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Recent Developments in Aviation Law

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RECENT DEVELOPMENTS IN AVIATION LAW

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THE FOLLOWING ARTICLE provides an overview of recent, important developments in aviation law from February 1, 2016, to January 1, 2017. This article will cover cases concerning the topics of federal preemption, *forum non conveniens*, international treaties including the Montreal Convention, and federal jurisdiction.

I. FEDERAL PREEMPTION

The 2016 case *Sikkelee v. Precision Airmotive Corp.* is one of the most significant decisions in the area of federal preemption.¹ The U.S. Court of Appeals for the Third Circuit held that the Federal Aviation Act of 1958, the General Aviation Revitalization Act of 1994 (GARA), and regulations promulgated by the Federal Aviation Administration (FAA) do not categorically preempt state products liability claims, clarifying the court's holding in *Abdullah v. American Airlines, Inc.*² from seventeen years earlier.³

Sikkelee arose out of the crash of a Cessna 172 airplane in North Carolina in 2005. The pilot David Sikkelee was killed from the burns and injuries he sustained in the crash.⁴ His wife brought a lawsuit in 2007 in the U.S. District Court for the Middle District of Pennsylvania against seventeen defendants, alleging various state tort law causes of action. In 2010, the district court, relying on the *Abdullah* decision, granted defendants' motion for judgment on the pleadings. It held that Sikkelee's state

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¹ *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680 (3d Cir. 2016).

² 181 F.3d 363 (3d Cir. 1999).

³ *Sikkelee*, 822 F.3d at 683.

⁴ *Id.* at 685.

law claims were within the preempted field of air safety.⁵ Sikkelee filed an amended complaint continuing to assert state law claims and, in an attempt to plead a federal standard of care, also alleged violations of numerous FAA regulations.⁶ Following settlements and motion practice, the engine's manufacturer—Lycoming—remained as the sole defendant and faced claims of defective design and failure to warn.⁷

Lycoming brought a motion for summary judgment on these claims. The court granted the motion as to the defective design claims related to the engine, holding that the FAA's issuance of a type certificate was based on Lycoming's compliance with the pertinent Federal Aviation Regulations (FARs), and thus, the federal standard of care had been satisfied as a matter of law.⁸ The Third Circuit granted an interlocutory appeal of the order granting partial summary judgment on the ground that it "raised novel and complex questions concerning the reach of *Abdullah* and the scope of preemption in the airlines industry."⁹ The court ultimately concluded that "neither the [Federal Aviation] Act nor the issuance of a type certificate per se preempts all aircraft design and manufacturing claims. Rather . . . aircraft products liability cases like [Sikkelee's] may proceed using a state standard of care."¹⁰

The Third Circuit began its analysis by re-visiting its decision in *Abdullah*. It noted that while *Abdullah* stood for the proposition that within the field of air safety "plaintiffs may bring state law causes of action that incorporate federal standards of care," *Abdullah* was clear that the "field of aviation safety described . . . was limited to in-air operations."¹¹ The court further bolstered its conclusion that products liability claims such as those brought by Sikkelee were outside *Abdullah*'s holding with the observation that, as to a federal standard of care, engine design regulations governing the issuance of type certificates are not as comprehensive as those governing pilot certification and in-air duties, responsibilities, and rules.¹² Having decided that the case was outside the scope of *Abdullah*, the court next examined applica-

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 686.

⁸ *Id.*

⁹ *Id.* at 687.

¹⁰ *Id.* at 683.

¹¹ *Id.* at 688–89 (emphasis added).

¹² *Id.* at 689–90.

ble congressional legislation to determine “whether Congress expressed [a] clear and manifest intent to preempt aviation products liability claims.”¹³

The court started by noting that, “[c]onsistent with the uniform treatment of aviation products liability cases as state law torts,” there exists a presumption against preemption in the aviation context.¹⁴ With that presumption in mind, the court turned to the FAA and the pertinent regulations issued pursuant to the FAA’s delegated authority. Finding it “significant” that the Act contains no express preemption provision, the court noted the Act provides that the FAA may establish “‘minimum standards’ for aviation safety,” language it noted has been held in other contexts to be “insufficient on its own to support a finding of clear and manifest congressional intent of preemption.”¹⁵ Moreover, the Act’s savings clause is consistent with an intent to permit states to retain regulatory power over certain aspects of aviation.¹⁶ Noting that the Act itself “does not signal an intent to preempt state law products liability claims,” the court turned to the FARs.¹⁷

Starting with the notion that the regulations themselves are “devoid of evidence” of intent to preempt state law, the court then distinguished the design regulations at issue in *Sikkelee* with the operation regulations at issue in *Abdullah*.¹⁸ Unlike regulations governing in-air operation, design regulations “do not purport to govern the manufacture and design of aircraft per se . . . but rather establish procedures for manufacturers to obtain certain approvals and certificates from the FAA.”¹⁹ A type certificate is merely a “baseline requirement” or, mirroring language from the Act, simply a “‘minimum standard[.]’”²⁰ Rather than establishing a comprehensive set of rules and regulations that can function as a standard of care, design regulations are “in the nature of discrete, technical specifications that range from simply requiring that a given component part work properly . . . to prescribing particular specifications for certain aspects (and not even all aspects) of that component part” that would be difficult

¹³ *Id.* at 690, 692.

¹⁴ *Id.* at 691–92.

¹⁵ *Id.* at 692 (citations omitted).

