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INTRODUCTION

THIS ARTICLE SUMMARIZES decisions and developments in the field of aviation law from 2019. It does not attempt to address every reported aviation case. Rather, it focuses on the areas of aviation law that likely will have the most significant ramifications in the upcoming year. The categories referenced are for organization, but some cases fall into multiple categories.

I. MONTREAL AND WARSAW CONVENTIONS

A. JURISDICTION

There was an interesting update to the Montreal Convention's (MC) "Fifth Jurisdiction"[1] in 2019. In *Erwin-Simpson v. AirAsia Berhad*, a passenger and her husband sued AirAsia Berhad (AirAsia) in the District of Columbia District Court for personal injuries arising from spilled boiling water during a flight from Malaysia to Cambodia operated by Malaysian-based airline AirAsia.[2] Given those facts, as well as the facts that AirAsia had no U.S. presence, "[did] not operate any flights to the [U.S.]," and did not maintain offices or employees in the U.S., AirAsia challenged subject matter jurisdiction under Article 33(2) of the MC, known as "the fifth jurisdiction."[3] Ultimately, the court held that there was no subject matter jurisdiction under Article 33(2).[4]

Under Article 33(2) of the MC, a passenger may bring a personal injury or death action in a forum state where (1) "at the time of the accident, the passenger has his or her principal and permanent residence"; (2) the air carrier operates flights "on its own aircraft or on another carrier's aircraft pursuant to a commercial agreement" (e.g., code-share agreement); and (3) the air carrier "conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement."[5] Based

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[1] Convention for the Unification of Certain Rules for International Carriage by Air art. 33, *opened for signature* May 28, 1999, T.I.A.S. 13038, 2242 U.N.T.S. 309 [hereinafter MC].

[2] Erwin-Simpson v. AirAsia Berhad, 375 F. Supp. 3d 8, 10–11 (D.D.C. 2019).

[3] *Id.* at 11, 14, 16.

[4] *Id.* at 14. The Court also ruled on defendant's motion to dismiss for lack of personal jurisdiction, addressed *infra* Section V (Personal Jurisdiction). *Id.* at 10–11, 19.

[5] *Id.* at 13 (quoting MC, *supra* note 1, art. 33(2)).

on interpretation of the second and third prongs above, the court agreed with AirAsia that it must not only operate service to or from the United States on its own or indirectly through another carrier, *but also* must conduct business from some physical location leased or owned by the carrier itself or a location for which it has an agreement.[6]

The court first examined the text of the MC and concluded that Article 33(2)'s language strongly indicates that there must be a physical presence—either directly or through an agreement with another carrier.[7] Even if another carrier leases or owns the premises, the text still requires that the carrier being sued operate some aspect of its business from those premises.[8]

To support its interpretation, the court next examined the ratification history of this provision, which was designed to fill a gap by allowing Americans injured abroad to sue in the United States.[9] And, while Article 33(2) was designed to "sweep broadly," it is limited by the language requiring a business presence in the forum state.[10] The court held that the "'presence' requirement reflects a compromise between the United States interest in allowing [American citizens] injured on international flights to sue in the U.S., on the one hand, with other countries' concerns about too broad a jurisdictional reach, on the other."[11] The court rejected plaintiffs' reliance on an affiliated airline's flight operations to and from Hawaii, finding it was not the "carrier" that operated plaintiff's flight and, in any event, it did not change the fact that AirAsia lacked a business presence in the United States.[12]

Lastly, the court dismissed plaintiff's argument that Article 33(2) should be broad enough to treat the carrier's website as a "virtual premises" in the United States.[13] Relying on the treaty's text and negotiation history, the court found that the MC's drafters intended traditional physical premises for the "fifth jurisdiction."[14] The court concluded that "[e]mbracing the theory that a website accessible to Americans suffices for subject matter

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[6] *Id.* at 18–19.
[7] *Id.* at 18.
[8] *Id.* at 14–15.
[9] *Id.* at 15–16.
[10] *Id.* at 16.
[11] *Id.* at 17 (quoting MC, *supra* note 1, art. 33(2)).
[12] *Id.* at 17–19.
[13] *Id.* at 18.
[14] *Id.* at 16–18.

jurisdiction would stretch the fifth jurisdiction too far."[15] As every single airline has a website that can be accessed in the United States and allows tickets to be purchased thereon, to allow such a broad interpretation of premises would "upset the careful political balance [the treaty] strikes."[16]

In 2019, U.S. courts were routinely confronted with the question as to what was included in MC Article 18's definition of "during the carriage of air."[17] In *Spectre Air Capital, LLC v. Crane Worldwide Logistics LLC*, plaintiff Spectre Air Capital, LLC (Spectre) sued for damages its two engines sustained during transportation.[18] "Spectre entered into a lease with Delta Airlines [ ] for the engines and [hired] defendant Crane Worldwide Logistics LLC ('Crane') to transport the engines from Tianjin, China, to Delta TechOps at Gate 6" of the Hartsfield-Jackson Airport in Atlanta, Georgia.[19] Most interestingly, the damage occurred to the engines while they were on the ground in Atlanta, after the flight had concluded.[20] In fact, the parties did not dispute that the damage to the engines occurred when Crane's subcontractor tightened straps over the top of the engines "on the very last portion of the evening when [the subcontractor] was instructed to go back to Gate 6 from Gate 4."[21]

"Spectre sued Crane in the 157th District Court of Harris County, Texas for breach of contract, negligence, gross negligence, fraud, and fraud in the inducement."[22] Then, "Crane removed the case to [federal court] claiming federal jurisdiction over international air carriage."[23] Spectre moved to remand the case and argued that the court lacked jurisdiction because the MC was inapplicable to the case.[24]

Under Article 18, the court reasoned that because this damage occurred on airport premises "while in the charge of the carrier," the damage to the engines was sustained "during the carriage by air," and that the MC governed liability in this case.[25]

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[15] *Id.* at 19.

[16] *Id.*

[17] MC, *supra* note 1, art. 18.

[18] Spectre Air Capital, LLC v. Crane Worldwide Logistics LLC, No. CV H-19-0997, 2019 WL 4765196, at *1 (S.D. Tex. Sept. 30, 2019).

[19] *Id.*

[20] *Id.* at *2.

[21] *Id.*

[22] *Id.* at *1.

[23] *Id.*

[24] *Id.*

[25] *Id.* at *2.

Accordingly, defendant's motion for remand back to state court was denied.[26]

B. "Accident"

Courts across the country also examined the definition of "accident." In *Armstrong v. Hawaiian Airlines, Inc.*, plaintiff sued for injuries he sustained allegedly as a result of a Qantas Airlines (Qantas) employee's refusal to help plaintiff retrieve his checked bags at baggage claim.[27] Plaintiff, who was disabled, alleged that he had paid for "curb-to-curb" service, and that this included the airline attendant helping him with his bags at baggage claim.[28] The Qantas employee denied that they were employed to help plaintiff with his bags.[29] Plaintiff, upon taking his own bags off the baggage carousel, tore ligaments in his forearm, which ultimately required surgery.[30] Plaintiff sued under the MC Article 17.[31]

Defendant moved for summary judgment, claiming the MC did not apply because an "accident" did not cause plaintiff's forearm injury.[32] The case turned on the specific question of whether the Qantas employee's rejection of plaintiff's requests for assistance constituted an "accident" under Article 17 of the MC.[33]

Article 17(1) of the MC states that "a plaintiff must prove the following elements: (1) there has been an 'accident'; (2) that caused the passenger's injury; and (3) that the accident occurred while onboard the aircraft or in the course of operations of embarking or disembarking."[34] "The United States Supreme Court has defined 'accident' under the [MC] as 'an unexpected or unusual event or happening that is external to the passenger.'"[35]

"The Supreme Court's definition of "accident" can be broken down into three parts": (1) an "event or happening"; (2) "that is

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[26] *Id.* at *1.

[27] Armstrong v. Haw. Airlines, Inc., 416 F. Supp. 3d 1030, 1034–36 (D. Haw. 2019).

[28] *Id.* at 1037.

[29] *Id.*

[30] *Id.* at 1036.

[31] *Id.* at 1037.

[32] *Id.* at 1041.

[33] *Id.* at 1040.

[34] *Id.* (citing MC, *supra* note 1, art. 17(1)).

[35] *Id.* (quoting Air France v. Saks, 470 U.S. 392, 405 (1985)).

unexpected or unusual"; and (3) "that is external to the passenger."[36]

(1) "Event or Happening": "An 'event or happening' can take the form of action or inaction."[37] The court focused on the Qantas employee's refusal of plaintiff's explicit requests for assistance with retrieving his bags from the baggage carousel and determined that refusal was "an act of commission, rather than omission, because it was inaction that produced an effect, result, or consequence."[38] "[U]nder Ninth Circuit and Supreme Court precedent, there was an issue of material fact as to whether that refusal constitutes an event or happening."[39]

(2) "Unusual or Unexpected": Thus, "[p]laintiff . . . injured his arm while retrieving his checked bags as a consequence of the wheelchair attendant's refusal to assist him."[40] "Had [p]laintiff not asked for the wheelchair attendant's assistance, there would be no question that a mere act or omission occurred, and [p]laintiff would not have a cause of action under Article 17."[41]

(3) "External to the Passenger": The event itself must occur external to the passenger.[42] Here, it is not disputed that the wheelchair is external to the passenger.[43]

Ultimately, the court determined that the MC applied to this injury because a jury could find that the attendant's refusal *could have* caused plaintiff's injury.[44] The court consequently denied defendant's motion for summary judgment.[45]

Sensat v. Southwest Airlines is another case that addressed "accident" under the MC.[46] A passenger was boarding a flight to the United States in the Dominican Republic when he tripped on the metal boarding stairs leading to the plane.[47] He alleged his

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[36] *Id.* at 1041.

[37] *Id.* (citing Olympic Airways v. Husain, 540 U.S. 644, 653–54 (2004)).

[38] *Id.* at 1042.

[39] *Id.* (citing Caman v. Cont'l Airlines, Inc., 455 F.3d 1087, 1092 (9th Cir. 2006); *Husain*, 540 U.S. at 652).

[40] *Id.*

[41] *Id.*

[42] *Id.* at 1043.

[43] *Id.*

[44] *Id.* at 1048–49.

[45] *Id.* at 1049.

[46] Sensat v. Sw. Airlines, 363 F. Supp. 3d 815, 816 (E.D. Mich. 2019).

[47] *Id.*

foot got stuck in a gap in the stairs and that he suffered multiple torn ligaments in his foot and required surgery.[48]

Defendant moved for summary judgment under the MC, claiming that this was not the type of "accident" explicitly covered by the MC.[49] The court reasoned that, because "accident" under the MC requires a jury to find that an "unusual" event had taken place, a jury could indeed find that a gap in air stairs was "unusual" enough for MC coverage.[50] This finding as to fortuity was bolstered by the fact that every witness testified that this had never happened before, and because the pilot stood on the stairs after the incident, warning everyone to watch their step.[51]

In *Expeditors International of Washington, Inc. v. United Parcel Service*, United Parcel Service (UPS) allegedly ruined several computers while they were en route from London to Denver.[52] Plaintiff prevailed on its motion for summary judgment when plaintiff's computers were clearly damaged in cargo.[53] Plaintiff charged that, under the MC, Subsection 1 of Article 18, UPS (a.k.a. the air carrier), "is liable for damage sustained in the event of . . . damage to cargo upon condition that the event which caused the damage so sustained took place during carriage by air."[54]

Because Subsection 2 of Article 18 provides that "the [air] carrier is not liable if and to the extent it proves that the . . . damage[ ] to the cargo resulted from . . . defective packaging of that cargo performed by a person other than the carrier,"[55] the court looked to UPS to present evidence that the cargo was damaged by anyone other than UPS.[56] The court held that UPS failed to present sufficient evidence to defend itself under the MC standard, and plaintiff's motion for summary judgment was granted.[57]

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[48] *Id.* at 816–17.

[49] *Id.* at 816.

[50] *Id.* at 823.

[51] *Id.*

[52] Expeditors Int'l of Wash., Inc. v. United Parcel Serv. Co., 370 F. Supp. 3d 1265, 1266 (D. Colo. 2019), *appeal dism'd*, No. 19-1115, 2019 WL 4725681 (10th Cir. July 1, 2019).

[53] *Id.* at 1270–71.

[54] *Id.* at 1269.

[55] MC, *supra* note 1, art. 18(2).

[56] *Expeditors Int'l*, 370 F. Supp. at 1269–70.

[57] *Id.* at 1271.

