

2023

## Recent Developments in Aviation Law

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### Recommended Citation

Brittany C. Wakim, *Recent Developments in Aviation Law*, 88 J. AIR L. & COM. 361 (2023)

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## RECENT DEVELOPMENTS IN AVIATION LAW

BRITTANY C. WAKIM\*

### ABSTRACT

Recent Developments in Aviation Law addresses developments in aviation law from January 2022 through December 2022. This submission focuses on certain cases in the area of aviation law that are expected to have a significant impact upon, and ramifications for, the industry going forward such as: (1) the Federal Aviation Act and Federal Aviation Regulations; (2) the Air Carrier Access Act; (3) the General Aviation Revitalization Act; (4) the Airline Deregulation Act; (5) the Montreal and Warsaw Conventions; (6) the Federal Tort Claims Act; and (7) the Death on the High Seas Act. Finally, this submission also discusses recent developments relating to the Federal Aviation Administration's regulations for unmanned aircraft, as well as the potential impact of recent developments in the application of the *Feres* Doctrine.

### TABLE OF CONTENTS

|  |     |
|--|-----|
| I. INTRODUCTION.....   | 363 |
| II. FEDERAL AVIATION ACT AND FEDERAL AVIATION REGULATIONS..... | 363 |
| A. LIMITATION OF LIABILITY.....                                | 364 |
| 1. J.A.G.P. v. Aerolineas Damojh, S.Z/de C.V. ....             | 364 |
| B. STANDARD OF CARE GOVERNED BY STATE OR FEDERAL LAW .....     | 365 |
| 1. Kropp v. United Airlines, Inc. ....                         | 365 |
| III. AIR CARRIER ACCESS ACT.....                               | 367 |
| A. FEDERAL QUESTION JURISDICTION .....                         | 368 |

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DOI: <https://doi.org/10.25172/jalc.88.2.2>

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|       |  |     |
|-------|--|-----|
| 362   | <i>JOURNAL OF AIR LAW AND COMMERCE</i>   | [88 |
|       | 1. Ramos v. JetBlue Airways, Corp. ....  | 368 |
|       | B. LACK OF A PRIVATE RIGHT OF ACTION .....                                       | 371 |
|       | 1. Henry v. Southwest Airlines Co. ....  | 371 |
| IV.   | GENERAL AVIATION REVITALIZATION ACT ...  | 372 |
|       | A. APPLICABILITY TO MANUFACTURERS AND<br>REBUILDERS .....                        | 373 |
|       | 1. Quinn v. Avco Corp. ....  | 373 |
| V.    | AIRLINE DEREGULATION ACT (ADA) .....   | 375 |
|       | A. PREEMPTION OF STATE LAW CLAIMS .....  | 377 |
|       | 1. Hung Cavaleri v. Avoir Airlines, C.A. ....                                    | 377 |
|       | 2. Day v. Skywest Airlines .....   | 379 |
|       | 3. Wilson v. Caribbean Airlines Ltd. ....  | 382 |
|       | 4. SwiftAir LLC v. Southwest Airlines Co. ....                                   | 384 |
| VI.   | MONTREAL AND WARSAW CONVENTIONS ...  | 386 |
|       | A. CAUSATION REQUIREMENT FOR BODILY INJURY<br>AND MENTAL HARM .....              | 390 |
|       | 1. Oshana v. Aer Lingus Ltd. ....  | 390 |
|       | 2. Bandary v. Delta Air Lines, Inc. ....   | 392 |
|       | 3. BT v. Laudamotion GmbH .....  | 394 |
|       | B. PREEMPTION—NON-PERFORMANCE VERSUS DELAY<br>IN PERFORMANCE CLAIMS .....        | 395 |
|       | 1. A.S.A.P. Logistics, Ltd. V. UPS Supply<br>Chain Solutions, Inc. ....          | 395 |
|       | 2. Chapa v. American Airlines Group, Inc. ...                                    | 397 |
|       | 3. Klein v. Lufthansa AG .....   | 398 |
|       | C. ACCIDENT INJURY .....   | 400 |
|       | 1. Moore v. British Airways PLC .....  | 400 |
|       | 2. JR v. Austrian Airlines, AG .....   | 402 |
|       | D. TIMELINES .....   | 404 |
|       | 1. Barry v. Maroc .....  | 404 |
|       | E. JURISDICTIONAL REACH .....  | 405 |
|       | 1. Pettaway v. Miami Air International, Inc. ...                                 | 405 |
| VII.  | FAA AND UNMANNED AIRCRAFT<br>RULEMAKING .....                                    | 409 |
|       | A. FAA REMOTE IDENTIFICATION OF UNMANNED<br>AIRCRAFT RULE (REMOTE ID RULE) ..... | 409 |
|       | B. CHALLENGES TO REMOTE ID RULE .....  | 411 |
|       | 1. Brennan v. Dickson .....  | 411 |
| VIII. | POLITICAL QUESTION JURISDICTION .....  | 413 |
|       | A. Preston v. M1 Support Services, L.P. ....                                     | 414 |
| IX.   | FEDERAL TORT CLAIMS ACT .....  | 416 |
|       | A. CAUSATION REQUIREMENT .....   | 416 |
|       | 1. Lyons v. United States .....  | 416 |

|       |   |     |
|-------|---|-----|
| X.    | DEATH ON THE HIGH SEAS ACT .....                        | 417 |
|       | A. PREEMPTION .....                                     | 419 |
|       | 1. Murray v. AET, Inc.....                              | 419 |
| XI.   | ANTI-MASKING CASES.....                                 | 420 |
|       | A. THE FEDERAL MASK MANDATE .....                       | 420 |
|       | 1. Seklecki v. CDC & Prevention .....                   | 421 |
| XII.  | EXPERT TESTIMONY .....                                  | 424 |
|       | A. Kula v. United States.....                           | 424 |
| XIII. | FERES DOCTRINE .....                                    | 427 |
|       | A. RULEMAKING.....                                      | 428 |
|       | B. REJECTED APPLICATION OF THE <i>Feres</i> Doctrine .. | 428 |
|       | 1. Spletstoser v. Hyten .....                           | 428 |

## I. INTRODUCTION

**T**HIS SUBMISSION ADDRESSES DEVELOPMENTS in aviation law over the past year — i.e., from January 2022 through December 2022. This submission of course does not address every reported case in the aviation field generally, but rather focuses on certain cases in the area of aviation law that are expected to have a significant impact upon, and ramifications for, the industry going forward. Accordingly, this submission addresses legal developments related to the Federal Aviation Act and Federal Aviation Regulations, the Air Carrier Access Act, the General Aviation Revitalization Act, the Airline Deregulation Act, the Montreal and Warsaw Conventions, the Federal Tort Claims Act, and the Death on the High Seas Act. Finally, this submission also discusses recent developments relating to the Federal Aviation Administration’s regulations for unmanned aircraft, as well as the potential impact of recent developments in the application of the *Feres* Doctrine.

## II. FEDERAL AVIATION ACT AND FEDERAL AVIATION REGULATIONS

The Federal Aviation Act of 1958 abolished the Civil Aeronautics Administration and created the Federal Aviation Agency, now known as the Federal Aviation Administration (FAA).<sup>1</sup> Among other things, the Federal Aviation Act vested in the FAA all regulatory authority over aviation safety.<sup>2</sup>

As addressed in the cases discussed below, in a section entitled “Limitation of liability,” the Federal Aviation Act shields owners

<sup>1</sup> See Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 737.

<sup>2</sup> *Id.*

and lessors from liability for personal injuries if they did not have actual possession or operational control of the aircraft.<sup>3</sup> Specifically, the Act provides, in relevant part, that:

A lessor, owner, or secured party is liable for personal injury, death, or property loss or damage only when a civil aircraft, aircraft engine, or propeller is in the actual possession or operational control of the lessor, owner, or secured party, and the personal injury, death or property loss or damage occurs because of –

- (1) the aircraft, engine, or propeller; or
- (2) the flight of, or an object falling from, the aircraft, engine, or propeller.<sup>4</sup>

#### A. LIMITATION OF LIABILITY

##### 1. J.A.G.P. v. Aerolineas Damojh, S.A. de C.V.<sup>5</sup>

In 2018, a Boeing 737 operated by Cubana, Cuba's flagship carrier, crashed shortly after takeoff near Havana, resulting in the deaths of more than seventy-five people.<sup>6</sup> Plaintiffs filed suit against the airline, the aircraft manufacturer, and Wells Fargo Trust Company (Wells Fargo), the former owner of the aircraft.<sup>7</sup> Wells Fargo purchased the aircraft in 2005 and sold it to a Mexican aviation company in 2008 that subsequently leased the aircraft to Cubana.<sup>8</sup>

The plaintiffs alleged that when Wells Fargo bought the aircraft in 2005, it was “defective and unreasonably dangerous” and “had defects in the flight control surfaces, the rudder and rudder control system, the rudder power control unit rods, the aircraft stabilizer, and more generally, the engine.”<sup>9</sup> The plaintiffs also alleged that Wells Fargo “bought and sold the plane without including any warnings about the effect of aging on the plane.”<sup>10</sup> Moreover, they contended, Wells Fargo was liable for its “failure to correct, remedy, and repair the dangerous and defective conditions,” its sale of the aircraft “in an unsafe condition,” and for its “negligent failure to inspect and discover” the

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<sup>3</sup> 49 U.S.C. § 44112(b).

<sup>4</sup> *Id.*

<sup>5</sup> J.A.G.P. v. Aerolineas Damojh, S.A. de C.V., 585 F. Supp. 3d 1092 (N.D. Ill. 2022).

<sup>6</sup> *Id.* at 1094.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 1094, 1097.

<sup>10</sup> *Id.* at 1095.

alleged defective conditions.<sup>11</sup> Wells Fargo claimed it had not possessed or controlled the aircraft during the three years of its ownership (2005–2008).<sup>12</sup> Wells Fargo filed a motion to dismiss the plaintiffs’ complaint on various grounds, including that the plaintiffs’ state common law tort claims were preempted under the Federal Aviation Act’s limitation of liability, which “shields owners and lessors from personal-injury liability if they did not have actual possession or operational control of the plane.”<sup>13</sup>

The court granted Wells Fargo’s motion to dismiss and found that the plaintiffs’ state common law claims were preempted under the Federal Aviation Act.<sup>14</sup> In granting the motion to dismiss, the court rejected the contention that the statute did not apply because the plaintiffs were suing Wells Fargo “as a seller of the plane – not as an owner or lessor.”<sup>15</sup> The court held “as a matter of law, affixing the ‘seller’ label to Wells Fargo makes no substantive difference,” because if “non-possessory, non-operating owners, lessors or security-interest holders of an aircraft could be held liable after selling it, then that would shrink the supply of financiers for aircraft.”<sup>16</sup>

## B. STANDARD OF CARE GOVERNED BY STATE OR FEDERAL LAW

### 1. *Kropp v. United Airlines, Inc.*<sup>17</sup>

In *Montalvo v. Spirit Airlines*,<sup>18</sup> the Ninth Circuit held that the FAA and the associated Federal Aviation Regulations (FARs) set the standard of care for negligence claims against aircraft operators based on an alleged failure to warn because “a number of specific federal regulations govern the warnings and instructions which must be given to airline passengers,” and 14 C.F.R. § 91.13(a) sets the “general federal standard of care for aircraft operators.”<sup>19</sup> Meaning, in certain situations, a passenger who claims they suffered an injury on a flight cannot recover on a negligence claim against an airline by alleging that the airline violated some state law standard of care applicable to “normal”

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<sup>11</sup> *Id.* at 1095.

<sup>12</sup> *Id.* at 1096.

<sup>13</sup> *Id.* at 1095–96 (citing 49 U.S.C. § 44112(b)).

<sup>14</sup> *Id.* at 1100.

<sup>15</sup> *Id.* at 1096–97.

<sup>16</sup> *Id.* at 1097–98.

<sup>17</sup> No. 21-55960, 2022 U.S. App. LEXIS 165853 (9th Cir. June 15, 2022).

<sup>18</sup> 508 F.3d 464 (9th Cir. 2007).

<sup>19</sup> *Id.* at 472 (citing 14 C.F.R. § 91.13(a) (2003)).

negligence claims.<sup>20</sup> Instead, to pursue their negligence claim, the passenger must establish that the airline violated one or more FARs.<sup>21</sup>

The Ninth Circuit recently applied this rule in *Kropp v. United Airlines, Inc.*<sup>22</sup> In *Kropp*, Plaintiff alleged that she was injured during turbulence on her flight.<sup>23</sup> Plaintiff brought state law claims against the airline for negligence and common carrier liability, alleging a failure to warn of the turbulence and “keep its passengers safe.”<sup>24</sup> The airline moved for summary judgment on the premise that Plaintiff did not provide any evidence the airline violated a FAR.<sup>25</sup> The trial court granted the motion and Plaintiff appealed.<sup>26</sup>

On appeal, the Ninth Circuit noted that various FARs specify the warnings that an airline must provide to its passengers, and that 14 C.F.R. § 91.13(a) provides that “no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.”<sup>27</sup> Here, the plaintiff failed to put forth any evidence the airline violated the FARs governing warnings or otherwise acted in a “careless or reckless manner.”<sup>28</sup> Instead of arguing that the airline violated a FAR, the plaintiff argued that the airline violated two Federal Aviation Administration Advisory Circulars.<sup>29</sup> The court rejected this argument because Advisory Circulars offer only guidance and are not binding regulations.<sup>30</sup> Specifically, the court found that “an airline’s duty to warn passengers . . . is regulated by FARs rather than advisory circulars.”<sup>31</sup> Lastly, the court held that to the extent Plaintiff was relying on state law standards of care to pursue her claims, those claims were preempted by the Federal Aviation

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<sup>20</sup> See *id.* at 472–73.

<sup>21</sup> See *id.*

<sup>22</sup> *Kropp*, 2022 U.S. App. LEXIS 16583, at \*1–4 (referencing *Montalvo*, 508 F.3d at 472).

<sup>23</sup> *Id.* at \*1.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at \*3.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at \*3.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at \*3–4; An advisory circular is a FAA publication guiding compliance with regulations and other standards. See *Advisory Circulars (ACs)*, Federal Aviation Administration, [https://www.faa.gov/regulations\\_policies/advisory\\_circulars/](https://www.faa.gov/regulations_policies/advisory_circulars/) (last visited May 12, 2023).

<sup>30</sup> *Kropp*, 2022 U.S. App. LEXIS 16583, at \*4.

<sup>31</sup> *Id.*

Act.<sup>32</sup> The Ninth Circuit affirmed the trial court's entry of summary judgment in favor of the airline.<sup>33</sup>

### III. AIR CARRIER ACCESS ACT

In 1986, Congress enacted, as an amendment to the Federal Aviation Act, the Air Carrier Access Act (ACAA).<sup>34</sup> Under the ACAA, an air carrier, in the course of providing air transportation, “may not discriminate against an otherwise qualified individual” on the basis of a disability.<sup>35</sup> The ACAA provides, in relevant part, that:

[A]n air carrier . . . may not discriminate against an otherwise qualified individual on the following grounds:

- (1) the individual has a physical or mental impairment that substantially limits one or more major life activities.
- (2) the individual has a record of such an impairment.
- (3) the individual is regarded as having such an impairment.<sup>36</sup>

Rather than filing a private action, a passenger alleging disability discrimination in violation of the ACAA may file a written complaint with the United States Department of Transportation (DOT) against an airline.<sup>37</sup> Various circuit courts have held that the ACAA does not create a private cause of action.<sup>38</sup> Indeed, according to the Fifth Circuit Court of Appeals in *Stokes v. Southwest Airlines*, since the United States Supreme Court decision of *Alexander v. Sandoval*<sup>39</sup> in 2001, every federal court to reach the issue has held that the ACAA's text and structure preclude a private right of action.<sup>40</sup> Moreover, accompanying regulations from the DOT also require an air carrier to:

[P]rovide or ensure the provision of assistance requested by or on behalf of a passenger with a disability . . . in moving from the terminal entrance (or a vehicle drop-off point adjacent to the entrance) through the airport to the gate for a departing flight,

<sup>32</sup> *Id.* at \*5.

<sup>33</sup> *Id.*

<sup>34</sup> Air Carrier Access Act of 1986, Pub. L. No. 435, 100 Stat. 1080.

<sup>35</sup> See 49 U.S.C. § 41705(a).

<sup>36</sup> *Id.*

<sup>37</sup> 49 U.S.C. § 46101(a)(1).

<sup>38</sup> See *Segalman v. Sw. Airlines Co.*, 895 F.3d 1219, 1222–29 (9th Cir. 2018); *Stokes v. Sw. Airlines Co.*, 887 F.3d 199, 201–05 (5th Cir. 2018); *Lopez v. Jet Blue Airways*, 662 F.3d 593, 597 (2d Cir. 2011); *Boswell v. Skywest Airlines, Inc.*, 361 F.3d 1263, 1271 (10th Cir. 2004); *Love v. Delta Air Lines*, 310 F.3d 1347, 1354 (11th Cir. 2002).

<sup>39</sup> 532 U.S. 275 (2001).

<sup>40</sup> *Stokes*, 887 F.3d at 202.

or from the gate to the terminal entrance (or a vehicle pick-up point adjacent to the entrance after an arriving flight).<sup>41</sup>

#### A. FEDERAL QUESTION JURISDICTION

##### 1. *Ramos v. JetBlue Airways, Corp.*<sup>42</sup>

On July 8, 2020, the plaintiff arrived at Newark Liberty International Airport from Orlando on JetBlue.<sup>43</sup> The plaintiff alleged that prior to arrival, she indicated to JetBlue that she would need wheelchair assistance.<sup>44</sup> According to the plaintiff, assistance did not arrive and she tripped and fell while walking on her own to baggage claim.<sup>45</sup> Plaintiff filed her complaint in state court asserting four causes of action: “negligent construction, maintenance, repair, and supervision (Count I); negligence (Count II); breach of (unspecified) regulations that constitute a statutory tort (Count III); and negligence in fulfilling and executing agreements and circumstances to allow [her] to be safely transported (Count IV).”<sup>46</sup>

When asked to identify and provide copies of “any ‘statute, rule, regulation or ordinance’ at issue” as part of form interrogatories, plaintiff objected.<sup>47</sup> Based on those responses, “JetBlue inferred that [the plaintiff’s] claims arose under federal law, specifically the [ACAA], and the related federal regulation, 14 C.F.R. § 382.91” (detailing the level of assistance carriers must provide to passengers with a disability in moving within the terminal).<sup>48</sup> JetBlue filed a notice of removal based on federal question jurisdiction and the plaintiff moved to remand.<sup>49</sup>

JetBlue argued that the court had subject matter jurisdiction because count III was “completely preempted by the ACAA” and because count IV required “application of the ACAA regulation to define the duty of care.”<sup>50</sup> JetBlue contended that these “substantial issue[s]” of federal law should be decided in federal court.<sup>51</sup> The plaintiff argued that the notice of removal was un-

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<sup>41</sup> 14 C.F.R. § 382.91(b) (2009).

<sup>42</sup> No. 22-01214, 2022 U.S. Dist. LEXIS 188296 (D.N.J. Oct. 13, 2022).

<sup>43</sup> *Id.* at \*3.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at \*2–3.

<sup>47</sup> *Id.* at \*4.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at \*6.