¹⁶ *Id.*

¹⁷ *Id.* at 693.

¹⁸ *Id.* at 693–94.

¹⁹ *Id.* at 694.

²⁰ *Id.*

to translate into a tort standard of care.²¹ Thus, the court found that “Congress has not created a federal standard of care for persons injured by defective airplanes; and the type certification process cannot as a categorical matter displace the need for compliance in this context with state standards of care.”²²

According to the court, the language of GARA further bolstered the court’s conclusion. “By barring products liability suits against manufacturers of these older aircraft parts, GARA necessarily implies that such suits were and are otherwise permitted.”²³

Recognizing that traditional conflict preemption principles would continue to apply in the rare circumstances in which a type certification requirement and a state standard of care may be at odds, the court ultimately held that “the field of aviation safety . . . preempted in *Abdullah* does not include product manufacture and design, which continues to be governed by state tort law.”²⁴

Later in 2016, the U.S. District Court for the Southern District of Texas considered the issue of whether state products liability claims are preempted as a field in the case of *Davidson v. Fairchild Controls Corp.*²⁵ Davidson involved state products liability claims against Fairchild over air cycle machines manufactured by it and installed on a Twin Commander 690A that allegedly exposed pilots on board to toxic fumes, causing injury.²⁶ The plaintiffs’ claims were based on state law defective product theories including defective design, failure to warn, and breach of warranty.²⁷ Fairchild sought summary judgment on the basis that federal law preempted all of the plaintiffs’ claims. Relying heavily on the *Sikkelee* decision, as well as a 2011 case out of the Northern District of Texas, the court concluded that products liability law is not preempted as a field.²⁸ Rather, “the certification system effectuates ‘baseline requirement[s]’ that ‘speak to a floor of regulatory compliance.’”²⁹ The *Davidson* court answered the question that the *Sikkelee* decision left to the lower court in

²¹ *Id.* at 694–95.

²² *Id.* at 696.

²³ *Id.*

²⁴ *Id.* at 704, 709.

²⁵ No. H-15-0827, 2016 WL 5539982, at *6 (S.D. Tex. Sept. 29, 2016).

²⁶ *Id.* at *2–4.

²⁷ *Id.* at *4.

²⁸ *Id.* at *7–8.

²⁹ *Id.* at *8 (quoting *Sikkelee*, 822 F.3d at 694) (alteration in original).

that case, and concluded that conflict preemption did not apply on the grounds that the “minimum standards of the federal aviation regulations do not prohibit the design and manufacture of safer aircraft and component parts.”³⁰

In *Escobar v. Nevada Helicopter Leasing, LLC*, the U.S. District Court for the District of Hawaii considered the claim of a plaintiff whose husband was piloting a Eurocopter EC130 B4 helicopter when it crashed into mountainous terrain.³¹ The plaintiff’s husband was employed by the company operating the helicopter. Plaintiff brought claims against both the manufacturer and the owner/lessor sounding in state law negligence and strict products liability.³² The aircraft’s owner/lessor, Nevada Helicopter Leasing, LLC (NHL), brought a motion for summary judgment arguing that as an owner and lessor not in actual possession or control of the helicopter, it was immune from liability for the accident due to the preemptive effect of 49 U.S.C. § 44112.³³ That section provides that a lessor or owner is “liable for personal injury, death, or property loss or damage . . . only when a civil aircraft, aircraft engine, or propeller is in the actual possession or control of the lessor, owner, or secured party.”³⁴ NHL argued that the provision preempted all of plaintiff’s state law tort claims against it.

The court examined the preemption issue under both express and implied preemption. The court rejected express preemption after minimal analysis, finding that the FAA does not contain an express preemption clause.³⁵ Turning to implied preemption, the court quickly dispensed with field preemption and analyzed the claims under the principles of conflict preemption.³⁶ After examining the legislative history of 49 U.S.C. § 44112, the court concluded that the statute’s purpose was to “make it clear that an owner or lessor of an aircraft would not be liable unless it had actual possession or control over the aircraft” and that a state tort claim such as the one at issue in the case was at odds “with the objectives and intentions of Congress.”³⁷ Fol-

³⁰ *Id.*

³¹ *Escobar v. Nevada Helicopter Leasing, LLC*, No. 13-00598 HG-RLP, 2016 WL 3962805, at *1 (D. Haw. July 21, 2016). Wilson Elser Moskowitz Edelman & Dicker represented the helicopter’s owner/lessor in this matter.

³² *Id.*

³³ *Id.* at *5.

³⁴ *Id.* at *6.

³⁵ *See id.* at *5.

³⁶ *See id.* at *5–6.

