003 U.S. Dist. LEXIS 2088, at *13 (N.D. Tex. Feb. 12, 2003).

dent's employer, Bell Helicopter, alleging that his death was caused, in part, by exposure to asbestos during his employment.¹⁰ Pursuant to a contract with the government, "Bell used asbestos in the process of manufacturing military helicopters."¹¹ The decedent was exposed to that asbestos while working for Bell Helicopters.¹² Textron removed the case under "federal officer" removal jurisdiction in 28 U.S.C. § 1442 (a)(1) to which Bell agreed.¹³ Textron had to show "that Bell: (1) [was] a 'person' within the meaning of the statute; (2) 'acted pursuant to a federal officer's directions and that a causal nexus exist[ed] between the defendant's actions under color of federal office and the plaintiff's claims'; and (3) assert[ed] a 'colorable federal defense.'"¹⁴ The court found that Bell met the first two requirements and then examined whether Bell sufficiently presented a federal defense.¹⁵ The court held that in order to avoid remand, Bell only needed to provide a "colorable federal defense." It did not need to prove the asserted defense, but only to articulate its apparent applicability to the case before the court.¹⁶

C. WAIVER OF DEFENSE

The United States District Court for the Eastern District of Louisiana held that the failure to timely plead the government contractor defense as an affirmative defense in accordance with Rule 8(c) of the Federal Rules of Civil Procedure constitutes a waiver.¹⁷ In *New Orleans Assets v. Woodward*, the defendant failed to formally plead the government contractor defense in accordance with Rule 8(c), even though it had filed answers to the plaintiff's original and amended complaints, a co-defendant's cross-claim, the plaintiff's second, third, and fifth amended complaints and a supplemental and amended cross-complaint.¹⁸ Additionally, the defense was not raised as an issue in arguments over summary judgment.¹⁹ The defendant first attempted to as-

¹⁰ *Id.* at *2.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at *3.

¹⁵ *Id.* at *3, *11.

¹⁶ *Id.* at *12-13.

¹⁷ *New Orleans Assets v. Woodward*, No. 01-2171, 2003 U.S. Dist. LEXIS 3382, at *6 (E.D. La. Feb. 5, 2003).

¹⁸ *Id.* at *4.

¹⁹ *Id.* at *4 n.1.

sert the defense "on the final day which motions could be filed in compliance with [the] Court's Scheduling Order, and just one week before the discovery cut-off date."²⁰ The defendant failed to produce any evidence showing that the facts supporting the affirmative defense were only discovered recently.²¹ Based on the foregoing, the court held that the defense was waived.²²

II. FEDERAL AVIATION ACT

A. PREEMPTION OF STATE LAW

The United States District Court for the Eastern District of Pennsylvania had the opportunity to consider whether or not the Federal Aviation Act applied to a passenger's claim for injury resulting from items falling from an overhead bin.²³ In *Allen v. American Airlines, Inc.*, the plaintiff was injured when a computer fell from an overhead bin after arrival at the gate.²⁴ The bin was opened by an unidentified passenger who stood up while the seatbelt light was still on, but after the aircraft had come to a stop at the terminal gate.²⁵ The plaintiff contended that American Airlines was negligent because it operated the aircraft in a careless and reckless manner contrary to the requirements of 14 C.F.R. § 91.13(a) by: failing to require the unidentified passenger to remain seated; failing to give a post-landing warning; and allowing the overhead compartments to be overloaded.²⁶ The court noted that the Third Circuit has held that the Federal Aviation Act "establishes the applicable standard of care in the field of air safety, generally, [and] thus preempt[s] the entire field from state and territorial regulation."²⁷ While the court found that allegations of negligence based on Section 91.13 sufficiently alleged a federal standard of care, the court also found that the regulation did not require the defendant to provide a warning immediately prior to disembarking.²⁸ This was based, in part, on 14 C.F.R. § 91.519,

²⁰ *Id.* at *5.

²¹ *Id.* at *5-6.

²² *Id.* at *6.

²³ See *Allen v. Am. Airlines, Inc.*, 301 F. Supp. 2d 370 (E.D. Pa. 2003).

²⁴ *Id.* at 373.

²⁵ *Id.*

²⁶ *Id.* at 374-75.

²⁷ *Id.* at 374 (citing *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 367 (3d Cir. 1999)).

²⁸ *Id.* at 375.

which only requires a pre-takeoff warning.²⁹ Since there was no breach of a federal standard of care, the defendant was entitled to summary judgment on that cause of action.³⁰ Of interest, the court analyzed other cases which have considered the application of Section 91.13(a) to the conduct of air carriers and found that application of Section 91.13(a) is reserved only for serious misconduct where a potential for harm is incontestably high.³¹ Here the court noted that the aircraft was at a stop and there was simply no "threat of imminent, dire physical injury to Plaintiff and his fellow passengers while their plane sat stationary."³² This opinion briefly summarized several cases, facts, and issues that courts have looked at to determine whether or not the carrier may be liable for injuries as a result of objects falling from overhead bins.³³

In a case that is close to home, specifically mine, the United States District Court for the Southern District of Florida considered whether the Federal Aviation Act, which governs all qualifications and capacity to operate commercial aircraft in interstate commerce, preempted state criminal laws.³⁴ *Hughes v. 11th Judicial Circuit* involved two America West Airline pilots who were assigned as the crew on a commercial flight from Miami, Florida to Phoenix, Arizona.³⁵ Shortly after pushback, officers from the Miami-Dade police department asked the Transportation Security Administration for permission to stop the flight and have it return to the gate on the basis that officials at a security checkpoint smelled alcohol on the pilots' breath.³⁶ The aircraft was recalled, and approximately two hours later, the Miami-Dade police department took the pilots' breathalyzer test.³⁷ Their breath-alcohol level exceeded the 0.08 limit of Florida law, but was less than the federal criminal limit of 0.10.³⁸ "America West permanently fired [both pilots], and the Federal Aviation Administration permanently revoked their Airman and Medical Certificates."³⁹ The State of Florida sought to prosecute

²⁹ *Id.*

³⁰ *Id.* at 378.

³¹ *Id.* at 376.

³² *Id.* at 377.

³³ *Id.* at 377-78.

³⁴ See *Hughes v. 11th Jud. Cir.*, 274 F. Supp. 2d 1334 (S.D. Fla. 2003).

³⁵ *Id.* at 1336.

³⁶ *Id.*

³⁷ *Id.* at 1336-37.

³⁸ *Id.* at 1337.

³⁹ *Id.*

the pilots criminally for having operated an aircraft with an alcohol level in excess of the 0.08 state limit.⁴⁰ The court did a detailed analysis of whether it should abstain from interfering with the state court prosecutions, but ultimately decided that federal abstention was inappropriate.⁴¹ In analyzing whether or not there was federal preemption, the court noted that there are three situations where preemption can arise: express preemption, field preemption, and conflict preemption.⁴² "Field preemption exists where either: (1) the pervasiveness of the federal regulation precludes supplementation by the States; (2) the federal interest in the field is sufficiently dominant; or (3) the object the federal law seeks to obtain and the character of obligations federal law imposes reveal the same purpose."⁴³ The court determined that the comprehensive legislation provided under the U.S. Code and the Code of Federal Regulations (C.F.R.) evidenced Congress's intent "to preempt the field of pilot qualifications and capacity to fly a commercial airliner in interstate commerce."⁴⁴ Additionally, the court noted that 14 C.F.R. expressly preempts state law except where there has been "actual loss of life, injury, or damage to property."⁴⁵ As a result of the court's decision that the Federal Aviation Act preempted this specific area, the court issued a writ of habeas corpus and enjoined the State of Florida from criminally prosecuting the pilots.⁴⁶

B. NO PREEMPTION OF STATE LAW

In *Casey v. Goulian*, the court considered whether the Federal Aviation Act sufficiently preempted plaintiffs' state law nuisance claims alleging that the defendants were involved in noisy and dangerous stunt plane flights over their homes.⁴⁷ The court noted that the Federal Aviation Act does not provide a private cause of action to enforce its standards nor does it completely preempt the field of noise regulation.⁴⁸ Citing *Vorhees v. Naper Aero Club, Inc.*, the court found that "[t]here is no . . . broad

⁴⁰ *Id.*

⁴¹ *Id.* at 1339-40.

⁴² *Id.* at 1341.

⁴³ *Id.* at 1342.

⁴⁴ *Id.* at 1343.

⁴⁵ *Id.* at 1344 (citing 14 C.F.R. pt. 121, App I, § XI (B)).

⁴⁶ *Id.* at 1346.

⁴⁷ 273 F. Supp. 2d 136 (D. Mass. 2003).

⁴⁸ *Id.* at 138.

language in the Federal Aviation Act specifically prohibiting state and local governments from regulating airflight in any way whatsoever,” and as a result, there is no complete preemption of the field so as to allow removal of the state law claim based upon federal question grounds.⁴⁹

III. DEATH ON THE HIGH SEAS ACT

The only aviation case dealing with the Death on the High Seas Act (DOHSA) was an offshoot of the Egypt Air crash of 1999. In the case of *Allen v. Egypt Air, Inc.*, the court found that a decedent’s stepchildren were not entitled to recover under DOHSA as “a stepchild does not qualify as a ‘child’ under DOHSA.”⁵⁰ The court further determined that none of the stepchildren qualified as dependent relatives under DOHSA (no claim was made that the stepchildren were financially dependent upon the decedent), and as a result, the court held they were not entitled to assert claims under DOHSA.⁵¹

IV. AIRLINE DEREGULATION ACT

Only two cases made it to the circuit court level dealing with the Airline Deregulation Act (ADA).⁵² The Act was germane to a half dozen district court decisions.

A. PREEMPTION OF STATE LAW

In *King Jewelry Inc. v. Federal Express Corp.*, King Jewelry sought to recover for damage to a shipment of candelabra.⁵³ The candelabra were valued at \$37,000.⁵⁴ King Jewelry had contracted with a professional packager in Florida to package and ship the candelabra.⁵⁵ The shipper then contracted with Federal Express when other companies refused to ship such high value items.⁵⁶ Federal Express told the shipper that he could pay an extra \$185 for the declared value of \$37,000.⁵⁷ The extra

⁴⁹ *Id.* at 139-40 (citing *Vorhees v. Naper Aero Club, Inc.*, 272 F.3d 390, 404 (7th Cir. 2001)).

