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Recent Developments In Aviation Law

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RECENT DEVELOPMENTS IN AVIATION LAW

JUSTIN V. LEE*

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I. FEDERAL AVIATION ACT

A. SAFETY-RELATED CLAIMS

1. Register v. United Airlines, Inc.

IN *REGISTER V. UNITED AIRLINES, INC.*, a passenger sued United Airlines after becoming involved in a verbal altercation with a flight attendant prior to takeoff.¹ Plaintiff alleged that another crewmember complained to the captain, who announced that the flight would return to the gate due to a “situation” on the aircraft.² Plaintiff subsequently filed a number of state and federal claims alleging, among other things, that United had discriminated against him on account of his race.³ United moved for judgment on the pleadings, arguing that plaintiff’s state law claims were preempted by the Federal Aviation Act (the Act).⁴

The court agreed that the Act preempts state law claims when an air carrier removes a passenger for safety reasons.⁵ Plaintiff argued that safety was not implicated because the captain used the word “situation” during his announcement rather than “security threat” or other similar language.⁶ Calling plaintiff’s argu-

¹ Register v. United Airlines, Inc., No. 16-CV-2480 W (BGS), 2017 WL 784288, at *1 (S.D. Cal. Mar. 1, 2017).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* at *2 (citing 49 U.S.C. § 44902(b)).

⁶ *Id.* at *3.



ment a “distinction without a difference,” the court held that it was not plausible to conclude that the captain did not consider the safety of passengers when he decided to return to the gate.⁷ Plaintiff’s state law claims were therefore preempted by the Act.⁸

B. EMBARKING AND DISEMBARKING

1. Okeke-Henry v. Southwest Airlines, Co.

In *Okeke-Henry v. Southwest Airlines Co.*, plaintiff sued after being struck in the head by another passenger’s bag.⁹ Plaintiff alleged that Southwest failed to: (1) properly oversee the boarding process; (2) properly train its crewmembers to protect passenger safety; (3) supervise its employees during boarding; and (4) ensure that passengers would be uninjured during boarding.¹⁰ On appeal, the court considered—as a matter of first impression—whether the Act preempts claims for negligence arising out of the boarding of an aircraft.¹¹

The court found the Third Circuit’s opinion in *Elassaad v. Independence Air, Inc.* instructive, where a passenger suffered injuries while disembarking the aircraft.¹² The *Elassaad* court concluded that the Act does not preempt state tort law where the claim relates to a crewmember’s oversight of the disembarkation process after the aircraft comes to a complete stop.¹³ The *Okeke-Henry* court found the *Elassaad* holding persuasive, noting the aircraft in the instant case had not moved from the gate when the incident occurred nor had either passenger requested the assistance of a flight attendant.¹⁴ As such, there was “no basis for concluding that the incident occurred in the course of the operation of the aircraft[,]” and the matter was remanded to the trial court for additional proceedings.¹⁵

⁷ *Id.*

⁸ *Id.*

⁹ *Okeke-Henry v. Sw. Airlines Co.*, 163 A.3d 1014, 1015 (Pa. Super. Ct. 2017).

¹⁰ *Id.*

¹¹ *Id.* at 1017.

¹² *Id.* at 1017–18 (citing *Elassaad v. Indep. Air, Inc.*, 613 F.3d 119 (3d Cir. 2010)).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 1018–19.

C. FIELD PREEMPTION

1. Estate of Becker v. Avco Corp.

In *Estate of Becker v. Avco Corp.*, the Supreme Court of Washington examined whether regulations created under the Act were “so pervasive as to constitute field preemption of state product liability law[.]”¹⁶ The case arose out of a plane crash that killed a retired physician.¹⁷ The physician’s estate asserted a number of tort claims, alleging that a poorly made carburetor caused the aircraft’s engine to stall.¹⁸ One of the defendants, Forward Technology Industries, Inc. (FTI), filed a motion for summary judgment, arguing that because of ubiquitous FAA regulations, federal law occupied the entire field of aviation safety and plaintiff’s tort claims were thus preempted.¹⁹ The trial and appellate courts sided with FTI.²⁰

The Washington Supreme Court reversed the lower courts, holding that the Act does not completely preempt state law.²¹ The court first looked to the Third Circuit’s decision in *Sikkelee v. Precision Airmotive Corp.*, which held that the Act was not so pervasive as to preempt state products liability law.²² The *Sikkelee* court found that although the Act does preempt the field of aviation safety, neither the Act nor the regulations created by it “were [ever] intended to create federal standards of care for manufacturing and design defect claims.”²³ Here, the court agreed with the rationale in *Sikkelee*, finding that even though there were minimum safety standards promulgated under the Act, federal regulations did not attempt to regulate the actual manufacture and design of aircraft.²⁴ Federal regulations were merely “baseline requirements” for aircraft manufacturers, not limits to state court remedies.²⁵

The court also found that Congress did not intend to completely preempt state law because it had twice declined to do

¹⁶ Estate of Becker v. Avco Corp., 387 P.3d 1066, 1069 (Wash. 2017).

¹⁷ *Id.* at 1067.

¹⁸ *Id.*

¹⁹ *Id.* at 1068.

²⁰ *Id.*

²¹ *Id.* at 1069.

²² *Id.* at 1070 (citing *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680 (3d Cir. 2016)).

²³ *Id.* (alteration in original) (citation omitted) (internal quotation marks omitted).

²⁴ *Id.*

²⁵ *Id.* at 1070–71.

so.²⁶ Congress first rejected a 1989 bill that would have expressly preempted all state tort liability laws for aviation accidents.²⁷ Congress again revisited the issue when it passed the General Aviation Revitalization Act of 1994 (GARA).²⁸ In that instance, Congress created a statute of repose that limited a manufacturer's liability, but the House Judiciary Committee specified that it was "*a very limited Federal preemption of State law.*"²⁹

Given the lack of "pervasive and comprehensive" regulations—and the "strong general presumption against finding that federal law has preempted state law"—the court concluded that Washington's product liability law was not preempted by the Act.³⁰

II. GENERAL AVIATION REVITALIZATION ACT

A. *SNIDER V. STERLING AIRWAYS, INC.*

In *Snider v. Sterling Airways, Inc.*, plaintiffs sued Continental Motors and others after plaintiffs' decedents were killed in the crash of a Cessna T210L following engine failure.³¹ The jury returned a verdict against Continental (the engine manufacturer), and Continental moved for entry of judgment as a matter of law.³² Continental argued that plaintiffs' claims were time-barred by GARA because Continental had manufactured the engine over eighteen years before the accident and no reasonable juror could conclude otherwise.³³

Under GARA's statute of repose, claimants are barred from bringing suit for death, injury, or property damage involving a general aviation aircraft more than eighteen years after manufacture and delivery.³⁴ A new limitation period begins when a component is replaced, but a new period does not necessarily begin for an entire system simply because one component part was replaced.³⁵

²⁶ *Id.* at 1071.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* (emphasis in original) (citation omitted).

³⁰ *Id.* at 1069, 1071.

³¹ *Snider v. Sterling Airways, Inc.*, No. 13-CV-2949, 2017 WL 2813223, at *1 (E.D. Pa. June 29, 2017).

³² *Id.*

³³ *Id.* at *2.

³⁴ *Id.* at *3.

³⁵ *Id.*

Here, the court found that plaintiffs produced sufficient evidence that Continental had manufactured a replacement part for the engine just six years before the crash, which was installed on the accident engine during an overhaul.³⁶ The court noted that all six cylinder assemblies were replaced with new cylinder assemblies manufactured by Continental, and the failure of one of the replacement cylinders caused the engine failure.³⁷ As such, the court held that GARA's rolling provision was properly applied and plaintiffs' claims were not barred.³⁸

B. *INTACT INSURANCE CO. V. PIPER AIRCRAFT CORP.
IRREVOCABLE TRUST*

In *Intact Insurance Co. v. Piper Aircraft Corp. Irrevocable Trust*, plaintiffs brought suit against the Piper Aircraft Corporation Irrevocable Trust, seeking contribution for money paid to satisfy claims resulting from an airplane crash in Canada.³⁹ Plaintiffs brought their claims pursuant to a "Channeling Injunction" issued several years earlier during bankruptcy proceedings for Piper Aircraft Corporation.⁴⁰ Under the Channeling Injunction, any claims against Piper Aircraft Corporation after the bankruptcy had to be pursued against the Trust.⁴¹

The Trust moved for judgment on the pleadings, arguing that plaintiffs' claims were barred by GARA's statute of repose.⁴² Plaintiffs responded that GARA should not bar their claims because "(1) but for the Trust Agreement's channeling injunction, Plaintiffs' lawsuit would have been filed in Canada, beyond the reach of GARA's statutory provisions; and (2) GARA's application in this matter would be inequitable, unfair and violate Plaintiffs' constitutional rights."⁴³

The court was unpersuaded by either argument. The court characterized the Trust Agreement's jurisdictional requirement as "a *de facto* forum selection clause, which are deemed presump-

³⁶ *Id.* at *4.

³⁷ *Id.* at *4-5.

³⁸ *Id.*

³⁹ *Intact Ins. Co. v. Piper Aircraft Corp. Irrevocable Trust*, No. 15-24792-CV, 2017 WL 3328225, at *2 (S.D. Fla. June 29, 2017), *report and recommendation adopted*, No. 15-24792-CIV, 2017 WL 3328170 (S.D. Fla. Aug. 3, 2017), *appeal dismissed sub nom.*, *R&Q Ins. (Malta Ltd.) v. Piper Aircraft Corp. Irrevocable Trust*, No. 17-13989-CC, 2017 WL 8223248 (11th Cir. Sept. 5, 2017).

⁴⁰ *Id.* at *1-2.

⁴¹ *Id.* at *2.

⁴² *Id.*

⁴³ *Id.* at *4.

tively valid by the United States Supreme Court.”⁴⁴ Plaintiffs even conceded that channeling injunctions are a permissible tool used in bankruptcy proceedings.⁴⁵ But even if Canadian law did apply, the court observed that GARA’s statute of repose would still operate to bar the claim under the Supremacy Clause.⁴⁶

The court similarly rejected plaintiffs’ argument that application of GARA’s statute of repose would violate plaintiffs’ constitutional rights. Notably, plaintiffs failed to cite any authority supporting this argument.⁴⁷ The court reasoned that plaintiffs could not “defeat pre-trial dismissal of a lawsuit merely because [they are] unhappy with the accompanying result[.]”⁴⁸ Judgment on the pleadings was therefore appropriate.

III. AIRLINE DEREGULATION ACT

A. PREEMPTION OF STATE LAW CLAIMS

1. *Hickcox-Huffman v. US Airways, Inc.*

In *Hickcox-Huffman v. US Airways, Inc.*, the Ninth Circuit considered whether the Airline Deregulation Act (ADA) preempts state law claims arising out of lost or delayed luggage.⁴⁹ Plaintiff sued US Airways for the return of the \$15 checked bag fee after her bag was delivered a day late to her destination.⁵⁰ Plaintiff’s complaint included a breach of contract claim for violation of US Airways’ “Terms of Transportation,” which stated that “‘US Airways has voluntarily established a program setting standards for service levels’ regarding baggage, and has ‘committed to . . . [p]rovide on-time baggage delivery’ and ‘[m]ake prompt refunds.’”⁵¹ The district court ruled that plaintiff’s claims related to a US Airways “service” and were thus preempted by the ADA.⁵²

On appeal, the court noted that the Supreme Court has recognized that breach of contract claims are not preempted where the claims are based upon an airline’s “voluntarily assumed obli-

⁴⁴ *Id.* (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991)).

⁴⁵ *Id.*

⁴⁶ *Id.* at *5.

⁴⁷ *Id.* at *7.

⁴⁸ *Id.*

⁴⁹ *Hickcox-Huffman v. US Airways, Inc.*, 855 F.3d 1057, 1059 (9th Cir. 2017).

⁵⁰ *Id.*

⁵¹ *Id.* (alteration in original) (citation omitted).

⁵² *Id.* at 1060.

gations” as opposed to state requirements.⁵³ Although states could not impose regulations regarding fares, routes, and services, they could afford relief if an airline voluntarily created an obligation, “even when the obligations directly relate to fares, routes, and services.”⁵⁴ The key question facing the *Hickox* court was whether plaintiff properly pleaded that US Airways had *voluntarily* entered into a contract.⁵⁵

The court determined that US Airways’ Terms of Transportation constituted “a routine offer of a unilateral contract subject to being accepted by flying on US Airways.”⁵⁶ The court reasoned that the “delayed baggage” policy in the Terms of Transportation was triggered if US Airways “fail[ed] to return checked baggage *upon arrival* at the destination.”⁵⁷ The court also found that the fifteen dollar baggage fee plaintiff paid constituted consideration for delivery “upon her arrival at her destination.”⁵⁸ The court concluded that plaintiff properly pleaded a breach of contract (i.e., the Terms of Transportation) when she alleged that US Airways failed to deliver her bag upon arrival.⁵⁹

The court rejected US Airways’ argument that allowing plaintiff to prevail would require airlines “to deliver checked baggage on-time or to provide that service for free.”⁶⁰ The court observed that checked baggage policies vary from one airline to the other and emphasized that “[n]o state law made US Airways promise timely delivery of the first bag for \$15.”⁶¹ The court vacated and remanded the matter to the district court.⁶²

B. WHAT CONSTITUTES A SERVICE?

1. *Fawemimo v. American Airlines, Inc.*

In *Fawemimo v. American Airlines, Inc.*, a pro se plaintiff sued American Airlines after striking her head on a video monitor while taking her seat.⁶³ Plaintiff alleged that American was negli-

⁵³ *Id.* at 1061 (citing *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 228–30 (1995)).

⁵⁴ *Id.* at 1062 (citation omitted).

⁵⁵ *Id.*

⁵⁶ *Id.* at 1063.

⁵⁷ *Id.* (emphasis in original).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* (internal quotation marks omitted).

⁶¹ *Id.* at 1066.

⁶² *Id.*

⁶³ *Fawemimo v. Am. Airlines, Inc.*, No. 14-CV-4510 (PKC), 2017 WL 398387, at *2 (S.D.N.Y. Jan. 30, 2017).

gent by failing to provide safe seating conditions and failing to warn passengers about the dangers of aircraft video monitors.⁶⁴ In addition to money damages, plaintiff sought injunctive relief requiring greater distance between aircraft seating and walls and a contrasting paint scheme between walls and monitors.⁶⁵ American moved for summary judgment on the basis that plaintiff's claims were preempted by the ADA.⁶⁶

The court employed the three-factor *Rombom* test—first employed by United States Supreme Court Justice Sonia Sotomayor as a district judge—to determine whether plaintiff's claims were preempted.⁶⁷ Under *Rombom*, the court asks (1) whether the underlying activity is an airline service; (2) whether plaintiff's claim directly affects the service, rather than “tenuously, remotely, or peripherally”; and (3) whether the airline's tortious conduct was “reasonably necessary to the provision of the service.”⁶⁸ The court determined that the design and placement of the video monitors satisfied the *Rombom* test.

First, the court agreed that the purpose of the video monitor—to provide safety demonstrations and in-flight entertainment—fit within the category of an airline service under the ADA.⁶⁹ Second, the court observed that plaintiff's claims were directly related to that service because plaintiff sought to regulate the design and placement of the monitor and its surroundings.⁷⁰ Finally, the court found that the airline's decision to place the monitor near passengers “was essential to the provision of safety-instruction videos and in-flight entertainment.”⁷¹ The court also found that the video monitors were subject to federal regulations.⁷² Accordingly, plaintiff's claim was preempted by the ADA.⁷³

2. *Hekmat v. U.S. Transportation Security Administration*

In *Hekmat v. U.S. Transportation Security Administration*, plaintiffs sued JetBlue Airways and the Transportation Security Ad-

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at *3.

⁶⁸ *Id.* (citing *Rombom v. United Air Lines, Inc.*, 867 F. Supp. 214, 221–22 (S.D.N.Y. 1994)).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at *4.

ministration (TSA) after losing \$95,000 worth of jewelry plaintiffs had placed in their checked luggage.⁷⁴ JetBlue argued that plaintiffs' various tort claims were preempted by the ADA.⁷⁵ As in *Fawemimo* above, the court employed the *Rombom* test to determine whether the claims were preempted.⁷⁶

Applying the first prong, the court determined that JetBlue's handling of plaintiffs' luggage did indeed constitute a "service."⁷⁷ The court also held that plaintiffs' claims affected the service directly because the claims specifically challenged JetBlue's policies related to baggage handling.⁷⁸ Finally, the court determined that plaintiffs' claims satisfied the third prong because the alleged tortious conduct (baggage handling) is "reasonably necessary to the provision of the service."⁷⁹

Although plaintiffs attempted to recast the underlying tortious conduct as theft—which the court conceded might not be preempted by the ADA—the court found that plaintiffs failed to accuse JetBlue of theft and claimed negligence instead.⁸⁰ Thus, plaintiffs' tort claims were preempted by the ADA.