³⁷ *Id.* at *7–9.

lowing an in-depth examination of the terms of the NHL's lease agreement with the operator, the court ultimately granted NHL's summary judgment motion on the grounds that NHL had no "actual possession or control" of the accident helicopter and was therefore immune from liability pursuant to 49 U.S.C. § 44112.³⁸

In the next two cases discussed, U.S. district courts considered the preemptive effect of the Airline Deregulation Act of 1978 (ADA), specifically its express preemption provision, which states that "a [s]tate . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart."³⁹ In *Golden Hawk Metallurgical, Inc. v. Federal Express Corp.*, the plaintiff brought suit against Federal Express Corp. (FedEx) alleging loss of two shipments of precious metals by FedEx.⁴⁰ The plaintiff further accused FedEx's employees of stealing the goods and replacing them with rocks from one of FedEx's shipping locations.⁴¹ FedEx's terms and conditions expressly limited FedEx's liability to \$100 unless a higher value is declared and paid. It was undisputed that the plaintiff did not declare a higher value for its shipments nor did it pay for a higher value in its shipping contracts.⁴²

FedEx brought a summary judgment motion as to the claims of state law (1) breach of duty as bailee; and (2) conversion, asserting that both were preempted by the ADA's express preemption provision.⁴³ The court noted that the U.S. Supreme Court has interpreted the "provision broadly to preclude all claims 'having a connection with, or reference to, airline rates, routes, or services.'"⁴⁴ The court further noted the holding in *Northwest, Inc. v. Ginsberg* "that preemption under the ADA depends on whether a claim 'is based on a state-imposed obligation or simply one that the parties voluntarily undertook.'"⁴⁵ The court eventually granted FedEx's motion as to the breach of

³⁸ *Id.* at *11-13.

³⁹ 49 U.S.C. § 41713(b)(1).

⁴⁰ *Golden Hawk Metallurgical, Inc. v. Federal Express Corp.*, No. 15-14005, 2016 WL 5791198, at *1 (E.D. Mich. Oct. 4, 2016).

⁴¹ *Id.* at *1.

⁴² *See id.*

⁴³ *Id.*

⁴⁴ *Id.* at *2 (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)).

⁴⁵ *Id.* at *2 (quoting *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1431 (2014)).

duty as bailee and conversion causes of action, finding that unlike a claim for breach of contract, “these claims do not ‘serve to effectuate the intentions of [the] parties Nor do they allege violations of terms or conditions that ‘the parties voluntarily undertook.’”⁴⁶ As such, regardless of whether they arose from statutory or common law, the claims were preempted by the ADA.⁴⁷

The court in *Shrem v. Southwest Airlines Co.* undertook a similar analysis to find that the plaintiffs’ claims were preempted by the ADA.⁴⁸ *Shrem* concerned two plaintiffs who filed a class action against Southwest Airlines Co. (Southwest) over its handling of plaintiffs’ travel credits obtained as the result of flight cancellations, alleging California state law causes of action of, among others, fraud, negligence, and unjust enrichment.⁴⁹ Southwest brought a motion to dismiss as to these counts arguing that such claims were preempted by the ADA. Finding that the “forfeited credits from cancelled flights [were] connected to both Defendant’s rates (the credits are available for purchase of future travel), and Defendant’s services (the credits provide access to flights), [the court found] the causes of action [were] preempted under the ADA.”⁵⁰ The court further rejected plaintiffs’ argument that the claims were mere enforcement of self-imposed obligations, finding that plaintiffs’ claim that Southwest violated a regulatory obligation to provide conspicuous written notice of its terms and conditions as to travel credits as being both outside the contract and based on a regulation, which does not create a private right of action.⁵¹ Accordingly, plaintiffs’ claims of negligence, fraud, and unjust enrichment were preempted under the ADA and dismissed.

II. FORUM NON CONVENIENS

In *Dordieski v. Austrian Airlines, AG*, the U.S. District Court for the Northern District of Indiana declined to dismiss a claim against Austrian Airlines on *forum non conveniens* grounds.⁵² The plaintiff Mary Dordieski, who lived in Indiana, “suffer[ed] from

⁴⁶ *Id.* (citations omitted).

⁴⁷ *Id.*

⁴⁸ *Shrem v. Southwest Airlines Co.*, No. 15-cv-04567-HSG, 2016 WL 4170462, at *4 (N.D. Cal. Aug. 8, 2016).

⁴⁹ *Id.* at *1.

⁵⁰ *Id.* at *3.

⁵¹ *Id.* at *3–4.

⁵² *Dordieski v. Austrian Airlines, AG*, No. 2:15CV180-PPS/PRC, 2016 WL 4437958, at *5 (N.D. Ind. Aug. 23, 2016).

spina bifida, as a result of which her right leg [was] deformed and ha[d] always been outstretched and rigid since birth.”⁵³ She was “confined to a wheelchair and incapable of any self-support.”⁵⁴ Dordieski and her caregiver purchased tickets for an Austrian Airlines flight from Chicago to Vienna with a final destination of Skopje, Macedonia. The tickets were purchased specifically for the bulkhead section of the aircraft to accommodate Dordieski’s disability.⁵⁵ She and her caregiver boarded the flight without incident, but due to a mechanical issue, the aircraft made an emergency landing in Toronto. After an overnight stay, they returned to the Toronto airport the following day for the new flight continuing to Vienna. Austrian Airlines, however, did not assign them bulkhead seats for the new flight, but rather it assigned them regular seats that did not accommodate her disability. Despite protest by both Dordieski and her caregiver, Dordieski claimed that Austrian Airlines’ employees or agents forced her into a regular seat and forced her outstretched leg into the inadequate space afforded to it, thereby breaking her leg.⁵⁶

Austrian Airlines sought dismissal of the case on *forum non conveniens* grounds. The court began by noting the general standard that

a court has discretion to dismiss a case on the grounds of *forum non conveniens* when an alternative forum has jurisdiction to hear the case, and trial in the chosen forum would establish oppressiveness and vexation to a defendant out of all proportion to plaintiff’s convenience, or the chosen forum [is] inappropriate because of considerations affecting the court’s own administrative and legal problems.⁵⁷

The court further noted the “plaintiff’s choice of forum should seldom be disturbed” and that the defendant bears a “heavy burden” in seeking the exceptional remedy of a *forum non conveniens* dismissal because “granting such a motion usually launches a plaintiff into a foreign court and the logistical hassles that come with it.”⁵⁸

⁵³ *Id.* at *1.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at *2 (quoting *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 429 (2007)) (alteration in original).

