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Recent Developments in Aviation Law

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RECENT DEVELOPMENTS IN AVIATION LAW*

OLIVER BEIERSDORF**
JENNIFER A. GUIDEA***

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* The authors wish to thank Geoffrey Young of Reed Smith LLP's New York office for his assistance in the preparation of this paper. This paper has been prepared in connection with the 2007 SMU Air Law Symposium. The purpose of the paper is to provide the reader with an update of recent developments in the field of aviation law during the 2006 calendar year. The paper is in outline format to allow the reader to easily access topic areas that are of particular interest. Although not all cases decided in 2006 are included, the writers have attempted to include the most significant cases. The case summaries provided are not exhaustive but are written to provide a general understanding of the more significant issues that arose in the cases. Some of the cases summarized do not involve traditional aviation law, but are included as they are of interest to practitioners and professionals in the field of aviation.

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I. WARSAW AND MONTREAL CONVENTIONS

The Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention) is an international treaty that regulates liability for the international carriage of passengers, baggage, and cargo by air. The Warsaw Convention was created in 1929 to insulate the fledgling airline industry from airline accident liability and promote industry growth. The Warsaw Convention sought to accomplish this by “achieving uniformity of rules governing claims arising from international air transportation.”

The Warsaw Convention has been revised and amended multiple times. In 1955, the Warsaw Convention was amended by the international agreement known as the Hague Protocol, which the United States did not ratify. However, in 1998 The Warsaw Convention was further modified by Montreal Protocol No. 4, (Montreal Protocol No. 4), which the United States ratified.

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7 Id.
The Convention for International Carriage by Air at Montreal, (Montreal Convention),\(^8\) which became effective in the United States on November 4, 2003, consolidated and modernized the scheme that had governed the liability of international air carriers under the Warsaw Convention.\(^9\) Although the Montreal Convention contains many of the same provisions as the Warsaw Convention, there are several differences. Of particular interest are those relating to the liability of an air carrier for passenger bodily injury or death, and the creation of a “fifth jurisdiction.”\(^10\) Under Article 21, the carrier is strictly liable for the first 100,000 Special Drawing Rights (SDRs), but it can limit its liability to 100,000 SDRs if it can prove that the damage was not caused by the negligence of the carrier or that the damage was solely due to the negligence of a third party.\(^11\) Under Article 33, the Montreal Convention provides that, in addition to the four jurisdictions where an action for damages may be brought under the Warsaw Convention, an action also may be brought in the place of the claimants’ domicile if the carrier provides service to passengers in that jurisdiction and meets certain other conditions.\(^12\)

A. Preemption

1. Weiss v. El Al Israel Airlines\(^13\)

El Al Israel Airlines (El Al) “bumped”\(^14\) plaintiffs off an oversold flight from New York to Jerusalem.\(^15\) As a result of being “bumped,” plaintiffs filed a suit under the Federal Aviation Act\(^16\) (Federal Regulations) and also alleged both tort and contract claims.\(^17\) El Al filed a motion to dismiss on three grounds.\(^18\) First, it asserted that both the Montreal Convention and the Air-

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\(^11\) Kruger v. United Air Lines, Inc., 481 F. Supp. 2d 1005, 1008 (N.D. Cal. 2007); see Montreal Convention, supra note 8, art. 33(2).

\(^12\) Baah, 473 F. Supp. 2d at 596–97.


\(^14\) “Bumping is an airline industry practice whereby passengers are denied seats due to intentional overselling.” Id. at 362.

\(^15\) Id.

\(^16\) Federal Aviation Act, 14 C.F.R. § 250.1 et seq. (“Federal Regulations”).

\(^17\) Weiss, 433 F. Supp. 2d at 362.
line Deregulation Act\textsuperscript{19} preempted plaintiffs' claims. Additionally, El Al claimed that that there was no right of action under the Federal Regulations.\textsuperscript{20}

The court began its analysis with the Montreal Convention and highlighted Article 29, which states: "'In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention.'"\textsuperscript{21} In explaining the scope of this article, the court emphasized that when "an action for damages, however founded, falls within one of the Convention's three damages provisions, the Convention provides the sole cause of action under which a claimant may seek redress for his injuries."\textsuperscript{22}

El Al argued that plaintiffs' bumping claims were essentially claims for "damages occasioned by delay" and were governed exclusively by the Montreal Convention.\textsuperscript{23} Plaintiffs countered that their "bumping" claim was not for "damages occasioned by delay" but for damages from the "complete non-performance" of their contract with El Al, and as such the Montreal Convention did not apply.\textsuperscript{24} In analyzing this issue, the court sought guidance from the Seventh Circuit's decision in \textit{Wolgel v. Mexicana Airlines},\textsuperscript{25} where a bumping claim was found to be a claim for complete non-performance of the contract, rather than delay under Article 19.\textsuperscript{26} The court noted that the \textit{Wolgel} court's interpretation of the Montreal Convention was historically accurate.\textsuperscript{27} The drafters of the Montreal Convention specifically chose not to define "delay" and expected courts to mold its definition on a case-by-case basis.\textsuperscript{28} The court also was persuaded by decisional law in foreign jurisdictions, including Canada, Germany, Italy, and France, which found that "bumping" consti-

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\textsuperscript{19} \textit{Weiss}, 433 F. Supp. 2d at 362.
\textsuperscript{20} \textit{Id}.
\textsuperscript{21} \textit{Id} at 365 (quoting Montreal Convention, \textit{supra} note 8, art. 29).
\textsuperscript{22} \textit{Id}.
\textsuperscript{23} \textit{Id} at 366.
\textsuperscript{24} \textit{Id}.
\textsuperscript{25} 821 F.2d 442 (7th Cir. 1987).
\textsuperscript{26} \textit{Id} at 445.
\textsuperscript{27} \textit{Weiss}, 433 F. Supp. 2d at 368–69.
\textsuperscript{28} \textit{Id}.
tuted the non-performance of a contract and was not governed by the Montreal Convention.\(^{29}\)

The court considered the Supreme Court's decision in *El Al Israel Airlines v. Tseng*,\(^{30}\) where it emphasized the "drafting history" of the Convention and its stated goal regarding international uniformity of rules governing claims arising from international air transportation."\(^{31}\) The *Weiss* court concluded that, in the "interest of international uniformity" and "the greater focus on consumer protection intended in the Montreal Convention, plaintiffs' bumping claims" did not constitute claims for delay, but for non-performance of contract."\(^{32}\) Thus, plaintiffs' claims were not preempted under the Montreal Convention.\(^{33}\)

The court next addressed El Al's argument that the Airline Deregulation Act (ADA) preempted plaintiffs' claims. Under the Act, no state may "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."\(^{34}\) The court considered the United States Supreme Court's decision in *American Airlines, Inc. v. Wolens*.\(^{35}\) In *Wolens*, the Supreme Court held that the ADA only preempted claims brought under state tort law and not state contract law because contract law involves agreements between private individuals.\(^{36}\) The *Wolens* court found that the ADA's preemption clause did not "shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self imposed undertaking."\(^{37}\) Accordingly, the Southern District of New York held that the *Weiss* plaintiffs' tort claims were preempted, but that their state-law-based contract claims were not.\(^{38}\)

Finally, the *Weiss* court agreed with El Al's argument that the Federal Regulations did not support plaintiffs' "bumping" claims.\(^{39}\) The court cited numerous cases that indicated that

\(^{29}\) *Id.* at 368.

\(^{30}\) 525 U.S. 155 (1999).


\(^{32}\) *Id.* at 369.

\(^{33}\) *Id.*

\(^{34}\) *Id.* (quoting 49 U.S.C. § 417-13(b)(1) (2006)).

\(^{35}\) *Id.* (citing Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 228-29 (1994)).

\(^{36}\) *Id.*

\(^{37}\) *Wolens*, 513 U.S. at 228.

\(^{38}\) *Weiss*, 433 F. Supp. 2d at 370.

\(^{39}\) *Id.*
only the Secretary of Transportation or the Attorney General could bring a suit under the Federal Aviation Act.” As a result, this cause of action was dismissed.

[In a subsequent decision, which is summarized below on page 31 under Section G. Airline Deregulation Act, the court addressed a motion for reconsideration filed by plaintiffs, which requested that the court reconsider its dismissal of plaintiffs’ tort cause of action.]

2. **Mbabu v. Societe Air France**

Plaintiff in this case purchased a ticket from his employer, Federal Express, for an Air France flight from Houston, Texas to Lagos, Nigeria with a layover in Paris, France. Plaintiff had four extra bags, so he paid an excess bag fee of $130.00 per bag, which totaled $520.00 for his four bags. During his layover in Paris, Air France unloaded all of plaintiff’s bags from the plane. Air France asserted that it did so because plaintiff had purchased his ticket through his employer and was flying as a non-revenue passenger. At some point during the layover, however, plaintiff missed his scheduled flight to Lagos. As a result, plaintiff reclaimed his checked luggage and stayed in the airport that night. When plaintiff checked in for another flight to Lagos the next day, an Air France agent told him that he had a new excess luggage fee of $4,048.66, which was based on the weight of his luggage, rather than the number of excess bags. Plaintiff claimed that Air France would not allow him to send the extra bags back to Houston. Plaintiff alleged that the airline threatened to burn his luggage if he did not pay the fee. Consequently, plaintiff charged the extra bag fees on his credit card.

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40 Id. at 371.
41 Id.
42 457 F.3d 496 (5th Cir. 2006).
43 Id. at 496.
44 Id.
45 Id.
46 Id.
47 Id.
48 Id.
49 Id.
50 Id.
51 Id.
52 Id.
Plaintiff sued Air France in Texas state court and alleged claims of fraud, breach of contract, and violation of the Texas Deceptive Trade Practices Act. Air France removed the case to federal court where it won summary judgment following discovery. Specifically, the court found that plaintiff’s claims had been preempted by the Warsaw Convention.