C. Venue

In *Agasino v. American Airlines Inc.*, the U.S. District Court for the Northern District of California affirmed that the MC does not contain specific venue rules that supersede the United States' general venue statutes.[58] This specific case concerned injuries sustained by a passenger on a flight from Tokyo, Japan, to Dallas, Texas, when a bag fell from an overhead bin and struck him in the head.[59] Plaintiff sued in the Northern District of California despite the fact that plaintiff did not live in California, nor did he allege any connection to California.[60] Because plaintiff also failed to allege that American Airlines (AA) itself had any connection to California, AA moved to dismiss for improper venue under Federal Rule of Civil Procedure 12(b)(3).[61] AA did not raise a personal jurisdiction challenge at the time of filing its 12(b)(3) motion for improper venue.[62]

In opposition to AA's motion, plaintiff argued that venue for his "case was governed by the [MC]," and that the MC "contains its own venue rules and that those rules supersede the general venue statute, 28 U.S.C. § 1391."[63] The court swiftly and succinctly quashed his argument in one sentence, simply replying, "Not so."[64] The MC "does not govern venue within the United States"—the Federal Rules of Civil Procedure do.[65]

Nonetheless, the court held that the chosen venue was permissible because defendant moved to dismiss solely for improper venue, but did not challenge personal jurisdiction over AA, which would be one of the venue criterion.[66] The court did ultimately grant a motion to *transfer* venue to Texas, based on traditional venue transfer factors:

> (1) the plaintiff's choice of forum; (2) the convenience of the parties; (3) the convenience of the witnesses; (4) the relative ease of access to the evidence; (5) the familiarity of each forum with the applicable law; (6) the feasibility of consolidation with other

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[58] Agasino v. Am. Airlines Inc., No. 19-CV-03243-LB, 2019 WL 3387803, at *2 (N.D. Cal. July 26, 2019).

[59] *Id.* at *1.

[60] *Id.*

[61] *Id.* at *1–2.

[62] *Id.* at *3.

[63] *Id.* at *2.

[64] *Id.*

[65] *Id.*

[66] *Id.* at *3.

> claims; (7) any local interest in the controversy; and (8) the relative court congestion and time to trial in each forum.[67]

In *McCormick v. Aerovias De Mexico S.A. de C.V.*, plaintiffs sued Delta Airlines (Delta) for injuries sustained on AeroMexico Flight 2431 when it crashed shortly after attempting to take off from Durango, Mexico.[68] Plaintiffs purchased airline tickets from Delta's website on June 2, 2018.[69]

> Plaintiffs' ticket confirmations indicated the following: (1) at 3:09 p.m. on July 31, 2018, plaintiffs would fly from Durango, Mexico, to Mexico City, Mexico, on "AeroMexico Flight 2431," which [was] "[o]perated by" Aerolitoral S.A. de C.V. (Aerolitoral), a subsidiary of AeroMexico Aerovias De Mexico S.A. de C.V. (AeroMexico); and (2) at 6:40 p.m. on July 31, 2018, plaintiffs would fly from Mexico City, Mexico, to Portland, Oregon, on "Delta Flight 8072," which [was] "[o]perated by" AeroMexico.[70]

According to Delta's Manager of Interline and Industry Affairs, "Delta sold tickets for AeroMexico flight 2431, operated by Aerolitoral, because Delta had an Interline Passenger Ticketing and Baggage Agreement ('Interline Agreement') with Aerolitoral."[71] The Interline Agreement, "which went into effect on November 1, 2000," provides that the airline that issues the tickets (here, Delta) "acts only as agent of the carrying airline" and is not responsible for "any injury to or death of a passenger, or any loss of or damage to a passenger's personal effects, or any loss of or damage to baggage caused by or occurring on or in connection with the premises of the airplane[.]"[72]

"Delta *also* had a Codeshare Agreement with AeroMexico, which was in effect on July 31, 2018."[73] According to Delta, "the Codeshare Agreement 'applied only to AeroMexico flights that were designated as codeshare flights by Delta.'"[74] Codeshare flights by Delta are classified as such when "Delta markets and sells . . . its own transportation services for a flight that . . . is

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[67] *Id.* at *4 (citing EEOC v. United Airlines, Inc., No. C 09-2469 PJH, 2009 WL 7323651, at *1 (N.D. Cal. Dec. 3, 2009)).

[68] McCormick v. Aerovias De Mexico S.A. de C.V., No. 3:18-CV-01628-SB, 2019 WL 1552498, at *1–2 (D. Or. Feb. 27, 2019).

[69] *Id.* at *1.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.* at *2 (emphasis added).

[74] *Id.*

operated by another air carrier."[75] The court concluded that Delta could not be held liable under Article 36 of the MC because it was not the actual carrier of AeroMexico Flight 2431 during which the accident occurred.[76]

Plaintiff also argued Delta was liable under MC Article 39 "as a 'contracting carrier.'"[77] Courts focus "on whether the flight at issue was a codeshare flight" when determining "contracting carrier" liability under the MC.[78] In this case, plaintiffs did not dispute that they were injured on AeroMexico Flight 2431, a flight that did not bear Delta's name or code.[79] The court concluded that AeroMexico Flight 2431 was not a Delta codeshare flight and therefore Delta could not be held liable as a contracting carrier under Article 39.[80]

D. Carriers

In *Indemnity Insurance Company of North America v. Expeditors International of Washington, Inc.*, an insurer was subrogee of the shipper of a CAT scan machine that was damaged in transport from Tokyo to Shanghai.[81] The insurer brought an action against common carriers asserting claims for breach of contract and breach of bailment obligations.[82] Defendant moved to dismiss for failure to state a claim on the grounds that the United States is not a proper forum for this action because only one defendant (EXPJapan)—which had neither a domicile nor principal place of business in the United States—was the "carrier" for this shipment.[83] The motion also asserted that the insurer failed to provide notice of a claim to the carrier pursuant to the MC.[84]

The court denied the motion and held that Expeditors International of Washington, Inc. (EIW) that negotiated rates for shipment of the machine during international aviation transpor-

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[75] *See id.* n.3 (quoting 14 C.F.R. § 257.3 (2019), which defines codeshare as "an arrangement whereby a carrier's designator code is used to identify a flight operated by another carrier").

[76] *Id.* at *3.

[77] *Id.* at *4.

[78] *Id.*

[79] *Id.*

[80] *Id.* at *7–8.

[81] Indem. Ins. Co. of N.A. v. Expeditors Int'l of Wash., Inc., 382 F. Supp. 3d 302, 306 (S.D.N.Y. 2019).

[82] *Id.* at 307.

[83] *Id.* at 308.

[84] *Id.* at 311.

tation was an "indirect carrier" within meaning of the MC.[85] The Southern District of New York defined two classes of carriers—direct and indirect—both of which are covered by the MC.[86] "[D]irect air carriers are those who operate aircraft, while indirect air carriers hold out a transportation service to the public under which they utilize the services of a direct carrier for the actual transportation by air."[87]

The court also held that the alleged failure by the insurer to provide notice of a claim to the carrier pursuant to the MC was not a ground for dismissal for failure to state a claim:

> While [d]efendants may be correct that [p]laintiff was required to provide notice of its dissatisfaction with the condition of the shipment—and that [p]laintiff's failure to provide such notice may ultimately bar it from recovery—[d]efendants have offered no support for the contention that Article 31.2 of the Montreal Convention creates an affirmative pleading standard.[88] Accordingly, the court granted EXPJapan's Rule 12(b)(2) motion to dismiss and denied EIW's motion to dismiss under Rules 12(b)(1) and 12(b)(6).[89]

E. Limitation Period

In *LAM Wholesale v. United Airlines, Inc.*, plaintiff LAM Wholesale, LLC (LAM) brought a contract action to recover alleged damages for the loss of electronic scooters shipped by defendant United Airlines, Inc. (United).[90] The accident occurred sometime in 2015, and the suit was first filed on May 30, 2019.[91] United moved to dismiss the complaint as time barred.[92] MC Article 35, "entitled 'Limitation on Actions,' further requires that 'any claim be brought within a two-year period computed from either the date of arrival, the date of intended arrival, or the date that carriage ceased.'"[93] "Questions as to the calculation of the period of limitations are left to the court of the fo-

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[85] *Id.* at 309.

[86] *Id.* at 308.

[87] *Id.* (quoting Royal Ins. v. Amerford Air Cargo, 654 F. Supp. 679, 682 (S.D.N.Y. 1987)).

[88] *Id.*

[89] *Id.*

[90] LAM Wholesale, LLC v. United Airlines, Inc., No. 18-CV-3794 (DLI)(LB), 2019 WL 1439098, at *1 (E.D.N.Y. Mar. 31, 2019).

[91] *Id.* (quoting MC, *supra* note 1, art. 35).

[92] *Id.*

[93] *Id.* at *2.

rum" and are not tolled, and the court granted United's motion.[94]

Louis Vuitton North America v. Schenker involved the loss of over $760,000 in Louis Vuitton merchandise.[95] To fly the merchandise from Paris to New York, Louis Vuitton North America (LVNA) hired Schenker, which subcontracted the cargo's air carriage to Air France.[96] Upon arrival at John F. Kennedy Airport (JFK) in New York, the merchandise was transported by defendant Cargo Airport Services USA, LLC (CAS) to its storage warehouse at JFK, where it was held in storage.[97] That same night at approximately 10 p.m., three men arrived in an unmarked van, presented a fake driver's license and fake Air Automated Manifest System (AIR AMS) documents, and absconded with the merchandise.[98] LVNA sued CAS, Schenker, and Air France for the loss.[99] CAS and Air France moved to:

> (1) dismiss LVNA's claim for statutory indemnification under Article 10 of the Montreal Convention, and (2) enter judgment on their affirmative defenses that: (a) any common law claims that could be inferred from the Amended Complaint are preempted by the Montreal Convention, and (b) CAS's liability is limited to that of a carrier under Article 22.3 because it was "acting in the scope of its employment."[100]

The court held that Article 10 of the MC applies to carriers and does not apply to actual third-party transporters.[101] CAS's motion for judgment on the pleadings was denied in part and granted in part, dismissing LVNA's claim for statutory indemnification.[102]

Another case concerning the MC's "cause of injury" was *Abba v. British Airways*.[103] In *Abba*, while flying on a British Airlines flight from Milwaukee to Paris, a male passenger hurt his finger after he tripped on a beverage cart which was operated by a

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[94] *Id.* at *2–3.

[95] Louis Vuitton N. Am., Inc. v. Schenker S.A., No. 17-CV-7445 (DLI)(PK), 2019 WL 1507792, at *2 (E.D.N.Y. Mar. 31, 2019).

[96] *Id.* at *1.

[97] *Id.* at *2.

[98] *Id.*

[99] *Id.* at *1.

[100] *Id.* at *4.

[101] *Id.* at *6.

[102] *Id.* at *10.

[103] Abba v. British Airways PLC, No. 17 C 6138, 2019 WL 1354300, at *1 (N.D. Ill. Mar. 26, 2019).

flight attendant.[104] Defendant British Airways moved for summary judgment, claiming the fall was not the airline's fault.[105] But the court denied the motion, holding that a jury may be able to weigh the evidence and conclude that this injury was caused by the flight attendant.[106]

The court reasoned denial was proper because (1) the entire chain of events was completely unclear based on plaintiff's and flight attendant's conflicting testimony; and (2) British Airways did not conclusively disprove the plaintiff's injury was its fault.[107]

F. Pleading

DHL Global Forwarding (China) Co. v. Lan Cargo, S.A. concerned a stolen shipment of over 20,000 Apple iPhones.[108] The court struck a cause of action from the complaint, which pled both a cause of action under the MC and also sought for declaratory relief regarding the same MC claim.[109] The Southern District of Florida held it was "superfluous" to make a MC claim and then also request declaratory relief regarding the same claim, and dismissed the latter cause of action.[110]

In *Sokolova v. United Airlines, Inc.*, plaintiffs alleged "that they suffered damages as a result of delays during [roundtrip] flights they booked through [United] from Chicago to Tbilisi, in the Republic of Georgia."[111] United "moved pursuant to Federal Rule of Civil Procedure 12(b) to dismiss two counts and strike portions of the plaintiffs' complaint."[112]

United argued that counts two and four, which asserted entitlement to relief under breach of contract theories, "should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) because United did not breach any term of the applicable contract of carriage as a matter of law and because those counts are duplicative of count one."[113] United also argued that "certain allegations in the plaintiffs' complaint requesting relief that is

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[104] *Id.*

[105] *Id.*

[106] *Id.* at *3–4.

[107] *Id.* at *4.

[108] DHL Glob. Forwarding (China) Co. v. Lan Cargo, S.A., No. 18-21866-CIV, 2019 WL 2329281, at *1 (S.D. Fla. May 31, 2019).

[109] *Id.* at *1, *4.

[110] *Id.* at *4.

[111] Sokolova v. United Airlines, Inc., No. 18-CV-02576, 2019 WL 1572555, at *1 (N.D. Ill. Apr. 11, 2019).