⁵⁸ *Id.* at *2.

The appropriateness of an alternative forum is a “two part inquiry: availability and adequacy.”⁵⁹ Austrian Airlines argued that Canada was the more appropriate forum because when Dordieski was issued a new boarding pass in Toronto, that constituted a new “contract for carriage” and thus constituted an available forum pursuant to Article 33 of the Montreal Convention.⁶⁰ The court was unpersuaded, finding that “[t]he unforeseen stopover in Canada, occasioned by circumstances beyond [Dordieski’s] control and not of their choosing, did not result in a new contract” but rather represented a mere modification of the original contract.⁶¹ Without a new contract, the court determined that Canada was neither an available nor an adequate forum.

Nevertheless, the court embarked on the traditional public and private interest factor examination between Indiana and Canada as potential forums for the litigation, with, as the court described it, a “thumb on the scale in favor of Indiana” due to it being the plaintiff’s home and choice of forum.⁶² Turning to the private interest factors of (1) relative ease of access to proof; (2) availability of compulsory process for unwilling witnesses; (3) cost of attendance of witnesses; and (4) “all other practical problems,” Austrian Airlines argued that factors (1) and (2) were in favor of Canada because key witnesses and evidence were in Canada.⁶³ The court rejected these arguments, noting that the argument as to ease of access was speculation because Austrian Airlines failed to produce any proof about the residences of the passengers or crew, all of which would have been available via its flight manifest and, regardless of difficulty of access, the difficulties would fall equally on both parties. As to the cost of transporting witnesses, the court took note that Austrian Airlines’ very business was transporting people, while plaintiff was an individual confined to a wheelchair and as such, issues of “expense and inconvenience” clearly favored the plaintiff.⁶⁴ Overall, the court found the private interests weighed in favor of Indiana.

As to public interests, the court found that those too weighed in favor of Indiana, noting that the stop in Canada on this flight

⁵⁹ *Id.* at *3 (quoting *Kamel v. Hill-Rom Co.*, 108 F.3d 799, 802 (7th Cir. 1997)).

⁶⁰ *Id.*

⁶¹ *See id.*

⁶² *Id.* at *4.

⁶³ *Id.*

⁶⁴ *Id.*

was unintended and unforeseen as compared to Indiana where the plaintiff lives and which has an interest in resolving its citizen's claims.⁶⁵ The court ultimately determined that the United States had the strongest ties to the case on the basis that the plaintiff was a resident of the United States, the ticket was purchased in the United States, the flight departed in the United States, and Austrian Airlines conducted substantial and continuous business in the United States.⁶⁶ Finding that both the private and public interest factors favored the Northern District of Indiana, the court denied Austrian Airlines' motion to dismiss on *forum non conveniens*.

III. INTERNATIONAL TREATIES

In *Bernfeld v. US Airways, Inc.*, the U.S. District Court for the Northern District of Illinois considered whether US Airways breached Article 19 of the Montreal Convention with respect to its handling of a flight delayed by a bird strike.⁶⁷ The Bernfelds traveled from Tel Aviv, Israel to Chicago, Illinois in October 2013.⁶⁸ The first leg of the flight—Tel Aviv to Philadelphia—arrived timely and without incident. However, the aircraft inbound to Philadelphia that was assigned to the Philadelphia to Chicago leg of their trip suffered a bird strike on approach to Philadelphia. The “aircraft had to be removed from service” and the flight to Chicago was cancelled. The Bernfelds were re-booked on the next available flight to Chicago and arrived there ten hours after their originally scheduled arrival time.⁶⁹

The Bernfelds sued US Airways alleging a number of causes of action, including breach of Article 19 of the Montreal Convention. “The Montreal Convention is an international treaty that standardizes liability and damages for claims arising out of international air travel.”⁷⁰ Article 19 governs compensation resulting from delays and states:

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage, or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it

⁶⁵ *Id.*

⁶⁶ *Id.* at *5.

⁶⁷ *Bernfeld v. US Airways, Inc.*, No. 14-cv-5573, 2016 WL 1583057, at *1 (N.D. Ill. Apr. 20, 2016). Wilson Elser Moskowitz Edelman & Dicker represented US Airways in this action.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at *2.

proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.⁷¹

The court took note of case law interpreting Article 19 indicating that to satisfy Article 19, a carrier must only “show that, on the whole, it took measures reasonably available and reasonably calculated to prevent the subject loss.”⁷² “[N]ot every possible precaution must be taken Instead, the carrier need only show that it took all precautions that, in sum, were appropriate to the risk.”⁷³ The Bernfelds did not dispute that a bird strike was unpredictable and unavoidable, nor did they dispute that US Airways attempted to substitute in another aircraft. They further could not identify any reasonable measure US Airways could have taken to minimize the delay in their travel.

