2006

Recent Developments in Aviation Law

Edward C. Bresee

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RECENT DEVELOPMENTS IN AVIATION LAW

Edward C. Bresee, Jr.*
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Whedbee v. United States, 352 F. Supp. 2d 618 (M.D.N.C. 2005)
I. AIR TRANSPORTATION SAFETY AND SYSTEM STABILIZATION ACT (ATSSSA)

The AIR TRANSPORTATION Safety and Systems Stabilization Act ("ATSSSA") was passed shortly after the September 11, 2001, terrorist attacks. The ATSSSA created the Victim Compensation Fund ("Fund") to provide no-fault compensation to victims who were injured in the attacks and to personal representatives of victims killed in the attacks,\(^1\) limited liability for the air carriers involved,\(^2\) and an election of remedies, that is, all claimants who file with the Fund waive the right to sue for injuries resulting from the attack except for collateral benefits.\(^3\) On November 19, 2001, the ATSSSA was amended by the Aviation and Transportation Security Act\(^4\) to extend limited liability to aircraft manufacturers, those parties with a proprietary interest in the World Trade Center, and the City of New York, while allowing Fund claimants to sue individuals responsible for the attacks notwithstanding an election to otherwise proceed under the ATSSSA.\(^5\) The ATSSSA also confers "original and exclusive jurisdiction" upon the Southern District of New York over all actions "resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001."\(^6\)

A. 2005 Cases

1. In re McNally v. Port Authority (In re WTC Disaster Site)

In McNally, the Second Circuit Court of Appeals considered questions regarding federal court jurisdiction over claims related to respiratory injuries suffered by rescue and clean-up workers as a result of exposure to toxins and other contaminants in the aftermath of the terrorist attacks at the World Trade Center on September 11, 2001.\(^7\) The plaintiffs originally made claims under state law in the New York Supreme Court against the City of New York, the Port Authority of New York and New Jersey, and the owner and operator of the World Trade Center.\(^8\) The defendants removed the cases to the United States District Court for the Southern District of New York.

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\(^1\) ATSSSA §§ 401-02, 405.
\(^2\) ATSSSA § 408(a).
\(^3\) ATSSSA § 405(c)(3)(B)(i).
\(^5\) ATSSSA § 202.
\(^6\) ATSSSA § 408(b)(3).
\(^7\) In re WTC Disaster Site, 414 F.3d 352, 357 (2d Cir. 2005).
\(^8\) Id.
Court for the Southern District of New York, contending that the ATSSSA created a federal cause of action over which the federal courts had exclusive jurisdiction, thus preempting the plaintiffs' state law claims.\(^9\)

Some of the plaintiffs moved to remand their cases to state court.\(^10\) District court Judge Alvin K. Hellerstein granted remand to some plaintiffs and denied remand to others.\(^11\) Judge Hellerstein ordered all cases in which the plaintiffs alleged that their exposure occurred after September 29, 2001, or at locations other than the World Trade Center site, to be remanded to state court on the ground that the district court lacked subject matter jurisdiction over the actions.\(^12\) Judge Hellerstein refused to remand cases in which claimants alleged at least some exposure at the World Trade Center site on or before September 29th, holding that the ATSSSA gave the federal court exclusive jurisdiction over those actions.\(^13\) The rationale for the September 29, 2001, demarcation was that September 29th was the date that Mayor Rudolph Giuliani announced that the search for survivors came to an end.\(^14\) From that point on, the workers principally searched for human remains and engaged in demolition and debris removal.

After its order was issued, the district court entered an order certifying its decision for immediate interlocutory appeal to the Second Circuit under the authority of 28 U.S.C. § 1292(b), finding that its ruling as to the scope of federal jurisdiction conferred by ATSSSA "involves a controlling question of law as to which there is substantial ground for difference of opinion," and that "immediate appeal may also materially advance the ultimate termination of the litigation."\(^15\) In accordance with § 1292(b), the defendants moved the Second Circuit for permission to appeal that portion of the district court's decision granting remands.\(^16\) Likewise, some of the plaintiffs, whose

\(^9\) Id.
\(^10\) Id.
\(^12\) Id. at 380.
\(^13\) Id.
\(^14\) Id. at 374.
\(^15\) Id. at 380-81 (quoting 28 U.S.C.A. § 1292(b) (West 2005)).
\(^16\) In re WTC Disaster Site, 414 F.3d 352, 357 (2d Cir. 2005); 28 U.S.C.A. § 1291 provides:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from
RECENT DEVELOPMENTS

motions to remand had been denied sought to appeal those denials.\textsuperscript{17}

The Second Circuit held it lacked jurisdiction to review the district court’s decision, remanding certain of the cases to state court.\textsuperscript{18} However, the court held it had unquestionable jurisdiction to review the district court’s decision denying remand to the other pending cases and affirmed the district court’s decision.\textsuperscript{19} As to those cases that were not remanded to state court, the court affirmed the district court’s decision, holding that Congress intended ATSSSA to preempt those cases.\textsuperscript{20} The court held that there was no basis for the district court’s reasoning that the ATSSSA’s preemptive effect differs depending on whether the respiratory injuries were suffered at the World Trade Center site or elsewhere, or whether those injuries were suffered before or after midnight of September 29th.\textsuperscript{21} There is no language in the legislative history suggesting any basis for that line of demarcation. Therefore, in making the federal cause of action under the ATSSSA the “exclusive remedy for damages arising out of the September 11 plane crashes, Congress clearly expressed its intent to preempt state law remedies

\textsuperscript{17} \textit{In re WTC Disaster Site}, 414 F.3d at 357.
\textsuperscript{18} \textit{Id.} at 381.
\textsuperscript{19} \textit{Id.}
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.} at 380-81.
for damages claims arising out of these crashes."\textsuperscript{22} The court therefore affirmed the district court’s order to the extent it denied motions to remand to state court.

In an interesting final note, the Second Circuit provided its opinion, in \textit{dicta}, on the remanded cases while acknowledging it had no power to review the decision to remand them.\textsuperscript{23} In doing so, the appellate court invited Judge Hellerstein to change his mind on the issue of remand based on its analysis.\textsuperscript{24} The court stated as follows:

\begin{quote}
[W]e note that the district court stayed its remand orders pending appeal. Where the remand order has not been implemented and the case has not actually been returned to the state court, the district court has the authority, as with any interlocutory order, “to revise its order at any time before the entry of final judgment,” Fed. R. Civ. P. 54(b), and “to reconsider the remand to the state court in light of this [Court’s] opinion.” \textit{Active Fire Sprinkler Corp. v. United States Postal Service}, 811 F.2d 747, 758 (2d Cir. 1987). Given our view that the respiratory injury claims before the district court are preempted by ATSSSA and are claims over which the district court has exclusive jurisdiction, we invite the district court, in any such actions as remain pending before it, to reconsider so much of its decision as ordered remands to state court.\textsuperscript{25}
\end{quote}

2. \textit{In re World Trade Center Disaster Site Litigation}

In this opinion issued two months after the Second Circuit’s opinion in \textit{In re WTC Disaster Site}, Judge Hellerstein acknowledged the Second Circuit’s disagreement with his ruling that September 29, 2001, should delineate federal and state jurisdiction, and that there should be a geographical limitation to the World Trade Center site in fixing jurisdiction.\textsuperscript{26} Although noting the Second Circuit’s statement was \textit{dicta}, Judge Hellerstein nevertheless adopted the Second Circuit’s reasoning, reversed his previous order, and held that his court had jurisdiction over all cases alleging respiratory injuries by workers at the World Trade Center site, regardless of the date of injury.\textsuperscript{27}

\begin{flushright}
\textsuperscript{22} \textit{Id.} at 380.
\textsuperscript{23} \textit{Id.} at 381 (emphasis added).
\textsuperscript{24} \textit{Id.}
\textsuperscript{25} \textit{In re WTC Disaster Site}, 414 F.3d at 381.
\textsuperscript{26} \textit{In re World Trade Ctr. Disaster Site Litig.}, 2005 U.S. Dist. LEXIS 14705, at *8 (S.D.N.Y. July 22, 2005).
\textsuperscript{27} \textit{Id.} at *8-9 (emphasis added).
\end{flushright}
Rodriguez v. Bush

Rodriguez, a former maintenance worker at the World Trade Center ("WTC"), was injured while assisting and rescuing persons from the North Tower after American Airlines Flight 11 crashed on September 11, 2001. Rodriguez sued fifty-six government officials in Pennsylvania federal district court, including the President of the United States, Dick Cheney, Condoleezza Rice, John Ashcroft, and Colin Powell, alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), the Anti-Terrorism Act ("ATA"), and other criminal statutes. Plaintiff contended that, because of the defendants' violations of those acts, he lost his job and suffered personal injuries.

The defendants moved the court to dismiss the claims arguing they were controlled by the ATSSSA. The ATSSSA provides that "[t]he United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions brought for any claim...resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001." The court held that the plaintiff's claims clearly "result from or relate to" the September 11 attacks. The court found it important that the plaintiff was present and working at the WTC when the planes crashed into it and was injured while trying to rescue workers. The court thus distinguished these facts from an earlier decision in which it declined to construe "resulting from or relating to" as encompassing a construction worker's claim for personal injury occurring while cleaning up debris from the WTC site. The court also rejected the plaintiff's argument that, because the ATA authorized the plaintiff to bring suit in his domicile, his ATA allegation should override the limited jurisdictional provision in the ATSSSA. The court held that the ATSSSA's narrower exclusive jurisdiction provision is specific and limited to a one-time event, while the ATA provision is

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32 ATSSSA § 408(b)(3).
33 Rodriguez, 367 F. Supp. 2d at 768.
34 Id. at 769-70.
36 Rodriguez, 367 F. Supp. 2d at 769-70.
broader and universal in application.\textsuperscript{37} Under construction principles enunciated by the United States Supreme Court,\textsuperscript{38} the court held that the ATSSSA provision applied and did not unduly interfere with the general rules of the ATA. The court utilized its authority under federal law to transfer the case to the Southern District of New York rather than dismissing the case outright.\textsuperscript{39}

4. \textit{Virgilio v. City of New York}

In \textit{Virgilio}, the Second Circuit reviewed an order of the United States District Court for the Southern District of New York, which dismissed the plaintiffs' complaint against defendants Motorola, Inc. ("Motorola") and the City of New York (the "City") for allegedly providing ineffective radio transmission communication equipment to the City's firefighters.\textsuperscript{40} The plaintiffs alleged the defendants' negligent, intentional, and fraudulent actions proximately caused the decedents' deaths.\textsuperscript{41} The defendants moved to dismiss the claims on the ground that the plaintiffs waived any rights to sue the City or Motorola based on their election to take part in the Victim Compensation Fund.\textsuperscript{42} The plaintiffs argued that the waiver provision of the ATSSSA only bars suits against the airline industry.\textsuperscript{43} The court disagreed, holding that the waiver provision in the statute is unambiguous and also applies to claims against non-airline defendants.\textsuperscript{44} The ATSSSA provides as follows:

(B) Limitation on Civil Action.

(i) In general. Upon the submission of a claim under this title, the claimant waives the right to file a civil action (or to be a party to an action) in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001. The preceding sentence does not apply to a civil action to recover collateral source obligations, or to a civil action against any person who is a

\textsuperscript{37} \textit{Id.} at 771.
\textsuperscript{39} \textit{Rodriguez}, 367 F. Supp. 2d at 773.
\textsuperscript{40} \textit{Virgilio v. City of New York}, 407 F.3d 105, 108-09 (2d Cir. 2005).
\textsuperscript{41} \textit{Id.} at 108-09.
\textsuperscript{42} \textit{Id.} at 110-11.
\textsuperscript{43} \textit{Id.} at 112.
\textsuperscript{44} \textit{Id.} at 117-18.
knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act.\textsuperscript{45}

The court held the plaintiffs' claims were within the scope of the waiver provision and found that their damages arose "as a result of" the terrorist-related attacks.\textsuperscript{46} The court rejected the plaintiffs' argument that, even if the waiver applied, it only applied to compensatory damages and not to the plaintiffs' claims against the defendants for punitive damages.\textsuperscript{47} The court held that, while punitive damages were not curative in nature, they could not be recovered under New York law without some compensatory injury.\textsuperscript{48} Since the plaintiffs' claims for compensatory damages were barred, the possibility of a punitive award was likewise relinquished.

II. AIRLINE DEREGULATION ACT

The Airline Deregulation Act ("ADA") preempts state based claims if they relate to price, route, or service of an air carrier.\textsuperscript{49} The ADA states:

Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 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 carrier that may provide air transportation under this subpart.\textsuperscript{50}

Several Supreme Court cases have interpreted the scope of preemption under the ADA. In \textit{Morales v. Trans World Airlines, Inc.}, the Court determined that claims involving advertising by airlines were preempted by the ADA because advertising, under the broad "related to" language of the statute, is connected with price, route, or service of air carriers.\textsuperscript{51} In \textit{American Airlines, Inc. v. Wolens}, the Court addressed whether breach of contract claims against air carriers were preempted by the ADA.\textsuperscript{52} The Court held that, while the ADA preempted a claim under the Illinois Consumer Fraud Act, routine breach of contract claims under state law were not preempted because the ADA does not

\textsuperscript{45} ATSSSA § 405(c)(3)(B).
\textsuperscript{46} \textit{Virgilio}, 407 F.3d at 114.
\textsuperscript{47} \textit{Id.} at 116-18.
\textsuperscript{48} \textit{Id.} at 117-18.
\textsuperscript{49} 49 U.S.C.A. § 41713 (West 2005).
\textsuperscript{50} 49 U.S.C.A. § 41713(b)(1) (West 2005).
shelter airlines from suits "seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings."

In 2005, courts rendered ADA decisions involving consumer protection statutes, contract claims, privacy claims, tort claims, whistleblower acts, and deep vein thrombosis claims.

A. Consumer Protection Statutes

1. Brownstein v. American Airlines

Plaintiffs had purchased tickets on an American Airlines, Inc. ("American") flight but were unable to sit in their reserved seats due to an overweight passenger who occupied a portion of one of their seats and who refused to lower the armrest. After the man moved to another row and the plaintiffs took their seats, they were escorted off the aircraft by an American gate agent who then called the police and had the plaintiffs escorted from the terminal. This same gate agent would not permit the plaintiffs to rebook their flight, but they were accommodated by another American employee who placed them on a flight to a different, but nearby, destination airport. Plaintiffs sued for negligent and intentional infliction of emotional distress, false imprisonment, defamation, breach of contract, and violation of the California Unfair Competition Law. Plaintiffs also sought remedies under the California Consumer Legal Remedies Act.

American moved to dismiss all six claims, alleging that plaintiffs had failed to state a claim for the alleged negligent and intentional infliction of emotional distress, false imprisonment, breach of contract, and violation of the California Unfair Competition Law. Plaintiffs also sought remedies under the California Consumer Legal Remedies Act.

As to the tort claims, the court dismissed the false imprisonment claim but denied defendant's motion as to the negligent and intentional infliction of emotional distress and breach of

53 Id. at 228.
54 See infra Section III and accompanying text on Deep Vein Thrombosis claims.
56 Id.
57 Id. at *3.
58 Id. at *4-5.
59 Id. at *5.
60 Id. at *5-7.
contract claims. The court based these rulings on whether the claims were properly pled and whether the facts created a jury question, not on whether they were preempted by the ADA. The court held that the plaintiffs’ claims under the California consumer protection statutes were preempted by the ADA.

The court cited the United States Supreme Court’s opinion in American Airlines v. Wolens as persuasive. In Wolens, the Court found that the plaintiffs’ challenge to the airline’s retroactive changes to its frequent flyer program, which limited availability of seats, was preempted by the ADA because the consumer protection laws attempted “to guide and police the marketing practices’ of the airline, in direct contravention of the purpose of the ADA.” Here, the court found that the plaintiffs’ complaints about the overweight passenger’s occupation of their seat related to the prices charged by American, since it implicated the amount of space allocated by the airline to each passenger, and that their complaint about American’s removal procedures related to its services. Because the ADA preempts claims related to price, route, or service, the court dismissed these two claims.

B. Contract Claims

1. Samtech Corp. v. Federal Express Corp.

In Samtech, a Texas federal district court addressed whether the Airline Deregulation Act (“ADA”) preempted a Texas law which prohibited the enforcement of a contractually imposed statute of limitations period of less than two years. The plaintiff, Samtech Corporation (“Samtech”), shipped a package via Federal Express Corporation (“FedEx”) and sued two years later, alleging that FedEx damaged the shipment, although the contract of carriage required a suit to be brought within one year of shipment. The court granted FedEx’s motion for summary judgment in part and found that Samtech’s claims for bail-

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61 Id. at *9-11.
62 Id. at *10-11.
63 Id. at *11.
65 Brownstein, 2005 U.S. Dist. LEXIS 30295 at *16 (quoting Wolens, 513 U.S. at 228).
66 Id. at *18-19.
68 Id. at *1.
ment and negligence were preempted by the ADA, leaving only Samtech's breach of contract claim against FedEx.\textsuperscript{69} The court initially agreed with Samtech that the Texas law applied and allowed the breach of contract claim to proceed.\textsuperscript{70} However, upon reconsideration, it held that the ADA preempted the Texas law and found that the one year limitation was enforceable.\textsuperscript{71} Samtech then moved for reconsideration of the court's last decision.\textsuperscript{72}

The court affirmed its last decision and found that the Texas law, which makes contractually agreed to limitation provisions of less than two years unenforceable, was preempted by the ADA and that the one-year limitation period in FedEx's contract was reasonable.\textsuperscript{73} The court declined to borrow the Texas statute of limitations because, "while federal courts generally borrow state statutes of limitation if federal law does not supply a limitations period, such borrowing is not necessary when the parties have contracted for a limitations period."\textsuperscript{74} Samtech made several arguments against preemption, including arguing that the Texas law was a procedural tolling statute that did not affect the parties' substantive rights.\textsuperscript{75} The court upheld its earlier ruling that the ADA "does not permit the application of state law to expand or enlarge parties' contractual obligations by external requirements, such as requiring parties to allow suit after their contractually agreed period for filing has expired."\textsuperscript{76}


In Monzingo, the plaintiff filed suit against Alaska Air Group Inc. and Alaska Airlines, Inc. ("Alaska Airlines") after the airline made changes to its frequent flyer program which affected Monzingo's use of previously accumulated miles.\textsuperscript{77} The trial court granted Alaska Airlines' motion for summary judgment, finding that while Monzingo's breach of contract claim was not preempted by the Airline Deregulation Act ("ADA"), the con-

\textsuperscript{69} The details of the court's decision as to preemption by the ADA are contained in the court's unpublished decisions of March 14, 2005, and May 28, 2005. \textit{Id.} at *2.
\textsuperscript{70} \textit{Id.} at *3.
\textsuperscript{71} \textit{Id.}
\textsuperscript{72} \textit{Id.}
\textsuperscript{73} \textit{Id.} at *9.
\textsuperscript{74} \textit{Id.} at *5.
\textsuperscript{75} \textit{Id.}
\textsuperscript{76} \textit{Id.} at *9.
tract between the parties and their course of dealing indicated the intent to allow changes to the program, with reasonable notice.\(^7\) The trial court also awarded the defendants $36,877.15 in attorney’s fees under Alaska law.\(^7\)

The Alaska Supreme Court affirmed the trial court’s determination that, while the breach of contract action was not preempted by the ADA, there was no breach by defendants.\(^8\) The court concluded that *American Airlines, Inc. v. Wolens* and subsequent cases have held that

contract actions seeking invalidation of express contract terms, enforcement of equitable remedies, or punitive damages are preempted, because they would “impermissibly enlarge the scope of the proceedings beyond the parties’ agreement.” But if the parties “seek to enforce a term implied in fact in the agreement based upon the parties’ reasonable expectations,” no preemption problem is presented.\(^9\)

Here, because it was within Monzingo’s reasonable expectations, based upon the language of the contract, that Alaska Airlines could modify the program with adequate notice, no breach of contract occurred.\(^10\) However, the court did reverse the trial court’s award of attorney’s fees.\(^11\)


In *Koutsouradis*, a female passenger on a Delta Air Lines, Inc. (“Delta”) flight between Las Vegas and Tampa with a layover in Dallas sued the airline in federal court after she was allegedly subjected to sexually offensive comments by Delta employees.\(^12\) During the layover in Dallas, Koutsouradis was asked to accompany the gate agent to the tarmac because her checked baggage was vibrating.\(^13\) She told the gate agent that the vibration was probably due to her vibrator and proceeded to retrieve it and

\(^7\) *Id.* at 659-60.