[112] *Id.*

[113] *Id.* at *2.

unavailable under the Montreal Convention should be stricken pursuant to Rule 12(f)."[114] Plaintiffs argued that there is a distinction between a legal claim and a legal theory, and that all of [p]laintiffs' seemingly duplicative causes of action were alternative legal theories.[115] United "argue[d] in its reply brief that the distinction between [the two was] 'not relevant' in this case because the Montreal Convention supplies the [p]laintiffs' only remedy."[116]

The court denied the motion, holding that Rule 12(b)(6) authorizes the dismissal of claims, but does not authorize the dismissal of alternative legal theories.[117] United conceded that the plaintiffs stated a plausible claim.[118] The court held that "Rule 12(f) similarly fails to provide a basis to strike the plaintiffs' allegations regarding the harm they suffered."[119] United's motion was "therefore denied."[120]

Saegusa-Beecroft v. Hawaiian Airlines was a curious decision.[121] Plaintiff pled that inter-island travel between Hawaiian islands somehow was encompassed by the MC even though it is a purely domestic U.S. flight.[122] The court held the MC does not apply to inter-island travel within the Hawaiian islands.[123]

G. Comparative Fault

Finally, we examine two cases that deal with airline liability in light of bare minimum MC standards, and what happens when an airline exceeds those standards by attempting to accommodate the guest, but the guest declines or abuses the accommodation.

In *Greig-Powell v. LIAT*, plaintiff sued for personal injuries she sustained as a result of passing out on a flight.[124] Plaintiff, a diabetic, was scheduled to fly from St. Thomas to Trinidad, with a

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[114] *Id.*

[115] *Id.* at *3.

[116] *Id.* at 4.

[117] *Id.*

[118] *Id.* at *3.

[119] *Id.* at *1.

[120] *Id.* at *5.

[121] Saegusa-Beecroft v. Haw. Airlines, Inc., No. 18-00384 HG-KJM, 2019 WL 1586744 (D. Haw. Apr. 12, 2019).

[122] *Id.* at *1–2.

[123] *Id.* at *3.

[124] Greig-Powell v. LIAT (1974) Ltd., No. CV 2017-42, 2019 WL 1940595, at *1 (D.V.I. Apr. 30, 2019).

layover in Antigua.[125] Plaintiff's initial flight from St. Thomas to Antigua was delayed, causing her to miss her connecting flight from Antigua to Trinidad.[126] Leeward Islands Air Transport Services (LIAT) rebooked plaintiff "on the next available flight from Antigua to Trinidad."[127]

Prior to the taking off from St. Thomas, plaintiff expressed her concerns to the airline about her arrival time in Trinidad.[128] Plaintiff told a LIAT employee that she needed to eat food by a certain time in order to take her medication.[129] The flight crew informed her that as a policy, there was no food on LIAT flights.[130] Thereafter, the airline offered to rebook plaintiff's connecting flight out of Antigua for the next day and to provide her with hotel and meal vouchers.[131] Plaintiff declined these offers and stayed on the flight.[132] Once airborne, plaintiff once again asked the flight attendants for food.[133] Once again, she was informed that LIAT flights do not have any food on board.[134] Plaintiff ultimately lost consciousness and hit her head on the seat in front of her.[135] She sued LIAT for her personal injuries.[136]

LIAT moved for summary judgment, which was granted.[137] The court held that, under MC Article 17, "[f]or liability to attach, the Supreme Court requires that a passenger's injury be 'caused by an unexpected or unusual event or happening that is external to the passenger.'"[138]

Based on the facts of the case, the court found it "difficult to reconcile: (1) a claim that LIAT's inability to provide food on the flight was unexpected or unusual," based on LIAT's policy of not having food on any of its flights; with "(2) LIAT's communications with Greig-Powell in Antigua," offering plaintiff a hotel,

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125 *Id.*
126 *Id.*
127 *Id.*
128 *Id.*
129 *Id.*
130 *Id.*
131 *Id.*
132 *Id.*
133 *Id.*
134 *Id.*
135 *Id.*
136 *Id.*
137 *Id.* at *8.
138 *Id.* (citing Air Fr. v. Saks, 470 U.S. 392, 405 (1985)).

meal voucher, and rebooking.[139] Moreover, the court found it "even more difficult to reconcile such a claim with Greig-Powell's conduct, including her refusal before she was airborne, of a meal, overnight accommodations, and a different flight at LIAT's expense."[140] The court ultimately held that, "[i]n light of these circumstances, LIAT has carried its burden by demonstrating that an accident within the meaning of the Montreal Convention did not occur as a matter of law."[141]

And finally, in *Bytska v. Swiss International Air Line Ltd.*, a passenger sued Swiss International Air Line Ltd. (Swiss Air) for damages she sustained when she was not allowed to board her connecting flight from Zurich to Chicago and had to stay in Zurich overnight until the next flight.[142] She missed boarding because her original flight from Kyiv was delayed by two hours due to ice.[143]

The airline accordingly provided plaintiff with vouchers for a hotel stay, telephone calls, and meals, and the airline rebooked her on the next Zurich–Chicago flight, which was the next day.[144] Plaintiff spent in excess of the vouchers while at the hotel and airport.[145] Upon her return to Chicago, she also called in sick to work the next day due to exhaustion and an upset stomach.[146] She sued Swiss Air for damages as well as for her lost wages.[147]

The court looked at the minimum requirements of MC's Article 19 to hold that Swiss Air provided plaintiff with hotel and meal vouchers and rebooked her in order to minimize plaintiff's delay.[148] The airline was not liable for the extra expenses she incurred.[149]

II. REFUSAL TO TRANSPORT

An airline's authority to use its discretion to refuse transportation to a passenger is found in 49 U.S.C. § 44902, which pro-

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[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] Bytska v. Swiss Int'l Air Line Ltd., No. 15 C 00483, 2019 WL 1399925, at *1–2 (N.D. Ill. Mar. 28, 2019).
[143] *Id.*
[144] *Id.* at *2.
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.* at *4.
[149] *Id.* at *5.

vides that an air carrier "may refuse to transport a passenger or property the carrier decided is, or *might be*, inimical to safety."[150] In *Karrani v. JetBlue Airways Corp.*,[151] the plaintiff was an elderly Somali passenger on a flight from New York to Seattle. Due to a medical emergency, the flight had to make an emergency landing in Billings, Montana.[152] An incident occurred during descent in which a flight attendant claimed that the plaintiff hit her as she attempted to guide him from the forward to the aft lavatory.[153] The captain refused to allow the plaintiff to reboard the aircraft following the stopover in Billings.[154]

The plaintiff sued JetBlue alleging that his removal from the flight constituted racial discrimination under 42 U.S.C. § 1981(a).[155] JetBlue moved for summary judgment.[156] After finding that the "plaintiff had presented a triable issue of [material] fact as to his prima facie case of discrimination, the burden shift[ed] to JetBlue to provide a legitimate, non-discriminatory reason" for denying transportation.[157] The court found that JetBlue met this burden pursuant to its authority under § 44902.[158] Under Ninth Circuit law, "[a] passenger's removal is proper under [§] 44902 so long as the pilot's decision is not arbitrary or capricious."[159] In this case, the captain's refusal of transportation to the plaintiff was not arbitrary and capricious as a matter of law because he was entitled to base his decision upon the information provided to him by the flight attendant notwithstanding the possibility that it was false or exaggerated.[160]

In *Cardenas v. American Airlines, Inc.*, AA refused to transport an "unruly" passenger because she allegedly assaulted a customer service manager (CSM).[161] The parties agreed that due to a delayed flight and missed connecting flight, plaintiff needed to report to the AA helpdesk to let the agents know she had

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150 49 U.S.C. § 44902 (2018) (emphasis added).

151 Karrani v. JetBlue Airways Corp., No. C18-1510-RSM, 2019 WL 3458536, at *1 (W.D. Wash., July 31, 2019).

152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.* at *4.

158 *Id.*

159 *Id.* at *5.

160 *Id.*

161 Cardenas v. Am. Airlines, Inc., No. 17cv2513-GPC(JLB), 2019 WL 2918162, at *2 (S.D. Cal. July 8, 2019).

been rebooked through AA's phone customer service.[162] Plaintiff claimed she calmly approached the CSM and may have touched him on the shoulder.[163] However, the CSM demanded to know her name and where she was going, and then informed her that she had assaulted him and would not be allowed on board.[164] The CSM, on the other hand, testified that plaintiff forcefully spun him around, yelled at him, and that his coworker called the police.[165] Plaintiff was locked out of her online account until 2 a.m., at which time she booked a 6 a.m. flight home.[166]

AA moved for summary judgment, which was denied in part and granted in part.[167] Defendant asserted that the plaintiff's state law claims were preempted by the Federal Aviation Administration (FAA) because § 44902 concerns aviation safety which occupies an area that FAA intended to regulate.[168] Although the court acknowledged the evidence that the plaintiff had assaulted a CSM, it nonetheless found that AA had not demonstrated that the plaintiff's reservation was canceled due to a safety concern.[169] Interestingly, the court distinguished the long line of cases regarding a captain's authority to refuse transportation based on his belief that a passenger might be inimical to safety, and the court questioned whether § 44902(b) even applies to a CSM.[170] Therefore, the court denied AA's motion for summary judgment on that issue.[171]

III. FEDERAL PREEMPTION

A. The Federal Aviation Act

This past year saw a number of preemption cases dealing with the Federal Aviation Act (FAAct). This included two significant preemption cases from within the Second Circuit: *Jones v. Goodrich Corp.* and *Tweed-New Haven Airport Authority v. Tong.*[172]

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[162] *Id.* at *1.
[163] *Id.*
[164] *Id.*
[165] *Id.* at *2.
[166] *Id.* at *3.
[167] *Id.* at *1.
[168] *Id.* at *3.
[169] *Id.* at *7.
[170] *Id.* at *6.
[171] *Id.* at *8.
[172] Jones v. Goodrich Corp., No. 3:12-cv-01297-WWE, 2019 WL 4760113, at *1 (D. Conn. Sept. 30, 2019); Tweed-New Haven Airport Auth. v. Tong, 930 F.3d 65, 68–69 (2d Cir. 2019).

In *Tweed-New Haven Airport Authority v. Tong*, the court utilized a two-step field preemption analysis to hold that a runway statute (Runway Statute)[173] was preempted by the FAAct.[174] The Tweed-New Haven Airport (Tweed) serves the New Haven area, with a population in excess of 1,000,000 people.[175] Runway 2/20, the Airport's primary runway, is 5,600 feet long.[176] Runway 2/20 "is one of the shortest commercial airport runways in the country" and the shortest runway for an airport with a population area as large as Tweed's.[177] This has precluded the airport from offering nonstop flights to Orlando, and from offering flights to a number of East Coast cities such as Boston, Washington D.C., and Atlanta.[178] Tweed has been unable to attract new airlines, since many cannot safely fill their planes or land safely.[179]

But, "[i]n 2009, the Connecticut legislature, seeking to prevent the expansion of Runway 2/20, passed the Runway Statute."[180] The law provides that "'Runway 2-20 of the airport shall not exceed the existing paved runway length of five thousand six hundred linear feet,'" thereby preventing Tweed from "extending Runway 2/20 past its current length."[181]

Connecticut argued that, because the Runway Statute "does not prevent Tweed from complying with any federally-mandated safety standards," implied preemption is not warranted.[182] Connecticut also argued "that the FAAct does not preempt the Runway Statute because . . . no federal mandate requires that Tweed extend its runway."[183]

The Second Circuit rejected both of Connecticut's arguments. First, it clarified that this case does not involve conflict preemption as the state suggested, but rather field preemption because "Congress intended the Federal Government to occupy [a field] exclusively" and "the FAAct to occupy the entire field of air safety including runway length."[184] Second, it held that the preemption analysis did not turn on whether the "airline safety

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[173] CONN. GEN. STAT. § 15-120j(c).
[174] *Tweed-New Haven Airport Auth.*, 930 F.3d at 75.
[175] *Id.* at 69.
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.* (quoting CONN. GEN. STAT. § 15-120j(c)).
[182] *Id.* at 75.
[183] *Id.*
[184] *Id.* (quoting Air Transp. Ass'n v. Cuomo, 520 F.3d 218, 220 (2d Cir. 2008)).

activity" is mandated by the federal government, but instead on whether the Runway Statute intrudes into "the field of air safety."[185] The court concluded that the Runway Statute did so intrude into the field of air safety, and was therefore preempted by the FAAct.[186]

The court concluded that the Runway Statute fell "well within the scope of the FAAct's preemption because of its direct impact on air safety."[187] The statute was "incompatible with the FAAct's objective of establishing [a] 'uniform and exclusive system of federal regulation in the field of air safety.'"[188] The court further reasoned that "[i]f every state were free to control the lengths of runways within its boundaries, [the] Congressional objective could never be achieved."[189]

Jones v. Goodrich Corporation applied the holding of *Tweed*.[190] The *Jones* case arose from the crash of an Army helicopter at Fort Benning, Georgia, which was powered by a Rolls-Royce 250-C30R/3M engine.[191] Plaintiffs submitted that moments before the crash that killed the occupants, the Full Authority Digital Electronic Control (FADEC) computer, which controls fuel metering and other parameters, experienced a "step count fault," which caused a failure.[192] A step count fault was "caused by, among other things, a faulty fuel metering valve potentiometer (MVP)."[193] "The fault caused the FADEC to enter a fixed fuel mode where the pilot [could not] alter fuel flow and power to the engine."[194]

Defendants moved to dismiss on the grounds that, because the Army required "both the baseline [engine] and all of the modifications, including modifications to the FADEC, to be FAA certified," and because "[a]ny changes in equipment that were required by the Army also *required* the Original Equipment Manufacturers [OEMs] to obtain additional FAA certification," the

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185 *Id.*

186 *Id.*

187 *Id.* at 74.