⁵⁰ *Allen v. Egypt Air, Inc. (In re Air Crash Near Nantucket Island)*, No. 02-CV-00101, 2003 U.S. Dist. LEXIS 13877, at *5 (E.D.N.Y. Aug. 8, 2003).

⁵¹ *Id.* at *6, *8.

⁵² 49 U.S.C. § 410701 (2004).

⁵³ 316 F.3d 961, 962 (9th Cir. 2003).

⁵⁴ *Id.* at 962.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

value was paid to Federal Express.⁵⁸ However, the air waybill provided that the highest allowed declared value was \$50,000, except that "items of extraordinary value" were limited to a declared value of \$500.⁵⁹ "Items of extraordinary value" were defined in FedEx's Service Guide and referenced and incorporated into the air waybill.⁶⁰ "Items of extraordinary value" were defined to include items such as artwork, jewelry, furs, precious metal, and negotiable instruments.⁶¹ When the candelabra arrived damaged, King Jewelry filed suit in California state court, and the case was removed to federal court by Federal Express.⁶² Federal Express then "moved for partial summary judgment, seeking to limit its liability to \$500.00 per crate."⁶³ King Jewelry alleged the \$500 per crate limit was inapplicable because the parties amended the contract under California law (presumably due to the payment for the additional declared value).⁶⁴

The circuit court determined that the ADA preempted California law, thereby preventing modification of the air waybill between the parties.⁶⁵ The court held that "federal common law governs contractual clauses that limit interstate carriers' liability for damage to goods shipped by air."⁶⁶ The court also found that the ADA preempts state law because "the modification that King Jewelry [sought] to impose pertains directly to the services Federal Express offers."⁶⁷ Of note, when the court held that the ADA preempted King Jewelry's state law claims, it also required Federal Express to return the excess premium paid for the declared value in excess of \$500 per crate.⁶⁸

In a case involving Florida's Whistleblower Act (FWA)⁶⁹, the United States District Court for the Southern District of Florida considered whether or not the ADA preempted a plaintiff's

⁵⁸ *Id.* at 962-63.

⁵⁹ *Id.*

⁶⁰ *Id.* at 963.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 964, *see* 49 U.S.C. § 41713 (2004).

⁶⁵ *King Jewellery*, 316 F.3d at 964.

⁶⁶ *Id.*

⁶⁷ *Id.* at 964 n.8.

⁶⁸ *Id.* at 966.

⁶⁹ FLA. STAT. § 448.102(1)(2004).

claim.⁷⁰ In *Tucker v. Hamilton Sundstrand Corp.*, the plaintiff was terminated from his employment at an aircraft parts repair facility that held an FAA certified repair station certificate.⁷¹ The plaintiff was supposedly terminated due to workplace misconduct, although the plaintiff alleged that he was terminated due to his complaints that his employer was not properly repairing parts in accordance with the Federal Aviation Regulations and was not properly filling out required FAA paperwork.⁷² The plaintiff's ex-employer moved for summary judgment on the basis that the ADA preempted the FWA claim and that the ADA's Whistleblower Protection Program⁷³ provided the exclusive remedy for the plaintiff's claim.⁷⁴ Finally, the employer argued that a claim under the Whistleblower Protection Program was time-barred because the plaintiff had failed to file a complaint with the Department of Labor within 90 days as required by the Act.⁷⁵

The court determined that, while an aircraft could fly with one generator not working (which was the type of part principally repaired by the plaintiff's employer), the "aircraft generator maintenance [was] sufficiently related to air carrier service" as to be preempted by the ADA.⁷⁶ The court then found that the Whistleblower Protection Program incorporated into the ADA was applicable, but that the plaintiff had failed to file a timely complaint, and therefore, the plaintiff's claim was time-barred under the Whistleblower Protection Program.⁷⁷

In yet another case involving FWA, the District Court of New Hampshire held that the Florida Whistleblower Act was preempted by the ADA.⁷⁸ In *Simonds v. Pan American Airlines*, the plaintiff filed suit in Florida state court claiming he was discharged in violation of Florida's Whistleblower Act.⁷⁹ Pan Am removed the proceeding to the United States District Court for the Middle District of Florida where it was thereafter transferred

⁷⁰ *Tucker v. Hamilton Sundstrand Corp.*, 268 F. Supp. 2d 1360 (S.D. Fla. 2003).

⁷¹ *Id.* at 1361.

⁷² *Id.*

⁷³ 49 U.S.C. § 42127.

⁷⁴ *Id.*

⁷⁵ *Id.* at 1362-63.

⁷⁶ *Id.* at 1364.

⁷⁷ *Id.* at 1365.

⁷⁸ *Simonds v. Pan Am. Airlines, Inc.*, No. 03-11-M, 2003 U.S. Dist. LEXIS 17328, at *17 (D.N.H. Sept. 30, 2003).

⁷⁹ *Id.* at *1; FLA. STAT. § 448.102(1).

to the District of New Hampshire.⁸⁰ Pan Am then moved to dismiss the claim on the basis that the ADA preempted the plaintiff's claim.⁸¹ "Simonds [was] an experienced commercial pilot, with approximately 20,000 hours of flight time."⁸² He was scheduled to fly a four-leg flight from New Hampshire to Maine to Pittsburgh to Florida and then back to Portsmouth, New Hampshire.⁸³ "The entire trip should have required approximately eight hours of flight time and 13 and one-half hours of duty time."⁸⁴ The Federal Aviation Regulations preclude a pilot from being assigned or accepting an assignment of a schedule that requires duty for more than sixteen hours in any twenty-four hour period.⁸⁵ Due to unexpected aircraft mechanical problems after the first three legs of the trip, it appeared to Simonds that he would not be able to complete the trip without running afoul of the 16 hour limit.⁸⁶ Based on the foregoing, he reported his concerns to Pan Am and refused to fly the last leg of the flight.⁸⁷ As a result, the flight was delayed until another pilot took over the flight.⁸⁸

The court analyzed whether or not the ADA would preempt the Florida Whistleblower Act claim under these facts.⁸⁹ The court cited the Eleventh Circuit's decision in *Branche v. Airtran Airways*, and noted that it is the specific facts of a retaliation claim and not the statute that determines whether or not the claim is preempted by the ADA.⁹⁰ The court also found that the ADA's incorporation of the Whistleblower Protection Program evidenced Congress's intent "to preempt state-law whistleblower claims related to air safety."⁹¹ The court determined that the plaintiff's conduct in refusing to fly the aircraft put in jeopardy the air carrier's ability to render "service" to its passengers by

⁸⁰ *Simonds*, 2003 U.S. Dist. LEXIS 17328, at *1.

⁸¹ *Id.* at *1-2.

⁸² *Id.* at *3.

⁸³ *Id.* at *4.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at *4-5.

⁸⁸ *Id.* at *5.

⁸⁹ *Id.* at *11.

⁹⁰ *Id.* (citing *Branch v. Airtran Airways, Inc.*, 342 F.3d 1248 (11th Cir. 2003)).

⁹¹ *Id.* at *14 (citing *Botz v. Omni Air Int'l*, 286 F.3d 488, 496 (8th Cir. 2002)).

threatening to ground the plane.⁹² As such, his claim was preempted by the ADA.⁹³

B. NO PREEMPTION OF STATE LAW

In *Skydive Factory, Inc. v. Maine Aviation Corp.*, the plaintiff filed suit for property damage suffered after landing as a result of “defendants’ improper inspection and maintenance of the airplane.”⁹⁴ The defendant removed the suit to federal court on federal question grounds under 28 U.S.C. § 1331 asserting “that the Federal Aviation Act completely preempts any state-law cause of action for inspection and maintenance.”⁹⁵ Upon plaintiff’s motion to remand, the court noted that “[t]he FAA ha[d] promulgated regulations that deal with aircraft maintenance and inspection, 14 C.F.R. pt. 43 [and] prescrib[ed] the qualifications for who can do them and how they are to be done.”⁹⁶ Nonetheless, citing *American Airlines v. Wolens*, the court found that terms and conditions in a contract between parties, as opposed to a state law or regulation, are not preempted by the Federal Aviation Regulations.⁹⁷ While that case dealt with property damage, as opposed to personal injury, the court found no reason to distinguish between the two, and, noting that other courts have found that safety-related claims for personal injury were not preempted, found no basis for preemption of claims dealing solely with property damage.⁹⁸ As a result, the case was remanded for lack of federal question jurisdiction.⁹⁹

In *Branche v. Air Tran Airways, Inc.*, the court considered whether the Airline Deregulation Act preempted Florida’s Whistleblower Act (FWA).¹⁰⁰ Mr. Branche worked for Air Tran as their only aircraft inspector at Tampa International Airport.¹⁰¹ In this capacity, he was required to conduct safety inspections of Air Tran’s aircraft after they had been serviced by Air Tran’s maintenance crew prior to takeoff.¹⁰²

⁹² *Id.* at *17.

⁹³ *Id.*

⁹⁴ 268 F. Supp. 2d 61, 62 (D. Me. 2003).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* (citing *Am. Airlines, Inc., v. Wolens*, 513 U.S. 219, 229 (1995)).

⁹⁸ *Id.* at 62-63.

⁹⁹ *Id.* at 65.

¹⁰⁰ 342 F.3d 1248, 1250 (11th Cir. 2003); FLA. STAT. § 448.102(1) (2004).