\(^8\) *Id.* at 658.

\(^9\) *Id.* at 668. The Supreme Court of Alaska hears appeals directly from the Alaska trial courts. The Alaska Court of Appeals only hears appeals in certain criminal cases. Alaska Court System, About the Alaska Court System, http://www.state.ak.us/courts/ctinfo.htm (last visited Mar. 27, 2006).


\(^11\) *Id.* at 618.

\(^12\) *Id.*


\(^14\) *Id.*
She claimed that the Delta employees made lewd comments and laughed at her while she was forced to remove the vibrator from her bag in front of the employees and other passengers. Prior to trial the district court judge dismissed all claims except for the breach of contract of carriage claim. During the trial, the court found that the breach of contract claim was preempted by the ADA and granted Delta’s motion for judgment as a matter of law.

The Eleventh Circuit Court of Appeals affirmed the district court’s decision. The court found that the district court was correct in allowing the breach of contract claim to go to trial because “[t]he ADA preemption clause does not shelter airlines from suits which allege no violation of state-imposed obligations, but seek only to recover for the airline’s alleged breach of its own, self-imposed undertakings.”

However, the evidence at trial presented by Koutsouradis revealed that her breach of contract claim related to the service provided to her by Delta, under the definition of “service” established by the Fifth Circuit in Hodges v. Delta Airlines, Inc. The court noted the following:

Koutsouradis’ bag was vibrating. The situation needed to be addressed from a security standpoint. Baggage handling, passenger handling and courteousness relate to the heart of services that an airline provides. These services are inherent when you board an airplane. The basis of her claim was personal rudeness, wonton [sic] interference and lack of good treatment. If a passenger is unhappy with the way his or her baggage is handled, or the way he or she are [sic] treated, such individual is free never to fly that airline again.

Because the allegations arose from Delta’s service and not from a “self-imposed undertaking” by Delta, Koutsouradis’ claims were preempted by the ADA. The court also affirmed the dis-

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86 Id at 1342.
87 Id.
88 Id.
89 Id. at 1341.
90 Id.
91 Id.
92 Id. at 1343.
93 Id. at 1344.
94 Id. at 1344 n.2.
95 Id. at 1343-44.
trict court’s denial of punitive damages and dismissal of plain-
tiff’s intentional infliction of emotional distress claim.96

4. O’Callaghan v. AMR Corp.

In O’Callaghan, the plaintiffs’ suit in an Illinois federal district
court against American Airlines, Inc. (“American Airlines”) and
its parent company, AMR Corp. (“AMR”), arose out of advertis-
ing by American Airlines stating that it offered more legroom
than other airlines.97 Plaintiffs alleged that the advertisement
induced their purchase of tickets and sued on four counts—
breach of contract, common law fraud, violation of the Illinois
Consumer Fraud and Deceptive Business Practice Act, and a
class action claim.98

The district court first addressed the fraud claims under com-
mon law and Illinois state law and found that both claims were
preempted by the Airline Deregulation Act.99 Because Ameri-
can Airlines’ advertising related to both its rate and service,
plaintiffs’ claims were preempted.100 The court rejected the de-
fendants’ arguments that plaintiffs’ breach of contract claim
failed to state a claim, because the jury could find that the plain-
tiffs’ offer to purchase American Airlines’ tickets was subject to
the terms of American Airlines’ advertisement.101 Because the
court found that the breach of contract claim was proper, it de-
nied defendants’ motion to dismiss the class action claim.102
However, the court did grant AMR’s motion to dismiss the plain-
tiffs’ claims against it because, in general, a parent company is
not liable for the acts of its subsidiary, and plaintiffs had
presented no evidence to persuade the court to pierce the cor-
porate veil.103

5. Power Standards Lab, Inc. v. Federal Express Corp.

In Power Standards, the plaintiff, Power Standards Lab, Inc.
(“Power Standards”), sued after defendant Federal Express Cor-
poration (“FedEx”) failed to pay for damages caused during

96 Id. at 1344-45.
June 8, 2005).
98 Id. at *2.
99 Id. at *5.
100 Id. at *4.
101 Id. at *6-7.
102 Id. at *7.
103 Id. at *8-9.
shipment.\textsuperscript{104} Power Systems had paid for $20,000 of additional “declared value” coverage, but when it submitted a claim for $17,450 in repair costs, FedEx refused to pay.\textsuperscript{105} After Power Systems had incurred over $78,000 in attorney’s fees, and just six weeks prior to trial, FedEx sent it a check for $18,409.45 as a refund of the repair costs and the $959.45 initially paid to ship the goods.\textsuperscript{106} Power Systems proceeded to trial, arguing that it was entitled to the attorney’s fees due to FedEx’s breach of the implied covenant of good faith and fair dealing.\textsuperscript{107} At trial, the jury awarded Power Systems $78,027.08 in attorney’s fees and punitive damages of $1.5 million.\textsuperscript{108} After Power Systems agreed to a reduced punitive damages award of $600,000, FedEx appealed.\textsuperscript{109}

FedEx argued on appeal that the California laws under which Power Systems sought relief, for \textit{Brandt} damages\textsuperscript{110} and punitive damages, were preempted by the Airline Deregulation Act (“ADA”) since the lawsuit arose out of the service it provided to Power Systems, and the damages were limited to the declared value of the shipment.\textsuperscript{111} In addition, FedEx argued that the federal common law “released value” doctrine also limited Power Systems’ recovery to the declared value.\textsuperscript{112} The appeals court agreed with both arguments.\textsuperscript{113}

Under the ADA, the appeals court found both that FedEx qualified as an air carrier and that the dispute arose out of the service provided by FedEx through its shipping contract with Power Systems.\textsuperscript{114} The court rejected Power Systems’ argument that the dispute instead arose out of FedEx’s handling of the claim after shipment.\textsuperscript{115} Because the ADA was applicable, it preempted Power Systems’ claims for \textit{Brandt} damages (attorney

\textsuperscript{105} Id. at 1041-42.
\textsuperscript{106} Id. at 1042.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} \textit{Brandt} damages are attorney’s fees awarded in California insurance cases where the insured must retain counsel in order to obtain benefits under its policy with the insurer. \textit{Brandt} v. Superior Court, 37 Cal. 3d 813 (1985).
\textsuperscript{111} \textit{Power Standards Lab, Inc.,} 127 Cal. App. 4th at 1042.
\textsuperscript{112} Id. at 1050.
\textsuperscript{113} Id. at 1051.
\textsuperscript{114} Id. at 1044-45.
\textsuperscript{115} Id. at 1048.
fees) and punitive damages. The appeals court found that both of these awards arose out of California state laws, and further commented that Brandt damages were only applicable in insurance cases. It also found that Power Systems' recovery was limited by the contract of carriage between it and FedEx, and the contract did not mention either Brandt damages or punitive damages. As for Power Systems' argument that the dispute arose out of claim handling rather than out of the service provided by FedEx, the court found that "the law of federal preemption does not allow such a distinction." Because the claim ultimately arose out of the movement of Power Systems' goods by FedEx, the ADA preempted all of Power Systems' state law claims. In addition, the court held that the federal common law "declared value" or "released value" doctrine also limited Power Systems' recovery to its declared value of $20,000 for the shipment.

C. PRIVACY LITIGATION

1. In re JetBlue Airways Corp. Privacy Litigation

After September 11, 2001, the government and airlines became more concerned about airline safety; in response to these concerns, the Transportation Security Administration ("TSA") sent a written request to JetBlue Airways Corporation ("JetBlue") asking it to supply its Passenger Name Records ("PNRs") to Torch Concepts, Inc. ("Torch"), a government subcontractor. After JetBlue provided the requested data, passengers sued JetBlue, Torch, and other data companies in a class action lawsuit filed in the United States District Court for the Eastern District of New York. The plaintiffs alleged that the defendants violated the Electronic Communications Privacy Act of 1986 ("ECPA"), violated New York consumer protection statutes, committed trespass to property, and were unjustly en-

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116 Id. at 1049.
117 Id. at 1046.
118 Id. at 1049.
119 Id. at 1048.
120 Id. at 1049.
121 Id. at 1050.
123 Id. at 305.
In addition, JetBlue was sued individually for breach of contract. All defendants filed 12(b)(6) motions to dismiss, alleging that the plaintiffs had failed to state a claim either under the ECPA or under state law. Defendants alleged that plaintiffs’ state law claims were expressly preempted by the Airline Deregulation Act (“ADA”), or alternatively, that the state law claims were impliedly preempted by the federal government’s occupation of the field of aviation safety.

The court, relying on other cases interpreting the ECPA, including In re Northwest Airlines Privacy Litigation, found that JetBlue’s website did not qualify it as an electronic communication service provider or remote computing service. Because there was no claim under the ECPA against JetBlue, the aiding and abetting claims against the other defendants failed as well.

As to the defendants’ argument that the plaintiffs’ state law claims were expressly preempted, the court found that while the ADA preempted the claims under the New York consumer protection statutes, the plaintiffs’ claims for breach of contract, trespass to property, and unjust enrichment were not expressly preempted. Under the holdings of Morales v. Trans World Airlines, Inc. and American Airlines, Inc. v. Wolens, the breach of contract claim against JetBlue was not preempted, because “the application of state law to honor private bargains does not threaten to undermine federal deregulation in the same way that enforcement of state public policy would.” In addition, the court held that the plaintiffs’ claims for trespass to property and unjust enrichment did not implicate “service” under the ADA and thus were not preempted.

As for the defendants’ arguments that the plaintiffs’ claims were impliedly preempted because the federal government occupies the field of aviation safety, the court found that a ques-
tion of fact remained as to whether the defendants’ actions arose out of aviation safety.\textsuperscript{137} Therefore, the breach of contract, trespass to property, and unjust enrichment claims were not preempted by either express preemption under the ADA nor by implied preemption in the field of aviation security.\textsuperscript{138}

Even though the court found that these claims by the plaintiffs were not preempted, it ultimately held that the plaintiffs failed to state a claim under state or common law.\textsuperscript{139} Plaintiffs were unable to show how they were damaged by JetBlue’s alleged breach of contract, how they were injured by the alleged trespass to property, or why JetBlue should be required to pay restitution for its alleged unjust enrichment.\textsuperscript{140} Therefore, while the claims survived the preemption challenge, the court ultimately granted the defendants’ 12(b)(6) motions.

2. \textit{In re American Airlines, Inc. Privacy Litigation}

In privacy litigation against American Airlines, Inc. ("American Airlines"), passengers sued American Airlines, AMR Corp., Airline Automation, Inc. ("AAI") and various other companies that received passenger information collected by American Airlines through its website.\textsuperscript{141} The various lawsuits sought damages from defendants for violations of the ECPA and for state law claims for breach of contract, trespass to property, invasion of privacy, unjust enrichment, and deceptive trade practices.\textsuperscript{142} The defendants moved for summary judgment, arguing that the plaintiffs failed to state a claim under the ECPA and either that the state law claims were preempted by the Airline Deregulation Act ("ADA") or, in the alternative, that the plaintiffs failed to state a claim under state law.\textsuperscript{143}

The court determined that AAI and American Airlines did not violate the ECPA under either § 2701, which prohibits una-

\textsuperscript{137} The court stated that, although the state laws at issue were not specifically applicable to aviation security, "the Supreme Court has recognized that field preemption analysis may be understood as a species of conflict preemption, which exists where a state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” \textit{Id.} at 320 (quoting \textit{English v. Gen. Elec. Co.}, 496 U.S. 72, 79 (1941)).

\textsuperscript{138} \textit{Id.} at 316.

\textsuperscript{139} \textit{Id.} at 320.

\textsuperscript{140} \textit{Id.} at 327-30.


\textsuperscript{142} \textit{Id.} at 554.

\textsuperscript{143} \textit{Id.} at 556-57.
Authorized access to a facility through which electronic communication service is provided, or § 2702, which prohibits an electronic communication service from knowingly divulging stored contents. As to § 2701, the court determined, based upon plaintiffs' pleadings, that while AAI might have made an unauthorized disclosure of American Airlines' data, it did not do so through unauthorized access to an American Airlines' facility. Further, American Airlines did not violate § 2702, a criminal statute, even if it breached its privacy contract with plaintiffs. Therefore, the court granted the defendants' motions to dismiss the plaintiffs' ECPA claims.

The court also determined that all of the plaintiffs' state law tort claims for trespass to property, invasion of privacy, deceptive trade practices, and unjust enrichment were preempted by the ADA, because of their relation to American Airlines' service. The court agreed with the Fifth Circuit's definition of "services" from Hodges v. Delta Airlines, Inc. which stated the following:

"Services" generally represent a bargained-for or anticipated provision of labor from one party to another. If the element of bargain or agreement is incorporated in our understanding of services, it leads to a concern with the contractual arrangement between the airline and the user of the service. 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.

While each of these claims, which touched some aspect of American Airlines' services, was preempted by the ADA, the plaintiffs' breach of contract claim against American Airlines was not expressly preempted because the ADA does not preempt recovery for air carriers' violations of self-imposed under-

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144 Id. at 554-61 (citing 18 U.S.C.A. §§ 2701-2702 (West 2005)).
145 Id. at 554.
146 Id. at 560.
147 Id. at 561.
148 Id. at 563.
However, the court determined that the plaintiffs ultimately had failed to state a claim under this cause of action and granted American Airlines' motion to dismiss the breach of contract claim. The court granted the plaintiffs leave to amend their complaint in light of the court's ruling.

D. Tort Claims

1. Denzik v. Regional Airport Authority of Louisville & Jefferson County

In Denzik, a property owner sued the Louisville Regional Airport Authority ("Authority") in Kentucky state court for issues related to airplane flights over his home. The Authority removed the action to federal court on the grounds that the Airline Deregulation Act ("ADA") completely preempted Denzik's state law claims for trespass, nuisance, invasion of privacy, and intentional infliction of emotional distress. Denzik then sought to remand the case to state court.

The district court found that, although the ADA might preempt some of Denzik's claims, the case was improperly removed to federal court, because the Authority claimed that the ADA completely preempted Denzik's claims. The court found the holding in Musson Theatrical, Inc. v. Federal Express Corp. to be persuasive. In Musson, the Sixth Circuit held that the ADA did not "completely" preempt state law claims in lawsuits against air carriers. Unlike other statutes, "the ADA is simply not one of those extraordinary circumstances where Congress intends, not merely to preempt a certain amount of state law, but also to transfer jurisdiction to decide the preemption question from state to federal courts." Because the claims were not completely preempted by the ADA, Denzik's claims were state law claims requiring adjudication in state court. The court did
note, however, that the state court would be required to analyze the claims to determine whether any of them were preempted by the ADA.\textsuperscript{162}

2. \textit{Henson v. Southwest Airlines Co.}

The Federal Aviation Administration ("FAA") brought an action against appellant, Desmond T. Henson, after his checked baggage was searched, and an unloaded handgun was discovered.\textsuperscript{163} After the FAA dropped the charges, Henson sued Southwest Airlines Company ("Southwest") for malicious prosecution and negligence, alleging that he was "profiled" by a Southwest ticket agent as a potential drug courier, which prompted the search of his baggage.\textsuperscript{164} The trial court granted summary judgment to Southwest on the ground that Henson's claims were preempted by the Airline Deregulation Act ("ADA"), and Henson appealed.\textsuperscript{165}

The court acknowledged the United States Supreme Court decisions involving ADA preemption in \textit{Morales v. Trans World Air Lines}\textsuperscript{166} and in \textit{American Airlines, Inc. v. Wolens}\textsuperscript{167} but appeared to base its decision on a Texas Supreme Court case, \textit{Continental Airlines, Inc. v. Kiefer}.\textsuperscript{168} In \textit{Kiefer}, the court applied a two-part test to determine whether state tort actions against airlines were preempted by the ADA.\textsuperscript{169} "First, it asked whether the claims related to airline rates, routes or services. Second, the court determined whether the claims constituted the enactment or enforcement of a state law, rule, regulation, standard, or other provision."\textsuperscript{170} Applying the \textit{Kiefer} test, the court answered the first part in the affirmative and determined that Henson's claims arose out of the service provided by Southwest.\textsuperscript{171} Southwest employees were notified by a computer-assisted passenger screening system that alerted them as to which passengers required further screening.\textsuperscript{172} The "Southwest employees have no discretion in determining which passengers are subject to addi-

\textsuperscript{162} \textit{Id.}\textsuperscript{163} Henson v. Sw. Airlines Co., 180 S.W.3d 841, 842 (West 2005).\textsuperscript{164} \textit{Id.}\textsuperscript{165} \textit{Id.}\textsuperscript{166} Morales v. Trans World Air Lines, Inc., 504 U.S. 374 (1992).\textsuperscript{167} Am. Airlines, Inc. v. Wolens, 513 U.S. 219 (1995).\textsuperscript{168} \textit{Henson}, 180 S.W.3d at 846-47.\textsuperscript{169} \textit{Cont'l Airlines, Inc. v. Kiefer}, 920 S.W.2d 274, 281 (Tex. 1996).\textsuperscript{170} \textit{Henson}, 180 S.W.3d at 845.\textsuperscript{171} \textit{Id.} at 846.\textsuperscript{172} \textit{Id.}
tional security screening” and “the ticketing agent’s actions were based on mandatory federal aviation security screening regulations directly affecting airline services through ticketing and baggage-handling procedures.” In applying the second part of the test, the court found that “allowing state courts to adjudicate tort law claims arising out of an airline’s use of federally mandated security screening procedures has the potential for undermining the federal regulatory scheme and subjecting airlines to inconsistent multi-state litigation.” Therefore, the court upheld the lower court’s grant of summary judgment to Southwest based on the preemption of Henson’s claims by the ADA.