3. *Shin v. American Airlines Group, Inc.*

In *Shin v. American Airlines Group, Inc.*, the court considered the applicability of preemption where state law prevents parties from disclaiming legal obligations. Plaintiff sued American Airlines and others after he was denied permission to board a flight.⁸¹ Claiming he was singled out because of his race, plaintiff filed claims for, among other things, equal rights violations under § 1981⁸² and breach of the implied covenant of good faith and fair dealing.⁸³ Defendants moved to dismiss under Rule 12(b)(6).

⁷⁴ *Hekmat v. U.S. Transp. Sec. Admin.*, 247 F. Supp. 3d 427, 430 (S.D.N.Y. 2017).

⁷⁵ *Id.* at 431.

⁷⁶ *Id.* at 431–32 (citations omitted).

⁷⁷ *Id.* at 432.

⁷⁸ *Id.*

⁷⁹ *Id.* at 432–33.

⁸⁰ *Id.* at 433.

⁸¹ *Shin v. Am. Airlines Grp., Inc.*, No. 17-CV-2234-ARR-JO, 2017 WL 3316129, at *1 (E.D.N.Y. Aug. 3, 2017) *appeal filed*, No. 17-2735 (2d Cir. Aug. 31, 2017).

⁸² *Id.* The court held that plaintiff's bare assertion that he was treated differently from white passengers did not "give rise to an inference of unlawful discrimination" in violation of § 1981. *Id.* at *3 (citation omitted).

⁸³ *Id.* at *1.

After disposing of plaintiff's other claims, the court turned to plaintiff's allegation that defendants breached "implied promises that [p]laintiff would . . . not [be] discriminated against."⁸⁴ The court explained that preemption of plaintiff's contract claim depended on whether the obligation allegedly breached was required by the state or undertaken voluntarily by defendants.⁸⁵ But the court also noted that if a state does not permit the parties to "free themselves from the covenant, a breach of contract claim is pre-empted."⁸⁶ Stated differently, if state law prevents the parties from disclaiming an implied contractual obligation, a suit for breach of the implied obligation will be preempted.

The court recognized that New York law does not permit parties to contract out of (i.e., disclaim) the implied covenant of good faith and fair dealing.⁸⁷ Plaintiff's implied breach of contract claim was therefore preempted by the ADA.⁸⁸

4. *Watson v. Air Methods Corp.*

In *Watson v. Air Methods Corp.*, the Eighth Circuit examined whether the ADA preempted an air carrier employee's claims for wrongful discharge under Missouri common law.⁸⁹ Plaintiff, a flight paramedic, filed suit against Air Methods in state court alleging he was fired in retaliation for revealing safety violations at the company.⁹⁰ Plaintiff claimed that his status as a "whistleblower" precluded the company from firing him "for reporting wrongdoing or violations of law to superiors or public authorities."⁹¹ After removing the matter to federal court, Air Methods moved to dismiss, arguing that the ADA preempted plaintiff's state law wrongful discharge claim.⁹² Relying on the Eighth Circuit's decision in *Botz v. Omni Air International*,⁹³ the district court granted the motion, and a panel from the Eighth

⁸⁴ *Id.* at *4 (alteration in original) (citation omitted).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Watson v. Air Methods Corp.*, 870 F.3d 812, 814 (8th Cir. 2017) [hereinafter *Watson II*] (en banc).

⁹⁰ *Id.*

⁹¹ *Id.* at 814–15 (citing *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 92 (Mo. 2010)) (internal quotation marks omitted).

⁹² *Id.* at 815.

⁹³ 286 F.3d 488, 498 (8th Cir. 2002), *overruled by Watson II*, 870 F.3d 812 (8th Cir. 2017).

Circuit affirmed.⁹⁴ The Eighth Circuit granted rehearing en banc to determine whether to reconsider its holding in *Botz*.⁹⁵

In *Botz*, a flight attendant sued for violation of the Minnesota whistleblower-protection statute after purportedly being terminated for refusing to fly an assignment that violated federal regulations.⁹⁶ The court concluded that the claims were preempted because the Minnesota statute related to “service of an air carrier” within the meaning of the ADA.⁹⁷ The court reasoned that the flight attendant’s refusal to fly created a “significant likelihood” that the airline would have to cancel the flight, and the Minnesota statute’s authorization of her refusal constituted “a forbidden connection with an air carrier’s service.”⁹⁸ The *Botz* court further explained that its ADA analysis was “bolstered by Congress’s enactment of the [Whistleblower Protection Program],” which was designed to protect air carrier employees who report safety violations.⁹⁹ The court viewed the whistleblower program as proof that Congress intended for the ADA to preempt the type of state law claims asserted by plaintiff.¹⁰⁰

The *Watson II* court noted that while *Botz* was the first federal appellate ruling regarding preemption of whistleblower lawsuits, other circuits have since rejected *Botz*’s holding.¹⁰¹ The court ultimately agreed with the other circuit courts, overturning *Botz* and holding that “any effect of Missouri wrongful-discharge claims on the contractual arrangement between an air carrier and the user of its service is too tenuous, remote, or peripheral to deem the claims expressly pre-empted by the ADA.”¹⁰² The court cited the following reasons in support of its decision:

- (1) Forcing an air carrier to retain an employee would not “significantly impact” the carrier’s service relationship with its customers;

⁹⁴ See *Watson v. Air Methods Corp.*, 834 F.3d 891, 892 (8th Cir. 2016), *rev’d per curiam*, 870 F.3d 812 (8th Cir. 2017) [hereinafter *Watson I*].

⁹⁵ *Watson II*, 870 F.3d at 815.

⁹⁶ *Botz*, 286 F.3d at 489–90.

⁹⁷ *Id.* at 494.

⁹⁸ *Id.* at 495.

⁹⁹ *Id.* at 497.

¹⁰⁰ *Id.*

¹⁰¹ *Watson II*, 870 F.3d at 816 (“[T]he Third, Ninth, and Eleventh Circuits each rejected *Botz*’s view that the ADA expressly pre-empt[s] whistleblower claims based on *post hoc* air-safety reports.”).

¹⁰² *Id.* at 818.

- (2) A *post hoc* complaint by a whistleblower is not likely to cancel any flights, but instead trigger an investigation by the FAA;
- (3) A wrongful discharge claim, like a race discrimination claim, would not frustrate the ADA's primary objective of promoting competition among air carriers;
- (4) State laws related to safety are not tantamount to laws related to "service," and there is no evidence showing that safety laws have a significant impact on service; and
- (5) The "mere existence of a federal enforcement mechanism" (i.e., the Whistleblower Protection Program) does not imply preemption.¹⁰³

The *Watson II* decision brings the Eighth Circuit in line with the Third, Ninth, and Eleventh Circuits, which the court noted contain "important airline hubs" and over a third of the country's populace.¹⁰⁴

C. PREEMPTION OF STATE REGULATORY SCHEMES

1. EagleMed LLC v. Cox

In *EagleMed LLC v. Cox*, the Tenth Circuit considered an appeal from the district court's holding that a state regulatory schedule for reimbursement of air ambulance services was preempted by the ADA.¹⁰⁵ Under the Wyoming Worker's Compensation Act (Worker's Comp Act), the Wyoming Department of Workforce Services is responsible for managing the state workers' compensation fund and allocating payments from the fund.¹⁰⁶ The Worker's Comp Act provides, in relevant part, that "the division shall allow a reasonable charge for the ambulance service at a rate not in excess of the rate schedule established by the director under the procedure set forth for payment of medical and hospital care."¹⁰⁷ Pursuant to the Worker's Comp Act, the agency promulgated a rate schedule for ambulance services, including *air* ambulance services.¹⁰⁸ Several air ambulance service providers filed suit, arguing that the ADA preempts the Worker's Comp Act "to the extent the statute and regulation set compensation that air ambulances may receive for their ser-

¹⁰³ *Id.* at 818–19.

¹⁰⁴ *Id.* at 819.

¹⁰⁵ *EagleMed LLC v. Cox*, 868 F.3d 893, 896 (10th Cir. 2017).

¹⁰⁶ *Id.* at 897.

¹⁰⁷ *Id.* at 898 (citing WYO. STAT. ANN. § 27-14-401(e)).

¹⁰⁸ *Id.*

vices.”¹⁰⁹ After a series of motions, the district court granted plaintiffs’ motion for summary judgment and entered an order requiring the agency to pay air ambulance providers “the full amount charged for air ambulance services.”¹¹⁰

On appeal, defendants argued that the district court erred for two reasons: (1) the rate schedule was not mandatory, but instead provided air ambulance providers with the option of either seeking reimbursement through the Worker’s Comp Act or from the injured worker directly; and (2) the preemption issue presented a question of material fact as to whether the Worker’s Comp Act and rate schedule had a “significant and adverse effect” on air ambulance prices in Wyoming.¹¹¹ The court first noted that while the ADA does preempt state enforcement actions related to “airline rates, routes, or services,”¹¹² it does not preempt enforcement of contractual obligations “that the airline voluntarily agreed to[.]”¹¹³ Defendants seized upon this distinction by claiming that air ambulance providers were essentially given two options: voluntarily agree to submit the bill to the agency at the rates provided in the rate schedule *or* tender the entire bill to the injured worker.¹¹⁴

The court disagreed, finding that the statutory language made it clear that the Worker’s Comp Act was “intended to establish a universally applicable system for managing *all* in-state workers’ compensation claims.”¹¹⁵ Furthermore, nothing in the Worker’s Comp Act suggested that the compensation scheme was intended to operate as a “voluntary contractual offer” that air ambulance providers and others could opt into.¹¹⁶ The court further explained that defendants’ interpretation was contrary to the statute’s very purpose, ensuring “that [the] industry, not an individual, bears the burden of an accident and injury that has occurred within the industrial setting.”¹¹⁷

The court also affirmed the district court’s summary judgment ruling, holding that the Worker’s Comp Act “expressly es-

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (internal quotation marks omitted).

¹¹¹ *Id.* at 899.

¹¹² *Id.* (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383–84 (1992)).

¹¹³ *Id.* (citing *Am. Airlines v. Wolens*, 513 U.S. 219, 228 (1995)).

¹¹⁴ *Id.* at 900.

¹¹⁵ *Id.* (emphasis added).

¹¹⁶ *Id.* at 900–01.

¹¹⁷ *Id.* at 901 (citing *Wright v. State ex rel. Wyo. Workers’ Safety & Comp. Div.*, 952 P.2d 209, 212 (Wyo. 1998)) (internal quotation marks omitted).

tablish[ed] a mandatory fixed maximum rate that will be paid by the State for air-ambulance services provided to injured workers[.]”¹¹⁸ Thus, the court negated any need to decide (as a matter of fact) whether the rate schedule had a significant effect on rates, routes, or services.

IV. MONTREAL & WARSAW CONVENTIONS

A. PREEMPTION

1. *Alam v. American Airlines Group, Inc.*

In *Alam v. American Airlines Group, Inc.*, plaintiffs brought federal and state discrimination claims, along with other state law claims, after being removed from a New York-bound flight in Toronto.¹¹⁹ Plaintiffs alleged that a flight attendant wrongfully ordered them to deplane just after they had boarded the aircraft.¹²⁰ Plaintiffs were instead booked on the next available flight to New York.

Defendants moved to dismiss, arguing that discrimination claims are preempted by the Montreal Convention.¹²¹ In *King v. American Airlines, Inc.*, the Second Circuit held that the plaintiffs’ discrimination claims were preempted under the Warsaw Convention because they had already received their boarding passes and were being transported from the terminal to the aircraft.¹²² The Second Circuit determined that the claims fell within the ambit of Article 17, and were therefore preempted, because “the events in question occurred in the course of embarkation[.]”¹²³

The *Alam* court determined that the facts and circumstances giving rise to plaintiffs’ discrimination claims similarly occurred after plaintiffs had obtained their boarding passes and boarded the flight.¹²⁴ In other words, plaintiffs’ alleged injuries occurred during “the operations of embarking” the aircraft and were thus preempted by the Montreal Convention.¹²⁵

¹¹⁸ *Id.* at 902.

¹¹⁹ *Alam v. Am. Airlines Group, Inc.*, No. 16-CV-00251 (DLI) (ST), 2017 WL 1048073, at *1–2 (E.D.N.Y. Mar. 17, 2017).

¹²⁰ *Id.* at *2.

¹²¹ *Id.*; *King v. Am. Airlines, Inc.*, 284 F.3d 352 (2d Cir. 2002).

¹²² *King*, 284 F.3d at 359.

¹²³ *Id.* at 358.

¹²⁴ *Alam*, 2017 WL 1048073, at *4.

¹²⁵ *Id.*

2. Sanches-Naek v. TAP Portugal, Inc.

In *Sanches-Naek v. TAP Portugal, Inc.*, plaintiffs sued TAP Portugal after being removed from a Portugal-bound flight prior to departing John F. Kennedy International Airport.¹²⁶ Plaintiffs claimed that they were wrongfully removed from the flight, which caused them to miss subsequent connecting flights and “completely ruined” their vacation.¹²⁷ Plaintiffs brought a number of state law claims, including intentional misrepresentation, negligence, slander, malicious prosecution, breach of contract, and intentional infliction of emotional distress.¹²⁸ Plaintiffs also brought claims under 28 U.S.C. §§ 1981 and 1983 for “discriminatory practices and treatment.”¹²⁹

TAP Portugal moved to dismiss, arguing that plaintiffs’ claims were precluded by the Montreal Convention.¹³⁰ Plaintiffs countered that the Montreal Convention did not preempt or preclude their state law claims because they sought only economic damages—not personal injury damages.¹³¹ The court sided with TAP Portugal, citing long-standing precedent to show that allowing a passenger to bring a claim under local law where the Montreal Convention does not allow recovery would “encourage artful pleading by plaintiffs seeking to opt out of the Convention’s liability scheme when local law promised recovery in excess of that prescribed by the treaty.”¹³² All of plaintiffs’ state law claims were preempted because each of the claims arose from a single “damaging event,”¹³³ which occurred during the embarking process of an international flight.¹³⁴ The court also held, pursuant to Second Circuit precedent, that plaintiffs’ § 1981 and § 1983 claims were preempted by the Montreal Convention.¹³⁵

¹²⁶ *Sanches-Naek v. TAP Port., Inc.*, 260 F. Supp. 3d 185, 188–89 (D. Conn. 2017).

¹²⁷ *Id.*

¹²⁸ *Id.* at 189.

¹²⁹ *Id.* at 189–90 (internal quotation marks omitted).

¹³⁰ *Id.* at 188.

¹³¹ *Id.* at 191.

¹³² *Id.* (citing *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 171 (1999)).

¹³³ *Id.* (citing *Yanovskiy v. Air France*, 173 F.3d 848 (2d Cir. 1999)).

¹³⁴ *Id.* at 193 (citing *King v. Am. Airlines, Inc.*, 284 F.3d 352, 359 (2d Cir. 2002)).

¹³⁵ *Id.* at 191–92 (citations omitted).



Plaintiffs' failure to allege any physical or bodily injuries, as required under Article 17, led the court to conclude that the claims were precluded by the Montreal Convention.¹³⁶

3. Patel v. Singapore Airlines, Ltd.

In *Patel v. Singapore Airlines, Ltd.*, the court analyzed the interplay between the concept of *applicability* of the Montreal Convention and the concept of *liability* under the Montreal Convention. Plaintiff was an elderly woman, originally from India but residing in California, who booked roundtrip airfare from San Francisco to India.¹³⁷ Prior to the flight, plaintiff misplaced her U.S. passport and instead arrived at the airport with her Indian passport.¹³⁸ Plaintiff was permitted to board the flight even though the Indian passport had been canceled.¹³⁹ Plaintiff was denied entry into India due to the canceled passport and was immediately booked on a return flight to San Francisco.¹⁴⁰

Plaintiff sued Singapore Airlines for negligence, claiming “severe back pain, emotional trauma, and headaches as a result” of the long return flight.¹⁴¹ Singapore Airlines moved for summary judgment, arguing that plaintiff’s claim was preempted and barred by the Montreal Convention.¹⁴² Plaintiff contended that the Montreal Convention did not apply because she had not yet “embarked” on the plane when Singapore Airlines allowed her to board with a canceled passport.¹⁴³ Under this theory, the “accident” that caused her injury occurred outside the scope of the Montreal Convention.¹⁴⁴

The court disagreed, stating that “plaintiff’s argument ‘erroneously conflate[s] the *applicability* of the Convention with *liability* under the Convention.’”¹⁴⁵ The court noted that “the question whether an injury-causing accident occurred on board

¹³⁶ *Id.* at 196.