On appeal, the Court of Appeals for the Fifth Circuit affirmed, holding that plaintiff’s claims were entirely preempted by the Warsaw Convention as amended by Montreal Protocol No. 4. Plaintiff argued that his claims were not preempted because his injury did not fall within the general categories of the Montreal Protocol No. 4 which he claimed limited recovery to “personal injury, lost or damaged baggage, or delay.” According to plaintiff, the district court’s holding was incorrect because it meant that “unless an injury is specified in the Warsaw Convention, there can be no remedy for it.”

Relying on *El Al Israel Airlines, Ltd. v. Tseng* and Article 24 of the Warsaw Convention as amended by Montreal Protocol No. 4, which states that “[i]n 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 [the Warsaw] Convention,” the court concluded that plaintiff’s claims could only be brought under the terms of the Montreal Convention, regardless of whether a remedy was available.

B. Definition of “Accident” and “Delay”


Plaintiff in this case purchased a round trip ticket from Virgin Atlantic for a flight from New York to Lagos, Nigeria, with a stop in London. The ticket incorrectly listed plaintiff’s name, how-
ever plaintiff arrived in Lagos without difficulty.\textsuperscript{62} On the return trip, after clearing security checkpoints at Lagos Airport, he was questioned about the authenticity of his passport while waiting in line at the gate to board the aircraft.\textsuperscript{63} Plaintiff was brought to an office where he was questioned by Virgin Atlantic personnel about his passport.\textsuperscript{64} The Virgin Atlantic personnel called in a British official responsible for inspecting the documentation of people flying to the United Kingdom. The official determined that plaintiff could proceed onto the flight.\textsuperscript{65} The Virgin Atlantic personnel then permitted plaintiff to board the flight.\textsuperscript{66}

 Plaintiff did not board his flight and instead demanded a written explanation for the treatment he had received.\textsuperscript{67} After an argument, the Nigerian police asked plaintiff to "accompany them to another office in the airport."\textsuperscript{68} After meeting with the police and making a written statement, plaintiff returned to the gate; however, plaintiff's flight had closed for boarding.\textsuperscript{69}

 Plaintiff then requested that Virgin Atlantic honor his ticket on another airline, but Virgin Atlantic declined.\textsuperscript{70} Plaintiff subsequently bought a ticket to London on British Airways.\textsuperscript{71} Because London was not his final destination, plaintiff claimed that once he arrived there he had no choice but to beg for money in order to buy both food and a ticket back to New York.\textsuperscript{72}

 Plaintiff commenced an action against Virgin Atlantic alleging various state-law-based causes of action.\textsuperscript{73} After removing the case to federal court, Virgin Atlantic moved for summary judgment on the grounds that the Warsaw Convention provided plaintiff's exclusive remedy.\textsuperscript{74}

 Turning first to Article 17 of the Warsaw Convention, the court analyzed whether plaintiff could satisfy the three condi-
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The court held that although the first and third elements were satisfied, the second element was not. The record established that plaintiff had suffered "purely mental injuries," which under Floyd are not recoverable in the absence of a physical injury. Plaintiff, therefore, could not recover under Article 17.

The court then analyzed whether plaintiff was entitled to recovery for "damages occasioned by delay" under Article 19 of the Warsaw Convention. The court found that although Article 19 covered plaintiff's claims for damages for the missed flight, plaintiff decided to "secure substitute travel," which absolved Virgin Atlantic of any liability under Article 19. Among other cases cited, the court relied heavily on Paradis v. Gahana Airways, Ltd., which held that "[a] passenger cannot convert mere delay into contractual non-performance by choosing to obtain more punctual conveyance."

2. Sobol v. Continental Airlines

The plaintiffs, a family of four, purchased round trip first class tickets for travel on a Continental Airlines (Continental) flight from Newark, New Jersey to Mazatlan, Mexico. The departing flight was oversold and plaintiff Lora Sobol was forced to downgrade to coach class. On the return flight, two family members

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76 Oparaji, 2006 U.S. Dist. LEXIS 68636, at *8 (quoting Floyd, 499 U.S. at 536).
77 Id. The court, with very little analysis, concluded that the questioning of plaintiff about his passport qualified as an "accident" under Article 17. Id. An "accident" for purposes of Article 17 is defined as "an unexpected or unusual event or happening that is external to the passenger." Air Fr. v. Saks, 470 U.S. 192, 405 (1985).
79 Id.
80 Id. at *10.
81 Id. at *11.
84 No. 05 CV 8992 (LBS), 2006 U.S. Dist. LEXIS 71096 (S.D.N.Y. Sept. 26, 2006).
85 Id. at *2.
86 Id. at *2.
were also downgraded to coach. In both instances, Continental reimbursed the family for the difference in price between their first class and coach tickets. Additionally, Continental provided a travel voucher, a free upgrade from coach to first class on a later flight, and frequent flier miles.

Plaintiffs commenced an action alleging breach of contract, unjust enrichment, conversion, and punitive damages. No physical injury was alleged, but plaintiffs claimed that they suffered emotional trauma as a result of being separated from each other during the flights. Subsequently, Continental moved for summary judgment on the grounds that plaintiffs could not establish a viable claim under the Warsaw Convention.

The court concluded that plaintiffs' claims were governed exclusively by the Warsaw Convention. Article 24 of the Warsaw Convention provides that "in the carriage of passenger and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention." Moreover, in *El Al Israel Airlines, Ltd. v. Tseng*, the Supreme Court held that the preemptive effect of Article 24 "precludes passengers from bringing actions under local law when they cannot establish air carrier liability under the treaty." Accordingly, plaintiffs' state law claims for breach of contract, conversion, and unjust enrichment were barred.

The court similarly dismissed plaintiffs' claim for punitive damage because Article 29 of the Warsaw Convention specifically states that "punitive damages . . . shall not be recoverable." On the issue of whether plaintiffs could recover under Article 17 of the Warsaw Convention, the court concluded:

the separation and segregation of the party does not qualify as an "accident" for the purposes of the Warsaw Convention . . . .

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87 Id. at *2–4.
88 Id.
89 Id. at *3–4.
90 Id. at *4.
91 Id. at *3.
92 Id. at *6.
93 Id. at *14–15 (quoting Warsaw Convention as amended by Montreal Protocol No. 4, *supra* note 6, art. 24).
94 Id.
96 Sobol, 2006 U.S. Dist. LEXIS 71096, at *14 (quoting Tseng, 525 U.S. at 175).
97 Id.
98 Id. (quoting the Warsaw Convention as amended by Montreal Protocol No. 4, *supra* note 6, art. 29).
ting apart from one's family can hardly be described as out of the ordinary or unexpected on a plane flight, nor is the rigid enforcement of the boundary between first class and coach a surprise to anyone who has flown before. Neither would the theoretical emotional distress of learning of the downgrade qualify as out of the ordinary or unexpected for those, like plaintiffs, accustomed to travel. . . . 99

The court also noted that plaintiffs could not satisfy the requirement that a bodily injury occurred, and cited Eastern Airlines v. Floyd, in which the United States Supreme Court held that "Article 17 does not allow recovery for purely mental injuries." 100 Accordingly, the court granted summary judgment in favor of Continental and dismissed plaintiffs' complaint with prejudice. 101

C. "ALL NECESSARY MEASURES" DEFENSE

1. Medina v. American Airlines, Inc. 102

During a flight from Miami, Florida to Cali, Columbia, plaintiff was burned by hot coffee. 103 As a result, he commenced an action seeking damages under Article 17 of the Warsaw Convention. 104 Following a bench trial, the court issued its findings of fact and conclusions of law. 105

The court found that the flight attendant placed a cup of hot coffee contained in a styrofoam cup on the folding tray table in front of plaintiff. 106 Plaintiff testified that he picked the cup of coffee up with his right hand, [and] "‘tried to take it to [his] mouth, but it was so hot that [he] held up the other hand to hold it’" and that he "‘was getting [his] hands burned.’" 107 Plaintiff then spilled the coffee resulting in severe burns to his abdomen and groin area. 108

American Airlines argued that it should be exonerated from liability, or that its liability should at least be limited, under Arti-
cle 21 of the Warsaw Convention, which provides in pertinent part that "[i]f the carrier proves that the damage was caused by or contributed to by the negligence of the injured person, the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability." The court agreed:

American met its burden of proving not only that [plaintiff] was comparatively negligent in causing the accident, but he was the sole proximate cause of same, as the only uncontroverted evidence establishes that [plaintiff] attempted to pick up a coffee cup with what he knew to be hot coffee and attempted to drink it when, by his own claim, it was too hot to handle and he could have put it back on the tray and/or allowed some cooling to take place.

The court also agreed with American Airlines' argument that it should not be held liable because it took "all 'necessary measures' to avoid the damage pursuant to Article 20." Article 20 provides that "a carrier is liable unless 'he proves that he and his agents have taken all necessary measure to avoid the damage ... .'" The court held that plaintiff's bare allegation that the coffee was too hot, without the support of expert testimony, did not "create an issue that required a response." The court concluded that the only credible evidence on the record established that American Airlines took all reasonable measures to avoid the damage and was therefore entitled to invoke the Article 20 defense.

D. Deep Vein Thrombosis


Plaintiff was a passenger aboard a Continental Airlines ("Continental") flight from Los Angeles, California to Paris, France. The flight was uneventful: there were no equipment malfunctions or any other anomalies. Upon arrival in Paris, plaintiff

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109 Id. at *5 (quoting Montreal Convention, supra note 8, art. 21).
110 Id. at *5.
111 Id. at *5-6.
112 Id. at *5 (quoting Montreal Convention, supra note 8, art. 20(1)).
113 Id. at *7-8.
114 Id. at *6-7.
115 455 F.3d 1087 (9th Cir. 2006).
116 Id. at 1089.
117 Id.
had difficulty walking and quickly sought medical attention. He was admitted to the hospital and was diagnosed with deep vein thrombosis (DVT). He stayed in the hospital for three days and later received therapy.

Plaintiff filed an action against Continental seeking recovery for his injuries under the Warsaw Convention. The district court granted Continental's motion for summary judgment on the grounds that there was no Article 17 "accident." Plaintiff appealed to the Ninth Circuit Court of Appeals.