3. Kalantar v. Lufthansa German Airlines

On March 25, 2000, the plaintiff, an Iranian born physician, was denied boarding at Dulles Airport in Washington, D.C. and was led away by airport police after he and a Lufthansa German Airlines’ (“Lufthansa”) employee were involved in a dispute regarding the search of his baggage. The plaintiff claimed the agent told him that he was subject to a search prior to boarding simply because he carried an Iranian passport and because he posed a security threat to the flight and to the other passengers. The ticket agent told the plaintiff that she was acting pursuant to “top-secret United States government regulations” and refused to provide a copy of the regulations upon plaintiff’s request. After the plaintiff was arrested, the Lufthansa manager on duty sent the local magistrate a written statement, indicating the intent to press charges against plaintiff for criminal trespass. The plaintiff eventually traveled to Germany and, upon his return, approached the Lufthansa counter to request a copy of the written report, at which time the same ticket agent called the police, alleging that plaintiff was “threatening” her. The plaintiff pled not guilty, and all charges were eventually dropped. The plaintiff then sued Lufthansa and its two

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173 Id.
174 Id.
175 Id. at 847.
177 Id. at 134.
178 Id.
179 Id.
180 Id. at 135.
181 Id.
agents for violation of several federal statutes, including the Federal Aviation Act, the Civil Rights Act of 1866, Title II of the Civil Rights Act of 1964, and Article 1 of the Warsaw Convention, as well as for several common law torts. The defendants moved for summary judgment as to all counts.

The court dismissed the plaintiff's claims under the Federal Aviation Act, the two civil rights statutes, and the Warsaw Convention, but rejected the defendants' argument that the tort claims were preempted by the Airline Deregulation Act ("ADA"). The court found that the plaintiff's claims were unrelated to Lufthansa's price, route or service since they arose from incidents which occurred after the plaintiff was denied boarding by Lufthansa. The court also rejected the defendants' argument that because "aviation security is a national concern," they should be "automatically immune from suit." The court granted the defendants' motion to dismiss in part and denied it in part, and determined that plaintiff's tort claims for false arrest, defamation, malicious prosecution, and civil conspiracy should proceed to trial.

E. Whistleblower Acts


In Selim, a Pan American Airways Corp. ("Pan Am") pilot of Egyptian descent sued the airline under the Florida Whistleblower Act after he was terminated. Selim filed a grievance against the airline after he was denied moving and travel expenses, was subjected to numerous physical examinations for alleged hearing loss issues, was passed over for a promotion, and was fired after allegedly causing a disturbance prior to a flight. The Pan Am Board of Adjustment ("Board") arbitrated these issues and found that Selim was entitled to monetary damages and reinstatement, subject to a ninety day suspension. Selim then filed suit against Pan Am for viola-

182 Id. at 136-39.
183 Id. at 136.
184 Id. at 137-41.
185 Id. at 141.
186 Id.
189 Selim, 889 So. 2d at 159.
190 Id. at 161.
tions of the Florida Whistleblower Act and the Florida Civil Rights Act, alleging that the Air Line Pilots Association representative failed to raise his discrimination claims at the hearing. The trial court granted Pan Am’s motion for summary judgment, finding that Selim’s claims were barred both by collateral estoppel and res judicata, based on the Board’s proceedings, and by preemption of the state law claims by the Airline Deregulation Act (“ADA”).

The Florida Court of Appeal reversed the trial court’s decision and remanded the case for further review. As to the issues of collateral estoppel and res judicata, the court found Alexander v. Gardner-Denver Co. persuasive in determining whether an arbitration proceeding can bar a later discrimination suit. Gardner-Denver held that Title VII and applicable state statutes addressing discrimination could not be supplanted by an arbitration proceeding.

As to the trial court’s determination that the ADA preempted Selim’s state law claims, the appeals court agreed with a line of cases cited by Selim and found that employment discrimination and whistle-blower retaliation were not related to air carrier service. Therefore, Selim’s claims for racial discrimination under the Florida Civil Rights Act and for retaliatory firing under the Florida Whistleblower Act were not preempted by the ADA. The appeals court additionally found that both claims were also not preempted by the Railway Labor Act.

2. Gary v. The Air Group, Inc.

In Gary, the plaintiff sued his former employer, The Air Group, Inc. (“AGI”), under the New Jersey Conscientious Employee Protection Act, claiming that he was fired in retaliation for questioning another pilot’s qualifications. After the dis-

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193 Selim, 889 So. 2d at 159.
194 Gardner-Denver, 415 U.S. at 56-57.
196 Id. at 159.
197 Id. at 161.
199 Gary v. Air Group, Inc. 198 397 F.3d 183, 186, (3d Cir. 2005).
trict court dismissed the plaintiff’s action as preempted under the Airline Deregulation Act ("ADA") and the Whistleblower Protection Program200 ("WPP"), the plaintiff appealed.201

The appeals court found that the plaintiff’s claims did not involve price, route, or service and were thus not preempted by the ADA. The court distinguished other cases202 and found that, because the plaintiff did not himself refuse to fly, he did not affect any of AGI’s scheduled flights.203 In addition, his questioning of the other pilot also did not affect service, as no flights with that pilot had been scheduled which could be affected.204 As to the AGI’s argument that the federal WPP preempts all state whistleblower claims, the appeals court followed the reasoning in Branche v. Airtran Airways, Inc.205 and held that the WPP did not affect the ADA preemption analysis for two reasons—first, because the text of the WPP did not even mention the issue of preemption, and second, because “courts should not lightly infer preemption.”206


In McBride, four employees sued Gemini Air Cargo, Inc. ("Gemini") in Florida state court claiming that Gemini violated the Florida Whistleblower Act by firing them after three of the plaintiffs had witnessed an uncertified vendor install an aircraft engine, and the fourth reported the incident to Gemini’s president.207 The trial court dismissed the action, finding that the claims were preempted by both the Airline Deregulation Act ("ADA") and the Whistleblower Protection Program ("WPP").208

The Florida Court of Appeal found that neither the ADA nor the WPP preempted plaintiffs’ claims; price and route were not involved, and the plaintiffs’ actions in reporting their safety concerns were too remote from Gemini’s services to be preempted

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201 Gary, 397 F.3d at 186.
203 Gary, 397 F.3d at 189.
204 Id.
206 Gary, 397 F.3d at 190 (quoting Int’l Paper Co. v. Ouellette, 479 U.S. 481, 491 (1987)).
208 Id. at 188.
under the ADA. The court followed the holding from Branch u. Airtran Airways, Inc. in determining that the WPP did not preempt state whistleblower statutes nor did it affect the ADA in any meaningful way. Rather, the WPP “simply added an additional remedy for plaintiffs seeking to advance a retaliatory discharge claim.” Therefore, the court reversed the trial court’s dismissal and allowed the Florida Whistleblower Act claims to proceed.

III. DEEP VEIN THROMBOSIS

Deep Vein Thrombosis ("DVT") is a medical condition that occurs when a blood clot forms in a deep vein, usually in the leg. DVT can cause serious complications if the clot breaks off and lodges in the brain, lungs, or heart, causing severe damage to the organs. The analysis of a claimant’s DVT claim differs depending on whether the injury occurred on an

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209 Id.
210 Branch, 342 F.3d at 1264.
211 The Whistleblower Protection Program provides:
   (a) Discrimination against airline employees. No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—
      (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;
      (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle [49 USCS §§ 40101 et seq.] or any other law of the United States;
      (3) testified or is about to testify in such a proceeding; or
      (4) assisted or participated or is about to assist or participate in such a proceeding.
212 McBride, 915 So. 2d at 189 (quoting Branch, 342 F.3d at 1264).
213 Id.
215 Id. at 382.
international or domestic flight. There were three significant opinions on DVT liability for non-Warsaw domestic flights in 2005.216 The United States District Court for the Northern District of California issued two opinions in the DVT Multidistrict Litigation. One opinion involved claims against the defendant airlines and the other opinion involved claims against Boeing. A third case was from Wisconsin State Court. These cases cemented the growing judicial precedent making recovery for DVT claims from airlines or manufacturers difficult.

A. MDL: Claims Against Airlines—Domestic Flights

1. In re Deep Vein Thrombosis Litigation

The United States District Court for the Northern District of California considered the “non-Warsaw” DVT claims against the defendant airlines in the pending Multi-District Litigation (“MDL”).217 The opinion addressed ten cases in the MDL, which involved state law claims and did not involve international flights or an interpretation of the Warsaw Convention.218 The airline defendants moved jointly to dismiss the plaintiffs’ claims based on federal preemption, and the federal court granted the motion.219

The non-Warsaw plaintiffs made three allegations: that seating configurations were dangerous and defective so as to create a risk of developing DVT; that the seats were defectively designed so as to create the same risk of developing DVT; and that the defendants failed to warn the plaintiffs of the DVT risk or inform them of steps that could have been taken to mitigate the risk. The plaintiffs made state law claims for negligence, breach of duty of a common carrier, products liability, and breach of warranty.220

While the defendants’ motions to dismiss were pending, the Fifth Circuit rendered its decision in Witty v. Delta Airlines,

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216 In 2004, the Fifth and Ninth Circuit Courts of Appeal addressed DVT claims in the Warsaw context, holding that airlines were not liable to international passengers who developed DVT during flight. Blansett v. Cont’l Airlines, Inc., 379 F.3d 177 (5th Cir. 2004); Rodriguez v. Ansett Austl. Ltd., 383 F.3d 914 (9th Cir. 2004).
218 Id. at *9.
219 Id. at *10.
220 Id. at *11.
Inc.,\textsuperscript{221} which had a significant impact on the MDL court. In \textit{Witty}, the plaintiff made a DVT claim against Delta Air Lines, Inc. ("Delta"), alleging Delta's seating configuration did not provide adequate legroom to prevent DVT and that Delta was negligent in failing to warn passengers of the risks of DVT.\textsuperscript{222} The district court denied Delta's motion to dismiss, holding that the plaintiff's claims were not preempted by federal law. The Fifth Circuit unanimously reversed.\textsuperscript{223} First, the court held the plaintiff's defective seating configuration claim was preempted by the Airline Deregulation Act ("ADA"), which expressly preempted state laws "having the force and effect of law related to price, route, or service of an air carrier."\textsuperscript{224} Specifically, the court held that providing additional legroom would require Delta to decrease the number of seats on the aircraft, which would have the effect of increasing prices.\textsuperscript{225} Second, the court held that the failure to warn claim was subject to implied field preemption by the Federal Aviation Act of 1958.\textsuperscript{226} Finally, the court held that airlines were not otherwise required by federal law to provide any such warnings.\textsuperscript{227}

Based on \textit{Witty}, the MDL court directed the parties to include in their briefs arguments regarding whether the court should adopt or reject the Fifth Circuit's reasoning. After considering the briefs, the MDL court adopted the Fifth Circuit's rationale and expanded upon it, dismissing the plaintiffs' claims.\textsuperscript{228} The MDL court first addressed the plaintiffs' defective seating configuration argument.\textsuperscript{229} The plaintiffs had argued that the ADA did not preempt common law personal injury claims and that, even if some personal injury claims were preempted by the ADA, the defendants' seating configuration claim was outside the scope of the ADA because it did not relate to prices.\textsuperscript{230} The court rejected both arguments.\textsuperscript{231} The court held that the ADA's "related to a price, route or service" language is a contin-

\textsuperscript{221} Witty v. Delta Airlines, Inc., 366 F.3d 380 (5th Cir. 2004).
\textsuperscript{222} Id. at 380-82.
\textsuperscript{223} Id.
\textsuperscript{224} 49 U.S.C.A. § 41713 (West 2005).
\textsuperscript{225} Witty, 366 F.3d at 383.
\textsuperscript{226} Id.
\textsuperscript{227} Id. at 386.
\textsuperscript{229} Id. at *18.
\textsuperscript{230} Id. at *19, 26.
\textsuperscript{231} Id. at *25, 29.
uum with individual state law claims, including personal injury claims, falling at various points. Therefore, not all personal injury claims are immune from ADA preemption. With respect to plaintiffs' argument that seating configuration is not related to price, the court held that the language of the ADA directs courts to examine not only the "force" but also the "effect" a state law has on price. The ADA provides that a state "may not enact or enforce a law, regulation or other provision having the force and effect of a law related to a price, route or service of an air carrier."

Following Witty, the court held that the ADA not only preempts direct regulation of airline prices by states but also preempts indirect regulation relating to prices that have the forbidden significant effect on any such prices. The court held that requiring an airline to change its seating configuration would have the forbidden significant economic effect of altering pricing.

The court next addressed the plaintiffs' claim of defective seat design (as opposed to seat configuration), an issue not addressed in Witty. Conceding that defective seat design claims would have no effect on price, the airlines argued that the claims were instead impliedly preempted by the Federal Aviation Act of 1958 (the "Act"). The court agreed, reasoning that the Federal Aviation Administration ("FAA") has enacted numerous federal regulations governing the design, maintenance, structure, and position of the aircraft seats. Also, as with the defective seat configuration argument, the court noted that allowing state law claims to proceed would lead to non-uniform decisions, creating an impossible situation for airlines.

With respect to the plaintiffs' failure to warn claims, the court followed Witty and held that the Act impliedly preempted plaintiffs' failure to warn claims. The court held that previous Ninth Circuit decisions paralleled those of other circuits and those of the United States Supreme Court in holding that Con-

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232 Id. at *25.
233 Id.
236 Id. at *48.
237 Id. at *48-49.
238 Id. at *49.
239 Id.
progress intended to centralize aviation regulation under the Act. The court noted that the FAA has enacted numerous regulations governing warnings and instructions that must be given to airline passengers. Allowing state lawsuits to proceed based on failure to warn of DVT would lead to non-uniformity of decisions, which would make it impossible for airline defendants to comply with pre-flight warnings applicable in different states. Thus, the court held that airline defendants were not liable for failure to warn the non-Warsaw plaintiffs of the risks of DVT.

Finally, the court addressed plaintiffs’ rather creative argument that they were not seeking to have the airlines reconfigure the seats and were not contending that reconfiguration would cure the problem. Rather, they argued that the airlines should remain free to do nothing about the seats, but simply be required to compensate passengers who suffer personal injury as a result of the cabin environment. Rejecting that argument, the court noted that the argument had been attempted once before in cigarette litigation and had been rejected by the United States Supreme Court.


In *Miezin*, the plaintiff sued Midwest Express Airlines, Inc. ("Midwest") in Wisconsin state court, asserting that the airline negligently failed to warn passengers about the dangers of DVT. The trial court granted summary judgment to Midwest based on federal preemption and because Midwest had no duty under Wisconsin common law to warn passengers about DVT. On appeal, the Wisconsin Court of Appeals affirmed the lower court. The court held that the plaintiff’s claims were based solely on a state common law negligence theory and that such a claim was impliedly preempted by the Federal Aviation Act of

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240 *Id.; United States v. Christensen, 419 F.2d 1401 (9th Cir. 1969); World Airways, Inc v. Int’l Bhd. of Teamsters, 578 F.2d 800 (9th Cir. 1978).*
242 *Id. at *45.*
243 *Id.*
244 *Id. at *31-32.*
245 *Id. (citing Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992)).*
246 *Miezin v. Midwest Express Airlines, Inc., 701 N.W.2d 626, 627 (Wis. Ct. App. 2005).*
247 *Id. at 627.*
248 *Id.*
The court discussed and followed the decision of *Witty v. Delta Airlines, Inc.* The court addressed the plaintiffs' DVT claims against The Boeing Company ("Boeing"). The plaintiffs developed DVT after traveling either on domestic or international flights on aircraft manufactured by Boeing. Plaintiffs sued Boeing, alleging that the seats and seating configuration on each of the aircraft were dangerous and defective so as to create a risk of developing DVT. In twelve of the seventeen cases, Boeing manufactured the aircraft but did not install the seating. In the remaining five cases, Boeing not only manufactured the aircraft but also installed the seating. However, Boeing did not design, manufacture, or even purchase the seating in any of the cases; the seating was supplied by the airlines.

Boeing filed two motions for summary judgment: the first involved the twelve cases in which it did not install seating, and the second involved the five cases in which it did install the seating. The court granted both motions. In the first motion, the court held Boeing was not liable because it did not design, manufacture, or install the allegedly defective seats. The plaintiffs had argued Boeing was nevertheless responsible for defects in the seats as part of the "completed product" doctrine from the Restatement (Second) of Torts section 402A. The court rejected the plaintiffs' argument, holding that the completed product supplied by Boeing was not an aircraft with seats, but an aircraft without seats. It was thus undisputed that Boeing's completed product did not have defective seats.

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249 *Id.*
252 *Id.* at 1058.
253 *Id.*
254 *Id.*
255 *Id.* at 1059.
256 *Id.*
257 *Id.* at 1071.
258 *Id.* at 1062.
259 *Id.*
260 *Id.*
261 *Id.* at 1063.
Plaintiffs also argued that Boeing's seat tracking system was defectively designed, because it permitted the airlines to configure seats that were unsafe for passengers. The court refused to place a duty upon Boeing to prohibit airlines from spacing seats too closely, holding that Boeing would have no legal authority to require the airlines to configure seats in a certain manner, because only the FAA would have that authority.\footnote{Id. at 1065-66.}

The court also rejected plaintiffs' claim that Boeing had a duty to warn about DVT and defective seating conditions. The court held that a manufacturer has no duty to warn a purchaser of potentially dangerous products that exist in the world, or to otherwise specify products that the manufacturer subjectively believes are safer.\footnote{Id. at 1068.} The court further held that Boeing had no duty to warn passengers of DVT, reasoning that a manufacturer, after its product is sold, has no duty to warn a third party with whom it has no contact that the purchaser of its product may or may not have supplemented the completed product with a defective piece of equipment.\footnote{Id.} Finally, the court rejected plaintiffs' theory that Boeing was "an integral part of the overall producing and marketing enterprise" which had the duty to warn the airlines about seating configuration.\footnote{Id. at 1066.}

The court also granted Boeing's motion as to the five cases in which Boeing installed the seating. The court held that state law precedent is universal that an installer of a defective product is not liable to an end user for a defectively designed product.\footnote{Id. at 1070.} As such, even though Boeing installed the seats, the court held it could have no liability to the plaintiffs.\footnote{Id. at 1071.}

IV. FEDERAL AVIATION ACT OF 1958

Congress passed the Federal Aviation Act of 1958\footnote{49 U.S.C.A. §§ 40101-50105 (West 2005).} (the "Act") and created the present-day Federal Aviation Administration ("FAA"). The Act authorizes the FAA to enact Federal Aviation Regulations ("FAR"), which have the effect of laws.\footnote{49 U.S.C.A. § 106(g) (West 2003).} While the Act provides federal jurisdiction for injunctive relief
for any violations of the Act or any rule or FAR, there is no express or implied private right of action under the Act.\textsuperscript{270}

A. No-Fly List

1. Green v. Transportation Security Administration

In \textit{Green}, plaintiffs sued after they were identified on the Transportation Security Administration ("TSA") "No-Fly List," which contains the names of individuals who pose a risk to aviation security and who are prohibited from flying.\textsuperscript{271} The plaintiffs have the same or similar names as individuals identified on the No-Fly List.\textsuperscript{272} They were routinely detained and searched by airport personnel in front of co-workers and the general public.\textsuperscript{273} The TSA issues Security Directives which outline the procedures for airport personnel to follow if a passenger’s name appears on the No-Fly List.\textsuperscript{274} Plaintiffs sued the TSA in federal district court alleging that the TSA’s maintenance, management, and dissemination of the No-Fly List violated plaintiffs’ Fifth Amendment due process rights and their Fourth Amendment rights to be free from unreasonable searches and seizures.\textsuperscript{275} In its defense, the TSA claimed that it has instituted an ombudsman process which allows passengers who are identified erroneously on the No-Fly List to clear their names from the list.\textsuperscript{276} Only three of the plaintiffs had properly followed the clearance procedures; the others either did not attempt to clear their names or failed to use the established procedures in their attempts.\textsuperscript{277} Defendants moved to dismiss, arguing that the district court lacked subject matter jurisdiction over the claims and, in the alternative, that plaintiffs had failed to state a claim upon which relief could be granted.\textsuperscript{278}