¹³⁷ *Patel v. Sing. Airlines, Ltd.*, No. CV 15-4205 FMO (PLAx), 2017 WL 1078444, at *1 (C.D. Cal. Mar. 21, 2017), *appeal filed*, No. 17-55414 (9th Cir. Mar. 28, 2017).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* (citation omitted).

¹⁴² *Id.* at *3.

¹⁴³ *Id.* at *4.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* (citing *Acevedo-Reinoso v. Iberia Líneas Aéreas de España S.A.*, 449 F.3d 7, 13 (1st Cir. 2006)) (alteration in original) (emphasis added).

or in the course of embarking or disembarking bears upon liability” as it is “analytically distinct from the antecedent question whether the Convention applies[.]”¹⁴⁶ Simply put, whether the “accident” (plaintiff being allowed to board with a canceled passport) occurred before or after embarking the flight is irrelevant to the question of whether the Montreal Convention governs the claim.¹⁴⁷

The court concluded that plaintiff’s negligence claim was preempted because her injury occurred aboard the aircraft, meaning that Article 17 provided the exclusive means for recovery.¹⁴⁸ But plaintiff could not establish that an “accident” had occurred within the meaning of the Montreal Convention and therefore could not recover from the airline.¹⁴⁹ Even though the Montreal Convention *applied* to plaintiff’s claims, plaintiff could not show that the airline was *liable* under the Montreal Convention.

B. WHAT CONSTITUTES AN “ACCIDENT”?

As shown in *Patel*, the question of whether an “accident” has occurred within the meaning of Article 17 often decides the outcome. Article 17 provides: “[t]he carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.”¹⁵⁰

In *Air France v. Saks*, the Supreme Court determined that liability under Article 17 of the Warsaw Convention (the predecessor to the Montreal Convention) arose only if “a passenger’s injury is caused by an unexpected or unusual event or happening that is external to the passenger.”¹⁵¹ But in cases where the injury results from “the passenger’s own internal reaction to the usual, normal, and expected operation of the aircraft, in which case [the injury] has not been caused by an accident.”¹⁵²

The cases below highlight the nuances involved in proving the occurrence of an Article 17 accident. The analysis often

¹⁴⁶ *Id.* (citation omitted) (internal quotation marks omitted).

¹⁴⁷ *Id.* (citation omitted) (internal quotation marks omitted).

¹⁴⁸ *Id.* at *5.

¹⁴⁹ *Id.*

¹⁵⁰ Convention for the Unification of Certain Rules for International Carriage by Air, art. 17, May 28, 1999, S. Treaty Doc. No. 106-45, 1999 WL 33292734, at *16–17.

¹⁵¹ *Air Fr. v. Saks*, 470 U.S. 392, 405 (1985).

¹⁵² *Id.* at 406.

turns on whether an unusual or unexpected event has occurred and whether the plaintiff's response can be categorized as internal or external.

1. *Yang v. Air China Ltd.*

In *Yang v. Air China Ltd.*, plaintiff's mother collapsed on the jet bridge and died while deplaning an overnight Air China flight from Boston.¹⁵³ There were no eyewitnesses to the decedent's collapse, and flight attendants learned of the incident only after someone alerted them that a passenger had fainted on the jet bridge.¹⁵⁴ One of the flight attendants then saw the decedent lying on the jet bridge just beyond the cabin door.¹⁵⁵

The Health Bureau of Beijing issued a death certificate, listing the cause of death as a pulmonary embolism and possible heart attack.¹⁵⁶ Plaintiff's medical expert opined that the decedent slipped while stepping from the aircraft onto the jet bridge, causing her to fall and die.¹⁵⁷ Plaintiff argued that the fall was therefore an "accident" within the meaning of the Montreal Convention and Air China was liable for the fall.¹⁵⁸ Plaintiff relied upon the medical expert's opinion that the decedent died as a result of an external cause (the fall on the jet bridge) rather than an internal cause (pulmonary embolism or a heart attack).¹⁵⁹ Defendants Air China and Boeing each moved to strike plaintiff's expert and moved for summary judgment on the basis that plaintiff could not establish that decedent's fall was precipitated by an external cause.¹⁶⁰

The court granted the motion to strike, determining that the expert's testimony was not sufficiently reliable to establish whether decedent fell before or after exiting the aircraft door.¹⁶¹ The court also found that the expert's theory regarding the cause of death—head trauma as a result of the fall—was sim-

¹⁵³ *Yang v. Air China Ltd.*, No. 14 C 6482, 2017 WL 4283953, at *1 (N.D. Ill. Sept. 27, 2017).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at *2.

¹⁵⁷ *Id.* at *4.

¹⁵⁸ *Id.* at *5.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at *6.

ilarly unreliable.¹⁶² The expert had even conceded that a heart attack or other *internal* factor could have caused her to fall.¹⁶³

The court further held that even if the expert's testimony were permitted, it would not "reliably narrow down the cause of [the decedent's] death to an 'accident' that would allow [plaintiff] to succeed at trial."¹⁶⁴ Without reliable testimony—or some other evidence to substantiate liability—plaintiff's theory of causation was simply too speculative to show that the decedent's death resulted from an Article 17 accident.¹⁶⁵

2. Lee v. Air Canada

In *Lee v. Air Canada*, a passenger sued Air Canada after being hit with a bag that another passenger was loading into the overhead bin during boarding.¹⁶⁶ When the incident occurred, flight attendants were stationed in the cabin assisting with the boarding process but were not assisting passengers with stowing luggage.¹⁶⁷ Air Canada moved for summary judgment on the basis that plaintiff's injuries were not caused by an accident under the Montreal Convention.¹⁶⁸

Air Canada did not dispute that the incident was an external and unexpected event.¹⁶⁹ Rather, Air Canada asserted that there was no causal link between Air Canada and the incident that injured plaintiff.¹⁷⁰ Air Canada argued that an accident did not occur because plaintiff's injuries were caused by another passenger.¹⁷¹ Air Canada noted that in other cases involving items falling from overhead bins, the incidents occurred "only *after* the flight crew's responsibility to secure the items in those bins had been triggered."¹⁷² In this case, the airline argued that the flight attendants were not responsible for the supervision and stowing

¹⁶² *Id.* at *7.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at *11.

¹⁶⁵ *Id.* (citation omitted).

¹⁶⁶ *Lee v. Air Can.*, 228 F. Supp. 3d 302, 304 (S.D.N.Y. 2017).

¹⁶⁷ *Id.* at 304–05.

¹⁶⁸ *Id.* at 304.

¹⁶⁹ *Id.* at 309.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 310.

¹⁷² *Id.* at 309–10 (citing *Maxwell v. Aer Lingus Ltd.*, 122 F. Supp. 2d 210, 212–13 (D. Mass. 2000); *Smith v. Am. Airlines, Inc.*, No. C 09-02903, 2009 WL 3072449, at *5 (N.D. Cal. Sept. 22, 2009)) (emphasis in original).

of luggage, nor were they in a position to prevent the passenger from dropping his bag on plaintiff.¹⁷³

The court rejected the notion that a “causal connection” between the carrier and the incident is required to establish an accident under the Montreal Convention.¹⁷⁴ The court found that flight attendants were stationed throughout the cabin and that at least one flight attendant witnessed the incident.¹⁷⁵ Moreover, Air Canada was better positioned than plaintiff to control risks associated with bags falling from the overhead bin, including the ability to warn passengers to take care when stowing items.¹⁷⁶ The court concluded the incident was an “unexpected or unusual event” that was external to plaintiff.¹⁷⁷ Thus, the incident was indeed an “accident” within the meaning of Article 17.

3. *Lynn v. United Airlines, Inc.*

In *Lynn v. United Airlines, Inc.*, plaintiff’s flight was on final descent for landing when she noticed that an overhead bin across the aisle had come unlatched.¹⁷⁸ Plaintiff was admittedly aware that the seatbelt sign was illuminated and that it was unsafe to move about the cabin but, nevertheless, stood up to close the overhead bin.¹⁷⁹ As she reached out to close the bin, the aircraft touched down, wrenching her arm and fracturing her shoulder.¹⁸⁰ United Airlines moved for summary judgment, arguing plaintiff was not injured by an “accident” under the Montreal Convention because: (1) no “unexpected or unusual event” occurred that was “external” to plaintiff; and (2) plaintiff’s decision to leave her seat disconnected the causal chain.¹⁸¹

United Airlines first asserted that plaintiff’s injury could not be considered an accident because her injury was not caused by an unusual or unexpected event.¹⁸² The court, however, found that United’s theory failed to consider all of the circumstances that surrounded plaintiff’s injury, particularly when there were “genuine material issues” regarding how unexpected it is for an

¹⁷³ *Id.* at 310.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 311.

¹⁷⁸ *Lynn v. United Airlines, Inc.*, No. 15-CV-7041, 2017 WL 4357387, at *1 (N.D. Ill. Oct. 2, 2017).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at *2–4.

¹⁸² *Id.* at *2.

overhead bin to open during descent.¹⁸³ As such, a reasonable jury could conclude that the overhead bin popping open was an unusual or unexpected event.¹⁸⁴

United also argued that plaintiff's decision to leave her seat during an otherwise normal descent and landing was an "internal response" rather than an external event.¹⁸⁵ The court disagreed with what it termed an "overly restrictive approach to the evidence," finding that a jury could reasonably conclude that the "external event" was the bin popping open during descent.¹⁸⁶

Finally, United claimed it could not be liable under Article 17 because plaintiff's voluntary decision to leave her seat broke the chain of causation involving United Airlines and its crew members.¹⁸⁷ The court rejected this theory, reasoning that the determination as to whether plaintiff leaving her seat severed the causal chain was best left for the jury decide.¹⁸⁸ This was particularly true where one could reasonably conclude that plaintiff's decision to close the overhead bin was "a foreseeable result of the bin popping open."¹⁸⁹ The court ultimately denied summary judgment, leaving it for the jury to decide whether an accident had occurred within the meaning of the Montreal Convention.

4. *Dizon v. Asiana Airlines, Inc.*

In *Dizon v. Asiana Airlines, Inc.*, plaintiff sued Asiana Airlines for, among other things, violations of the Montreal Convention after suffering from deep vein thrombosis during multiple legs of an international trip.¹⁹⁰ Asiana filed a motion for summary judgment on the basis that plaintiff's injury was not caused by an accident because his deep vein thrombosis "was the result of normal and expected operations of the aircraft."¹⁹¹ Plaintiff argued that Asiana "ignor[ed] other links in the causal chain," including the alleged failure of flight attendants to respond to his requests for assistance.¹⁹²

¹⁸³ *Id.* at *3.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at *4.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Dizon v. Asiana Airlines, Inc.*, 240 F. Supp. 3d 1036, 1038–39 (C.D. Cal. 2017).

¹⁹¹ *Id.* at 1041.

¹⁹² *Id.*

The court began by acknowledging that an airline employee's failure to act *can* constitute an accident under the Montreal Convention.¹⁹³ For example, in *Olympic Airways v. Husain*, the Supreme Court held that an air carrier could be liable where a flight attendant refused to reseat an asthmatic passenger who was allergic to the cigarette smoke emanating from the aircraft's smoking section.¹⁹⁴ The Supreme Court found that "the flight attendant's refusal to reseat the passenger was a 'link in the chain' that ultimately led to his death, though the ambient smoke in the cabin was also a cause."¹⁹⁵ The *Dizon* court also considered *Air France v. Saks*, where the Supreme Court held that a passenger's loss of hearing during the normal descent of the aircraft was her "own internal reaction to the usual, normal, and expected operation of the aircraft."¹⁹⁶ The Ninth Circuit's decision in *Rodriguez v. Ansett Australia Ltd.* was also relevant because it held that deep vein thrombosis was not an accident "because it is an injury that arises due to the normal and expected operation of the aircraft."¹⁹⁷

The court distinguished the facts of *Rodriguez*, emphasizing that the plaintiff in that case failed to inform the flight crew of her injury, whereas plaintiff in the present case did raise the issue with flight attendants.¹⁹⁸ Indeed, plaintiff characterized the "accident" as "the flight crew's failure to adequately attend to his medical needs," rather than the deep vein thrombosis itself.¹⁹⁹ The court found that the facts of plaintiff's case "fall directly in the area between *Husain* and *Rodriguez*."²⁰⁰ Like the plaintiff in *Husain*, plaintiff in the present case informed the flight attendants of his medical issues.²⁰¹ But unlike the flight attendants in *Husain*, Asiana's flight attendants *did* provide medical assistance to plaintiff in the form of Tylenol and wheelchair assistance.²⁰² The issue turned on whether the airline's response was "so insufficient as to be considered an unusual or unexpected event."²⁰³

¹⁹³ *Id.*

¹⁹⁴ *Id.* (citing *Olympic Airways v. Husain*, 540 U.S. 644, 654–55 (2004)).

¹⁹⁵ *Id.* at 1042 (citing *Husain*, 540 U.S. at 653–54).

¹⁹⁶ *Id.* at 1042 (citing *Air Fr. v. Saks*, 470 U.S. 392, 406 (1985)).

¹⁹⁷ *Id.*; *see also* *Rodriguez v. Ansett Austl. Ltd.*, 383 F.3d 914, 917 (9th Cir. 2004).

¹⁹⁸ *Id.* at 1042–43.

¹⁹⁹ *Id.* at 1042.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 1043.

²⁰² *Id.*

²⁰³ *Id.* (internal quotation marks omitted).

The court found no evidence that flight attendants had ignored plaintiff's requests and granted Asiana's motion for summary judgment.²⁰⁴

C. FORUM SELECTION

1. *In re Air Crash at San Francisco, California, on July 6, 2013*

In re Air Crash at San Francisco, California, on July 6, 2013 arose from the July 2013 crash of Asiana Airlines Flight 214 at San Francisco International Airport.²⁰⁵ Asiana moved to dismiss the claims of two Chinese passengers on the basis that the U.S. District Court for the Northern District of California lacked subject-matter jurisdiction.²⁰⁶ Under Article 33 of the Montreal Convention, a passenger must bring suit in one of five jurisdictions: (1) the domicile of the carrier; (2) the principal place of business of the carrier; (3) the place of business where the contract was made; (4) the place of final destination; or (5) the principal and permanent residence of the passenger.²⁰⁷ If a passenger cannot show that at least one of the five places listed above is in the United States, dismissal for lack of subject-matter jurisdiction is appropriate.²⁰⁸ Plaintiffs focused on the fourth and fifth prongs as the basis for jurisdiction in the United States.

For purposes of Article 33, the "final destination" for a round-trip flight is the place of origin.²⁰⁹ Plaintiffs argued, however, that they were not operating on a roundtrip ticket but instead on "open jaw itineraries."²¹⁰ Plaintiffs' theory was that one "jaw" of the trip was the flight from China to San Francisco, with the second jaw being the return flight from Los Angeles to China.²¹¹ This theory hinged on the fact that plaintiffs were arriving in San Francisco, driving to Los Angeles, and then returning to China from Los Angeles.²¹² Plaintiffs argued that this constituted two separate contracts for transportation, with San Fran-

²⁰⁴ *Id.* at 1044–45.

²⁰⁵ *In re Air Crash at S.F., Cal., on July 6, 2013*, 14-CV-02038, 2017 WL 3484643, at *1 (N.D. Cal. Aug. 14, 2017).

²⁰⁶ *Id.*

²⁰⁷ *Id.* at *3 (citation omitted).

²⁰⁸ *Id.*

²⁰⁹ *Id.* at *4.

²¹⁰ *Id.* (internal quotation marks omitted).