¹⁰¹ *Id.*

¹⁰² *Id.*

In 2001, one of Air Tran's DC-9 aircraft landed at the airport with one of its two engines running at temperatures exceeding FAA safety guidelines.¹⁰³ The plaintiff recommended that the engine be subjected to a detailed physical inspection.¹⁰⁴ Instead, one of Air Tran's maintenance personnel and two maintenance workers climbed into the aircraft and conducted a high power run in an effort to ascertain the airworthiness of the engine.¹⁰⁵ The plaintiff alleged "that none of these individuals were qualified to undertake this diagnostic maneuver."¹⁰⁶ After the aircraft departed Tampa without the recommended service, "the engine overheated during its flight to Atlanta and the plane subsequently was taken out of service."¹⁰⁷ Mr. Branche reported Air Tran's alleged regulatory violations to the FAA.¹⁰⁸ Both he and Air Tran were contacted regarding his allegations, and Air Tran realized that he was the source of the FAA's knowledge of the incidents in question.¹⁰⁹ Approximately two weeks later, Air Tran accused Mr. Branche of falsifying his time card and stealing approximately two hours of pay, and he was terminated.¹¹⁰ As a result, Mr. Branche filed suit in Florida state court under the FWA.¹¹¹

Air Tran removed the case on the basis of diversity jurisdiction.¹¹² The district court granted the motion for removal and also granted Air Tran's motion for summary judgment on the basis that the plaintiff's FWA Claim was preempted by the ADA.¹¹³ On appeal the Eleventh Circuit noted that "[p]re-emption may be either express or implied, and is compelled whether Congress's command is explicitly stated in the statute's language or implicitly contained in its structure and purpose."¹¹⁴ On appeal the Eleventh Circuit noted that the ADA expressly states that a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price,

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1252.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 1253 (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting *FMC Corp. v. Holliday*, 498 U.S. 52, 56-57 (1990))).

route, or service of an air carrier”¹¹⁵ The court considered whether Branche’s claim under the Whistleblower Act was preempted because it had the effect of regulating services provided by Air Tran.¹¹⁶ The court made a careful analysis of other opinions on whether retaliatory discharge claims were preempted by the ADA and ultimately concluded that this claim was not preempted by the ADA.¹¹⁷ The court’s reasoning was that safety is not a basis on which airlines compete for passengers, and as such, it does not serve the purposes of the ADA to preempt state law employment claims related to safety.¹¹⁸ Because Branche’s FWA claim was fundamentally an employment discrimination claim and did not impact any area in which airlines compete, the court concluded that his claim did not relate to “services” of the air carrier within the meaning of the Act.¹¹⁹ The court went on to note that in 1999 Congress amended the ADA to include the Whistleblower Protection Program (WPP), which provided similar protection to Florida’s Whistleblower Act.¹²⁰ The court noted that Air Tran fired the plaintiff because he had reported a violation to the FAA.¹²¹ This did not affect the providing of services by Air Tran.¹²² Had the plaintiff claimed that Air Tran fired him in retaliation for refusing to allow an aircraft to take off, the court would have likely ruled that state law, under those facts, did affect services.¹²³

In *Alasady v. Northwest Airlines Corp.*, plaintiffs brought claims against Northwest alleging violations of the Civil Rights Act¹²⁴ and the Minnesota Human Rights Act¹²⁵, as well as tort claims for negligent and intentional infliction of emotional distress.¹²⁶ The claims arose out of Northwest’s refusal to allow the three plaintiffs, all Muslim men of Middle Eastern descent, to board a flight from Minneapolis to Salt Lake City on September 20, 2001, just nine days after the events of September 11th.¹²⁷ Al-

¹¹⁵ *Id.* (citing 49 U.S.C. § 41713(b)(1)(2004)).

¹¹⁶ *Id.* at 1253-54.

¹¹⁷ *Id.* at 1259-60.

¹¹⁸ *Id.* at 1258.

¹¹⁹ *Id.* at 1261.

¹²⁰ *Id.*

¹²¹ *Id.* at 1263.

¹²² *Id.*

¹²³ *See id.*

¹²⁴ Civil Rights Act of 1964, 42 U.S.C.A. § 1981 (2004).

¹²⁵ MINN. STAT. ANN. § 363.03 (2004).

¹²⁶ No. 02-3669, 2003 U.S. Dist. LEXIS 3841, at *1-2 (D. Minn. Mar. 3, 2003).

¹²⁷ *Id.* at *1.

though the plaintiffs had been fully interviewed by both state and federal officers and were considered to pose no security threat, the crew and passengers on Northwest's flight refused to fly the aircraft with them on board.¹²⁸ Plaintiffs were ultimately provided alternate travel with Delta Airlines after a nearly four-hour delay.¹²⁹ The court noted that the purpose of the ADA was to maximize reliance on competitive market forces to further the efficiency, innovation, and low prices of air transportation services.¹³⁰ To ensure that the states would not undo the federal deregulation, Congress passed the Airline Deregulation Act, prohibiting states from enforcing any law relating to rates, routes, or services.¹³¹ The court determined that the preemption of state law claims for infliction of emotional distress or from claims arising from conduct alleged to be the product of discriminatory motives would do nothing to promote the purposes of the ADA.¹³² As a result, the court held that the plaintiff's claims were not preempted.¹³³

In *Hannibal v. Federal Express Corp.*, the plaintiff sought to recover for damage to musical equipment shipped via Federal Express.¹³⁴ The plaintiff claimed that Federal Express breached the agreement to deliver the goods the next day and to honor insurance claims placed against the equipment for which additional value had been declared.¹³⁵ Federal Express removed the case to federal court on the basis of federal question jurisdiction.¹³⁶

The court noted that there was no federal question presented on the face of the complaint, and pursuant to the well-pled complaint rule, there was no basis for removal.¹³⁷ While the court noted that federal preemption by the ADA is ordinarily a defense, it did not appear on the face of the complaint as a defense, and therefore, did not authorize removal.¹³⁸ The court also noted that under the doctrine of complete preemption, when Congress "so completely pre-empt[s] an area of law [so] as

¹²⁸ *Id.* at *7.

¹²⁹ *Id.* at *8.

¹³⁰ *Id.* at *29.

¹³¹ *Id.* at *29-30.

¹³² *Id.* at *31-32.

¹³³ *Id.* at *32.

¹³⁴ 266 F. Supp. 2d 466, 468 (E.D. Va. 2003).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 469.

¹³⁸ *Id.*

to display an intent to not merely preempt a certain amount of state law, but also to transfer jurisdiction from state to federal courts,” then preemption may provide a basis for federal jurisdiction.¹³⁹ The court noted that the ADA did not preempt all state acts, but only those which affected rates, routes, or services.¹⁴⁰ As such, there was no complete preemption which would form the basis of federal jurisdiction.¹⁴¹

In *All World Professional Travel Services v. American Airlines*, the court denied American Airlines’ motion to dismiss the complaint alleging causes of action under a state law breach of contract claim and a federal RICO claim.¹⁴² All World was a travel agency, which, in the months after the September 11th tragedies, assisted American in processing refunds to passengers whose travel was cancelled immediately after September 11th.¹⁴³ Shortly after September 11th, “American unilaterally claimed that refund requests for passengers unable to travel as a result of the September 11th tragedies should not be processed through the ARC [a clearinghouse through which funds are collected from various travel agencies on behalf of carriers], but should be sent directly to American instead.”¹⁴⁴ “All World was unaware of American’s purported change in policy, and continued to process refunds through the ARC. Thereafter, American began issuing ‘Debit Memos’ (demands for money), charging All World an ‘administrative service charge’ and ‘penalty fee’ of \$100 or \$200 per ticket refunded through the ARC” and processed by All World.¹⁴⁵

The court carefully considered the purposes of the ADA and found the ADA was adopted to encourage development and to obtain air transportation service based upon competitive market forces.¹⁴⁶ The court noted that the ADA retained a savings clause to protect “the ability of states to control non-economic matters concerning airlines within their borders.”¹⁴⁷ All World brought three state law claims for breach of contract, unjust enrichment, and a claim for declaratory and injunctive relief.¹⁴⁸

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 470.

¹⁴¹ *Id.*

¹⁴² 282 F. Supp. 2d 1161, 1172, 1176 (C.D. Cal. 2003).

¹⁴³ *Id.* at 1164.

¹⁴⁴ *Id.* at 1165.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1167.

¹⁴⁷ *Id.* at 1167-68.

¹⁴⁸ *Id.* at 1165.

The court found that All World's breach of contract claim fell under the scope of *American Airlines v. Wolens*, which held that "Court enforcement of a private contract does not constitute 'a State's' enactment or enforcement of law.'"¹⁴⁹ The court found that part of All World's breach of contract claim did, however, derive from enactment of state law, specifically Virginia law, which held that the amount American charged in the Debit Memos constituted a penalty prohibited by Virginia law.¹⁵⁰ The court went on to determine that All World's breach of contract claim on the basis of unjust enrichment and claims for declaratory and injunctive relief, as stated, did not relate to American's prices or services, and therefore, were not preempted by the ADA.¹⁵¹

C. BASIS OF FEDERAL JURISDICTION

In *Kings Choice Neckwear, Inc., v. DHL Airways*, the court considered whether the ADA would give rise to federal question jurisdiction supporting removal.¹⁵² The plaintiffs originally brought this case in the state court of New York "on behalf of a proposed class of individuals who received packages shipped from abroad" via DHL.¹⁵³ The plaintiffs alleged that DHL "charged . . . some recipients of international packages an undisclosed and unauthorized 'Processing Fee' and [sought] damages and injunctive relief for alleged violations of *New York General Business Law* §349 (deceptive business practices), breach of contract, and unjust enrichment."¹⁵⁴ DHL "removed the action to federal court asserting diversity and federal question jurisdiction."¹⁵⁵

The plaintiffs moved for remand, which was ultimately denied by the court on the basis that there did not appear to be more than \$75,000 in damages claimed, thereby preventing diversity jurisdiction.¹⁵⁶ The court noted that, "[i]n determining whether a claim arises under federal law, the court 'examines the "well pleaded" allegations of the complaint and ignores po-

¹⁴⁹ *Id.* at 1168 (quoting *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 228-29 (1995)).

¹⁵⁰ *Id.* at 1168-69.

¹⁵¹ *Id.* at 1171-72.

¹⁵² No. 9580, 2003 U.S. Dist. LEXIS 17507, at *4 (S.D.N.Y. Oct. 2, 2003).

¹⁵³ *Id.* at *1.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at *1-2.