<sup>51</sup> *Id.*

timely because it was not “within thirty days of learning . . . the basis for removal.”<sup>52</sup> Alternatively, the plaintiff also asserted that “federal law [did] not preempt her negligence claims.”<sup>53</sup>

The court held JetBlue’s notice of removal was timely pursuant to 28 U.S.C § 1446(b)(3), which states that a defendant may remove a state action within thirty days of receipt or service of “a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.”<sup>54</sup> As to whether the plaintiff’s claims were preempted, the court examined “whether the doctrine of complete preemption require[d] that [the plaintiff]’s negligence claims be treated as federal for purposes of removal and remand.”<sup>55</sup> The court concluded that:

Under the doctrine of complete preemption, when federal law completely preempts a state law cause of action, a claim within the scope of that federal law is deemed federal in nature, even if it is pleaded in terms of state law, and it is therefore removable under 28 U.S.C. § 1441.<sup>56</sup>

JetBlue argued that count III, alleging “a breach of regulations that constitutes a statutory tort” was “completely preempted by the ACAA” because the ACAA “governs discrimination against handicapped individuals by air carriers’ and ‘substantially if not completely, occupies the field of nondiscrimination on the basis of handicap in air travel.’”<sup>57</sup> For support, JetBlue pointed to the statement in the Third Circuit’s decision in *Elassaad v. Independence Air, Inc.*,<sup>58</sup> that “the ACAA might preempt state nondiscrimination laws as they apply to discrimination by air carriers against disabled passengers.”<sup>59</sup> However, the court found that the statement about preemption from *Elassaad* did not apply in this case because the plaintiff did not raise a discrimination claim or allege that her claim was based on a violation of the ACAA or on an act of discrimination.<sup>60</sup> Instead, Plaintiff asserted that JetBlue was negligent.<sup>61</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at \*7–8 (quoting 28 U.S.C § 1446(b)(3)).

<sup>55</sup> *Id.* at \*12.

<sup>56</sup> *Id.* at \*12–13.

<sup>57</sup> *Id.* at \*13.

<sup>58</sup> 613 F.3d 119 (3d Cir. 2010).

<sup>59</sup> *Ramos*, 2022 U.S. Dist. LEXIS 188296, at \*13 (quoting *Elassaad*, 613 F.3d at 132).

<sup>60</sup> *Id.* at \*14.

<sup>61</sup> *Id.*

JetBlue also contended that the FAA's "administrative remedy scheme" showed "that there [was] a federal cause of action available for violation of the ACAA."<sup>62</sup> However, the court concluded that this did not rise to the level of complete preemption because "complete preemption requires that the statute provide the *exclusive* cause of action, not just that a federal cause of action is available."<sup>63</sup> Therefore, the court found "that the ACAA and its regulations [did] not completely preempt [the plaintiff's] negligence claim" and, accordingly, JetBlue "cannot establish federal question jurisdiction."<sup>64</sup>

JetBlue also argued that count IV of the complaint required the resolution of a substantial federal question: "[W]hether JetBlue breached a duty of care by falling short of its obligations under 14 C.F.R. § 382.91(b)."<sup>65</sup> The court held that because the plaintiff did not rely on the ACAA regulation and stated instead that her claims were based on general negligence principles, it was wrong for JetBlue to "simply assume[ ]" that the ACAA provided the duty of care for the claim.<sup>66</sup> Moreover, the court found that "JetBlue's contention [was] also contrary to the Third Circuit's conclusion in *Elassaad* that state law, and not the ACAA, supplied the controlling standard of care for the plaintiff's non-airborne negligence claims."<sup>67</sup> In the alternative, "even if the ACAA regulation did furnish the standard of care" for the plaintiff's claim, the court stated that it still would "conclude that no substantial federal question existed" because "[a]pplying a federal standard of care in a state tort claim is generally insufficient to raise a substantial federal question."<sup>68</sup> For these reasons, the court granted the plaintiff's motion to remand the case to state court.<sup>69</sup>

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at \*15; see discussion *supra* note 40.

<sup>66</sup> *Ramos*, 2022 U.S. Dist. LEXIS 188296, at \*15.

<sup>67</sup> *Id.* (citing *Elassaad v. Indep. Air, Inc.*, 613 F.3d 119, 133 & n.20 (3d Cir. 2010)). Of note, *Elassaad* dealt with negligence claims based on injuries from a fall while disembarking an aircraft on the air stairs. *Elassaad*, 613 F.3d at 121.

<sup>68</sup> *Ramos*, 2022 U.S. Dist. LEXIS 188296, at \*15–16.

<sup>69</sup> *Id.* at \*17.

## B. LACK OF A PRIVATE RIGHT OF ACTION

1. *Henry v. Southwest Airlines Co.*<sup>70</sup>

The plaintiff purchased a roundtrip ticket from Houston to New Orleans on Southwest Airlines and requested wheelchair assistance due to a pre-existing injury.<sup>71</sup> When he arrived at the airport for his return flight, he allegedly was not provided with a wheelchair despite multiple requests.<sup>72</sup> When boarding the aircraft without a wheelchair, the plaintiff allegedly fell and was injured.<sup>73</sup> The plaintiff filed a lawsuit seeking to recover damages and alleged five causes of action, including claims under the ACAA.<sup>74</sup> The airline filed a motion to dismiss pursuant to the ACAA on the grounds that the statute does not provide a private right of action.<sup>75</sup>

The court noted that the Fifth Circuit recently “unequivocally held that ‘no private right of action exists to enforce the ACAA in district court.’”<sup>76</sup> While the ACAA may prohibit an airline “from discriminating on the basis of a disability, [there are no express provisions that] provide a right to sue the air carrier.”<sup>77</sup> The court noted that “every federal court to reach the issue has held that the ACAA’s text and structure preclude a private right of action.”<sup>78</sup> The court further explained that the ACAA is part of a “comprehensive administrative scheme,” along with other federal aviation statutes, designed to “vindicate fully the rights of disabled persons.”<sup>79</sup> The court found that the ACAA only allows “carefully circumscribed roles” for private litigants with a limited “remedial process”: (1) “an aggrieved passenger” notifies the DOT “of an alleged violation”; (2) “the DOT investigates the allegation”; (3) “the DOT issues an order of compliance”; and (4) “the DOT . . . enforces that order by filing a civil action in district court.”<sup>80</sup> This court followed the other courts that had

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<sup>70</sup> No. 22-0944, 2022 U.S. Dist. LEXIS 148720 (E.D. La. Aug. 16, 2022).

<sup>71</sup> *Id.* at \*1–2.

<sup>72</sup> *Id.* at \*2.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at \*3.

<sup>76</sup> *Id.* at \*4 (quoting *Stokes v. Sw. Airlines*, 887 F.3d 199, 205 (5th Cir. 2018)).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* (quoting *Stokes*, 887 F.3d at 202).

<sup>79</sup> *Id.* at \*4–5 (quoting *Stokes*, 887 F.3d at 202–03).

<sup>80</sup> *Id.* at \*5 (referencing *Stokes*, 887 F.3d at 202-03).

found no private right of action against an airline for discrimination on the basis of a disability.<sup>81</sup>

Therefore, since the plaintiff was a private litigant alleging a cause of action based on the airline's alleged violation of the ACAA, Plaintiff's ACAA claims were dismissed for the failure to state a claim.<sup>82</sup>

#### IV. GENERAL AVIATION REVITALIZATION ACT

The General Aviation Revitalization Act (GARA) was passed by Congress in 1994.<sup>83</sup> The law provides, in part:

(a) In General.—Except as provided in subsection (b), no civil action for damages for death or injury to persons or damage to property arising out of an accident involving a general aviation aircraft may be brought against the manufacturer of the aircraft or the manufacturer of any new component, system, subassembly, or other part of the aircraft, in its capacity as a manufacturer if the accident occurred—

(1) after the applicable limitation period beginning on—

(A) the date of delivery of the aircraft to its first purchaser or lessee, if delivered directly from the manufacturer; or

(B) the date of first delivery of the aircraft to a person engaged in the business of selling or leasing such aircraft; or

(2) with respect to any new component, system, subassembly, or other part which replaced another component, system, subassembly, or other part originally in, or which was added to, the aircraft, and which is alleged to have caused such death, injury, or damage, after the applicable limitation period beginning on the date of completion of the replacement or addition.<sup>84</sup>

The “limitation period” is defined as eighteen years for a general aviation aircraft and its associated systems.<sup>85</sup> A “general aviation aircraft” is an aircraft with a “maximum seating capacity of fewer than [twenty] passengers, and which was not, at the time of the accident, engaged in scheduled passenger-carrying opera-

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<sup>81</sup> *Id.* at \*5–6.

<sup>82</sup> *See id.*

<sup>83</sup> General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552.

<sup>84</sup> *Id.* § 2(a).

<sup>85</sup> *Id.* § 3(3).

tions as defined under regulations in effect under the Federal Aviation Act of 1958 . . . at the time of the accident.”<sup>86</sup>

GARA “supersedes any State law to the extent that such law permits a civil action described in subsection (a) [above]” to be brought after the limitation period.<sup>87</sup> GARA also contains a “rolling” provision wherein if a “new component, system, subassembly or other part which replaced another component, system, subassembly, or other part originally in, or which was added to, the aircraft” is alleged to have caused the accident, then the eighteen year statute of repose begins “on the date of completion of the replacement or addition.”<sup>88</sup> In other words, the eighteen year statute of repose restarts when a new replacement part is installed and that part is alleged to have caused the accident at issue.

#### A. APPLICABILITY TO MANUFACTURERS AND REBUILDERS

##### 1. *Quinn v. Avco Corp.*<sup>89</sup>

On November 5, 2013, a small airplane crashed in the woods in Missouri, killing the two occupants—a pilot and a flight instructor.<sup>90</sup> The airplane, a six-seat Piper Saratoga, was manufactured by Piper Aircraft Corporation in 1980, and was powered by a six-cylinder Lycoming engine.<sup>91</sup> The engine had “a single-drive dual ‘magneto’” that provided “electrical energy to the . . . ignition system.”<sup>92</sup> Bendix, later acquired by Continental Motors, Inc., manufactured dual magnetos for certain Lycoming engines—after the acquisition Continental began to manufacture its own dual magnetos.<sup>93</sup>

The pilot’s family filed a wrongful death action against Continental, alleging that the accident was caused by a malfunction in the autopilot system due to a defect in the design in the single-

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<sup>86</sup> *Id.* § 2(c).

<sup>87</sup> *Id.* § 2(d).

<sup>88</sup> *Id.* § 2(a)(2); *See Quinn v. Cont’l Motors, Inc.*, No. 15-1005-RGA, 2020 U.S. Dist. LEXIS 49612, at \*13 (D. Del. Mar. 23, 2022), *vacated*, 2022 U.S. Dist. LEXIS 37540 (D. Del. Mar. 4, 2022).

<sup>89</sup> No.15-1005-RGA, 2022 U.S. Dist. LEXIS 37540 (D. Del. Mar. 3, 2022).

<sup>90</sup> *Quinn v. Cont’l Motors*, 2020 U.S. Dist. LEXIS 49612, at \*1.

<sup>91</sup> *Id.* at \*2.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at \*2–3.

drive dual magneto.<sup>94</sup> Continental rebuilt the magneto in 2002, and installed it on the aircraft starting in 2004.<sup>95</sup>

Continental moved for summary judgment, arguing that the plaintiffs' claims were barred by GARA.<sup>96</sup> The court granted Continental's motion for summary judgment.<sup>97</sup> In response, the plaintiffs moved for re-argument "on the grounds that Continental [was] not entitled to the protections of GARA for its role as the rebuilder and seller of the dual magneto."<sup>98</sup> The court:

[G]ranted reargument on three issues: (1) whether the phrase "capacity as a manufacturer" includes a manufacturer acting as a rebuilder or a seller; (2) the status of Plaintiffs' claims against Continental in its capacity as a rebuilder; and (3) the status of Plaintiffs' claims against Continental in its capacity as a seller.<sup>99</sup>

More specifically, the plaintiffs argued "that Continental was not acting in its capacity as a manufacturer when it rebuilt and sold the magneto in 2002," and that GARA's statute of repose should not apply because the "capacity as a manufacturer" language in GARA does not include rebuilders or sellers.<sup>100</sup> The plaintiffs further argued that "Congress did not intend to shield" "rebuilders" or "sellers" from liability because there is no specific mention within the text of GARA.<sup>101</sup> Instead, the plaintiffs argued that the rebuilding of the magneto was an "unprotected maintenance procedure."<sup>102</sup>

However, the court was not convinced, stating, "[The court] do[es] not think that the structure of the FAA regulations shows that rebuilding a magneto is a maintenance procedure performed by a manufacturer in its capacity as a mechanic rather than in its capacity as a manufacturer."<sup>103</sup> The court found that "[a]lthough rebuilt parts are governed under part 43 rather than part 21, they must meet the same tolerances and limits as new parts."<sup>104</sup> These standards are different from those required under general maintenance. The court stated that "[i]f only a

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<sup>94</sup> *Id.* at \*3.

<sup>95</sup> *Id.* at \*13-14.

<sup>96</sup> *Id.* at \*11.

<sup>97</sup> *Id.* at \*2.

<sup>98</sup> *Quinn v. Avco Corp.*, No. 15-1005-RGA, 2022 U.S. Dist. LEXIS 37540, at \*2 (D. Del. Mar. 3, 2022).

<sup>99</sup> *Id.* at \*2-3.

<sup>100</sup> *Id.* at \*4.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at \*5.

<sup>103</sup> *Id.* at \*5.

<sup>104</sup> *Id.* at \*5-6.

manufacturer can rebuild an aircraft part, then a manufacturer who rebuilds an aircraft part is necessarily acting in its capacity as a manufacturer.”<sup>105</sup>

The court also noted that it was unable to find, and “the parties [did] not cite,” any case law “addressing whether the phrase ‘capacity as a manufacturer’ includes rebuilders.”<sup>106</sup> However, the court looked to the “maintenance manual” line of cases holding that a manufacturer is “acting in its capacity as a manufacturer when it publishes maintenance manuals.”<sup>107</sup> The court used this logic to “conclude that a manufacturer is acting ‘in its capacity as a manufacturer’ under GARA when it rebuilds an aircraft part.”<sup>108</sup> Therefore, since Continental was determined to be acting in its capacity as a manufacturer in 2002 when it rebuilt and sold the magneto at issue, GARA, and its statute of repose, applied to plaintiffs’ claims.<sup>109</sup>

## V. AIRLINE DEREGULATION ACT (ADA)

In 1978, Congress enacted the ADA after “determining that ‘maximum reliance on competitive market forces’ would best further ‘efficiency, innovation, and low prices’ as well as ‘variety [and] quality . . . of air transportation services.’”<sup>110</sup> The ADA includes a preemption provision “[t]o ensure that the States would not undo federal deregulation with regulation of their own.”<sup>111</sup> Under the ADA, “a State, political subdivision of a State, or political authority of at least [two] States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air

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<sup>105</sup> *Id.* at \*7.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at \*7–8 (citing *Crouch v. Honeywell Int’l, Inc.*, 720 F.3d 333, 339-41 (6th Cir. 2013); *Est. of Grochowski v. Romey*, 813 N.W.2d 687, 695-97 (Wis. Ct. App. 2012); *Mason v. Schweizer Aircraft Corp.*, 656 N.W.2d 543, 549-52 (Iowa 2002); *Burroughs v. Precision Airmotive Corp.*, 93 Cal. Rptr. 2d 124, 133-39 (Cal. Ct. App. 2000).

<sup>108</sup> *Id.* at \*8. The court previously held that the word “new” in GARA § 2(a)(2) (the “rolling provision”) means “brand new” and excludes rebuilt parts. *Quinn v. Cont’l Motors, Inc.*, No. 15-1005-RGA, 2020 U.S. Dist. LEXIS 49612, at \*19 (D. Del. Mar. 23, 2022), *vacated*, 2022 U.S. Dist. LEXIS 37540 (D. Del. Mar. 4, 2022).

<sup>109</sup> *Quinn v. Avco Corp.*, 2022 U.S. Dist. LEXIS 37540, at \*8.

<sup>110</sup> *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992); *see also* Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, 1705 (ADA was passed “to encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services.”).

<sup>111</sup> *Morales*, 504 U.S. at 378.

carrier that may provide air transportation.”<sup>112</sup> According to the U.S. Supreme Court, the preemptive effect of the ADA is generally broad: “[T]he ordinary meaning of these words [‘relating to’] is a broad one . . . and the words thus express a broad preemptive purpose.”<sup>113</sup>

The U.S. Supreme Court has applied this general “broad preemptive purpose” principle to the ADA on only three occasions. In *Morales v. Trans World Airlines, Inc.*, the Court held that the Attorney General of Texas could not enforce proposed guidelines for airfare advertising.<sup>114</sup> Three years later, in *American Airlines, Inc. v. Wolens*, the Court held that the ADA preempted a class-action lawsuit claiming violations of Illinois consumer-protection law in connection with a frequent flyer program.<sup>115</sup> The Court in *Wolens* also stated that “terms and conditions airlines offer and passengers accept are privately ordered obligations ‘and thus do not amount to a State’s “enactment or enforcement of any law, rule, regulation, standard, or other provision having the force and effect of law” within the meaning of §1305(a)(1).’”<sup>116</sup>

Most recently in 2014, in *Northwest, Inc. v. Ginsburg*, the Court held that a common-law claim for breach of the implied covenant of good faith and fair dealing was preempted by the ADA.<sup>117</sup> To date, the Supreme Court’s ADA preemption decisions have all arguably involved cases involving the economics of the airline industry. The Supreme Court has not addressed whether traditional tort claims for personal injuries are preempted by the ADA. Therefore, pending further guidance from the Supreme Court, such determinations are left up to the circuit and district courts.

Of note, Justice Sotomayor, while still a district court judge, applied a three-part analysis in *Rombom v. United Airlines, Inc.*<sup>118</sup>

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<sup>112</sup> 49 U.S.C. § 41713(b)(1).

<sup>113</sup> *Morales*, 504 U.S. at 383.

<sup>114</sup> *Id.* at 391.

<sup>115</sup> 513 U.S. 219, 221 (1995).

<sup>116</sup> *Id.* at 228–229 (alterations omitted).

<sup>117</sup> 572 U.S. 273, 273 (2014). In *Northwest*, the plaintiff was a member of an airline’s frequent flyer program with premium elite status. Three years after achieving this status, his membership was terminated by the airline. The plaintiff sued the airline and argued that his termination from the frequent flyer program constituted a breach of the frequent flyer program’s contractual agreement and the implied doctrine of good faith and fair dealing under Minnesota law. *Id.*

<sup>118</sup> 867 F. Supp. 214 (S.D.N.Y. 1994). In *Rombom*, after a flight left the gate, a flight attendant complained that the plaintiff and her companions were loud and

to determine whether a plaintiff's tort claim was preempted under the ADA. Under this analysis, "[t]he threshold inquiry . . . is to define whether the activity at issue in the claim is an airline service."<sup>119</sup> The court stated: "[I]f the activity in question implicates a service, the court must then determine whether the claim affects the airline service directly or [only] tenuously, remotely, or peripherally."<sup>120</sup> The third prong of this preemption analysis "is whether the underlying tortious conduct was reasonably necessary to the provision of the service."<sup>121</sup>

#### A. PREEMPTION OF STATE LAW CLAIMS

##### 1. *Hung Cavalieri v. Avoir Airlines C.A.*<sup>122</sup>

The plaintiffs purchased tickets for an Avoir Airlines, C.A. flight from Miami to Venezuela.<sup>123</sup> When the plaintiffs checked in for their flight, they were informed "that they had to pay an additional \$80.00 'Exit Fee'" before boarding.<sup>124</sup> The plaintiffs deemed this "Exit Fee" to be "extra-contractual" and filed a putative class action alleging that the defendant breached its Contract of Carriage by requiring this additional fee that was otherwise not disclosed in the Contract of Carriage.<sup>125</sup> The district court dismissed the plaintiffs' claims as preempted by the ADA after finding that they related to the price of the airline ticket.<sup>126</sup> Plaintiffs appealed to the Eleventh Circuit.<sup>127</sup>

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disruptive during the flight safety instructions. The pilot returned to the gate and the crew requested the group disembark the aircraft. After the plaintiff left the aircraft, she was arrested for disorderly conduct. The plaintiff claimed that the flight crew had her arrested out of spite. The airline responded that they called the police because the plaintiff would not leave the flight and, in any event, the plaintiff's claims for emotional and physical distress were preempted by the ADA. The court granted the airline's motion for summary judgment in part. The court held that plaintiff's claims relating to the flight attendant's "reprimands" and the pilot's decision to return to the gate were preempted by the ADA as these related to carrier "services" under the ADA. However, the court held there was a genuine issue of material fact as to the circumstances surrounding the plaintiff's arrest. *Id.* at 216–17, 223, 224.