Under 49 U.S.C. § 46110(a), the United States Court of Appeals has exclusive jurisdiction over final orders issued by the Secretary of Transportation under the Federal Aviation Act. The court first determined that the Security Directives issued by

\textsuperscript{270} Montawk–Caribbean Airways, Inc. v. Hope, 784 F.2d 91, 97 (2d Cir. 1986).
\textsuperscript{272} Id. at 1122.
\textsuperscript{273} Id.
\textsuperscript{274} Id. at 1121.
\textsuperscript{275} Id. at 1122.
\textsuperscript{276} Id.
\textsuperscript{277} Id. at 1128.
\textsuperscript{278} Id. at 1122.
the TSA were orders under § 46110(a) because, while not lengthy, they impose an obligation or define legal rights.279 Because the directives were orders, the district court did not have subject matter jurisdiction over them and could not address plaintiffs’ claims relating to them.280 However, the court did determine that it had subject matter jurisdiction over the plaintiffs’ challenge to the TSA’s Ombudsman Clearance Procedures, as these were not final orders but merely procedures that persons could follow to clear their name from the No-Fly List.281

Plaintiffs also argued that even if the Security Directives were orders, the district court had jurisdiction, because their complaint raised broad constitutional challenges to the directives. If the claims raised such challenges, and the challenges were not “inescapably intertwined” with the directives themselves, then the district court would have jurisdiction to hear the claims, regardless of the jurisdictional rules set forth in § 46110(a).282 The court determined that plaintiffs’ Fourth and Fifth Amendment challenges were inescapably intertwined with the directives’ because the court would be required to review the procedures and merits of the No-Fly List itself.283 The court ultimately determined that only the plaintiffs’ Fifth Amendment challenge to the Ombudsman Clearance Procedures could survive defendants’ motion to dismiss under § 46110(a).284 However, this remaining claim could not survive defendants’ motion to dismiss for failure to state a claim, since plaintiffs could not show that their claim met the “stigma-plus” doctrine under the Fifth Amendment.285 Under the stigma-plus doctrine, “Plaintiffs must show (1) public disclosure of a stigmatizing statement by the government, the accuracy of which is contested; plus (2) the denial of some more tangible interest such as employment, or the alteration of a right or status recognized by state law.”286 While plaintiffs may have suffered stigmatizing statements, they were not deprived of any liberty or property rights while being

279 Id. at 1125.
280 Id.
281 Id.
282 Id. at 1126.
283 Id. at 1127.
284 Id. at 1128.
285 Id. at 1129.
286 Id.
detained and searched by airport personnel, and accordingly, the court dismissed their complaint.287

B. TORT CLAIMS


In Greene, the wife of a deceased pilot brought a wrongful death action in federal district court in Kentucky, claiming that there was a manufacturing defect in a gyroscope, which caused the crash, and that the manufacturer had failed to warn of the defect.288 Prior to trial, the trial court had granted defendant B.F. Goodrich Avionics Systems, Inc.’s (“Goodrich”) motion to dismiss the failure to warn claim.289 After trial, where plaintiff was awarded substantial damages, defendants appealed the verdict, and plaintiff cross-appealed the granting of partial summary judgment for Goodrich.290

On appeal, the Sixth Circuit agreed with the trial court that the failure to warn claim was preempted by the Federal Aviation Act (the “Act”). Plaintiff had argued at trial that Goodrich had not maintained a database of malfunctions and employee concerns, which might have warned users of the alleged gyroscope defects.291 Because the Act granted exclusive authority for aviation regulation in the Federal Aviation Administration and the plaintiff’s claims were based on state law, the appeals court found that the trial court was correct in finding her failure to warn claims preempted by federal law.292

C. VALIDITY OF LIENS


In Creston, the Florida Court of Appeal considered whether Florida law,293 which requires an aircraft lien to be filed in the county where services were last provided, was preempted by the Federal Aviation Act (the “Act”), which requires liens to be filed with the Federal Aviation Administration (“FAA”).294 Creston

287 Id. at 1130.
289 Id.
290 Id.
291 Id. at 794.
292 Id. at 795.
Aviation, Inc. ("Creston") acquired an artisan’s lien against an aircraft owned by Tack I, Inc. ("Tack") in which Textron Financial Corporation ("Textron") held a security interest. After Tack defaulted on the loan with Textron while the aircraft was in Creston’s possession, Textron filed a petition for writ of replevin against Creston, claiming that Creston’s lien was improperly filed. Creston had filed its lien with the FAA’s aircraft registry office in Oklahoma City, pursuant to 49 U.S.C. § 44108. Textron claimed that this filing was improper because the lien was not also filed in Broward County, where Creston had performed repairs, pursuant to Florida Statute section 329.51.

The court relied on the holding in In re Holiday Airlines Corp., which stated the following: "The provisions of the Federal Aviation Act preempt State law insofar as they relate to the priority of liens. But matters touching on the validity of liens are determined by underlying State law." The fact that the FAA requires the filing of liens in its office in Oklahoma City did not preclude the Florida legislature from requiring the filing in Broward County. Because the issue here was enforceability and not priority, the Florida statute was not preempted by the federal law. Creston’s failure to file the lien both with the FAA in Broward County, Florida, resulted in an invalid lien.

2. Triad International Maintenance Corp. v. Southern Air Transport, Inc.

Southern Air Transport, Inc. ("SAT") hired Triad International Maintenance Corporation ("TIMCO") to perform maintenance work on a DC8-73 aircraft that SAT leased from Aerolease Financial Group, Inc. ("Aerolease"). SAT requested additional services from TIMCO, resulting in an unpaid balance of over one million dollars. SAT made partial payments and

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295 Id.
296 Id. at 728-29.
297 Id. at 728.
298 Id. at 729.
299 In re Holiday Airlines Corp., 620 F.2d 731 (9th Cir. 1980).
300 Creston, 900 So. 2d at 730 (citations omitted).
301 Id. at 731.
302 Id. at 730-31.
303 Id. at 731.
305 Id. at *3.
Aerolease guaranteed the remaining balances.\textsuperscript{306} After SAT paid TIMCO $100,000.00 to complete the maintenance, with the remaining balance of $657,096.47 paid by Aerolease, SAT filed for bankruptcy under Chapter 11 of the Bankruptcy Code.\textsuperscript{307} The bankruptcy trustee sued TIMCO on behalf of SAT to recover the $100,000.00, which the trustee characterized as an avoidable preference.\textsuperscript{308} Both parties conceded that the first four of the five requirements of an avoidable preference were met, but TIMCO argued that it was a fully secured creditor of SAT that would be entitled to the payment in the event of a Chapter 7 bankruptcy proceeding.\textsuperscript{309}

The court agreed with the trustee and found that TIMCO was not a secured creditor of SAT, because it had not followed the Federal Aviation Administration ("FAA") filing requirements for a conveyance, lease, or instrument executed for security purposes as required by 49 U.S.C. § 44108.\textsuperscript{310} TIMCO argued that, having performed the maintenance in North Carolina, a state that does not accept filings for artisan’s liens, the FAA would not accept the filing since the lien would not be recognized in the state where it arose.\textsuperscript{311} The court disagreed based upon the text of the Federal Aviation Act which requires the filing of a notice with the FAA for all conveyances which affect the title of air-

\begin{itemize}
\item \textsuperscript{306} Id.
\item \textsuperscript{307} Id. at *3-4.
\item \textsuperscript{308} The Bankruptcy Code, 11 U.S.C.A. § 547(b), provides that:
\begin{itemize}
\item (b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property—
\begin{itemize}
\item (1) to or for the benefit of a creditor;
\item (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
\item (3) made while the debtor was insolvent;
\item (4) made—
\begin{itemize}
\item (A) on or within 90 days before the date of the filing of the petition; or
\item (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
\end{itemize}
\item (5) that enables such creditor to receive more than such creditor would receive if—
\begin{itemize}
\item (A) the case were a case under chapter 7 of this title;
\item (B) the transfer had not been made; and
\item (C) such creditor received payment of such debt to the extent provided by the provisions of this title.
\end{itemize}
\end{itemize}
\end{itemize}
\item \textsuperscript{308} Id.
\item \textsuperscript{310} Id. at *11.
\item \textsuperscript{311} Id.
craft.\textsuperscript{312} Even though there was no requirement to record the lien in North Carolina, and "... even if TIMCO's artisan’s lien was valid under North Carolina law, it is not enforceable against the bankruptcy trustee, because TIMCO failed to record its interest with the FAA. Thus, it cannot be said that TIMCO was a fully secured creditor."\textsuperscript{313}

Therefore, the FAA’s recording statutes for conveyances, leases, or instruments executed for security purposes must be complied with regardless of the underlying state law where the interest in the aircraft arose.\textsuperscript{314}

V. FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act\textsuperscript{315} ("FSIA") established the general rule that foreign states are immune from suits in the United States. The FSIA defines a "foreign state" as:

(a) A “foreign state,” except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An “agency or instrumentality of a foreign state” means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title nor created under the laws of any third country.\textsuperscript{316}

The FSIA also sets forth certain statutory exceptions to this immunity. In 2005, courts construed three of the FSIA exceptions—commercial activity, waiver, and tort. Exceptions such as these "provide the sole basis for obtaining subject matter jurisdiction over a foreign state and its instrumentalities in federal court."\textsuperscript{317}

\textsuperscript{312} 49 U.S.C.A. § 44107 (West 2005).
\textsuperscript{313} Triad, 2005 U.S. Dist. LEXIS 33691 at *20.
\textsuperscript{314} Id. at *13.
\textsuperscript{316} 28 U.S.C.A. § 1603(a), (b) (West 2005).
A. Waiver and Commercial Activity Exceptions

1. In re Air Crash Near Nantucket Island, Massachusetts

This declaratory judgment action arose out of EgyptAir Flight 990, which crashed on October 31, 1999 in the Atlantic Ocean near Nantucket Island, Massachusetts, resulting in the death of all 217 individuals onboard. Prior to this action, MISR Insurance ("MISR"), EgyptAir’s hull insurer, filed a subrogation action against The Boeing Company ("Boeing") in an Egyptian court. In this declaratory judgment action filed in the United States District Court for the Eastern District of New York, Boeing sought to have the court hold that EgyptAir and MISR were contractually barred from recovering damages against Boeing in that subrogation action or otherwise.

MISR moved to dismiss Boeing’s complaint on several grounds, including lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA") and lack of "minimum contacts" required by the due process clause to exercise personal jurisdiction over MISR. The court denied MISR’s motion.

The court first addressed MISR’s claim that the case be dismissed for lack of subject matter jurisdiction. The court noted that the FSIA provides the sole basis for obtaining subject matter jurisdiction over foreign sovereigns in the United States, and that MISR qualified as a foreign state under the statute because it was wholly owned by the Arab Republic of Egypt. Boeing argued that MISR was not immune from jurisdiction under the FSIA due to the "waiver" and "commercial activity" exceptions to sovereign immunity found in 28 U.S.C. § 1605(a). That statute provides that a foreign state is not entitled to immunity in any case

...in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver. ...
or

...in which the action is based upon a commercial activity carried on in the United States by the foreign state or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States...  

The court held that MISR was subject to jurisdiction under the waiver exception since it stood in EgyptAir's shoes and because EgyptAir expressly waived sovereign immunity in the Foreign Air Carrier Permit that it filed with the Department of Transportation. The court also found it important that when EgyptAir purchased the subject aircraft from Boeing the contracts executed between the companies provided, *inter alia*, that EgyptAir waived rights against Boeing expressly including "any obligation, right, claim or remedy in tort, whether or not arising from the negligence of Boeing." EgyptAir also agreed in the contracts to indemnify Boeing and hold it harmless under certain circumstances for injury to any person or for loss of property, to have Boeing named as an additional insured on EgyptAir's aviation liability policy, and to have its hull insurance carrier waive all rights of subrogation against Boeing.

The court also held that it had subject matter jurisdiction over MISR pursuant to the commercial activity exception based on the third prong of the statute, that is, based on an act taken outside the United States in connection with a commercial activity outside the country that caused a direct effect in the United States. Specifically, the court held that MISR's issuance of the insurance policy was clearly a commercial activity and that the policy, which expressly incorporated terms of Boeing's agreement with EgyptAir, was "taken in connection" with the commercial activity. The court further held that MISR's policy had a direct effect in the United States by providing insurance coverage to Boeing for the plane that it manufactured and which was to be flown in the United States.

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327 *Id.* at 464-65.
329 *In re* Air Crash Near Nantucket Island, Mass., 392 F. Supp. 2d at 469.
330 *Id.* at 469.
The court next addressed MISR's minimum contacts argument. The court found that the five factors which must be considered in determining whether an exercise of personal jurisdiction comports with "fair play and substantial justice" under World-Wide Volkswagen Corp. v. Woodson\(^{331}\) were satisfied.\(^{332}\) It held that MISR had sufficient minimum contacts with the United States based on its issuance of the insurance policy naming Boeing as an additional insured with the expectation that the plane would be flown in the United States.\(^{333}\)

2. *Kirkham v. Societe Air France*

In *Kirkham*, the plaintiff sued Air France in federal district court in Washington, D.C. for negligence after she was injured at Orly Airport while allegedly being assisted by an Air France employee.\(^{334}\) The plaintiff believed that the "blue-uniformed man" who assisted her navigation through the airport, during which she fell and injured her foot, worked for Air France, and Air France never disputed the claim.\(^{335}\) Air France moved for summary judgment claiming that, because the Republic of France owned a majority stake in the company at the time plaintiff was injured, the Foreign Sovereign Immunities Act ("FSIA") deprived the court of subject matter jurisdiction.\(^{336}\) In response, plaintiff argued that the commercial activity exception applied, because she purchased the ticket in the United States, and the district court agreed.\(^{337}\)

The appeals court affirmed, finding that the applicability of the commercial activity exception of the FSIA depended on determining whether the plaintiff's negligence claim was "based upon" her purchase of the ticket from Air France, since the exception is only applicable when the sovereign's commercial activity is necessary to the plaintiff's claim.\(^{338}\) In other words,

\[\ldots\] so long as the alleged commercial activity establishes a fact without which the plaintiff will lose, the commercial activity exception applies, regardless of whether the plaintiff has either al-

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\(^{331}\) World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

\(^{332}\) *In re Air Crash Near Nantucket Island*, Mass., 392 F. Supp. 2d at 469.

\(^{333}\) *Id.* at 470.


\(^{335}\) *Id.* at 290-91.

\(^{336}\) *Id.* at 290.

\(^{337}\) *Id.* at 290-91.

Because Air France conceded that the ticket purchase was a commercial activity and because the plaintiff has to establish the sale in order to prevail on her negligence claim, the court found that the FSIA’s commercial activity exception was applicable.  

B. COMMERCIAL ACTIVITY AND TORTS EXCEPTIONS

1. In re Terrorist Attacks on September 11, 2001 (January 18, 2005)

In this opinion issued by the United States District Court for the Southern District of New York in the Multi-District Litigation action based on the September 11th related cases, District Court Judge Richard Casey held that the Kingdom of Saudi Arabia and two Saudi Arabian princes were immune from suit for alleged support of terrorist acts based on sovereign immunity. The plaintiffs sued Prince Sultan (“Sultan”), Saudi Arabia’s Minister of Defense and Aviation and Inspector General, alleging that he met with Osama bin Laden after Iraq invaded Kuwait in the summer of 1990 and that he took actions to support and fund several Islamic charities sponsoring Osama bin Laden and Al Qaeda. The plaintiffs also sued Prince Turki (“Turki”), Saudi Arabia’s Ambassador to the United Kingdom and the Director of Saudi Arabia’s Department of General Intelligence, alleging that he met with Osama bin Laden several times and offered bin Laden the use of his family’s engineering equipment and provided other financial support to Al Qaeda. In addition, the plaintiffs sued the Kingdom of Saudi Arabia and the National Commercial Bank (“NCB”), the first commercial bank of Saudi Arabia. The defendants moved to dismiss, alleging a lack of subject matter jurisdiction under the FSIA.

The court held that the FSIA extends immunity to agents of a foreign state acting in their official capacities, since that is the equivalent of a suit against the sovereign directly. The court

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539 Kirkham, 429 F.3d at 292.
540 Id. at 293.
542 Id. at 784.
543 Id. at 785.
544 Id. at 786-87.
545 Id. at 780-81.
546 Id. at 789.
held that immunity was thus available not only to the Kingdom of Saudi Arabia, but also to Sultan and Turki to the extent their alleged actions were performed in their official capacities on behalf of Saudi Arabia, unless an exception to the FSIA applied. The court held that resolution of NCB’s status could not be determined and that additional discovery was needed on that issue.

Considering whether any FSIA exceptions applied to Sultan and Turki or to the Kingdom of Saudi Arabia, the court held that the commercial activities exception outlined in 28 U.S.C. § 1605(a) (2) was not applicable, because the defendants were not engaged in commercial activity. Commercial activity connotes “either a regular course of commercial conduct or a particular commercial transaction or act.” The court held that the defendants’ contributions to terrorist charities could not be considered a commercial activity. The court also held that the state sponsored terrorist exception did not apply, because Saudi Arabia has never been formally designated as a state sponsor of terrorism.

Finally, the court held that the torts exception found in 28 U.S.C. § 1605(a)(5) was also inappplicable. The torts exception deprives a foreign sovereign of immunity in actions

... in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official of that foreign state while acting within the scope of his office or employment; except this [exception] shall not apply to
(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused.