¹⁵⁶ *Id.* at *11.

tential defenses.’”¹⁵⁷ Federal question jurisdiction exists only if it is presented on the face of the complaint.¹⁵⁸ “[A] defense relying on the preemptive effect of a federal statute does not normally provide a basis for removal” except in “cases in which Congress has either expressly provided that a preempted state claim be removed to federal court . . . or, in which a federal statute has been held to wholly displace the state-law cause of action through so called ‘complete preemption’.”¹⁵⁹ The court noted that the Supreme Court has only found complete preemption to apply in three contexts: the Labor Management Relations Act, the Employer Retirement Income Security Act, and the National Bank Act.¹⁶⁰ The court noted that, while the ADA “may provide a defense to plaintiffs [sic] state-law claims, . . . [no] provision of the ADA expressly create[d] federal question jurisdiction or provide[d] that state claims relating to the ADA may be removed to federal court.”¹⁶¹

1. *Air Transportation Safety & System Stabilization Act*

In *Canada Life Assurance Co. v. Coverium Rückversicherung*, a Canadian Reinsurer sued a German Reinsurer in the United States District Court for the Southern District of New York.¹⁶² Jurisdiction was to be based upon Section 408(B)(3) of the Air Transportation Safety & Stability Act.¹⁶³ The District Court dismissed the action for lack of jurisdiction.¹⁶⁴ The Second Circuit reviewed the decision *de novo*.¹⁶⁵

The court noted that the Act has five principal titles.¹⁶⁶ “Titles I, II, III, and V provide financial and tax relief to the airline industry, including federal support for airline insurance, and affirm the President’s decision to spend \$3 billion [on getting re-elected; just kidding] on airline safety and security.”¹⁶⁷ Section 408(b) has two jurisdictional provisions.¹⁶⁸ Section 408 (b)(3) provides that the District Court of the Southern District of New

¹⁵⁷ *Id.* at *5 (quoting *Ben Nat’l Bank v. Anderson*, 539 U.S. 1 (2003)).

¹⁵⁸ *Id.* at *6.

¹⁵⁹ *Id.* at *6-7.

¹⁶⁰ *Id.* at *7.

¹⁶¹ *Id.* at *8-9.

¹⁶² 335 F.3d 52, 53 (2d Cir. 2003).

¹⁶³ *Id.* at 55.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

York has "original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001."¹⁶⁹ Plaintiff alleged its losses increased as a result of 9/11 and that the defendant failed to honor its reinsurance (or retrocession) agreement.¹⁷⁰ The plaintiff's losses would not have occurred "but-for" 9/11.¹⁷¹

The court held that, while plaintiff's losses increased due to 9/11, that did not constitute a "claim" under the Act.¹⁷² The court noted that no fact concerning 9/11 needed to be adjudicated in the Act and that the cause of plaintiff's increased losses was irrelevant.¹⁷³ The only issue was that plaintiff's incurred losses that were not shared by the defendant per the agreement.¹⁷⁴ The court commented that Congress could not have possibly intended every lawsuit traceable to 9/11 to be brought in the Southern District of New York.¹⁷⁵ The court limited its decision to that line of cases and affirmed the dismissal.¹⁷⁶

2. General Aviation Revitalization Act

In *Butler v. Bell Helicopter Textron, Inc.*, survivors and successors of victims sued to recover for damages from the crash of a Bell helicopter based upon negligence, strict products liability, warranty, and fraud.¹⁷⁷ The trial court granted Bell's motion for summary judgment based upon the eighteen year statute of repose set forth in the General Aviation Revitalization Act (GARA).¹⁷⁸

On appeal, the court considered whether any exceptions applied.¹⁷⁹ The helicopter, a model 205A-1, was originally sold in 1976.¹⁸⁰ The tail rotor yoke was the original equipment from

¹⁶⁹ *Id.* at 55-56 (citing Air Transportation Safety and System Stabilization Act, H.R. 2926, 107th Cong. § 408(b)(3) (2001) (enacted)).

¹⁷⁰ *Id.* at 57.

¹⁷¹ *Id.*

¹⁷² *Id.* at 58.

¹⁷³ *Id.* at 57.

¹⁷⁴ *Id.* at 53.

¹⁷⁵ *Id.* at 58.

¹⁷⁶ *Id.* at 59-60.

¹⁷⁷ 135 Cal. Rptr. 2d 762, 764 (Cal. Ct. App. 2d Dist. 2003).

¹⁷⁸ *Id.*; Pub. L. No. 103-289, as amended by Pub. L. No. 105-102 § 3(e), 111 Stat. 2215, 49 U.S.C. § 40101 (2004) [hereinafter GARA].

¹⁷⁹ *Butler*, 135 Cal. Rptr. 2d at 764-65.

¹⁸⁰ *Id.* at 765.

the manufacturer.¹⁸¹ The plaintiff alleged Bell misrepresented and withheld a variety of information from the FAA: first, in 1989, when it revised the helicopter's maintenance manual to increase the operational life of the tail rotor yoke from 4,000 to 5,000 flight hours; later in 1996, when it revised the manual to require a new dimensional test for inspection of the yoke; and finally, throughout a ten-year period in which it failed to report at least five accidents involving in-flight fatigue failures of rotors that had less than 2,400 hours of use.¹⁸² The appellate court held that part 21.3(a) of the FAA's regulations put an affirmative duty on Bell to report the military failures of the identical yokes.¹⁸³ Bell's failure to report such to the FAA fell within GARA's exception arising from withholding information from the FAA.¹⁸⁴ The summary judgment was reversed.¹⁸⁵

In *Hiser v. Bell Helicopter Textron, Inc.*, the widow of a helicopter pilot sued for wrongful death on theories of strict product liability, negligence, and warranty.¹⁸⁶ The accident occurred during a fire-fighting mission.¹⁸⁷ Just before the accident, the pilot, who had extensive helicopter experience, called on the radio that he had a "flame-out."¹⁸⁸ The Bell 206 has a turbine engine and fuel system consisting of three tanks.¹⁸⁹ The engine feeds from only one tank and is automatically replenished from the other two.¹⁹⁰ The helicopter had a history of flame-outs due to problems with the fuel system failing to transfer fuel to the main tank.¹⁹¹ A system retrofit designed to make the system more reliable was issued in 1982, and the modification became mandatory per a 1989 Airworthiness Directive.¹⁹² Plaintiff argued that the fuel system was defective and that the 1982 retrofit made the whole fuel system subject to GARA's rolling statute of limitation.¹⁹³ Defendant alleged that the replacement of a few components did not start a new limitation period for the whole

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 770.

¹⁸⁴ *Id.*; GARA *supra* note 178, § 2(b)(1), 2(a), 3(3).

¹⁸⁵ *Butler*, 135 Cal. Rptr. at 774-75.

¹⁸⁶ 4 Cal. Rptr. 3d 249, 251 (Cal. Ct. App. 4th Dist. 2003).

¹⁸⁷ *Id.* at 252.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 252-53.

¹⁹¹ *Id.* at 254.

¹⁹² *Id.*

¹⁹³ *Id.* at 256.

system, only the components replaced.¹⁹⁴ Defendant appealed the adverse jury verdict.¹⁹⁵ While the appellate court agreed that GARA's rolling statute only applied to the components replaced, and not the fuel system as a whole, it found substantial evidence to support the jury's finding that one of the new components caused the accident.¹⁹⁶

V. WARSAW CONVENTION

A. STANDING TO SUE

In *Commercial Union Insurance Co. v. Alitalia Airlines*, the Second Circuit addressed the following issues: (1) whether the subrogee of the owner of goods had standing under the Warsaw Convention¹⁹⁷ to bring an action against the carriers consisting of two freight forwarders and Alitalia as the air carrier and (2) whether the contract for carriage between the parties was one which included ground transportation incidental to the transportation by air, or whether the ground transportation was a distinct leg in the instance of combined carriage.¹⁹⁸ Alitalia alleged that Commercial Union lacked standing to sue as its insured was not in privity of contract with Alitalia.¹⁹⁹ The court carefully analyzed the Warsaw Convention as well as the facts of the case and noted that the freight forwarders considered themselves to be agents of Alitalia.²⁰⁰ Based on the foregoing, the court determined that a contract with the freight forwarders, as agents of Alitalia, constituted a contract between the owner of the goods and Alitalia.²⁰¹ Since Commercial Union stood in the shoes of its insured as a subrogee, it had standing to bring suit under the Convention against Alitalia.²⁰²

Alitalia also argued that the contract between the parties was one of successive transportation in accordance with Article 31 of the Convention, and therefore that Commercial Union had the

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 252.

¹⁹⁶ *Id.* at 258.

¹⁹⁷ Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, *reprinted* in 49 U.S.C. § 405105 (West 2004) [hereinafter Warsaw Convention].

¹⁹⁸ 347 F.3d 448, 456, 466 (2d Cir. 2003).

¹⁹⁹ *Id.* at 457-58.

²⁰⁰ *Id.* at 462.

²⁰¹ *Id.* at 463.

²⁰² *Id.* at 463-64.

burden of proving the damage to the cargo took place during the air carriage portion of the shipment.²⁰³ Commercial Union argued that the transportation was one principally of transportation by air with incidental land carriage in accordance with Article 18 of the Convention.²⁰⁴ Under Article 18, there is a rebuttable presumption that the damage occurred during that portion of the shipment that occurred by air.²⁰⁵ In this case, the goods were shipped from Italy and received at JFK Airport.²⁰⁶ There was no apparent damage to the container, and the air waybill was accepted with the goods being in good condition at JFK.²⁰⁷ The goods were then shipped to Commercial Union's insured via ground transportation and were again received in apparent good condition until after the container was opened, and the goods were discovered to be damaged.²⁰⁸

The court found that although there was no provision for ground transportation on the air waybill, "people often expect door-to-door delivery, a service that is simply not possible without the aid of transportation other than aircraft."²⁰⁹ The court further found that the presumption of damage during the carriage by air was a provision inserted in the Convention to avoid the precise question before the court, namely, when the damage occurred.²¹⁰ Finally, the court found that, while the presumption may be a hardship on carriers, there was also a concession granted in exchange for the limitation of liability carriers enjoy under the Warsaw Convention.²¹¹ The court found that "the important factor in applying presumptive liability is not whether the air carrier itself has agreed to delivery, but simply whether the carrier is party to any contract for air carriage that contemplated delivery by another means."²¹² Here it found that there was no way that the goods could have been delivered in accordance with the air waybill without carriage by land and, as such, such land carriage was incidental to the carriage by air.²¹³ As a result, the court found that the damage to the cargo presump-

²⁰³ *Id.* at 464.