The court noted that "[i]t is well settled that the development of DVT as the result of international air travel, without more, does not constitute an 'accident' for purposes of Article 17 liability;" this is because the development of DVT simply occurs due to the passengers' own internal reaction to regular and expected aircraft operation. Plaintiff argued that, although the development of DVT itself did not constitute an Article 17 "accident," Continental's alleged failure to warn him of the risk of DVT was an "accident" under Article 17.

The court noted that this was an issue of first impression in the Ninth Circuit and turned to the Fifth Circuit's decision in Blansett v. Continental Airlines, Inc. for guidance. In that case, the Fifth Circuit rejected the identical theory of liability alleged in Caman: that an airline's failure to warn of the potential for DVT is a departure from a known risk and is "unexpected." The Fifth Circuit reasoned that the lack of any Federal Aviation Administration requirement that a warning of DVT be issued on an international flight demonstrated that the airline's failure to warn of DVT was not "unexpected" and was not an Article 17 accident.

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118 Id.
119 Id. Deep vein thrombosis is a medical condition that occurs when a blood clot forms in a vein. Witty v. Delta Air Lines, Inc., 366 F.3d 380, 381 (5th Cir. 2004). Deep vein thrombosis can cause serious medical complications if the clot becomes dislodged and travels to the heart, brain or lungs. Id. at 382.
120 Caman, 455 F.3d at 1089.
121 Id. at 1088-89.
122 Id. at 1089.
123 Id.
124 Id.
125 Id.
126 Id.
127 379 F.3d 177 (5th Cir. 2004).
128 Caman, 455 F.3d at 1090.
129 Blansett, 379 F.3d at 182.
130 Id.
Notwithstanding the Fifth Circuit's decision in Blansett, the court concluded that issues relevant to the court's inquiry remained unanswered: "Specifically, whether an air carrier's departure from either industry standard or its own company policy are the appropriate benchmark for determining whether an event is 'unexpected or unusual' conduct under Article 17 and, more importantly, whether the inaction alleged here is sufficient to constitute an Article 17 'event.'"  

The court noted that it is important to consider both Article 17, which provides the framework for determining whether an event occurred that triggers liability, and Article 20(1), which provides an air carrier with a defense if it proves that it took all measures that were required to avoid the damage, or that such measures were impossible to take. The court explained that the distinction between these two articles is significant because, while Article 17 is about the nature and cause of the event, Article 20(1) is about the care taken to avert the event, which are clearly two different inquiries.

The court concluded that plaintiff could not establish that his DVT was the result of an "accident" because he was unable to demonstrate that it resulted from an "unexpected or unusual event."

2. In re Deep Vein Thrombosis Litigation

The Judicial Panel on Multidistrict Litigation centralized pretrial proceedings involving numerous cases alleging liability for DVT in the Northern District of California. Previously, in cases involving DVT related injuries on or after domestic flights, the court granted summary judgment to the airline defendants based on federal preemption. In this decision, the court addressed whether the airline defendants were entitled to summary judgment in the cases involving DVT related injuries during or after international flights governed by the Warsaw Convention.

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131 Caman, 455 F.3d at 1091.
132 Id. at 1091–92 (quoting Warsaw Convention, supra note 2, arts. 17, 20).
133 Id. at 1092 (citing Air Fr. v. Saks, 470 U.S. 392, 407 (1985)).
134 Id.
136 Id. at *3–4.
137 Id. at *4.
138 Id.
The district court's decision was rendered shortly after the Ninth Circuit's decision in *Caman v. Continental Airlines, Inc.* As *Caman* was binding precedent, the court concluded that it was unnecessary to consider plaintiffs' proffered evidence of an industry practice or airline-specific policies concerning DVT. As in *Caman*, the failure to provide DVT warnings did not constitute an accident under Article 17 of the Warsaw Convention, regardless of industry standards or airline policies. The court nonetheless analyzed related theories of liability that *Caman* did not specifically address.

Plaintiffs argued that there is a difference between the failure to provide a DVT warning and the inadequacy of the warning that actually was given. According to plaintiffs, the focus should not be on the lack of warning, but on the inadequacy of the warnings that were actually given. The court was not persuaded, stating that it "would be strange indeed if the failure to provide any warning could not give rise to liability under Article 17 while the provision of an ineffective warning could."

Plaintiffs then attempted to shift the focus to the airlines' overall policy decision not to give DVT warnings. Plaintiffs argued that the airlines' "election" not to provide such warnings constituted an "event" for purposes of Article 17. The court rejected this argument, noting that the "event" under Article 17 must have occurred either on board the aircraft or during the course of embarking or disembarking. The policy decisions by the airlines as to whether to provide DVT warnings simply were too remote in time to qualify as an event under Article 17. The court also noted that Article 17 was not intended to regulate the behavior of air carriers when there is no accident either on board or in proximity to an aircraft." The airline defendants' motions for summary judgment were granted.

139 *Id.* at *18.
140 *Id.* at *20–21.
141 *Id.* at *20.
142 *Id.* at *21.
143 *Id.*
144 *Id.*
145 *Id.* at *22.
146 *Id.*
147 *Id.* at *22–23.
148 *Id.* at *23.
149 *Id.* at *28–29.
150 *Id.* at *36.
II. TOKYO CONVENTION

The primary goal of the Tokyo Convention, which was ratified by the United States in 1969, was to encourage nations to exercise jurisdiction in instances where a crime was committed aboard an aircraft registered in that nation.\textsuperscript{151} Although the main thrust of the Tokyo Convention focuses on criminal acts committed on aircraft, the convention also covers “acts which, whether or not they are offenses, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board.”\textsuperscript{152}

A. \textit{Eid v. Alaska Airlines, Inc.}\textsuperscript{153}

During an Alaska Airlines flight from Vancouver to Las Vegas, nine passengers that were flying together in the first-class section of the aircraft became unruly.\textsuperscript{154} The captain received a report from cabin crew that passengers were gathering near the flight deck door and that they were continuing to stand near the door even when told not to.\textsuperscript{155} In a later phone call from a flight attendant who was “in hysteria” and “crying,” the captain was advised that the flight attendant “lost control” of the first class cabin.\textsuperscript{156} The captain then heard a “bunch of yelling and screaming” through the interphone and decided to land the airplane as soon as possible.\textsuperscript{157} The captain landed the airplane in Reno, Nevada and all nine plaintiffs were ordered to disembark.\textsuperscript{158}

Plaintiffs filed an action alleging damages due to delay under Article 19 of the Warsaw Convention, common law defamation, slander, intentional infliction of emotional distress, and invasion of privacy.\textsuperscript{159} Following a prior motion to dismiss, the court ruled that the state law causes of action alleged by plaintiffs were preempted by the Warsaw Convention.\textsuperscript{160} Plaintiffs then


\textsuperscript{152} Tokyo Convention, \textit{supra} note 151, art. 1.


\textsuperscript{154} Id. at *2.

\textsuperscript{155} Id. at *15.

\textsuperscript{156} Id. at *16.

\textsuperscript{157} Id.

\textsuperscript{158} Id.

\textsuperscript{159} Id. at *2.

\textsuperscript{160} Id.
amended the complaint to allege further claims, which the court again dismissed as preempted by the Warsaw Convention.161

Plaintiffs later filed a motion for leave to file supplemental pleadings alleging seven new causes of action, all for defamation, and allegedly arising after plaintiffs' amended complaint was filed.162 The proposed causes of action arose from publication or republication of alleged defamatory statements regarding plaintiffs' involvement in the incident.163 Following plaintiffs' motion, the defendants filed a motion for summary judgment seeking a dismissal of the complaint under the terms of the Tokyo Convention.164 After the court denied the motion for leave to file supplemental pleadings because the alleged causes of action had already accrued at the time plaintiffs filed the original and amended complaints, the court turned to the motion for summary judgment.165

Defendants argued that, under the Tokyo Convention, any action taken by an in-command pilot or captain to preserve the good order and discipline on board an aircraft is precluded from liability.166 Specifically, the defendants relied on Article 10 of the Tokyo Convention, which provides that "neither the aircraft commander, [n]or any other member of the crew, any passenger, [nor] the owner or operator of the aircraft . . . shall be held responsible in any proceeding on account of the treatment undergone by the person against whom the actions were taken."167

Article 6 paragraph 1(b) of the Tokyo Convention provides that:

[the aircraft commander may, when he has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an offence or act contemplated in Article 1, paragraph 1, (acts which whether or not they are offences, may or do jeopardize the safety of the aircraft or . . . good order and discipline on board) impose upon such person reasonable measures including restraint which are necessary: (a) to protect the

161 Id. at *3.
162 Id.
163 Id.
164 Id.
165 Id. at *4–8.
166 Id. at *11.
167 Id. at *14 (quoting Tokyo Convention, supra note 151, art. 10) (emphasis in original).
safety of the aircraft, or of the person or property therein, (b) to maintain good order and discipline on board; or . . . (c) to enable him to deliver such persons to competent authorities or to disembark him in accordance with the provision of this Chapter.

Plaintiffs argued that the captain’s decision to disembark the passengers was not reasonable or necessary, citing testimony that plaintiffs ultimately complied with the flight attendants and returned to their seats. Plaintiffs also proffered testimony by the first officer that if the captain had looked through the cabin portal window and seen that all passengers were in their seats as directed, a "less direct" response would have been appropriate. The court disagreed, stating that "[t]he critical inquiry here is whether the Captain had reasonable grounds to believe that a person on board the aircraft had committed 'an act which may jeopardize the safety of the aircraft . . . or good order and discipline on board.'" The court held that any action the captain or first officer could have taken is therefore irrelevant. Reasonable minds, considering the circumstances of this case, could not differ with respect to whether the captain had reasonable grounds to disembark the unruly passengers. As a result, the court held that there was no genuine issue of material fact. Thus, defendants were not liable under Art. 10 of the Tokyo Convention and summary judgment was granted to Alaska Airlines.

III. FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act (FSIA) provides the general rule that foreign states are immune from suits in the United States. The FSIA defines a "foreign state" to include "any political subdivision of a foreign state or an agency or instrumentality of a foreign state." In turn, "agency or instrumentality of a foreign state" means any entity:

168 Id. at *14–15 (quoting Tokyo Convention, supra note 151, art. 6).
169 Id. at *17.
170 Id.
171 Id. (citing Tokyo Convention, supra note 151, arts. 1, 6).
172 Id. at *17–18.
173 Id. at *18.
174 Id.
175 Id.
which is a separate legal person, corporate or otherwise, and
which is an organ of a foreign state or political subdivision
ter thereof, or a majority of whose shares or other ownership interest
is owned by a foreign state or political subdivision thereof, and
which is neither a citizen 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{178}

There are several statutory exceptions to this immunity in-
cluding the “state-sponsored terrorism exception,” which pro-
vides that a foreign state “shall not be immune from jurisdiction
of courts of the United States” where money damages are sought
against a foreign state “for personal injury or death that was
caused by an act of torture, extrajudicial killing, aircraft sabo-
tage, hostage taking, or the provision of material support or re-
sources for such an act.”\textsuperscript{179}

A. Hartford Insurance Co. v. Socialist People’s
Libyan Arab Jamahiriya\textsuperscript{180}

Plaintiff, Hartford Insurance Company, brought suit against
the Socialist People’s Libyan Arab Jamahiriya (Libya) to recover
damages sustained as a result of the bombing of Pan American
World Airways (Pan Am) Flight 103 over Lockerbie, Scotland,
on December 21, 1988.\textsuperscript{181} The aircraft was destroyed when an
improvised explosive device was loaded onto a cargo hold on
the airplane.\textsuperscript{182} Before the details of the crime and identity of
the criminals emerged, many suits were filed alleging wrongful
death and personal injury against Pan Am based on negligent
failure to detect the explosive device.\textsuperscript{183} At trial, Pan Am was
found liable for the deaths of the passengers and was required
to pay full compensatory damages.\textsuperscript{184} In the course of defend-
ing and settling claims arising out of the bombing, Pan Am’s
insurers spent over $500 million dollars.\textsuperscript{185} Subsequently, Libya
accepted responsibility for the bombing.\textsuperscript{186} Plaintiffs filed a
complaint to recover the sums expended from the defendants

\textsuperscript{178} 28 U.S.C.A. § 1603(b).
\textsuperscript{179} 28 U.S.C.A. § 1605(a) (7) (West 2006).
\textsuperscript{181} Id. at 205.
\textsuperscript{182} Id.
\textsuperscript{183} Id.
\textsuperscript{184} Id.
\textsuperscript{185} Id.
\textsuperscript{186} Id.
through indemnity and contribution and subsequently sought to amend the complaint to assert claims under the state sponsored terrorism exception to the FSIA.\textsuperscript{187}

Defendants argued that the proposed complaint could not survive a motion to dismiss or summary judgment and would therefore be futile.\textsuperscript{188} First, the defendants argued that there was no subject matter jurisdiction.\textsuperscript{189} The court rejected this argument and reaffirmed its prior holding that it had subject matter jurisdiction over this case.\textsuperscript{190} The court refused to find the recent decisions of Cicippio-Puleo \textit{v.} Islamic Republic of Iran and Pugh \textit{v.} Socialist People’s Libyan Arab Jamahiriya applicable here.\textsuperscript{191} The court noted that these cases dealt with whether the state sponsored terrorism exception provided an independent cause of action against a foreign state, not whether it conferred jurisdictional authority.\textsuperscript{192} In fact, the Cicippio-Puleo court specifically found that jurisdiction was proper under the state sponsored terrorism exception.\textsuperscript{193} Further, Pugh dealt with a property damage claim, not a personal injury claim, and therefore was inapplicable to this case.\textsuperscript{194}

Defendants then argued that the proposed complaint failed to state a claim.\textsuperscript{195} The court disagreed, though it noted that the state sponsored terrorism exception does not, itself, create a private right of action against a foreign government.\textsuperscript{196} The court also reaffirmed that generic federal common law does not provide such a right.\textsuperscript{197} However, because the proposed amended complaint asserted claims for indemnity, contribution, and punitive damages under state law and federal statutes, the court found that plaintiffs had asserted viable causes of action.\textsuperscript{198} Accordingly, the court allowed the amendment.\textsuperscript{199}

\begin{itemize}
\item \textsuperscript{187} Id. at 205–06.
\item \textsuperscript{188} Id. at 207.
\item \textsuperscript{189} Id.
\item \textsuperscript{190} Id. at 207–08 (citing Cicippio–Puleo v. Islamic Republic of Iran, 353 F.3d 1024, 1036 (D.C. Cir. 2004), and Pugh v. Socialist People’s Libyan Arab Jamahiriya, 290 F. Supp. 2d 54, 60 (D.D.C. 2003)).
\item \textsuperscript{191} Id. at 207–08.
\item \textsuperscript{192} Id. at 207.
\item \textsuperscript{193} Id. (citing Cicippio–Puleo, 353 F.3d at 1036).
\item \textsuperscript{194} Id. (citing Pugh, 290 F. Supp. 2d at 60–61).
\item \textsuperscript{195} Id. at 208.
\item \textsuperscript{196} Id.
\item \textsuperscript{197} Id.
\item \textsuperscript{198} Id. at 209.
\item \textsuperscript{199} Id.
\end{itemize}
B. *Pugh v. Socialist People's Libyan Arab Jamahiriya*\(^{200}\)

Plaintiffs' claims in this case arose out of the September 19, 1989 bombing of Union des Transports Aeriens (UTA) Flight 772, which exploded in mid-air killing all 170 people on board, including seven Americans.\(^ {201}\) Subsequent to the bombing, the French Government investigated the cause of the explosion and concluded that Libya was responsible for the bombing and that the individual defendants planned and coordinated the explosion.\(^ {202}\) The Plaintiffs brought suit against "the Socialist People's Libyan Arab Jamahiriya (Libya), the Libyan External Security Organization (LESO), Muammar Qadhafi in his official capacity as Libya's Head of State, and six other high-ranking Libyan government officials in their personal capacities."\(^ {203}\) Plaintiffs filed claims under the state sponsored terrorism exception of the Foreign Sovereign Immunities Act,\(^ {204}\) as well as state and federal common law causes of action.\(^ {205}\)

Plaintiffs moved for partial summary judgment, seeking a judgment of liability against all defendants.\(^ {206}\) Defendants opposed plaintiffs' motion and also moved for summary judgment.\(^ {207}\)

The court noted that there was no dispute that the court had jurisdiction to hear plaintiffs' claims against Libya and LESO, as Libya's sovereign immunity was waived because of the state-sponsored terrorism exception.\(^ {208}\) The court then turned to the claims against the individual defendants in their personal capacities.\(^ {209}\) Defendants argued that these claims should be dismissed because they were "nothing more than a 'redundant' suit against Libya."\(^ {210}\) The court rejected this assertion, noting that while naming both the government and the employees in their official capacities would be redundant and inefficient, here

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\(^{200}\) No. 02-02026 (HHK), 2006 U.S. Dist. LEXIS 58033 (D.D.C. May 11, 2006).

\(^{201}\) *Id.* at *5*.

\(^{202}\) *Id.*

\(^{203}\) *Id.* at *3*.

\(^{204}\) *Id.* at *3*-4.

\(^{205}\) *Id.* at *4*.

\(^{206}\) *Id.*

\(^{207}\) *Id.*

\(^{208}\) *Id.* at *19*.

\(^{209}\) *Id.* at *20*.

\(^{210}\) *Id.* at *21* (quoting Holland v. Islamic Republic of Iran, No. 01-1924, 2005 U.S. Dist. LEXIS 40254, *35*-36 (D.D.C. Oct. 31, 2005)).
the defendants were named in their personal capacity.\textsuperscript{211} The court explained that "the difference between official-capacity and personal-capacity suits turns on 'the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury.'"\textsuperscript{212} The court also noted that the state-sponsored terrorism exception would be nullified if the court held an individual defendant could not be held personally liable.\textsuperscript{213}

The court next considered whether the individual defendants could be held liable under the state-sponsored terrorism exception, the Torture Victims Protection Act (TVPA), and 18 U.S.C. § 2333(a).\textsuperscript{214} First, the court considered liability under the state-sponsored terrorism exception and found that each of the three prerequisites for imposing liability had been satisfied.\textsuperscript{215} The court also found that the individual defendants could be held liable for violating the TVPA, which provides, in part, that:

an individual who, under actual or apparent authority, or color of law, of any foreign nation . . . (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.\textsuperscript{216}

Here, neither side contested that the individual defendants acted under the authority of the Libyan state when they assisted with the bombing.\textsuperscript{217} The undisputed evidence established that the actions of the individual defendants were calculated to lead to the death of those aboard the flight, including the seven Americans.\textsuperscript{218} Accordingly, the defendants were held liable under the TVPA.\textsuperscript{219}

The court next considered whether defendants were liable under 18 U.S.C. § 2333(a), which provides that:

[a]ny national of the United States injured in his or her person, property or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefore in any appropriate district court of the United States and shall re-

\textsuperscript{211} Id. at *21–22 (citing Robinson v. Dist. of Columbia, 403 F. Supp. 2d 39, 49 (D.D.C. 2005)).
\textsuperscript{212} Id. at *23 (quoting Hafer v. Melo, 502 U.S. 21, 26 (1991)).
\textsuperscript{213} Id. at *25.
\textsuperscript{214} Id. at *30.
\textsuperscript{215} Id. at *31.
\textsuperscript{216} Id. at *31–32 (quoting 28 U.S.C. § 1350 (2006)).
\textsuperscript{217} Id. at *32.
\textsuperscript{218} Id.
\textsuperscript{219} Id. at *33.
cover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.\textsuperscript{220}

The court concluded that the bombing satisfied the statutory definition of "international terrorism," as all of the definitional criteria were met.\textsuperscript{221} Summary judgment was granted on this issue.\textsuperscript{222}

The court then turned to the issue of whether Libya and LESO could be held liable under the state-sponsored terrorism exception and the TVPA.\textsuperscript{223} The court agreed with prior decisions from the D.C. Circuit that Congress did not intend to create a cause of action against foreign states because the explicit language of those statutes and their legislative history shows a specific intention to limit their applicability to suits against individuals, not foreign states.\textsuperscript{224}