<sup>119</sup> *Id.* at 221.

<sup>120</sup> *Id.* at 222 (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992)).

<sup>121</sup> *Id.* at 222.

<sup>122</sup> 25 F. 4th 843 (11th Cir. 2022).

<sup>123</sup> *Id.* at 846.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 847.

<sup>127</sup> *Id.*

The issue on appeal was whether the plaintiffs' breach of contract claim was protected from preemption by the ADA under *Wolens*.<sup>128</sup> The plaintiffs conceded that their breach of contract claim based on the "Exit Fee" "related to" the price charged by defendant, for the purposes of the ADA, but the plaintiffs also argued that their breach of contract action fit within the *Wolens* exception to preemption since the "Exit Fee" was an extra voluntary fee separate and apart from the ticketed price that was to be inclusive of all fees and taxes.<sup>129</sup> The defendant argued that the "Exit Fee" was "not a voluntary undertaking" since it "clearly related to pricing."<sup>130</sup>

The appellate court was not persuaded by the defendant's argument, stating that "an undertaking relate[d] to price does not necessarily make it subject to preemption."<sup>131</sup> Moreover, as to preemption, the appellate court found that the plaintiffs did not "invoke[ ] a state law or regulation that seeks to alter the voluntary agreement of the parties embodied in the alleged contract."<sup>132</sup>

Ultimately on appeal, the court held that the plaintiffs' breach of contract claim was one that sought to enforce the voluntary agreement of the parties, and that the plaintiffs sought recovery "solely for the alleged breach of [d]efendant's own, self-imposed undertaking regarding the price charged for transport."<sup>133</sup> The court also reiterated that while the language of the ADA expresses a broad preemptive intent, "the ADA preemption provision is not without limits."<sup>134</sup> Citing to its prior decision in *Bailey v. Rocky Mountain Holdings, LLC*, the court reiterated that "[t]he ADA does not . . . preempt a 'state-law-based court adjudication' . . . concerning a contractual obligation 'voluntarily' undertaken by an air carrier."<sup>135</sup> The court further quoted *Bailey*: "Therefore, an air carrier may bring a state action to enforce the terms of a contract, whether express or implied, or the person with whom an air carrier has contracted may bring a breach-of-contract action . . . so long as the action

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 851.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 850.

<sup>135</sup> *Id.* (citing *Bailey v. Rocky Mountain Holdings, LLC*, 889 F.3d 1259, 1268 (11th Cir. 2018)).

concerns voluntary commitments and not state-imposed obligations.”<sup>136</sup> The court agreed with the plaintiffs that their claims sought recovery solely for the alleged breach of the defendant’s own “self-imposed undertaking regarding the price charged for transport.”<sup>137</sup>

Based on this analysis, on appeal, the Eleventh Circuit reversed “the district court’s holding that the ADA preempt[ed]” the breach of contract claims and held that the “alleged obligation to provide transport at the ticketed price free from additional charges is a self-imposed undertaking, the alleged breach of which gives rise to a cause of action that *Wolens* protects from preemption.”<sup>138</sup>

## 2. Day v. Skywest Airlines<sup>139</sup>

The plaintiff was on a SkyWest flight from Oregon to Texas when she was allegedly struck by a flight attendant during beverage service, resulting in injuries to her shoulder.<sup>140</sup> The plaintiff filed a lawsuit asserting negligence claims for the flight attendant’s alleged failure to operate the beverage cart safely, and breach of contract claims for the breach of SkyWest’s contractual duty to provide her with safe passage.<sup>141</sup>

In response, SkyWest filed a motion to dismiss plaintiff’s negligence claims as preempted by the ADA because the claims were “related to a price, route, or service of an air carrier,” and sought to dismiss the breach of contract claims on two grounds: (1) as redundant of the negligence claims; and (2) for the failure to identify a specific contract that was breached.<sup>142</sup> The district court granted the motion to dismiss both claims as preempted by the ADA.<sup>143</sup> The plaintiff appealed to the Tenth Circuit on the grounds that her personal-injury claims did not fall within the preemptive scope of the ADA.<sup>144</sup>

The appellate court introduced its opinion with the following statement: “We agree with our sister circuits that personal-injury claims arising out of an airline employee’s failure to exercise

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<sup>136</sup> *Id.* (quoting *Bailey*, 889 F.3d at 1268).

<sup>137</sup> *Id.* at 851.

<sup>138</sup> *Id.* at 852 (citing *Am. Airlines v. Wolens*, 513 U.S. 219, 232–33 (1995)).

<sup>139</sup> 45 F.4th 1181 (10th Cir. 2022).

<sup>140</sup> *Id.* at 1182.

<sup>141</sup> *Id.* at 1182–83.

<sup>142</sup> *Id.* at 1182, 1183 (quoting 49 U.S.C. § 41713(b)(1)).

<sup>143</sup> *Id.* at 1182.

<sup>144</sup> *Id.* at 1183.

due care are not ‘related to’ a deregulated price, route, or service.”<sup>145</sup> Although “[t]he parties [did] not dispute that common-law . . . negligence and breach of contract [claims in concept] may fall within the [ADA’s preemptive] scope,” the parties did dispute whether the plaintiff’s claims were “related to” an air carrier’s “service.”<sup>146</sup>

The court first addressed whether SkyWest’s provision of food and drink constituted a “service” for the purpose of the ADA.<sup>147</sup> Relying on the Fifth Circuit’s definition of “service” from *Hodges v. Delta Airlines, Inc.*,<sup>148</sup> wherein “‘service’ includes ‘items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself,’” the court found SkyWest’s beverage service to be a “service” for the purposes of the ADA.<sup>149</sup>

The court next addressed whether the claims were “related to” an airline’s rates, routes, or services.<sup>150</sup> Referencing the Supreme Court’s “connection with or reference to” test that has been applied in the ERISA context<sup>151</sup>, the court stated that in the ADA context “a state law has an impermissible ‘reference to’ airline prices, routes, or services if the law ‘acts immediately and exclusively’ upon airline prices, routes, or services, or if ‘the existence of’ airline prices, routes, or services ‘is essential to the law’s operations.’”<sup>152</sup> The court further stated that:

A state law which does not “refer to” an airline’s price, route, or service may nevertheless be preempted as impermissibly “connected with” them if the law (1) governs a central matter of an airline’s prices, routes, or services; (2) interferes with uniform national policies regarding airline prices, routes, or services; or (3) will have acute economic effects that effectively limit airlines’ choices regarding their prices, routes, and services.<sup>153</sup>

Therefore, under “this test, a state law is not preempted if it ‘has only a tenuous, remote, or peripheral connection [with air-

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<sup>145</sup> *Id.* at 1182.

<sup>146</sup> *Id.* at 1184.

<sup>147</sup> *Id.*

<sup>148</sup> 44 F.3d 334, 336 (5th Cir. 1995).

<sup>149</sup> *Day*, 45 F.4th at 1184.

<sup>150</sup> *Id.*

<sup>151</sup> *See Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312 (2016) (applying the “connection with or reference to” test in regard to preemption by the Employee Retirement Income Security Act of 1974 (ERISA)).

<sup>152</sup> *Day*, 45 F.4th at 1186 (citing *Gobeille*, 577 U.S. at 319–320).

<sup>153</sup> *Id.* (citing *Gobeille*, 577 U.S. at 320).

line prices, routes, or services], as is the case with many laws of general applicability.’”<sup>154</sup>

Under this test, the Tenth Circuit held that plaintiff’s negligence claims were “not preempted under the ‘reference to’ part of the test because the state laws [at issue] . . . [did] not refer to airline prices, routes, or services.”<sup>155</sup> Instead, the court found that the state laws of Utah<sup>156</sup> for common-law negligence and contract causes of action were “laws of general applicability that apply to any individuals or corporations whose actions may foreseeably injure others or who enter into contractual arrangements” and did not make any “‘reference to’ airline prices, routes, or services.”<sup>157</sup> The court further found that the laws do not make any reference to airline prices, routes, or services “because they do not act immediately and exclusively upon airline prices, routes, or services, nor do they depend on the existence of airline prices, routes, or services for their operation.”<sup>158</sup>

The court next addressed whether the state laws have a “‘connection with [an] airline’s rates, routes, [or] services.”<sup>159</sup> The court first considered whether the objectives of the ADA would survive if such a connection was found.<sup>160</sup> Citing favorably to decisions from the Third, Fifth, Ninth, and Eleventh Circuits, the court found that:

Congress enacted the ADA to achieve “the *economic* deregulation of the airline industry,” but “[n]othing in the Act itself, or its legislative history, indicates that Congress had a clear and manifest purpose to displace state tort law in actions that do not affect *deregulation* in more than a peripheral manner.”<sup>161</sup>

The appellate court found that the “statute as a whole ‘evidences congressional intent to prohibit states from regulating the airlines while preserving state tort remedies that already ex-

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<sup>154</sup> *Id.* (citing *Dist. Of Columbia v. Greater Wash. Bd. Of Trade*, 506 U.S. 125, 130 n. 1).

<sup>155</sup> *Id.* at 1186.

<sup>156</sup> *Id.* at 1182 & n.1. The plaintiff’s flight was from Oregon to Texas. The two-count diversity complaint was filed in the United States District Court for the District of Utah. *Id.* at 1182.

<sup>157</sup> *Id.* at 1186–87.

<sup>158</sup> *Id.* at 1187.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

isted at common law, providing that such remedies do not significantly impact federal deregulation.”<sup>162</sup>

The appellate court then considered “the nature and effect of the state law on’ airline prices, routes, and services.”<sup>163</sup> The court held that “a judgment in [plaintiff’s] favor on her negligence and contract claims would impact SkyWest’s prices, routes, and services only insofar as SkyWest might be required to exercise more care in providing whatever services it decides to provide.”<sup>164</sup> In addition:

Finding SkyWest liable for its allegedly negligent infliction of personal injuries on [plaintiff] during its beverage service would not force SkyWest to remove, add, or modify any of its prices, routes, or services; it would simply hold SkyWest to the same general obligations of due care and contractual fealty that apply to other companies.<sup>165</sup>

Accordingly, the court held “that the district court erred in dismissing [Plaintiff’s] negligence and [breach of] contract claims as preempted by the ADA,” reversed, and remanded the case.<sup>166</sup>

### 3. *Wilson v. Caribbean Airlines Ltd.*<sup>167</sup>

The plaintiff was traveling from Guyana to New York on Caribbean Airlines Limited (CAL).<sup>168</sup> Prior to boarding, the plaintiff’s suitcase was taken to a staging area and loaded onto the flight.<sup>169</sup> Upon arrival in New York, the plaintiff was selected for a customs inspection that “revealed more than two kilograms of cocaine in his suitcase.”<sup>170</sup> The plaintiff was arrested and released on bail, but the charges were subsequently dropped.<sup>171</sup> The plaintiff filed suit alleging state law tort claims that CAL negligently handled his luggage, allowing the drugs to be

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<sup>162</sup> *Id.* at 1188 (quoting *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265 (9th Cir. 1998)).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 1188-89.

<sup>166</sup> *Id.* at 1191.

<sup>167</sup> No. 20-CV-4524-FB-CLP, 2022 U.S. Dist. LEXIS 124051 (E.D.N.Y. Jul. 3, 2022).

<sup>168</sup> *Id.* at \*1.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at \*1-2.

<sup>171</sup> *Id.* at \*2.

planted without his knowledge.<sup>172</sup> CAL moved for summary judgment, arguing preemption under the ADA.<sup>173</sup>

Per the ADA, a state may not enact or enforce a law “related to a price, route, or service” of an air carrier.<sup>174</sup> In deciding CAL’s motion for summary judgment, the court applied the three-part *Rombom* test.<sup>175</sup> As to whether the “activity at issue in the claim is an airline service,” the plaintiff argued the relevant activity was “securing passengers’ baggage from drug trafficking” and “protecting passengers’ baggage from having drugs planted in it.”<sup>176</sup> The court found that those acts were part of CAL’s agreement to transport the baggage and that “[b]aggage handling is, without question, an airline service.”<sup>177</sup> Since the activity implicated was a “service,” the court moved to the second prong of the *Rombom* test.<sup>178</sup> As to whether the claim “affects the airline service directly or [only] tenuously, remotely, or peripherally,” plaintiff argued that “allowing drugs to be placed in” his bag was “not directly related to safety or to baggage handling” because it is “the opposite of what a passenger expects.”<sup>179</sup> The court found that the end result occurred because of a failure to take adequate precautions, which “directly impacts the airline’s baggage handling procedures” and, thus, satisfied the second prong.<sup>180</sup> Finally, as to “whether the underlying tortious conduct was reasonably necessary to the provision of the service,” the court found this prong satisfied because the plaintiff only claimed that CAL negligently failed to prevent the planting of drugs from happening.<sup>181</sup> There was no evidence that CAL or its employees were involved in the drug plant.<sup>182</sup>

Based on the facts analyzed under the *Rombom* test, the court granted CAL’s motion for summary judgment dismissing the sole cause of action on the basis that it was preempted by the ADA.<sup>183</sup> Per the court, “This [was] a difficult conclusion because it le[ft] [the plaintiff] without a remedy for serious damage aris-

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<sup>172</sup> *Id.* at \*1–2.

<sup>173</sup> *Id.* at \*1.

<sup>174</sup> *Id.* at \*2 (quoting 49 U.S.C. § 41713(b)(1)).

<sup>175</sup> *Id.* at \*3.

<sup>176</sup> *Id.* at \*3–4.

<sup>177</sup> *Id.* at \*3.

<sup>178</sup> *Id.* at \*4.

<sup>179</sup> *Id.*

<sup>180</sup> *See id.*

<sup>181</sup> *Id.* at \*5.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at \*3–6.

ing from a situation for which he bore no fault.”<sup>184</sup> The court noted, “Perhaps it is some comfort to believe that this case might supply a vehicle by which some higher authority can finally and authoritatively decide the extent of the ADA’s preemptive effect on tort claims.”<sup>185</sup>

#### 4. *SwiftAir, LLC v. Southwest Airlines Co.*<sup>186</sup>

SwiftAir and Southwest entered into a beta test agreement for SwiftAir to develop software that would offer inflight deals to Southwest passengers, and for Southwest to test out the software to determine whether to license the product.<sup>187</sup> After the testing period, Southwest decided not to license the software, and SwiftAir filed a lawsuit for breach of contract, fraud, and various other causes of action.<sup>188</sup> Southwest filed a motion for summary adjudication on SwiftAir’s noncontract causes of action alleging that those claims were preempted by the ADA.<sup>189</sup> After trial, a jury determined that Southwest failed to comply with the beta test agreement, but that Southwest’s failure to comply did not result in any harm to SwiftAir.<sup>190</sup> SwiftAir filed a motion for judgment notwithstanding the verdict and for a new trial on the basis that the jury should have awarded SwiftAir at least the money spent on developing the software; additionally, on appeal, it argued that the trial court erred in granting Southwest’s motion for summary adjudication dismissing the noncontract causes of action as preempted by the ADA.<sup>191</sup>

In support of its position on appeal, Southwest argued that “the ADA preempt[ed] SwiftAir’s noncontract causes of action because those causes of action, in alleging SwiftAir developed its software platform for inflight use by Southwest passengers, ‘expressly refer[s] to’ Southwest ‘services’—specifically, to Southwest’s provision of ‘in-flight entertainment’ and ‘in-flight wireless internet access’ to its passengers.”<sup>192</sup> SwiftAir did not dispute that characterization of its software, only that it did not

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<sup>184</sup> *Id.* at \*6.

<sup>185</sup> *Id.*

<sup>186</sup> 77 Cal. App. 5th 46 (Cal. App. 2d Dist. 2022).

<sup>187</sup> *Id.* at 49.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 49–50.

<sup>192</sup> *Id.* at 54.

implicate a “service” within the meaning of the ADA.<sup>193</sup> Per the court:

*Morales, Wolens, and Rowe*<sup>194</sup> stand for the proposition that for a claim to be preempted by the ADA, “two things must be true[:] (1) the claim must derive from the enactment or enforcement of state law, and (2) the claim must relate to airline rates, routes, or services, either by expressly referring to them or by having a significant economic effect upon them.”<sup>195</sup>

The court analyzed various appellate court definitions of services and was persuaded to apply the broad definition provided by the Fifth Circuit in *Hodges* that:

‘Services’ generally represent a bargained-for or anticipated provision of labor from one party to another. . . . Elements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself. These matters are all appurtenant and necessarily included with the contract of carriage between the passenger or shipper and the airline. It is these [contractual] features of air transportation that we believe Congress intended to de-regulate as ‘services’ and broadly to protect from state regulation.<sup>196</sup>

Additionally, the broad definition from *Hodges* is consistent with the Supreme Court’s language in *Morales* that the ADA has a “broad pre-emptive purpose.”<sup>197</sup> The court held that the provision of “inflight entertainment and wireless internet access to passengers f[ell] well within the *Hodges* definition of an airline

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<sup>193</sup> *Id.*

<sup>194</sup> In *Rowe*, the U.S. Supreme Court applied its analysis from *Morales* regarding the ADA’s preemption provision to interpret a similar provision in the Federal Aviation Administration Authorization Act. *See Rowe v. N.H. Motor Transp. Ass’n.*, 552 U.S. 364 (2008).

<sup>195</sup> *SwiftAir*, 77 Cal. App. 5th at 54.

<sup>196</sup> *SwiftAir*, 77 Cal. App. 5th at 55 (quoting *Hodges v. Delta Airlines*, 44 F.3d 334, 336 (5th Cir. 1995)). “The First, Seventh, and Eleventh Circuits have joined the Fifth Circuit in adopting the *Hodges* definition of ‘services’ . . . [W]hile not explicitly adopting the *Hodges* definition, the Fourth and Tenth Circuits have cited it in determining that airline activities under consideration were ‘services’ within the meaning of the ADA preemption provision.” *Id.* *See Arapahoe County Public Airport Authority v. F.A.A.* 242 F.3d 1213, 1222 (10th Cir. 2001); *Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998). The Eighth Circuit has observed the *Hodges* definition is “[c]onsistent with’ the Supreme Court’s decision in *Wolens*, and has ‘assume[d] for the sake of analysis’ it is correct.” *Watson v. Air Methods Corp.*, 870 F.3d 812, 818 (8th Cir. 2017).

<sup>197</sup> *SwiftAir*, 77 Cal. App. 5th at 56 (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992)).

'service.'"<sup>198</sup> The court further held that "[b]ecause SwiftAir's noncontract causes of action expressly referred to Southwest services, the ADA preempted them without Southwest having to demonstrate a significant economic impact on those services."<sup>199</sup> As such, the court held that "[t]he trial court did not err in granting Southwest's motion for summary adjudication."<sup>200</sup>

## VI. MONTREAL AND WARSAW CONVENTIONS

The "cardinal purpose" of the Warsaw Convention was to "achieve [international] uniformity of rules governing claims arising from international air transportation."<sup>201</sup> The Warsaw Convention created a comprehensive liability system to serve as the exclusive mechanism to remedy injuries or damages suffered in the course of "international transportation of persons, baggage, or goods performed by aircraft."<sup>202</sup>

In 1999, the International Civil Aviation Organization (ICAO) member states adopted the Montreal Convention, which largely has supplanted the Warsaw Convention.<sup>203</sup> Like the Warsaw Convention, the Montreal Convention is a multilateral treaty governing the liability of air carriers for damage/injury to passengers, baggage, or cargo during international carriage by air.<sup>204</sup> The Montreal Convention "applies to all international carriage of persons, baggage or cargo performed by aircraft for reward" and "applies equally to gratuitous carriage by aircraft performed by an air transport undertaking."<sup>205</sup> The expression "international carriage" is defined by the Montreal Convention as:

[A]ny carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an

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<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 57-58.