²⁰⁴ *Id.* (citing Warsaw Convention, *supra* note 197 art. 18).

²⁰⁵ *Id.*; Warsaw Convention, *supra* note 197 art. 18.

²⁰⁶ *Commercial Union Ins.*, 347 F.3d at 456.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 465.

²¹⁰ *Id.*

²¹¹ *Id.* at 466.

²¹² *Id.*

²¹³ *Id.* at 467.

tively occurred during the flight.²¹⁴ As far as the receipts indicating no damage at JFK Airport, the court noted that, while “[r]eceipt by the person entitled to delivery . . . without complaint [is] prima facie evidence” of delivery in good condition, “[w]ithout inspection, however, such a statement could only apply to apparent damage.”²¹⁵ The court also noted that the Convention allows “a seven-day time period in which a party entitled to delivery may complain of damage to a shipment.”²¹⁶ Here the court found that the damage was timely reported and that the notation on the air waybills of receipt in good condition was not controlling.²¹⁷

B. EFFECT ON SUPPLEMENTAL JURISDICTION

In *Albingia Versicherungs A.G. v. Schenker International, Inc.*, the Ninth Circuit reviewed the district court’s decision concerning the applicability of the Warsaw Convention²¹⁸ and the federal court’s jurisdiction to consider state law claims.²¹⁹ “Siemens, a German manufacturer, made computer chips in Singapore, and sent them to San Jose, California, for testing.”²²⁰ When the cartons containing the boxes of computer chips were sent back to Siemens’ factory in Singapore after testing, some of the containers contained a brick instead of the circuits.²²¹ The value of the circuits was \$235,000.²²² “Siemens had purchased insurance from Albingia Versicherungs, which paid Siemens about \$235,000 for the stolen chips [and then] brought this subrogation claim against all the firms in the shipping chain” in the California state court alleging claims under the Warsaw Convention and state law claims.²²³ “Eva Air, an international air carrier, removed the case to federal court based on the Warsaw Convention claim.”²²⁴ After discovery, all but one defendant settled.²²⁵ Schenker, a freight forwarder, operated a warehouse in

²¹⁴ *Id.* at 468.

²¹⁵ *Id.* (citing Warsaw Convention, *supra* note 197 art. 26(1)).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Warsaw Convention, *supra* note 197.

²¹⁹ 344 F.3d 931, 935 (9th Cir. 2003).

²²⁰ *Id.* at 934.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

California located outside the airport.²²⁶ “Siemens’ [air] waybills contained a limitation of liability supplementing . . . the Warsaw Convention.”²²⁷ In the event that the Warsaw Convention was found not to apply, then there was a limit of \$20.00 per kilogram for damage.²²⁸ The parties eventually stipulated to facts which strongly supported the inference that the computer chips were stolen by Schenker’s employees, and, as such, that the loss occurred outside of the airport.²²⁹ As a result, the Warsaw Convention would not apply.²³⁰ When the district court held that the limitation in the air waybill of \$20.00 per kilogram was effective, the plaintiff then argued that the case should have been remanded to state court because the basis for federal jurisdiction, the Warsaw Convention, no longer applied.²³¹ The circuit court held that, when jurisdiction was originally invoked in federal court under the Warsaw Convention, the court had supplemental jurisdiction to hear and decide the state law claims.²³² That jurisdiction did not end once the Warsaw Convention was found to be inapplicable.²³³ Albingia argued that state law should apply to its claim and that California law precluded the \$20.00 per kilogram limitation.²³⁴ The court held that federal common law applied and, “[u]nder federal common law, the limit on liability is valid . . . if the shipper has reasonable notice of it and a fair opportunity to purchase the means to avoid it.”²³⁵ Here the court found that Siemens was on notice of the limitation as it had purchased insurance to cover its potential loss.²³⁶ Based on the foregoing, the private \$20.00 per kilogram limitation contained in the waybill was enforceable.²³⁷

C. WHAT CONSTITUTES AN ACCIDENT

In *Magan v. Lufthansa German Airlines*, the Second Circuit reviewed a summary judgment granted in favor of Lufthansa wherein the district court held that light or moderate turbu-

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.* at 935.

²³¹ *Id.* at 934-35.

²³² *Id.* at 936.

²³³ *Id.*

²³⁴ *Id.* at 939.

²³⁵ *Id.*

²³⁶ *Id.* at 939-40.

²³⁷ *Id.* at 940.

lence could not constitute the basis for an "accident" under the Warsaw Convention.²³⁸ In this case, the plaintiff was returning to his seat after the captain had announced that the aircraft may encounter turbulence.²³⁹ While the pilot characterized the turbulence as light or moderate, the plaintiff had difficulty maintaining his balance and only made it to his seat by holding onto other seatbacks as he progressed down the aisle.²⁴⁰ The aircraft on which he flew had a center fuel tank that protruded into the passenger cabin, providing a ceiling height of only 6'3" at one point.²⁴¹ Plaintiff was 6'4" tall.²⁴² As the plaintiff approached the protrusion, something caused him to violently strike his head on it, breaking his nose, dislodging a dental bridge, and causing his vision to blur and nose to bleed.²⁴³ Plaintiff was able to make it back to his seat.²⁴⁴ Plaintiff subsequently filed suit against Lufthansa seeking recovery for his injuries under Article 17 of the Warsaw Convention.²⁴⁵ Lufthansa moved for summary judgment arguing that mild to moderate turbulence is an expected part of normal flight and, therefore, could never meet the definition of an "accident" as defined in *Air France v. Saks*.²⁴⁶ According to *Saks*, an accident is an "unexpected or unusual event or happening that is external to the passenger."²⁴⁷ The circuit court noted that the plaintiff's witnesses described the turbulence to be more severe than that described by the pilot and also noted the Supreme Court's comment in *Saks*, that in "cases where there is contradictory evidence, it is for the trier of fact to determine whether an 'accident' as here defined caused the passenger's injury."²⁴⁸ The circuit court rejected the district court's decision that light or moderate turbulence could never constitute an accident and reversed the grant of summary judgment.²⁴⁹

In another case where the courts wrestled with what constitutes an "accident," the United States District Court for the East-

²³⁸ 339 F.3d 158, 159 (2d Cir. 2003); Warsaw Convention, *supra* note 197.

²³⁹ *Id.* at 160.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 160-61; *see* *Air France v. Saks*, 470 U.S. 392 (1985).

²⁴⁷ *Magan*, 339 F.3d at 161 (citing *Saks*, 470 U.S. at 405).

²⁴⁸ *Id.* at 162, 165 (citing *Saks*, 470 U.S. at 405).

²⁴⁹ *Id.* at 166.

ern District of New York dealt with the carrier's and plaintiff's opposing motions for summary judgment on whether the plaintiff's injury constituted an accident under the Warsaw Convention.²⁵⁰ In *Girard* the plaintiff was injured while exiting a bus that had transported her from the terminal to the aircraft.²⁵¹ As the plaintiff stepped from the bus, she lost her balance and fell, allegedly incurring injuries.²⁵² American argued that an accident under the Convention must be a risk that is characteristic of air travel.²⁵³ Since the plaintiff fell from a bus, American argued it was not a risk inherent to air travel.²⁵⁴ The court reviewed various post-*Saks* cases and noted there were two lines of opinions on the definition of an "accident," one broadly construing the term and the other doing so narrowly.²⁵⁵ Following *Fulop v. Malev Hungarian Airlines*, the court noted the conflicting cases showed a decisive pattern: "the extent to which the circumstances giving rise to the accident fall within the causal purview or control of the carrier—or at least within its practical ability to influence—as an aspect of the operations of the aircraft or airline."²⁵⁶ After analyzing the Warsaw Convention and the definition of "accident" as set forth in *Saks*,²⁵⁷ *supra*, the court determined that, while it was clear that the plaintiff was within the control of the carrier and, therefore, was in the process of embarking or disembarking, whether or not her falling from the bus was an accident as considered by the Warsaw Convention was an issue to be determined by the trier of fact (the jury).²⁵⁸

In *Miller v. Continental Airlines, Inc.*, the court addressed whether or not the Warsaw Convention applied to plaintiffs' claims for deep vein thrombosis (DVT) as a result of the seating configuration of the aircraft.²⁵⁹ Plaintiffs brought claims under the Warsaw Convention and various state law claims including claims for product negligence, common carrier negligence,

²⁵⁰ *Girard v. Am. Airlines, Inc.*, No. 00-CV-4559, 2003 U.S. Dist. LEXIS 14506, at *1-2 (E.D.N.Y. Aug. 21, 2003).

²⁵¹ *Id.* at *1.

²⁵² *Id.* at *2-3.

²⁵³ *Id.* at *19.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* at *21-22 (citing *Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651, 657 (S.D.N.Y. 2001)).

²⁵⁷ See *supra* notes 247-50 and accompanying text.

²⁵⁸ *Girard*, 2003 U.S. Dist. LEXIS 14506, at *31.

²⁵⁹ 260 F. Supp. 2d 931, 935 (N.D. Cal. 2003).

product liability, and breach of warranty.²⁶⁰ The court, following the Supreme Court's opinions in *El Al Israel Airlines, Ltd. v. Tseng*,²⁶¹ and *Saks, supra*, held that the plaintiffs' state law claims were barred on the basis of complete preemption under the Warsaw Convention.²⁶² The court also considered the application of the Convention to loss of consortium claims and noted that "the Convention extends to claims by non-passengers based on events during international air travel" and that its application is not merely personal to claims made by passengers.²⁶³ As a result, the court held that loss of consortium claims by a non-passenger are subject to the Convention.²⁶⁴

In *Scala v. American Airlines, Inc.*, the court considered whether providing the plaintiff with an alcoholic beverage, as opposed to the non-alcoholic beverage requested, could constitute an accident that would allow recovery under the Warsaw Convention.²⁶⁵ Plaintiff was on an international flight and requested a glass of cranberry juice, but was instead served and consumed cranberry juice with alcohol.²⁶⁶ As a result of the mix-up, the plaintiff allegedly "suffered physical injury to his heart."²⁶⁷ The plaintiff suffered from a preexisting heart condition.²⁶⁸ A suit was filed in state court and removed by American Airlines.²⁶⁹ Thereafter, American moved for judgment on the pleadings on the basis that the plaintiff's claims did not constitute an accident under the Warsaw Convention.²⁷⁰ The court decided that the provision of an alcoholic beverage when one was not requested constituted an "unexpected or unusual event or happening that is external to the passenger."²⁷¹ American argued that in order to qualify as an "accident" the event in question must "arise out of a risk that is peculiar to air travel."²⁷² The court determined that the characteristics of air travel in-

²⁶⁰ *Id.* at 933.