Rather, they attempted to argue that US Airways had no policies or procedures in place to avoid delays in such circumstances or to otherwise mitigate or rectify the consequences of the cancellation of the flight. The court, however, found that these assertions were directly contrary to a US Airways’ representative’s deposition testimony and that the policies and procedures to be followed in the event of a delay or cancellation were set forth in US Airways’ Passenger Customer Service Plan and its Contract of Carriage.⁷⁴ Moreover, the court noted that the existence or absence of the policies was not determinative as to the question of whether US Airways utilized “all reasonable efforts” to avoid the delay.⁷⁵ The court found that US Airways had met its burden under Article 19, used all reasonably available measures, and granted summary judgment in favor of US Airways as to the Bernfelds’ Montreal Convention claim.⁷⁶

Bintz v. Continental Airlines, Inc. concerned what constitutes an “accident” under Article 17 of the Montreal Convention.⁷⁷ In *Bintz*, the plaintiff Tom Bintz was a passenger on a Continental flight from Vancouver to Houston. During the flight, he “began

⁷¹ *Id.* (quoting Convention for International Carriage by Air art. 19, May 28, 1999, 1999 WL 33292734, at *34).

⁷² *Id.*

⁷³ *Id.* (citation omitted).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at *2–3.

⁷⁷ *Bintz v. Continental Airlines, Inc.*, No. 4:13-0566, 2016 WL 6906901, at *1 (S.D. Tex. Mar. 3, 2016).

to experience chest pains and cough up blood.”⁷⁸ The captain called MedLink, a service provided by MedAire that “flight crew can [use to] speak directly to medical professionals in the event of an in-flight emergency.”⁷⁹ In an emergency, the crew can call MedLink, speak with a MedAire operator, and be connected to an emergency physician provided by a company called Emergency Professional Services (EPS) to address the emergency.⁸⁰ The captain was connected with EPS physician Dr. Boothe, who recommended aspirin, antacid, and oxygen. The crew did as instructed but Bintz continued to deteriorate and a second call was placed to MedLink. Dr. Boothe recommended a nitroglycerine pill and asked the crew to take Bintz’s blood pressure, which she identified as normal. During this time, another passenger on board who was a cardiac nurse identified Bintz’s symptoms as that of cardiac arrest and recommended diverting the flight. Dr. Boothe, however, found that because Bintz’s vitals were normal, the flight did not necessarily need to divert. The flight continued to Houston, with two more calls to Dr. Boothe en route to update her on Bintz’s vitals, with Dr. Boothe maintaining her recommendation that the flight continue to Houston. After landing in Houston, Bintz went to a hospital where his heart attack and permanent heart damage were confirmed.⁸¹

Plaintiffs sued Continental, United Continental Holdings, MedAire, and EPS, arguing, “Mr. Bintz suffered severe and permanent damage to his heart as a result of the airline’s and the medical providers’ failure to divert the plane or otherwise appropriately address his medical emergency.”⁸² After motion practice and several amendments to the complaint, the only claim remaining against the defendants was for breach of Article 17 of the Montreal Convention. The Continental Defendants and MedLink Defendants both brought motions for summary judgment, arguing that their conduct after Bintz’s cardiac event on the flight did not constitute an “accident” under Article 17.⁸³

A claim for bodily injury under Article 17 consists of three elements: (1) bodily injury; (2) caused by an accident; (3) that occurs on an aircraft during an international flight.⁸⁴ The court

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at *1.

⁸¹ *Id.*

⁸² *Id.* at *2.

⁸³ *Id.* at *4.

⁸⁴ *Id.*

noted that “accident” has been defined as “‘an unexpected or unusual event or happening that is external to the passenger.’”⁸⁵ Looking to a prior case, which concerned similar circumstances and similar defendants, the court noted that “a failure to divert a plane after a medical emergency is not *ipso facto* an accident.”⁸⁶ The court further noted *McCaskey*’s instruction that “an injury resulting from routine procedures . . . can be an ‘accident’ if those procedures or operations are carried out in an unreasonable manner.”⁸⁷ The court ultimately denied the summary judgment motions, finding a number of disputed issues surrounding the incident and citing to Dr. Boothe’s testimony that Bintz’s symptoms were classic symptoms of a heart attack and that “the quicker that treatment can be provided, the better” as well as the passenger-nurse and flight attendant’s recommendations to the captain that the flight should be diverted.⁸⁸ As such, the court ruled that disputed issues of fact remained as to whether an “accident” had occurred and denied the motions.⁸⁹

In another case involving whether an “accident” occurred pursuant to Article 17, the court in *Lee v. Air Canada* concluded that an incident in which a passenger was struck on the head by falling baggage was an “accident” pursuant to the Montreal Convention.⁹⁰ In *Lee*, the plaintiff Lisa Lee was seated in an aisle seat on an Air Canada flight at LaGuardia bound for Toronto. Another passenger, whose own seat was located five rows behind Lee, returned “against the flow of other boarding passengers” to Lee’s seat area to stow his carry-on bag, as the compartment near his own seat was full.⁹¹ In the process of hoisting his bag up to the compartment, he was bumped by another passenger coming down the aisle, lost his balance, and dropped his bag, striking Lee on her head and hand. After speaking with flight attendants, Lee disembarked the plane to seek medical help.⁹² Lee filed a lawsuit in the U.S. District Court for the Southern

⁸⁵ *Id.* (quoting *Air France v. Saks*, 740 U.S. 392, 405 (1985)).

⁸⁶ *Id.* (citing *McCaskey v. Continental Airlines, Inc.*, 159 F. Supp. 2d 562, 574 (S.D. Tex. 2001)).