<sup>200</sup> *Id.* at 58.

<sup>201</sup> *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 169 (1999) (quoting *E. Airlines v. Floyd*, 499 U.S. 530, 552 (1991)).

<sup>202</sup> *Id.*

<sup>203</sup> Convention for the Unification of Certain Rules for International Carriage by Air, art. 53(1), 55, May 28, 1999, S. Treaty Doc. No. 106-45 [hereinafter Montreal Convention].

<sup>204</sup> *Id.* at art. 22.

<sup>205</sup> *Id.* at art. 1(1).

agreed stopping place within the territory of another State, even if that State is not a State Party.<sup>206</sup>

Presently, there are 139 parties to the Montreal Convention.<sup>207</sup>

Both the Montreal Convention and the Warsaw Convention provide international air passengers an exclusive remedy for claims that are governed by that treaty.<sup>208</sup> While the Warsaw Convention and Montreal Convention have many similarities, there are some notable differences. One notable difference, for example, is the addition of the “Fifth Jurisdiction.”<sup>209</sup> The Warsaw Convention permits suit against a carrier to be brought in “the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.”<sup>210</sup> The Montreal Convention added as a permissible jurisdiction, the State in which:

[T]he passenger has his or her principal and permanent residence, . . . [as long as] the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier’s aircraft pursuant to a commercial agreement, and in which the 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.<sup>211</sup>

Also, the Montreal Convention added a number of articles expressly covering contracting carriers, which were not explicitly referenced in the Warsaw Convention. Thus, the Montreal Convention expressly applies:

[W]hen a person (hereinafter referred to as “the contracting carrier”) as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as “the actual carrier”) performs, by vir-

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<sup>206</sup> *Id.* at art. 1(2).

<sup>207</sup> *Convention for the Unification of Certain Rules for International Carriage by Air*, ICAO, [https://www.icao.int/secretariat/legal/list%20of%20parties/mtl99\\_en.pdf](https://www.icao.int/secretariat/legal/list%20of%20parties/mtl99_en.pdf) [<https://perma.cc/B56H-446H>].

<sup>208</sup> *El Al Israel Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 160–161 (1999).

<sup>209</sup> Devendra Pradhan, *The Fifth Jurisdiction under the Montreal Liability Convention: Wandering American or Wandering Everybody*, 68 J. AIR L. & COM. 717, 719–20 (2003).

<sup>210</sup> Montreal Convention, *supra* note 203, at art. 33(1).

<sup>211</sup> *Id.* at art. 33(2).

tue of authority from the contracting carrier, the whole or part of the carriage.<sup>212</sup>

The Montreal Convention has a two-tiered liability scheme for passenger injuries caused by an accident. The carrier is strictly liable for damages up to 128,821 Special Drawing Rights, an amount determined by the International Monetary Fund.<sup>213</sup> For damages above that number, a carrier can avoid liability if it can prove that “such damage was not due to the negligence or other wrongful act or omission of the carrier” or that “such damage was solely due to the negligence or other wrongful act or omission of a third party.”<sup>214</sup> Moreover, a carrier may reduce or eliminate its liability for all damages to the extent it “proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation.”<sup>215</sup>

Article 17(1) of the Montreal Convention, like the corresponding provision of the Warsaw Convention, provides that a “carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.”<sup>216</sup> The Montreal Convention preempts state law claims for passenger injuries suffered on board an aircraft, during embarkation, or during disembarkation.<sup>217</sup> Recovery for such a claim, “if not allowed under the Convention, is not available at all” under U.S. law.<sup>218</sup>

The Supreme Court defined “accident” in Article 17 to mean “an unexpected or unusual event or happening that is external to the passenger.”<sup>219</sup> This definition “should be flexibly applied after assessment of all the circumstances surrounding a passenger’s injuries;” however, “when the injury indisputably results

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<sup>212</sup> *Id.* at art. 39.

<sup>213</sup> 2019 Revised Limits of Liability Under the Montreal Convention of 1999, ICAO, [https://www.icao.int/secretariat/legal/Pages/2019\\_Revised\\_Limits\\_of\\_Liability\\_Under\\_the\\_Montreal\\_Convention\\_1999.aspx](https://www.icao.int/secretariat/legal/Pages/2019_Revised_Limits_of_Liability_Under_the_Montreal_Convention_1999.aspx) [<https://perma.cc/4YRX-USWS>] (showing Article 21 original limit (SDRs) was 100,000, which was revised in December 2009 to 113,100, and revised again in December 2019 to 128,821).

<sup>214</sup> Montreal Convention, *supra* note 203, at art. 21(2).

<sup>215</sup> *Id.* at art. 20.

<sup>216</sup> *Id.* at art. 17(1).

<sup>217</sup> *See* *El Al Isr. Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 160-61 (1999).

<sup>218</sup> *Id.* at 161.

<sup>219</sup> *Air France v. Saks*, 470 U.S. 398, 405 (1985).

from the passenger's own internal reaction to the usual, normal, or expected operation of the aircraft, it has not been caused by an accident, and Article 17 . . . cannot apply."<sup>220</sup> As to whether the conduct was "unexpected or unusual," the Supreme Court has declined to adopt a "negligence-based approach."<sup>221</sup> Instead, Article 17 "involves an inquiry into the nature of the event which *caused* the injury rather than the care taken by the airline to avert the injury."<sup>222</sup> The court stated, "[I]t is the *cause* of the injury that must satisfy the definition [of accident] rather than the occurrence of the injury alone."<sup>223</sup>

As to mental injuries, United States courts have uniformly held that Article 17(1) does not provide a basis for recovery unless they result from an "accident" and there is also a "bodily injury."<sup>224</sup> Indeed, the Supreme Court interpreting a similar phrase from the Warsaw Convention (the predecessor to the Montreal Convention) barred recovery for "purely mental injuries."<sup>225</sup> The Supreme Court in *Eastern Airlines, Inc. v. Floyd* explicitly declined, however, to decide whether a plaintiff may recover for "mental injuries that are accompanied by physical injuries."<sup>226</sup>

Nevertheless, until the Sixth Circuit's decision in *Doe v. Etihad Airways*, few questioned that the Montreal Convention allowed recovery for emotional injury only when caused by a bodily injury, as this was the rule adopted by nearly every court to address the issue under the Warsaw Convention, and the Montreal Convention did not substantively change the language of Article 17.<sup>227</sup> The Sixth Circuit in *Doe* rejected this precedent, and held that while a passenger must have a bodily injury to recover damages for emotional distress under the Montreal Convention, there is no requirement that the emotional distress be caused by the physical injury.<sup>228</sup> Of note for this submission, Article 17(2) provides that:

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<sup>220</sup> *Id.* at 405–06.

<sup>221</sup> *Olympic Airways v. Husain*, 540 U.S. 644, 657 (2004).

<sup>222</sup> *Air France*, 470 U.S. at 407.

<sup>223</sup> *Id.* at 399.

<sup>224</sup> *See, e.g., Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535–36 (1991) (discussing the Warsaw Convention, the predecessor to the Montreal Convention).

<sup>225</sup> *Id.* at 534.

<sup>226</sup> *Id.* at 552–53.

<sup>227</sup> *Doe v. Etihad Airways*, 870 F.3d 406, 425–26, 430–32 (6th Cir. 2017).

<sup>228</sup> *See id.* at 417, 428 ("[B]ecause an accident onboard Etihad's aircraft caused Doe to suffer a bodily injury . . . Doe may therefore recover damages for her mental anguish, regardless of whether that anguish was caused directly by her

[A] carrier is liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier.<sup>229</sup>

Additionally, Article 35 provides for time limits on actions under the Montreal Convention, providing that “[t]he right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.”<sup>230</sup> Article 35 further states: “The method of calculating that period shall be determined by the law of the court seised of the case.”<sup>231</sup>

Lastly, Article 57, “Reservations,” states that “[n]o reservation may be made to this Convention except that a State Party may at any time declare by a notification” that the Montreal “Convention shall not apply to”:

- (a) international carriage by air performed and operated directly by that State Party for non-commercial purposes in respect to its functions and duties as a sovereign State; and/or
- (b) the carriage of persons, cargo and baggage for its military authorities on aircraft registered in or leased by that State Party, the whole capacity of which has been reserved by or on behalf of such authorities.<sup>232</sup>

#### A. CAUSATION REQUIREMENT FOR BODILY INJURY AND MENTAL HARM

##### 1. *Oshana v. Aer Lingus Ltd.*<sup>233</sup>

The plaintiff alleged she was seated on the toilet on her Aer Lingus flight from Chicago to Dublin when she was informed by a crew member “to return to her seat immediately.”<sup>234</sup> Before the plaintiff had time to pull up her pants, “the crew member

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bodily injury or more generally by the accident that caused the bodily injury. That is because, either way, Doe’s mental anguish is ‘damage sustained in case of’—i.e., ‘in the event of’ a compensable bodily injury.”).

<sup>229</sup> Montreal Convention, *supra* note 203, at art. 17(2).

<sup>230</sup> *Id.* at art. 35(1).

<sup>231</sup> *Id.* at art. 35(2).

<sup>232</sup> *Id.* at art. 57.

<sup>233</sup> No. 20 C 2041, 2022 U.S. Dist. LEXIS 8176 (N.D. Ill. Jan. 12, 2022).

<sup>234</sup> *Id.* at \*1–2.

unlocked the . . . [door] and pushed her to her seat.”<sup>235</sup> The plaintiff claimed physical pain from hitting the armrest while being placed in her seat and emotional distress from “having her genitals exposed in front of others.”<sup>236</sup> Aer Lingus countered that the plaintiff was “fixing her trousers” when the crew member unlocked the door.<sup>237</sup> The plaintiff filed suit to recover monetary damages under Article 17 of the Montreal Convention claiming both physical bodily injury and emotional distress.<sup>238</sup>

Prior to trial, both parties filed various motions in limine.<sup>239</sup> Among other motions, Aer Lingus filed a motion in limine on the Montreal Convention’s bodily injury requirement.<sup>240</sup> Aer Lingus argued that the plaintiff could only recover damages for her emotional distress where the emotional distress was caused by her bodily injury, and that the plaintiff could not establish a bodily injury as required in Article 17.<sup>241</sup> In response, the plaintiff argued that the court, similar to the Sixth Circuit in *Doe*, should decline to apply a causation requirement and that she was “entitled to seek recovery for all of her injuries, even though her emotional distress was not the result of her physical injuries.”<sup>242</sup> Aer Lingus argued that the plaintiff’s position ignored that the “Montreal Convention drafters tried ‘wherever possible’ to retain the language of the Warsaw Convention ‘with the purpose of not disrupting existing jurisprudence.’”<sup>243</sup>

The court rejected Aer Lingus’ causation requirement.<sup>244</sup> In rejecting this argument, the court looked at *Ehrlich v. American Airlines, Inc.*,<sup>245</sup> which is one of the most frequently cited cases on this issue.<sup>246</sup> In *Ehrlich*, the Second Circuit deemed the language of Article 17 ambiguous on this issue.<sup>247</sup> For that reason, the appellate court looked to the purpose of the Warsaw Convention (the operative treaty for that case).<sup>248</sup> Noting that the

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<sup>235</sup> *Id.* at \*2.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at \*2–3.

<sup>239</sup> *Id.* at \*1.

<sup>240</sup> *Id.* at \*18.

<sup>241</sup> *Id.* at \*18–19.

<sup>242</sup> *See id.* at \*21–22.

<sup>243</sup> *Id.* at \*26.

<sup>244</sup> *See id.* at \*26–27.

<sup>245</sup> 360 F.3d 366 (2d Cir. 2004).

<sup>246</sup> *See, e.g., Oshana* 2022 U.S. Dist. LEXIS 8176, at \*26 (citing *Ehrlich*, 360 F.3d at 385).

<sup>247</sup> *Ehrlich*, 360 F.3d at 385.

<sup>248</sup> *Id.*

Warsaw Convention's purpose was to "protect[ ] air carriers and foster[ ] a new industry rather than provid[e] a full recovery to injured passengers," the Second Circuit held that "[b]y reading Article 17 in a narrow fashion to preclude a physical injury from exposing a carrier to liability for unrelated mental injuries, we respect that legislative choice."<sup>249</sup> Unlike the Warsaw Convention, the purpose of the Montreal Convention was to provide passengers with a full recovery.<sup>250</sup> Thus, the court found that the rationale in *Ehrlich* actually weighed against a causation requirement for recovery of emotional injury, ignoring that the drafters of the Montreal Convention were aware of the existing case law when they decided to retain the operative language of the Warsaw Convention.<sup>251</sup>

Aer Lingus also argued that "jettisoning the causal link requirement would effectively nullify the Supreme Court's holding in *Eastern Airlines, Inc. v. Floyd*."<sup>252</sup> However, the court determined that while the Supreme Court in *Floyd* may have prohibited recovery of purely mental injuries, the Court "explicitly declined to decide whether, as in [plaintiff's] case, a plaintiff may recover for 'mental injuries that are accompanied by physical injuries.'"<sup>253</sup>

The court denied Aer Lingus' motion in limine and rejected its arguments for a causation requirement, holding that the plaintiff could recover for emotional distress regardless if the distress was caused by a bodily injury.<sup>254</sup> Additionally, the court held that plaintiff's claims of bruising to her arm and hips as a result of hitting the arm rest while being pushed into her seat were sufficient to send the bodily injury issue to a jury.<sup>255</sup>

## 2. *Bandary v. Delta Air Lines, Inc.*<sup>256</sup>

The following is a summary of the court's opinion on various motions in limine and jury instructions as they relate to "mental or emotional damages under [Article 17 of] the Montreal Convention," which reads:

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<sup>249</sup> *Id.*

<sup>250</sup> *See Oshana*, 2022 U.S. Dist. LEXIS 8176, at \*27–28.

<sup>251</sup> *See id.* at \*26–27.

<sup>252</sup> *Id.* at \*27.

<sup>253</sup> *Id.* at \*20 (quoting *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 552–53, (1991)).

<sup>254</sup> *Id.* at \*31.

<sup>255</sup> *Id.* at \*30–31.

<sup>256</sup> No. EDCV 17-1065, 2019 U.S. Dist. LEXIS 232295 (C.D. Cal. Oct. 11, 2019).

The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.<sup>257</sup>

The question before the court was what “sustained in case of death or bodily injury” means for the purposes of recovery of mental or emotional damages under the Montreal Convention.<sup>258</sup> The court noted the split among courts as to the interpretation of this language in the wake of *Doe v. Etihad*.<sup>259</sup> Most courts have interpreted this language consistent with the Warsaw Convention, creating a causation requirement.<sup>260</sup> However, other courts, again most notably the Sixth Circuit in *Doe*, disagree that Article 17 of the Montreal Convention “impose[s] a requirement that [the] mental or emotional damages be caused by the bodily harm.”<sup>261</sup>

Here, the federal district court for the Central District of California disagreed “with the broad holding of *Doe*,” and concluded that the language in Article 17, providing that “[t]he carrier is liable for damage sustained in case of death or bodily injury of a passenger,” does suggest a causation requirement.<sup>262</sup> According to the court, since recovery is permitted for “damage sustained in case of death or bodily injury,” this means, “the damage suffered due to the death or bodily injury.”<sup>263</sup> The court added, “[n]othing in this language suggests that any bodily injury suffered in the course of an accident, no matter how slight, opens up recovery for all mental and emotional distress, no matter how unrelated to the bodily injury.”<sup>264</sup> Such an interpretation “would lead to absurd results surely not intended by the drafters of Article 17.”<sup>265</sup>

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<sup>257</sup> *Id.* at \*1 (quoting Montreal Convention, *supra* note 203, art. 17(1)).

<sup>258</sup> *Id.* at \*2.

<sup>259</sup> *Id.*

<sup>260</sup> *See id.* at \*2 & n.1. (The English translation of Article 17 of the Warsaw Convention stated: “The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operation of embarking or disembarking.”).

<sup>261</sup> *Id.* at \*2.

<sup>262</sup> *Id.* at \*1–3.

<sup>263</sup> *Id.* at \*3.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

### 3. BT v. Laudamotion GmbH<sup>266</sup>

The plaintiff boarded a flight operated by Laudamotion from London to Vienna.<sup>267</sup> On takeoff, the left engine exploded, leading to an evacuation of the passengers.<sup>268</sup> The plaintiff exited the aircraft through the emergency exit and was thrown “several [meters] through the air by the jet blast from the right engine,” which was still moving.<sup>269</sup> As a result of the incident, the plaintiff was diagnosed with PTSD and received medical treatment.<sup>270</sup>

The plaintiff filed an action under Article 17(1) of the Montreal Convention for reimbursement of her medical expenses and payment for pain and suffering.<sup>271</sup> The airline contended that Article 17(1) only covered bodily harm and not just mental impairment.<sup>272</sup> The district court held that the plaintiff’s claims did not fall within Article 17(1) since that provision was for liability for bodily injury.<sup>273</sup> However, the district court also held that the airline “was liable under Austrian law, which provides for” damages for only psychological injuries.<sup>274</sup> The airline appealed, and the appellate court overturned the district court and dismissed the claim for damages.<sup>275</sup> The appellate court affirmed the lower court’s determination that Article 17(1) did not cover purely psychological injuries and also held that Article 29 of the Montreal Convention excluded the application of Austrian law.<sup>276</sup> The plaintiff appealed to the Supreme Court of Austria.<sup>277</sup>

The question before the Austrian Supreme Court was whether Article 17(1) allows for compensation of psychological injuries that are not connected with a “bodily injury.”<sup>278</sup> In analyzing this question, the court noted that a “passenger who has suffered a psychological injury as a result of an accident may, depending

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<sup>266</sup> Case C-111/21, *BT v. Laudamotion GmbH*, ECLI:EU:C:2022:808 (Oct. 20, 2022).

<sup>267</sup> *Id.* ¶ 8.

<sup>268</sup> *Id.* ¶ 9.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* ¶ 10.

<sup>272</sup> *Id.* ¶ 11.

<sup>273</sup> *Id.* ¶ 12.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* ¶ 13.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* ¶ 14.

<sup>278</sup> *Id.* ¶¶ 15, 16(1).

on the seriousness of the harm resulting from it, be [in a situation] comparable to that of a passenger who has suffered bodily injury.”<sup>279</sup> Because of this, “it must [therefore] be held that Article 17(1) of the Montreal Convention allows compensation . . . [to be paid for mental impairment] caused by an ‘accident,’ within the meaning of that provision, which is not linked to ‘bodily injury,’ within the meaning of that provision.”<sup>280</sup> Ultimately, the court held that:

[A] psychological injury caused to a passenger by an ‘accident’ within the meaning of that provision, which is not linked to ‘bodily injury,’ within the meaning of that provision, must be compensated in the same way as such a bodily injury, provided that the aggrieved passenger demonstrates the existence of an adverse effect on his or her psychological integrity of such gravity or intensity that it affects his or her general state of health and that it cannot be resolved without medical treatment.<sup>281</sup>

#### B. PREEMPTION—NON-PERFORMANCE VERSUS DELAY IN PERFORMANCE CLAIMS

##### 1. A.S.A.P. Logistics, Ltd. v. UPS Supply Chain Solutions, Inc.<sup>282</sup>

The plaintiff and defendant entered into a Global Air Charter Services Agreement by which “[d]efendant was obligated to charter one or more aircrafts from unspecified third-party carriers, for four flights [between] April 25, 2020 . . . and May 8, 2020.”<sup>283</sup> The flights were “to transport [p]laintiff’s goods between China and the United States.”<sup>284</sup> The purpose behind the charter was to control the costs, quantity, and delivery dates of the goods.<sup>285</sup> The plaintiff filed a complaint “seeking relief for (1) breach of contract, (2) breach of the duty of good faith and fair dealing, and (3) prima facie tort.”<sup>286</sup> The plaintiff alleged that the defendant “failed and refused to timely ship [the] goods on the dates listed” because “[d]efendant ‘bump[ed]’

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<sup>279</sup> *Id.* ¶ 28.