²⁶¹ 525 U.S. 155 (1999).

²⁶² *Id.* at 937.

²⁶³ *Id.* at 940.

²⁶⁴ *Id.* at 941; *see also* *Diaz Lugo v. Am. Airlines, Inc.*, 686 F. Supp. 373 (D.P.R. 1988).

²⁶⁵ 249 F. Supp. 2d 176, 177 (D. Conn. 2003).

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* at 179-180 (applying *Air France v. Saks*, 470 U.S. 392 (1985)).

²⁷² *Id.* at 180.

creased the plaintiff's vulnerability to a mistaken drink substitution and that such constituted an "accident" as defined under the Convention.²⁷³

Recently, a New York district court was asked to determine whether or not a carrier's response to an in-flight medical emergency constituted an "accident" under the Warsaw Convention.²⁷⁴ In *Fulop v. Malev Hungarian Airlines*, plaintiffs brought suit for injuries allegedly sustained during an international flight.²⁷⁵ Mr. Fulop had a prior history of a heart attack in 1994.²⁷⁶ During this 1998 flight, the plaintiff began to experience chest pains similar to what he recalled having experienced when he had his prior heart attack.²⁷⁷ He made one request to Malev's flight crew for assistance who then made an announcement requesting a physician.²⁷⁸ An orthopedic surgeon, who was not a heart specialist, was onboard and examined the plaintiff.²⁷⁹ During the initial checkup and several follow up checkups, the doctor noted that the plaintiff's pulse rate, blood pressure, and other indicia of a heart attack were normal.²⁸⁰ The doctor gave the plaintiff an injection of pain killer from the flight's medical kit, which seemed to alleviate the symptoms.²⁸¹ As a result, this flight from Budapest to New York was not diverted.²⁸² Shortly after landing in New York, plaintiff began experiencing increased pain again and, upon arrival, an ambulance took him to a hospital where he received a triple bypass two days later.²⁸³ Plaintiff alleged that had the flight been diverted, it would have allowed him to obtain medical treatment which would have avoided the permanent damage he incurred as a result of the delay in obtaining medical treatment.²⁸⁴ The court, at a bench trial, noted that the carrier had followed its own procedures for dealing with in flight medical emergencies and that those procedures were consistent with in-

²⁷³ *Id.* at 181.

²⁷⁴ *Fulop v. Malev Hungarian Airlines*, 244 F. Supp. 2d 217, 218 (S.D.N.Y. 2003).

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 219.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.* at 219-20.

²⁸⁴ *Id.* at 220.

dustry standards.²⁸⁵ As a result, the court found that the greater weight of the evidence did not support a finding that an "accident" under the Warsaw Convention had occurred and entered judgment for the carrier.²⁸⁶

D. WHAT CONSTITUTES A SINGLE OPERATION

In *Robertson v. American Airlines, Inc.*, plaintiff brought suit seeking recovery for thermal burns incurred during a flight.²⁸⁷ The plaintiff had been using an ice pack which had become warm and she asked the flight attendant to cool it.²⁸⁸ The flight attendant placed the bag inside an airsickness bag with a piece of dry ice.²⁸⁹ The plaintiff lived and worked in Virginia and she originally booked her flight with British Airways from Denver to London leaving on September 2nd and returning on September 8th.²⁹⁰ Three days later, she booked a roundtrip American Airlines flight from Washington, D.C. to Denver leaving on August 29th and returning on September 8th.²⁹¹ Plaintiff left on her trip as planned, but made several changes to her return arrangements.²⁹² Ultimately, she ended up returning on September 10th via a British Airways flight from London to Denver, and after spending three hours in the Denver airport, she took the American Airlines flight from Denver to Washington, D.C. via Chicago.²⁹³ It was on the Denver/Chicago leg of the flight that the plaintiff sustained her burns.²⁹⁴ Plaintiff brought suit three years after the incident.²⁹⁵

American Airlines alleged that the flight was part of a single operation of international travel and, therefore, subject to the limitations of the Warsaw Convention, including the two-year statute of limitations.²⁹⁶ In determining whether this was domestic carriage or part of a singular operation of international carriage, the court reviewed Article One of the Warsaw Convention and noted that the carriage would be deemed to be one

²⁸⁵ *Id.* at 221.

²⁸⁶ *Id.* at 222.

²⁸⁷ 277 F. Supp. 2d 91, 93 (D.D.C. 2003).

²⁸⁸ *Id.* at 95 n.6.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 93.

²⁹¹ *Id.*

²⁹² *Id.* at 94.

²⁹³ *Id.* at 94-95.

²⁹⁴ *Id.* at 95.

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 97.

undivided transportation if it had been regarded by the parties as a single operation.²⁹⁷ The court noted that travelers are unlikely to consider the question of whether the transportation was a single operation and, as a result, the courts used an objective standard to determine the party's intent based upon specific documentary indicia.²⁹⁸ Based upon the foregoing, the court held the travel was a single operation, that the Convention applied to the Denver/Chicago flight, and that the Convention's two-year statute of limitation barred plaintiff's claim.²⁹⁹

E. EMBARKING AND DISEMBARKING

The United States District Court for the District of Columbia considered what constituted "embarking" in *Kalantar v. Lufthansa German Airlines*.³⁰⁰ In this case, the plaintiff, an Iranian traveling with an Iranian passport, was in the process of checking in to depart the United States on a trip to Germany.³⁰¹ Upon arriving at the ticket counter, the agent wanted to search the plaintiff's baggage that was being checked onto the aircraft.³⁰² In response to the plaintiff's request as to why his luggage had to be searched when no one else's luggage was being searched, the agent only said that it was due to an FAA security directive but refused to disclose the directive to the plaintiff.³⁰³ The agent also told the plaintiff, within earshot of other passengers, that he "must know that the United States Government is against all Iranians."³⁰⁴ When the plaintiff refused to leave the Lufthansa counter and refused to allow the hand search of his luggage, Lufthansa's personnel called the police who eventually arrested the plaintiff and took him away in handcuffs.³⁰⁵ Plaintiff filed suit, alleging discrimination, defamation, false imprisonment, and intentional infliction of emotional distress.³⁰⁶ Lufthansa alleged plaintiff's state law claims were preempted by the Warsaw Convention.³⁰⁷ The court carefully reviewed many cases dealing with what constitutes "embarking," and this case

²⁹⁷ *Id.* at 96 (citing Warsaw Convention, *supra* note 197 art. 1 (3)).

²⁹⁸ *Id.* at 96-97.

²⁹⁹ *Id.* at 100.

³⁰⁰ 276 F. Supp. 2d 5 (D.D.C. 2003).

³⁰¹ *Id.* at 7.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 7, 9.

provides an excellent summary of same.³⁰⁸ The court noted that courts have generally focused on: "(1) the passenger's location at the time of the injury; (2) the passenger's activity at the time of the injury, and (3) the degree of control exercised by the airline over the passenger" at the time of the injury in order to ascertain whether or not it occurred during the process of embarking.³⁰⁹ With regard to the plaintiff's physical location, the court found that his placement at the ticket counter prior to being checked in and prior to receiving a boarding pass was too remote from the actual process of getting on a specific aircraft to constitute embarking.³¹⁰ Secondly, the court found that the plaintiff, checking in approximately an hour and a half prior to the flight's departure time was too distant, temporally, to constitute embarking.³¹¹ The court also found that plaintiff was just completing his initial check-in, which was the first of several steps a passenger must take prior to boarding an aircraft.³¹² Finally, the court noted that had the check-in procedure proceeded smoothly, the plaintiff would have been released to the public area of the airport, as opposed to a secured area reserved for passengers only.³¹³ Finding that the plaintiff was not in the process of embarking, the court denied the defendant's motion for partial summary judgment seeking application of the Warsaw Convention to the plaintiff's case.³¹⁴

In *Chips Plus, Inc. v. Federal Express Corp.*, plaintiff sought recovery for damage to some computer parts.³¹⁵ The parts were shipped from Finland to Warrington, Pennsylvania, which was where the damage to the cargo was discovered.³¹⁶ The total loss was alleged to be \$117,715.³¹⁷ The main issue before the court was the difference between the Warsaw Convention, as originally drafted, and its amendment under Montreal Protocol 4 (MP4).³¹⁸ Under the amended Warsaw Convention, a party as-

³⁰⁸ See *id.* at 10-12.

³⁰⁹ *Id.* at 10.

³¹⁰ *Id.* at 12.

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.* at 13.

³¹⁴ *Id.* at 14.

³¹⁵ 281 F. Supp. 2d 758, 760-61 (E.D. Pa. 2003).

³¹⁶ *Id.* at 760.

³¹⁷ *Id.*

³¹⁸ *Id.* at 761; Additional Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, as Amended by the Protocol done at The Hague on

serting jurisdiction must only show: "(1) that the goods at issue where [sic] shipped via international transportation by aircraft; (2) that, at the time the goods were shipped, the country of destination and the country from which the goods were shipped were signatories to the Amended Warsaw Convention; and (3) that the damage to the goods in question occurred during carriage by air."³¹⁹ The court noted that MP4 created a rebuttable presumption that the damage to goods took place during the carriage by air, and as a result of the presumption, all requirements for jurisdiction and application of the Convention were met.³²⁰ Plaintiff attempted to avoid the Convention by alleging that there were errors in the air waybill that did not conform with the requirements of Articles 5 through 8 of the Convention.³²¹ The court noted that an additional difference between MP4 and the original Convention was that, under the original Convention, if a carrier accepted goods without the air waybill having been made out and containing the requirements contained in Article 8, the carrier was not entitled to avail itself of the limitations of the Convention.³²² However, under MP4, "[n]on-compliance with the provisions of Articles 5 to 8 [do] not affect the existence or the validity of the contract for carriage . . . including those relating to limitation of liability."³²³

In the following case, the Southern District of New York considered whether or not adoption of MP4 necessarily resulted in the U.S.'s adoption of the Hague Protocol.³²⁴ In *Royal & Sun Alliance Insurance v. American Airlines, Inc.*, the question was important because, under the Hague Protocol, there is no requirement to include agreed stopping places on the air waybill in order to allow the carrier to avail itself of the limitations of the Convention.³²⁵ The U.S. had never formally adopted the Hague

28 September 1955, *opened for signature* Sept. 25, 1975, *reprinted* in Sec. Rep. No. 105-20 [hereinafter Montreal Protocol No. 4 or MP4].