188 *Id.* (citing *Air Transp. Ass'n*, 520 F.3d at 224 (quoting City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 639, (1973))).

189 *Id.*

190 Jones v. Goodrich Corp., No. 3:12-cv-01297-WWE, 2019 WL 4760113, at *1 (D. Conn. Sept. 30, 2019).

191 *Id.*

192 *Id.*

193 *Id.*

194 *Id.*

suit was preempted through implied field preemption like in *Tweed*.[195]

Plaintiffs disagreed and argued that:

> (1) [t]he circumstances of *Tweed* do not speak to implied field preemption or to any issues arising in the instant litigation; (2) [t]he FAA's interest and involvement with aircraft engine-component design and certification is insufficient to position such issues within the preempted realm of air safety; and (3) [t]he subject military aircraft is not subject to FAA certification requirements.[196]

Finally, plaintiffs submitted that their manufacturing defect claims should survive a finding of field preemption.[197]

The district court disagreed with plaintiffs and affirmed that this matter solely involves field preemption because the Second Circuit has long held and confirmed repeatedly that Congress intended the FAAct to preempt the entire field of aviation safety.[198] It further applied *Tweed*'s two-factor test in that, once the first prong is met, the court then examines whether state laws "intrude" or "enter [within] the scope of the preempted field in either their purpose or effect," or more broadly, whether they "interfere" with a federal regulation.[199] The court held that it did, and that "[p]laintiffs' state law claims of strict liability, negligence, breach of warranty, breach of contract, [and] fraud were field preempted" and dismissed on summary judgment.[200]

In *Belmont v. JetBlue Airways Corporation*, plaintiff sued JetBlue Airways Corp. (JetBlue) in state court, asserting claims including "false arrest, unlawful imprisonment, defamation of character, and intentional and negligent infliction of emotional distress."[201] Plaintiff took his family members to JFK for their flight.[202] He received a gate pass, helped his family onto the plane, then deboarded and left JFK.[203]

The next day he was arrested by the Port Authority for:

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[195] *Id.* (emphasis added).

[196] *Id.* at *3.

[197] *Id.* at *6.

[198] *Id.* at *5.

[199] *Id.* at *2–3.

[200] *Id.* at *7.

[201] Belmont v. JetBlue Airways Corp., 401 F. Supp. 3d 348, 352 (E.D.N.Y. 2019).

[202] *Id.*

[203] *Id.* at 352–53.

> his actions in boarding the aircraft at the [JetBlue] Terminal and charged . . . with criminal impersonation in the second degree, in violation of section 190.25 of the New York Penal Law, and unlawful use or possession of official police cards, in violation of section 14-108-1 of the New York City Administrative Code.[204]

Plaintiff was released a day later, and the charges were ultimately dropped and sealed.[205] After Plaintiff sued in state court, JetBlue removed the action on the argument that the FAAct does not provide for personal injury claims, and plaintiff moved to remand to state court.[206] But the court agreed with plaintiff—his claims, all being personal injury in nature, were not preempted by the FAAct, and therefore his suit was remanded back to state court.[207]

In *Carroll Airport Commission v. Danner*, the Carroll County Airport Commission (Commission) petitioned for abatement of a nuisance, seeking to require a farmer, Danner, to cease operation of and raze his twelve-story grain elevator.[208] The structure was located near a municipal airport.[209] However, the FAA had issued a "'no-hazard' letter" concerning the structure.[210]

Following a bench trial, Iowa's trial court granted the airport's petition and issued an injunction.[211] It also ordered Danner to pay a fine of $200 a day while the elevator remained.[212] Danner, having been given a clearance by the FAA, appealed.[213] The state court of appeals affirmed.[214] Danner applied for further review to the Iowa Supreme Court, which was granted.[215] The Commission argued that his structure was in no way preempted by the FAAct, either through conflict or field preemption, because the FAAct did not expressly preempt state and local restrictions on height of structures in or near flight paths.[216]

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[204] *Id.* at 353.
[205] *Id.*
[206] *Id.*
[207] *Id.* at 362.
[208] Carroll Airport Comm'n v. Danner, 927 N.W.2d 635, 639 (Iowa 2019).
[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] *Id.* at 640.
[213] *Id.* at 639.
[214] *Id.* at 640.
[215] *Id.* at 639.
[216] *Id.* at 643.

On review, the Iowa Supreme Court actually agreed with the Commission and held the FAAct did not preempt local zoning regulations.[217] However, the Iowa Supreme Court still found that the farmer's "grain leg constitute[d] a nuisance and hazard to aviation," and ordered Danner to remove the structure.[218] As a parting gift, the Iowa Supreme Court struck down the $200 daily penalty for each day that the structure remained after the opinion was rendered as inequitable.[219]

In *Helicopters for Agriculture v. County of Napa*, Helicopters for Agriculture, a Part 137 operator (Operator), challenged a Napa County law limiting the take-off and landing locations of helicopters used for agricultural operations.[220] The new law also prohibited "any new personal use of airports or heliports."[221] The Operator asserted the law was preempted by the FAAct.[222] The Northern District of California held that the FAAct did not preempt this law because it did not concern safety.[223] Additionally, this statute did not affect commercial airlines and was therefore allowed to stand.[224]

Farelas v. Hijazi concerned the removal to federal court based on federal preemption of a case arising out of the decision of an air traffic controller (ATC).[225] Plaintiffs pled state law claims arising out of a fatal plane crash at the Riverside Municipal Airport.[226] They sued twelve defendants, including air traffic control operator Serco Inc. "for negligence, negligent infliction of emotional distress, wrongful death, and a surviv[al] action."[227] The court denied a remand because air traffic control agents directly impact the "safety" of air operations and the state law claims are preempted by the FAAct.[228]

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[217] *Id.* at 655.

[218] *Id.* at 654.

[219] *Id.* at 655.

[220] Helicopters for Agric. v. Cnty. of Napa, 384 F. Supp. 3d 1035, 1038–39 (N.D. Cal. 2019).

[221] *Id.* at 1038.

[222] *Id.* at 1039.

[223] *Id.* at 1040–41.

[224] *Id.* at 1041.

[225] Farelas v. Hijazi, No. 5:19-cv-00176-RGK-SHK, 2019 WL 1553669, at *1 (C.D. Cal. Apr. 9, 2019).

[226] *Id.*

[227] *Id.*

[228] *Id.* at *3.

Finally, as of this writing, there has been a conclusion to the closely-watched case of *Avco Corp v. Sikkelee*.[229] Plaintiff Jill Sikkelee contended that Avco Corp. (Avco) sold a defective aircraft engine that was installed on an airplane that lost power shortly after takeoff in July 2005, killing her husband.[230] Avco filed a petition for certiorari with the U.S. Supreme Court after an appeal to the Third Circuit.[231]

The Third Circuit held that Avco was not entitled to summary judgment on an impossibility-preemption basis, despite acknowledging that the manufacturer had to get the design approved by the FAA before it could be produced.[232] Significantly, the majority acknowledged the manufacturer could not alter the engine's type certificate and carburetor design without FAA approval.[233] However, the majority then concluded the manufacturer was "not stuck with the design initially adopted and approved" by the FAA.[234]

To the majority, the summary judgment record, viewed in a light most favorable to Sikkelee, suggested that the manufacturer: (1) received approval for prior type-certificate amendments, and (2) repeatedly communicated with the FAA about purported carburetor issues in the field, but (3) did not seek FAA approval to amend the type certificate to address those purported issues.[235] Given its view of these distinct facts, the majority concluded that compliance with both federal and state law was not "impossible."[236]

The dissent would have applied impossibility preemption.[237] It explained that the Supreme Court, in its previous decisions in *Wyeth*, *PLIVA*, and *Bartlett*, had created a bright-line rule that, "when federal regulations prohibit a manufacturer from altering its product without prior agency approval, state-law claims imposing a duty to make a different, safer product are pre-

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[229] Sikkelee v. Precision Airmotive Corp., 907 F.3d 701, 704 (3d Cir. 2018), *reh'g denied*, (Dec. 11, 2018), *cert. denied* Avco Corp. v. Sikkelee, No. 18-1140, 2020 WL 129536 (U.S. Jan. 13, 2020).

[230] *Id.*

[231] *See generally* Avco Corp. v. Sikkelee, 139 S. Ct. 2765 (2019).

[232] *Sikkelee*, 907 F.3d at 711–12, 716.

[233] *Id.* at 713.

[234] *Id.*

[235] *Id.* at 714.

[236] *Id.*

[237] *Id.* at 717.

empted."[238] The dissent explained that in the aviation context, manufacturers cannot make design changes without FAA approval, meaning conflict preemption rightly applied.[239]

Avco Corporation petitioned the Supreme Court for a writ of certiorari on March 1, 2019.[240] Jill Sikkelee waived her response,[241] and both parties filed blanket consents.[242] In late April 2019, seven entities filed amicus briefs.[243] Respondent filed her opposition on May 22, 2019.[244] Avco filed a reply June 4, 2019.[245]

On June 24, 2019, the Court asked the Solicitor General for his views on whether the FAAct preempts state law claims alleging that a product's design was defective, i.e., applying impossibility preemption.[246] But, on January 13, 2020, the Supreme Court denied the petition for a writ of certiorari.[247] It appears compliance with both federal and state law was not "impossible."

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[238] *Id.* at 720 (citing Mut. Pharm. Co. v. Bartlett, 570 U.S. 472 (2013); PLIVA, Inc. v. Mensing, 564 U.S. 604 (2011); Wyeth v. Levine, 555 U.S. 555 (2009)).

[239] *Id.* at 722–23.

[240] Petition for Writ of Certiorari, Avco Corp. v. Sikkelee, 139 S. Ct. 2765 (2019), 139 S. Ct. 2765 (No. 18-1140), 2019 WL 1058108.

[241] Waiver of Right of Respondent Jill Sikkelee to Respond, *Sikkelee*, 139 S. Ct. 2765 (No. 18-1140) (Mar. 4, 2019).

[242] Blanket Consent Filed by Respondent, Jill Sikkelee, *Sikkelee*, 139 S. Ct. 2765 (No. 18-1140) (Mar. 19, 2019); Blanket Consent Filed by Petitioner, Avco Corp., *Sikkelee*, 139 S. Ct. 2765 (No. 18-1140) (Mar. 12, 2019).

[243] Brief of Aerospace Industries Ass'n of America as Amicus Curiae in Support of Petitioner, *Sikkelee*, 139 S. Ct. 2765 (No. 18-1140), 2019 WL 1787622; Brief of Amicus Curiae Airbus Americas, Inc. in Support of Petitioner, *Sikkelee*, 139 S. Ct. 2765 (No. 18-1140), 2019 WL 1787623; Brief of DRI – The Voice of the Defense Bar as Amicus Curiae Supporting Petitioners, *Sikkelee*, 139 S. Ct. 2765 (No. 18-1140), 2019 WL 1858779; Brief of Garmin Int'l as Amicus Curiae in Support of Petitioner, *Sikkelee*, 139 S. Ct. 2765 (No. 18-1140), 2019 WL 1787620; Brief of Amicus Curiae General Aviation Manufacturers Ass'n in Support of Petition for Writ of Certiorari, *Sikkelee*, 139 S. Ct. 2765 (No. 18-1140), 2019 WL 1916147; Brief of the Product Liability Advisory Council, Inc. et. al. as Amici Curiae in Support of Petitioner, *Sikkelee*, 139 S. Ct. 2765 (No. 18-1140), 2019 WL 178762; Brief for the United States as Amicus Curiae, *Sikkelee*, 139 S. Ct. 2765 (No. 18-1140), 2019 WL 6726852.

[244] Brief in Opposition, *Sikkelee*, 139 S. Ct. 2765 (No. 18-1140), 2019 WL 2226017.

[245] Reply Brief for Petitioner, *Sikkelee*, 139 S. Ct. 2765 (No. 18-1140), 2019 WL 2370281.

[246] *Sikkelee*, 139 S. Ct. 2765.

[247] Avco Corp. v. Sikkelee, No. 18-1140, 2020 WL 129536 (U.S. Jan. 13, 2020).