The court also rejected plaintiffs' argument that federal common law provided a viable cause of action against defendants.\textsuperscript{225} The court rejected this argument, citing \textit{Bettis v. Islamic Republic of Iran}, which declined to apply federal common law in FSIA cases.\textsuperscript{226} Therefore, the court granted summary judgment in favor of defendants on plaintiffs' federal common law claims.\textsuperscript{227}

Finally, the court considered whether the defendants could be held liable under state statutory and common law causes of action, including wrongful death and intentional infliction of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{220} Id. at *33 (quoting 8 U.S.C. § 2333(a) (2006)).
\item \textsuperscript{221} Id. at *35. "International terrorism" is defined as activities that:
\begin{itemize}
\item (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any state;
\item (B) appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by assassination or kidnapping; and
\item (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.
\end{itemize}
\item \textsuperscript{18 U.S.C. § 12331(1) (2006).}
\item \textsuperscript{222} Pugh, 2006 U.S. Dist. LEXIS 58033, at *35.
\item \textsuperscript{223} Id.
\item \textsuperscript{224} Id. at *37–40.
\item \textsuperscript{225} Id. at *42–43.
\item \textsuperscript{226} Id. at *43 (citing Bettis v. Islamic Republic of Iran, 315 F.3d 325, 333 (D.C. Cir. 2003)).
\item \textsuperscript{227} Id. at *48.
\end{itemize}
\end{footnotesize}
emotional distress. The court found that plaintiffs here did not identify a particular cause of action arising under a specific state’s law. In essence, plaintiffs asked the court to disregard any choice of law analysis and find nationwide liability. The court held that plaintiffs were required to amend their complaint and allege their state law claims with particularity in order to proceed with those claims.

C. Baker v. Great Socialist People’s Libyan Arab Jamahiriya

Plaintiffs sued under the state sponsored terrorism exception to the FSIA for claims stemming from the hijacking of Egypt Air Flight 648. Three terrorists hijacked the plane using weapons provided by Libyan government agents, which had been transported in Libyan diplomatic pouches. After the plane landed, the hijackers brought each of the three American passengers to the front of the plane, shot each of them in the head and then threw them from the plane. One of the Americans died from her injuries, one was left with permanent and severe brain damage, and the other recovered from his injuries.

Plaintiffs—the American victim that recovered and representatives of the other two victims—filed suit seeking recovery against all defendants for battery, assault, false imprisonment, wrongful death, intentional infliction of emotional distress, civil conspiracy, and aiding and abetting. Defendants were the Great Socialist People’s Libyan Arab Jamahiriya (Libya), Libyan Internal Security (LISO), Libyan External Security (LESO), the Syrian Arab Republic (Syria), Syrian Air Force Intelligence, and various individual defendants.

Defendants sought to dismiss plaintiffs’ complaint on the grounds that FSIA claims require more exacting pleading standards than traditional claims and that plaintiffs did not meet

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228 Id. at *49.
229 Id. at *50.
230 Id.
231 Id. at *53.
233 Id. at *2.
234 Id. at *4.
235 Id. at *6.
236 Id. at *6–7, nn.5–7.
237 Id. at *9–10.
238 Id. at *3, n.2.
this burden.\textsuperscript{239} The court rejected this argument, noting that federal courts may not create pleading requirements that are greater than those found in the Federal Rules of Civil Procedure ("Federal Rules").\textsuperscript{240} The FSIA requires only that plaintiffs' complaint provide defendants with fair notice of the claims, as well as the basis for the claims, and the court found that the complaint met this requirement.\textsuperscript{241}

Defendants also argued for dismissal of plaintiffs' complaint with regard to the state law claims because plaintiffs did not identify which states' laws applied.\textsuperscript{242} The court rejected this argument, noting that neither the Federal Rules nor case law requires plaintiffs to plead legal theories in their complaint.\textsuperscript{243}

The court also denied defendants' motion to dismiss, finding that defendants did not meet the standard of showing that plaintiffs were unable to recover under any applicable law.\textsuperscript{244} Defendants' motion related only to fair notice, arguing that the amended complaint needed to specify the sources of law on which plaintiffs intended to rely.\textsuperscript{245} The court found that the amended complaint gave fair notice of plaintiffs' claims, including the sources of law upon which the claims were based.\textsuperscript{246} Defendants' mere assertion that plaintiffs' claims had no basis in law was not enough to warrant dismissal.\textsuperscript{247}

IV. AIRPORT AND AIRWAYS IMPROVEMENT ACT

The Airport and Airways Improvement Act established the Airport and Airway Trust Fund from which the Secretary of Transportation may make project grants "to maintain a safe and efficient nationwide system of public use airports that meets the present and future needs of civil aeronautics."\textsuperscript{248}

\textsuperscript{239} Id. at *13.
\textsuperscript{240} Id. at *11.
\textsuperscript{241} Id. at *15 (quoting Sparrow v. United Air Lines, Inc., 216 F.3d 1111, 1118 (D.C. Cir. 2000)).
\textsuperscript{242} Id. at *16.
\textsuperscript{243} Id. at *17 (citing Hanson v. Hoffman, 628 F.2d 42, 53 (D.C. Cir. 1980)).
\textsuperscript{244} Id. at *17.
\textsuperscript{245} Id. at *17-18.
\textsuperscript{246} Id. at *19.
\textsuperscript{247} Id. at *18.
\textsuperscript{248} 49 U.S.C.A. § 47104(a) (West 2007).
A. **Mineta v. Board of County Commissioners of the County of Delaware**

This case involved a grant agreement between the Monkey Island Development Authority (MIDA) and the Federal Aviation Administration (FAA), pursuant to which the FAA disbursed funds to MIDA to acquire land for an airport in Delaware County, Oklahoma. The County of Delaware (the "County") co-signed the grant agreement as a sponsor, as required by the FAA. The grant agreement was procured pursuant to the Airport and Airway Trust Fund, and the FAA and both sponsors agreed to the use of grant funds. In particular, the grant agreement restricted alienability of any property the sponsors intended to purchase with the funding. If the land was no longer used for airport purposes, the sponsors agreed to dispose of such land at fair market value or make available to the FAA an "amount equal to the United States' proportionate share of the fair market value of the land."

MIDA leased airport property purchased with the federal grant funds to private parties, who subsequently sued MIDA for violations of the Racketeer Influenced and Corrupt Organization Act and other claims. The parties settled this suit and requested that the court enter judgment against MIDA. Per the settlement, the judgment was enforceable only against airport property and MIDA was required to convey ownership of its real property to the private parties. However, the settlement did not mention or list MIDA's grant agreements with the FAA, and MIDA did not acquire permission from the FAA to transfer ownership of the property. Subsequently, the FAA argued that under federal law, a state law judgment creditor may not execute against property which was acquired with a federal grant. The creditors filed a motion to dismiss arguing that

250 Id. at *2–3.
251 Id. at *2.
252 Id. at *3.
253 Id. at *5.
254 Id. at *6.
255 Id. at *7.
256 Id.
257 Id.
258 Id. at *7–8.
259 Id. at *8.
260 Id. at *9.
the federal government exceeded its authority under the Spending Clause of the United States Constitution by attempting to regulate the sale of property following attachment by a state judgment creditor. The creditors argued that "allowing the FAA to interfere with the proposed sale would effectively prevent any judgment creditor from enforcing a judgment against MIDA. . . ."

The court found that the actions of the FAA, creating legitimate restrictions on how the federal grants were used, were within the scope of the Spending Clause. The court explained that the Spending Clause "grants the federal government broad authority to spend for the general welfare and condition the receipt of federal funds on compliance with federal law." The Supreme Court has expressly permitted Congress to condition acceptance of federal funds on compliance with a federal program if the conditions bear some relationship to the purpose of the federal spending. Additionally, the Supreme Court has recognized that Congress has the authority to require that states spend federal funds as Congress intended.

The court rejected the creditors' argument that the FAA "may enforce grant provisions only against parties to the grant agreement." The court noted that this conclusion would mean that the FAA could not dictate how to spend federal funds. Further, the court found it was well established that property purchased with federal grant funds is treated as federal property and that federal property, even in the hands of another party, is not subject to attachment by a judgment creditor. Here, the FAA had expressly notified MIDA of the conditions to the grant agreements. The conditions bore a reasonable relationship to the purpose of the grant in that they ensured that the federal funds would be spent for airport purposes. Moreover, the grant agreement specifically stated "the FAA [had] a right to claim its proportionate share of funds from any sale of Airport

261 Id. at *10.
262 Id. at *13.
263 Id.
264 Id. at *14 (citing Helvering v. Davis, 301 U.S. 619, 639 (1937)).
265 Id. at *17 (citing New York v. United States, 505 U.S. 144, 167 (1992)).
266 Id. at *19 (citing Sabri v. United States, 541 U.S. 600, 605 (2004)).
267 Id. at *19–20.
268 Id. at *20.
269 Id. at *21 (citations omitted).
270 Id. at *21.
271 Id. at *22.
property if the property is no longer used for airport purposes." The creditors were aware when they entered into an agreement with MIDA that "federal oversight and intervention was a legitimate possibility." The court concluded that the "FAA [was] clearly within its constitutional authority to protect federal property from judgment creditors."

The creditors also argued that the FAA was limited to money damages in Spending Clause litigation and that the FAA could not prevent the creditors from selling the MIDA property. The court rejected this argument based on United States Supreme Court precedent holding that the federal government may seek both contract remedies and statutory remedies. Therefore, the FAA had authority to sell the airport property if MIDA breached the grant agreement.

After resolving the creditors' motion to dismiss, the court turned to the government's motion for summary judgment against MIDA and the County. The court found that there was no dispute that MIDA violated the grant agreement. Liability was therefore conclusively established. The court also found that the County was liable for damages as a co-sponsor of the grant.

V. AIR CARRIER ACCESS ACT OF 1986

The Air Carrier Access Act provides, among other things, that a carrier may not discriminate against an "otherwise qualified" individual because of a physical or mental impairment.