<sup>280</sup> *Id.* ¶ 29.

<sup>281</sup> *Id.* ¶ 35.

<sup>282</sup> No. 20-CV-4553, 2022 U.S. Dist. LEXIS 168703 (E.D.N.Y. Sept. 19, 2022).

<sup>283</sup> *Id.* at \*1.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at \*1–2.

<sup>286</sup> *Id.* at \*1.

[p]laintiff's freight" in line, and as a result, customers canceled their orders.<sup>287</sup> The defendant filed a motion to dismiss.<sup>288</sup>

The defendant argued that the plaintiff's claims were "preempted by the Montreal Convention."<sup>289</sup> The plaintiff did not challenge that the tort claims were preempted, but argued that the court should allow the breach of contract claim to proceed.<sup>290</sup> The plaintiff argued that the Montreal Convention applies only to "air carriers" defined as "those airlines that actually transport passengers or baggage" and since defendant arranged for the transport of goods between parties, defendant was not an "air carrier."<sup>291</sup> Instead, the plaintiff classified defendant as a "charter broker" that was not covered by the Montreal Convention.<sup>292</sup> The court disagreed with the plaintiff and recognized that the Montreal Convention "extended coverage to contracting carriers that arrange for a third party to transport carriage."<sup>293</sup> The court stated that the defendant was "plainly covered by the Montreal Convention."<sup>294</sup> The issue then became whether the plaintiff's claims otherwise fell within the Montreal Convention's scope.<sup>295</sup>

The defendant argued that plaintiff's breach of contract claim was based on defendant's "alleged delay of the shipments at issue"; specifically that defendant "intentionally failed and refused to timely ship" the goods.<sup>296</sup> As there was no allegation that the defendant failed to ship the goods at all, this was not a claim for nonperformance.<sup>297</sup> The plaintiff argued that the claim should be interpreted as a claim for nonperformance and not for delay of shipment, which would not fall within the scope of the Montreal Convention.<sup>298</sup>

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<sup>287</sup> *Id.* at \*2.

<sup>288</sup> *Id.* at \*1.

<sup>289</sup> *Id.* at \*3.

<sup>290</sup> *Id.*; see also *id.* at \*10 n.7 ("Defendant contends that plaintiff has failed to state a claim for implied covenant of good faith and fair dealing and for prima facie tort. Plaintiff, represented by counsel in this matter, did not respond, in any way, to [d]efendant's arguments concerning these claims[;] . . . [t]hus, [d]efendant's motion to dismiss [p]laintiff's implied covenant of good faith and fair dealing and prima facie tort claims is granted.").

<sup>291</sup> *Id.* at \*4-5.

<sup>292</sup> *Id.* at \*5.

<sup>293</sup> *Id.* at \*4.

<sup>294</sup> *Id.* at \*6.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at \*7.

<sup>297</sup> *Id.* at \*7-9.

<sup>298</sup> *Id.* at \*8.

According to the court, the nature of the claim—nonperformance versus delay in performance – is determinative of whether the Montreal Convention would apply.<sup>299</sup> Here, because the goods ultimately were shipped, the court held that the plaintiff’s breach of contract claim sounded in delay as opposed to nonperformance.<sup>300</sup> As such, plaintiff’s breach of contract claim was preempted by the Montreal Convention, and the court granted defendant’s motion to dismiss.<sup>301</sup>

## 2. *Chapa v. American Airlines Group, Inc.*<sup>302</sup>

The plaintiff purchased an American Airlines ticket to Saint Maarten in order to connect to Saint Barthelemy (on a separate airline).<sup>303</sup> American canceled the flight to Saint Maarten on the date of departure, causing plaintiff to miss the connecting flight to Saint Barthelemy, which resulted in the loss of money on the hotel room for that night.<sup>304</sup> American later flew the plaintiff to Saint Maarten.<sup>305</sup> The plaintiff filed a lawsuit in state court asserting three causes of action, including: “breach of the Texas Deceptive Trade Practices-Consumer Protection Act, negligence and breach of contract.”<sup>306</sup> American filed a notice of removal on the basis of federal question jurisdiction, and plaintiff filed a motion to remand on the basis that his complaint only contained state law claims.<sup>307</sup>

The plaintiff argued that the Montreal Convention was inapplicable to him as his damages “flowed after he disembarked in Dallas and Saint Maarten.”<sup>308</sup> In response, American argued that “the Montreal Convention applies when there is any international carriage between two signatory countries ‘whether or not there be a break in the carriage or a transshipment’ . . . [and] [t]he United States and the Kingdom of the Netherlands are signatories to the Montreal Convention.”<sup>309</sup>

The court held that because the plaintiff’s damages were due to the DELAY in his international carriage, as opposed to a non-

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<sup>299</sup> *Id.* at \*9.

<sup>300</sup> *Id.* at \*10.

<sup>301</sup> *Id.*

<sup>302</sup> No. 7:22-CV-00071, 2022 U.S. Dist. LEXIS 49372 (S.D. Tex. Mar. 21, 2022).

<sup>303</sup> *Id.* at \*2, 5.

<sup>304</sup> *Id.*

<sup>305</sup> *See id.* at \*5.

<sup>306</sup> *Id.* at \*2.

<sup>307</sup> *Id.* at \*2-3.

<sup>308</sup> *Id.* at \*5.

<sup>309</sup> *Id.*

performance by the airline, the Montreal Convention applied, which allowed the court to have federal jurisdiction over the case under 28 U.S.C. § 1331 (federal question jurisdiction).<sup>310</sup> The court noted that the outcome would have been different if the plaintiff brought suit following a “complete nonperformance,” such as a “refusal to transport a passenger,” as opposed to a delay in performance claim, as courts in the Fifth Circuit have not found the former to be subject to preemption under the Montreal Convention.<sup>311</sup>

### 3. Klein v. Lufthansa AG<sup>312</sup>

The plaintiffs, two Jewish individuals, were traveling with a large group of Jewish passengers on a pilgrimage to Hungary in honor of Rabbi Yeshaya Steiner.<sup>313</sup> Plaintiffs traveled from John F. Kennedy International Airport to Frankfurt via Lufthansa in order to connect from Frankfurt to Budapest.<sup>314</sup> At the time of the flights in May 2022, Lufthansa’s policy was that all passengers were required to wear masks on the flight.<sup>315</sup> The plaintiffs wore their masks but the other members of their group, along with other passengers, did not.<sup>316</sup> Some of the Jewish passengers on board were blocking aisles to pray.<sup>317</sup> After landing in Frankfurt, the plaintiffs went to the gate to board their next flight to Budapest.<sup>318</sup> The desk agents called only non-Jewish passengers to board.<sup>319</sup> The gate staff:

[R]ejected persons with Jewish-sounding names or appearances, including plaintiffs [and] [p]laintiffs were told that this was because of their group’s non-compliance with the mask requirement, even though (1) plaintiffs had complied with the mask requirement; and (2) the desk agents permitted non-Jewish passengers who had not complied with the mask requirement to board.”<sup>320</sup>

The plaintiffs were informed that “the remaining travelers would not be included on the flight and the travelers were

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<sup>310</sup> *Id.* at \*6.

<sup>311</sup> *See id.* at \*4-5.

<sup>312</sup> No. 22-CV-02957, 2022 U.S. Dist. LEXIS 150248 (E.D.N.Y. Aug. 22, 2022).

<sup>313</sup> *Id.* at \*1.

<sup>314</sup> *Id.* at \*1-2.

<sup>315</sup> *Id.* at \*2.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *Id.* at \*2-3.

banned from the airline for the day.”<sup>321</sup> The plaintiffs missed their flight, were re-booked on a different Lufthansa flight with a fare difference, and had to re-book their flight home after it was invalidated for non-completion of the outbound flight.<sup>322</sup> The plaintiffs filed a class action lawsuit alleging discrimination.<sup>323</sup> Lufthansa moved to dismiss the complaint as preempted by the Montreal Convention.<sup>324</sup>

The plaintiffs argued that Article 17 of the Montreal Convention, which pertains to “death or bodily injury suffered by an airline passenger” that takes place “onboard” the aircraft or “in the course of any of the operations of embarking [or disembarking],” did not apply to their claims because “they were not in the process of embarkation” – i.e., they were not actually on the aircraft or embarking the aircraft since they were denied boarding at the gate.<sup>325</sup> The court, however, noted the Second Circuit’s “flexible approach” for analyzing whether a passenger is “in the course of any of the operations of embarking” within the meaning of Article 17 when the injury occurs.<sup>326</sup> This analysis looks to four factors: “(1) the activity of the passengers at the time of the accident; (2) the restrictions, if any, on their movements; (3) the imminence of actual boarding; (4) the physical proximity of the passengers to the gate”<sup>327</sup> and the “situs of the alleged accident, as opposed to the location of the alleged damage sustained.”<sup>328</sup>

Here, the court found that the desk agent denied the plaintiffs from boarding the flight at the desk during the boarding process.<sup>329</sup> Per the court, “[a]s it was only after the desk agent saw them that they were rejected, plaintiffs necessarily had to have presented themselves at the gate to the agent for boarding.”<sup>330</sup> Accordingly, “all four factors from *Buonocore* were present—location, activity, control, and imminence.”<sup>331</sup> As such, the

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<sup>321</sup> *Id.* at \*3.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* at \*5-6.

<sup>326</sup> *Id.* at \*6.

<sup>327</sup> *Id.* (citing *Buonocore v. Trans World Airlines, Inc.*, 900 F.2d 8, 10 (2d Cir. 1990)).

<sup>328</sup> *Id.* (citing *Hunter v. Deutsche Lufthansa AG*, 863 F. Supp. 2d 190, 206 (E.D.N.Y. 2012)).

<sup>329</sup> *Id.* at \*7.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

court concluded that the plaintiffs “were in the course of any of the operations of embarking when the alleged actions giving rise to their claims took place.”<sup>332</sup> Moreover, the court found that “the incident [fell] within the substantive scope of Article 17 of the Montreal Convention,” and therefore the plaintiffs’ claims were preempted.<sup>333</sup>

### C. ACCIDENT INJURY

#### I. Moore v. British Airways PLC<sup>334</sup>

The plaintiff commenced litigation against British Airways to recover for injuries sustained as she was disembarking a British Airways flight from Boston to London using a mobile staircase.<sup>335</sup> The plaintiff sued the airline under the Montreal Convention, alleging that her injuries resulted from an “accident” under Article 17.<sup>336</sup> Plaintiff alleged that she fell because the last step of the mobile staircase was “appreciably more precipitous than the earlier ones” (according to plaintiff’s expert, each of the steps was 7.4 inches in height, while the final one was 13 inches).<sup>337</sup> The airline moved for summary judgment arguing that, “as a matter of law, the plaintiff’s injuries did not result from an ‘accident’ within the meaning of [Article 17].”<sup>338</sup> The district court agreed with the airline, ruled that “the plaintiff’s injuries were not the result of an accident within the meaning of the Montreal Convention,” and granted the motion.<sup>339</sup> The plaintiff appealed.<sup>340</sup>

The issue on appeal was whether her fall while descending this mobile staircase, “under the circumstances, was an event that may constitute an ‘accident’ within the meaning of the Montreal Convention.”<sup>341</sup> The plaintiff argued that her injuries were caused by an “accident” because it was “unexpected that she would have to disembark from the aircraft on a mobile staircase” in which the bottom step, without any warning, was farther

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<sup>332</sup> *Id.* (internal quotations omitted).

<sup>333</sup> *Id.*

<sup>334</sup> 32 F.4th 110 (1st Cir. 2022).

<sup>335</sup> *Id.* at 112-13.

<sup>336</sup> *Id.* at 113.

<sup>337</sup> *Id.* at 112-13.

<sup>338</sup> *Id.* at 114.

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> *Id.* at 112.

from the ground than the other steps.<sup>342</sup> Given that there was “no dispute that deploying the mobile staircase was an event that was external to the passenger,” the issue was whether disembarking on a staircase set up in such a way “should be considered ‘unexpected or unusual’ under the circumstances.”<sup>343</sup>

According to the court, the *Saks* formulation “does not confine the inquiry to whether the event was unusual; it also requires the court to ask whether the event was unexpected.”<sup>344</sup> The ordinary meaning of “unexpected” is “[c]oming without warning; unforeseen” and “unusual” means “not usual, common, or ordinary.”<sup>345</sup> The court analyzed the “unexpected” language of the *Saks* definition and asked “unexpected by whom?”<sup>346</sup> The plaintiff argued that the analysis of whether an event was “unexpected” should be from the perspective of the “average traveler” and the airline argued the proper perspective should be that of the “airline industry.”<sup>347</sup> Under the airline’s logic, the height difference in the staircase could not be an “accident” under Article 17 because such a difference was “normal and routine” across the airline industry.<sup>348</sup>

The court held that “under the *Saks* definition of ‘accident’ . . . an event is unexpected when a reasonable passenger with ordinary experience in commercial air travel, standing in the plaintiff’s shoes, would not expect that event to happen.”<sup>349</sup> In determining whether the height of the final stair constituted an “accident,” the court focused on four facts: (1) all of the steps prior to the last one had a uniform, lesser height; (2) the passenger prior to plaintiff also had difficulty navigating the final step, though she did not fall or get injured; (3) a jury could find that passengers were not warned of the difference in height with the final step; and (4) plaintiff’s expert referenced standards, including a European standard (voluntary, not required) for

<sup>342</sup> *Id.* at 116.

<sup>343</sup> *Id.*

<sup>344</sup> *Id.* (referencing *Air France v. Saks*, 470 U.S. 392 (1985)). In *Saks*, the Court “defined an ‘accident’ for the purposes of Article 17 of the Warsaw Convention (the predecessor of the Montreal Convention), as ‘an unexpected or unusual event or happening that is external to the passenger.’” *Id.* at 115 (quoting *Saks*, 470 U.S. at 405).

<sup>345</sup> *Id.* at 116 (quoting *AMERICAN HERITAGE DICTIONARY* 1950 (3d ed. 1992)).

<sup>346</sup> *Id.* at 117.

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> *Id.* at 120-21.

mobile staircases, stating that all steps should have the same riser height and none should exceed 10.24 inches.<sup>350</sup>

Based on these four facts, and notwithstanding the evidence that the set-up of the mobile staircase for the flight comported with industry practice, the court found that the “accident” inquiry was a question of fact to be determined at trial.<sup>351</sup> The appellate court vacated the entry of summary judgment for the airline, deciding “a jury could supportably find that the event was unexpected and that the passenger’s injuries resulted from such an accident.”<sup>352</sup>

## 2. JR v. Austrian Airlines, AG<sup>353</sup>

The Third Chamber of the Regional Court, Korneubourg, Austria addressed the issues of what constitutes an accident and how exoneration may be established under the Montreal Convention.<sup>354</sup> The plaintiff, her husband, and son were traveling from Greece to Austria on an Austrian Airlines flight.<sup>355</sup> At the airport in Austria, “while disembarking the aircraft via a mobile stairway with a handrail on each side, [plaintiff’s] husband,” who was in front of plaintiff holding luggage in both hands, “almost fell on the lower third of the stairway.”<sup>356</sup> The plaintiff, while holding her son in one hand and her handbag in the other, fell in the same place.<sup>357</sup> As a result, the plaintiff broke her arm.<sup>358</sup>

The plaintiff filed a lawsuit against the airline claiming the stairway did not fulfill the airline’s “contractual obligation to protect and ensure the safety of its passengers” because the stairwell was “slippery” due to rain as well as “oily and dirty.”<sup>359</sup> The airline responded that the stairwell was manufactured in a way to have water run off such that it would not have been slippery, which means it “had not failed to fulfill its contractual obligations of protection and diligence.”<sup>360</sup> Instead, the airline argued,

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<sup>350</sup> *Id.* at 121-22.

<sup>351</sup> *Id.* at 122-123.

<sup>352</sup> *Id.* at 112.

<sup>353</sup> Case C-589/20, JR v. Austrian Airlines AG, ECLI:EU:C:2022:47, (June 2, 2022).

<sup>354</sup> *Id.* ¶¶ 18, 25.

<sup>355</sup> *Id.* ¶ 9.

<sup>356</sup> *Id.* ¶ 10.

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> *Id.* ¶ 11.

<sup>360</sup> *Id.* ¶ 12.

the plaintiff fell due to her own conduct of not using the handrails.<sup>361</sup> The district court held that “the stairs showed no signs of defect or damage,” and although the stairs may have been wet, “they were not slippery, oily, greasy, or covered by dirt.”<sup>362</sup> As such, it was not possible to determine why plaintiff fell and the district court dismissed the action on the pleadings.<sup>363</sup> The plaintiff appealed.<sup>364</sup> On appeal, the court considered two issues. The first was:

[W]hether Article 17(1) of the Montreal Convention must be interpreted as meaning that a situation in which, for no ascertainable reason, a passenger falls on a mobile stairway set up for the disembarkation of the passengers of an aircraft and injures himself or herself constitutes an “accident”, within the meaning of that provision, including where the air carrier concerned has not failed to fulfil its diligence and safety obligations in that regard.<sup>365</sup>

The court held:

Article 17(1) of the Montreal Convention must be interpreted as meaning that a situation in which, for no ascertainable reason, a passenger falls on a mobile stairway set up for the disembarkation of passengers of an aircraft and injures himself or herself constitutes an “accident”, within the meaning of that provision, including where the air carrier concerned has not failed to fulfil its diligence and safety obligations in that regard.<sup>366</sup>

The second issue was:

[W]hether Article 20 of the Montreal Convention must be interpreted as meaning that where an accident which caused damage to a passenger consists of that passenger’s fall, for no ascertainable reason, on a mobile stairway set up for the disembarkation of the passengers of an aircraft, the fact that that passenger was not holding the handrail of that stairway at the time of his or her fall may constitute proof of negligence or another wrongful act or omission by that passenger which caused or contributed to the damage suffered by him or her, within the meaning of that provi-

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<sup>361</sup> *Id.*

<sup>362</sup> *Id.* ¶ 13.

<sup>363</sup> *Id.* ¶¶ 13-14 (stating that the trial court “dismissed the action brought by [the plaintiff], holding in essence that Austrian Airlines had not infringed its ancillary obligation to ensure the safety of its passengers and that [the plaintiff] had not taken any precautions to prevent her fall”).

<sup>364</sup> *Id.* ¶ 15.

<sup>365</sup> *Id.* ¶ 18.

<sup>366</sup> *Id.* ¶ 24.

sion, and, to that extent, exonerate the air carrier concerned from its liability to that passenger.<sup>367</sup>

Article 20 (Exoneration) of the Montreal Convention states, in pertinent part:

[If] the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage.<sup>368</sup>

Here, the court held that:

[T]he first sentence of Article 20 of the Montreal Convention must be interpreted as meaning that, where an accident which caused damage to a passenger consists of a fall of that passenger, for no ascertainable reason, on a mobile stairway set up for the disembarkation of the passengers of an aircraft, the air carrier concerned may be exonerated from its liability towards that passenger only to the extent that, taking account of all the circumstances in which that damage occurred, that carrier proves, in accordance with the applicable national rules and subject to the observance of the principles of equivalence and effectiveness, that the damage suffered by that passenger was caused or contributed to by the negligence or other wrongful act or omission of that passenger, within the meaning of that provision.<sup>369</sup>

#### D. TIMELINES

##### 1. *Barry v. Maroc*<sup>370</sup>

The plaintiff purchased a round-trip ticket from New York to Cairo, via Casablanca, on Royal Air Maroc (RAM) for April 21, 2019, and returning on June 21, 2019.<sup>371</sup> The plaintiff checked three pieces of luggage in New York and was subsequently re-routed onto Tunisair from Casablanca to Cairo.<sup>372</sup> The plaintiff arrived in Cairo without his luggage.<sup>373</sup> The plaintiff returned to New York, via RAM, still without his luggage.<sup>374</sup> On August 31,

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<sup>367</sup> *Id.* ¶ 25.