B. The Airline Deregulation Act of 1978

A hot topic of preemption litigation under the 1978 Airline Deregulation Act (ADA) in 2019 was state employee laws versus federal preemption. Two cases came before their respective circuits but ended in differing outcomes. In *Air Transportation Ass'n of America v. Washington Department of Labor*, the court held that Washington's Paid Sick Leave Law (WPSLL) is not preempted by the ADA because the law does not "sufficiently impact the rate, routes, or services offered by the airlines."[248] The law required that the airlines give its employees based in Washington a certain amount of paid sick leave each year.[249] Because the airlines could not show that this actually impacted consumers or the prices of tickets, the court held that WPSLL can be applied to flight crew employees.[250]

In contrast, in *Brindle v. Rhode Island*, Rhode Island's Sunday and holiday pay schedules *were* preempted by the ADA.[251] Rhode Island's law that governed Sunday and holiday pay was found to be sufficiently "related to" price, route, or service of air carrier, and thus, was expressly preempted by the ADA.[252] The Rhode Island law would require airlines to pay Sunday and holiday premium time to its Rhode Island workers, which would increase the airline's labor costs.[253] This, in turn, would "affect the customer service that [was] provided" at the airports and cause the airline "to modify the services that it provide[d] on those particular days" so as to significantly impact prices, routes, or services.[254]

The decisions in both cases were appealed: *Air Transportation* to the Ninth Circuit,[255] and *Brindle* to the Supreme Court.[256] However, on January 13, 2020, the Supreme Court denied certiorari in *Brindle*.[257]

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[248] Air Transp. Ass'n of Am. v. Wash. Dep't of Lab. & Indus., 410 F. Supp. 3d 1162, 1166 (W.D. Wash. 2019).

[249] *Id.*

[250] *Id.* at 1179.

[251] Brindle v. R.I. Dep't of Lab. & Training, 211 A.3d 930, 931 (R.I. 2019), *cert. denied*, 140 S. Ct. 908 (2020).

[252] *Id.* at 935, 937–38.

[253] *Id.* at 933.

[254] *Id.*

[255] Filing of Appeal, Air Transp. Ass'n of Am. v. Wash. Dep't of Lab. & Indus. (9th Cir. Nov. 8, 2019) (No. 19-35937), ECF No. 1.

[256] Petition for Writ of Certiorari, Brindle v. Delta Airlines, Inc., 140 S. Ct. 908 (2020) (No. 19-352), 2019 WL 4464065.

[257] Brindle v. Delta Airlines, Inc., 140 S. Ct. 908 (2020).

In *Covino v. Spirit Airlines*, plaintiff Covino, pro se, sued Spirit Airlines (Spirit) because a flight attendant allegedly yelled at her and would not let her use the lavatory on a flight from Las Vegas to Boston in April 2017.[258] Covino sued for emotional distress.[259] Spirit moved to dismiss the state claims based on preemption.[260] The court agreed with Spirit, and held that "Covino's claims of emotional distress based on the flight attendant's behavior toward her [were] inextricably related to the flight attendant's denial of an airline service."[261] Thus, Covino's claims were preempted by the ADA, and Spirit's motion to dismiss was granted.[262]

In *Hughes v. Southwest Airlines Co.*, Hughes sued Southwest Airlines (Southwest) for canceling his flight because they ran out of de-icing fluid.[263] Hughes subsequently brought this putative class action lawsuit alleging breach of contract and negligence and seeking consequential damages on behalf of all Southwest customers whose flights were similarly canceled on the day of his flight, as well as on other days.[264] The court held that the claims were preempted by the ADA, and dismissed that cause of action.[265] However, the court left the door open to Hughes (and his class) by stating that the breach of contract claim could be repleaded.[266] Hughes filed an amended complaint realleging breach of contract, and Southwest again moved to dismiss.[267]

The court found that Hughes again had failed to sufficiently plead the elements necessary to assert a claim for breach of contract.[268] Moreover, he failed to state a claim upon which relief may be granted, and the court determined that, after his second bite at the apple, further leave to amend the complaint would be futile.[269] The court granted Southwest's motion to dismiss and dismissed the amended complaint *with prejudice*.[270]

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[258] Covino v. Spirit Airlines, Inc., 406 F. Supp. 3d 147, 149 (D. Mass. 2019).

[259] *Id.*

[260] *Id.*

[261] *Id.* at 151.

[262] *Id.* at 154.

[263] Hughes v. Sw. Airlines Co., No. 18 C 5315, 2019 WL 1375927, at *1 (N.D. Ill. Mar. 26, 2019).

[264] *Id.*

[265] *Id.*

[266] *Id.* at *3.

[267] Hughes v. Sw. Airlines, 409 F. Supp. 3d 653, 655 (N.D. Ill. 2019).

[268] *Id.*

[269] *Id.*

[270] *Id.*

In *Dolan v. JetBlue*, an airline customer brought a putative class action against JetBlue alleging violations of the Florida Deceptive and Unfair Trade Practices Act (FDUPTA), unjust enrichment, and Racketeer Influenced and Corrupt Organizations Act (RICO) violations arising out of JetBlue keeping a portion of the fee charged for trip insurance sold on its website.[271] JetBlue filed a motion to dismiss.[272] The district court allowed the claims to proceed because the ADA does not preempt unjust enrichment and FDUTPA claims.[273]

In *Scarlett v. Air Methods Corp.*, patients filed a putative class action against air ambulance service providers, Air Methods Corporation and Rocky Mountain Holdings, LLC, to recover excess payments they had allegedly made.[274] The "United States intervened."[275] The U.S. District Court for the District of Colorado dismissed the complaints, and the patients appealed.[276] The Tenth Circuit held, among other holdings, that the air ambulance providers "[could] raise the ADA's preemption provision as a defense" since they qualified as "air carriers"; thus, the ADA's preemption provision "[did] not prohibit [the] court from declaring that . . . no express or implied-in-fact contracts were formed," and that the patient's "unjust enrichment claim [was] pre-empted by the ADA."[277]

C. The Air Carrier Access Act

Haxton v. American Airlines, Inc. involved Air Carrier Access Act (ACAA) preemption in the context of common law negligence and statutory civil rights causes of action under California law.[278] The plaintiff, an elderly woman with mobility problems, alleged that, over her protest, an AA ticket counter agent at Los Angeles International Airport (LAX) instructed her to surrender her personal wheelchair to be checked as baggage.[279] An attendant transported her to the gate in an airport wheelchair but insisted on leaving her there without the wheelchair.[280] Feeling dehy-

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[271] Dolan v. JetBlue Airways Corp., 385 F. Supp. 3d 1338, 1342 (S.D. Fla. 2019).
[272] *Id.*
[273] *Id.* at 1346.
[274] Scarlett v. Air Methods Corp., 922 F.3d 1053, 1057 (10th Cir. 2019).
[275] *Id.* at 1058.
[276] *Id.*
[277] *Id.* at 1061, 1068.
[278] Haxton v. Am. Airlines, Inc., No. 2:18-cv-10287-RGK-PLA, 2019 WL 4284513, at *1 (C.D. Cal. June 18, 2019).
[279] *Id.*
[280] *Id.*

drated sometime later, she fell while hobbling to a nearby kiosk for some water.[281]

The plaintiff asserted causes of action for negligence as well as breach of California's Unruh Civil Rights Act and Disabled Persons Act.[282] The court noted that, in the Ninth Circuit, the ACAA and its pervasive implementing regulations preempt the standard of care that an airline owes to a disabled passenger (like the plaintiff).[283] However, a disabled passenger can nonetheless proceed with a state law remedy by alleging that the airline breached a duty owed under the ACAA and its regulations.[284] The court found that the plaintiff pled a plausible claim for negligence by alleging that AA had violated the regulation permitting a passenger to bring a manual, collapsible wheelchair into the aircraft cabin.[285] However, the court held that the alleged violations of the regulations failed to state claims under the state civil rights statutes.[286]

Dilldine v. American Airlines addressed preemption under the ACAA.[287] After AA allegedly destroyed Dilldine's medications, Dilldine sued for negligence and breach of contract.[288] The court held that Dilldine's breach of contract claim was allowed under AA's contract of carriage, but the negligence cause of action was dismissed due to the ACAA.[289]

In *Mennella v. American Airlines*, a disabled passenger was denied drinks or help in first-class.[290] His reaction allegedly led to a diverted landing and arrest upon landing.[291] Plaintiff claimed that he should have been provided help with his wheelchair and sued for negligence for his unspecified "injury."[292] However, the court held that claiming an unspecified injury is not strong enough to survive preemption.[293]

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[281] *Id.*

[282] *Id.*

[283] *Id.* at *2.

[284] *Id.* at *3.

[285] *Id.* at *2–3.

[286] *Id.* at *4.

[287] Dilldine v. Am. Airlines Inc., No. 3:18-cv-178, 2019 WL 3821789, at *1 (S.D. Ohio Aug. 15, 2019).

[288] *Id.* at *1–2.

[289] *Id.* at *4.

[290] Mennella v. Am. Airlines, Inc., No. 17-21915-CIV, 2019 WL 1429636, at *1 (S.D. Fla. Mar. 29, 2019).

[291] *Id.* at *2.

[292] *Id.* at *6.

[293] *Id.* at *8.

IV. 737 MAX LEGAL DEVELOPMENTS

Two accidents involving the same model aircraft, The Boeing Company (Boeing) 737-8 aircraft (in conjunction with 737-9 model, the 737 MAX) have led to a number of lawsuits for wrongful death of the passengers and crew, lost earnings of pilots at affected airlines, and lawsuits pleading other forms of damages.[294] The investigations of the accidents and the various lawsuits present a number of interesting legal issues that could have an effect on future FAA regulatory action, congressional oversight, and lawsuits that concern aircraft type certification and safety assessments.

First, all three branches of government are involved in the investigations of the accidents: Executive (FAA and National Transportation Safety Board (NTSB)), Legislative (House of Representatives Committee on Transportation, among others), and Judicial (lawsuits filed for both accidents).[295] This dynamic has created an active cross-pollination of data between these various branches of government. Additionally, the various types of lawsuits filed create unusual issues with respect to collateral use of evidence, admissions, and verdicts from some cases being introduced in other cases. While all the lawsuits find a genesis in the two accidents, the theories of liability, causes of action, and forms of relief differ dramatically.

The first accident involved a 737 MAX that crashed on October 29, 2018, during operation by PT Lion Mentari Airlines (Lion Air) over the Java Sea near Indonesia.[296] All 184 passengers and five crewmembers were killed.[297] There were no survivors.[298] A second accident involving the same model aircraft occurred March 10, 2019, during an Ethiopian Airlines (EA) flight, which crashed approximately six minutes after takeoff

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[294] Sinéad Baker, *Here Are All the Investigations and Lawsuits that Boeing and the FAA are Facing After the 737 Max Crashes Killed Almost 350 People*, BUS. INSIDER (June 24, 2019), https://www.businessinsider.com/boeing-737-max-crisis-list-lawsuits-investigations-faces-faa-2019-5 [https://perma.cc/KM4E-VS7E].

[295] *Id.*

[296] NAT'L TRANSP. SAFETY BD., SAFETY RECOMMENDATION REPORT, ASSUMPTIONS USED IN THE SAFETY ASSESSMENT PROCESS AND THE EFFECTS OF MULTIPLE ALERTS AND INDICATIONS ON PILOT PERFORMANCE 2 (Sept. 19, 2019) [hereinafter NTSB MCAS REPORT], https://www.ntsb.gov/investigations/AccidentReports/Reports/ASR1901.pdf [https://perma.cc/JBT5-HXP2].

[297] *Id.*

[298] *Id.*

from Addis Ababa, Ethiopia.[299] All 149 passengers and eight crewmembers were killed.[300]

The 737 MAX was equipped with a Maneuvering Characteristics Augmentation System (MCAS).[301] That system has become the focus of the investigation into the crashes.[302] The NTSB has found that MCAS appears to have been responsible for changing the attitude of both aircraft when no correction was warranted.[303] The root cause of that change in attitude may have been sensors designed to measure angle of attack (AOA) that appear to have malfunctioned.[304]

Within ten days of the Lion Air crash, the FAA issued Emergency Airworthiness Directive No. 2018-23-51 (AD No. 2018-23-51).[305] AD No. 2018-23-51 noted an analysis by Boeing of the "potential for repeated nose-down trim commands of the horizontal stabilizer" if one AOA sensor provided an erroneously high input to the flight control system.[306] The FAA stated that—if not addressed—the condition "could cause the flight crew to have difficulty controlling the airplane, and lead to excessive nose-down attitude, significant altitude loss, and possible impact with terrain."[307] AD No. 2018-23-51 required a revision of the certificate limitations and revisions to the flight manual in the event of a need for "runaway horizontal stabilizer trim procedures."[308]

The day after the EA crash, on March 11, 2019, the FAA issued a Continued Airworthiness Notification to the International Community.[309] This message did not ground the 737 MAX aircraft.[310] The FAA stated that some sources were noting

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[299] *Id.* at 3.