³¹⁹ *Chips Plus*, 281 F. Supp. 2d at 762-63.

³²⁰ *Id.* at 763 (citing Montreal Protocol, *supra* note 318 art. 18(5)).

³²¹ *Id.* at 764 (citing Warsaw Convention, *supra* note 197 art. 5-8).

³²² *Id.*

³²³ *Id.* at 764-65.

³²⁴ *Royal & Sun Alliance Ins. v. Am. Airlines, Inc.*, 277 F. Supp. 2d 265 (S.D.N.Y. 2003); Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by air Signed at Warsaw on 12 October 1929, *opened for signature* Sept. 28, 1955, 478 U.N.T.S. 371 [hereinafter Hague Protocol].

³²⁵ *Royal & Sun*, 277 F. Supp. 2d at 267.

Protocol.³²⁶ However, the court carefully reviewed MP4 and noted that Article XVII (2) of MP4 states “[r]atification of this Protocol by any State which is not a party to the Warsaw Convention as amended at the Hague, 1955, shall have the effect of accession to the Warsaw Convention as amended by the Hague, 1955 and by the Protocol No. 4 of Montreal, 1975.”³²⁷ On July 31, 2002, President George W. Bush sent a letter to the Senate “for advice and consent for the proposition that the United States could not have been bound by the Hague Protocol before that date.”³²⁸ Plaintiffs argued that the letter indicated that the U.S. had not formally adopted the Hague Protocol and also noted that the U.S. is not on the list at the Polish Embassy as ratifying the Hague Protocol.³²⁹ The court dispelled these points and noted that, while the U.S. being listed in Poland would clarify the point, the language contained in MP4 was sufficient to show that the U.S. adopted the Hague Protocol by adopting MP4.³³⁰

F. WHAT CONSTITUTES CARRIAGE BY AIR

In *Fuller v. Amerijet International Inc.*, the Southern District Court of Texas considered whether significant carriage by land, during which loss to goods occurred, was part of carriage by air so as to fall under the Warsaw Convention.³³¹ In this case, the plaintiff contracted with Amerijet to transport a computer and home theater equipment from Houston to Belize City by air.³³² Plaintiff delivered the goods to Amerijet’s warehouse at Houston’s Bush Airport.³³³ Amerijet then hired Land Cargo to truck the goods from Houston to Miami and Land Cargo delivered the goods to Amerijet’s warehouse at Miami International Airport.³³⁴ However, at that point the goods disappeared.³³⁵ The court found that, “[u]nder the convention, transportation by air includes the entire period in which the air carrier is in charge of the goods-not simply the time the goods are on the airplane.”³³⁶

³²⁶ *Id.* at 268.

³²⁷ *Id.* at 267.

³²⁸ *Id.* at 268.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ 273 F. Supp. 2d 902 (S.D. Tex. 2003).

³³² *Id.* at 902.

³³³ *Id.*

³³⁴ *Id.* at 902-03.

³³⁵ *Id.* at 903.

³³⁶ *Id.*

Since it was “directly related to Amerijet’s contractual obligation to ship,” the court held that the land carrier was the air carrier’s sub-bailee and that the loss of the goods in Miami constituted a loss under the Convention.³³⁷ As a result, the court granted Amerijet’s motion for summary judgment limiting its liability to \$20.00 per kilogram (i.e. “\$9.07 per pound”).³³⁸

G. STATUTE OF LIMITATIONS

In *Pennington v. British Airways*, the United States District Court for the Eastern District of Pennsylvania addressed the issue of when the two-year statute of limitations under the Warsaw Convention³³⁹ would expire and whose law would be utilized in making that determination.³⁴⁰ In this case, the plaintiff originally filed suit in Pennsylvania, and British Airways removed the case on the basis of diversity of citizenship.³⁴¹ The plaintiff’s injury occurred on July 13, 2000, when the plaintiff suffered a stroke on an international flight with British Airways.³⁴² Plaintiff alleged that British Airways failed to provide appropriate medical treatment.³⁴³ Suit was filed on July 15, 2002.³⁴⁴ Under Pennsylvania rules, whenever the last day of any limitation period falls on a Saturday or Sunday, such day is omitted from the computation.³⁴⁵ “[B]ecause July 13, 2002 was a Saturday, [under Pennsylvania law,] the action was timely filed on the following Monday, July 15, 2002.”³⁴⁶ British Airways argued that the two year statute of limitations in the Convention could not be extended by local law and, therefore, the failure to file the suit prior to July 13 barred the action.³⁴⁷ The court, reviewing Article 29 of the Convention, noted that the “method of calculating the period of limitation shall be determined by the law of the court” in which the suit is filed.³⁴⁸ As a result, the court held that Pennsylvania law was applicable and that the complaint was

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ Warsaw Convention, *supra* note 197 art. 29.

³⁴⁰ 275 F. Supp. 2d 601 (E.D. Pa. 2003).

³⁴¹ *Id.* at 602.

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 604.

timely filed.³⁴⁹ This opinion includes citations to the drafting history of the Warsaw Convention and bears closer examination if this issue is present in your case.

H. WILLFUL MISCONDUCT

In *Mendez & Diaz v. American Airlines, Inc.*, the Southern District Court of New York considered the question of whether willful misconduct constitutes an exception to the application of the Warsaw Convention, thereby destroying federal jurisdiction.³⁵⁰ This case dealt with two complaints filed originally in Texas against American Airlines and others as a result of the November 12, 2001 American Airlines Flight 587 crash in Belle Harbor, New York.³⁵¹ The flight was bound for Santo Domingo in the Dominican Republic, and crashed shortly after takeoff, resulting in the deaths of all passengers and crew members onboard.³⁵² American, during the time it was the sole defendant (Airbus Industries and others were also named), timely removed the action to federal court.³⁵³ Thereafter, plaintiffs moved to remand to state court, alleging that the removal was defective because American failed to obtain the consent of all other defendants and that the willful misconduct of American constituted an exception to the application of the Warsaw Convention, thereby allowing the state law actions to survive.³⁵⁴ The court noted that, at the time American removed the case to federal court, it was the only defendant and, therefore, was not required to obtain the consent of the other defendants.³⁵⁵ In analyzing the plaintiffs' motion for remand, the court noted that the law puts the burden of demonstrating the existence of removal jurisdiction on the party opposing the remand.³⁵⁶ The court noted that the "well-pleaded complaint rule" normally would prevent the application of federal jurisdiction based on an affirmative defense.³⁵⁷ This allows the plaintiff to formulate its complaint in a manner designed to avoid federal law if it

³⁴⁹ *Id.* at 606.

³⁵⁰ No. 02: Civ. 6746, 2003 U.S. Dist. LEXIS 7540, at *10 (S.D.N.Y. May 5, 2003).

³⁵¹ *Id.*

³⁵² *Id.* at *2.

³⁵³ *Id.* at *4.

³⁵⁴ *Id.* at *4, 17.

³⁵⁵ *Id.* at *17.

³⁵⁶ *Id.* at *5.

³⁵⁷ *Id.* at *6.

chooses.³⁵⁸ However, the court noted that the “complete pre-emption” doctrine would bar state law claims regardless of the well-pleaded complaint rule.³⁵⁹ The court, noting the Supreme Court’s decision that the Warsaw Convention completely pre-empts state common law claims regarding personal injuries suffered during international air travel, held that there was federal question jurisdiction over the matter.³⁶⁰ Plaintiffs also argued that the matter should be remanded because additional defendants, namely Airbus Industries, who was not a “carrier” as defined in the Warsaw Convention,³⁶¹ were not covered by the Warsaw Convention and, therefore, the state law claims continued to exist.³⁶² The court, after analyzing the Convention and noting that the term “carriers” does not make reference to “manufacturers” of aircraft, nonetheless reviewed the Second Circuit’s holding that “the Warsaw Convention is to be construed as to further its purposes to the greatest extent possible, even if that entails rejecting a literal reading.”³⁶³ The court, noting that a good argument could be made to include manufacturers under the Warsaw Convention, nonetheless chose to simply grant supplemental jurisdiction over any potential state law claims against Airbus.³⁶⁴ Based on the foregoing, the motion to remand was denied.³⁶⁵

I. REQUIREMENTS FOR BAGGAGE CHECK

In the following case, the Eastern District Court of New York was faced with the question of what constituted a baggage check under the Warsaw Convention,³⁶⁶ the requirements of same, and the effect failure to comply with the requirements of the Convention had upon the carrier’s ability to limit its liability for lost or damaged baggage.³⁶⁷ In *Schopenhauer*, a passenger sued Air France for baggage lost and damaged on international

³⁵⁸ *Id.*

³⁵⁹ *Id.* at *6-7.

³⁶⁰ *Id.* at *9 (relying on *El Al Israel Airlines v. Tseng*, 525 U.S. 155 (1999)).

³⁶¹ See Warsaw Convention, *supra* note 197.

³⁶² *Mendez*, 2003 U.S. Dist. LEXIS 7540, at *14.

³⁶³ *Id.* at *15. (citing *Benjamins v. British European Airways*, 572 F.2d 913, 918 (2d Cir. 1978)).

³⁶⁴ *Id.*

³⁶⁵ *Id.* at *18.

³⁶⁶ Warsaw Convention, *supra* note 197 art. 22(2).