A. Chipps v. Continental Airlines, Inc.

Plaintiff, who was disabled and required the use of a wheelchair, purchased a ticket from Continental Airlines ("Continental") for travel from Wilkes-Barre/Scranton International

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272 Id.
273 Id. at *22–23.
274 Id. at *23.
275 Id.
276 Id. at *23–24 (citing Barnes v. Gorman, 536 U.S. 181, 187 (2002)).
277 Id. at *24 (citing 49 U.S.C. § 47107 (2006)).
278 Id. at *25.
279 Id. at *28.
280 Id. at *28–29.
281 See id. at *29–39.
Airport to Kansas City, Missouri. When plaintiff purchased his ticket, he informed Continental that he was disabled and required the use of a wheelchair. Subsequently, plaintiff confirmed his travel plans and confirmed wheelchair accessibility. When plaintiff arrived at the airport, he was informed that he would not be allowed to board as Continental was not equipped to assist him. Plaintiff was also told that he would not be allowed to travel on any Continental flight without a traveling companion.

Plaintiff commenced an action against Continental alleging violations of the Air Carrier Access Act of 1986 (ACAA) and for intentional infliction of emotional distress. Defendant moved to dismiss the complaint for failure to state a claim upon which relief may be granted. Specifically, defendant contended that the ACAA does not provide a private right of action and that there was no allegation of conduct sufficient to sustain an intentional infliction of emotional distress claim.

The court first considered plaintiff's ACAA claim, noting that the ACAA provides that "a carrier may not discriminate against an 'otherwise qualified' individual because of a disability." The court explained that in Alexander v. Sandoval, the United States Supreme Court set forth the requirement that a "private right of action to enforce federal law must be created by Congress with intent to be determined by examining the statute's text and structure." Although the Third Circuit Court of Appeals had not addressed the question of whether the ACAA presented a private right of action, the two circuit courts that had decided the issue determined that there was no private right of action under the statute. The court agreed, finding that because the statute permitted an individual to complain to the Secretary of Transportation, provided an appeals process,

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284 Id. at *2.
285 Id.
286 Id. at *3.
287 Id. at *4.
288 Id.
289 Id. at *5.
290 Id.
291 Id.
292 Id. at *7 (citing 49 U.S.C. § 41705 (2006)).
293 Id. at *7-8 (citing Alexander v. Sandoval, 532 U.S. 275, 276-77 (2001)).
294 Id. at *9 (citing Boswell v. Skywest Airlines, Inc., 361 F.3d 1263, 1269-70 (10th Cir. 2004); Love v. Delta Air Lines, 310 F.3d 1347, 1357 (11th Cir. 2002)).
295 Id. at *10 (citing Boswell, 361 F.3d at 1269-70; Love, 310 F.3d at 1357).
and provided no express provision of a private right of action, plaintiff's ACAA claim should be dismissed.

The court then turned to plaintiff's intentional infliction of emotional distress claim. Jurisdiction over the emotional distress claim was based upon supplemental jurisdiction pursuant to 28 U.S.C. § 1367. The court noted that "[o]nce a district court has dismissed all claims over which it has original jurisdiction, it may then decline to exercise supplemental jurisdiction over the remaining claims." The court considered the relevant factors and declined to assert supplemental jurisdiction over plaintiff's emotional distress claims. The court dismissed the complaint without prejudice and left plaintiff free to pursue the emotional distress claims in state court.

VI. DISCRIMINATION IN BOARDING

Pursuant to 42 U.S.C. §1981:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The term "make and enforce contracts" includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

A. THOMPSON v. SOUTHWEST AIRLINES CO.

Plaintiff, an African-American woman, sued Southwest Airlines Co. ("Southwest") for damages arising from Southwest's insistence that she purchase an additional seat under its

296 Id. at *10.
297 Id. at *14.
298 Id. at *14–15.
299 Id. at *15 (citing 28 U.S.C. § 1367 (2006)).
300 Id. (citing 28 U.S.C. § 1367(c)).
301 Id. at *16.
302 Id.
"customer of size" policy. Plaintiff alleged damages under New Hampshire and federal statutes, as well as emotional distress damages under state common law.

Plaintiff was approximately five feet, eight inches tall and weighed between 300 and 330 pounds at the time of the incident. She went to the Southwest customer service desk at Manchester Airport, was issued a ticket and told to go directly to the gate and board the plane. Although many Southwest employees had the opportunity to assess the passenger in relation to Southwest's "customer of size" policy, no one said anything until she was already boarded and seated on the flight.

After plaintiff was seated, the Customer Service Supervisor boarded the plane and asked plaintiff to accompany him back onto the loading bridge. He then told plaintiff that "for her comfort and safety," she needed to purchase a second seat. She told the supervisors that she would not purchase a second seat; she re-boarded the plane and sat in her assigned seat with the armrest down. Thereafter she was asked to disembark and, when she refused, she was escorted off the plane by security. Plaintiff's ticket was refunded and she later boarded a flight on another airline.

Southwest's "customer of size" policy requires certain passengers to purchase a second seat for their own comfort and safety, as well as for that of their fellow passengers. The court noted that the policy uses the armrest between the seats as a gauge of whether a passenger is required to purchase another seat. If a passenger cannot lower the armrest, they are considered a "customer of size." Notably, the policy requires that Southwest address "customer of size" issues at the earliest possible point of contact with passengers who may qualify.

306 Id. at *3.
307 See id. at *1.
308 Id. at *3.
309 Id. at *3-4.
310 Id. at *4-5.
311 Id. at *8.
312 Id.
313 Id. at *9.
314 Id. at *10.
315 Id. at *12.
316 Id. at *8.
317 Id. at *5.
318 Id. at *6.
319 Id. at *8.
does not require passengers to purchase a second seat in mid-
trip or once they have boarded a flight.\textsuperscript{320}

The court first considered plaintiff's claim for intentional dis-
 crimination under 42 U.S.C. §1981.\textsuperscript{321} Plaintiff alleged that be-
cause she could buckle her seatbelt and lower her armrest, she
was not a "customer of size,"\textsuperscript{322} and, if she was a "customer of
size," Southwest's policy did not require her to buy a second seat
after she had boarded the plane.\textsuperscript{323} Therefore, plaintiff argued
that the real reason the supervisors asked her to purchase a sec-
ond seat was her race.\textsuperscript{324}

The court adopted the Sixth Circuit's test for a prima facie
case of discrimination, set forth in Christian v. Wal-Mart Stores,
Inc.\textsuperscript{325} Under that test, plaintiff must prove: "(1) [she] is a mem-
ber of a protected class; (2) [she] sought to make or enforce a
contract for services ordinarily provided by the defendant; and
(3) [she] was denied the right to enter into or enjoy the benefits
or privileges of the contractual relationship."\textsuperscript{326} The Thompson
court found that plaintiff produced sufficient evidence to estab-
lish all three elements.\textsuperscript{327}

The court then found that defendant had ""articulated a legiti-
mate, nondiscriminatory reason for its action.""\textsuperscript{328} Defendant
contended that its agents were enforcing the "customer of size"
policy, which qualifies as a legitimate reason for their actions.\textsuperscript{329}
The court then shifted the burden back onto plaintiff to show
that the defendant's proffered reason was a pretext.\textsuperscript{330} The
court held that a rational factfinder could have reasonably con-
cluded that Southwest's explanation for the behavior of the su-
pervisors was "unworthy of credence."\textsuperscript{331} The court then found
a jury could conclude that the supervisors intentionally misap-

\textsuperscript{320} Id.
\textsuperscript{321} Id. at *14.
\textsuperscript{322} Id. at *23.
\textsuperscript{323} Id. at *8.
\textsuperscript{324} Id. at *14.
\textsuperscript{325} Id. at *16–17 (quoting Christian v. Wal-Mart Stores, Inc., 252 F.3d 862, 872
(6th Cir. 2001)).
\textsuperscript{326} Id. at *17.
\textsuperscript{327} Id. at *18–20.
\textsuperscript{328} Id. at *20 (quoting Straughn v. Delta Air Lines, Inc., 250 F.3d 31, 39 (1st
Cir. 2001)).
\textsuperscript{329} Id. at *20.
\textsuperscript{330} Id. at *20–21 (citing Che v. Mass. Bay Transp. Auth., 342 F.3d 31, 39 (1st
Cir. 2003)).
\textsuperscript{331} Id.
plied the policy to plaintiff and that racial animus is a fair explanation for the conduct. Therefore, summary judgment as to defendant's § 1981 discrimination claim was denied.

The court then turned to plaintiff’s remaining claims. The court found that her state law discrimination claims failed because the New Hampshire statute at issue did not define air travel as a “public accommodation.” Additionally, plaintiff's emotional distress claims failed because no reasonable jury could find defendant liable for intentional infliction of emotional distress as there was no outrageous or indecent conduct on the part of the defendant, even when viewing the facts in the light most favorable to plaintiff.

VII. AIRLINE DeregULATION ACT

The Airline Deregulation Act ("ADA") preempts state based claims if they relate to price, route, or service of an air carrier:

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 price, route, or service of an air carrier that may provide air transportation under this subpart.