<sup>368</sup> *Id.* ¶ 5 (quoting Montreal Convention, *supra* note 203, at art. 20).

<sup>369</sup> *Id.* ¶ 34.

<sup>370</sup> No. 21-CV-8481, 2022 U.S. Dist. LEXIS 122225 (S.D.N.Y. July 8, 2022).

<sup>371</sup> *Id.* at \*2.

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> *Id.* at \*2-3.

2021, the plaintiff, acting *pro se*, filed a lawsuit in state court seeking damages for the three pieces of lost luggage.<sup>375</sup> RAM removed the action to the District Court for the Southern District of New York, pursuant to federal statutory jurisdiction over claims arising from the Montreal Convention.<sup>376</sup> RAM asserted defenses under Articles 22 and 35 of the Montreal Convention and moved for summary judgment, which plaintiff failed to oppose.<sup>377</sup>

The court held that the Montreal Convention applied to the plaintiff's claims because the "plaintiff's baggage was under the charge of RAM when it was lost" and "since the United States, Morocco, and Egypt all are parties to the Montreal Convention."<sup>378</sup> The plaintiff's claims were governed by Article 17(2) for lost baggage.<sup>379</sup> The court also held that the two-year deadline set forth in Article 35 for commencement of an action "creates a condition to suit, rather than a statute of limitations, and is therefore not subject to tolling."<sup>380</sup> As such, since plaintiff completed his trip on June 21, 2019, the plaintiff had until June 21, 2021 to file any lost luggage claims.<sup>381</sup> The plaintiff did not file his state court action until August 31, 2021, when his claim was already extinguished, and his action was barred.<sup>382</sup>

## E. JURISDICTIONAL REACH

### 1. Pettaway v. Miami Air International, Inc.<sup>383</sup>

Commercial Flight 293 took off from the Naval Air Station at Guantanamo Bay, Cuba on May 3, 2019, and arrived at Naval Air Station Jacksonville, Florida.<sup>384</sup> On landing, the aircraft "veered off the runway . . . and landed in the St. John's River."<sup>385</sup> The incident spurred multiple lawsuits by the various passengers

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<sup>375</sup> *Id.* at \*1.

<sup>376</sup> *Id.*

<sup>377</sup> *Id.*

<sup>378</sup> *Id.* at \*7-8.

<sup>379</sup> *Id.*

<sup>380</sup> *See id.* at \*8-9 (quoting *Ireland v. AMR Corp.*, 20 F. Supp. 3d 341, 345 (E.D.N.Y. 2014)).

<sup>381</sup> *Id.*

<sup>382</sup> *Id.* at \*9.

<sup>383</sup> No. 3:22-CV-139-TJC-MCR, 2022 U.S. Dist. LEXIS 164424 (M.D. Fla. Aug. 31, 2022).

<sup>384</sup> *Id.* at \*3.

<sup>385</sup> *Id.*

against Miami Air International, Inc., the aircraft's owner and operator.<sup>386</sup>

In *Lail*, a case arising from the accident, the plaintiffs filed their complaint in the United States District Court for the Middle District of Florida on April 15, 2021, asserting a single claim for damages under the Montreal Convention.<sup>387</sup> The plaintiff's alleged the flight at issue was an "international charter flight" from Cuba to the United States.<sup>388</sup> In *Pettaway*, another case arising from the incident, the plaintiffs filed their complaint in Florida state court on December 20, 2021, alleging state law claims for negligence, vicarious liability, negligence, and loss of consortium.<sup>389</sup> Unlike the plaintiffs in *Lail*, the plaintiffs in *Pettaway* "affirmatively pled that the Montreal Convention [did] not apply to their claims" because the United States' possession of Guantanamo Bay meant the flight did not constitute "international carriage."<sup>390</sup> The defendant disagreed with the "international carriage" contention and removed the *Pettaway* action to federal court.<sup>391</sup> The *Pettaway* plaintiffs did not seek remand and the defendant filed a motion to dismiss.<sup>392</sup> The *Lail* plaintiffs thereafter moved to amend their complaint to parrot *Pettaway*'s alternative state law claims and allegations that the flight was not international carriage.<sup>393</sup> The court stayed the *Lail* matter in order to determine whether the Montreal Convention applied to the plaintiffs' various claims in order to address the pending motions (motions to dismiss, a motion to amend the complaint, and a motion for partial summary judgment).<sup>394</sup>

The court first addressed defendant's motion to dismiss in the *Pettaway* matter.<sup>395</sup> The defendant argued that "Flight 293 was an international flight involving 'international carriage' within the meaning of the Montreal Convention" because Guantanamo Bay "constitutes a territory of Cuba, therefore rendering Flight 293 international carriage."<sup>396</sup> In that case, the Montreal Convention would apply and preempt any state law claims asserted

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<sup>386</sup> *Id.* at \*1-2.

<sup>387</sup> *Id.* at \*3.

<sup>388</sup> *Id.* at \*4.

<sup>389</sup> *Id.* at \*3-4.

<sup>390</sup> *Id.* at \*4.

<sup>391</sup> *Id.* at \*5.

<sup>392</sup> *Id.*

<sup>393</sup> *Id.* at \*5-6.

<sup>394</sup> *Id.* at \*6.

<sup>395</sup> *Id.*

<sup>396</sup> *Id.* at \*6.

by the *Pettaway* plaintiffs.<sup>397</sup> Moreover, the Montreal Convention's two-year limitations period would apply (from Article 35) and preclude the *Pettaway* plaintiffs' claims.<sup>398</sup> The *Pettaway* plaintiffs argued the Montreal Convention did not apply because "Guantanamo [Bay] is a territory of the United States, not Cuba," based on "their reading of the [Montreal] Convention and based on the United States' history and relationship with Guantanamo."<sup>399</sup> In that case, their state law claims would not be preempted nor untimely.<sup>400</sup>

The court examined the language of the Montreal Convention and its intended reach.<sup>401</sup> It explained, "international carriage" as used in Article 1(1) of the Montreal Convention "means a flight must travel between the 'territories' of two countries that are signatories to the [Montreal] Convention."<sup>402</sup> The court noted that neither "territory" nor "territories" is defined under the Montreal Convention and whether Guantanamo Bay constitutes a "territory" of Cuba or the United States presented a "novel question" for the court.<sup>403</sup> The court first turned to the definition of "international carriage" and its focus on the "locations of the places of departure and arrival, requiring that such places be 'situated' 'within' the territories of the State Parties."<sup>404</sup> The court held that "Guantanamo Bay is SITUATED WITHIN the country of Cuba, a State Party [and] [t]he United States does not own Guantanamo Bay; rather, it leases the land comprising Guantanamo Bay from Cuba for its 'coaling and naval stations.'"<sup>405</sup> The court stated that "[t]he United States' operation of a military base in a foreign country generally does not render that land a territory of the United States" and under the "plain understanding of the word 'territory' in the [Montreal] Convention, Guantanamo Bay is not a part of the United States."<sup>406</sup>

Analyzing the United States' history with Article 57, which "precludes State Parties from making reservations under the [Montreal] Convention with two exceptions," the court noted

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<sup>397</sup> *Id.* at \*6-7.

<sup>398</sup> *Id.* at \*7.

<sup>399</sup> *Id.*

<sup>400</sup> *Id.*

<sup>401</sup> *Id.* at \*10-11.

<sup>402</sup> *Id.* at \*11 (citing Montreal Convention, *supra* note 203, at art. 1(1)).

<sup>403</sup> *Id.* at \*12.

<sup>404</sup> *Id.*

<sup>405</sup> *Id.* (emphasis in original).

<sup>406</sup> *Id.* at \*12-13.

that the United States has reserved the first exception—“a State Party may reserve from the Montreal Convention any international air carriage performed directly by the State Party for non-commercial purposes”—but not the second exception —“a State Party may reserve any chartered international air carriage leased by that State Party for its military authorities.”<sup>407</sup> Because the *Pettaway* plaintiffs “alleged that Flight 293 operated as a common carrier for hire engaged in the transportation of charter airline passengers in both domestic and international air travel,” the flight would “not constitute transportation conducted by the United States in its official capacity” and therefore was “not exempt under Article 57 from the Montreal Convention.”<sup>408</sup> As such, “Flight 293 remains within the Montreal Convention’s ambit under a plain reading of the text as a commercial flight from one United States’ military base in Cuba to another in the United States.”<sup>409</sup> Therefore, the court dismissed the *Pettaway* plaintiffs’ state law claims as preempted by the Montreal Convention.<sup>410</sup>

Based on the reasoning applied to the motion to dismiss in the *Pettaway* matter, the court denied the *Lali* plaintiffs’ motion to amend their complaint to assert state law claims.<sup>411</sup> However, the defendant had also moved for partial summary judgment in *Lali* “regarding the extent to which the plaintiffs were permitted to recover damages for any alleged mental injuries caused by the incident.”<sup>412</sup> The defendant sought to limit plaintiffs’ recoverable damages to mental injuries that were caused by a physical injury.<sup>413</sup> The plaintiffs argued they were “entitled to recover for any mental injuries caused by the accident, so long as they also sustained a physical injury.”<sup>414</sup> The court denied the motion as premature and without prejudice.<sup>415</sup>

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<sup>407</sup> *Id.* at \*13; see also Montreal Convention, *supra* note 203, at art. 57.

<sup>408</sup> *Pettaway*, 2022 U.S. Dist. LEXIS 164424, at \*15.

<sup>409</sup> *Id.* at \*16.

<sup>410</sup> *Id.* at \*23.

<sup>411</sup> *Id.* at \*25.

<sup>412</sup> *Id.* at \*27.

<sup>413</sup> *Id.*

<sup>414</sup> *Id.* at \*28.

<sup>415</sup> *Id.* at \*28-29.

## VII. FAA AND UNMANNED AIRCRAFT RULEMAKING

A. FAA REMOTE IDENTIFICATION OF UNMANNED AIRCRAFT RULE (REMOTE ID RULE)<sup>416</sup>

In 2016, Congress passed a law requiring the FAA to develop standards, issue regulations, and provide guidance for the remote identification of owners and operators of unmanned aircraft systems (UAS).<sup>417</sup> In 2018, Congress extended the FAA's authority over small recreational UAS.<sup>418</sup> In compliance with these Congressional mandates, the FAA promulgated the Remote ID Rule.<sup>419</sup> The FAA published its Notice of Proposed Rulemaking on Remote Identification of Unmanned Aircraft Systems on December 31, 2019, and received more than 53,000 comments during the 60-day comment period.<sup>420</sup> The FAA considered those comments and published its Final Rule on January 15, 2021.<sup>421</sup> Effective April 21, 2021, the Remote ID Rule requires the remote identification of UAS in order to “address safety, national security, and law enforcement concerns” regarding expanded UAS operations.<sup>422</sup>

The FAA equates remote identification (remote ID) to a “digital license plate” with multiple options for compliance.<sup>423</sup> The first option is to operate a “Standard Remote ID UAS” that broadcasts identification and location information about the UAS and its control station.<sup>424</sup> A Standard Remote ID UAS has built-in remote ID broadcast capability.<sup>425</sup> The Standard Remote ID UAS must broadcast the following information from takeoff to shut down: (1) an identifier unique to the UAS; (2) latitude, longitude, geometric altitude, and velocity; (3) control station latitude, longitude, and geometric altitude; (4) the time; and (5) any emergency status.<sup>426</sup>

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<sup>416</sup> Remote Identification of Unmanned Aircraft, 86 Fed. Reg. 4390 (Jan. 15, 2021).

<sup>417</sup> FAA Extension, Safety, and Security Act of 2016, Pub. L. No. 114-190, §2202(a), (d), 130 Stat. 615, 629 (2016).

<sup>418</sup> See FAA Reauthorization Act of 2018, Pub. L. No. 115-254, §349(f)(3), 132 Stat. 3186, 3298 (2018).

<sup>419</sup> See generally 86 Fed. Reg. 4390.

<sup>420</sup> *UAS Remote Identification*, FAA, [https://www.faa.gov/uas/getting\\_started/remote\\_id](https://www.faa.gov/uas/getting_started/remote_id) (last updated March 15, 2023).

<sup>421</sup> *Id.*

<sup>422</sup> 86 Fed. Reg. at 4390.

<sup>423</sup> *Id.* at 4396.

<sup>424</sup> *Id.* at 4391.

<sup>425</sup> *Id.*

<sup>426</sup> *Id.*

The second option is to operate a UAS with a remote ID broadcast module.<sup>427</sup> A broadcast module is a device that broadcasts identification and location information about the UAS and its takeoff location.<sup>428</sup> The remote ID broadcast module must broadcast, from takeoff to shut down: (1) the serial number of the broadcast module; (2) latitude, longitude, geometric altitude, and velocity of the UAS; (3) latitude, longitude, and geometric altitude of the UAS takeoff location; and (4) the time.<sup>429</sup> Owners of UAS manufactured without built-in remote ID capabilities must retrofit their UAS with a remote ID broadcast module, which can be a separate device attached to the UAS or a built-in module.<sup>430</sup> However, operation of a UAS with a remote ID broadcast module is limited to visual line of sight.<sup>431</sup>

Both options broadcast via radio frequency, e.g., Wi-Fi and Bluetooth.<sup>432</sup> Smart phones and similar devices can receive signals and read the remote ID information via a downloadable application available to the FAA, government entities, and members of the public.<sup>433</sup> The FAA does not require remote ID (any remote identification transmission from the UAS) if operated at a specific FAA-Recognized Identification Area (FRIA) and within visual line of sight.<sup>434</sup> Moreover, the Remote ID Rule does not apply to UAS that weigh less than 0.55 pounds (250 grams) on takeoff, including everything that is on board or otherwise attached to the UAS.<sup>435</sup>

UAS manufacturers had until December 16, 2022, to comply with the final requirements of the Remote ID Rule (remote ID functionality in production and design).<sup>436</sup> The deadline for UAS operators for transmitting remote ID signals during flight is September 16, 2023.<sup>437</sup>

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<sup>427</sup> *Id.* at 4392.

<sup>428</sup> *Id.*

<sup>429</sup> *Id.*

<sup>430</sup> *Id.* at 4392-93.

<sup>431</sup> *Id.*

<sup>432</sup> *Id.* at 4427.

<sup>433</sup> *Id.*

<sup>434</sup> *Id.* at 4392.

<sup>435</sup> *Id.* at 4403.

<sup>436</sup> *Id.* at 4390.

<sup>437</sup> *Id.*

## B. CHALLENGES TO REMOTE ID RULE

1. Brennan v. Dickson<sup>438</sup>

The United States Court of Appeals for the District of Columbia unanimously denied a petition to vacate the FAA's Remote ID Rule, holding that it does not constitute an unreasonable governmental search that would violate the Fourth Amendment.<sup>439</sup>

In *Brennan v. Dickson*, the petitioner, a UAS operator and owner of a UAS retailer, sought to vacate the Remote ID Rule on constitutional grounds, asserting that the "Remote ID requirement amounts to constant, warrantless governmental surveillance in violation of the Fourth Amendment."<sup>440</sup> The petitioner argued that the Remote ID Rule does not protect airspace safety, which he recognized as important, but instead "enable[d] the government to conduct intrusive tracking of everyone, everywhere, all the time, with extremely low costs and ease of accessibility for law enforcement without judicial safeguards."<sup>441</sup> In support of his arguments, the petitioner relied on the Supreme Court's Fourth Amendment precedent on electronic searches by law enforcement.<sup>442</sup>

The petitioner further argued that the Remote ID Rule should be vacated on procedural grounds because: (1) the FAA "relied on *ex parte* communications during the rulemaking that were not . . . available for public comment;" (2) aspects of the Rule "were not logical outgrowths of the Proposed Rule;" (3) the FAA did not "consult with specified entities in formulating standards;" and (4) "the FAA failed to address material comments."<sup>443</sup> The FAA responded that the Remote ID Rule does not invade any reasonable expectation of privacy for two reasons: (1) aviation is heavily regulated; and (2) the Rule applies only to outdoor UAS flights.<sup>444</sup> As such, using remote ID broadcasts to track the location of an operator and the UAS "invades no constitutionally recognized privacy interest."<sup>445</sup> The FAA further argued that "[e]ven if the [Remote ID] Rule did implicate

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<sup>438</sup> 45 F.4th 48 (D.C. Cir. 2022).

<sup>439</sup> *Id.* at 54.

<sup>440</sup> *Id.*

<sup>441</sup> *Id.* at \*60.

<sup>442</sup> *Id.*

<sup>443</sup> *Id.* at 59-60.

<sup>444</sup> *Id.* at 61.

<sup>445</sup> *Id.*

constitutional privacy . . . the ‘searches’ it contemplates are exempt from the Fourth Amendment’s warrant requirement,” similar to an administrative search of a “closely regulated” business.<sup>446</sup>

The court denied the petitioner’s facial challenge.<sup>447</sup> The court opened with, “It is hard to see what could be private about flying a drone in the open air.”<sup>448</sup> Similar to “cars traveling on public streets and highways or helicopters taking off,” UAS that fly in the skies “ordinarily make themselves visible to onlookers.”<sup>449</sup> Since UAS “are virtually always flown in public,” the requirement that a UAS transmit its location, as well as the location of its operator, while the UAS is in open air “violates no reasonable expectation of privacy.”<sup>450</sup> Indeed, “drone pilots generally lack any reasonable expectation of privacy in the location of their drone systems during flight.”<sup>451</sup> The petitioner hypothesized that law enforcement could use the remote ID data to continuously surveil UAS operators.<sup>452</sup> Since the petitioner did not demonstrate that any uses of the remote ID data have harmed him or will imminently harm him, however, the court found that he did not present any justiciable challenge to the Rule.<sup>453</sup>

The court next held that none of the asserted procedural challenges to the FAA’s promulgation of the Remote ID Rule “affecte[d] the validity of the [r]ule.”<sup>454</sup> First, the challenged *ex parte* communications did not materially affect the rulemaking so the fact that the FAA did not include them in the record did not impede the opportunity for public comment.<sup>455</sup> Second, the final rule provisions were “logical outgrowths” of the proposed rule that was available for public comment.<sup>456</sup> Third, the FAA fulfilled its statutory requirement to consult with numerous groups and industry stakeholders.<sup>457</sup> Fourth, the FAA did not need to respond to “purely speculative comments” and its repre-

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<sup>446</sup> *Id.* (referencing *New York v. Burger*, 482 U.S. 691, 712 (1987)).

<sup>447</sup> *Id.*

<sup>448</sup> *Id.* at 60.

<sup>449</sup> *Id.*

<sup>450</sup> *Id.* at 54.

<sup>451</sup> *Id.* at 61.

<sup>452</sup> *Id.* at 54.

<sup>453</sup> *Id.*

<sup>454</sup> *Id.*

<sup>455</sup> *Id.*

<sup>456</sup> *Id.*

<sup>457</sup> *Id.*

sentation that it considered all of the comments was sufficient.<sup>458</sup>

However, while the petitioner's facial challenge to the Remote ID Rule failed, the court explained that it was not ruling out the possibility of an as-applied challenge.<sup>459</sup> Specifically, the court noted that its opinion did "not foreclose the possibility of a declaratory judgment or injunctive action by a party establishing that application of the Remote ID Rule to its own specifically delineated drone uses would subject it to an unconstitutional privacy deprivation."<sup>460</sup> Similarly, the court noted it was not deciding the viability of Fourth Amendment objections that targets of enforcement actions might raise.<sup>461</sup>

### VIII. POLITICAL QUESTION JURISDICTION

The federal government is divided into three separate, coequal branches that empower and constrain one another. Judicial review serves as a check against unconstitutional or otherwise illegal actions by the other two political branches.<sup>462</sup> As instructed by Chief Justice John Marshall, "It is emphatically the province and duty of the judicial department to say what the law is."<sup>463</sup> When a disagreement arises, the court has the final say on the meaning of the Constitution.<sup>464</sup>

Although the scope and power of judicial review is extensive, the courts have also recognized that there are times where abstention is required.<sup>465</sup> Judicial review has its limitations, one of which is political questions.<sup>466</sup> As the court in *Japan Whaling Ass'n* stated, "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Execu-

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<sup>458</sup> *Id.*

<sup>459</sup> *Id.* at 65.