The court held that the FSIA’s discretionary function exception is analogous to that found in the Federal Tort Claims Act and is based on intent by the courts “to preserve immunity for decisions grounded in social, economic and political policy.” The court held that the discretionary function exception barred

347 Id.
348 Id. at 792.
349 Id. (quoting 28 U.S.C.A. § 1603(d)).
350 Id. at 793.
351 Id.
352 Id. (quoting 28 U.S.C.A. § 1605(a) (5)).
353 Id. at 794.
the plaintiffs’ claims against the princes, because their actions in allegedly aiding the terrorist organizations were made at the planning level of government and grounded in social, economic, and political policy of Saudi Arabia.\textsuperscript{354} Accordingly, the court granted the defendants’ motion to dismiss the complaints against them based on the discretionary function exception.\textsuperscript{355} The court also held that there was not sufficient evidence to warrant exercising personal jurisdiction over Sultan or Turki.\textsuperscript{356}

2. \textit{In re Terrorist Attacks on September 11, 2001 (September 21, 2005)}

In this second opinion in the September 11, 2001 MDL, Judge Casey followed the rationale from his previous opinion.\textsuperscript{357} The plaintiffs alleged certain Saudi princes and the Saudi High Commission ("SHC") were liable to them pursuant to various theories, including violations of the Anti-Terrorism Act,\textsuperscript{358} the Alien Tort Claims Act,\textsuperscript{359} the Racketeer Influenced and Corrupt Organizations Act,\textsuperscript{360} the Torture Victim Protection Act,\textsuperscript{361} and other state law tort claims.\textsuperscript{362} The defendants moved to dismiss the complaint for lack of subject matter jurisdiction under the FSIA and for lack of personal jurisdiction.\textsuperscript{363} The court held that the SHC was an organ of the Kingdom of Saudi Arabia and that it had not waived its sovereign immunity.\textsuperscript{364} The court further found, to the extent the plaintiffs’ allegations concerned actions taken by the princes in their official capacities, they were also entitled to immunity as foreign states.\textsuperscript{365}

The plaintiffs argued that the defendants were liable under the torts exception to the FSIA. The court disagreed, holding that the defendants’ actions were protected by the discretionary function exception to the torts exception to the FSIA, because their actions were undertaken in accordance with governmental

\begin{footnotesize}
\begin{enumerate}
\item Id. at 802.
\item Id.
\item Id. at 813-14.
\item 28 U.S.C.A. § 1350 (West 2005).
\item 28 U.S.C.A. § 1350.
\item In re Terrorist Attacks on Sept. 11, 2001, 392 F. Supp. 2d at 546.
\item Id. at 546-47.
\item Id. at 553.
\item Id. at 555-56.
\end{enumerate}
\end{footnotesize}
The court also held that the plaintiffs did not satisfy the constitutional requirement of due process by showing that the princes had sufficient minimum contacts with the United States, and, therefore, granted their motion to dismiss.\footnote{367}

VI. FEDERAL TORT CLAIMS ACT

The government is generally immune from suits for money damages under the principle of sovereign immunity. However, the government has enacted a broad waiver of that immunity through the Federal Tort Claims Act ("FTCA"), which authorizes suits against the government for money damages

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\text{. . . for injury or loss of property, or personal injury or death 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, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.}\footnote{368}
\]

This waiver of immunity is far from absolute, and many important classes of tort claims are excepted from the FTCA's coverage. One such exception to the waiver is the discretionary function exception, which preserves immunity for decisions grounded in public policy. There were four significant legal opinions construing the FTCA in 2005, three of which involved the discretionary function exception.

A. DISCRETIONARY FUNCTION AND INDEPENDENT CONTRACTOR EXCEPTIONS

1. FAA Enforcement Actions

a. Stables v. United States

On February 16, 2000, Emery World Airlines ("EWA") Flight 17, utilizing a McDonnell Douglas DC-8-71F, lost pitch control on take-off.\footnote{369} The aircraft became uncontrollable and crashed, killing the crew members.\footnote{370} The cause of the crash was an improperly secured flight control bolt on the aircraft's elevator assembly.\footnote{371} The bolt was improperly secured either during

\footnotetext{366}{Id. at 556.}  
\footnotetext{367}{Id. at 559.}  
\footnotetext{368}{28 U.S.C.A. § 1346(b)(1) (West 2005).}  
\footnotetext{369}{Stables v. United States, 366 F. Supp. 2d 559, 564 (S.D. Ohio 2004).}  
\footnotetext{370}{Id.}  
\footnotetext{371}{Id.}
maintenance by Tennessee Technical Services, a Federal Aviation Administration ("FAA") certified repair station, or during subsequent maintenance by EWA personnel.\textsuperscript{372}

The decedent’s estate sued the United States pursuant to the FTCA in the United States District Court for the Southern District of Ohio. The plaintiff claimed the FAA was negligent in its oversight and enforcement of its regulations and that the FAA’s negligence proximately caused the crash.\textsuperscript{373} The evidence showed that EWA had a history of serious FAA violations stemming from improper maintenance practices, which had resulted in the suspension of maintenance practices and issuance of several FAA certification actions.\textsuperscript{374} The FAA had threatened to shut down EWA’s maintenance department but had failed to take that action before the maintenance work that resulted in the crash had been performed.\textsuperscript{375} The plaintiff claimed the FAA was negligent in not taking stronger action against EWA.\textsuperscript{376}

The United States moved to dismiss the plaintiff’s suit for lack of subject matter jurisdiction, contending that the FAA’s enforcement actions with regard to the aircraft’s maintenance operations fell within the discretionary function exception to the FTCA. The court agreed and dismissed the action for lack of subject matter jurisdiction.\textsuperscript{377}

The court applied the two-part test for determining whether a governmental act falls within the discretionary function exception as set out by the United States Supreme Court in United States v. Gaubert.\textsuperscript{378} The first step is to determine whether the action involves an element of judgment or choice.\textsuperscript{379} If the answer to that question is yes, then the court must determine whether the action is of a type that the discretionary function exception was designed to shield.\textsuperscript{380} Only choices grounded in the “social, economic or political goals” of the statute or regulation are protected.\textsuperscript{381}

Applying this two-part test, the court first held that the Secretary of Transportation’s orders authorized the FAA to use its
judgment and experience to carry out the policies of the FAA.\textsuperscript{382} Therefore, the guidelines were not specific mandates but allowed for discretion.\textsuperscript{383} Having satisfied the first part of the test, the court then considered whether the FAA actions were the kind that the discretionary function exception was designed to shield.\textsuperscript{384}

The court reviewed the reasoning of \textit{United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Air Lines)}\textsuperscript{385} for guidance. In that case, the Supreme Court held that actions of the FAA in inspecting an aircraft and issuing a type certificate fell within the discretionary function exception to the FTCA.\textsuperscript{386} Following \textit{Varig Air Lines}, the court held that the FAA's action in implementing a mechanism for compliance review was similarly a discretionary activity protected by the discretionary function exception.\textsuperscript{387} The court held that the adoption and enforcement of FAA rules are grounded in the "social, economic and political policies of assuring air safety" and thus fit within the exception.\textsuperscript{388} The court therefore dismissed the plaintiff's claims for lack of subject matter jurisdiction.\textsuperscript{389}

2. \textit{Negligence of Private Air Traffic Controllers}

\textit{a. Alinsky v. United States}

In \textit{Alinsky}, the Seventh Circuit held that the United States was not liable under the FTCA for the negligence of an air traffic controller employed by a private air traffic control company hired by the United States.\textsuperscript{390} \textit{Alinsky} involved a mid-air collision between two private airplanes over the Chicago lakefront.\textsuperscript{391} At the time of the crash, both airplanes were receiving air traffic control services from Midwest Air Traffic Control, Inc. ("Midwest"), a private contractor hired by the Federal Aviation Administration ("FAA") to provide air traffic control services for

\begin{itemize}
  \item \textsuperscript{382} \textit{Id.} at 569.
  \item \textsuperscript{383} \textit{Id.}
  \item \textsuperscript{384} \textit{Id.}
  \item \textsuperscript{386} \textit{Id.} at 819.
  \item \textsuperscript{387} \textit{Stables}, 366 F. Supp. 2d at 570-71.
  \item \textsuperscript{388} \textit{Id.} at 572.
  \item \textsuperscript{389} \textit{Id.} at 573.
  \item \textsuperscript{390} \textit{Alinsky v. United States}, 415 F.3d 639, 648 (7th Cir. 2005).
  \item \textsuperscript{391} \textit{Id.} at 641.
\end{itemize}
 Plaintiffs sued various defendants, including the United States pursuant to the FTCA, alleging that the air traffic controller negligently failed to inform the pilots that they were on a collision course.

The plaintiffs alleged the United States was liable on the following four grounds: (1) it was vicariously liable for the controller's negligence, because it had a non-delegable duty to provide air traffic control services; (2) it was directly negligent for allowing an untrained and unqualified controller to staff Meigs; (3) it had no authority to hire an independent contractor to perform the controller services; and (4) it negligently delayed approving additional staffing at Meigs.

The district court granted summary judgment to the United States, holding that it lacked subject matter jurisdiction to consider the plaintiffs' claims under the FTCA. The Seventh Circuit affirmed the district court. First, the court rejected the plaintiffs' argument that the United States was liable because air traffic control services were non-delegable. The plaintiff argued that Illinois law dictated that abnormally dangerous activities, such as air traffic control, were non-delegable. The court held that, by enacting the FTCA's independent contractor exception, Congress did not simultaneously adopt state law exceptions to the independent contractor rule. Rather, Congress expressly granted jurisdiction for suits brought against the United States based on its employees' conduct, and expressly excluded claims based on the conduct of independent contractors. State common law principles could not overcome that federal mandate.

Second, the court held it had no jurisdiction to consider the plaintiffs' claims based on the controller's negligence, because he was an employee of Midwest, which was an independent contractor and therefore not a "federal agency" as defined by 28 U.S.C. § 2671. That definition of federal agency expressly excludes "any contractor with the United States."
Third, the court considered the plaintiffs' argument that the United States was directly negligent, because it allowed Midwest to staff the control tower with an unqualified controller. In rejecting the argument, the court relied upon the discretionary function exception to the FTCA. The court followed the two-step test promulgated by the United States Supreme Court to determine whether the discretionary function should apply. First, the court must determine whether the government employee violated a specific mandatory statute, regulation, or policy. Second, the court must determine whether the conduct involved was the type of conduct that Congress intended to shield from liability, as only governmental action based upon considerations of public policy are exempt. Utilizing this analysis, the court first held that the government did not violate a specific mandatory statute. Applying the second step, the court held that the government's decision to contract with private companies for air traffic control services was based on budgetary concerns as well as a desire to reopen smaller air traffic control locations, both of which are government policy decisions. The court thus held that the discretionary function exception protects the government from claims premised on the lack of training, oversight, or qualifications of the air traffic controllers.

Fourth, the court addressed the plaintiffs' argument that the United States lacked the authority to hire private contractors to provide air traffic control services. The plaintiffs relied upon 49 U.S.C. § 1344(h), which gives the FAA authority to make contracts with state or political subdivisions but not with private parties. Rejecting that argument, the court held the FAA was not relying on that statute for authority but rather on two other federal statutes, 49 U.S.C. § 106(1)(6) and 49 U.S.C. § 40110, both of which provide the FAA Administrator with general authority to contract for services with entities for the operation of facilities and installations. The court held that those statutes authorize

402 Alinsky, 415 F.3d at 647.
404 Alinsky, 415 F.3d at 647.
405 Id.
406 Id.
407 Id. at 648.
408 Id.
409 Id. at 644.
410 Id.
RECENT DEVELOPMENTS

the FAA to enter into contracts as necessary, including contracts for services to operate air traffic control facilities, even though they do not specifically mention air traffic control facilities.\footnote{Id.}

Finally, the court rejected the plaintiffs’ argument that the United States negligently failed to respond to Midwest’s request for additional funding for air traffic controllers. The evidence showed that Midwest made a non-emergency request for additional funding and that the FAA granted the request.\footnote{Id. at 646.} Although the funding had not been provided at the time of the crash, the court held that the delay in FAA funding was not unreasonable.\footnote{Id. at 646-47.}

b. Collins v. United States

Collins involved another mid-air collision of two aircraft near the Waukegan Regional Airport (“Waukegan”) in Illinois.\footnote{Id. at 646-47.} The plaintiffs filed claims against the United States under the FTCA, alleging it committed numerous acts of negligence regarding the operation of the air traffic control tower at Waukegan.\footnote{Collins v. United States, Nos.: 03-C-2958, 03-C-2998, 03-C-3162, 03-C-3166, 2005 U.S. Dist. LEXIS 7470, *1-2 (N.D. Ill. April 19, 2005).} The control tower was operated pursuant to a private contract between the FAA and Midwest Air Traffic Control Services, Inc. (“Midwest Services”), a private corporation.\footnote{Id. at *2-3.} The plaintiffs made the following three claims against the United States: (1) that the government negligently failed to install a Terminal Automated Radar Display and Information System (TARDIS); (2) that the government was liable for the negligence of the air traffic controller; and (3) that the government negligently administered and oversaw the control tower.\footnote{Id. at *3.}

The government moved to dismiss, arguing that the discretionary function and independent contractor exceptions were applicable, depriving the court of jurisdiction. The court first considered whether the FAA’s decision not to provide TARDIS to Waukegan, a visual flight rules airport, qualified for exemption under the FTCA discretionary function test.\footnote{Id. at *4.} The court stated that a discretionary decision is only shielded if it is suscep-
tible to policy judgments which involve the exercise of "social, economic and political" judgments.\textsuperscript{419} The plaintiffs argued that the government's decision was not based on public policy considerations because the FAA chose to install TARDIS at some eligible airports and not others, based primarily upon which airport did the best congressional lobbying.\textsuperscript{420} The plaintiffs argued that, once the FAA decided to install TARDIS at some but not all eligible airports, it could not argue that the decision was protected by the discretionary function exception.\textsuperscript{421}

The court agreed with the plaintiffs, relying on the precedent of \textit{Cope v. Scott}.\textsuperscript{422} In that case, the court held that where the government placed numerous traffic warning devices on a busy airport parkway but failed to place a "slippery when wet" sign at a particularly dangerous place, it could not argue that its decision was based on public policy concerning aesthetics and thus protected by the discretionary function exception.\textsuperscript{423} Relying upon \textit{Cope}, the court held that the government's decision to install TARDIS at some eligible airports and not others dictated that the discretionary function exception had not been established.\textsuperscript{424}

The court also considered the plaintiffs' claims that the United States was liable for negligently overseeing the control tower and vicariously liable for the controller's negligence. The government argued that the independent contractor exception applied, because Midwest Services was an independent contractor.\textsuperscript{425} Under the FTCA, the government is only liable for torts "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 . . . ."\textsuperscript{426} The definition of an "employee of the government" excludes "any contractor with the United States."\textsuperscript{427} Whether Midwest Services was an independent con-

\textsuperscript{419} \textit{Id.} at *12.
\textsuperscript{420} \textit{Id.} at *13.
\textsuperscript{421} The plaintiff showed that the FAA's general policy was not to install terminal radar displays unless the airport had over 30,000 itinerant operations per year. The FAA had not installed any such device at Waukegan even though it had over 300,000 itinerant operations per year, and was thus clearly eligible. \textit{Id.} at *9-10.
\textsuperscript{424} \textit{Id.} at *15-17.
\textsuperscript{425} \textit{Id.} at *5.
\textsuperscript{426} 28 U.S.C.A. § 1346(b) (West 2005).
\textsuperscript{427} 28 U.S.C.A. § 2671 (West 2005).
tractor depended on whether the government had authority to control the physical performance of the company.\textsuperscript{428} Because there were insufficient facts in the record to prove the exception, the court held that the government had not established the exception for jurisdictional purposes, and that the court retained subject matter jurisdiction.\textsuperscript{429}

B. INTENTIONAL TORTS/WORKPLACE HARASSMENT

1. Whedbee v. United States

In Whedbee, plaintiff was an FAA employee who brought state law claims against her supervisor and co-workers in state court, alleging intentional infliction of emotional distress, tortious interference with contract, and civil conspiracy.\textsuperscript{430} Plaintiff claimed she was harassed at the office by her supervisor and co-workers because of her "friendly, garrulous and outgoing personality."\textsuperscript{431} She claimed they chastised her in front of other employees, reported false accusations about her to others, and got other clerical employees to register complaints about her.\textsuperscript{432}

The United States removed the case to federal court and then successfully moved the court to substitute the United States as the correct defendant in place of the individual FAA employees. As a predicate to the removal, and pursuant to the requirements of the FTCA, the U.S. Attorney certified that the defendant employees were acting within the scope of their employment at the time the incident arose.\textsuperscript{433}

The court considered motions by both parties. The plaintiff moved the court to reconsider the substitution of the United States as a defendant. She argued that the FTCA did not apply, because it does not waive sovereign immunity as to claims for intentional conduct, and further that intentional conduct by definition is outside the scope of employment.\textsuperscript{434} The court denied the motion on technical and substantive grounds.\textsuperscript{435} The court held that the certification by the U.S. Attorney that the federal employees acted within their scope of employment was conclusive evidence the lawsuit was properly removed to federal

\textsuperscript{428} Collins, 2005 U.S. Dist. LEXIS 7470 at *18.
\textsuperscript{429} Id.
\textsuperscript{430} Whedbee v. United States, 352 F. Supp. 2d 618, 620 (M.D.N.C. 2005).
\textsuperscript{431} Id. at 621.
\textsuperscript{432} Id.
\textsuperscript{433} Id. at 620.
\textsuperscript{434} Id. at 634-24.
\textsuperscript{435} Id. at 624.
court.\textsuperscript{436} Once a case has been removed, the FTCA applies to the suit, whether or not the conduct alleged is in fact an intentional tort.\textsuperscript{437} If that certification is challenged, the plaintiff has the burden of proving, by a preponderance of evidence, that the federal employee was acting outside the scope of employment to defeat removal.\textsuperscript{438} In making that determination, the court must apply the \textit{respondent superior} law of the state where the tortious conduct occurred.\textsuperscript{439} In this case, the court held that, while North Carolina courts have rarely found intentional torts to be within the scope of employment, intentional torts can be considered within the scope if they were committed in the course of activities that the employee was authorized to perform.\textsuperscript{440} The court held that the plaintiff failed to meet her burden to show that the FAA employees acted outside the scope of their employment and thus denied plaintiff's motion.\textsuperscript{441}

The court granted the United States' motion to dismiss and motion for summary judgment.\textsuperscript{442} The court that held the plaintiff could only assert her common law tort claims under the FTCA and that the FTCA required that an administrative claim be filed as a prerequisite, which the plaintiff had failed to do.\textsuperscript{443} The court therefore held it lacked subject matter jurisdiction to consider the plaintiff's claims based on that failure.\textsuperscript{444} Additionally, the court noted that, even if the plaintiff had exhausted her administrative remedies, the court still would have lacked subject matter jurisdiction over the case, because the FTCA does not waive sovereign immunity for the types of intentional tort claims made by the plaintiff.\textsuperscript{445} Claims for tortious interference with a contract are specifically excluded by the FTCA, as are claims for assault, battery, etc.\textsuperscript{446} "This immunity applies even where federal law does not otherwise provide a remedy against the United States."\textsuperscript{447}

\textsuperscript{436} \textit{Id.}
\textsuperscript{437} \textit{Id.}
\textsuperscript{438} \textit{Id. at 625.}
\textsuperscript{439} \textit{Id.}
\textsuperscript{440} \textit{Id.}
\textsuperscript{441} \textit{Id. at 626.}
\textsuperscript{442} \textit{Id. at 627-28.}
\textsuperscript{443} \textit{Id.}
\textsuperscript{444} \textit{Id. at 628.}
\textsuperscript{445} \textit{Id.}
\textsuperscript{446} \textit{Id.}
\textsuperscript{447} \textit{Id.}
VII. FORUM NON CONVENIENS

Forum non conveniens is the doctrine used by courts to decline jurisdiction even where there is subject matter jurisdiction, personal jurisdiction over all parties, and proper venue in the case. In *Gulf Oil Corp. v. Gilbert*, the Supreme Court set forth the various private factors and public factors to be taken into consideration by courts when determining whether a foreign venue is more appropriate. Although *forum non conveniens* was used after *Gilbert* to allow federal courts to dismiss cases for re-filing in other federal district courts, the current doctrine generally applies in federal court when the more convenient forum is a foreign country.