⁸⁷ *Id.* at *5 (quoting *McCaskey*, 159 F. Supp. 2d at 572) (alteration in original).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Lee v. Air Canada*, No. 14-cv-10059 (SHS), 2017 WL 108058, at *1, *7 (S.D.N.Y. Jan. 10, 2017).

⁹¹ *Id.* at *2.

⁹² *Id.*

District of New York seeking damages for injuries suffered as a result of the incident.

The parties filed cross motions for summary judgment, with Lee seeking summary judgment that the incident was an “accident” under the Montreal Convention. Air Canada filed summary judgment on the grounds that it was not an accident under the Convention and alternatively that Article 21’s limitation of liability should apply to the incident. The court embarked on an in-depth examination of the definition of “accident” as it has been interpreted by several decisions of the district courts of New York. It began by noting the U.S. Supreme Court’s broad definition from *Air France v. Saks* that an “‘accident’ arises ‘only if a passenger’s injury is caused by an unexpected or unusual event or happening that is external to the passenger.’”⁹³ The court observed, however, that this broad definition “does not mean that every injury that occurs on an airplane is the result of an ‘accident.’”⁹⁴ The court then took note of a split within the district courts of New York, with some courts requiring a demonstration of a causal nexus between “any act of judgment, exercise of control or application of carrier operation that, regardless of fault, implicated the airline in some abnormal, unusual, or unexpected role as a causal agent of the injury”⁹⁵ and other courts that have adopted the broad *Saks* definition finding an “accident” to have occurred without even considering whether the actions of the airline or crew had any causal bearing on the incident.⁹⁶ With no controlling Second Circuit authority to guide it, Air Canada urged the court to apply the causal nexus test and to find that no accident had occurred given that Air Canada’s crew “was not responsible for supervising each passenger’s stowing of bags during the boarding process” and “was not in a position to prevent [the passenger] from dropping his bag onto Lee.”⁹⁷

In ruling that the incident did constitute an accident pursuant to Article 17, the court essentially provided two holdings. First, it concluded that neither the Convention nor the *Saks* decision indicates that any causal nexus was required between the operation of the aircraft or the flight crew and the injury and

⁹³ *Id.* at *4 (quoting *Air France v. Saks*, 470 U.S. 392, 405 (1985)).

⁹⁴ *Id.*

⁹⁵ *Id.* (quoting *Girard v. Am. Airlines, Inc.*, No. 00-CV-4559 (ERK), 2003 WL 21989978, at *9 (E.D.N.Y. Aug. 21, 2003))

⁹⁶ *Id.* at *5.

⁹⁷ *Id.* at *6.

thus concluded that this situation met the definition of “accident.”⁹⁸ Nevertheless, even if some causal link were required, under Second Circuit precedent, it could be satisfied in “situations where the flight crew has no ‘knowledge [of] or direct complicity [in]’ the incident and where its causal role is ‘attenuated and indirect.’”⁹⁹ Noting that the crew “could have minimized the risk of [the passenger] dropping his bag onto Lee by taking actions such as warning passengers to take care when passing one another in the aisle and in placing their bags overhead,” to the extent any “‘practical ability to influence’” an aspect of the operations was required, that test would be met here.¹⁰⁰ The court, therefore, granted plaintiff’s motion for summary judgment on liability, finding that this event was an “accident” under the Montreal Convention.

The court then turned to the Air Canada’s alternative motion for limitation of liability under Article 21 of the Convention.

Pursuant to Article 21 of the Montreal Convention, an airline is not liable for damages exceeding 100,000 SDRs¹⁰¹ if the carrier proves that “such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents” or “such damage was solely due to the negligence or other wrongful act or omission of a third party.”¹⁰²

In its motion, Air Canada sought to cap its liability pursuant to Article 21 on grounds that it was solely the other passenger who dropped the bag, or the passenger that bumped him causing him to drop the bag on Lee, that were negligent.

The court analyzed the case under traditional New York negligence law principles. In support of its motion, Air Canada provided expert testimony that it “would not have been reasonable—or even possible—to assist every single passenger” and pointed to federal regulations and industry standards stating that “flight attendants must assist passengers with stowing their bags only when requested or where passengers have apparent physical limitations.”¹⁰³ Moreover, Air Canada introduced

⁹⁸ *See id.*

⁹⁹ *Id.* (quoting *Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651, 669 (S.D.N.Y. 2001)) (alteration in original).

¹⁰⁰ *Id.* at *7.

¹⁰¹ Due to inflation, the limit is now 113,100 SDRs, or approximately \$150,000 U.S. dollars.

¹⁰² *Id.* at *7 (quoting Convention for International Carriage by Air art. 21, May 28, 1999, 1999 WL 33292734, at *35).

¹⁰³ *Id.* at *8–9.

evidence demonstrating that its crew complied with all duties and made all required announcements.¹⁰⁴ The court granted Air Canada's motion for summary judgment and limited Air Canada's liability to 113,100 SDRs of provable damages.¹⁰⁵

IV. FEDERAL JURISDICTION—REMOVAL AND PERSONAL JURISDICTION

Siswanto v. Airbus Americas, Inc. concerns the crash of AirAisa Flight 8501 on December 28, 2014, into the Java Sea while en route from Indonesia to Singapore.¹⁰⁶ “The crash resulted in the deaths of all passengers and crew on board.”¹⁰⁷ Plaintiffs, who were personal representatives of heirs of deceased passengers, sued several defendants in the U.S. District Court for the Northern District of Illinois alleging in their complaint that each “contributed to the fielding of an accident aircraft that was ‘defectively and unreasonably dangerous’ in myriad respects.”¹⁰⁸ Defendant Thales Avionics filed a motion to dismiss on grounds of personal jurisdiction.