[300] *Id.*

[301] *Id.* at 1, 4.

[302] Natalie Kitroeff et al., *The Roots of Boeing's 737 Max Crisis: A Regulator Relaxes Its Oversight*, N.Y. TIMES (July 27, 2019), https://www.nytimes.com/2019/07/27/business/boeing-737-max-faa.html [https://perma.cc/VP59-AHSY].

[303] *Id.* at 3–4.

[304] *Id.*

[305] FED. AVIATION ADMIN., AD NO. 2018-23-51, EMERGENCY AIRWORTHINESS DIRECTIVE (Nov. 7, 2018), https://www.flightradar24.com/blog/wp-content/uploads/2018/10/2018-23-51_Emergency.pdf [https://perma.cc/R8J8-3D97].

[306] *Id.*

[307] *Id.*

[308] *Id.*

[309] FED. AVIATION ADMIN., CONTINUED AIRWORTHINESS NOTIFICATION TO THE INTERNATIONAL COMMUNITY (Mar. 11, 2019), https://www.faa.gov/news/updates/media/CAN_2019_03.pdf [https://perma.cc/8RRC-SBDW].

[310] *Id.*

similarities between the Lion Air and EA losses but that the FAA had not yet reached that conclusion.[311] The FAA noted the steps it had undertaken subsequent to the Lion Air loss.[312]

On March 25, 2019, the European Union (EU) Aviation Safety Agency (EASA) issued Emergency Airworthiness Directive 2019-0051-E that grounded the 737 MAX model aircraft in all EU countries.[313] EASA also issued Safety Directive 2019-01 (SD 2019-01), which forbid any flights of 737 MAX aircraft in EU airspace by any operator, regardless of country of origin.[314] SD 2019-01 noted the FAA actions to date.[315] EASA said that it could not exclude that similar causes led to the crash of the two flights and for that reason was grounding the 737 MAX within EU airspace.[316]

Three days following the EA crash, the FAA issued an Emergency Order of Prohibition that both grounded 737 MAX aircraft for U.S. certified operators and prohibited any other entity to operate the aircraft in the United States.[317] The order allowed non-passenger ferry flights by special flight permits only.[318] That Emergency Order remains in effect as of the time of submission of this article.[319]

A number of lawsuits were filed in federal court in the Northern District of Illinois arising from the two losses.[320] Boeing maintains its corporate headquarters in Illinois, which is the basis for the venue selection and for assertions of personal jurisdic-

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311 *Id.*

312 *Id.*

313 EUR. UNION AVIATION SAFETY AGENCY, AD 2019-0051-E, EMERGENCY AIRWORTHINESS DIRECTIVE 1–2 (Mar. 25, 2019), https://ad.easa.europa.eu/ad/2019-0051R1 [https://perma.cc/2V2W-MJL9].

314 EUR. UNION AVIATION SAFETY AGENCY, SD 2019-01, SAFETY DIRECTIVE 2 (Mar. 12, 2019), https://ad.easa.europa.eu/ad/SD-2019-01 [https://perma.cc/67LS-D2LK].

315 *Id.* at 1.

316 *Id.*

317 FED. AVIATION ADMIN., EMERGENCY ORDER OF PROHIBITION 1 (Mar. 13, 2019), https://www.faa.gov/news/updates/media/Emergency_Order.pdf [https://perma.cc/NRV2-CA99].

318 *Id.* at 2.

319 The FAA issued a Continued Airworthiness Directive on March 20, 2019, that followed the grounding order. FED. AVIATION ADMIN., CONTINUED AIRWORTHINESS NOTIFICATION TO THE INTERNATIONAL COMMUNITY (Mar. 20, 2019), https://www.faa.gov/news/updates/media/CAN-2019-05.pdf [https://perma.cc/5NKU-XBRP].

320 Baker, *supra* note 294.

tion in that district.[321] The Lion Air lawsuits consist of multiple complaints filed by various law firms representing passenger estates.[322] The EA lawsuits have also been filed in the same court and consolidated.[323] Discovery is underway in these cases, primarily in the form of voluntary document exchanges among the parties.[324] Plaintiffs in the EA crash cases recently expressed in a joint status report their intent to file a master complaint, which each plaintiff can then endorse as it chooses.[325] The defendants, presently Boeing and Rosemount Aerospace, will file master answers thereafter.[326]

Boeing has not filed a forum non conveniens (FNC) motion in either of the two sets of cases.[327] Boeing representatives did say at an early stage of the Lion Air cases in 2019 that it would consider a motion to dismiss on that basis.[328] No passenger on the Lion Air flight was a U.S. resident. Eight passengers on the EA flight were U.S. residents.

At recent hearings in the U.S. House of Representatives, the President of Boeing was asked about his intentions to seek a dismissal of the Lion Air cases based on FNC—he responded that he was not aware of the company's legal strategy in this regard.[329] The Chairperson of the House Committee on Infra-

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321 David E. Rapoport & Keith Jacobson, *Will Boeing's Recent Move to Chicago Mean That More Commercial Airliner Crash Cases Will Be Litigated There?*, 2001 ISSUES AVIATION L. & POL'Y 22201, 22209 (2003).

322 *See, e.g.*, Complaint, Rosita v. Boeing Co., No. 19-cv-05973 (N.D. Ill. Sept. 6, 2019).

323 Consolidation Order, *In re* Ethiopian Airlines Flight ET 302 Crash, No. 1:19-cv-02170 (N.D. Ill. Oct. 16, 2019), ECF No. 513.

324 *See, e.g.*, Docket, *In re Ethiopian Airlines*, No. 1:19-cv-02170, ECF Nos. 547, 569, 741.

325 *Id.* at ECF No. 568; *see also* Amended Joint Status Report, *In re Ethiopian Airlines*, No. 1:19-cv-02170, ECF No. 567.

326 Amended Joint Status Report at 15, *In re Ethiopian Airlines*, No. 1:19-cv-02170, ECF No. 567.

327 Docket, *In re Ethiopian Airlines*, No. 1:19-cv-02170, *passim*.

328 Press Release, Rep. Peter DeFazio, House Comm. on Transp. & Infrastructure, Following Recent Hearing on the Boeing 737 MAX (Nov. 15, 2019) [hereinafter DeFazio Press Release], https://transportation.house.gov/news/press-releases/following-recent-hearing-on-the-boeing-737-max-chair-defazio-presses-boeing-ceo-for-additional-information-about-decisions-on-mcas-grounding-the-aircraft-ceo-pay-boeings-legal-strategy-and-more-[https://perma.cc/2Z6G-44ZV].

329 Sinéad Baker, *Boeing's CEO was at a Loss for Words When He Got Hammered Over Attempts to Move Lawsuits from 737 Max Victims' Relatives to Indonesia*, BUS. INSIDER (Oct. 31, 2019), https://www.businessinsider.com/boeing-ceo-congress-grilled-moving-737-max-cases-indonesia-2019-10 [https://perma.cc/85AP-R8QW].

structure has followed up with a series of written questions to Boeing, which include the FNC issue.[330] This creates an unusual situation for a defendant in a civil case, where another branch of government is trying to use its subpoena power to compel answers that would disclose the defendant's legal strategy. Typically, those queries would not be permitted by an adversary in a lawsuit due to the attorney work–product doctrine and attorney–client privilege.

In light of the congressional investigation and oversight of the FAA, as well as the FAA investigation of these two accidents, the plaintiffs in the EA lawsuit have issued demands that cross over to these branches of government.[331] Plaintiffs have demanded all data that Boeing produced to Congress.[332] Boeing has reserved its rights to oppose producing all data it sent to Congress and has agreed to produce "relevant documents."[333] Plaintiffs also demanded all data that Boeing exchanged with the FAA during its investigation.[334] Boeing has countered with agreeing to relevant and "non-privileged correspondence and documents exchanged between Boeing and the FAA regarding the 737 Max from October 29, 2018 to March 10, 2019."[335]

Boeing faces other lawsuits that could create similar issues of disclosure, admissions, and ultimately collateral estoppel with regard to the wrongful death cases. For example, the union for Southwest pilots (SWAPA) filed a lawsuit in Texas state court at Dallas County (later removed to federal court) in which it alleges damages to all pilots employed by the airline due to the grounding.[336] It alleges that Southwest was the single largest user of the 737 MAX before the grounding.[337] The removal petition states that federal law preempts state law because the collective bargaining agreement of the union is governed exclusively by federal statutes.[338]

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330 *See* DeFazio Press Release, *supra* note 328, at 9.

331 *See* Amended Joint Status Report at 4, *In re Ethiopian Airlines*, No. 1:19-cv-02170, ECF No. 567.

332 *Id.*

333 *Id.* at 5.

334 *Id.* at 4.

335 *Id.* at 10.

336 Notice of Removal at 2, 6, Sw. Airlines Pilots Ass'n v. Boeing Co., No. 3:19-cv-02680-N (N.D. Tex. Nov. 8, 2019), ECF No. 1.

337 *Id.* at 4.

338 *Id.*

Additionally, a number of shareholder derivative actions were filed by owners of Boeing stock.[339] The lawsuits claim that the representations of Boeing executives misled the investors and caused them financial losses.[340] A similar lawsuit was recently filed against Boeing directors by one family that appears to seek more than just money damages and perhaps a change in management personnel.[341] These lawsuits will focus on what the Boeing executives stated to the public at various junctures, whether those representations were false or misleading, and if the company knew or had reason to know the accuracy of its statements.[342] Those findings could be used in the other lawsuits to varying degrees in the form of deposition testimony, admissions, and ultimately a trial verdict, if the jury responds to specific questions that have application in the related cases.

Some of the complaints pleaded involvement by the FAA in the certification process for the aircraft and allocate some fault to the FAA for allegedly insufficient critical review of MCAS.[343] This supposedly was due in part to a lack of FAA personnel with the necessary pilot credentials to provide critical analysis of the operational aspects of MCAS as it relates to pilot reaction and interface with other aircraft systems.

Suing the U.S. government requires satisfying procedural requirements. The Federal Tort Claims Act allows lawsuits against the United States and its agencies (e.g., Department of Transportation or FAA) for negligence claims in the same manner as private individuals, including for officials who act in the course of their work.[344] An exception exists, however, if an official was exercising discretion in their decisions, even if they abuse that discretion.[345] Suing the FAA would require plaintiffs to establish that the FAA did not exercise its discretion with regard to the 737 MAX design approval process.[346]

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[339] *E.g.*, Complaint, Seeks v. Boeing Co., No. 1:19-cv-02394 1 (N.D. Ill. Apr. 9, 2019), ECF No. 1.

[340] *Id.* at 22.

[341] Docket Report, Kirby Family Partnership v. Boeing Co., No. 2019-0907 (Del. Ch. Nov. 18, 2019).

[342] Complaint at 10–24, *Seeks*, No. 19-cv-02394, ECF No. 1.

[343] Consolidated Class Action Complaint at ¶ 53, *In re* Boeing Co. Aircraft, No. 1:19-cv-03394, 2020 WL 1026354 (N.D. Ill. Feb. 14, 2020).

[344] 28 U.S.C. § 2674 (2018).

[345] *Id.* § 2680(a) (2018).

[346] Marisa Garcia, *Why Fixing FAA Aircraft Safety Certification is Not a Matter of Money*, FORBES (Mar. 29, 2019), https://www.forbes.com/sites/marisagarcia/

A number of governmental bodies have been involved in the investigation of the cause(s) of these two accidents. The NTSB issued a Safety Recommendation Report on September 19, 2019.[347] The report is entitled Assumptions Used in the Safety Assessment Process and the Effects of Multiple Alerts and Indications on Pilot Performance.[348] The NTSB report addresses whether Boeing complied with certain federal regulations and the advice of FAA advisory circulars with respect to predicting the likely outcome of a failure of a system accompanied by multiple alerts or other prompts that require pilot attention, consideration, and potential action.[349] The NTSB concluded that Boeing's assessment of the effects of MCAS on pilots did not comply in that regard.[350]

The NTSB noted that both crashes (Lion Air and EA), as well as the preceding Lion Air flight "on the accident airplane with a different flight crew" all shared common attributes.[351] During rotation, the left (captain) stick shaker activated.[352] The left and right AOA sensors varied by about twenty degrees.[353] The left and right altitude and airspeed indicators also varied.[354] After flaps were retracted, an automated nose-down stabilizer trim input occurred of ten second duration.[355] The crew countered with manual inputs, but each time the automated system provided another nose-down trim input.[356]

On the incident prior to the Lion Air crash, the NTSB noted that the crew experienced the issue throughout the flight but was able to avoid a nose-down attitude of the magnitude experienced in the subsequent flight and the Ethiopian flight.[357] On the Lion Air crash, the NTSB said the Digital Flight Data Recorder (DFDR) captured more than twenty of these automated trim inputs in six minutes.[358]

2019/03/29/why-fixing-the-faa-designee-program-is-not-a-matter-of-money/#544d30c4220b [https://perma.cc/E7X7-XHZ6].