²¹¹ *Id.*

²¹² *Id.*

cisco being the final destination for the first contract.²¹³ Asiana, on the other hand, argued that that the entire trip should be considered a “single undivided transportation” with the ultimate destination of Shanghai.²¹⁴

The court sided with the airline, finding that the parties clearly “contemplated a single operation of undivided operation transportation.”²¹⁵ The court noted that each plaintiff had (1) purchased airline tickets through a single contract; (2) for transportation by one carrier (Asiana); and (3) were issued at the same time and place.²¹⁶ Moreover, the entire trip was to take place within a two-week period.²¹⁷ Accordingly, the court determined that it did not have jurisdiction to hear plaintiffs’ claims under the “place of destination” prong.²¹⁸

Plaintiffs also claimed that jurisdiction was proper in the United States under the “principal and permanent residence” prong, because they resided in the United States for a period of time while receiving medical care.²¹⁹ The court rejected this argument, finding that Article 33 permits jurisdiction at the passenger’s principal and permanent residence “*at the time of the accident.*”²²⁰ Thus, even if plaintiffs could establish that three months of medical care constituted principal and permanent residence, the court still would not have jurisdiction because plaintiffs resided in China when the accident occurred.²²¹ The court determined that it did not have subject-matter jurisdiction under Article 33 and granted Asiana’s motion.²²²

2. *Sajajed v. Emirates Airlines*

In *Sajajed v. Emirates Airlines*, plaintiff sued after airline staff caused plaintiff—an Iranian citizen with permanent residence in the United States—to be burned by hot tea during a flight from Dubai to San Francisco.²²³ When the incident occurred, plaintiff was traveling under an itinerary that included legs from

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at *7 (internal quotation marks omitted).

²¹⁶ *Id.* at *6.

²¹⁷ *Id.*

²¹⁸ *Id.* at *7.

²¹⁹ *Id.*

²²⁰ *Id.* (emphasis added).

²²¹ *Id.*

²²² *Id.* at *7–8.

²²³ *Sajajed v. Emirates Airlines*, No. C 16-06659 SBA, 2017 WL 1150403, at *1 (N.D. Cal. Mar. 28, 2017).

Iran to Dubai, Dubai to San Francisco, San Francisco to Dubai, and Dubai to Iran.²²⁴ Plaintiff would routinely purchase round-trip tickets from Iran to the United States with an open return date to Iran.²²⁵ Emirates removed the case to federal court and moved to dismiss, asserting that the court lacked subject-matter jurisdiction under the Warsaw Convention.²²⁶

The Warsaw Convention allowed plaintiff to bring suit in one of four locations: (1) the airline's domicile; (2) the airline's principal place of business; (3) the place where the ticket was purchased; or (4) the passenger's destination.²²⁷ The dispute centered on whether plaintiff's place of destination was Iran or the United States.²²⁸ The court determined that plaintiff's final destination was indeed Iran because that was the location where her roundtrip journey began.²²⁹

Plaintiff attempted to circumvent this fact by arguing that Iran could not be the place of destination because "the United States does not have diplomatic or consular relations with Iran and [] there is no direct commercial air service between the two countries."²³⁰ The court found no authority supporting this proposition and noted that the lack of direct flights and diplomatic relations did not prevent plaintiff from actually buying a ticket that took her from the United States to Iran.²³¹

Plaintiff also sought to invoke the Montreal Convention, which allows for a fifth potential forum: the place of the passenger's "principal and permanent residence."²³² Setting aside whether the United States was plaintiff's principal and permanent residence, the court held that the Montreal Convention could not apply because Iran—the place of departure and place of destination—was not a party to the Montreal Convention.²³³

Finally, plaintiff asked the court to find that the place of destination was the United States because that is the location where plaintiff "wishe[d] to end up."²³⁴ The court stated that "al-

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at *2.

²²⁸ *Id.* at *3.

²²⁹ *See id.* ("In the case of a roundtrip ticket, the destination is 'the place where the trip began.'" (citation omitted)).

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at *4 (citation omitted).

²³³ *Id.*

²³⁴ *Id.* (internal quotation marks omitted).

though a passenger's intent is accorded considerable weight in ascertaining the final destination, when a contract is unambiguous, the instrument alone is taken to express the intent of the parties."²³⁵ Because plaintiff's itinerary clearly provided for roundtrip transportation from Iran, with stops in Dubai and San Francisco, the place of destination could be nowhere other than Iran.²³⁶

In any case, the United States was not a proper forum for the suit and the court dismissed for lack of subject-matter jurisdiction.

D. DELAY VS. NONPERFORMANCE

1. *Shabotinsky v. Deutsche Lufthansa AG*

In *Shabotinsky v. Deutsche Lufthansa AG*, plaintiff filed suit when he was rebooked on a later flight from Frankfurt to Tel Aviv after his initial flight was canceled, which delayed his arrival by several hours.²³⁷ Plaintiff asserted claims under Article 19 of the Montreal Convention, which provides:

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 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.²³⁸

Lufthansa moved to dismiss, arguing that the Montreal Convention does not govern issues arising before the flight's departure and that plaintiff's claim was thus governed by the airline's Conditions of Carriage.²³⁹ The court disagreed, finding that "nothing in Article 19 of the Montreal Convention suggests that it only applies to delays that occur after a plaintiff's initial flight takes off."²⁴⁰

The fundamental question was whether the airline failed to perform under the contract or simply delayed plaintiff's arri-

²³⁵ *Id.* at *5 (citing *Coyle v. P.T. Garuda Indon.*, 363 F.3d 979, 987 (9th Cir. 2004)).

²³⁶ *Id.*

²³⁷ *Shabotinsky v. Deutsche Lufthansa AG*, 245 F. Supp. 3d 1018, 1020–21 (N.D. Ill. 2017).

²³⁸ *Id.* at 1021 (citation omitted).

²³⁹ *Id.* at 1022.

²⁴⁰ *Id.* (quoting *Dochak v. Polskie Linie Lotnicze LOT S.A.*, 189 F. Supp. 3d 798, 808 (N.D. Ill. 2016)).

val.²⁴¹ The court concluded that plaintiff had not alleged that Lufthansa failed to transport him to Tel Aviv but instead alleged that Lufthansa failed to transport him to Tel Aviv *on time*.²⁴² As such, plaintiff was not claiming nonperformance of a contract (i.e., the Conditions of Carriage) but instead claiming delay under the Montreal Convention.²⁴³

E. SCOPE OF THE MONTREAL CONVENTION

1. Brannen v. British Airways PLC

In *Brannen v. British Airways PLC*, plaintiff sued British Airways after slipping and sustaining injuries while boarding a shuttle bus between terminals at Heathrow Airport in the United Kingdom.²⁴⁴ Plaintiff argued that his injuries were sustained while disembarking from his British Airways flight and embarking on a Brussels Airlines flight and sought recovery under the Montreal Convention.²⁴⁵ British Airways moved to dismiss on the grounds that the Montreal Convention was inapplicable because plaintiff's injuries were not sustained during embarking or disembarking as required by Article 17.²⁴⁶ To determine whether the incident occurred during embarking or disembarking, the court engaged in a three-part analysis that considered "the location of the accident, the activity in which the injured person was engaged, and the control by defendant of such injured person at the location and during the activity taking place at the time of the accident" ²⁴⁷

The court first examined the location of the incident. The court noted that plaintiff was not in an "exclusive area" when he was injured but instead located in an area accessible to other passengers.²⁴⁸ Additionally, plaintiff could not show that he was in the process of embarking on another flight because he had not yet arrived at the gate or received a boarding pass.²⁴⁹ Moreo-

²⁴¹ *Id.*

²⁴² *Id.* at 1023.

²⁴³ *Id.*

²⁴⁴ *Brannen v. British Airways PLC*, No. 1:17-cv-00714, 2017 WL 4953856, at *1 (M.D. Pa. Nov. 1, 2017).

²⁴⁵ *Id.* at *2.

²⁴⁶ *Id.* at *3.

²⁴⁷ *Id.* at *4 (quoting *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152, 155 (3d Cir. 1977)) (internal quotation marks omitted).

²⁴⁸ *Id.* at *5.

²⁴⁹ *Id.*

ver, plaintiff's next flight had, in fact, been canceled.²⁵⁰ As such, the location of the incident weighed in favor of dismissal.²⁵¹

The court next considered British Airways' level of control over plaintiff at the time of the incident. Plaintiff argued that he had been instructed by British Airways to "immediately" travel to a different terminal via shuttle bus to get a boarding pass and board the next flight.²⁵² Plaintiff further claimed that the shuttle bus system was operating as an agent of the airline for the purpose of embarking on the next flight.²⁵³ The court disagreed and instead found that British Airways' mere instruction to board the shuttle bus for another terminal was insufficient to show the level of control necessary to demonstrate that plaintiff was in the process of embarking or disembarking.²⁵⁴

Finally, the court held that plaintiff's activity—boarding a shuttle bus to another terminal—also weighed in favor of dismissal.²⁵⁵ The court again focused on the fact that plaintiff had not yet obtained a boarding pass.²⁵⁶ Boarding a shuttle bus was simply "too attenuated to the process of embarking on a flight."²⁵⁷

With all three factors weighing in favor of British Airways, the court determined that the "[p]laintiff has failed to state a cognizable claim under Article 17" and dismissed plaintiff's claims.²⁵⁸

F. EMOTIONAL DISTRESS CLAIMS

Courts have generally held that claims for emotional distress and mental anguish are not permitted under the Montreal Convention unless caused by a bodily injury. One of the most prominent cases that courts cite for this proposition is *Ehrlich v. American Airlines, Inc.*²⁵⁹ Although the *Ehrlich* court was interpreting the Warsaw Convention—not the Montreal Convention—courts have long held that opinions interpreting the Warsaw Convention are useful in interpreting the Montreal Convention. The cases below illustrate these two principles.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at *6.

²⁵⁵ *Id.*

²⁵⁶ *See id.* (citation omitted).

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ 360 F.3d 366 (2d Cir. 2004).

1. Ojide v. Air France

In *Ojide v. Air France*, plaintiffs filed suit under Articles 17 and 19 of the Montreal Convention after their luggage was misplaced during a flight from New York to Nigeria.²⁶⁰ Prior to boarding, Plaintiffs checked four pieces of luggage, one of which contained medication.²⁶¹ Air France required plaintiffs to check a carry-on bag containing additional prescription medication during a layover in Paris.²⁶² When plaintiffs arrived in Nigeria, all five pieces of luggage were missing, including the bags containing prescription medication.²⁶³ Plaintiffs alleged that the lack of medication caused one of the plaintiffs to suffer from dehydration, necessitating an early return to the United States, which caused plaintiffs to miss two family burials in Nigeria.²⁶⁴ Although plaintiffs did eventually receive their luggage, plaintiffs claimed the bags were “severely damaged.”²⁶⁵

Plaintiffs filed claims for delayed luggage under Article 19 and claims for “dehydration, deprivation of food, and various forms of emotional distress” under Article 17.²⁶⁶ Air France filed a Rule 12(b)(6) motion to dismiss on the basis that plaintiffs’ claims for dehydration, food deprivation, or emotional distress did not constitute “bodily injuries” under the Montreal Convention.²⁶⁷

The court relied on prior cases to hold that neither dehydration nor food deprivation were bodily injuries under Article 17.²⁶⁸ The court further held that because plaintiffs could not establish the occurrence of a physical injury, their emotional distress claims were barred under the Montreal Convention.²⁶⁹

2. Nwokeji v. Arik Air

In *Nwokeji v. Arik Air*, a passenger sued American Airlines and Arik Air for breach of contract and intentional and negligent

²⁶⁰ *Ojide v. Air Fr.*, No. 17-CV-3224 (KBF), 2017 WL 4402569, at *1 (S.D.N.Y. Oct. 2, 2017).

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.* at *2.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

infliction of emotional distress.²⁷⁰ Plaintiff claimed, in relevant part, that the airlines inflicted emotional distress upon him when they delayed his return flight from Nigeria to Boston.²⁷¹ Plaintiff alleged that the waiting area was uncomfortable and devoid of any amenities but did not allege that he sustained any bodily injuries.²⁷² The airlines moved for summary judgment.

The court noted that the Montreal Convention does not allow for recovery of emotional damages unless a passenger has suffered a bodily injury.²⁷³ The court further observed that “[c]ourts have repeatedly dismissed claims for purely emotional injuries arising from delayed flights.”²⁷⁴ Having determined that plaintiff “suffered no physical injury and never saw a medical professional as a result of the experience,” the court held that plaintiff could not establish a claim for emotional distress under the Montreal Convention.²⁷⁵

3. Doe v. Etihad Airways, P.J.S.C.

In *Doe v. Etihad Airways, P.J.S.C.*, the Sixth Circuit issued an opinion that seemingly departed from traditional interpretations of the Montreal Convention. The case arose from an Abu Dhabi to Chicago Etihad Airways flight, during which plaintiff pricked her finger on a hypodermic needle that was left in her seatback pocket.²⁷⁶ Plaintiff’s physician prescribed a number of medications for exposure to hepatitis, tetanus, and HIV, and ordered a series of tests over the following year.²⁷⁷ Plaintiff and her husband sued the airline, alleging physical injury, loss of consortium, and a variety of emotional and mental injuries.²⁷⁸ The district court granted partial summary judgment in the airline’s favor as to plaintiff’s claims for mental anguish and emotional distress, observing that “recovery for mental injuries is permitted only to the extent the distress is caused by the physical injuries

²⁷⁰ *Nwokeji v. Arik Air*, No. 15-10802-MLW, 2017 WL 4167433, at *1 (D. Mass. Sept. 20, 2017).

²⁷¹ *Id.*

²⁷² *Id.* at *6.

²⁷³ *Id.* at *11 (citations omitted).

²⁷⁴ *Id.* (citations omitted).

²⁷⁵ *Id.*

²⁷⁶ *Doe v. Etihad Airways, P.J.S.C.*, 870 F.3d 406, 408–09 (6th Cir. 2017) [hereinafter *Doe I*].

²⁷⁷ *Id.* at 410.

²⁷⁸ *Id.* at 409–10.

sustained.”²⁷⁹ The district court also dismissed her husband’s loss of consortium claim.²⁸⁰

On appeal, Etihad argued that plaintiff could only recover for mental anguish under the Montreal Convention if the mental anguish was caused by the bodily injury (i.e., being stuck by the needle).²⁸¹ The court began with the text of Article 17(1) of the Montreal Convention, which states: “The carrier is liable for damage sustained *in case of* death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.”²⁸²

Under Etihad’s reading, “in case of” was the equivalent of “caused by,” which meant that plaintiff would have to prove that an accident caused her bodily injury and that the mental anguish arose from the injury.²⁸³ Etihad argued that even though plaintiff did sustain a bodily injury—the pinprick—the bodily injury itself did not cause her mental anguish.²⁸⁴ Rather, plaintiff’s mental anguish was a result of the fear that she might have been exposed to a disease.²⁸⁵ The court recognized that Etihad’s argument was rooted in the Second Circuit’s decision in *Ehrlich v. American Airlines, Inc.*, which, as noted above, had spawned the conventional understanding that a plaintiff can only recover for emotional damages if they were caused by a bodily injury.²⁸⁶

The court declined to adopt the *Ehrlich* holding as a means to interpret the Montreal Convention. The court noted the differing purposes of the Warsaw and Montreal Conventions.²⁸⁷ For instance, the Warsaw Convention was adopted in 1929 to limit the liability of airlines “in order to foster the growth of the fledgling commercial aviation industry,”²⁸⁸ while the Montreal Convention was adopted in 1999 to offer a “modernized uni-

²⁷⁹ *Doe v. Etihad Airways*, P.J.S.C., No. 13-14358, 2015 WL 5936326, at *2 (E.D. Mich. Oct. 13, 2015), *rev’d and remanded*, 870 F.3d 406 (6th Cir. 2017) (citation omitted) (internal quotation marks omitted).

²⁸⁰ *Doe I*, 870 F.3d at 410.

²⁸¹ *Id.* at 412–13.

²⁸² *Id.* at 412 (emphasis added) (citation omitted).

²⁸³ *Id.*

²⁸⁴ *Id.* at 412–13.

²⁸⁵ *Id.* at 413.

²⁸⁶ *Id.* at 414–15 (citing *Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 369 (2d Cir. 2004)).