Plaintiffs sought class certification in an action against various airline defendants and the Federal Aviation Administration. Plaintiffs asserted that "the airline industry has acted unlawfully in its handling of various taxes, fees and charges included in the cost of non-refundable airline tickets." When a non-refundable ticket is purchased, passengers pay various government fees. When the tickets are changed, cancelled, or otherwise not used, the airlines allegedly retain some or all of the govern-

332 Id. at *23.
333 Id. at *25.
334 Id. at *26–27.
335 Id. at *29.
339 Id. at *2.
340 Id. at *3.
341 Id.
Plaintiffs argued that "such retention of fees . . . is unlawful and against public policy."\textsuperscript{343}

Defendants moved to dismiss on the grounds that plaintiffs' claims were preempted by the Airline Deregulation Act (ADA) of 1978, or in the alternative, that the claims were not viable under state law.\textsuperscript{344} The court noted that in \textit{Morales v. Trans World Airlines},\textsuperscript{345} the United States Supreme Court considered the "relating to" language of the ADA's preemption clause.\textsuperscript{346} The Court indicated that "preemption should apply where the challenged law or action has a 'forbidden significant effect upon' fares, routes or services."\textsuperscript{347} The Supreme Court also concluded, in \textit{American Airlines v. Wolens}, that although states may not enact their own regulations regarding rates, routes, or services, they may enact laws that afford relief when it is proven that the airline stipulates to and then dishonors a contract term.\textsuperscript{348} The \textit{Wolens} court noted that this distinction further limits courts' consideration to the parties' agreement, with no consideration of external state laws or policies.\textsuperscript{349}

Applying the Supreme Court's holding to this case, the court found that plaintiffs' claims were preempted because enforcing these state laws would have serious effects on the airline industry, most notably in the realm of fares and competition.\textsuperscript{350} The court concluded that "it is undeniable that, should Class [p]laintiffs succeed in enforcing their claims under Massachusetts law, airline prices and services will be more than marginally affected and the ADA's deregulatory purpose frustrated."\textsuperscript{351} Moreover, "an award of permanent injunctive relief under Massachusetts law in this case would either compel airlines to change their practices nationally or impose different treatment upon Massachusetts passengers."\textsuperscript{352}

\textsuperscript{342} \textit{Id.}
\textsuperscript{343} \textit{Id.}
\textsuperscript{344} \textit{Id.} at *6.
\textsuperscript{345} 504 U.S. 374 (1992).
\textsuperscript{346} Harrington, 2006 U.S. Dist. LEXIS 8144, at *8 (citing \textit{Morales}, 504 U.S. at 384).
\textsuperscript{347} \textit{Id.} (citing \textit{Morales}, 504 U.S. at 388).
\textsuperscript{348} \textit{Id.} at *9 (quoting Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 232-33 (1995)).
\textsuperscript{349} \textit{Id.} at *9–10 (quoting \textit{Wolens}, 513 U.S. at 232-33).
\textsuperscript{350} \textit{Id.} at *11.
\textsuperscript{351} \textit{Id.} at *12.
\textsuperscript{352} \textit{Id.}
The court also rejected plaintiffs' argument that their claims were preserved under the Supreme Court's ruling in *Wolens*.

The court found that there were no viable contract claims asserted in this case. Plaintiffs could not preserve their claims by asserting that there were undiscovered contracts that supported their allegations. Further, plaintiffs' argument that the withholding of the government fees constituted a monetary penalty that was unexpressed by the word "non-refundable" failed under the most minimal scrutiny.

**B. *WEISS V. EL AL ISRAEL AIRLINES***

The facts of this case are described in the case summary relative to the court's prior decision, which is located in section IA., *Warsaw and Montreal Conventions*. This decision involved plaintiffs' motion for reconsideration of the court's dismissal of plaintiffs' tort cause of action on the grounds that it was preempted by the ADA. In their motion for reconsideration, plaintiffs claimed that because they never actually flew on El Al, the two days spent in the airport terminal were not related to any airline services.

The court noted that neither the United States Supreme Court nor the Second Circuit has provided a definition of "airline services," but that the district courts have developed two distinct methods for making this determination. The first line of cases, exemplified by *Trinidad v. American Airlines, Inc.*, focuses on whether the actions by airline personnel are "commonplace and ordinary, and relate directly to travel." If so, the actions are considered airline services and are preempted.

The second approach to ADA preemption was set forth in *Rombom v. United Air Lines, Inc.* The first prong of the *Rombom* test requires a determination of whether the activity is a ser-

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353 Id. at *13.
354 Id.
355 Id. at *14.
356 Id. at *14–15.
358 Id. at 357.
359 Id. at 358.
360 Id. at 359.
362 Id. at 360.
363 Id. at 361 (citing Rombom v. United Air Lines, Inc., 867 F. Supp. 214, 221 (S.D.N.Y. 1994)).
vice.\textsuperscript{364} If so, then the court must "ascertain whether the claim affects the airline service directly or tenuously, remotely or peripherally;" thus, the court must decide "whether the underlying tortious conduct was reasonably necessary to the provision of the service."\textsuperscript{365}

Here, the court found that plaintiffs' claims were preempted under either line of cases, and therefore declined to either pick an approach or combine the two approaches.\textsuperscript{366}

VIII. AIR TRANSPORTATION SAFETY AND SYSTEM STABILIZATION ACT

Shortly after September 11, 2001, Congress enacted the Air Transportation Safety and System Stabilization Act (ATSSSA).\textsuperscript{367} The ATSSSA created the well-known Victim Compensation Fund to provide no-fault compensation to victims of the attacks, and limited the involved air carriers' liability to the limits of their insurance coverage.\textsuperscript{368} Part of the ATSSSA also directed the President to compensate air carriers up to five billion dollars, in the aggregate, for "direct losses" caused by the government's orders ceasing air traffic, as well as for "incremental losses" directly caused by the terrorist attacks of September 11, 2001.\textsuperscript{369} The ATSSSA also conferred "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."\textsuperscript{370}

A. Federal Express Corp. v. Department of Transportation\textsuperscript{371}

In conjunction with the applications made by airlines for compensation under the ATSSSA for losses caused by the terrorist attacks, the ATSSSA provided that the alleged losses were to be proven "to the satisfaction of the President."\textsuperscript{372} In accordance

\textsuperscript{364} Id. (quoting Galbut v. Am. Airlines, Inc., 27 F. Supp. 2d 146, 152 (E.D.N.Y. 1997)).
\textsuperscript{365} Id. (quoting Galbut, 27 F. Supp. 2d at 152).
\textsuperscript{366} Id. at 359.
\textsuperscript{367} Fed. Express Corp. v. Dep't of Transp., 434 F.3d 597, 598 (D.C. Cir. 2006).
\textsuperscript{368} In re World Trade Ctr. Disaster Site Litig., 456 F. Supp. 2d 520, 542 (S.D.N.Y. 2006).
\textsuperscript{369} 49 U.S.C.A. § 40101 (West 2007), Fed. Express, 434 F.3d at 598.
\textsuperscript{371} 434 F.3d 597 (D.C. Cir. 2006).
\textsuperscript{372} Id. at 598.
with that directive, the Secretary of the Department of Transportation (DOT) promulgated a rule governing submission of requests for compensation under the ATSSSA. In addition to assuming that airlines would experience a reduction in revenue, the regulations forecasted situations where airlines’ expenses would also decrease. To address this situation, the DOT promulgated the “cost savings rule,” which provides:

The Department generally does not accept claims by air carriers that cost savings should be excluded from the calculation of incurred losses. Consequently, the Department will generally not allow such claims to be used in a way that has the effect of increasing the compensation for which an air carrier is eligible.

In a petition to the District of Columbia Circuit Court of Appeals, Federal Express (FedEx) challenged the “cost savings rule” promulgated by the DOT as contrary to the ATSSSA and also challenged the DOT’s rejection of FedEx’s financial statements as arbitrary and capricious under the Administrative Procedure Act (APA). The court denied both of FedEx’s challenges.

First, the court held that the DOT rule is reasonable and rational, given the statutory objectives of the ATSSSA and for the reasons stated in the rulemaking. The rule, according to the court, is reasonable since it effectively and efficiently implemented the ATSSSA’s goal of compensating air carriers. In fact, the system put in place by the DOT ensured that all air carriers, including FedEx, initially received approximately fifty percent of their estimated losses, and installment payments were made later to distribute the rest of their entitled compensation. Some of the reasons supporting the cost savings rule included that cost reductions unrelated to September 11 were

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373 Id.
374 Id. at 599 (citing Procedures for Compensation of Air Carriers, 67 Fed. Reg. 18,468, 18,472 (Apr. 16, 2002)).
375 Id. (citing 14 C.F.R. § 330.39(b) (2005)).
376 Id. at 598. FedEx’s previous challenge to the DOT’s ruling was held to be premature because a “final decision” had not been issued by the DOT regarding FedEx’s compensation claims. See Fed. Express Corp. v. Mineta, 373 F.3d 112, 119–20 (D.C. Cir. 2004) (“FedEx I”).
377 Fed. Express, 434 F.3d at 598.
379 Id.
380 Id. at 599 (citing Procedures for Compensation of Air Carriers, 66 Fed. Reg. 54,616, 54,617 (Oct. 29, 2001) (to be codified at 14 C.F.R. pt. 330)).
expected to be incorporated in pre-September 11 forecasts, and thus were accounted for already.\textsuperscript{381} The rule reduced an air carrier's losses, thereby preventing air carriers from receiving unwarranted increases in compensation.\textsuperscript{382}

Second, the court held that the rejection of FedEx's financial statements was not arbitrary and capricious under the APA.\textsuperscript{383} The records were held under seal and were not explicitly discussed by the court, but the court noted that the affidavits accompanying the statements, as well as the statements themselves, "left significant gaps in relevant information or contained significant inconsistencies and weaknesses that gave the Secretary reasonable grounds to deny further compensation to FedEx under the Act."\textsuperscript{384} Since the only requirement under the ATSSSA was that the President, and his delegates, were to be "satisfied," the DOT was entitled to significant deference.\textsuperscript{385} FedEx was required to satisfy the DOT by providing adequate statements and affidavits.\textsuperscript{386}

\section*{IX. FEDERAL TORT CLAIMS ACT}

Traditionally, the principle of sovereign immunity insulates the United States government from suits for money damages. However, the Federal Tort Claims Act (FTCA) authorizes suits against the government for money damages 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."\textsuperscript{387} The government may be held liable for negligence "in the same manner and to the same extent as a private individual under like circumstances."\textsuperscript{388}

\begin{footnotes}
\footnotetext[381]{\textit{Id.} (citing Procedures for Compensation of Air Carriers, \textit{supra} note 379, at 18,473).}
\footnotetext[382]{\textit{Id.}}
\footnotetext[383]{\textit{Id.} at 603.}
\footnotetext[384]{\textit{Id.}}
\footnotetext[385]{\textit{Id.}}
\footnotetext[386]{\textit{Id.}}
\footnotetext[387]{28 U.S.C.A. § 1346(b) (West 2006).}
\footnotetext[388]{\textit{Id.}}
\end{footnotes}
A. Discretionary Function Exception

1. Bollinger v. United States

Plaintiffs sued the United States, specifically, the Federal Aviation Administration (FAA), for claims arising out of the crash of an "amateur-built experimental aircraft." Plaintiffs claimed that the accident occurred as a "direct and proximate result of the negligent acts and omissions of the FAA inspector during the airworthiness inspection and the issuance of the special airworthiness certificate." The aircraft was constructed by plaintiffs from an aircraft kit with the assistance of an Experimental Aircraft Association technical counselor. Plaintiffs added a fuel injection system, including a purge valve that was inappropriate for use in the aircraft. It was undisputed that the malfunction of the purge valve was the cause of the accident. Plaintiffs claimed that they did not have sufficient expertise to recognize the defect, but that it would be apparent to any FAA inspector. An FAA airworthiness inspection was conducted on the aircraft approximately one and one-half years prior to the crash. The examination included the engine and purge valve. The FAA inspector certified that the aircraft met the requirements for airworthiness. Subsequently, the owners conducted the FAA required yearly inspections and no problems were found.