347 *See* NTSB MCAS REPORT, *supra* note 296, at 1 n.1.

348 *Id.* at 1.

349 *Id.*

350 *Id.* at 8.

351 *Id.* at 2–3.

352 *Id.* at 2.

353 *Id.*

354 *Id.*

355 *Id.*

356 *Id.* at 3.

357 *Id.*

358 *Id.* at 2.

Several federal regulations and advisory circulars concern the process for assessment of safety of newly implemented flight control systems. One regulation requires that the design of a "stability augmentation system" or other similar automated system allow for counteraction of certain specified failures without "exceptional pilot skill or strength" to deactivate or override the system.[359] Advisory Circular (AC) 25-7C touches on the same topic by noting a manufacturer should expect that a pilot will attempt to counter any short term changes to forces affecting flight path by re-trimming or changing configuration or flight conditions.[360] The NTSB said that Boeing predicted in its safety assessment that continuous "[u]nintended stabilizer inputs" (e.g. the type experienced on these accident flights) would be recognized by pilots as a runaway stabilizer or trim failure and the relevant manual "procedure for runaway stabilizer would be followed."[361]

The NTSB report concluded that the Boeing assessment of pilot reaction was erroneous because it did not consider "all the potential alerts and indications that could accompany a failure that also resulted in uncommanded MCAS operation."[362] The NTSB went on to say that the Boeing safety assessment did not evaluate "how the combined effects of alerts and indications might impact pilots' recognition of which procedure(s) to prioritize" when faced with an MCAS failure.[363]

As a result of this analysis, the NTSB report recommended two major action items: (1) that Boeing reassess the MCAS system failure modes with consideration of all alerts and indications in the cockpit in order to evaluate pilot likely reactions; and (2) that Boeing arrange for relevant system design enhancements and pilot training needed to account for the expected reactions of pilots in these circumstances.[364] The report also contained other recommendations, including coordination of these changes with EASA officials.[365]

As of the time of publication of this article, some lawsuits arising from the two crashes were reportedly settled. The grounding

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[359] 14 C.F.R. § 25.672(b) (2020).

[360] U.S. Dep't of Transp. Fed. Aviation Admin., AC No. 25-7C, Flight Test Guide for Certification of Transport Category Airplanes (2012).

[361] NTSB MCAS Report, *supra* note 296, at 6.

[362] *Id.* at 8.

[363] *Id.*

[364] *Id.* at 12.

[365] *Id.*

of all 737 MAX aircraft continues in the EU and in the United States.

V. PERSONAL JURISDICTION

There are two types of personal jurisdiction: general (all-purpose) and specific (case linked).[366] Both bases for jurisdiction have been revisited over the past several years by the U.S. Supreme Court. It has confirmed that general jurisdiction, absent an extreme exception, can be exercised in only two very narrow circumstances.[367] Specific jurisdiction has evolved as well through these recent decisions and now requires a close nexus between the actions complained of against the defendant and the forum state.[368]

These decisions are increasingly affecting the venue of aviation cases. Cases involving aircraft crashes historically have been filed in the state where the accident occurred. For a defendant with business in every major state, a plaintiff's prospect of obtaining personal jurisdiction over it was not very challenging. All of the usual rules changed for aviation lawyers once the U.S. Supreme Court revisited how its personal jurisdiction jurisprudence had evolved.

In *Daimler AG v. Bauman*, the Supreme Court redefined and effectively narrowed the parameters of general jurisdiction.[369] The case represented a sea change in personal jurisdiction jurisprudence and caused every state to re-examine its laws relating to "long-arm" jurisdiction so that the application of those laws remains within the bounds of the Due Process Clause to the Fourteenth Amendment of the U.S. Constitution (Due Process Clause).[370] The paradigm bases for general jurisdiction for a corporation are its place of incorporation and its principal place of business, each of which "have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable."[371] These bright-line rules afford plaintiffs "at least one clear and certain forum in which a corporate defendant may be sued on any and all claims."[372]

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[366] Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 137 S. Ct. 1773, 1779–80 (2017).

[367] *Id.* at 1780.

[368] *Id.*

[369] *See generally* Daimler AG v. Bauman, 571 U.S. 117 (2014).

[370] *Id.* at 121–22.

[371] *Id.* at 137.

[372] *Id.*

The Supreme Court held general jurisdiction cannot be exercised in every state where a corporation "engages in a substantial, continuous, and systematic course of business," a formulation the Court held would be "unacceptably grasping."[373] Otherwise, "'at home' would be synonymous with 'doing business' tests framed before specific jurisdiction evolved in the United States."[374]

Moreover, "the general jurisdiction inquiry does not focus solely on the magnitude of the defendant's in-state contacts. General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide."[375] "It is one thing to hold a corporation answerable for operations in the forum [s]tate . . . quite another to expose it to suit on claims having no connection whatever to the forum [s]tate."[376]

The Supreme Court's subsequent decision in *BNSF Railway Co. v. Tyrrell* cemented *Daimler*'s impact on jurisdictional jurisprudence.[377] The Court rejected jurisdiction over a defendant despite a long-arm statute directed to persons or companies "found in" the state.[378] Although the defendant had extensive personnel and property in the state, it was neither incorporated nor maintained its principal place of business there and consequently could not be subjected to in personam jurisdiction.[379]

The Supreme Court has also significantly narrowed the bases for specific jurisdiction over the past five years, but it remains a more fact-intensive two-step inquiry. First, a court must find that the long-arm statute of the forum state authorizes jurisdiction over the defendant.[380] Then, the court must find that the exercise of personal jurisdiction over the defendant accords with the constitutional requirements of the Due Process Clause.[381] Where the long-arm statute extends personal jurisdiction to the extent permitted by the Due Process Clause, the statutory inquiry necessarily merges with the constitutional inquiry, and the two inquiries become one.

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373 *Id.* at 138.

374 *Id.* at 139 n.20.

375 *Id.* (internal quotations and citations omitted).

376 *Id.* at 139 n.19.

377 *See generally* BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549 (2017).

378 *Id.* at 1558.

379 *Id.* at 1559.

380 *Id.* at 1588.

381 *Id.*

Specific personal jurisdiction can be exercised if a defendant's minimum contacts with the forum state form the basis for the claims in question.[382] The lynchpin for jurisdiction is whether the cause of action arises from the defendant's actions in the state.[383] In most states, it requires something more than "but for" causation, instead rising to the level of something akin to legal or proximate causation.

Many long-arm statutes retain wording that permits the exercise of jurisdiction even where a defendant allegedly has caused tortious injury through actions outside the state.[384] If a defendant regularly does or solicits business, or engages in a persistent course of conduct, or derives substantial revenue from goods used or services rendered in a state, those facts alone should no longer justify the exercise of personal jurisdiction where the acts at issue occur exclusively outside the forum.

In *Walden v. Fiore*, the Court emphasized that "the defendant's suit-related conduct must create a substantial connection with the forum [s]tate" based on (1) contacts between the defendant itself and the forum state, without regard to the connections between the plaintiff and the forum; and (2) defendant's contacts with the forum state itself, not with persons who reside there.[385] "[I]t is the defendant, not the plaintiff or third parties, who must create contacts with the forum [s]tate."[386] *Walden* relied on an earlier decision where the court held that an individual's contract with an out-of-state party alone cannot automatically establish sufficient minimum contacts to permit the exercise of personal jurisdiction.[387]

In *Bristol-Myers*, the Court rejected the California Supreme Court's affirmation of a sliding-scale method of assessing jurisdiction.[388] In the words of the majority, that approach of aggregating more contacts unrelated to the plaintiff was nothing more than a "loose and spurious form of general jurisdiction."[389] This one decision has been the most controversial of all

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[382] *Id.*

[383] *Id.* at 1561 (Sotomayor, J., concurring).

[384] *E.g.*, V.I. CODE ANN. tit. 5 § 4903 (2019).

[385] Walden v. Fiore, 134 S. Ct. 1115, 1121 (2014).

[386] *Id.* at 1125.

[387] *Id.* at 1122–25 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)).

[388] Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 137 S. Ct. 1773, 1781–82 (2017).

[389] *Id.* at 1781.

recent decisions with respect to the scope of its application in specific jurisdiction cases.[390]

The application of these decisions generally to aviation cases has been inconsistent. Some courts continue to rely upon cases—that are ten or more years older—from their own states or federal circuits as the legal basis for exercising personal jurisdiction.[391] Cases that predate *Daimler* and its progeny remain a source of authority for courts that want to resist implementation of the new constraints on personal jurisdiction set down by the Supreme Court. Other courts openly acknowledge the new regime and are not hesitant to reject personal jurisdiction as violative of due process rights.[392]

The Central District of California refused to exercise jurisdiction over an engine manufacturer that did not sell the subject engine in the forum.[393] The Court noted that the stream of commerce theory from *World-Wide Volkswagen v. Woodson* is now in doubt in light of more recent Supreme Court decisions.[394] It held that the sale of an engine in Tennessee to a third-party, who installed the engine and sold the aircraft, which eventually made its way to the forum state, does not satisfy the requirements for a causal connection that permits specific jurisdiction.[395]

In *Schaefer v. Synergy Flight Center*, the Illinois Appellate Court for the First District found jurisdiction over an engine overhaul company that performed no work in the forum on the subject engine.[396] The case relied on two prior Illinois Supreme Court decisions—one from 1961—as well as one U.S. Supreme Court decision, which was referenced only in passing.[397] While the *Schaefer* court quoted the wording cause of action "relates to defendant's [conduct in] the forum," the remainder of the deci-

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[390] Michael P. Daly, *Federal Courts Continue to Split Over Whether They Have Personal Jurisdiction Over Claims Brought by Non-Forum Class Members Against Non-Forum Defendants*, 9 NAT'L L. REV. 149 (2019), https://www.natlawreview.com/article/federal-courts-continue-to-split-over-whether-they-have-personal-jurisdiction-over [https://perma.cc/A3PK-BYES].

[391] *See, e.g.*, Schaefer v. Synergy Flight Ctr., 2019 IL 181779-U (Ill. App. Ct. May 13, 2019).

[392] *See, e.g.*, Perry v. Jabiru Aircraft Pty., No. LACV-17-8536-VAP, 2018 WL 6321643 (C.D. Cal. Aug 3, 2018).

[393] *Id.* at *1.

[394] *Id.* at *4 (citing World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980)).

[395] *Id.* at *3.

[396] *Schaefer*, 2019 IL 181779-U, at *1.

[397] *Id.* at *2.

sion never touched on explaining how that criterion was satisfied.[398] Instead, the court discussed how the defendant derived substantial revenue from the state and then sold a product that eventually made its way into the state.[399]

In a similar case, *Cessna Aircraft Co. v. Garcia*, the Texas Court of Appeals found jurisdiction over a defendant that manufactured a part one of its approved vendors installed in the forum state two years before the plaintiff's accident.[400] Cessna Aircraft (Cessna) was not in privity with plaintiffs and had performed no activity in Texas related to the crankshaft at issue.[401] Instead, it sold the part to a Cessna authorized service center and that entity installed the part.[402] The Court relied on Cessna's unrelated sales of aircraft that eventually are operated in Texas as a basis for exercising jurisdiction.[403]

The court in *Erwin-Simpson v. Berhad* rejected a plea of general jurisdiction over an airline based on its website and marketing activity in the forum.[404] The court held that no amount of marketing targeted at the forum would render the defendant "at home" in the forum.[405] For that reason, the court also denied jurisdictional discovery as an exercise in futility.[406]

Recently, in *Menard v. Textron Aviation Inc.*, a federal court in Wisconsin found jurisdiction over two defendants with regard to engines designed and manufactured outside the forum as well as serviced entirely outside the forum.[407] No contract between plaintiff and the defendants was signed in the forum.[408] The court relied heavily on a Seventh Circuit decision from 2010.[409] The *Menard* court found specific jurisdiction based in part on 274 unrelated engines from the manufacturer ending up in the forum.[410] The court found specific jurisdiction over the mainte-

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398 *Id.*

399 *Id.*

400 Cessna Aircraft Co. v. Garcia, No. 13-17-00259-CV, 2018 WL 6627602 (Tex. App.—Corpus Christi-Edinburg Dec. 19, 2018, pet. filed).

401 *Id.*

402 *Id.*

403 *Id.* at *4.

404 Erwin-Simpson v. Berhad, 375 F. Supp. 3d 8, 10–11, 19 (D.D.C. 2019).

405 *Id.* at 19–21.

406 *Id.* at 21.

407 Opinion and Order at 1–3, Menard v. Textron Aviation, Inc., No. 3:18-cv-00844 (W.D. Wisc. Oct. 24, 2019), ECF No. 57.