³⁶⁷ *Schopenhauer v. Compagnie Nationale Air France*, 255 F. Supp. 2d 81 (E.D.N.Y. 2003).

flights.³⁶⁸ This case has a fairly long list and summary of numerous cases dealing with both the original Warsaw Convention and the courts' interpretation of the Convention as modified by MP4.³⁶⁹ It also looks to opinions from Canada and the United Kingdom concerning the requirements of a baggage check under the Hague Protocol as both have been signatories to the Hague since the mid-1960s.³⁷⁰ The plaintiff was traveling from New York to the Republic of Benin, with "a four-day stopover in Paris on the way to Benin, and a 13-hour stopover in Paris on the way back to New York."³⁷¹ When the plaintiff arrived to begin his trip in New York, he checked five bags and attempted to carry on a sixth bag, but Air France required that he check it as it was "too bulky."³⁷² Plaintiff was given a "limited release" identification tag in exchange for giving the sixth bag to the flight attendant.³⁷³ When the flight arrived in Paris, the sixth bag did not, and it did not turn up again until approximately six weeks later, heavily looted.³⁷⁴ The plaintiff alleged lost and damaged items totaling \$69,000 in that bag.³⁷⁵ Also in the lost bag were the plaintiff's tickets for his remaining itinerary.³⁷⁶ The plaintiff was delayed in getting a replacement ticket and, when continuing his travel from Paris to Benin, checked six pieces of baggage.³⁷⁷ Unfortunately, when he arrived in Benin, "two of the pieces were 'completely destroyed' and thoroughly looted."³⁷⁸ Plaintiff alleged that the contents of those bags were valued at approximately \$2,200.³⁷⁹

Air France moved for summary judgment under the Warsaw Convention and also moved to dismiss the part of the plaintiff's claim relating to the damages incurred on the Paris to Benin flight.³⁸⁰ The basis of the motion to dismiss was that, having issued replacement tickets to the plaintiff, a new contract for carriage was created and, therefore, New York no longer satisfied

³⁶⁸ *Id.* at 82.

³⁶⁹ *Id.* at 85-87.

³⁷⁰ *Id.* at 96.

³⁷¹ *Id.* at 83.

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ *Id.* at 84.

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ *Id.*

the requirements of the Convention as one of the jurisdictional locales.³⁸¹ The court rejected this argument, noting that under the Convention, international carriage could be through successive contracts of carriage without destroying the international character of the flight.³⁸²

Of greater interest was the court's handling of the requirements of the Warsaw Convention as to Air France's liability for the sixth bag that was lost on the New York to Paris flight.³⁸³ Under the original Convention, prior to its amendment by MP4, a carrier could not limit its liability under the Convention unless it issued a baggage check containing certain particulars, specifically, the ticket number of the passenger, the number and weight of the baggage, and a statement that the transportation was subject to the rules relating to the Convention.³⁸⁴ Montreal Protocol 4, which came into effect prior to this loss, however, only requires an indication of the places of departure and destination (if the places of departure and destination are within a single High Contracting Party), one or more agreed stopping places in another state, and a notice to the effect that the Warsaw Convention may be applicable.³⁸⁵ The "limited release" given by Air France to the plaintiff for the sixth bag failed to include the above requirements.³⁸⁶ Because Air France did not base its motion for summary judgment as to the application of the Warsaw Convention to the loss of the sixth bag on the basis that the requirements of the current Convention for the baggage ticket could be fulfilled by the information contained in the passenger's ticket, the court did not grant Air France summary judgment as to the application of the Warsaw Convention to that bag.³⁸⁷ This opinion contains a detailed analysis of the application of the current Convention and the utilization of the passenger ticket and baggage ticket to constitute a single document meeting the requirements of the Convention as modified by MP4.

³⁸¹ *Id.* at 85 n.6.

³⁸² *Id.* (citing Warsaw Convention, *supra* note 197 art. 28(1)).

³⁸³ *Id.* at 89.

³⁸⁴ *Id.* (citing Warsaw Convention, *supra* note 197 art. 4).

³⁸⁵ *Id.* at 88 (citing Montreal Protocol No. 4, *supra* note 318 art. 4.).

³⁸⁶ *Id.* at 89.

³⁸⁷ *Id.* at 99.

J. NOTIFICATION OF DAMAGE

In *G.D. Searle & Co. v. Federal Express Corp.*, the Northern District Court of California considered cross-motions for summary judgment under the Warsaw Convention concerning damage to cargo.³⁸⁸ This case evidences the care that counsel involved in these types of cases must take to ensure which version of the Warsaw Convention properly applies to the case. While the U.S.'s adoption of MP4 constitutes an adoption of the Hague Protocol, counsel must nonetheless check to ensure that both appropriate high contracting parties are signatories to the Hague.³⁸⁹ In this case, the plaintiff filed suit for damage to certain pharmaceutical goods which were transported from Germany to the United States.³⁹⁰ The shipment was supposed to arrive within two days, but ended up taking slightly more than a week.³⁹¹ When the goods were delivered by Federal Express in California, many of the cartons were damaged resulting in plaintiff's claim that the entire shipment was destroyed.³⁹² As a preliminary matter, the court determined which version of the Warsaw Convention applied to the proceedings.³⁹³ Thereafter, it determined that the evidence of record was sufficient to support a jury finding that Federal Express' acts or omissions were done with the intent to cause damage or recklessly and with knowledge that damage would probably result, as set forth in Article 22 of the Hague.³⁹⁴ This standard differs from the original Warsaw Convention which required the plaintiff to show that the carrier engaged in willful misconduct.³⁹⁵

Also of issue in the case was whether or not notice of claim was timely made.³⁹⁶ The two entities involved in the shipment from Germany were Federal Express and Union-Transport.³⁹⁷ Under the Hague Protocol and the language contained in the air waybill, the person entitled to delivery must complain to the carrier promptly after discovery of the damage and in no case

³⁸⁸ 248 F. Supp. 2d 905, 906 (N.D. Cal. 2003).

³⁸⁹ See *id.* at 907.

³⁹⁰ *Id.* at 906.

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ *Id.* at 907-08.

³⁹⁴ *Id.* at 910-11 (citing Hague Protocol, *supra* note 324 art. 22).

³⁹⁵ *Id.* at 910 n.3 (citing Warsaw Convention, *supra* note 197 art. 25).

³⁹⁶ *Id.* at 908-09 (citing Hague Protocol, *supra* note 324 art. 15).

³⁹⁷ *Id.* at 909.

more than 14 days from date of receipt of the cargo.³⁹⁸ Although the plaintiff in this case had timely informed Federal Express of its claim, it did not send notice to Union-Transport until nearly 6 weeks after receipt of the goods.³⁹⁹ However, since the air waybills provided that a written complaint could be made "to the Carrier whose Air Waybill was used, or to the first Carrier or to the last Carrier or to the Carrier who performed the transportation during which the loss, damage or delay took place," the court found that by notifying Federal Express in a timely manner, plaintiff complied with its obligation to timely notify Union-Transport.⁴⁰⁰

VI. DOMESTIC SHIPPING CASES

In *Kesel v. United Parcel Service, Inc.*, plaintiff brought suit against UPS seeking recovery for the value of lost paintings.⁴⁰¹ Plaintiff had selected seven paintings from studios in the Ukraine for exhibition in San Francisco.⁴⁰² Plaintiff asked his assistant to ship the paintings to California through UPS, "to declare the paintings at \$13,500 for U.S. customs purposes and to insure them for \$60,000, a figure based upon [plaintiff's] belief that the paintings could be sold in the United States for \$8,000 to \$10,000 a piece."⁴⁰³ The assistant took the paintings to the customs commission in Odessa as required by law.⁴⁰⁴ The commission determined that the works were not antique, and therefore assigned a value based on the cost of materials and provided plaintiff's assistant with a permit listing the value of the paintings as \$558.⁴⁰⁵ When the assistant attempted to ship the goods through UPS and insure them for \$60,000, UPS refused to insure them for more than the \$558 value indicated on the customs form.⁴⁰⁶ Nevertheless, the assistant shipped all seven paintings in a single package.⁴⁰⁷ UPS's limitation of liability and tariffs limited its liability to \$100 per package.⁴⁰⁸ When the paintings failed to show up in California, UPS was able to trace

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

⁴⁰¹ 339 F.3d 849, 850 (9th Cir. 2003).

⁴⁰² *Id.*

⁴⁰³ *Id.* at 850-51.

⁴⁰⁴ *Id.* at 851.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

the paintings to their receipt and storage at a Kentucky warehouse, where they then "vanished like the Ark of the Covenant."⁴⁰⁹ Plaintiff sued UPS in a California court, alleging numerous federal and state claims, and seeking \$60,000 in damages for the loss of the paintings.⁴¹⁰ UPS removed the case to federal court.⁴¹¹ The district court granted summary judgment in favor of UPS and limited its liability to \$558.⁴¹² The circuit court affirmed the grant of summary judgment, noting that federal common law "delineates what a carrier must do to limit its liability."⁴¹³ Under the "released valuation doctrine . . . in exchange for a low rate, the shipper is deemed to have released the carrier from liability beyond a stated amount."⁴¹⁴ In order for UPS to take advantage of the doctrine, it must have provided the plaintiff with, "(1) a reasonable notice of limited liability, and (2) a fair opportunity to purchase higher liability."⁴¹⁵ The court found that the plaintiff was placed on notice of UPS's limitation and that UPS had provided the plaintiff with increased coverage (\$558 of coverage as opposed to \$100 per container), and therefore UPS complied with federal common law.⁴¹⁶ The court noted that UPS does not have carte blanche to impose arbitrary valuations on property.⁴¹⁷ Here, the court noted that UPS relied upon the customs documents setting the valuation of the property.⁴¹⁸

⁴⁰⁹ *Id.* at 850-51.

⁴¹⁰ *Id.* at 851.

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ *Id.* at 852.

⁴¹⁴ *Id.* (citing *Deiro v. Am. Airlines*, 816 F.2d 1360, 1365 (9th Cir. 1987)) (internal citations omitted).

⁴¹⁵ *Id.* (citing *Read-Rite Corp. v. Burlington Air Express, Ltd.*, 186 F.3d 1190, 1198 (9th Cir. 1998)).

⁴¹⁶ *Id.* at 852, 854.

⁴¹⁷ *Id.* at 854.

⁴¹⁸ *Id.*