A. MOTION TO DISMISS GRANTED


On July 21, 2002, a mid-air collision occurred between a Bashkirian Airways aircraft flying a charter flight between Moscow and Barcelona and a DHL cargo aircraft flying between Bergamo, Italy and Brussels. The accident took place after the air traffic controllers instructed the DHL crew to “descend” and the Bashkirian Airways crew first to “climb” but then to “expedite descent.” After all passengers onboard both aircraft were killed, some of the families sued the airlines as well as the Traffic Collision Avoidance System (“TCAS”) manufacturers. A lawsuit was first filed in Spain against Bashkirian Airways. Then, on July 1, 2004, the subject litigation was filed in the Superior

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449 The private factors from *Gilbert* are (1) “the relative ease of access to sources of proof;” (2) “availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses;” (3) “possibility of view of premises, if view would be appropriate to the action;” (4) “all other practical problems that make trial of a case easy, expeditious and inexpensive;” and (5) “the enforcibility [sic] of a judgment if one is obtained.” *Id.* at 508.

450 The public factors from *Gilbert* are (1) administrative difficulties due to court congestion; (2) the burden of jury duty on a community with no relation to the litigation; (3) the “local interest in having localized controversies decided at home;” and (4) judicial interest in a forum familiar with the applicable law. *Id.* at 508-509.


453 *Id.*

454 See *id.* at *4.

455 *Id.*
Court of New Jersey against the manufacturers.\textsuperscript{456} After the case was removed to the United States District Court for the District of New Jersey, the defendants filed a motion to dismiss based on \textit{forum non conveniens} grounds.\textsuperscript{457}

In granting the defendants' motion to dismiss, the court found that they had met the two-part test in \textit{Lacey v. Cessna Aircraft Co.},\textsuperscript{458} since they had shown both that an adequate alternative forum existed in Spain and that the public and private factors from \textit{Gulf Oil Corp. v. Gilbert}\textsuperscript{459} weighed in favor of dismissal. As for the private factors, the court found that Spain was an adequate alternative forum for several reasons. First, the moving defendant agreed to voluntarily submit to Spanish jurisdiction and waive its statute of limitations defense.\textsuperscript{460} In addition, the court afforded little deference to the plaintiffs' choice of forum, since they were not domestic plaintiffs.\textsuperscript{461} The public factors also weighed in favor of dismissal, mainly due to the litigation already ongoing in Spain by the plaintiffs against Bashkirian.\textsuperscript{462} Although the plaintiffs' allegations against the manufacturers arose out of the training manuals and procedures developed in the United States, the majority of witnesses as well as the accident site were located in Europe, and the defendants agreed to produce witnesses located outside Europe.\textsuperscript{463} In addition, because of the case already filed in Spain, evidence had already been assembled by the plaintiffs in that forum.\textsuperscript{464} New Jersey would be an inappropriate forum since none of the defendants' alleged acts took place there and because New Jersey law would not apply.\textsuperscript{465} Because the accident occurred in Europe and because plaintiffs already filed suit against other responsible parties in Spain, the court found that dismissal was appropriate.\textsuperscript{466}

2. \textit{Gambra v. International Lease Finance Corp.}

In \textit{Gambra}, a California federal district court determined that the appropriate forum for the litigation was in France, not Cali-
The plaintiffs commenced the lawsuit following the crash of a Flash Airlines ("Flash") Flight 604 between Egypt and France in 2004. The aircraft was manufactured by The Boeing Company, sold to International Lease Finance Corporation ("ILFC"), which was headquartered in California, and leased to Flash, an Egyptian company. Additional defendants, Parker Hannifin Corporation and Honeywell International, Inc., who manufactured certain component parts on the aircraft, were also United States corporations. The defendants jointly moved to dismiss on the grounds that France was an adequate alternative forum and that the public and private interest factors favored dismissal from the California court.

The court granted the motion to dismiss, conditioned upon a French court agreeing to assert jurisdiction over the case which involved non-French defendants. The defendants agreed to submit to personal jurisdiction in France and waive their statute of limitations defense for 120 days after dismissal. The court found that the French forum was an adequate alternative, because the plaintiffs' claims of strict liability, negligence, and breach of warranty were recognized claims in France. In addition, the court system in France would provide all parties with adequate procedural safeguards and a fair forum for the proceedings.

The court also found that both the private and public interest factors weighed in favor of dismissal. Because the majority of the relevant evidence was located in France or Egypt, compared to only a small amount in California, and because defendants agreed to produce the California evidence in a French court, the court found that the ease of access to sources of proof weighed in favor of dismissal. As to the availability of witnesses, the court found that, because defendants agreed to produce all witnesses in France, this factor also favored dismissal.

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468 Id.
469 Id.
470 Id.
471 Id. at 813.
472 Id. at 810.
473 Id. at 828.
474 Id.
475 Id. at 817, 825.
476 See id. at 825.
477 Id. at 828.
Finally, the court found that the forum-selection clause in the contract between ILFC and Flash did not compel a finding that California was the most appropriate forum. Because plaintiffs had already filed suit against Flash in France, the court found that it would be more convenient to have both cases proceed there.

The court determined that the public interest factors also weighed in favor of dismissal. The court found that, although the leasing company did business in California, the majority of the decedents were French citizens, creating a greater interest in the outcome of the litigation in France. Finally, because either Egyptian or French law could apply, the court held that the choice of law also weighed in favor of dismissal.

B. Motion to Dismiss Denied

1. Ellis v. AAR Parts Trading, Inc.

In Ellis, the defendants appealed the trial court’s denial of their motions to dismiss actions brought by Katherine A. Ellis ("Ellis") and Jovy Layug ("Layug"). Their lawsuits arose out of the crash of Air Philippines Corp. ("Air Philippines") Flight 541, involving an aircraft manufactured by The Boeing Company, purchased by AAR Parts Trading, Inc. ("AAR"), and sold to Fleet Business Credit, LLC ("Fleet") after being leased to Air Philippines Corp. Plaintiffs Ellis and Layug filed separate lawsuits in Cook County, Illinois, with multiple other plaintiffs added later to the Layug case.

Although the court found jurisdiction over the appeals, it affirmed the trial court’s decision by finding that the trial court had not abused its discretion in denying the defendants’ motions to dismiss on forum non conveniens grounds. In reviewing the trial court’s analysis of the private interest factors, it found it significant that defendants AAR and Fleet had their principal places of business located in Illinois:

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478 Id. at 814 n.3.
479 Id. at 810.
480 Id. at 825.
481 Id.
482 Id. at 811.
484 Id. at 730, 731.
485 Id. at 723.
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... it is incredulous for two Illinois resident corporations to argue that their home state is inconvenient to them to litigate this matter. It is also incredulous to observe that the defendants thoroughly ignore the fact that the theories of liability pled against them concern the alleged defective condition of the aircraft prior to its transfer to Air Philippines, and there has been no assertion by the defendants that the sources of proof, records, and witness on these issues are not located in Illinois. In addition, because the accident site located in the Philippines had been paved over, it would not even be possible to view it. The court also rejected the defendants' argument regarding their inability to bring a third-party claim against either Air Philippines or the Philippines Air Transportation Office should the case remain in Cook County, as no such claim had been filed by either defendant. Therefore, the private interest factors weighed in favor of keeping venue in Illinois.

The public interest factors also weighed in favor of Illinois rather than the Philippines. The court found that, because the defendants and owners of the aircraft were residents of Illinois, the citizens of Illinois and potential jurors had an interest in the case. In cases “where the potential trial witnesses are scattered among different forums, neither forum enjoys a predominant connection to the litigation.” While the court agreed with the defendants that the Cook County courts were congested, it found this factor insufficient for not retaining jurisdiction over the case when the other public interest factors weighed against dismissal.

In upholding the trial court’s denial of the defendants’ motions to dismiss, the court focused on the facts that the defendants were residents of Illinois and that neither Illinois nor the Philippines had a predominant connection with the case. While the court acknowledged that either forum would be appropriate, it affirmed the decision, because the trial court had not abused its discretion.

486 Id. at 743.
487 See id.
488 Id. at 746.
489 Id. at 747.
490 Id.
491 Id.
492 Id. at 748.
493 Id.

In Hewett, the lawsuit arose out of the crash of a charter flight in Australia in September, 2000.\(^{494}\) The plaintiffs, citizens of New Zealand, brought a products liability suit against Raytheon Aircraft Company, a Kansas corporation, and Professional Aviation Associates, Inc., a Georgia corporation, in the Superior Court of Fulton County, Georgia.\(^{495}\) In 2004, the trial court granted the defendants' motion to dismiss on *forum non conveniens* grounds, in which the defendants argued that Australia was the more appropriate forum for the action.\(^{496}\) In 2005, the Georgia General Assembly passed legislation codified as O.C.G.A. section 9-10-31.1, which set forth the factors to be used by courts in determining whether to dismiss actions based on *forum non conveniens* grounds.\(^{497}\)

The Georgia Court of Appeals first determined that the new code section applied to the case since it was pending on the effective date of the statute.\(^{498}\) Second, the court determined that in light of this new statute, the trial court's order should be remanded for application of the new statute.\(^{499}\) While defendants argued that the trial court must have evaluated the *forum non conveniens* factors from *AT&T Corp. v. Sigala*,\(^{500}\) since the case was cited in the court's order, the appeals court found that it could not determine whether these factors were considered and remanded the case. In addition, the court found that remand was warranted, because the *forum non conveniens* factors from *Sigala* and O.C.G.A. section 9-10-31.1 were different.\(^{501}\)

The court also found that, pursuant to O.C.G.A. section 9-10-31.1, the defendants were required to file a written stipulation prior to filing their motion to dismiss on *forum non conveniens* grounds.\(^{502}\) While the defendants argued that this would make the new statute supplant the requirements in O.C.G.A. section 50-2-21, another Georgia *forum non conveniens* statute, the court found that, because O.C.G.A. section 50-2-21 only applied to cases filed after July 1, 2003, there was no conflict between the

\(^{495}\) Id. at 876.
\(^{496}\) Id. at 877.
\(^{497}\) Id.
\(^{498}\) Id. at 878.
\(^{499}\) Id. at 879.
\(^{500}\) AT&T Corp. v. Sigala, 549 S.E.2d 373 (Ga. 2003).
\(^{501}\) Hewett, 614 S.E.2d at 881.
\(^{502}\) Id. at 881-882.
statutes in the present case. However, the court declined to address whether O.C.G.A. section 9-10-31.1 impliedly repealed O.C.G.A. section 50-2-21.\textsuperscript{503}

3. \textit{Holsinger v. Nickell}

In this case, the issue was not \textit{forum non conveniens} as between a domestic and foreign venue but rather the issue of changing venue between district courts under 28 U.S.C. \textsection{}1404(a).\textsuperscript{504} In \textit{Holsinger}, the defendant filed a motion to change venue from the District Court in Kansas to federal court in Iowa.\textsuperscript{505} The case arose out of the crash of a plane sold by Larry Smith ("Smith") of AmeriPlanes, Inc. ("AmeriPlanes") to Terrance Thornton, in which a passenger, Jerry Holsinger, was killed.\textsuperscript{506} The court found that, because Kansas was chosen as the venue by the plaintiff, was the resident state of the plaintiff, and was the location of the accident, it would be inappropriate to transfer venue to Iowa simply because it was the resident state of Smith and AmeriPlanes. Because the transfer would merely shift the burden from defendants to plaintiff, the court denied the motion.\textsuperscript{507}

\textbf{VIII. GENERAL AVIATION REVITALIZATION ACT}

The General Aviation Revitalization Act of 1994\textsuperscript{508} ("GARA") was enacted in part to address serious concerns about the enormous product liability costs imposed by the tort system upon manufacturers of general aviation aircraft. GARA imposes an 18-year statute of repose with respect to general aviation aircraft. There was one opinion construing GARA in 2005.

\textbf{A. 2005 Cases}


Plaintiffs' decedents, employees of Hawkins & Powers Aviation, Inc. ("Hawkins & Powers"), were killed in a plane crash while conducting fire suppression under a contract to provide

\textsuperscript{503} See \textit{id.} at 882 n.6.
\textsuperscript{505} \textit{id.} at *1.
\textsuperscript{506} \textit{id.} at *2.
\textsuperscript{507} \textit{id.} at *4-5.
\textsuperscript{508} 49 U.S.C.A. \textsection{}40101 (West 2005).
services for the United States Forest Service. The aircraft was manufactured in 1945 by the predecessor to General Dynamics Corporation ("General Dynamics"), delivered to the United States Navy, and later acquired by Hawkins & Powers in 1969. Plaintiffs sued, inter alia, General Dynamics and Hawkins & Powers under various tort theories. The defendants moved to dismiss plaintiffs' claims, and the U.S. District Court for the District of Wyoming granted both motions. General Dynamics argued that the plaintiffs' claims were barred by the 18-year statute of repose contained within GARA, while the plaintiffs argued that the statute of repose did not apply. First, plaintiffs argued that the aircraft was not a "general aviation aircraft" under GARA, because it was a "public aircraft" as defined by the Federal Aviation Act of 1958 (the "Act"). The court rejected that argument, holding that the definitions under the Act have no application to GARA, and that nothing in the definition of "general aviation aircraft" in GARA prohibits public aircraft from being included. Second, the plaintiffs argued the aircraft was not a "general aviation aircraft" because it had not been issued an "airworthiness certificate," but rather a "special restricted airworthiness certificate." Rejecting that argument, the court held that GARA incorporates the description of airworthiness certificate from the Act, and that the Act's definition does not make a distinction between standard or restricted certificates. Third, the plaintiffs argued that subsequent modifications to the aircraft tolled the statute of repose. In response, the court held that the statute is only tolled if the modification is alleged to have proximately caused the injury, which was not alleged in this case. Fourth, the court held that plaintiffs' arguments about the application of the knowing misrepresentation and warranty exceptions to GARA had no basis, because there was no factual support for those exceptions to apply.

510 Id.
511 Id. at *6.
512 Id. at *9.
513 Id. at *10.
514 Id. at *11.
515 Id.
516 Id. at *12.
517 Id. at *13.
518 Id. at *17.
With respect to defendant Hawkins & Powers, the plaintiffs alleged a *Bivens* claim.\(^{519}\) Plaintiffs alleged that Hawkins & Powers acted under color of federal law by fighting forest fires on federal lands and that it deprived the decedents of their lives without due process of law by failing to maintain the firefighting aircraft fleet due to coercion and encouragement by the federal government.\(^{520}\) The court dismissed the plaintiffs' claims, holding that they could not assert a *Bivens* claim against a private entity under contract with the United States Government, relying upon the authority of *Correctional Services Corp. v. Malesko*.\(^{521}\) The court noted that it did not find it necessary to decide whether a *Bivens* action was cognizable against an individual employed by Hawkins & Powers and addressed only whether a *Bivens* claim was cognizable against the company.\(^{522}\)

IX. GOVERNMENT CONTRACTOR DEFENSE

The "government contractor defense" limits state law tort liability against contractors for claims that arise out of procurement contracts with the federal government. A contractor can use this defense successfully if it meets the test set forth by the Supreme Court in *Boyle v. United Technologies Corp.*,\(^{523}\) which allows the defense when the following requirements are met: "(a) the United States approved reasonably precise specifications; (b) the equipment conformed to those specifications, and (c) the supplier warned the United States about dangers in the use of the equipment that were known to the supplier but not to the United States."\(^{524}\) The defense, however, is limited to design defect cases in which it is shown that the government approved the design feature in question and that the contractor complied with the government's specifications.

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\(^{519}\) *Id.* at *18-19 (*[a] Bivens claim provides a tort remedy for an injured party to sue a federal officer, or a person operating under color of federal authority, who has violated the claimants' constitutional rights*) (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)).

\(^{520}\) *Id.* at *19.

\(^{521}\) *Id.* at *21; see 534 U.S. 61 (2001).

\(^{522}\) *Schwartz*, 2005 U.S. Dist. LEXIS 12188 at *23 n.2.


\(^{524}\) *Id.* at 501.
A. Colorable Federal Defense

1. Malsch v. Vertex Aerospace, LLC

In Malsch, a contractor successfully used the government contractor defense in removing to federal court a case brought by injured servicemen in Mississippi state court. The plaintiff servicemen had been injured when their Marine Corps UH-1N helicopter, manufactured by Bell Helicopters ("Bell"), crashed after the aircraft lost its vertical stabilizer. Plaintiffs filed suit in state court in Mississippi, and Bell removed the action to federal court under 28 U.S.C Section 1442, which allows removal when there is a colorable federal defense for acts performed under the color of office.

After plaintiffs moved to remand the case back to state court, the defendants argued that the government contractor defense was applicable, since all the requirements of the Boyle test were met. In support of this contention, the defendants produced an affidavit from one of Bell’s directors stating that the government had controlled every step of the approval of the helicopter and the design was specified or mandated by the contract with the government. The plaintiffs argued that defendants had not met the Boyle test, since the affidavit had not referenced the allegedly defectively designed components.

The court found that the defendants had successfully shown that they had a colorable federal defense with the government contractor defense.

In the court’s opinion, although Wilson’s affidavit does not explicitly refer to any specific parts or components of the helicopter which plaintiffs now claim were defectively designed and led to the crash, the affidavit nevertheless fully supports a conclusion that Bell has asserted a “colorable federal defense,” and that the requisite "causal nexus" exists between plaintiffs’ claims as alleged in the complaint and acts Bell asserts it performed “under color of federal office” in view of his declaration that the Government “controlled the design of every aspect of the helicopter.”

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526 Id. at 584-85.
527 Id.
528 Id. at 586.
529 Id.
530 Id. at 587.
In opposing the plaintiffs' motion to remand, the defendants did not have to show the merits of the government contractor defense. Rather, they only had to show a "colorable federal defense" to keep the action in federal court.

X. WARSAW CONVENTION

The Warsaw Convention is an international private treaty drafted in 1929 which, if applicable, governs the liability of airlines conducting international transportation of passengers and cargo. In 1955, the Warsaw Convention was modified by the international agreement referred to as the Hague Protocol, which the United States chose not to ratify. However, on September 28, 1998, the United States ratified a later amending treaty, the Montreal Protocol #4, which became effective as to the United States on March 4, 1999. It is generally accepted by most courts that by adopting the Montreal Protocol #4 the United States acceded to the Warsaw Convention as amended by the 1955 Hague Protocol. Finally, on May 28, 1999, the Montreal Convention was created as a new international agreement to replace the Warsaw Convention. The Montreal Convention is not an amendment to the Warsaw Convention but rather an entirely new treaty that replaces the system of liability derived from Warsaw. The Montreal Convention took effect in the United States on November 4, 2003.

The Montreal Convention contains many of the same provisions as the Warsaw Convention, but there are a few notable differences. One critical distinction is that the Montreal Convention added a "fifth jurisdiction," which provides that a claimant asserting a claim for death or injury may bring suit in the place of his or her domicile if the carrier provides service to that State Party (country). A second critical distinction is that,

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531 See Polanski v. KLM Royal Dutch Airlines, 378 F. Supp. 2d 1222, 1227 (S.D. Cal. 2005). However, in Avero Belgium Ins. v. Am. Airlines, Inc., 423 F.3d 73 (2d Cir. 2005), the Second Circuit found that "the United States did not consent to be bound to the Hague Protocol (as a separate treaty) by virtue of its ratification of Montreal Protocol No. 4. Indeed, it expressed an intention to the contrary." Avero, 423 F.3d at 86.
533 Polanski, 378 F. Supp. 2d at 1227.
in the case of death or bodily injury, there is no limitation of liability. The carrier is strictly liable for the first 100,000 Special Drawing Rights ("SDRs"), but can dispute liability for amounts in excess of 100,000 SDRs if it can show it was not negligent or that the damages were solely due to the negligence of a third party. A third distinction is that Montreal apparently makes both the "actual carrier" and the "contracting carrier" liable. In other words, a claimant can sue either the carrier that operated the flight or the carrier which issued the ticket. There were no significant cases in 2005 specifically construing provisions of the Montreal Convention, but there were several cases construing the Warsaw Convention on issues which remain relevant under the Montreal Convention and a few which would have had different results under Montreal.