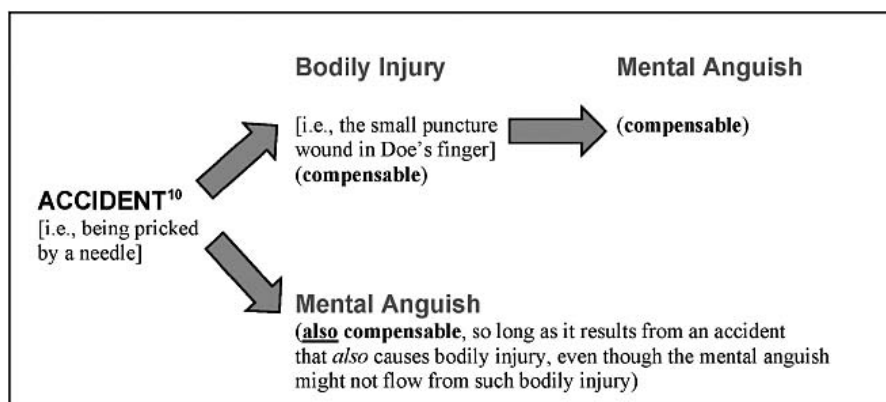
²⁸⁷ *Id.* at 426.

²⁸⁸ *Id.* at 416 (citations omitted) (internal quotation marks omitted).

form liability regime for international air transportation.”²⁸⁹ Given the dramatically different rationales for each treaty, the court found *Ehrlich* of limited use in interpreting the actual text of the Montreal Convention.²⁹⁰

The court instead relied on its own textual interpretation of Article 17 to find that although a passenger may not recover mental anguish damages absent an “accident” causing bodily injury, there is no requirement that the mental anguish be caused by the bodily injury itself.²⁹¹ The court’s interpretation hinged upon its understanding of the phrase “in case of.” While *Etihad* likened the phrase to “caused by,” the court determined that its meaning was conditional rather than causal.²⁹² In other words, a passenger need not establish that her emotional damages were caused by “death or bodily injury.” The passenger need only show that she suffered emotional damages as a result of an accident that also happened to cause a bodily injury.²⁹³ Accordingly, the court held that as long as there is an “accident” that causes a bodily injury, mental anguish damages are recoverable even if the mental anguish does not flow from the bodily injury itself.²⁹⁴ The court illustrated its interpretation using the diagram in Figure 1.

DIAGRAM 1



²⁸⁹ *Id.* at 423 (citation omitted) (internal quotation marks omitted).

²⁹⁰ *Id.*

²⁹¹ *Id.* at 417–18.

²⁹² *Id.* at 414–15.

²⁹³ *Id.* at 417–18.

²⁹⁴ *Id.*

Applying this rationale, the court found that plaintiff had satisfied her burden because she could show the occurrence of an accident (pricking her finger on a hypodermic needle), which caused a bodily injury (the pinprick), and she suffered emotional damages as a result of the *accident*.²⁹⁵

The court's decision diverges from the conventional understanding regarding recovery of emotional damages under the Montreal Convention. It is unclear, however, how broadly its holding will be felt. Although the court held that emotional damages do not have to be tied directly to a bodily injury, it did hold that there must nevertheless be a bodily injury in order for a passenger to recover emotional damages. Regardless, Etihad has filed a petition for writ of certiorari to the Supreme Court, so it remains to be seen whether the Sixth Circuit's holding will have any lasting effect.

V. FAA RULEMAKING

A. *FLYERS RIGHTS EDUCATION FUND, INC. v. FEDERAL AVIATION ADMINISTRATION*

Flyers Rights Education Fund, Inc. v. FAA arose from an August 2015 petition by a passengers' rights group, Flyers Rights Education Fund, which asked the Federal Aviation Administration (FAA) to set forth rules regarding airline seat size and spacing.²⁹⁶ Flyers Rights' petition stated that while seat pitch and seat width had steadily decreased over the years, the girth and height of the average passenger had grown larger.²⁹⁷ Flyers Rights argued that the decrease in pitch and width could harm passenger health by causing deep vein thrombosis while also slowing emergency egress.²⁹⁸ Flyers Rights asked the FAA to: (1) limit the degree of seat size changes; (2) place a moratorium on any further reductions in size, width, pitch, and aisle width until the FAA could promulgate new rules; and (3) appoint an advisory committee to advise the FAA regarding new standards.²⁹⁹

The FAA denied the petition, explaining that Flyers Rights did not raise issues "relate[d] to passenger health and comfort, and d[id] not raise an immediate safety or security concern."³⁰⁰

²⁹⁵ *Id.* at 412.

²⁹⁶ *Flyers Rights Educ. Fund, Inc. v. FAA*, 864 F.3d 738, 741 (D.C. Cir. 2017).

²⁹⁷ *Id.* at 741–42.

²⁹⁸ *Id.* at 742.

²⁹⁹ *Id.*

³⁰⁰ *Id.* (internal quotation marks omitted) (alteration in original).

The FAA stated that emergency egress drills had been successful with seating configurations more restrictive than those operated by most airlines, despite the decrease in seat pitch.³⁰¹ The FAA similarly dismissed Flyers Rights' claims about passenger health, claiming that deep vein thrombosis is a rare condition that can occur during long periods of seated activity, regardless of seat size.³⁰² At Flyers Rights' request, the FAA identified studies it relied upon in issuing its denial.³⁰³ The studies cited by the FAA did not, however, evaluate the effects of smaller seat size and increased passenger size on emergency egress procedures.³⁰⁴

Flyers Rights petitioned the U.S. Court of Appeals for the D.C. Circuit for review, challenging: (1) the FAA's conclusion that seat pitch, seat width, and passenger size do not negatively affect emergency egress; and (2) the FAA's refusal to consider matters regarding health and comfort.³⁰⁵ The court noted that its review of the decision would be quite narrow because a government agency has broad discretion when it refuses to engage in making new rules.³⁰⁶ The review would turn on whether there was "some basis in the record" for the decision and whether the FAA "adequately explained the facts and policy concerns it relied on."³⁰⁷

Under this standard, the court concluded that the FAA failed to provide sufficient evidence that decreased seat size and increased passenger size did not affect emergency egress.³⁰⁸ Flyers Rights' petition raised a number of valid concerns related to emergency egress—namely, that more restrictive seating configurations inhibited the ability of passengers to quickly exit their seats—while the FAA failed to cite any evidence showing whether smaller seats and larger passengers affect emergency egress.³⁰⁹ The court also found that the studies cited by the FAA were several years old and that seat dimensions were larger at the time.³¹⁰

The court similarly disregarded the FAA's explanation that the results of its emergency egress testing were proprietary and

³⁰¹ *Id.*

³⁰² *Id.* at 742–43.

³⁰³ *Id.* at 743.

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 743–44.

³⁰⁶ *Id.* at 743 (citing *WildEarth Guardians v. EPA*, 751 F.3d 649, 651 (D.C. Cir. 2014)).

³⁰⁷ *Id.* (citation omitted) (internal quotation marks omitted).

³⁰⁸ *Id.* at 744.

³⁰⁹ *Id.*

³¹⁰ *Id.* at 745.

exempt from disclosure.³¹¹ Despite the lenient standard of review, the court held the FAA could not “hide the evidentiary ball” by citing to testing data while simultaneously refusing to produce it.³¹² Stated differently, the record could not be completely devoid of evidence.³¹³

However, the court did side with the FAA regarding the health and comfort concerns raised by Flyers Rights. The court found that the FAA’s decision to refrain from creating new health and safety rules—coupled with its statement that it would continue to monitor those issues—was “the very type of regulatory-effort and resource-allocation judgments that fall squarely within the agency’s province.”³¹⁴ The court also credited the FAA’s response to Flyers Rights’ deep vein thrombosis claim, where the FAA cited an American College of Physicians study showing that the risk of developing deep vein thrombosis is not any higher in economy seats than in business class seats.³¹⁵ The court ultimately granted, in part, Flyers Rights’ petition for review and remanded the matter to the FAA with a directive to provide “a properly reasoned disposition of the petition’s safety concerns about the adverse impact of decreased seat dimensions and increased passenger size on aircraft emergency egress.”³¹⁶

It is unclear whether the FAA will create new rules related to seat dimensions, but a handful of lawmakers are keen to force the issue. In mid-2017, a bipartisan group of House and Senate members introduced the Seat Egress in Air Travel Act of 2017 (SEAT Act).³¹⁷ The SEAT Act would require the FAA to create regulations establishing minimum standards for size, width, and pitch of seats on commercial aircraft.³¹⁸ In the end, whether the FAA elects to promulgate new rules may depend on how Congress chooses to proceed.

VI. FEDERAL AND STATE PREEMPTION OF ZONING REGULATIONS

The proliferation of aircraft, particularly in the Unmanned Aircraft Systems (UAS) category, has created more overlap be-

³¹¹ *Id.* at 747.

³¹² *Id.* at 746.

³¹³ *Id.* at 747.

³¹⁴ *Id.* at 749.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ SEAT Act of 2017, H.R. 1467, 115th Cong. (2017).

³¹⁸ *Id.* § 2(b)(1).

tween aviation rules and land use regulations. The decisions below—one state and one federal—underscore the tension that can arise when a local government attempts to address aviation-related issues through zoning regulations.

A. FEDERAL PREEMPTION

1. *Singer v. City of Newton*

In *Singer v. City of Newton*, an FAA-certified drone operator challenged the City of Newton's UAS ordinance, which required owners to register drones with the city and prohibited operation beyond the operator's line of sight or in specified areas without permission.³¹⁹ Plaintiff challenged the registration requirement and the operation limits on the basis that the ordinance was preempted by federal law.³²⁰ The city countered that the ordinance was not preempted because the FAA carved out certain areas for local regulation.³²¹

Plaintiff first argued that the city's registration requirement infringed upon "the FAA's exclusive registration requirements."³²² The court agreed, citing an FAA Fact sheet, which states: "[b]ecause Federal registration is the exclusive means for registering UAS for purposes of operating an aircraft in navigable airspace, no state or local government may impose an additional registration requirement on the operation of UAS in navigable airspace without first obtaining FAA approval."³²³ Accordingly, the ordinance's registration provision was preempted.

Plaintiff next asserted that two subsections in the ordinance impermissibly restricted flight within the navigable airspace.³²⁴ One of the contested subsections prohibited drone operation over private land below four hundred feet without permission of the property owner, while the other subsection prohibited drone operation over public property (regardless of altitude) without the city's permission.³²⁵ Noting that FAA regulations require drone operators keep their aircraft below an altitude of four hundred feet, the court found that these two provisions

³¹⁹ *Singer v. City of Newton*, No. CV 17-10071-WGY, 2017 WL 4176477, at *1 (D. Mass. 2017), *appeal filed*, No. 17-2045 (1st Cir. Oct. 26, 2017).

³²⁰ *Id.* at *2.

³²¹ *Id.* (internal quotation marks omitted).

³²² *Id.* at *4.

³²³ *Id.* (citation omitted).

³²⁴ *Id.* at *5.

³²⁵ *Id.*

“work[ed] in tandem [] to create an essential ban on drone use within the limits of Newton.”³²⁶ The ordinance’s altitude restrictions were thus preempted.

Finally, plaintiff claimed that the city’s requirement that drones be operated within the visual line of sight of the operator was preempted by the FAA’s visual observer rule.³²⁷ The court agreed, citing the FAA’s requirement that either the operator *or a visual observer* be able to see the aircraft during operation.³²⁸ Finding that the ordinance “limits the methods of piloting a drone beyond that which the FAA has already designated, while also reaching into navigable [air]space,” the court held that the visual operation limit was also preempted.³²⁹

B. STATE PREEMPTION

1. *Roma, III, Ltd. v. Board of Appeals of Rockport*

In *Roma, III, Ltd. v. Board of Appeals of Rockport*, the Supreme Judicial Court of Massachusetts considered whether a town needed approval from the aeronautics division of the state Department of Transportation before exercising its zoning authority to restrict land use for a noncommercial private heliport.³³⁰ Plaintiff constructed a heliport at a single-family waterfront residence after the FAA recognized the property as a licensed private use heliport.³³¹ The state division of aeronautics also approved the heliport.³³²

Approximately a year later, the town building inspector issued an order stating that use of the heliport violated the town’s zoning bylaw.³³³ The Board of Appeals of Rockport denied plaintiff’s appeal of the order, holding that “[t]he vibration and noise resounding in this neighborhood[,] even when an over-ocean approach path would be utilized would, in the judgment of this [b]oard, be detrimental.”³³⁴ Plaintiff thereafter appealed to the Land Court, which cited a prior appeals court and held that “a town may not enforce a zoning bylaw that would prohibit a pri-

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.* at *6.

³²⁹ *Id.*

³³⁰ *Roma, III, Ltd. v. Bd of Appeals of Rockport*, 88 N.E.3d 269, 271 (Mass. 2018).

³³¹ *Id.*

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.* at 272 (internal quotation marks omitted) (alteration in original).

vate landowner from creating a noncommercial private restricted landing area on his or her property, unless the relevant bylaw had been approved by the division [of aeronautics].”³³⁵ The Land Court granted summary judgment in favor of plaintiff.³³⁶

The Supreme Judicial Court found that nothing in the language of the state statute precluded the town from exercising its zoning authority to regulate the use of land.³³⁷ The court determined that the issue at hand was not the “use and operation of aircraft,” as that term is used in the Massachusetts aeronautics statutes.³³⁸ Rather, the issue was whether the state intended to prevent the local exercise of zoning power to regulate the construction and use of private noncommercial heliports.³³⁹

Delving into the aeronautics code, the court first observed that the legislative purpose of the code—fostering air commerce and private flying within Massachusetts—“does not suggest a legislative intent to encourage the development of private heliports . . . so that persons may land their helicopters and aircraft on their own private property.”³⁴⁰ The court also found that land use regulation had long been “a prerogative of local government” and that there was no evidence that the legislature intended to preempt a local government’s ability to protect its residents from the harms and nuisances associated with noncommercial private landing areas.³⁴¹ The court finally held that if the legislature desired to preempt local zoning authority for noncommercial private restricted landing areas, “it must provide a clearer indication of such intent.”³⁴² The court vacated and remanded the matter to the Land Court for reconsideration.³⁴³ Although neither party raised the issue of federal preemption, the court briefly discussed the issue, noting “[w]ithin the Federal aviation framework, land use matters are ‘intrinsically local,’ and the zoning of a heliport ‘remains an issue for local control.’”³⁴⁴

³³⁵ *Id.* (citing *Hanlon v. Sheffield*, 50 N.E.3d 443 (Mass. App. Ct. 2016)).

³³⁶ *Id.*

³³⁷ *Id.* at 274.

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.* at 278 (citing MASS. GEN. LAWS ch. 90, § 40).

³⁴¹ *Id.*

³⁴² *Id.* at 278–79.

³⁴³ *Id.* at 276.

³⁴⁴ *Id.* (citing *Gustafson v. City of Lake Angelus*, 76 F.3d 778, 784 (6th Cir. 1996); *Hoagland v. Town of Clear Lake*, 415 F.3d 693, 697 (7th Cir. 2005)).

VII. FEDERAL QUESTION JURISDICTION

A. DRONES AND “NAVIGABLE AIRSPACE”

1. *Boggs v. Merideth*

In *Boggs v. Merideth*, plaintiff sued for trespass to chattels under state law after defendant used a shotgun to shoot down plaintiff’s drone as it flew over defendant’s property.³⁴⁵ Plaintiff also sought a declaration from the court that: (1) the drone was an “aircraft” under federal law; (2) the drone was operating in federal airspace; (3) the drone was *not* flying on defendant’s property; (4) plaintiff did not therefore violate defendant’s reasonable expectation of privacy; and (5) a property owner may not, as a matter of law, shoot at drones operating in federal airspace.³⁴⁶ Defendant moved to dismiss for lack of subject-matter jurisdiction, arguing that plaintiff’s complaint merely anticipates certain defenses that the defendant *might* bring, which is insufficient to provide federal question jurisdiction.³⁴⁷ Plaintiff’s response relied upon the idea that he was operating the drone in “navigable airspace,” which made resolution of the claims in federal court appropriate.³⁴⁸

Plaintiff first argued that his Kentucky trespass to chattels claim was properly before the court under the *Grable* standard.³⁴⁹ In *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, the Supreme Court held that state law claims could implicate federal issues to the extent necessary to create federal question jurisdiction.³⁵⁰ In such cases, the federal issue would have to be: “(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.”³⁵¹

The *Boggs* court was unpersuaded by plaintiff’s hypothetical *Grable* argument. The court found that plaintiff’s hypothetical basis for jurisdiction—“if the unmanned aircraft was flying on

³⁴⁵ *Boggs v. Merideth*, No. 3:16-CV-00006-TBR, 2017 WL 1088093, at *1 (W.D. Ky. Mar. 21, 2017).