The accident aircraft was an Airbus A320-216, a model of A320 that is certified by the European Aviation Safety Agency but has not been type certified by the FAA. The A320-216 is not operated by any U.S. Airbus customer.¹⁰⁹ The accident aircraft itself was designed, assembled, and sold in Europe and was never operated in the United States prior to the crash. Defendant Thales Avionics is alleged to have designed, manufactured, and sold defective pilot tubes, flight augmentation computers, and software that was used on the accident aircraft.¹¹⁰ Thales Avionics is a French corporation with its headquarters and principal place of business in France. The sales of Thales Avionics products to Airbus for use on the accident aircraft occurred in France and the products sold were all designed, tested, assembled, and manufactured in Europe.¹¹¹

¹⁰⁴ *Id.* at *9.

¹⁰⁵ *Id.* at *10.

¹⁰⁶ *Siswanto v. Airbus Americas, Inc.*, No. 15-cv-5486, 2016 WL 7178459, at *1 (N.D. Ill. Dec. 9, 2016).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at *2.

¹¹⁰ *Id.*

¹¹¹ *Id.* at *3.

As to Thales Avionics's contacts with the United States, it had only one employee that resided in America.¹¹² It had no real property in the United States nor did it maintain a place of business or even a phone number. It was not authorized to do business in the United States and did not sell products directly to the United States. However, it derived substantial revenue from deliveries to the United States through sales to French purchasers who subsequently ship the products to the United States. From 2011 to 2015, "Thales Avionics' revenue from deliveries to the United States [was] 88, 96, 99, 116, and 85 million euros, respectively."¹¹³ Thales Avionics also participated in thirteen aviation product industry exhibitions in the United States from 2011 to 2015.¹¹⁴

Because Thales Avionics was served with a summons pursuant to the Multiparty, Multiforum Trial Jurisdiction Act, service of process on Thales Avionics of the summons and complaint was proper.¹¹⁵ However, that Act does not override the constitutional limitations of due process and thus, plaintiffs bore the burden of showing that Thales Avionics, a foreign corporation, had sufficient minimum contacts with the United States to support exercise of the Court's adjudicative authority.¹¹⁶ Plaintiffs proceeded only under a theory of general jurisdiction, which, unlike specific jurisdiction, is "all-purpose jurisdiction,"¹¹⁷ and thus, "the constitutional requirement for general jurisdiction 'is considerably more stringent' than that required for specific jurisdiction."¹¹⁸ "A court may assert general jurisdiction over foreign corporations only when their business contacts with the forum (here, the United States as a whole), 'are so continuous and systematic as to render them essentially at home in the forum.'¹¹⁹ Because Thales Avionics's principal place of business and state of incorporation are both located outside the United States, and thus outside the "exemplar bases" for general jurisdiction, the court proceeded to analyze Thales Avionics's con-

¹¹² *Id.*

¹¹³ *Id.* at *2.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at *3.

¹¹⁶ *Id.* at *4.

¹¹⁷ *Diamler AG v. Bauman*, 134 S. Ct. 746, 751 (2014).

¹¹⁸ *Siswanto*, 2016 WL 7178459, at *4 (quoting *Purdue Research Found. v. Sano-Synthelabo, S.A.*, 338 F.3d 773, 787 (7th Cir. 2003)).

¹¹⁹ *Id.* (quoting *Goodyear Dunlop Tires Operations, S.A., v. Brown*, 564 U.S. 915, 919 (2011)) (internal quotations omitted).

tacts with the United States to determine whether general jurisdiction existed.¹²⁰

As to Thales Avionics's sales revenue derived from deliveries to the United States, the court noted that "imputing general personal jurisdiction solely from a defendant's sales in the forum, even if sizable, would rip general personal jurisdiction from its constitutional underpinnings."¹²¹ In rejecting sales revenue as a sufficient contact, the court indicated that a "corporation's 'continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.'"¹²²

Turning to Thales Avionics's participation in aviation industry exhibitions, the court found that notion "equally unavailing," noting that "'no case has ever held that solicitation alone is sufficient for general jurisdiction.'"¹²³ The court similarly rejected the presence of a single Thales Avionics employee who resides in the United States as sufficient to establish general jurisdiction, noting that the employee is not the company's president, general manager, or principal stockholder.¹²⁴ "While it is reasonable to assume that the employee conducts business on behalf of the company, the record fails to reflect a 'continuous and systematic supervision.'"¹²⁵

Finally, plaintiffs argued that Thales Avionics's association with its parent company, Thales Group, subjected it to general jurisdiction here by asserting that Thales Group's contacts with the United States should be imputed to Thales Avionics. The court, however, rejected that argument too. According to the court, even assuming Thales Group's contacts were sufficient to support general jurisdiction, "jurisdiction over a parent corporation does not automatically establish jurisdiction over a wholly owned subsidiary."¹²⁶ Moreover, plaintiffs failed to introduce any evidence showing "an unusually high degree of control over" Thales Avionics by Thales Group such that the corporate formalities between the two corporations should be disregarded

¹²⁰ See *id.* at *5; *Daimler*, 134 S. Ct. at 760.