408 *Id.*

409 *Id. passim.*

410 *Id.* at 13.

nance, repair, and operating supplies (MRO) firm because it had been "subcontracted" by a company with an office in the forum.[411] The court held that the "arising out of" nexus for specific jurisdiction was satisfied in part by the MRO firm shipping a loaner engine into the forum for customer use during the overhaul.[412]

In federal court and in some state courts, a party cannot appeal the denial of a motion to dismiss for lack of personal jurisdiction until the case ends, absent a motion for leave to file an interlocutory appeal.[413] This delay renders an appeal somewhat of an illusory remedy for an arguably erroneous decision on personal jurisdiction. The parties will have devoted significant resources to litigate the merits of the case, only to seek a new trial in an alternate venue on the basis that jurisdiction was not permissible.

For the foreseeable future, we can expect to see many courts, both state and federal, continuing to apply prior law on personal jurisdiction in order to justify the denial of motions to dismiss. The single most challenging aspect of the change in the law for courts and litigants to absorb is the discounting in specific jurisdiction cases of extensive forum contacts that bear no relation to the product or service at issue. Those unrelated contacts were historically the forum activity that would result in sustaining even the most marginal of personal jurisdiction pleas. Changes of this magnitude in the law require time for lower courts to both absorb and apply these principles in a consistent manner.

VI. UNMANNED SYSTEMS

The legal landscape around unmanned systems is still a relatively new area, as the FAA only introduced Part 107 (Part 107) relating to the rules for operating Commercial Unmanned Aircraft Systems (UAS) in 2016.[414] Prior to the introduction of Part 107, the FAA was processing ad hoc Section 333 applications for commercial use of unmanned systems.[415] As such, the law related to unmanned systems is evolving and will in the future pre-

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411 *Id.* at 1–2, 4.

412 *Id.* at 3, 7.

413 *E.g.*, 28 U.S.C. § 1291–92 (2018).

414 14 C.F.R. § 107 (2016).

415 *What is the FAA 333 Exemption?*, DRONE PILOT GROUND SCHOOL, https://www.dronepilotgroundschool.com/kb/what-is-the-faa-333-exemption/ [https://perma.cc/ZTR5-9FHU].

sent many unique issues specific to unmanned systems versus manned flights, regarding operating rules—particularly beyond visual line of sight—and federal preemption.

Foletta v. Ellis, an unreported case from the Court of Appeals First District, Division 5 in California, draws a line that local government may not cross in regulating drone use before being preempted by federal authority.[416] This case arose from a dispute between neighbors and briefly touches on the issue of preemption.[417] After plaintiff, Foletta, reported his neighbor to county authorities for engaging in "unlicensed commercial activit[y]," Ellis began a series of harassing behaviors including flying a drone "at Foletta about six to ten feet over his head."[418] Foletta obtained a restraining order against Ellis which, in part, prohibited him from flying drones over Foletta's property.[419]

Ellis challenged the order, arguing that it was "invalid to the extent it prohibits him from flying drones . . . over the Foletta property because air space use is governed by the [FAA]."[420] The court evaluated "whether the federal government's regulation of air space generally is intended to preempt the authority of states to regulate harassment that involves that air space" and found that it did not.[421]

Additionally, in late November 2019, the FAA "announced two important expansions of the Low Altitude Authorization and Notification Capability (LAANC)."[422] The LAANC "automates the application and approval process for drone [pilots] to obtain airspace authorizations" in controlled airspace.[423] The FAA announced that the LAANC capability is now active at "Baltimore/Washington International Thurgood Marshall Airport, Dulles International Airport, William P. Hobby Airport in Houston and Newark Liberty International Airport."[424] As of March

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416 Foletta v. Ellis, No. A153079, 2019 WL 1091049, at *1–2 (Cal. Dist. Ct. App. Mar. 8, 2019).

417 *Id.*

418 *Id.* at *1.

419 *Id.* at *2.

420 *Id.*

421 *Id.*

422 FED. AVIATION ADMIN., LAANC DRONE PROGRAM EXPANSION CONTINUES 1 (last modified Dec. 2, 2019), https://www.faa.gov/news/updates/?newsId=94750 [https://perma.cc/TFD7-N3GP].

423 *Id.*

424 *Id.*

2020, seven additional companies have been approved by the FAA to provide LAANC services.[425]

LAANC "directly supports the safe integration of UAS into the nation's airspace, [and] expedites the time it takes for drone pilots to receive authorizations to fly under 400 feet in controlled airspace."[426] LAANC also provides pilots with an awareness of where they can and cannot fly. The program is "accessible to all pilots who operate under the FAA's small drone rule (Part 107)" and "was expanded in July to provide near real-time airspace authorizations to recreational flyers."[427] LAANC provides airspace authorizations only. Pilots must still check notices to airmen (NOTAMs) and weather conditions before they fly.

A. Proposed Rule Re: Remote Identification of Unmanned Aircraft Systems

The FAA issued a Notice of Proposed Rulemaking (NPRM) on December 31, 2019, concerning mandatory identification (ID) of Unmanned Aircraft Systems (UAS) by remote means.[428] The comment period ended on March 2, 2020.[429] The stated purpose is for both situational awareness of air traffic control managers and law enforcement.[430]

The current process for UAS registration is limited to a physical marking on the unmanned aircraft itself combined with filing a registration with the FAA.[431] The use of Automatic Dependent Surveillance-Broadcast (ADS-B) and radio communications with FAA air traffic control (ATC) were considered and rejected due to the saturation of the available radio frequencies by the high number of UAS.[432]

The FAA proposes a three-year phase-in for the new remote ID technology.[433] Manufacturers of UAS would be required to integrate a remote ID system into each unmanned aircraft with

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425 *Id.*

426 *Id.* at 2.

427 *Id.*

428 Remote Identification of Unmanned Aircraft Systems, 84 Fed. Reg. 72438-01 (Dec. 31, 2019).

429 *Id.*

430 *Id.* at 72438–40.

431 *Id.* at 72439–40.

432 *Id.*

433 *Id.* at 72439.

a compatibility as required by the FAA.[434] Each system would need to (1) allow a remote ID message in near real time with the FAA; (2) secure the remote ID data; (3) meet FAA contractually required technical parameters; and (4) inform the FAA when the system is active or inactive.[435]

The NPRM applies to both recreational and commercial use UAS.[436] Operators would be obliged to follow the remote ID requirements, regardless of who owns the UAS.[437]

B. Aeronautical Knowledge and Safety Test

> The FAA's Reauthorization Bill introduced new rules for how, when, and where you can fly your drone for recreational purposes. . . . The law requires that all recreational flyers must pass a knowledge and safety test. . . . The knowledge test is being developed in three phases: (1) Test Content—the FAA, with input from drone stakeholders has developed the content for the knowledge test; (2) Development of requirements for knowledge test administrators with input from the drone community; [and] (3) Selection of knowledge test administrators—anticipated early 2020.[438]

In mid-September, "the FAA issued a Request for Information (RFI) seeking input from stakeholders on aeronautical knowledge and safety test administration requirements that the agency will apply to future knowledge test administrators."[439] Based on those responses, the FAA "selected stakeholders to make recommendations on the administration of the test," which "will assist the agency in developing requirements that potential test administrators must meet through an onboarding process."[440] The FAA also invited several organizations "to provide input to the aeronautical knowledge and safety test administration requirements."[441] The results will be announced on www.faa.gov.[442]

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434 *Id.* at 72460–61.

435 *Id.* at 72422.

436 *Id.* at 72439.

437 *Id.* at 72440.

438 Fed. Aviation Admin., Aeronautical Knowledge and Safety Test Updates 1 (Dec. 9, 2019), https://www.faa.gov/uas/recreational_fliers/knowledge_test_updates/ [https://perma.cc/YJ9V-W7QF].

439 *Id.*

440 *Id.*

441 *Id.* at 2.

442 *Id.* at 1.

VII. DUE PROCESS

Several decisions came down in 2019 related to personal liberties before and in flight. In *Abdi v. Wray*, an airplane passenger sued the directors of several federal agencies in a challenge to his placement on the federal government's terrorist watch list.[443] Plaintiff alleged that he was subjected to "enhanced screening measures," and that his status as a known or suspected terrorist was disseminated "to state and local authorities, foreign governments, corporations, private contractors, airlines, gun sellers, car dealerships, financial institutions, among other official and private entities and individuals."[444] Plaintiff alleged that all of those actions violated his Fifth Amendment rights to substantive and procedural due process and the Administrative Procedure Act.[445] Plaintiff sought declarative and injunctive relief.[446]

The U.S. District Court for the District of Utah granted defendants' motion to dismiss for failure to state a claim.[447] Plaintiff appealed.[448] The Tenth Circuit Court of Appeals applied a fundamental-rights approach to assess the substantive due process claim.[449] It held that (1) plaintiff's allegations did not "state[ ] a substantive due process claim, because [the] impediments [did] not substantially interfere with his ability to travel"; (2) "the government's conduct did *not* deprive [plaintiff] of a liberty interest in travel" in violation of procedural due process; and (3) plaintiff failed to "plausibly state a procedural due process claim under" the "stigma-plus standard," meaning that plaintiff failed to plead (a) the utterance of a statement sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she claims is false, and (b) a material state-imposed burden or state-imposed alteration of the plaintiff's status or rights.[450]

In *Kashem v. Barr*, several U.S. citizens alleged that their inclusion on the No Fly List—"which prohibit[ed] them from boarding commercial aircraft flying to, from, or within United States or through United States airspace"—violated the Due Process

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[443] Abdi v. Wray, 942 F.3d 1019, 1023 (10th Cir. 2019).

[444] *Id.* at 1024.

[445] *Id.* at 1024–25.

[446] *Id.* at 1024.

[447] *Id.*

[448] *Id.*

[449] *Id.* at 1026.

[450] *Id.* at 1024–25, 1031–32, 1033–34 (emphasis added).

Clause.[451] The U.S. District Court for the District of Oregon entered summary judgment in the government's favor.[452] Plaintiffs appealed.[453]

The Ninth Circuit held that: (1) the criteria used to determine whether to place these individuals on the No Fly List were not unconstitutionally vague because the individuals "had fair notice that *his conduct* would raise suspicion under the criteria";[454] (2) the "No Fly List criteria [used by the Terrorist Screening Center (TSC) were] governed by constitutionally sufficient standards . . . as applied";[455] (3) the government's use of "the reasonable suspicion standard satisfies procedural due process" in determining whether to place individuals on No Fly List;[456] (4) the government's failure to provide a complete list of reasons for including plaintiffs on the No Fly List did not violate the Due Process Clause;[457] (5) the letter notifying plaintiff that he was being placed on the No Fly List because of concerns about the nature and purpose of his travel to Yemen did not violate the Due Process Clause;[458] (6) the "unclassified summaries [provided by the government to justify its decision to place plaintiffs on the No Fly List] afforded the plaintiffs a meaningful opportunity to tailor their responses to the subject matter of the government's concerns";[459] (7) "the opportunity [for individuals placed on the No Fly List] to provide written responses was sufficient to satisfy due process . . . and live [adversarial] hearings were not required";[460] and (8) due process did not require the district court to use "procedures specified for handling classified information in criminal cases."[461]

In *Kovac v. Wray*, Muslim citizens of the United States who were identified in the federal terrorist screening database sued several federal officials, alleging violations of, among other things, the Administrative Procedure Act, the Equal Protection Clause, and the Due Process Clause.[462] The named plaintiff,

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451 Kashem v. Barr, 941 F.3d 358, 364 (9th Cir. 2019).
452 *Id.*
453 *Id.*
454 *Id.* at 373–74 (emphasis in original).
455 *Id.* at 374.
456 *Id.* at 381.
457 *Id.* at 383.
458 *Id.* at 385.
459 *Id.* at 385–86.
460 *Id.* at 389.
461 *Id.* at 389–90.
462 Kovac v. Wray, 363 F. Supp. 3d 721, 731 (N.D. Tex. 2019).

Adis Kovac, challenged his placement on the No Fly List, while four additional plaintiffs challenged their placement on a "Selectee List," which means they were subjected to mandatory airport screenings.[463] The government moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim.[464]

The Northern District of Texas held that: (1) the FAAct did not "limit the jurisdiction of the district court[ ]" so as to preclude subject matter jurisdiction; and (2) Mr. Kovac's pleading that his placement on the No Fly List plausibly pleaded a substantive due process claim, procedural due process claim, and APA claim.[465] However, the court held that the Screening List plaintiffs had failed to state a substantive due process claim, as they failed to show they had been prevented from traveling, only showing that they experienced delays.[466] The court further held that Congress "[did] not violate the non-delegation doctrine" when it empowered the Transportation Security Administration to create and maintain a database on individuals "who may pose a risk to transportation or national security."[467]

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[463] *Id.* at 734–35.
[464] *Id.* at 738.
[465] *Id.* at 741, 744, 751, 759.
[466] *Id.* at 752.
[467] *Id.* at 721.