³⁴⁶ *Id.* at *6.

³⁴⁷ *Id.* at *1.

³⁴⁸ *Id.*

³⁴⁹ *Id.* at *2.

³⁵⁰ *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 312 (2005).

³⁵¹ *See, e.g., Gunn v. Minton*, 568 U.S. 251, 258 (2013) (citing *Grable*, 545 U.S. at 314)).

[the defendant's] property, his actions may have been privileged, but if it was flying in federal airspace, they would not"—did not satisfy the “necessarily raised” requirement under *Grable*.³⁵² The court held that a claim of privilege was a defense to a tort claim under Kentucky law and merely anticipating a defense is not sufficient to confer federal question jurisdiction.³⁵³

The court also held that plaintiff's “garden-variety state tort claim” was not the type of claim that raised a substantial federal issue.³⁵⁴ The court noted that no federal agencies (such as the FAA) were involved in the case, nor were any federal regulations in dispute.³⁵⁵ Notably, the court flatly rejected the notion that any questions involving the regulation of drones should be resolved exclusively by federal courts.³⁵⁶ Moreover, even if the state court were to interpret or apply a federal law or regulation, it would be for “the limited purpose of determining whether [the plaintiff's] unmanned aircraft was on [the defendant's] property such that [the defendant] could have been privileged in damaging [the plaintiff's] chattel.”³⁵⁷ Accordingly, the court held that it did not have federal question jurisdiction over plaintiff's trespass to chattels claim.

The court also found that it did not have jurisdiction to hear plaintiff's request for a declaration that drones are “aircraft” under federal law.³⁵⁸ The court stated that “the purpose of the Declaratory Judgment Act is to create a remedy for a preexisting right enforceable in federal court. It does not provide an independent basis for federal subject matter jurisdiction.”³⁵⁹ Having concluded that it did not have jurisdiction over plaintiff's state law claim and associated request for declaratory relief, the court granted defendant's motion to dismiss.

B. FEDERAL STATUTES AND TREATIES

1. Hofmann v. Virgin America, Inc.

In *Hofmann v. Virgin America, Inc.*, a pilot filed suit in California state court against Virgin America, alleging that Virgin had wrongfully terminated him after he raised concerns about air-

³⁵² *Boggs*, 2017 WL 1088903, at *3.

³⁵³ *Id.*

³⁵⁴ *Id.* at *4 (citation omitted).

³⁵⁵ *Id.* at *5.

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.* at *6.

³⁵⁹ *Id.* at *7 (citations omitted) (internal quotation marks omitted).

line safety.³⁶⁰ Specifically, plaintiff alleged claims for: (1) “wrongful termination in violation of public policy”; (2) “retaliation against an employee for disclosing information to a government agency in violation of California Labor Code § 1102.5”; (3) “breach of contract”; and (4) “tortious breach of [covenant] of good faith and fair dealing.”³⁶¹ Virgin removed the case to federal court on the basis of federal question jurisdiction under the Act.³⁶² Plaintiff moved to remand, arguing that Virgin “overstates the scope of preemption and the [Act] does not completely preempt the state law claims asserted in the complaint.”³⁶³

The court first considered Virgin’s argument that the Act completely preempted plaintiff’s claims.³⁶⁴ The court noted that Virgin’s arguments for removal focused solely on its defenses. This is an insufficient basis for removal because: “[A] case may *not* be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff’s complaint, and even if both parties concede that the federal defense is the only question truly at issue.”³⁶⁵

The court next considered Virgin’s argument that federal question jurisdiction was proper under *Grable*.³⁶⁶ The court found that the question of whether Virgin violated FAA regulations was not a necessary element to plaintiff’s claims.³⁶⁷ Moreover, plaintiff’s claims did not meet *Grable*’s “substantial” requirement because his claims did not depend on a pure issue of law as they did in *Grable*.³⁶⁸ As such, plaintiff’s case did not meet all of the *Grable* factors, federal jurisdiction was not proper, and the court granted the motion to remand.³⁶⁹

³⁶⁰ Hofmann v. Virgin Am., Inc., No. 16-CV-05178-BLF, 2017 WL 1373850, at *1 (N.D. Cal. Apr. 17, 2017).

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *Id.* at *2.

³⁶⁴ *Id.*

³⁶⁵ *Id.* (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987)) (internal quotation marks omitted) (emphasis in original).

³⁶⁶ *Id.* at *5.

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ *Id.*

2. McCubbins v. United Airlines, Inc.

In *McCubbins v. United Airlines, Inc.*, a passenger sued United Airlines after it allowed him to board a Panama-bound flight with a faulty passport.³⁷⁰ Upon arrival in Panama, plaintiff was detained and told that he could not enter the country because his passport was due to expire within six months.³⁷¹ Plaintiff was detained overnight and placed on a plane back to the United States.³⁷²

Plaintiff obtained a default judgment against United in a Mississippi state court after suing the wrong entity (United Airlines Corporation).³⁷³ United subsequently removed the matter to federal court and asked the court to set aside the default judgment because plaintiff sued the wrong entity.³⁷⁴ United contended that federal question jurisdiction was proper because plaintiff's claims were preempted by the Montreal Convention and the ADA.³⁷⁵ The court disagreed and remanded the matter to state court.³⁷⁶

In the meantime, plaintiff had filed a second lawsuit in state court to ensure that he had sued the proper entity and to toll the applicable statute of limitations.³⁷⁷ United again removed to federal court, arguing for preemption under the Montreal Convention and the ADA.³⁷⁸ In conducting its analysis, the court noted one significant difference between the first complaint and the second complaint.

In the second complaint, plaintiff had added language alleging that United failed to warn plaintiff of restrictions and requirements under "State, Federal, or International treaties."³⁷⁹ The second complaint also referenced potential defenses that United might bring and stated that they would violate "Federal laws . . . and the Constitution of the United States of America."³⁸⁰ United argued that this language raised new causes

³⁷⁰ *McCubbins v. United Airlines, Inc.*, 244 F. Supp. 3d 557, 559 (S.D. Miss. 2017).

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *Id.* at 559–60.

³⁷⁴ *Id.* at 560.

³⁷⁵ *Id.*

³⁷⁶ *Id.* at 561.

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 562.

³⁷⁹ *Id.* at 563 (emphasis omitted).

³⁸⁰ *Id.* (emphasis omitted).

of action under federal law, which presented a federal question.³⁸¹

The court disagreed, observing that the crux of these allegations—failure to warn—was grounded in negligence rather than any federal statute or treaty.³⁸² The court also reiterated that “a possible federal defense does not give rise to a federal question for purposes of jurisdiction.”³⁸³ Accordingly, the court held that plaintiff’s complaint, on its face, did not raise a federal question.³⁸⁴

The court also reconsidered United’s arguments that plaintiff’s claims were preempted by the Montreal Convention and the ADA. Acknowledging that neither the Supreme Court nor the Fifth Circuit had considered whether common law negligence claims were preempted by the ADA, the court nevertheless found that plaintiff’s negligence claims were analogous to a breach of contract claim, which is not necessarily preempted under the ADA.³⁸⁵ In any case, the court held that plaintiff’s claims were not preempted by the ADA.

The court also rejected United’s argument that plaintiff’s complaint was preempted by Article 19 of the Montreal Convention. The court held that Article 19, which deals with damages for “delay in the carriage by air passengers, baggage or cargo,” had “no application to [the plaintiff’s] grievances as stated in his complaint.”³⁸⁶ Accordingly, plaintiff’s claims were not preempted by the Montreal Convention, and the court granted plaintiff’s motion to remand.

C. ADMIRALTY JURISDICTION

1. Shapiro v. Lundahl

Shapiro v. Lundahl arose out of a private airplane crash in Mexico.³⁸⁷ Plaintiff was an experienced pilot in his own right but was flying as a passenger from La Paz, Mexico to Calexico, California while defendant piloted the aircraft.³⁸⁸ Plaintiff alleged

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ *Id.* (citing *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321 (5th Cir. 2008)).

³⁸⁴ *Id.*

³⁸⁵ *Id.* at 565 (citing *Northwest, Inc. v. Ginsberg*, 134 S.Ct. 1422 (2014)).

³⁸⁶ *Id.* at 567 (citation omitted).

³⁸⁷ *Shapiro v. Lundahl*, No. 16-CV-06444-MEJ, 2017 WL 2902799, at *1 (N.D. Cal. July 7, 2017).

³⁸⁸ *Id.* at *2.

that defendant negligently failed to plan a fuel stop during the trip, forcing the aircraft to divert for fuel at San Felipe International Airport in Mexico.³⁸⁹ Plaintiff further alleged that defendant unexpectedly passed plaintiff the flight controls just prior to touchdown, leading to a crash that injured all aboard.³⁹⁰ Plaintiff sued defendant for negligence in federal court, arguing that jurisdiction was proper under admiralty jurisdiction.³⁹¹

For a tort claim to be proper under admiralty jurisdiction, two conditions must be met: (1) the tort must occur over navigable waters (i.e., situs test); and (2) the tortious act must “bear a significant relationship to traditional maritime activity” (i.e., nexus test).³⁹² Plaintiff alleged that the situs test was satisfied because one of the negligent acts—defendant’s decision not to initially divert after seeing “white caps” over the Sea of Cortez—occurred over navigable waters.³⁹³ The court disagreed, noting that plaintiff failed to allege “any plausible facts” supporting his assertion.³⁹⁴ Rather, the unplanned stop and subsequent crash resulted from a multitude of factors, such as defendant’s failure to plan a fuel stop before takeoff, defendant’s inability to land during strong winds, and plaintiff’s inability to save the landing.³⁹⁵ Furthermore, it was undisputed that the crash itself occurred on land, not over navigable waters.³⁹⁶

The court also found that plaintiff failed to satisfy the nexus test. The court observed that admiralty jurisdiction was only proper in an aviation case “if, but for aviation, the journey would have been conducted by sea.”³⁹⁷ Here, Plaintiff failed to allege that any portion of the trip from La Paz to Calexico would have been conducted over water if not by plane, nor were there any other facts suggesting a connection with traditional maritime activity.³⁹⁸ Because plaintiff failed to satisfy the nexus and situs tests, admiralty jurisdiction did not apply and the court dismissed plaintiff’s complaint.³⁹⁹

³⁸⁹ *Id.*

³⁹⁰ *Id.*

³⁹¹ *Id.* at *3.

³⁹² *Id.* (citations omitted).

³⁹³ *Id.* at *4.

³⁹⁴ *Id.* at *5.

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Id.* at *7.

³⁹⁸ *Id.*

³⁹⁹ *Id.*

VIII. PERSONAL JURISDICTION

A. GENERALLY

1. Hinkle v. Continental Motors, Inc.

In *Hinkle v. Continental Motors, Inc.*, a pilot and passengers filed suit in Florida after suffering injuries during a plane crash in South Carolina.⁴⁰⁰ Defendants Cirrus Design Corporation and Cirrus Designs, Inc. (aircraft manufacturer), were based in Minnesota and defendant Kavlico Corporation, Inc. (manufacturer of the allegedly defective sensor), was based in California.⁴⁰¹ Defendants claimed they were not subject to personal jurisdiction in Florida and moved to dismiss.

Plaintiffs argued that defendants submitted to specific jurisdiction in Florida by: (1) engaging in business in Florida; (2) committing a tort in Florida; (3) causing injury to persons and property by conducting service activities in Florida; and (4) breaching a contract required to be performed in Florida.⁴⁰² The court, however, found no nexus between defendants' Florida-related business activities and plaintiffs' claims.⁴⁰³ Although the pilot was located in Florida when he purchased the aircraft, the sale and delivery took place in Minnesota.⁴⁰⁴

The court similarly concluded that defendants had not conducted a tortious act within Florida. Plaintiffs failed to cite any communications into Florida by defendants that constituted a tortious act.⁴⁰⁵ Additionally, the aircraft was manufactured, sold, and delivered in Minnesota, not in Florida.⁴⁰⁶

For the breach of contract claim, the court found no existence of a contract between Kavlico and any plaintiff.⁴⁰⁷ As to Cirrus, the court noted that the contract required delivery in Minnesota and that the alleged breach occurs "at the point of delivery of the nonconforming goods."⁴⁰⁸ Cirrus would there-

⁴⁰⁰ *Hinkle v. Cont'l Motors, Inc.*, 268 F. Supp. 3d 1312, 1317–18 (M.D. Fla. 2017), *appeal dismissed*, No. 17-13716-J, 2017 WL 5635149 (11th Cir. Oct. 17, 2017).

⁴⁰¹ *Id.* at 1317.

⁴⁰² *Id.* at 1322.

⁴⁰³ *Id.* at 1323.

⁴⁰⁴ *Id.* at 1323–25.

⁴⁰⁵ *Id.* at 1324.

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.* at 1325.

⁴⁰⁸ *Id.* (quoting *Advanced Bodycare Sols. LLC v. Thione Int'l, Inc.*, 514 F. Supp. 2d 1326, 1330 (S.D. Fla. 2007)) (internal quotation marks omitted).

fore be subject to specific personal jurisdiction in Minnesota for the breach of contract claim, but not in Florida.⁴⁰⁹

Finally, the court found, under Florida's long arm statute, that the place of injury must be within Florida rather than another state such as South Carolina.⁴¹⁰ Although plaintiffs argued that the injuries occurred in Florida because some of them resided there, the court remained unpersuaded, finding South Carolina to be the actual "place of injury."⁴¹¹

Plaintiffs also argued that defendants were subject to general jurisdiction in Florida. Plaintiffs argued that Cirrus engaged in "intrastate and interstate" business activities by shipping planes to Florida, providing service in Florida, marketing in Florida, and training pilots in Florida.⁴¹² Plaintiffs argued that Kavlico had similarly submitted to general jurisdiction in Florida because its activities within the state were "substantial and not isolated."⁴¹³

Citing *Daimler*, the court concluded that defendants were not subject to general jurisdiction in Florida because neither of them conducted enough activity within Florida to be considered "essentially at home" in the forum.⁴¹⁴ With none of the defendants being incorporated in Florida or having their principal place of business in Florida, general jurisdiction was not proper and the court granted the motion to dismiss.⁴¹⁵

2. *Sia v. AirAsia Berhad*

In *Sia v. AirAsia Berhad*, survivors of passengers killed on AirAsia Flight 8501 sued the airline and a parts manufacturer in the U.S. District Court for the Western District of Washington.⁴¹⁶ Flight 8501 crashed while carrying passengers—none of whom were U.S. citizens—from Indonesia to Singapore.⁴¹⁷ Plaintiffs claimed that Artus S.A.S., a French legal entity with its principal place of business in France, was partially liable for the crash be-

⁴⁰⁹ *Id.*

⁴¹⁰ *See id.* at 1325–26 (citing FLA. STAT. § 48.193(1)(a)(6)).

⁴¹¹ *Id.*

⁴¹² *Id.* at 1326–27.

⁴¹³ *Id.* at 1327.

⁴¹⁴ *Id.*

⁴¹⁵ *Id.* at 1327–28.

⁴¹⁶ *Sia v. AirAsia Berhad*, No. C16-1692 TSZ, 2017 WL 1408172, at *1 (W.D. Wash. Apr. 20, 2017).

⁴¹⁷ *Id.*

cause it manufactured a defective rudder travel limiter unit.⁴¹⁸ Plaintiffs also sued AirAsia Berhad, a Malaysian legal entity with its principal place of business in Malaysia, because it partially owned the operator of Flight 8501.⁴¹⁹ Both defendants moved to dismiss for lack of personal jurisdiction.

The court determined that neither defendant was subject to general jurisdiction in the United States because neither defendant had contacts “so continuous and systematic” as to be at home in the United States.⁴²⁰ The court also found that neither defendant was subject to specific jurisdiction in the United States.⁴²¹

With respect to Artus, the court held that plaintiffs’ claims did not arise out of any forum-related activity by Artus.⁴²² The design, manufacture, and sale of the part at issue all occurred in France rather than the United States.⁴²³ Furthermore, Plaintiffs could not cite a single forum-related contact by Artus, such as delivery of products to the United States.⁴²⁴

As to AirAsia Berhad, plaintiffs claimed that jurisdiction was proper in the United States because AirAsia Berhad: (1) had its website on a Seattle-based server; (2) was involved in a joint venture with Expedia, Inc. in Washington; and (3) had engaged in commercial transactions with Washington-based companies.⁴²⁵ The court disagreed, finding “no nexus between any of these activities and an alleged breach of AirAsia Berhad’s duty to maintain, repair, and supervise [the] operation of an aircraft involved in a [c]rash occurring halfway around the world.”⁴²⁶

The court held that neither defendant was subject to personal jurisdiction in the United States and granted dismissal.