<sup>460</sup> *Id.*

<sup>461</sup> *Id.*

<sup>462</sup> See generally *About The Supreme Court*, U.S. COURTS, [https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about#:~:text=the%20best%2Dknown%20power%20of,Madison%20\(1803](https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about#:~:text=the%20best%2Dknown%20power%20of,Madison%20(1803) (last visited Apr. 16, 2023) [<https://perma.cc/R8VV-WP2N>] (discussing judicial review).

<sup>463</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

<sup>464</sup> See *id.*

<sup>465</sup> See, e.g., *Japan Whaling Ass'n. v. Am. Cetacean Soc'y*, 478 U.S. 221, 229-30 (1986).

<sup>466</sup> *Id.* at 430.

tive Branch.”<sup>467</sup> This is because “the Judiciary is particularly ill suited to make such decisions, as courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.”<sup>468</sup>

A. *PRESTON V. M1 SUPPORT SERVICES, L.P.*<sup>469</sup>

A Navy helicopter caught on fire and crashed into the Atlantic Ocean off the coast of Virginia, killing three and injuring two service members.<sup>470</sup> The Navy recovered the helicopter wreckage and discovered two holes in the fuel-transfer tube.<sup>471</sup> The holes allowed fuel to leak into the cabin, which was ignited by poorly insulated wiring.<sup>472</sup> Investigators also suspected that “a wire bundle held together by a plastic zip-tie had rubbed against the fuel tube, causing the chafing damage.”<sup>473</sup> Defendant M1 Support Services, a Texas based contractor, performed a “top-to-bottom helicopter inspection and repair” three months prior to the crash and marked the helicopter as “safe for flight.”<sup>474</sup> M1’s work was aligned with a performance work statement provided by the Navy.<sup>475</sup> One of the maintenance directives by the Navy expressly required M1 to “check the fuel and vent lines in the helicopter’s cabin for leakage, chafing, obvious damage, and security.”<sup>476</sup>

After the accident, the families of the deceased and one of the injured servicemen sued M1 for damages in Texas state court under the Death on the High Seas Act and general maritime law.<sup>477</sup> The plaintiffs alleged that “M1 negligently failed to detect and repair the damage to the fuel-transfer tube and wire bundle,” which caused their injuries.<sup>478</sup> M1 denied the allegations and moved for summary judgment, raising the government-contractor defense.<sup>479</sup> Before the court ruled on the summary judgment motion, M1 also filed a motion to dismiss

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<sup>467</sup> *Id.*

<sup>468</sup> *Id.* (internal citations omitted).

<sup>469</sup> 642 S.W.3d 452 (Tex. 2022).

<sup>470</sup> *Id.* at 455.

<sup>471</sup> *Id.* at 455-56.

<sup>472</sup> *Id.* at 456.

<sup>473</sup> *Id.*

<sup>474</sup> *Id.*

<sup>475</sup> *Id.*

<sup>476</sup> *Id.* (internal brackets omitted).

<sup>477</sup> *Id.*

<sup>478</sup> *Id.*

<sup>479</sup> *Id.*

for lack of subject-matter jurisdiction due to the “political question doctrine,” under which courts may not review “those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.”<sup>480</sup> M1 argued that the doctrine deprived the court of jurisdiction because the case was “inextricable from judicial review of military decisions.”<sup>481</sup>

The court noted that when considering the political question doctrine under Texas law, the first question is the extent to which the case “requires a review of military decisions.”<sup>482</sup> Here, the plaintiffs claimed M1 was negligent precisely because it deviated from the Navy’s maintenance procedures.<sup>483</sup> The second question is whether a judicial review of the case would interfere with military strategy or judgment.<sup>484</sup> M1 claimed it was possible that it was the Navy itself that was responsible for the accident due to its own faulty maintenance.<sup>485</sup> The court held that, even if that were the case, the inquiry would still be one of “mechanical, not military, expertise” such that the political question doctrine was not implicated.<sup>486</sup>

While the court agreed that “issues that implicate sensitive military decision-making are nonjusticiable,” the court held that the action was simply one alleging ordinary negligence, stating “[o]rdinary tort suits’ . . . are not unquestionably committed to the political branches—even when ‘touching on military matters.’”<sup>487</sup> The court explained, “When the military’s actions do not involve military expertise or judgment, and judicial history demonstrates the existence of ‘judicially discoverable and manageable standards,’ a state court should not abstain from exercising its constitutional jurisdiction to resolve the dispute.”<sup>488</sup> The court reversed the judgment of the court of appeals and re-

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<sup>480</sup> *Id.* at 456, 458 n.12 (quoting *Japan Whaling Ass’n. v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986)).

<sup>481</sup> *Id.* at 456.

<sup>482</sup> *Id.* at 460.

<sup>483</sup> *Id.* at 461.

<sup>484</sup> *Id.* at 460.

<sup>485</sup> *Id.* at 461.

<sup>486</sup> *See id.* at 464.

<sup>487</sup> *Id.* at 464-65 (quoting *American K-9 v. Freeman*, 556 S.W.3d 246, 254 (Tex. 2018)).

<sup>488</sup> *Id.* at 465.

manded to the trial court, holding that the political question doctrine did not prevent state court jurisdiction over the case.<sup>489</sup>

## IX. FEDERAL TORT CLAIMS ACT

The Federal Tort Claims Act (FTCA) waives the United States' sovereign immunity "for injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment."<sup>490</sup> However, there are several exceptions within the FTCA that preserve the Government's sovereign immunity under specific circumstances.<sup>491</sup> For example, the "discretionary function" exception bars claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."<sup>492</sup> There is also the "combatant activities" exception that bars claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."<sup>493</sup> The FTCA specifically excludes "any contractor with the United States" from the definition of federal agencies that are covered by the statute, and also limits the employees covered to: "(1) officers or employees of any federal agency . . . and persons acting on behalf of a federal agency . . . and (2) any officer or employee of a Federal public defender organization."<sup>494</sup> Therefore, the FTCA's sovereign immunity waiver does not include military contractors.

### A. CAUSATION REQUIREMENT

#### 1. *Lyons v. United States*<sup>495</sup>

On August 28, 2020, while traveling from Oklahoma to Washington on Southwest Airlines, the plaintiff's flight made an unscheduled emergency stop in New Mexico and then a scheduled connecting stop in Nevada.<sup>496</sup> Due to the unscheduled emergency stop, the plaintiff missed his flight from Nevada to Wash-

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<sup>489</sup> *Id.* at 465-66.

<sup>490</sup> 28 U.S.C. § 1346(b)(1) (effective March 7, 2013).

<sup>491</sup> *See, e.g.*, 28 U.S.C. § 2680.

<sup>492</sup> 28 U.S.C. § 2680(a).

<sup>493</sup> 28 U.S.C. § 2680(j).

<sup>494</sup> 28 U.S.C. § 2671.

<sup>495</sup> No. 21-CV-419-JFH-SH, 2022 U.S. Dist. LEXIS 189643 (N.D. Okla. Oct. 18, 2022).

<sup>496</sup> *Id.* at \*2.

ington and was subsequently rebooked on a later flight.<sup>497</sup> Prior to boarding the first flight, the plaintiff checked one suitcase that did not make it to Washington.<sup>498</sup> The following day, the suitcase was delivered to the plaintiff through the airline's contracted courier.<sup>499</sup> Upon receipt, the plaintiff noticed that the built-in lock latch on his suitcase was broken, yet there was no TSA Notice of Inspection inside of the suitcase.<sup>500</sup> Nothing had been stolen from the suitcase.<sup>501</sup>

The plaintiff filed a lawsuit claiming the "TSA violated the [FTCA] by negligently or intentionally damaging his property."<sup>502</sup> It was not disputed that there was no TSA Notice of Inspection in the suitcase, that plaintiff did not have personal knowledge of whether his suitcase was ever in the TSA's controlled screening environments in any of the stops along his route, and that plaintiff did not have personal knowledge of where the suitcase was stored prior to delivery to him the next day.<sup>503</sup>

The plaintiff argued that "because of the way his luggage was damaged, the contents were moved around and the fact that nothing was stolen, the Plaintiff knows that the bag was opened by TSA inspectors."<sup>504</sup> The court held that the plaintiff's "personal belief [was] insufficient to meet the causation element" to succeed on his claims under the FTCA.<sup>505</sup> The plaintiff then argued he did "not need to present direct evidence of causation."<sup>506</sup> The court held that the plaintiff's *res ipsa loquitur* argument failed "because he cannot prove that his suitcase was in the complete control of TSA."<sup>507</sup> Therefore, summary judgment in favor of the TSA was proper.<sup>508</sup>

## X. DEATH ON THE HIGH SEAS ACT

In *The Harrisburg*, the Supreme Court held that general maritime law, which was judge-made common law, did not allow a

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<sup>497</sup> *Id.*

<sup>498</sup> *Id.* at \*2-3.

<sup>499</sup> *Id.* at \*3.

<sup>500</sup> *Id.* at \*3-4.

<sup>501</sup> *Id.* at \*3.

<sup>502</sup> *Id.* at \*3-4.

<sup>503</sup> *Id.* at \*4.

<sup>504</sup> *Id.* at \*5.

<sup>505</sup> *Id.*

<sup>506</sup> *Id.* at \*6.

<sup>507</sup> *Id.* at \*7.

<sup>508</sup> *Id.* at \*9-10.

cause of action for wrongful death.<sup>509</sup> The Court noted that because wrongful death actions were statutory, they could not be created by judicial decree.<sup>510</sup> In order to mitigate the impact of *The Harrisburg*, Congress enacted two statutes allowing for recovery for wrongful death. In 1920, Congress passed the Death on the High Seas Act (DOHSA),<sup>511</sup> which provides a federal claim for wrongful death occurring more than three nautical miles from the shore of any State or Territory.<sup>512</sup> That same year, Congress also passed the Jones Act,<sup>513</sup> which provides a wrongful death claim to the survivors of seamen killed in the course of their employment, whether on the high seas or in territorial waters. DOHSA provides, in relevant part, that:

When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative.<sup>514</sup>

The following section of DOHSA applies specifically to commercial aviation accidents:

- (a) **Definition.** In this section, the term “nonpecuniary damages” means damages for loss of care, comfort, and companionship.
- (b) **Beyond 12 nautical miles.** In an action under this chapter [46 USCS §§ 30301 et seq.], if the death resulted from a commercial aviation accident occurring on the high seas beyond 12 nautical miles from the shore of the United States, additional compensation is recoverable for nonpecuniary damages, but punitive damages are not recoverable.
- (c) **Within 12 nautical miles.** This chapter [46 USCS §§ 30301 et seq.] does not apply if the death resulted from a commercial aviation accident occurring on the high seas 12 nautical miles or less from the shore of the United States.<sup>515</sup>

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<sup>509</sup> 119 U.S. 199, 213 (1886).

<sup>510</sup> *Id.* at 214.

<sup>511</sup> 46 U.S.C. §§ 30301-30308.

<sup>512</sup> *Id.* § 30302.

<sup>513</sup> *Id.* § 30104.

<sup>514</sup> *Id.* § 30302.

<sup>515</sup> *Id.* § 30307.

Where DOHSA applies, it preempts the application of general maritime law and state law causes of action for wrongful death.<sup>516</sup> The Supreme Court has not held that DOHSA preempts claims for pain and suffering in state law causes of action for survival.<sup>517</sup> However, the Court has held that a claim for loss of society is not recoverable under DOHSA.<sup>518</sup> In *Zicherman*, the Court held that “where DOHSA applies, neither state law nor general maritime law can provide a basis for recovery of loss-of-society damages.”<sup>519</sup> Under Federal Rule of Civil Procedure 9(h):

If a claim for relief is within the admiralty or maritime jurisdiction and also within the court’s subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated.<sup>520</sup>

## A. PREEMPTION

### 1. *Murray v. AET, Inc.*<sup>521</sup>

A professional sea pilot died after falling from a pilot ladder on the side of a crude oil tanker approximately seven nautical miles off the shore of New York.<sup>522</sup> The decedent’s widow filed a complaint alleging four causes of action for: (1) “wrongful death under general maritime law;” (2) “survival under general maritime law;” (3) “wrongful death under New York’s wrongful death statute;” and (4) “survival under New York law.”<sup>523</sup> The

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<sup>516</sup> See, e.g., *Dooley v. Korean Air Lines Co.*, 524 U.S. 116, 118 (1998); *Offshore Logistics v. Tallentire*, 477 U.S. 207, 232 (1986).

<sup>517</sup> See, e.g., *Tallentire*, 477 U.S. at 215 n.1.

<sup>518</sup> See *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 231 (1996) (“Because DOHSA permits only pecuniary damages, petitioners are not entitled to recover for loss of society.”).

<sup>519</sup> *Id.* at 217; See *Tallentire*, 477 U.S. at 232-233; *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625-26 (1978).

<sup>520</sup> FED. R. CIV. P. 9(h)(1).

<sup>521</sup> No. 21-CV-3360, 2022 U.S. Dist. LEXIS 154166, at \*1 (S.D.N.Y. Aug. 26, 2022).

<sup>522</sup> *Id.* at \*2.

<sup>523</sup> *Id.* at \*4.

plaintiff also demanded a jury.<sup>524</sup> The defendants filed a motion to dismiss the plaintiff's complaint.<sup>525</sup>

The defendants argued that since the accident was more than three nautical miles from shore (seven nautical miles), the plaintiff's claims "under general maritime law and state law should be dismissed because DOHSA provides the 'exclusive remedy.'"<sup>526</sup> The plaintiff argued that, according to Second Circuit precedent, "the 'high seas' begin at [twelve] nautical miles offshore for the purposes of DOHSA" and "general maritime law and state law remedies are possible within twelve miles."<sup>527</sup> The court concluded, "Based on the language of DOHSA and its legislative history and amendments, it is clear that § 30302 [of DOHSA] begins to apply at three nautical miles from the shore of the United States."<sup>528</sup>

Moreover, the court held that DOHSA preempted the plaintiff's "wrongful death and survival claims under both general maritime law and state law, and a potential remedy beyond that for pecuniary loss under DOHSA."<sup>529</sup> In concluding DOHSA preempted the plaintiff's survival claims, the court relied on the Supreme Court's holdings in *Tallentire*, the Court's subsequent holding in *Dooley* as to the preemption of survival actions under general maritime law, and the Court's holding in *Zicherman* as the preemption of survival actions under state law.<sup>530</sup>

## XI. ANTI-MASKING CASES

### A. THE FEDERAL MASK MANDATE

On January 21, 2021, President Biden issued Executive Order No. 13998, "Promoting COVID-19 Safety in Domestic and International Travel."<sup>531</sup> Following this Executive Order, the Center for Disease Control (CDC) and the U.S. Department of Health and Human Services (HHS) issued the Federal Transportation Mask Mandate (FTMM).<sup>532</sup> Specifically, the CDC issued the "Requirement for Persons To Wear Masks While on Conveyances

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<sup>524</sup> *Id.* at \*5.

<sup>525</sup> *Id.*

<sup>526</sup> *Id.* at \*10.

<sup>527</sup> *Id.* at \*14.

<sup>528</sup> *Id.* at \*29.

<sup>529</sup> *Id.* at \*42.

<sup>530</sup> *Id.* (referencing *Dooley v. Korean Air Lines Co.*, 524 U.S. 116, 123 (1998)).

<sup>531</sup> Executive Order No., 86 Fed. Reg. 7205 (Jan. 26, 2021).

<sup>532</sup> Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8025 (Feb. 3, 2021).

and at Transportation Hubs.”<sup>533</sup> This order from the CDC mandated that people wear masks while on public transportation “conveyances” such as airplanes, but allowed exemptions for people with disabilities who could not safely wear a mask, and children under the age of two.<sup>534</sup>

### I. Seklecki v. CDC & Prevention<sup>535</sup>

The plaintiff and his son were living in Florida and frequently flying to Boston for treatment at Boston Children’s Hospital.<sup>536</sup> The plaintiff, for himself and his son, filed a multi-count *pro se* complaint against two airlines, alleging their mask requirements “violated numerous state, federal, and international laws.”<sup>537</sup> He alleged that he could not wear a mask because of his Generalized Anxiety Disorder, and his son could not wear a mask because of his Autism Spectrum Disorder.<sup>538</sup> Doctors corroborated that the plaintiff’s son could not medically tolerate a mask.<sup>539</sup> The plaintiff alleged he had to cancel various flights due to the airlines’ procedures for requesting a mask exemption, which were difficult to navigate.<sup>540</sup> The airlines moved to dismiss some of the counts in plaintiff’s complaint for the failure to state a claim.<sup>541</sup>

Civil Conspiracy Claims. The plaintiff claimed the airline defendants were liable under 42 U.S.C. § 1985(3) for conspiracy and 42 U.S.C. § 1986 for being “aware of the conspiracy” and doing “nothing to stop it.”<sup>542</sup> The airline defendants argued that the plaintiff could not pursue his disability-based discrimination claims under § 1985(3) “because the [ACAA] already provides administrative regulations and procedures to respond to complaints against airlines for disability discrimination.”<sup>543</sup> Similar to the analogous context of section 1985(3) and Title VII violations, the court held that “[b]ecause a statutory scheme and administrative remedies are in place for the ACAA, [the plaintiff]

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<sup>533</sup> *Id.*

<sup>534</sup> *Id.* at 8025, 8027.

<sup>535</sup> No. 22-10155-PBS, 2022 U.S. Dist. LEXIS 186265 (D. Mass. Oct. 12, 2022).

<sup>536</sup> *Id.* at \*2-3.

<sup>537</sup> *Id.* at \*1-2.

<sup>538</sup> *Id.* at \*3.

<sup>539</sup> *Id.*

<sup>540</sup> *Id.*

<sup>541</sup> *Id.* at \*2.

<sup>542</sup> *Id.* at \*5-6.

<sup>543</sup> *Id.* at \*7 (citing the Air Carrier Access Act of 1986 (ACAA), 49 U.S.C. § 41705).

cannot pursue claims for disability discrimination under section 1985(3).<sup>544</sup> Additionally, the court held that the civil conspiracy claims should be dismissed for the failure to plead specific allegations of the existence of the conspiracy finding that, “[i]n light of [the] COVID-19 pandemic and evolving recommendations on masking in response to the pandemic, there is no plausible allegation that the Airline Defendants were conspiring to harm disabled passengers by imposing a mask requirement.”<sup>545</sup>

**ADA Preemption of State Law Claims.** The airline defendants argued that the plaintiff’s state-law claims for fraudulent misrepresentation, deceptive trade practices, invasion of privacy, and breach of contract were preempted by the Airline Deregulation Act (ADA) and its prohibition of states enforcing any law “related to a price, route, or service of an air carrier.”<sup>546</sup>

The airline defendants argued that the plaintiff’s deceptive trade practice claims for falsely representing the benefits of wearing a face mask were preempted by the ADA.<sup>547</sup> The court quoting the Supreme Court in *Am. Airlines v. Wolens*, which held that “the ADA preempts state consumer fraud and deceptive business practices claims,”<sup>548</sup> wrote:

“In light of the full text of the preemption clause, and of the ADA’s purpose to leave largely to the airlines themselves, and not at all to States, the selection and design of marketing mechanisms appropriate to the furnishing of air transportation services, we conclude that [the ADA] preempts plaintiffs’ claims under the Illinois Consumer Fraud Act.”<sup>549</sup>

The court held that, since the requirements to wear a mask on board an aircraft “relates to the furnishing of an air carrier’s services,” the plaintiff’s claims were preempted by the ADA.<sup>550</sup> The airline defendants argued that the plaintiff’s invasion of privacy claims for having to wear a mask were preempted by the ADA because it relates to an air carrier’s “service.”<sup>551</sup> The court noted state-law claims related to ticketing and boarding proce-

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<sup>544</sup> *Id.* at \*8; *see id.* at \*7 (explaining the Supreme Court holding that “§ 1985(3) may not be invoked to redress violation of Title VII”).