A. CARRIER CODE-SHARING AGREEMENTS

1. Shirobokova v. CSA Czech Airlines, Inc.

A New York district court held that a "code-sharing" agreement between carriers did not make the non-operating carrier liable for Warsaw Convention claims.\(^\text{535}\) The plaintiff flew from Minneapolis to Cincinnati on a Delta Air Lines, Inc. ("Delta") flight, from Cincinnati to New York on a Delta flight, from New York to Prague on a CSA Czech Airlines, Inc. ("CSA") flight, and from Prague to Saint Petersburg, Russia, on another CSA flight. During the New York to Prague leg, the plaintiff suffered traumatic brain injury, damaged and bulging disks in her spine, and a fractured rib when the airplane encountered severe turbulence. She sued Delta and CSA in district court alleging state law claims of negligence, breach of warranty, and negligent misrepresentation, as well as Warsaw claims.\(^\text{536}\) The court dismissed all of the state law claims as preempted by the Warsaw Convention.\(^\text{537}\) Delta also moved to dismiss the plaintiff's Warsaw Convention claims as they applied to Delta. Delta argued that it was not the "carrier" at the time of the plaintiff's injuries and was therefore not liable under the Warsaw Convention. Article 30(2) of the Warsaw Convention specifies that an injured party may "take action only against the carrier who performed the carriage during which the accident or the delay . . . occurred, save

536 Id. at 440-41.
537 Id. at 442.
in the case where by express agreement, the first carrier has assumed liability for the whole journey. The court reasoned that although the term "carrier" is not specifically defined in the Warsaw Convention, the term as used throughout the convention makes it clear that the drafters intended that it apply only to the airline which actually transported the passenger. Further, the plaintiff asserted in her complaint that she was on a "CSA Czech Airlines Flight," and the complaint contained no allegations suggesting that Delta was the carrier. The court held that Delta's participation in a code sharing agreement with CSA did not make Delta the carrier. A code-sharing agreement is merely "an arrangement whereby a carrier's designator code is used to identify a flight operated by another carrier." The court therefore dismissed the plaintiff's claims against Delta. Interestingly, the plaintiff's claims may have survived Delta's motion had the Montreal Convention applied; Articles 39 to 48 of the Montreal Convention, which took effect in the United States on November 4, 2003, provide that a passenger may sue both the "contracting carrier" which issued the ticket and the "actual carrier" which performed the transportation. Here, if Delta issued the ticket, it would have qualified as a contracting carrier under Article 39 and would have been subject to liability. However, the court did not indicate whether Delta actually issued the ticket, which makes determining what the outcome would have been under the Montreal Convention difficult.

2. Orova v. Northwest Airlines

In Orova, a Pennsylvania district court held that a non-operating alliance partner was not liable under the Warsaw Convention. Plaintiff purchased an airline ticket from a Northwest Airlines Inc. ("Northwest") ticket agent to fly on KLM Royal Dutch Airlines ("KLM") from Newark, New Jersey, to Geneva, Switzerland and then to Amsterdam. On the flight from Geneva to Amsterdam, the plaintiff alleged she was accosted by the pilot and temporarily prevented from exiting the plane when it arrived in Amsterdam. She claimed that this was done in retali-
ation for insisting that a flight attendant question the pilot regarding an unidentified individual leaning over the pilot’s shoulder in the cockpit during the flight.\textsuperscript{544} Then, on her return flight home leaving from Amsterdam, she claimed she was once again humiliated by the flight attendant when she requested an aisle seat due to health problems.\textsuperscript{545} The plaintiff claimed the flight attendant yelled at her, told her not to touch her, escorted her off the flight, and called security.\textsuperscript{546} KLM security personnel then approached plaintiff and said that she would not be flying with KLM.\textsuperscript{547}

Plaintiff sued Northwest on the grounds that it was an “alliance partner” with KLM, and Northwest moved to dismiss.\textsuperscript{548} The court granted the motion, holding that Northwest was not a proper party and that plaintiff provided no evidence to pierce the corporate veil between KLM and Northwest.\textsuperscript{549} The court held that the term “carrier” used in Articles 17 and 19 of the Warsaw Convention is not clearly defined, but it means the airline which “actually transports the passengers or baggage.”\textsuperscript{550} This case would likely have been decided differently if the Montreal Convention had applied, as Northwest clearly issued the ticket and would have qualified as a “contracting carrier” pursuant to Article 39 of the Montreal Convention.

B. Choice of Law


Plaintiff filed suit in federal court in Florida after sustaining injuries when a cup of coffee spilled on his lap while onboard an American Airlines, Inc. (“American”) flight that originated in Miami, Florida, bound for Cali, Colombia.\textsuperscript{551} Plaintiff alleged that the flight attendant served him a cup of scalding coffee which spilled, resulting in third degree burns to his lower stom-

\textsuperscript{544} Id.
\textsuperscript{545} Id.
\textsuperscript{546} Id.
\textsuperscript{547} Id.
\textsuperscript{548} Id. at *6.
\textsuperscript{549} Id.
\textsuperscript{550} Id. at *10 (quoting Kapar v. Kuwait Airways Corp., 845 F.2d 1100, 1103 (D.C. Cir. 1998)).
ach and groin area, leaving permanent scarring. Plaintiff sued American pursuant to the Warsaw Convention.552

American filed a motion seeking to have the court determine that Colombian law governed the measure of damages.553 American relied upon certain agreements promulgated by the International Air Transport Association and the Air Transport Association. The court held that, although documents promulgated by those associations had domicile provisions, the provisions did not dictate that Colombian law should apply.554 Instead, the court applied a choice of law analysis under Florida law, as the case was filed in Florida. The court noted that Florida has adopted the “most significant relationship” test of the Restatement (Second) of Conflict of Laws (1971), which dictates weighing a list of relevant factors.555 Considering those factors, the court held that Florida law, not Colombian law, should apply to the issue of damages.556 The court relied principally on the portion of the most significant relationship test requiring the court to apply the law of the state that would best achieve the basic policy underlying the law involved.557 Because the court found that Colombian law appeared stricter than Florida law on the issue of compensatory damages, it held that the application of Colombian law would frustrate the goal of compensation and deterrence by limiting the amount the tortfeasor must pay to compensate the victim.558

C. DEFINITION OF “ACCIDENT”

1. Ramos v. Transmeridian Airlines

The plaintiff in Ramos boarded Air Santo Domingo Flight 803 in Puerto Rico to fly to the Dominican Republic.559 After the passengers were seated, a flight attendant asked the passenger occupying the window seat in plaintiff’s row if he would be willing to change seats with another passenger.560 The passenger occupying the window seat agreed and crossed in front of plain-

552 Id. at *2.
553 Id.
554 Id. at *15.
555 Id. at *17.
556 Id. at *26.
557 Id. at *20.
558 Id. at *26.
560 Id. at 137.
tiff to exit the row.\textsuperscript{561} While doing so, he lost his balance and fell on the plaintiff, fracturing her arm in two places.\textsuperscript{562} The plaintiff filed suit in the Court of First Instance of Puerto Rico, and defendant Transmeridian Airlines, Inc. ("Transmeridian") removed the action to federal court.\textsuperscript{563} Transmeridian moved for summary judgment on the ground that the plaintiff's common law claims did not satisfy the requirements of the Warsaw Convention.\textsuperscript{564}

The court agreed, holding that the plaintiff did not suffer an accident as defined by Article 17 of Warsaw Convention.\textsuperscript{565} Citing \textit{Air France v. Saks},\textsuperscript{566} the court stated that an "accident" is defined as an "unexpected or unusual event or happening that is external to the passenger."\textsuperscript{567} In order for the event to qualify as an accident, the plaintiff must prove both that an unusual or unexpected event external to the plaintiff occurred and that the event was a malfunction or abnormality in the aircraft's operation.\textsuperscript{568} The court held that the first prong of the test was satisfied, because a reasonable passenger would not expect a fellow passenger to fall on top of him.\textsuperscript{569} However, the second part of the test was not satisfied, because the event did not fall within the "operation of the aircraft", \textit{i.e.}, it was not within the airline's purview or control.\textsuperscript{570} The court relied upon the precedent of \textit{Gotz v. Delta Airlines, Inc.},\textsuperscript{571} a case in which a plaintiff was injured while attempting to put a heavy bag in the overhead compartment. Even though the airline had specifically ordered the plaintiff to place the bag in the overhead compartment, that court found there was no evidence that the incident was in the airline's purview or control.\textsuperscript{572} Following that rationale, the Ramos court reasoned that the passenger stepping over the plaintiff had no relation to the operation of the aircraft and did not require the aid of any flight crew personnel.\textsuperscript{573}

\begin{itemize}
  \item \textsuperscript{561} Id.
  \item \textsuperscript{562} Id.
  \item \textsuperscript{563} Id.
  \item \textsuperscript{564} Id.
  \item \textsuperscript{565} Id.
  \item \textsuperscript{566} \textit{Air France v. Saks}, 470 U.S. 392 (1985).
  \item \textsuperscript{567} Ramos, 385 F. Supp. 2d at 141 (quoting \textit{Saks}, 470 U.S. at 406).
  \item \textsuperscript{568} Id.
  \item \textsuperscript{569} Id.
  \item \textsuperscript{570} Id. at 142.
  \item \textsuperscript{572} Id. at 204.
  \item \textsuperscript{573} Ramos, 385 F. Supp. 2d at 142.
\end{itemize}
The court further held that plaintiff’s claims for emotional injuries were barred as not recoverable under the Warsaw Convention and that the plaintiff’s Commonwealth claims under the law of Puerto Rico were barred pursuant to the Warsaw Convention’s clear preemptive effect.\footnote{Id. at 143.}

D. International Transportation—Single Operation

1. \textit{Robertson v. American Airlines, Inc.}

In \textit{Robertson}, the D.C. Circuit affirmed the district court’s decision, holding that a Denver to Chicago flight qualified as international transportation under the Warsaw Convention.\footnote{Robertson v. Am. Airlines, Inc., 401 F.3d 499, 502 (D.C. Cir. 2005).} The plaintiff booked a roundtrip flight between Washington, D.C., and Denver on American Airlines ("American") and then booked a roundtrip flight from Denver to London on British Airways ("BA"). The plaintiff’s plan was to fly from Washington to Denver on American and then from Denver to London on BA with her return trip following the same path. On the return trip, the plaintiff flew BA from London to Denver. After a three-hour layover in Denver, she boarded an American flight to Washington via Chicago. On that leg of the journey, she was injured after she asked a flight attendant to cool a "gel pack" she was using to treat a sore back. The attendant cooled the pack with dry ice, as opposed to ordinary ice; as a result, the plaintiff suffered third degree thermal burns when she applied the gel pack to her skin.\footnote{Id. at 500-01.}

Plaintiff sued American in superior court in the District of Columbia, and American removed the action to federal court. American then filed a motion for summary judgment asserting that the two year statute of limitations of the Warsaw Convention barred the claim (the action was filed almost three years after the accident). The plaintiff argued Washington, D.C.’s three-year statute of limitation applied.\footnote{Id. at 501.}

The issue was whether the plaintiff’s flight constituted an international flight so as to invoke Warsaw’s two year limitations statute.\footnote{See id.} Article I(3) of the Warsaw Convention, which defines international transportation, provides the following:

\begin{itemize}
\item Article I(3) of the Warsaw Convention defines international transportation as including "a flight, in connection with which a passenger is carried from one place to another place where the flight starts, is made, or ends, at an airport situated in a Contracting State, and the place where a passenger is carried to or from an airport situated in an aviation area of another Contracting State is in the flight path of such flight, provided that such carryover is not less than 100 nautical miles in any direction from such an airport and that the flight path is not in such a way as to cause the flight to pass over land in which there is no airport of a Contracting State." 
\end{itemize}
Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or series of contracts is to be performed entirely within a territory subject to the sovereignty . . . of the same High Contracting Party. 579

Focusing on the phrase “regarded by the parties as a single operation,” the court held that the parties regarded the trip as a single operation. Because of the impossibility of knowing the subjective knowledge of the parties, the court applied an objective test to determine the parties’ intent. 580 The court found it significant that the plaintiff’s layover in Denver was only for the purpose of making the plane connection home. The court also found that American knew the trip was international, because it is charged with the knowledge of the travel agency who sold the ticket on its behalf. The court held that the plaintiff’s argument that she performed different work in Denver than in London and that two different airlines were involved was irrelevant. 581 Accordingly, the circuit court affirmed the district court’s ruling and barred plaintiff’s claims.

2. Auster v. Ghana Airways

In June 2000, Airlink Flight 200 crashed during the landing approach on a flight between Tamale, Ghana and Accra, Ghana. 582 The plaintiffs, some of the surviving passengers and the estates of some decedents, sued Airlink and Ghana Airways pursuant to the Warsaw Convention in federal district court. Defendants filed a motion for summary judgment, arguing that because Airlink Flight 200 was a domestic flight, the Warsaw Convention did not apply. 583 In response, plaintiffs alleged that the flight within Ghana was part of an international journey with a connecting flight to the United States making that portion an international flight. 584

579 Id. at 502
580 Id.
581 Id. at 502-03.
583 Id. at *3-4.
584 Id.
The court, citing Article 1 of the Warsaw Convention, determined that plaintiffs could prevail only if Flight 200 was part of "one undivided transportation" between Tamale, Ghana and the United States. Plaintiffs argued that the Airlink flight between Tamale and Accra was part of their international travel, because they had tickets booked on Ghana Airways to continue from Accra to the United States and because they told the Airlink ticket agent of their intent to travel internationally. In response to defendants' argument that the tickets for Flight 200 were purchased on different dates than the international tickets, plaintiffs noted that they were unable to purchase Airlink tickets in the United States, even though they intended to make this flight as part of their overall itinerary.

While acknowledging the recent decision of the D.C. Circuit Court in Robertson v. American Airlines, Inc. which appeared helpful to plaintiffs' case, the court distinguished the facts of Robertson and granted the defendants' motion. While the Robertson court found the knowledge by Robertson's travel agent, who booked both the international and domestic segments, was imputed to the airline, the court did not make such an imputation here. Although plaintiffs claimed that they informed the Airlink agent about their intentions to travel on international flights, the Airlink tickets were stamped as domestic and were purchased from a different agent than the tickets purchased in the United States. The court characterized the flights between Accra and Tamale as a "domestic side trip." The court found that there was "simply no objective documentary evidence to support a conclusion that the parties intended plaintiffs' domestic flight from Tamale to Accra to constitute a portion of plaintiffs' international journey."

E. Preemption

1. Adegbuji v. Continental Airlines, Inc.

In Adegbuji, a New Jersey federal district court held that plaintiff's claims for state law negligence and assault were preempted

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585 Id. at *6.
586 Id. at *7.
587 Id. at *8.
590 Id. at *13.
591 Id. at *15.
by the Warsaw Convention.\textsuperscript{592} The plaintiff was ordered to be removed from the United States by the United States Bureau of Immigration and Customs Enforcement.\textsuperscript{593} In connection with that removal, Continental Airlines’ (“Continental”) employees attempted to board him on a Continental flight from Newark Liberty International Airport to London.\textsuperscript{594} The plaintiff resisted being escorted onto the plane and suffered minor injuries after crew members accompanied him to his seat.\textsuperscript{595} Plaintiff filed numerous claims against Continental, most of which were dismissed by a previous order, including his claim for Warsaw damages. In that previous order, the court held that his injuries did not arise from an “accident” as defined by Warsaw.\textsuperscript{596}

This opinion involved Continental’s motion for summary judgment seeking to dismiss plaintiff’s common law negligence and assault claims and to enforce the limitation of liability for plaintiff’s lost luggage claims under Warsaw.\textsuperscript{597} The court held that the plaintiff’s common law negligence and assault claims were preempted by the Warsaw Convention.\textsuperscript{598} Article 24 of the Convention, as amended by Montreal Protocol No. 4, provides that: “in the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.”\textsuperscript{599} The treaty thus “precludes passengers from bringing actions under local law when they cannot establish air carrier liability under the treaty.”\textsuperscript{600} The court also held that the plaintiff’s claim for lost luggage was limited by Warsaw to $640 per bag.\textsuperscript{601}

2. \textit{Elnajjar v. Northwest Airlines, Inc.}

Less than four months after September 11, 2001, plaintiffs Elnajjar and Jaoude claimed that they were treated rudely at the

\textsuperscript{593} Id. at *2.
\textsuperscript{594} Id.
\textsuperscript{595} Id.
\textsuperscript{596} Id.
\textsuperscript{597} Id. at *3.
\textsuperscript{598} Id. at *9.
\textsuperscript{599} Id. at *6 (quoting El Al Israel Airlines, Inc. v. Tseng, 525 U.S. 155, 175 (1999)).
\textsuperscript{600} Id. at *9 (quoting Tseng, 525 U.S. at 159).
\textsuperscript{601} Id. at *10.
gate and onboard defendants’ flight between Houston and Amsterdam. Plaintiffs claimed that they were screamed at by the gate agent and were told that they would be seated next to a Federal Marshal on the airplane. Prior to takeoff, plaintiffs were escorted off the aircraft by United States Secret Service Agents and an armed soldier and were not allowed to reboard the aircraft. Plaintiffs were routed through different cities and ultimately missed spending the Christmas holidays with their families. Plaintiffs sued the airlines in federal district court for negligence, breach of contract, false imprisonment, intentional infliction of emotional distress, invasion of privacy, defamation, and violations of several federal statutes. Defendants moved to dismiss and argued that the claims were either preempted by the Warsaw Convention or the Federal Aviation Act as amended by the Airline Deregulation Act (“ADA”) or, if not preempted, that the plaintiffs’ claims failed to state a claim upon which relief could be granted.

The court divided plaintiffs’ claims into two categories, those injuries that occurred onboard and during disembarkation and those that occurred after disembarking the aircraft. The court found that Article 17 of the Warsaw Convention preempted plaintiffs’ state law claims for negligence and conspiracy, which arose out of incidents onboard the airplane and while disembarking. Unfortunately for plaintiffs, the claims were barred under Article 17, since they only alleged emotional and mental harm and not physical injuries. As to the injuries that arose after disembarking, the court found that the Warsaw Convention did not preempt plaintiffs’ claims. However, all but one of these state law claims were nevertheless preempted by the ADA, because the court found that the claims related to the service provided by defendants. The only one of the plaintiffs’ state law claims to survive preemption, the claim for false imprisonment, was also dismissed, because plaintiffs’ allegations were insufficient to satisfy the requirements of a false imprisonment claim.