B. AGENCY RELATIONSHIPS

1. Helicopter Transport Services, LLC v. Sikorsky Aircraft Corp.

In *Helicopter Transport Services, LLC v. Sikorsky Aircraft Corp.*, two respective owners of Sikorsky S-61R model helicopters sued Si-

⁴¹⁸ *Id.*

⁴¹⁹ *Id.* at *2.

⁴²⁰ *Id.* at *3.

⁴²¹ *Id.* at *4.

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ *Id.*

⁴²⁶ *Id.*

korsky after the FAA grounded the helicopters until a certain model gear box could be installed.⁴²⁷ Plaintiffs claimed that the model gear box required by the FAA no longer existed and that no technical specifications were available to allow anyone to manufacture the part, keeping the helicopters grounded “indefinitely.”⁴²⁸ Plaintiffs filed suit in Oregon and Sikorsky moved to dismiss for lack of personal jurisdiction.

Sikorsky first argued that the acts of its wholly-owned subsidiary—Sikorsky Commercial Services, Inc. (SCS)—could not be imputed to Sikorsky for purposes of establishing personal jurisdiction in Oregon.⁴²⁹ Sikorsky relied upon the Supreme Court’s decisions in *Daimler AG v. Bauman* and *Walden v. Fiore* in support of its argument.⁴³⁰ Specifically, Sikorsky asserted that *Daimler* expressly rejected the Ninth Circuit’s agency theory, which would “subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate.”⁴³¹

The court, however, rejected Sikorsky’s argument, reasoning that the Supreme Court rejected the Ninth Circuit’s agency theory *only* as it relates to general jurisdiction.⁴³² In fact, the Supreme Court expressly acknowledged that “a corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there.”⁴³³ Having determined that SCS’s actions could be considered a part of its analysis, the court examined whether Sikorsky had “purposefully availed itself of the privilege of doing business in [Oregon].”⁴³⁴

The court found that SCS maintained a “comprehensive inventory” of Sikorsky parts and was the sole reliable source for such products.⁴³⁵ The court also found that SCS provided key logistical and repair support, which involved multiple communications between SCS and plaintiffs.⁴³⁶ The court found these post-sale contacts to be particularly relevant because “the real

⁴²⁷ *Helicopter Transp. Servs., LLC v. Sikorsky Aircraft Corp.*, 253 F. Supp. 3d 1115, 1120 (D. Or. 2017).

⁴²⁸ *Id.* at 1123.

⁴²⁹ *Id.* at 1125.

⁴³⁰ *Id.* at 1125–26.

⁴³¹ *Id.* at 1125 (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 136 (2014)).

⁴³² *Id.* at 1126.

⁴³³ *Id.* (quoting *Daimler*, 571 U.S. at 135 n.13) (emphasis omitted) (internal quotation marks omitted).

⁴³⁴ *Id.* at 1127 (quoting *Boschetto v. Hansing*, 539 F.3d 1011, 1016 (9th Cir. 2008)) (internal quotation marks omitted).

⁴³⁵ *Id.* at 1128.

⁴³⁶ *Id.*

object of the business transaction becomes the sale of replacement parts and related services and technical advice.”⁴³⁷ The court concluded that these post-sale contacts by Sikorsky and SCS reflected the “type of affirmative conduct” that reflected an intent by Sikorsky to purposefully avail itself of the privilege of doing business in Oregon.⁴³⁸

The court then considered whether plaintiffs’ claims arose out of Sikorsky’s and SCS’s contacts with Oregon. The court found that Sikorsky’s field service representative in Oregon had instructed plaintiffs to install a certain model gear box on the helicopters.⁴³⁹ The installation of this particular model gear box—later determined to be insufficient by the FAA—was the origin of plaintiffs’ claims.⁴⁴⁰ The court determined this “affirmative conduct” to be sufficient to show that the claims arose from Sikorsky’s contacts with Oregon and therefore concluded that plaintiffs showed enough jurisdictional facts to allege that Sikorsky was subject to specific personal jurisdiction in Oregon.⁴⁴¹

It is worth reiterating that the key to the entire analysis was SCS’s contacts with the forum. “Indeed, but for the actions of SCS, the conduct of Sikorsky by itself would be insufficient to establish specific personal jurisdiction.”⁴⁴² But as shown below, the contacts of a wholly owned subsidiary do not necessarily subject a parent corporation to personal jurisdiction.

2. Everett v. Leading Edge Air Foils, LLC

In *Everett v. Leading Edge Air Foils, LLC*, a pilot sued four defendants after the engine on his airplane stalled, causing the plane to crash.⁴⁴³ Plaintiff purchased the engine at the EAA AirVenture Oshkosh airshow in Oshkosh, Wisconsin.⁴⁴⁴ Three of the defendants were dismissed due to lack of personal jurisdiction, and the plaintiff settled his claims against the remaining

⁴³⁷ *Id.* at 1129.

⁴³⁸ *Id.* at 1127, 1130.

⁴³⁹ *Id.* at 1131–32.

⁴⁴⁰ *Id.* at 1132.

⁴⁴¹ *Id.*

⁴⁴² *Id.* at 1128.

⁴⁴³ *Everett v. Leading Edge Air Foils, LLC*, No. 14-C-1189, 2017 WL 2894135, at *2 (E.D. Wis. July 7, 2017).

⁴⁴⁴ *Id.*

defendant.⁴⁴⁵ Plaintiff filed a motion for reconsideration after the matter was assigned to another judge.⁴⁴⁶

The settling defendant (LEAF) is a Wisconsin LLC that sold the engine to plaintiff at the airshow.⁴⁴⁷ The engine was manufactured by defendant BRP-Rotax and sold to LEAF through BRP-Rotax's independent distributor, defendant Kodiak.⁴⁴⁸ BRP-Rotax is an Austrian legal entity with its principal place of business in Austria, while Kodiak is a Bahamas legal entity based solely in the Bahamas.⁴⁴⁹ The court began its analysis by noting that in products liability cases, a distributor and manufacturer are subject to specific jurisdiction in the place of sale to the plaintiff if the sale "arose from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in that state."⁴⁵⁰

The court found that BRP-Rotax and Kodiak were both aware that LEAF sold Rotax branded products in Wisconsin and that both foreign companies listed LEAF on their respective website as a dealer and service provider for Wisconsin.⁴⁵¹ The court also observed that LEAF was one of only three authorized Rotax dealers in the country, which allowed LEAF to market products using the Rotax brand.⁴⁵² These facts demonstrated BRP-Rotax's and Kodiak's intent to serve the Wisconsin market by introducing Rotax products "into the stream of commerce with the expectation that they would be sold by LEAF in Wisconsin."⁴⁵³ The court held that BRP-Rotax and Kodiak were indeed subject to personal jurisdiction in Wisconsin and reinstated both defendants as parties.⁴⁵⁴

But the court declined to reinstate BRP-Rotax's Canadian parent company, BRP Inc., as a party to the lawsuit.⁴⁵⁵ Although the record reflected that BRP Inc. was not part of the manufacture, design, or distribution of aircraft engines, plaintiff argued that BRP Inc. was nevertheless subject to personal jurisdiction in Wis-

⁴⁴⁵ *Id.* at *1.

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.* at *1–2.

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.* at *4 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

⁴⁵¹ *Id.* at *2.

⁴⁵² *Id.* at *4.

⁴⁵³ *Id.*

⁴⁵⁴ *Id.* at *5.

⁴⁵⁵ *Id.*

consin through its subsidiary, BRP-Rotax.⁴⁵⁶ The court found that the contacts of a subsidiary are generally “not imputed to the parent” unless the parent maintains an “unusual degree of control over the subsidiary.”⁴⁵⁷ Here, the court held that plaintiff failed to show anything more than a parent-subsidiary relationship, which in and of itself, was insufficient to impute BRP-Rotax’s jurisdictional contacts to BRP Inc.⁴⁵⁸ Accordingly, BRP Inc. was not subject to personal jurisdiction in Wisconsin.

C. VENUE BEFORE JURISDICTION

Courts typically review and decide jurisdictional challenges before venue challenges. But courts may consider the venue issue first if “there is a sound prudential justification for doing so.”⁴⁵⁹ A court may, for instance, reverse the order if the jurisdictional issue is particularly complicated.⁴⁶⁰ A court may also decide the venue issue first when, as in the case below, it is clear that venue is improper.

1. *Ricks v. Cadorath Aerospace Lafayette, LLC*

In *Ricks v. Cadorath Aerospace Lafayette, LLC*, plaintiff filed suit in the Eastern District of Louisiana after her husband was killed while piloting a helicopter in Mississippi.⁴⁶¹ Defendant Rolls-Royce moved to dismiss for lack of personal jurisdiction and improper venue and, alternatively, moved to transfer the case to the Southern District of Indiana.⁴⁶²

The court noted that the parties had “vigorously dispute[d] whether Rolls-Royce’s contacts with Louisiana [were] sufficient to establish that exercising personal jurisdiction over Rolls-Royce in the state of Louisiana is constitutional.”⁴⁶³ In contrast, plaintiff had not shown that venue would be proper in the Eastern District of Louisiana and could not point to a single contact by Rolls-Royce in the district.⁴⁶⁴ Plaintiff did not allege that any

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.* (citations omitted).

⁴⁵⁸ *Id.*

⁴⁵⁹ *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979).

⁴⁶⁰ *See, e.g., Hypower, Inc. v. Atl. Elec., LLC*, No. 12-61633-Civ-SCOLA, 2013 WL 12086268, at *2 (S.D. Fla. Feb. 13, 2013).

⁴⁶¹ *Ricks v. Cadorath Aerospace Lafayette, LLC*, No. CV 15-6686 c/w 16-2593, 2017 WL 590293, at *1 (E.D. La. Feb. 14, 2017).

⁴⁶² *Id.* at *1–2.

⁴⁶³ *Id.* at *6.

⁴⁶⁴ *Id.*

of the events giving rise to the claim occurred in the district, nor did plaintiff allege that any property subject to the action was located in the district.⁴⁶⁵ Venue was, however, proper in the Southern District of Indiana where Rolls-Royce maintains its principal place of business.⁴⁶⁶

Because venue was “clearly improper” in the Eastern District of Louisiana, the court held that it was unnecessary to resolve motion to dismiss for lack of personal jurisdiction, and instead transferred the matter to the Southern District of Indiana.⁴⁶⁷

IX. FORUM NON CONVENIENS

A. *KOLAWOLE V. SELLERS*

In *Kolawole v. Sellers*, the Eleventh Circuit considered an appeal from an order dismissing plaintiffs’ claims under the *forum non conveniens* doctrine.⁴⁶⁸ Plaintiffs sued in federal court in Florida after an airliner crashed in Nigeria, killing all aboard and several individuals on the ground.⁴⁶⁹ The district court maintained the claims filed on behalf of U.S. citizens and residents but dismissed claims brought on behalf of foreign plaintiffs.⁴⁷⁰ On appeal, the court observed that for defendant to prevail on a motion to dismiss on the basis of *forum non conveniens*, she had to: (1) demonstrate the availability of an adequate alternative forum; and (2) show that the private and public interest factors weighed in favor of dismissal.⁴⁷¹

In support of her motion, defendant submitted an affidavit provided by a Nigerian professor, who concluded that the Nigerian judiciary could offer appropriate legal remedies for wrongful death similar to remedies available in the United States.⁴⁷² Plaintiffs countered that Nigeria was too dangerous and corrupt and that the case could take thirty years to litigate.⁴⁷³ Plaintiffs submitted State Department travel advisories and affidavits from two former Nigerian justices in support of their position.⁴⁷⁴ De-

⁴⁶⁵ *Id.* at *9.

⁴⁶⁶ *Id.* at *10.

⁴⁶⁷ *Id.* at *6, *11.

⁴⁶⁸ *Kolawole v. Sellers*, 863 F.3d 1361, 1365 (11th Cir. 2017).

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.* at 1366.

⁴⁷¹ *Id.* at 1369.

⁴⁷² *Id.* at 1370.

⁴⁷³ *Id.*

⁴⁷⁴ *Id.* at 1370.

fendant's expert countered that recent reforms to the Nigerian justice system rendered many of these concerns moot.⁴⁷⁵

The court concluded that the district court did not abuse its discretion in finding that Nigeria would be an adequate alternative forum.⁴⁷⁶ Plaintiffs did not "identify any specific dangers related to this particular litigation . . . or evidence of partiality" related to their claims.⁴⁷⁷ The court similarly disregarded Plaintiffs' argument that the district court was required to hold a hearing on the matter or accept their experts' testimony as true, finding no such requirement in the law.⁴⁷⁸ Having determined that an alternate forum was available and adequate, the court next considered the private and public factors.⁴⁷⁹

The court found that the district court properly considered a host of private factors, including the fact that most of the evidence was located in Nigeria and that a U.S. court "would be unable to compel the cooperation of non-party Nigerian witnesses."⁴⁸⁰ The court also found that the presumption in favor of plaintiffs' chosen forum was weakened because "none of the [p]laintiffs or their decedents whose cases were dismissed were United States citizens or residents."⁴⁸¹

As to the public factors, the court found that the district court properly considered the public factors and "reasonably concluded" that: (1) plaintiffs' case would cause significant delays in the district court's docket; (2) the case would be a burden upon jurors in South Florida; (3) the court might have to apply Nigerian law; and (4) Nigeria had a compelling interest in resolving the claims.⁴⁸² Accordingly, dismissal was proper.

B. *ROSEN V. EXECUJET SERVICES LLC*

In *Rosen v. Execujet Services LLC*, the representative of an aircraft mechanic's estate filed a wrongful death action in Florida after the mechanic was killed while servicing a landing gear in the Bahamas.⁴⁸³ Defendants moved to dismiss on grounds of *forum non conveniens*.

⁴⁷⁵ *Id.* at 1370–71.

⁴⁷⁶ *Id.* at 1371.

⁴⁷⁷ *Id.* (citations omitted).

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.* at 1372.

⁴⁸¹ *Id.*

⁴⁸² *Id.*

⁴⁸³ *Rosen v. Execujet Servs., LLC*, 241 F. Supp. 3d 1303, 1307 (S.D. Fla. 2017).

The court found the Supreme Court of the Bahamas to be an adequate alternative forum. Defendants cited Bahamian case law showing that the Bahamas recognizes negligence actions like those asserted by plaintiff.⁴⁸⁴ While plaintiff argued that the applicable statute of limitations in the Bahamas had already expired, defendants agreed to waive any such defenses.⁴⁸⁵ The court found that these stipulations and facts were sufficient to make the Bahamian court an adequate alternative forum.⁴⁸⁶

The court also found that the private interest factors weighed in favor of defendants' motion. Defendants pointed to over a dozen witnesses who were located in the Bahamas, including the only eyewitness and members of the police department who investigated the incident.⁴⁸⁷ Although other relevant witnesses were located in the United States, the court found that the most critical witnesses were located in the Bahamas and that the Bahamian witnesses would not be subject to compulsory process if the case were to remain in the United States.⁴⁸⁸

Finally, the court held that the public factors weighed in favor of dismissal. The court agreed with defendants that Florida residents would have little interest in a suit brought on behalf of decedent's Connecticut widow, against non-Florida defendants, for an incident in the Bahamas.⁴⁸⁹ The court also agreed that the Bahamas had a greater interest in the lawsuit than the United States because the matter involved "proper aircraft maintenance and services undertaken by foreign entities and individuals at the Bahamas airport."⁴⁹⁰ While the court did acknowledge that the United States had an interest in providing its own citizens with a forum for their grievances, the court held that the aircraft safety issue was more significant for the Bahamas.⁴⁹¹ Given the weight of all factors, the court granted defendants' motion to dismiss.

⁴⁸⁴ *Id.* at 1308.

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.* at 1309.

⁴⁸⁷ *Id.* at 1309–11.

⁴⁸⁸ *Id.* at 1312.

⁴⁸⁹ *Id.* at 1315.

⁴⁹⁰ *Id.* at 1316.

⁴⁹¹ *Id.* at 1316–17.