¹²¹ *Siswanto*, 2016 WL 7178459, at *5 (citing *Daimler*, 134 S. Ct. at 760–62).

¹²² *Id.* at *6 (citing *Daimler*, 134 S. Ct. at 757).

¹²³ *Id.* (quoting *Kipp v. Ski Enter. Corp. of Wis.*, 783 F.3d 695, 699 (7th Cir. 2015)).

¹²⁴ *Id.* at *6–7.

¹²⁵ *Id.* at *7 (quoting *Perkins v. Benguet Consol. Mining Co.*, 72 S. Ct. 413, 448 (1952)).

¹²⁶ *Id.* (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984)) (internal quotations marks omitted).

as part of the jurisdictional analysis.¹²⁷ As such, Thales Avionics's motion to dismiss for lack of personal jurisdiction was granted and all claims against it were dismissed with prejudice.

In *Dietz v. Avco Corp.*, the U.S. District Court for the Eastern District of Pennsylvania granted the plaintiff's motion to remand the case to state court following removal filed by the defendants.¹²⁸ *Dietz* arose out of the crash of a Mooney M20J-201 aircraft in Kansas City, Missouri. Shortly after takeoff, the aircraft's engine allegedly failed and the aircraft crashed during an attempted return to the airport, fatally injuring the pilot-owner and his wife.¹²⁹

Plaintiffs filed suit in the Court of Common Pleas in Pennsylvania against several defendants, including Continental Motors, who manufactured the magneto on the accident aircraft's engine, which they allege was defective and caused the engine to fail in flight.¹³⁰ The Continental Defendants timely removed the case alleging diversity jurisdiction pursuant to 28 U.S.C. § 1332, removal jurisdiction pursuant to 28 U.S.C. § 1441, and federal officer removal jurisdiction pursuant to 28 U.S.C. § 1442. Plaintiffs timely filed a motion for remand primarily pursuant to the forum defendant rule of 28 U.S.C. § 1441(b)(2), but also challenging federal officer removal and alleging defects in removal procedure itself.¹³¹

Turning first to federal officer removal jurisdiction, the court found that the Continental Defendants were not entitled to removal on that basis. Continental's contention was that because its employees acted pursuant to delegated authority of the FAA for certification of products and components, they thus "acted under color of a federal officer in performing those alleged actions[,] and thus, removal was proper."¹³² The court, however, rejected this contention. Relying heavily on the Seventh Circuit's decision in *Lu Junhong v. Boeing Co.*,¹³³ the court noted that "certifications just demonstrate a person's awareness of the governing requirements and evince a belief in compliance" and that simply "being regulated, even when a federal agency directs, supervises and monitors a company's activities in consider-

¹²⁷ *Id.* (citations omitted).

¹²⁸ *Dietz v. Avco Corp.*, 168 F. Supp. 3d 747, 750–51 (E.D. Penn. 2016).

¹²⁹ *Id.* at 751.

¹³⁰ *Id.* at 750–51.

¹³¹ *Id.*

¹³² *Id.* at 752.

¹³³ 792 F.3d 805 (7th Cir. 2015).

able detail is not enough to make a private firm a person acting under a federal agency.”¹³⁴ As to the Continental Defendants, the court ruled that “Congress never intended to afford the Continental Defendants federal officer status through their compliance with federal laws, rules, and regulations, even if the regulations are highly detailed and even if the defendants’ activities are highly supervised and monitored.”¹³⁵

The court looked next to whether the Continental Defendants violated procedural requirements with respect to removal and found that the Continental Defendants had violated the unanimity rule requiring all defendants to unanimously join in the removal or consent to it by timely filing an express, written indication of consent.¹³⁶ The court found that the Continental Defendants had failed to even consult some of the other defendants prior to filing the notice of removal and that they had failed to provide any written evidence at the time of removal or consent from any of the defendants. Finding that the nominal party and fraudulent joinder exceptions to the unanimity rule were not applicable, the court concluded that the action should be remanded to state court.¹³⁷

With no federal question and no federal officer jurisdiction available, the only remaining basis for removal was diversity jurisdiction. The court, however, found that removal based on diversity was defeated on the basis of the forum defendant rule, which states that “[a] civil action otherwise removable solely on the basis of [diversity jurisdiction] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.”¹³⁸ In *Dietz*, three of the defendants were citizens of Pennsylvania. The Continental Defendants asserted that these defendants were fraudulently joined and thus should not defeat diversity jurisdiction. The three defendants at issue were alleged in plaintiff’s complaint to have designed, manufactured, tested, and sold the gasket interface between the allegedly defective magneto and the engine. Accepting the allegations in plaintiff’s complaint as true as is required in a fraudulent joinder analysis, the court found that these defendants were not fraudulently joined. On a

¹³⁴ *Dietz*, 186 F. Supp. 3d at 754–55 (internal quotations marks and citations omitted).

¹³⁵ *Id.* at 755.

¹³⁶ *Id.* at 756–57.

¹³⁷ *Id.* at 757–59.

¹³⁸ *Id.* (citing 28 U.S.C. § 1441(b)(2)) (alteration in original).

similar basis, the court also rejected the contention that these defendants were nominal parties.¹³⁹

V. CONCLUSION

2016 was an eventful year in aviation litigation. It brought decisions that remind aviation attorneys that they have the opportunity to provide significant value to their clients by staying abreast of both the trends and the changes in law when it comes to these fresh topics.

¹³⁹ *Id.* at 758–59.