603 Id. at *3.
604 Id. at *4.
605 Id.
606 Id. at *2-7.
607 Id. at *12.
The court also dismissed the plaintiffs’ federal statutory claims for failure to state a claim upon which relief could be granted.\textsuperscript{608}

\section*{F. Subject Matter Jurisdiction/Venue}

\subsection*{1. Polanski v. KLM Royal Dutch Airlines}

Plaintiff purchased a ticket in California for a KLM Royal Dutch Airlines (“KLM”) flight from Los Angeles to Warsaw, Poland with a layover in Amsterdam.\textsuperscript{609} The ticket was issued by Northwest Airlines Inc. (“Northwest”) on behalf of KLM.\textsuperscript{610} Fifteen minutes after takeoff, the plaintiff began to experience excruciating stomach pain.\textsuperscript{611} He claimed that he was forced to remain for the entire flight lying down in a baggage compartment area, where he was administered an injectable pain medication.\textsuperscript{612} After suffering severe pain during the entire twelve hour flight to Amsterdam, he was taken by ambulance to a hospital, where he was diagnosed with a perforated duodenal ulcer.\textsuperscript{613} He underwent surgery, which he alleged was necessary only because of complications arising from the delay in treatment.\textsuperscript{614} Plaintiff claimed the plane should have landed in the continental United States so that he could have received timely medical treatment.

Plaintiff brought suit against KLM in federal court in California, and KLM moved to dismiss the complaint for lack of subject matter jurisdiction.\textsuperscript{615} KLM argued that the plaintiffs claims were governed by the Warsaw Convention, that the Warsaw Convention established four places where an action may be brought, and that the United States was not one of the four places authorized by the Warsaw Convention under the facts of the case.\textsuperscript{616}

The court agreed that the Warsaw Convention governed the claims, because the plaintiff’s ulcer was an “accident” under Article 17 of the Warsaw Convention.\textsuperscript{617} The court held that the

\textsuperscript{608} \textit{Id.} at *20.
\textsuperscript{609} Polanski v. KLM Royal Dutch Airlines, 378 F. Supp. 2d 1222, 1224 (S.D. Cal. 2005).
\textsuperscript{610} \textit{Id.}
\textsuperscript{611} \textit{Id.} at 1225.
\textsuperscript{612} \textit{Id.}
\textsuperscript{613} \textit{Id.}
\textsuperscript{614} \textit{Id.}
\textsuperscript{615} \textit{Id.}
\textsuperscript{616} \textit{Id.}
\textsuperscript{617} The court held that the Montreal Convention did not apply as alleged by the plaintiff because it did not enter into force until November 4, 2003, and the accident happened on October 30, 2003.
“unusual or unexpected event” was the unreasonable delay by the airlines before the plaintiff received necessary medical care. Also, the court held that the Warsaw Convention would apply to the extent the plaintiff made a claim for an intentional tort under Article 25. Because the Warsaw Convention applied, the court dismissed all of the plaintiff's state law claims against KLM.\textsuperscript{618}

In addressing the subject matter jurisdiction argument, the court noted that the Warsaw Convention allows four places where a plaintiff may bring suit: the domicile of the carrier, the carrier's principal place of business, the carrier's place of business through which the contract has been made, or the place of destination.\textsuperscript{619} The court held that California was the place through which the contract was made by the carrier, and, therefore, the third prong of the test was satisfied.\textsuperscript{620} The court rejected KLM's argument that Northwest Airlines rather than KLM issued the ticket.\textsuperscript{621} The court found that, as an alliance partner with Northwest, KLM essentially has a place of business in the United States through which it makes contracts.\textsuperscript{622} Because a contract is made in the place where the last act was done that was essential to the meeting of the minds of the parties, the court found that the contract was made within the United States and that the court had subject matter jurisdiction.\textsuperscript{623} This analysis would have been unnecessary had the Montreal Convention applied, as jurisdiction in the domicile of the plaintiff is expressly provided for if the carrier provides service to the State Party (country) where the plaintiff resides.\textsuperscript{624} Further, had the Montreal Convention applied, the plaintiff could have also sued Northwest as a “contracting carrier” under Article 39.

G. Willful Misconduct

1. Simo-Noboa v. Iberia Lineas Aereas de Espana

In Simo-Noboa, plaintiff's mother died in the Dominican Republic and plaintiff sent her body to Puerto Rico for cremation, with the ashes to be returned to the Dominican Republic for

\textsuperscript{618} Id. at 1231.
\textsuperscript{619} Id. at 1228.
\textsuperscript{620} Id. at 1231.
\textsuperscript{621} Id. at 1229.
\textsuperscript{622} Id. at 1230.
\textsuperscript{623} Id. at 1231.
\textsuperscript{624} See Montreal Convention, supra note 534, at art. 33(2).
After the body was cremated, the ashes were placed in a small box labeled “Fragile” and loaded for the return trip. On the return trip, the ashes were lost and have never been found. The plaintiff sued the defendant airline under the Warsaw Convention, alleging willful misconduct for failing to establish a procedure for transportation of human ashes and for failing to follow even its own procedures for the transfer of human remains. Specifically, the plaintiff claimed the airline failed to place a “HUM” code (for human remains) on the box of ashes, which would have alerted airline personnel to take extra precautions with the package.

The issue was whether the plaintiff stated a valid claim for “willful misconduct” under the Warsaw Convention so that the limitation of liability found in Article 25 would not apply. The court held the term “willful misconduct” encompasses two components, the “intellectual” aspect, whereby a person is aware that a particular course of conduct is unsound, and the “volitional” element whereby the person decides to follow that particular course of conduct. The court held the defendant’s failure to include the “HUM” label on the cargo did not constitute either a conscious awareness of its detrimental consequences or a deliberate intention to cause damage. Therefore, the court held the plaintiff was subject to the liability limitation of Article 25 of Warsaw, limiting the plaintiff’s damages to $736.00 in accordance with Article 22.

XI. MISCELLANEOUS CASES

A. ADMIRALTY JURISDICTION

1. Isla Nena Air Services, Inc. v. Cessna Aircraft Co.

In Isla Nena, an airline sued the aircraft and engine manufacturers after one of its aircraft was forced to make a water landing off the coast of Puerto Rico after an engine failure. As a result of the engine failure, the engine was completely destroyed,
and the aircraft suffered major damage. The airline sued in federal court in Puerto Rico under the theories of negligence and strict liability to recover economic losses from the loss of the aircraft, repair to the aircraft, loss of business income, and other damages, and sought indemnification for claims brought by the passengers. Defendants moved to dismiss the first four counts of the complaint, which addressed the airline’s economic losses arising from the crash, alleging that admiralty law applied, under which the “economic loss rule” would bar recovery for damage to the aircraft except under warranty claims. In the alternative, defendants argued that if the court followed Puerto Rican law, the economic loss rule would still be applicable and would bar plaintiff’s claims.

The court agreed with defendants and granted their motion to dismiss Counts I through IV. The court applied the two-part test from Executive Jet Aviation, Inc. v. City of Cleveland, which determines whether admiralty law applies to the crash of a land-based aircraft. The test requires the following: “[F]irst, the situs of the crash had to be within navigable waters; and second, there had to be some nexus between the type of activity involved and traditional maritime activity.” Later Supreme Court decisions attempted to define the second prong of the test to determine “traditional maritime activity” and raised the following two additional issues under this prong: “(1) whether the incident has a ‘potentially disruptive impact on maritime commerce’ (viewing the ‘general features of the type of incident involved’); and (2) whether the ‘general character’ of the ‘activity giving rise to the incident’ bears a ‘substantial relationship to traditional maritime activity.’” As to the first prong of the test, the court found that, because the crash occurred in the waters surrounding Puerto Rico, it had occurred in “navigable waters” for the purpose of determining admiralty jurisdiction. The court also found that the second prong was met since “the Supreme Court has made clear that the test is a broad one and

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633 Id. at 76.
634 Id. at 75.
635 Id. at 75-76.
636 Id. at 76.
637 Id.
639 Isla Nena, 380 F. Supp. 2d at 77.
640 Id. (quoting Sisson v. Ruby, 497 U.S. 358, 363-365 (1990)).
641 Id. at 77.
concerns ‘potential impact’ and not actual impact on maritime commerce.” 642 The court rejected plaintiff’s arguments that both the manufacturing of aircraft and the defective component had to be related to maritime activity due to the broad nature of the test and found admiralty jurisdiction, which triggered the application of the economic loss rule. 643 Because Counts I through IV of plaintiff’s complaint sought damages for damage or loss to the aircraft and did not seek recovery for damage to other property or for personal injuries, the court found that the economic loss rule applied and barred recovery by plaintiff under those four counts. 644 Plaintiff’s claim for its losses would have to be alleged as a warranty claim rather than as a tort action. 645 In the alternative, the court found that the same result would occur under Puerto Rican law, since the economic loss rule would still bar plaintiff’s recovery. 646

B. Dram Shop Acts

1. Delta Airlines, Inc. v. Townsend

The plaintiff sued Delta Air Lines, Inc. (“Delta”) after he was injured in an automobile accident in which the other driver, William Serio, had been served alcohol by Delta prior to the crash. 647 The plaintiff sued Delta in Georgia state court under the Georgia Dram Shop Act 648 (“GDSA”) and for common law negligence. After the trial court granted Delta’s motion to dis-

642 Id. at 78.
643 The court defined the economic loss rule as follows:
The “economic loss rule” is a products liability concept that precludes tort claims, whether stated in negligence or strict liability, for damages the alleged defective product causes to the product itself resulting in purely economic losses under the rationale that such claims are properly brought as a warranty claim rather than in tort. Only where the alleged defective product causes damage to other property (other than the defective product itself) or personal injuries, does the economic loss rule not apply. In those exceptions, the plaintiff is entitled to recover in tort only those damages to the other property or for personal injuries sustained as a result, but not the economic losses associated with the alleged defective product.
644 Id.
645 Id. at 82.
646 Id.
RECENT DEVELOPMENTS

The Georgia Court of Appeals reversed the decision as to the GDSA claim.\textsuperscript{649}

The Supreme Court of Georgia reversed, determining that the intent of the GDSA was to target land-based establishments, such as restaurants or bars, where the "patrons of land-based establishments serving alcohol generally have direct and immediate access to their vehicles."\textsuperscript{650} With respect to an airline, the passengers to whom the flight attendants serve alcohol do not have such direct and immediate access to motor vehicles.\textsuperscript{651} In addition, the airline would not have knowledge of whether the passenger would be continuing to travel by another flight or by car.\textsuperscript{652} Therefore, the court held that the plaintiff failed to state a claim against Delta under the GDSA.\textsuperscript{653} Because there was no claim, the court did not address Delta's preemption argument under federal law.\textsuperscript{654}

C. Federal Officer Removal Statute

1. Britton v. Rolls Royce Engine Services

In Britton, plaintiffs sued in California state court for injuries arising out of a helicopter crash.\textsuperscript{655} The plaintiffs alleged that defendants were liable due to negligence, product liability, and breach of warranty.\textsuperscript{656} After the defendants' motion to dismiss on \textit{forum non conveniens} grounds was denied, defendants removed the case to federal court after which plaintiffs filed a motion to remand.\textsuperscript{657}

The United States District Court for the Northern District of California first determined that it lacked subject matter jurisdiction over the case due to lack of diversity between the parties and because there was no federal question involved. Defendants had argued that there was federal question jurisdiction since the "Transportation Laws of the United States and the regulations promulgated by the FAA [Federal Aviation Administra-
The court agreed with other decisions that found no preemption by the federal government in the field of aviation safety.\textsuperscript{659}

The court also found that removal was not warranted under the Federal Officer Removal Statute, which provides an absolute right of removal in certain actions against officers of the United States.\textsuperscript{660} The defendants relied on the Eleventh Circuit decision in \textit{Magnin v. Teledyne Continental Motors},\textsuperscript{661} which held that the Federal Officer Removal Statute applied to private individuals who repaired aircraft according to the Federal Aviation Administration ("FAA") specifications.\textsuperscript{662} The court declined to follow \textit{Magnin}, because the plaintiffs here had not named any individuals who had performed maintenance on the helicopter and had not alleged that the FAA's issuance of an airworthiness certificate contributed to the crash.\textsuperscript{663} The court also noted that

\textsuperscript{658} \textit{Id.} at *7 (quoting defendants' motion opposing plaintiffs' motion to remand).


\textsuperscript{660} 28 U.S.C.A. § 1442 provides:

\begin{enumerate}
\item A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
\begin{enumerate}
\item The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.
\item A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.
\item Any officer of the courts of the United States, for any act under color of office or in the performance of his duties;
\item Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.
\end{enumerate}
\end{enumerate}

\textsuperscript{661} \textit{Magnin v. Teledyne Cont'l Motors}, 91 F.3d 1424 (11th Cir. 1996).

\textsuperscript{662} \textit{See id.} at 1429.

\textsuperscript{663} The court stated in a footnote that it . . . decline[d] to read \textit{Magnin} so broadly as to consider all underlying conduct involved in airplane engine repair and maintenance in determining whether a defendant may raise a colorable federal officer defense. Assuming that every repair or maintenance inspection on an airplane engine is eventually followed by issuance of a certificate of airworthiness, then every airplane engine repair and
the defendants' removal of the case was untimely, as it had been filed more than thirty days after the complaint had been served.\(^{664}\)

D. NON-OPERATOR OWNER/LESSOR LIABILITY


In Coleman, the plaintiff sued for wrongful death after the crash of a Piper aircraft with a Cessna aircraft owned by defendant Windham Aviation, Inc. ("Windham") and leased by defendant Brooks Kay ("Kay").\(^{665}\) The plaintiff moved for partial summary judgment on the issue of Windham's vicarious liability for Kay's actions, but Windham argued that the plaintiff's state law vicarious liability claims were preempted by 49 U.S.C. Section 44112.\(^{666}\)

Initially, the text of 49 U.S.C. Section 44112 appeared to support Windham's argument.\(^{667}\) However, the court looked to the predecessor statute, 49 U.S.C. Section 1404, to determine the Congressional intent of the new statute.\(^{668}\) The court determined that the recodification of Section 1404 substantially al-

\(\text{Britton, 2005 U.S. Dist. LEXIS 13259 at } ^{*13} \text{ n.3.}\)

\(\text{Id. at } ^{*16}.\)


\(\text{Id.}\)

\(\text{The text of 49 U.S.C.A. § 44112 reads:}\)

\(\text{(a) Definitions. In this section —}\)

\(\text{(1) "lessor" means a person leasing for at least 30 days a civil aircraft, aircraft engine, or propeller.}\)

\(\text{(2) "owner" means a person that owns a civil aircraft, aircraft engine, or propeller.}\)

\(\text{(3) "secured party" means a person having a security interest in, or security title to, a civil aircraft, aircraft engine, or propeller under a conditional sales contract, equipment trust contract, chattel or corporate mortgage, or similar instrument.}\)

\(\text{(b) Liability. A lessor, owner, or secured party is liable for personal injury, death, or property loss or damage on land or water only when a civil aircraft, aircraft engine, or propeller is in the actual possession or control of the lessor, owner, or secured party, and the personal injury, death, or property loss or damage occurs because of —}\)

\(\text{(1) the aircraft, engine, or propeller; or}\)

\(\text{(2) the flight of, or an object falling from, the aircraft, engine, or propeller.}\)

\(\text{\textit{Coleman}, 2005 R.I. Super. LEXIS 119 at } ^{*16}.\)
tered the original statute by exempting all owners and lessors, instead of limiting the exemption for security purposes. The court found that

[t]he recodification impermissibly extends the scope of the exemption well beyond the confines of the predecessor statute. Because the Court is bound by the intent of the predecessor statute, the Court finds that Section 44112 does not provide an exemption for Defendant Windham as they outright owned the Piper involved in the fatal collision.

The court then engaged in a choice of law discussion to determine whether Rhode Island or Connecticut’s vicarious liability laws would apply. Ultimately, because the law of either state would produce the same result, the court granted plaintiff’s partial motion for summary judgment as to Windham’s vicarious liability.

E. Proximate Cause


In 2002, a Pratt & Whitney Canada, Inc. (“Pratt & Whitney”) engine failed during a flight piloted by Thomas Janis (“Janis”) over Colombian airspace. Although Janis and his passenger, Luis Alcides Cruz (“Cruz”), survived the crash, they were killed by members of a Colombian rebel group. Janis’ estate sued Pratt & Whitney in Florida federal district court for negligence and strict liability for the resulting deaths, and Pratt & Whitney moved for summary judgment. Pratt & Whitney’s main contention was that it did not owe a duty to the decedents and that, even if a duty was owed, the breach of that duty did not proximately cause the deaths.

The court found that under Florida law, Pratt & Whitney, as an engine manufacturer, owed a duty of care to decedents. Specifically, it owed them the “duty of care to prevent the general harm of injury and death occurring at the site of an unplanned
landing allegedly caused by a defective engine." As to proximate cause, because plaintiffs presented evidence that Pratt & Whitney had knowledge of the presence of hostile forces in Colombia and knew that Janis would be flying missions over Colombia utilizing their engine, there remained an issue of fact whether the injuries received by Janis and Cruz were foreseeable by Pratt & Whitney. Therefore, the court denied Pratt & Whitney's motion for summary judgment.

F. September 11th Liability Insurance

1. *In re September 11th Liability Insurance Coverage Cases* (February 23, 2005)

In this action, the lessees of One and Two World Trade Center moved the court for leave to schedule additional depositions. The lessees had brought third-party actions against their insurers seeking both a defense and indemnification for their losses. In denying the motion, Judge Hellerstein revisited his reasoning for limiting discovery concerning the insurance binders to ten depositions per side. The magnitude of discovery requested by the lessees "would take years to accomplish, wasting valuable resources of insurance monies, needlessly delaying and frustrating the recoveries sought by plaintiffs, the prospect of reasonable and early settlements, and uselessly enriching counsel." Therefore, the parties were limited to the initial scope of discovery set forth in earlier orders, with additional discovery permitted by a showing of good cause. Judge Hellerstein also set out a schedule which, among other things, set deadlines for the insurers, both primary and excess, to identify witnesses and to show the court good cause for allowing additional depositions.

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677 *Id.* at 1231.
678 *Id.* at 1232.
679 *Id.*
681 The issue of insurance coverage for the lessees arose from the insurance binders, not insurance policies, since the policies had not been issued as of September 11, 2001. *Id.* at *5-6.
682 *Id.* at *8-9.
2. **In re September 11th Liability Insurance Coverage Cases**  
(March 1, 2005)

The decision issued on March 1, 2005, addressed questions arising out of Judge Hellerstein’s order of February 23, 2005. This opinion concerned a letter sent by United States Fire Insurance Company (“U.S. Fire”) requesting clarification of the February 23, 2005 order. U.S. Fire, as an excess insurer, had deferred discovery and requested that the insureds identify witnesses and produce documents in order for the excess insurers to be able to determine whether additional depositions were required. Judge Hellerstein’s decision indicated frustration with the excess insurers due to their delay in complying with the discovery schedules, since he had earlier denied the excess insurers’ applications to defer their discovery. U.S. Fire’s requests were denied.

3. **In re September 11th Liability Insurance Coverage Cases**  
(March 8, 2005)

In a second decision issued by Judge Hellerstein in March 2005, he addressed a cross-motion by Certain Underwriters of Lloyds, London (“Certain Underwriters”), both an excess and primary insurer for the Port Authority of New York and New Jersey. The motion by Certain Underwriters requested leave of the court to conduct additional depositions. Judge Hellerstein denied the motion, commenting that “Certain Underwriters decision to wait on the sidelines to see how the so-called ‘main issues’ played out reflected their strategy, but not my orders.” As with the other parties, the court held that, if Certain Underwriters sought discovery, they would have to show good cause.

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684 Id.
685 Id.
686 Id.
687 Id. at *11.
689 Id. at *5.
690 Id. at *6.