C. *OTO V. AIRLINE TRAINING CENTER ARIZONA, INC.*

Oto v. Airline Training Center Arizona, Inc. arose from the deliberate crash of Germanwings Flight 9525.⁴⁹² Plaintiffs sued in federal court in Arizona, claiming that defendant had “breached its duty of care to the passengers of the [flight] by failing to properly screen and monitor [the co-pilot] for mental health conditions” during his flight training.⁴⁹³ Defendant filed a number of motions, including a motion to dismiss based on *forum non conveniens*.⁴⁹⁴

The court first acknowledged that Germany was an adequate alternative forum. The court noted that defendant had agreed to submit to the jurisdiction of the German judiciary and that plaintiffs did not contest the adequacy of German courts.⁴⁹⁵

The court then found that the private and public interest factors weighed in favor of dismissal. The court observed that the vast majority of the decedents were German citizens and that the plaintiffs and witnesses were also located primarily in Germany.⁴⁹⁶ Additionally, Arizona’s interest in the litigation was “comparatively low” compared to Germany’s interest, and the Arizona court would be less adept at interpreting and applying German law.⁴⁹⁷ Moreover, the cost to German courts would be considerably lower because most of the evidence was located in Germany.⁴⁹⁸ As such, the court granted defendant’s motion to dismiss for *forum non conveniens*.

X. FEDERAL TORT CLAIMS ACT

A. *ANDREINI V. UNITED STATES*

In *Andreini v. United States*, the survivors of a stunt pilot sued the government through the Federal Torts Claim Act (FTCA), asserting negligence under California law for failure to comply with federal safety policies after the pilot was killed during an air show at the Travis Air Force Base.⁴⁹⁹ The pilot died when

⁴⁹² *Oto Airline Training Ctr. Ariz., Inc.*, 247 F. Supp. 3d 1098, 1102 (D. Ariz. 2017).

⁴⁹³ *Id.* at 1103.

⁴⁹⁴ *Id.* at 1107.

⁴⁹⁵ *Id.* at 1108.

⁴⁹⁶ *Id.* at 1108–09.

⁴⁹⁷ *Id.* at 1109.

⁴⁹⁸ *Id.*

⁴⁹⁹ *Andreini v. United States*, No. 3:15-cv-01169-JD, 2017 WL 3895705, at *1 (N.D. Cal. Sept. 6, 2017).

firefighters failed to save him from the post-crash fire.⁵⁰⁰ The government invoked the FTCA's discretionary function exception to challenge jurisdiction and moved to dismiss.⁵⁰¹

The discretionary function exception excludes jurisdiction for “[a]ny claim based upon . . . a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.”⁵⁰² In determining whether the discretionary function applies, courts ask “whether the action is a matter of choice for the acting employee.”⁵⁰³ Plaintiffs’ allegations must explain the specific conduct that must be reviewed to determine if discretionary immunity applies.⁵⁰⁴

Plaintiffs’ allegations hinged upon the theory that rescue vehicles arrived too late to save the pilot because firefighters were on the other side of the airfield taking photographs, which prevented a quick response.⁵⁰⁵ Plaintiffs further averred that the government was liable because there was not a public address system at the fire station that would have allowed the firefighters to be quickly summoned.⁵⁰⁶ The government responded that the target time for response was five minutes, which was satisfied when the first truck responded in four minutes and thirty seconds.⁵⁰⁷

The court ruled that plaintiffs’ allegations did not implicate any social, economic, or policy judgment by the government.⁵⁰⁸ Rather, the question implicated by plaintiffs’ allegations was “*how* the government is alleged to have been negligent.”⁵⁰⁹ Because the alleged negligence centered on the firefighters’ decision to cross the airfield to take photos—an activity that did not touch upon any policy judgment by the government—the discretionary function exception did not apply.⁵¹⁰ Furthermore, plaintiffs alleged that the government did not meet well-estab-

⁵⁰⁰ *Id.*

⁵⁰¹ *Id.*

⁵⁰² *Id.* at *2 (citing 28 U.S.C. § 2680(a)) (alteration in original).

⁵⁰³ *Id.* (citation omitted).

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.*

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.* at *3.

⁵⁰⁸ *Id.*

⁵⁰⁹ *Id.* (citing *Whisnant v. United States*, 400 F.3d 1177, 1185 (9th Cir. 2005)) (emphasis in original) (internal quotation marks omitted).

⁵¹⁰ *Id.*

lished aviation crash response times of *three* minutes.⁵¹¹ Accordingly, the government's motion was denied in its entirety.⁵¹²

B. *MORALES V. UNITED STATES*

In *Morales v. United States*, plaintiffs sued the government after their father was killed while flying a helicopter over the Prescott National Forest in Arizona.⁵¹³ The helicopter crashed after the decedent pilot struck a cable that was strung across a canyon by the U.S. Geological Survey.⁵¹⁴ Although the cable had been in place since 1934, it did not appear on aeronautical charts.⁵¹⁵ At the end of the first phase of discovery, the government moved to dismiss and plaintiffs filed a motion for partial summary judgment.⁵¹⁶ The government argued, in relevant part, that plaintiffs' claims were barred by sovereign immunity.⁵¹⁷

The court applied the Supreme Court's two-part test to determine whether the Geological Survey's decision not to mark the cable was a discretionary function.⁵¹⁸ The first part of the test asks whether the governmental action (or inaction) "is a matter of choice for the acting employee and . . . discretionary because it involves an element of judgment."⁵¹⁹ An action cannot, however, be considered discretionary if a regulation or policy requires a specific course of action.⁵²⁰ Under the second part of the test, a court asks whether the decision is the type of judgment that the discretionary exception was intended to protect.⁵²¹ To meet this burden, the government need only show that the decision is "the type grounded in social, economic, or political policy judgments."⁵²²

The government asserted that the Geological Survey's decision not to mark the cable was a discretionary act because: (1) "no statute, regulation, or policy specifically directed the [Geo-

⁵¹¹ *Id.*

⁵¹² *Id.*

⁵¹³ *Morales v. United States*, No. CV-14-08110-PCT-JJT, 2017 WL 67546, at *1 (D. Ariz. Jan. 6, 2017).

⁵¹⁴ *Id.*

⁵¹⁵ *Id.*

⁵¹⁶ *Id.*

⁵¹⁷ *Id.*

⁵¹⁸ *Id.* at *6 (citing *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)).

⁵¹⁹ *Id.* (citation omitted) (internal quotation marks omitted).

⁵²⁰ *Id.*

⁵²¹ *Id.*

⁵²² *Id.* (quoting *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1028 (9th Cir. 1989)) (internal quotation marks omitted).

logical Survey] to mark the cable”; and (2) the decision was “susceptible to policy analysis and therefore the type of decision that the discretionary function exception was designed to shield.”⁵²³ Plaintiffs argued that the decision did not involve public policy, but instead involved a safety decision that arose from an unsafe condition created by the Geological Survey.⁵²⁴ Plaintiffs further argued that the government had failed to show that the decision not to mark such cables was “susceptible to any valid policy consideration.”⁵²⁵

With respect to the first element, the court concluded that the Geological Survey’s decision not to mark the cable weighed in favor of immunity. The court found that there was no statute, policy, or regulation at the time of the accident (2012) that required the Geological Survey to mark the cable.⁵²⁶ The court further noted that the Geological Survey considers several factors when deciding to mark a cable, such as economic considerations, the safety of its employees, the priorities of the agency that manages the land (in this case, the U.S. Forest Service), and aircraft safety.⁵²⁷ The fact that the Geological Survey considers different factors when making its decision evidenced that the decision required judgment (i.e., discretion).⁵²⁸

The court also found that the Geological Survey’s deference to FAA regulations regarding air space obstructions when deciding whether to mark the cable was “rooted in public policy.”⁵²⁹ This deference was precisely “the type of agency decision that Congress sought to protect from judicial review.”⁵³⁰ Because the Geological Survey’s decision not to mark the cable was subject to the discretionary function exception under the FTCA, the court held that it lacked subject-matter jurisdiction and dismissed plaintiffs’ claims.⁵³¹

C. *CURTIS V. UNITED STATES*

In *Curtis v. United States*, one of two plaintiffs sued the government after her husband was killed when his aircraft crashed

⁵²³ *Id.*

⁵²⁴ *Id.*

⁵²⁵ *Id.* (citation omitted).

⁵²⁶ *Id.*

⁵²⁷ *Id.* at *7.

⁵²⁸ *Id.*

⁵²⁹ *Id.*

⁵³⁰ *Id.* (citing *United States v. Varig Airlines*, 467 U.S. 797, 798 (1984)).

⁵³¹ *Id.* at *8.

while attempting to avoid a runway collision with another aircraft and glider at an uncontrolled airport.⁵³² The aircraft and glider were operated by members of the Civil Air Patrol, an Air Force auxiliary organization.⁵³³ Under local rules at the airport, glider operators were required to: (1) file a Notice to Airmen (NOTAM) advising other pilots of glider activity; (2) use a spotter with an unobstructed view of the ends of each runway; and (3) refrain from launching from one of the runways if a powered aircraft is within five miles on approach to the intersecting runway.⁵³⁴ Because the airport was uncontrolled, pilots were obligated to communicate with one another using the airport's common traffic advisory frequency (CTAF).

Based on the testimony of witnesses, the court determined that the Civil Air Patrol aircraft was traveling toward the intersection of the runways as the decedent's aircraft was about to touch down near the same intersection.⁵³⁵ Just prior to touchdown, the pilot of the decedent's aircraft—in an apparent attempt to avoid a collision—applied full power to the engines.⁵³⁶ The rapid application of power caused the aircraft to pitch up, stall, roll to the left, and crash.⁵³⁷ Based on these facts, the court concluded after a bench trial that the presence of the Civil Air Patrol aircraft near the runway intersection caused the fatal crash.⁵³⁸

At trial, the government admitted that the Civil Air Patrol had failed to follow local rules requiring the filing of a NOTAM and use of a spotter.⁵³⁹ But the government contested the notion that the local rules applied to Civil Air Patrol flights.⁵⁴⁰ The court found, irrespective of whether the local rules applied, that the failure to use a spotter constituted a breach of its duty to conduct safe flight operations.⁵⁴¹ The court also found that the failure to yield the right-of-way as required under FAA regulations similarly breached the duty to conduct safe flight operations.⁵⁴² Finally, the court held that the Civil Air Patrol failed to

⁵³² *Curtis v. United States*, 274 F. Supp. 3d 1366, 1369–75 (N.D. Ga. 2017).

⁵³³ *Id.* at 1369.

⁵³⁴ *Id.* at 1371.

⁵³⁵ *Id.* at 1375.

⁵³⁶ *Id.* at 1372.

⁵³⁷ *Id.* at 1375.

⁵³⁸ *Id.* at 1377.

⁵³⁹ *Id.*

⁵⁴⁰ *Id.*

⁵⁴¹ *Id.*

⁵⁴² *Id.* (citing 14 C.F.R. § 91.113(g)).

act with reasonable care by failing to announce its actions over CTAF.⁵⁴³

Applying Georgia negligence law, the court ruled that the Civil Air Patrol's actions constituted a breach of its duty to act with reasonable care, which caused the crash.⁵⁴⁴ The government was therefore liable under the FTCA.

XI. CONFLICTS OF LAW

A. *O'BRIEN V. CESSNA AIRCRAFT CO.*

In *O'Brien v. Cessna Aircraft Co.*, the plaintiff sued a number of defendants after the Cessna 208B Caravan he was piloting crashed through the roof of a building and into a utility pole while approaching the airport at Alliance, Nebraska.⁵⁴⁵ The jury found in favor of defendants and plaintiff appealed.⁵⁴⁶ One of the issues plaintiff appealed was the trial court's conclusion that Nebraska law, rather than Kansas law, applied to the issue of punitive damages.⁵⁴⁷

Nebraska law does not permit recovery of punitive damages.⁵⁴⁸ Kansas, however, does permit punitive damages in cases involving "malicious, vindictive, or willful and wanton invasion of another's rights, with the ultimate purpose being to restrain and deter others from the commission of similar wrongs."⁵⁴⁹ Accordingly, the Nebraska Supreme Court determined that there was a conflict between Nebraska law and Kansas law regarding punitive damages.⁵⁵⁰

The court applied § 146 of the Restatement (Second) of Conflict of Laws, which states that "[i]n an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless . . . some other state has a more significant relationship . . ."⁵⁵¹ The most significant relationship test examines the following contacts: (1) the place of injury; (2) the place of the injury-causing

⁵⁴³ *Id.*

⁵⁴⁴ *Id.*

⁵⁴⁵ *O'Brien v. Cessna Aircraft Co.*, 903 N.W.2d 432, 444 (Neb. 2017).

⁵⁴⁶ *Id.*

⁵⁴⁷ *Id.* at 458.

⁵⁴⁸ *Id.* (citing *Distinctive Printing & Packaging Co. v. Cox*, 443 N.W.2d 566, 574 (Neb. 1989)).

⁵⁴⁹ *Id.* (quoting *Adamson v. Bicknell*, 287 P.3d 274, 280 (Kan. 2012)) (internal quotation marks omitted).

⁵⁵⁰ *Id.* at 459.

⁵⁵¹ *Id.* (alteration in original) (internal quotation marks omitted).

conduct; (3) the place where the parties reside or conduct business; and (4) the place where the relationship between the parties is centered.⁵⁵²

The district court found that Nebraska had a greater interest in applying its law because plaintiff lived in Nebraska, was injured in Nebraska, was flying a regular route within Nebraska, was employed in Nebraska, and the alleged product failure occurred in Nebraska.⁵⁵³ The court noted that plaintiff failed to cite any errors in the record, but instead simply argued that Kansas's punitive damages law should apply because defendant Cessna was based in Kansas.⁵⁵⁴ Plaintiff also failed to argue that Kansas law should apply to any area in the case other than punitive damages.⁵⁵⁵ Consequently, the trial court did not err in finding that Nebraska law applied to the punitive damages issue.

XII. DEATH ON THE HIGH SEAS ACT

A. *BURNETTE V. SIERRA NEVADA CORP.*

In *Burnette v. Sierra Nevada Corp.*, plaintiff sued after her son was killed in an airplane crash near the Panama-Colombia border.⁵⁵⁶ Plaintiff's son was a sensor operator aboard a counter-narcotics surveillance aircraft in Latin America.⁵⁵⁷ On the night of his death, decedent's aircraft was conducting a surveillance mission but had been given strict instructions to stay over the Caribbean Sea at all times because the ground proximity warning system had been disabled.⁵⁵⁸ The crew nevertheless crossed over land and struck a ridge, killing plaintiff's son and three others.⁵⁵⁹

Defendant filed a motion for partial summary judgment, asserting that plaintiff should be limited to pecuniary losses under the Death on the High Seas Act (DOHSA).⁵⁶⁰ Defendant argued that although the crash itself occurred in Colombia, the negligent act leading to the accident—decedent's failure to tell the

⁵⁵² *Id.* (citation omitted).

⁵⁵³ *Id.* at 460.

⁵⁵⁴ *Id.*

⁵⁵⁵ *Id.*

⁵⁵⁶ *Burnette v. Sierra Nev. Corp.*, No. 2:14-cv-2761 JWS, 2017 WL 264465, at *1–2 (D. Ariz. Jan. 20, 2017).

⁵⁵⁷ *Id.* at *1.

⁵⁵⁸ *Id.*

⁵⁵⁹ *Id.*

⁵⁶⁰ *Id.*

pilots to turn back to sea—occurred over the water.⁵⁶¹ Defendant implored the court to “pinpoint the location where the wrongful or negligent act consummates or initially takes effect and not the place where any previous or subsequent negligence occurred.”⁵⁶² Under defendant’s theory, decedent’s failure to instruct the pilots to turn away from the coastline was the moment when the negligence occurred, and because it occurred over water, DOHSA applies.⁵⁶³

The court rejected defendant’s theory, finding that “[t]he consummation of the negligent acts *is the crash itself . . .*”⁵⁶⁴ Regardless of whether negligent acts occurred on the high seas that may have ultimately led to the crash, the crash itself occurred on land, rendering DOHSA inapplicable.⁵⁶⁵ The court also disagreed that decedent’s alleged failure to warn the pilots was the proximate cause of the crash, noting that there were factual disputes as to who was responsible for maintaining separation from the coastline.⁵⁶⁶ As such, the court denied defendant’s motion.

⁵⁶¹ *Id.*

⁵⁶² *Id.* at *2 (internal quotation marks omitted).

⁵⁶³ *Id.*

⁵⁶⁴ *Id.* at *4 (emphasis added).

⁵⁶⁵ *Id.*

⁵⁶⁶ *Id.* at *5.