<sup>545</sup> *Id.* at \*8-10.

<sup>546</sup> *Id.* at \* 10 (quoting 49 U.S.C. § 41713(b)(1)).

<sup>547</sup> *Id.* at \*13.

<sup>548</sup> *Id.* (referencing 513 U.S. 219, 228 (1995)).

<sup>549</sup> *Id.* (quoting *Wolens*, 513 U.S. at 228) (internal brackets omitted).

<sup>550</sup> *Id.* at \*13-14.

<sup>551</sup> *Id.* at \*12.

dures are preempted by the ADA.<sup>552</sup> Because the plaintiff's claims related to boarding procedures —the plaintiff having to obtain an exemption from the mask mandate to board without a mask—these claims were preempted by the ADA.<sup>553</sup>

The court noted that, while breach of contract claims “‘seeking recovery solely for an airline’s alleged breach of its own, self-imposed undertakings’ are not preempted by the ADA,” a claim “can be preempted if ‘it seeks to enlarge the contractual obligations that the parties voluntarily adopted.’”<sup>554</sup> The plaintiff argued that, “because the contract of carriage makes no mention of a [mask] requirement . . . [the airlines] breached the contract by imposing such a requirement.”<sup>555</sup> The court held that, while passengers can “bring a breach of contract claim for violations of the airlines’ own rules, policies, or other self-imposed undertakings regarding mask exemptions that the airlines violated,”<sup>556</sup> the plaintiff had not “identif[ied] any self-imposed undertaking to refrain from requiring masks.”<sup>557</sup> Instead, the plaintiff had launched “a broad attack on any mask mandate, even though required by federal law.”<sup>558</sup> Therefore, the court dismissed this claim.<sup>559</sup>

No Private Right of Action under the ACAA. The airline defendants argued that the plaintiff had no private right of action under the ACAA.<sup>560</sup> The court recognized that the ACAA does not provide a private right of action; rather a passenger alleging disability discrimination in violation of the ACAA against an airline may file a written complaint with the DOT.<sup>561</sup> Therefore, because there is no private right of action for violations of the ACAA (the plaintiff had filed two complaints against the airlines with the DOT), the court dismissed this claim.<sup>562</sup>

Rehabilitation Act Claims. The plaintiff argued the airlines are subject to Section 504 of the Rehabilitation Act, which “provides that no qualified individual with a disability shall be sub-

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<sup>552</sup> *Id.*

<sup>553</sup> *Id.*

<sup>554</sup> *Id.* at \*11 (first quoting *Wolens*, 513 U.S. at 228; then quoting *Nw., Inc. v. Ginsberg*, 572 U.S. 273, 276 (2013)).

<sup>555</sup> *Id.*

<sup>556</sup> *Id.*

<sup>557</sup> *Id.* at \*12.

<sup>558</sup> *Id.* at \*11-12.

<sup>559</sup> *Id.* at \*12.

<sup>560</sup> *Id.* at \*14.

<sup>561</sup> *Id.* at \*14-15.

<sup>562</sup> *Id.* at \*15.

jected to discrimination under ‘any program or activity receiving Federal financial assistance.’”<sup>563</sup> According to the plaintiff, because the airlines had accepted federal assistance under the Coronavirus Air, Relief, and Economic Security Act (CARES Act), they were liable under the Rehabilitation Act.<sup>564</sup> The airlines argued that the federal funds were under the Payroll Support Program and not for “general assistance,” as required for claims under the Rehabilitation Act.<sup>565</sup> The court concluded that “Congress did not intend to circumvent the procedures for handling claims of disability discrimination against the airlines under the ACAA” by providing payroll protection to airlines through the CARES Act, and dismissed plaintiff’s claims.<sup>566</sup>

Infringement on the Right to Travel Claims. The plaintiff argued the airlines infringed his constitutional right to travel.<sup>567</sup> The right to travel has three components:

(1) the right of a citizen of one State to enter and to leave another State; (2) the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State; and (3) “for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.”<sup>568</sup>

The court held that “[r]equiring a mask in compliance with the FTMM is not an actionable interference with [plaintiff’s] constitutional right to travel” since he was not prohibited from boarding the plane, only prohibited from boarding without either a mask or an exemption.<sup>569</sup>

## XII. EXPERT TESTIMONY

### A. *KULA V. UNITED STATES*<sup>570</sup>

Michael Apfelbaum piloted a flight from Florida to Pennsylvania with his wife and father-in-law aboard.<sup>571</sup> Due to worsening weather over North Carolina, Mr. Apfelbaum contacted air traffic control to advise that he was flying in instrument meteor-

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<sup>563</sup> *Id.* at \*16 (quoting 29 U.S.C. § 794(a)).

<sup>564</sup> *Id.* at \*16-17.

<sup>565</sup> *Id.*

<sup>566</sup> *See id.* at \*18.

<sup>567</sup> *Id.* at \*1.

<sup>568</sup> *Id.* (quoting *Sanez v. Roe*, 526 U.S. 489, 500 (1999)).

<sup>569</sup> *Id.* at \*19-20.

<sup>570</sup> 2022 U.S. App. LEXIS 11823 (3d Cir. May 2, 2022).

<sup>571</sup> *Id.* at \*1-2.

ological conditions.<sup>572</sup> An air traffic controller tried to help Mr. Apfelbaum navigate to a landing, but Mr. Apfelbaum reported disorientation and struggled to follow the instructions.<sup>573</sup> The controller then recommended a no-gyro approach (a procedure that requires a pilot to follow the verbal directions of an air traffic controller to start and stop turning the aircraft).<sup>574</sup> Mr. Apfelbaum agreed and followed the air traffic controller's commands, but ended the turns without assistance from the air traffic controller.<sup>575</sup> Soon after, the air traffic controller informed Mr. Apfelbaum of a "low altitude alert," to which he did not reply.<sup>576</sup> The air traffic controller then instructed Mr. Apfelbaum to "climb to 4,000 feet".<sup>577</sup> Mr. Apfelbaum "asked if there was a nearby field," and "about two minutes later, the aircraft crashed."<sup>578</sup> As a result of the crash, the estates of Mr. Apfelbaum and his wife (the Estates) sued the United States, alleging that the air traffic controller's negligence caused the accident.<sup>579</sup> Specifically, the Estates alleged that the air traffic controller directed Mr. Apfelbaum "on a dizzying series of dangerous maneuvers and turns," causing the crash," and advanced three theories of liability.<sup>580</sup> After a bench trial, the United States moved for, and was granted, judgment on partial findings.<sup>581</sup> The Estates appealed the decision.<sup>582</sup>

The Third Circuit issued a non-precedential opinion concluding that the trial court's factual findings were not clearly erroneous and that the trial court did not abuse its discretion in excluding plaintiff's expert testimony as unreliable.<sup>583</sup>

The Estates advanced three theories of liability concerning: (1) "heading," (2) "emergency," and (3) "the no-gyro turn."<sup>584</sup> Each of these theories had causation issues. As to the heading, the Estates alleged that the air traffic controller's instructions

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<sup>572</sup> *Id.* at \*2.

<sup>573</sup> *Id.*

<sup>574</sup> *Id.*

<sup>575</sup> *Id.*

<sup>576</sup> *Id.*

<sup>577</sup> *Id.*

<sup>578</sup> *Id.*

<sup>579</sup> *Id.*

<sup>580</sup> *Id.* at \*3.

<sup>581</sup> *Id.* at \*2.

<sup>582</sup> *Id.*

<sup>583</sup> *Id.* at \*6-7.

<sup>584</sup> *Id.* at \*3-5.

forced Mr. Apfelbaum “radically off-course.”<sup>585</sup> According to the Third Circuit, the “District Court correctly concluded that [the air traffic controller’s] instruction did not exceed the parameters allowed by federal law.”<sup>586</sup> Additionally, the Estates failed to provide evidence that the instructions were “unsafe.”<sup>587</sup> As to the emergency, the Estates alleged that the air traffic controller “failed to treat” the situation as an emergency.<sup>588</sup> According to the Third Circuit, “even assuming the controller perhaps should have recognized Apfelbaum’s disorientation, the Estates do not explain how that possible breach made a difference.”<sup>589</sup> The court continued: “Once a controller declares an emergency, he must ‘select and pursue a course of action which appears most appropriate’ . . . [i]n other words, the regulations require no specific action.”<sup>590</sup> Moreover, the Estates failed to demonstrate how declaring an emergency would have resulted in preventing the accident.<sup>591</sup> Lastly, as to the no-gyro turns, the Estates alleged that the air traffic controller “inappropriately guided the no-gyro turns.”<sup>592</sup> However, the court once again found an issue with causation.<sup>593</sup> While the air traffic controller “appeared to violate federal regulations . . . there was no evidence that the turns caused the crash.”<sup>594</sup> Citing federal regulations, the Court stated, “Ultimately the pilot ‘is in command of the aircraft, is directly responsible for its operation, and has final authority as to its operation’ . . . [t]hat is the case here.”<sup>595</sup> Even if the air traffic controller was negligent, explained the court, the Estates’ claims “fail[ed] on contributory negligence” because Mr. Apfelbaum had not complied with instrument training requirements.<sup>596</sup>

At the bench trial, the district court excluded as unreliable expert testimony in “cognitive engineering, human factors, and

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<sup>585</sup> *Id.* at \*3.

<sup>586</sup> *Id.* at \*4.

<sup>587</sup> *Id.*

<sup>588</sup> *Id.*

<sup>589</sup> *Id.*

<sup>590</sup> *Id.* at \*4-5 (internal ellipses omitted).

<sup>591</sup> *Id.* at \*5.

<sup>592</sup> *Id.*

<sup>593</sup> *Id.*

<sup>594</sup> *Id.*

<sup>595</sup> *Id.* (quoting *Redhead v. United States*, 686 F.2d 178, 182 (3d Cir. 1982) (citing 14 C.F.R. § 1.1).

<sup>596</sup> *Id.* at \*5-6.

spatial disorientation.”<sup>597</sup> The Estates then offered a second expert, “who relied on [the first expert’s] excluded methodology” as to his conclusions on spatial disorientation, which was also excluded by the district court.<sup>598</sup> The Third Circuit found no abuse of discretion by the district court because, pursuant to Federal Rule of Evidence 702, expert testimony “must be based on the methods and procedures of science, not on subjective belief and unsupported speculation.”<sup>599</sup> As such, the Estates’ second expert “did not analyze what type of spatial disorientation Apfelbaum may have experienced. Rather, he deferred to [the first expert’s] excluded methodology.”<sup>600</sup> Additionally, counsel for the Estates repeatedly acknowledged that their second expert “was not offered as a spatial disorientation expert” and, as such, his testimony as to that subject was properly excluded.<sup>601</sup>

### XIII. FERES DOCTRINE

The *Feres* Doctrine extends the federal government’s sovereign immunity to claims by or on behalf of active-duty military personnel for tortious injuries or deaths caused by or “incident to” their military service.<sup>602</sup> The doctrine, which is court-made, has been criticized. Indeed, Justice Clarence Thomas continues to call for revocation of the doctrine and “bid [ ] farewell” to the 70-year-old precedent.<sup>603</sup>

As recently as November 2022, Justice Thomas criticized the Court for denying certiorari in a case involving a veteran’s widow seeking damages for her husband’s death from leukemia due to an exposure to toxins and contaminated water while stationed at Camp Lejeune.<sup>604</sup> In the underlying action, the district court determined that the plaintiff’s suit was barred by the *Feres* Doctrine, even if the Federal Tort Claims Act would otherwise allow the suit.<sup>605</sup> The Court of Appeals affirmed.<sup>606</sup> In his dissent

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<sup>597</sup> *Id.* at \*6.

<sup>598</sup> *Id.* at \*7.

<sup>599</sup> *Id.* (quoting *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 80-81 (3d Cir. 2017)).

<sup>600</sup> *Id.*

<sup>601</sup> *Id.*

<sup>602</sup> *See Feres v. United States*, 340 U.S. 135, 146 (1950).

<sup>603</sup> *See Doe v. United States*, 141 S. Ct. 1498, 1499 (2021) (Thomas, J., dissenting).

<sup>604</sup> *See Clendening v. United States*, 143 S. Ct. 11, 11-12 (2022) (cert. denied) (Thomas, J., dissenting).

<sup>605</sup> *Id.* at 12.

<sup>606</sup> *Id.*

to the Supreme Court's denial of certiorari, Justice Thomas pointed out that "[n]othing in the [Federal Tort Claims] Act bars suit by servicemen based on their military status alone . . . [y]et, in *Feres*, this Court invented an atextual, policy-based carveout that prevents servicemen from taking advantage of the FTCA's sweeping waiver of sovereign immunity."<sup>607</sup> Justice Thomas added, "*Feres* heartily deserves the widespread, almost universal criticism it has received."<sup>608</sup> In closing, Justice Thomas wrote, "It would be one thing if Congress itself were responsible for this incoherence. But Congress set out a comprehensive scheme waiving sovereign immunity that we have disregarded in the military context for nearly 75 years. Because we caused this chaos, it is our job to fix it."<sup>609</sup>

#### A. RULEMAKING

On August 26, 2022, the Department of Defense (DOD) published the Medical Malpractice Claims by Members of the Uniformed Service rule "to finalize the implementation of requirements of the National Defense Authorization Act (NDAA) for Fiscal Year 2020."<sup>610</sup> Section 731 of the NDAA "allows members of the uniformed services or their authorized representatives to file claims for personal injury or death caused by a DOD health care provider in certain military medical treatment facilities."<sup>611</sup> Since the federal courts do not have jurisdiction to consider these claims, the DOD issued a final rule to provide "uniform standards and procedures for considering and processing" these types of actions.<sup>612</sup> The rule is effective as of September 26, 2022.<sup>613</sup>

#### B. REJECTED APPLICATION OF THE *FERES* DOCTRINE

##### 1. *Spletstoser v. Hyten*<sup>614</sup>

The Ninth Circuit rejected the application of the *Feres* doctrine and affirmed the denial of a former United States Air Force General (Hyten's) motion to dismiss a former United

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<sup>607</sup> *Id.*

<sup>608</sup> *Id.* (internal quotation omitted).

<sup>609</sup> *Id.* at 14.

<sup>610</sup> 32 C.F.R. § 45 (2021).

<sup>611</sup> *Id.*

<sup>612</sup> *Id.*

<sup>613</sup> *Id.*

<sup>614</sup> 44 F.4th 938 (9th Cir. 2022).

States Army Colonel (Spletstoser's) complaint for sexual assault allegations.<sup>615</sup>

Hyten was Commander of the United States Strategic Command (STRATCOM) and Spletstoser was the Director of the Commander's Action Group at STRATCOM.<sup>616</sup> STRATCOM was invited to attend a defense forum hosted by a civilian organization, for which the military did not have any input as to invitees.<sup>617</sup> Hyten and Spletstoser attended the forum and stayed together in separate rooms at a hotel that was open to both the military and the public.<sup>618</sup>

After the forum concluded, Spletstoser returned to her room across the hall from Hyten's room.<sup>619</sup> When Spletstoser was getting ready for bed, Hyten knocked on the door, and physically forced himself on her.<sup>620</sup> Spletstoser filed a lawsuit alleging (1) sexual battery, (2) assault, (3) gender violence, (4) intentional infliction of emotional distress, and (5) battery, as well as various violations of the California Code.<sup>621</sup> The defendants, Hyten and the Government, "moved to dismiss the [complaint], arguing that the suit was barred by the *Feres* doctrine."<sup>622</sup> The district court denied the motion to dismiss concluding that "the *Feres* doctrine [did] not bar Spletstoser's claims because the 'alleged sexual assault could not conceivably serve any military purpose.'"<sup>623</sup> Hyten, and the Government, appealed.<sup>624</sup>

The Ninth Circuit applies a four-factor test to determine whether tortious activity is "incident to military service" such that the *Feres* doctrine should apply:

- (1) the place where the tortious act occurred; (2) the duty status of the plaintiff when the tortious act occurred; (3) the benefits accruing to the plaintiff because of his or her status as a service member; and (4) the nature of the plaintiff's activities at the time the tortious act occurred.<sup>625</sup>

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<sup>615</sup> *Id.* at 942.

<sup>616</sup> *Id.*

<sup>617</sup> *Id.*

<sup>618</sup> *Id.*

<sup>619</sup> *Id.*

<sup>620</sup> *Id.*

<sup>621</sup> *Id.*

<sup>622</sup> *Id.*

<sup>623</sup> *Id.* at 941 (internal brackets omitted).

<sup>624</sup> *Id.* at 942.

<sup>625</sup> *Id.* at 948 (citing *Johnson v. United States*, 704 F.2d 1431, 1436-39 (9th Cir. 1983)).

Applying the *Johnson* factors, the Ninth Circuit affirmed the district court and held that the *Feres* doctrine did not bar the claims raised by Spletstoser at the motion to dismiss stage, which required the court to assume the truth of the well-pled allegations.<sup>626</sup>

As to the first factor—place where the tortious act occurred—the alleged sexual assault occurred in a hotel in California that was equally open to the military and the public.<sup>627</sup> The off-base location of the hotel weighed against application of the *Feres* Doctrine.<sup>628</sup>

As to the second factor—duty status when the tortious act occurred—while Spletstoser acknowledged that she was on “active-duty status,” the “incident occurred during her personal time.”<sup>629</sup> Hyten forced himself on Spletstoser while she was in her private hotel room getting ready for bed, at which time she “was in the same position as any civilian would have been at the time,” which “weigh[ed] against application of the *Feres* doctrine.”<sup>630</sup>

As to the third factor—benefits accruing due to status as a service member—since Spletstoser was at an off-base hotel open to the public, she did not have access solely because of her status as a member of the military.<sup>631</sup> Spletstoser was “not engaging in on-base or government-sponsored recreational activities” at the time of the incident, which weighed against application of the *Feres* doctrine.<sup>632</sup>

As to the fourth factor—nature of the activities when tortious act occurred—“[i]t is unimaginable that Plaintiff would have been ‘under orders’ to submit to Hyten’s sexual advances, or that she was performing any sort of military mission in conjunction with the alleged assault.”<sup>633</sup> Moreover, the alleged sexual assault “does not ‘involve’ a ‘close military judgment call’.”<sup>634</sup> Essentially, at the time of the incident, Spletstoser was in the same

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<sup>626</sup> *Id.* at 942.

<sup>627</sup> *Id.* at 954.

<sup>628</sup> *Id.*

<sup>629</sup> *Id.* at 955.

<sup>630</sup> *Id.*

<sup>631</sup> *Id.* at 956.

<sup>632</sup> *Id.* (quoting *Johnson v. United States*, 704 F.2d 1431, 1438 (9th Cir. 1983)).

<sup>633</sup> *Id.* at 957.

<sup>634</sup> *Id.* (quoting *Johnson*, 704 F.2d at 1440) (internal brackets omitted).

position as a civilian, which weighed against application of the *Feres* doctrine.<sup>635</sup>

According to the court, “it would be a highly unusual circumstance when a sexual assault consisting of the facts alleged by [the plaintiff] would further any conceivable military purpose, and thus be considered incident to military service” allowing application of the *Feres* doctrine.<sup>636</sup> The court affirmed the district court’s denial of the motion to dismiss.<sup>637</sup>

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<sup>635</sup> *See id.* at 957-58.

<sup>636</sup> *Id.* at 958.

<sup>637</sup> *Id.* at 959.