Defendant filed a motion to dismiss, asserting that the lawsuit was barred by the discretionary function exception of the FTCA. The court noted at the outset that there is no waiver of immunity under the FTCA for "claims based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government." The court then articulated

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390 Id. at *2.
391 Id. at *3.
392 Id.
393 Id. at *5.
394 Id. at *5.
395 Id. at *4.
396 Id.
397 Id. at *4.
398 Id.
399 Id.
400 Id. at *2–3.
401 Id. at *6 (citing 28 U.S.C. § 2680(a) (2006)).
the two-part test governing application of the discretionary function exception.\textsuperscript{402} First, the challenged conduct must "involve an element of judgment or choice" and second, the "[j]udgment [must be] of the kind that the discretionary function exception was designed to shield."\textsuperscript{403}

Applying the test, the court found that the FAA inspector's actions were protected by the discretionary function exception.\textsuperscript{404} The court noted that, although "the FAA is authorized by statute to establish safety regulations, and minimum standards for the design, construction, and maintenance and inspection of the aircraft," there are "no published airworthiness standards for amateur-built experimental aircraft."\textsuperscript{405} Moreover, "[r]esponsibility for maintaining the airworthiness of an aircraft rests with the owner."\textsuperscript{406} The court relied heavily on the Supreme Court's decision in \textit{United States v. Varig Airlines},\textsuperscript{407} which held that the "discretionary function exception to the [FTCA] precluded tort actions based on the [FAA's] alleged negligence in failing to check certain specific items in the course of certifying certain aircraft for use in commercial aviation."\textsuperscript{408} The court refused to distinguish the present case from \textit{Varig}, finding the owner's responsibility to maintain the airworthiness of experimental aircraft analogous to the airline's responsibility to inspect commercial aircraft.\textsuperscript{409} Accordingly, the discretionary function exception applied and plaintiffs' claims were dismissed.\textsuperscript{410}

\section*{B. NEGLIGENCE}

\subsection*{1. \textit{Barnes v. United States}}\textsuperscript{411}

Plaintiff sued the United States under the Federal Tort Claims Act for damages due to a wrist injury she sustained when preparing to enter airport security.\textsuperscript{412} She claimed that Transportation

\footnotesize
\begin{itemize}
  \item \textsuperscript{402} \textit{Id.} at *7.
  \item \textsuperscript{403} \textit{Id.} (quoting Berkovitz v. United States, 486 U.S. 531, 536 (1988)).
  \item \textsuperscript{404} \textit{Id.} at *16 (quoting \textit{In re Glacier Bay}, 71 F.3d 1447, 1451 (9th Cir. 1995)).
  \item \textsuperscript{405} \textit{Id.} at *9–10 (citing 49 U.S.C. § 44701(a)(1) (2006); 14 C.F.R. § 91.403(a) (2006)).
  \item \textsuperscript{406} \textit{Id.} at *10 (quoting 14 C.F.R. § 91.403(a) (2006)).
  \item \textsuperscript{407} 467 U.S. 797 (1984).
  \item \textsuperscript{408} \textit{Bollinger}, 2006 U.S. Dist. LEXIS 84308, at *11–12 (citing \textit{Varig Airlines}, 467 U.S. at 816).
  \item \textsuperscript{409} \textit{Id.} at *13.
  \item \textsuperscript{410} \textit{Id.} at *16.
  \item \textsuperscript{411} No. 3:04-CV-489, 2006 U.S. Dist. LEXIS 49629 (E.D. Tenn. July 18, 2006).
  \item \textsuperscript{412} \textit{Id.} at *1.
\end{itemize}
Safety Administration (TSA) security officers required her to remove her shoes before walking through a metal detector and that because no chair was provided, she lost her balance and fell.\textsuperscript{413} The court granted the TSA’s motion for summary judgment on the grounds that (1) there was no duty to provide plaintiff with a chair; (2) there was no evidence that the cause in fact of plaintiff’s injuries was the absence of a chair; and (3) there was no evidence that the absence of a chair proximately caused plaintiff’s injuries.\textsuperscript{414}

The court noted that the question was one of duty, specifically whether “there was any showing from which it can be said that the defendants reasonably knew or should have known of the probability of an occurrence such as the one which caused the plaintiff’s injuries.”\textsuperscript{415} The court found that it was not reasonably foreseeable that plaintiff would fall and injure herself while trying to remove her shoes at the security checkpoint.\textsuperscript{416} The TSA was not aware of any similar previous incidents, although thousands of travelers passed through the security checkpoint daily.\textsuperscript{417} Moreover, the court noted that there were “no facts that would have alerted TSA that this particular plaintiff might be at risk for falling.”\textsuperscript{418} Accordingly, there was no duty to provide plaintiff with a chair to facilitate the removal of her shoes.\textsuperscript{419}

C. Weather Briefings

1. Srock v. United States\textsuperscript{420}

The estate of an airplane passenger who was killed in a crash brought an action under the FTCA, alleging that a deficient weather briefing by the FAA caused the crash.\textsuperscript{421} Plaintiff’s decedent was a passenger in an “experimental amateur-built amphibious ‘Seawind’ aircraft” that crashed after entering clouds in the Cumberland Gap National Historic Park in Virginia.\textsuperscript{422}

\textsuperscript{413} Id.
\textsuperscript{414} Id.
\textsuperscript{415} Id. at *7 (quoting Eaton v. McLain, 891 S.W.2d 587, 594 (Tenn. 2005)) (internal quotation marks omitted).
\textsuperscript{416} Id. at *7–9.
\textsuperscript{417} Id. at *8.
\textsuperscript{418} Id.
\textsuperscript{419} Id. at *9.
\textsuperscript{421} Id. at 814.
\textsuperscript{422} Id. at 815.
The decedent and the pilot planned to fly the Seawind from Florida to Michigan on the morning of February 11, 2000.\textsuperscript{423} The pilot checked the weather by telephone twice that morning, each time contacting a different Flight Service Station (FSS).\textsuperscript{424} The pilot first telephoned the FSS in Gainesville, Florida, and received a “standard” weather briefing, which follows a “pre-ordained format consisting of certain weather information presented in a particular order.”\textsuperscript{425} Ultimately, the briefer expressed doubt as to whether the pilot could get to Michigan that day due to the weather conditions.\textsuperscript{426} The briefer noted that the only possible route would be to fly to central Tennessee and then continue from there through southern Indiana to Michigan.\textsuperscript{427}

Instead, the pilot flew to Douglas, Georgia.\textsuperscript{428} In Douglas, the pilot telephoned the Macon, Georgia FSS for an additional weather briefing.\textsuperscript{429} The briefer began providing a standard briefing and sought to obtain necessary background information from the pilot.\textsuperscript{430} The court noted that the pilot was reluctant to provide this important information.\textsuperscript{431} When the briefer began providing standard weather information, the pilot interrupted her and began asking specific questions.\textsuperscript{432} The briefer advised that there was some “light precipitation” along the direct route from Georgia straight up to Michigan.\textsuperscript{433}

After receiving the second briefing, the plane flew into eastern Tennessee in favorable weather conditions.\textsuperscript{434} The route took the Seawind over the Great Smokey Mountains into Virginia.\textsuperscript{435} Beyond the Smokey Mountains, and along the Cumberland Mountain Gap, there was a deck of clouds almost one mile thick.\textsuperscript{436} The cloud layer would have been clearly visible for at least ten miles and more likely twenty to forty miles before

\begin{flushright}
\textsuperscript{423} Id. at 816.\textsuperscript{424} Id.\textsuperscript{425} Id. at 816–17.\textsuperscript{426} Id. at 816.\textsuperscript{427} Id. at 817.\textsuperscript{428} Id.\textsuperscript{429} Id.\textsuperscript{430} Id.\textsuperscript{431} Id. at 818.\textsuperscript{432} Id.\textsuperscript{433} Id. at 819.\textsuperscript{434} Id. at 820.\textsuperscript{435} Id.\textsuperscript{436} Id.\end{flushright}
the crash.\textsuperscript{437} There was ample opportunity for the pilot to turn the aircraft around or to land, but he chose to press on through the cloudy conditions.\textsuperscript{438} The plane later crashed, killing the pilot and plaintiff’s decedent.\textsuperscript{439}

The court’s analysis began by noting that “\textquoteright\textquoteright\textquoteright[s]ince the FAA has undertaken to advise requesting pilots of weather conditions, thus engendering reliance on facilities . . . it is under a duty to see that the information which it furnishes is accurate and complete.”\textsuperscript{440} However, the court elaborated that nothing a flight service specialist does relieves a pilot of his continuing duty to be aware of danger when he can obtain the information through his own observation.\textsuperscript{441} Specifically, “\textquoteright\textquoteright\textquoteright[i]n conditions where judgment is exercisable, the decision as to whether and when weather conditions permit a takeoff is up to the pilot.”\textsuperscript{442}

Accordingly, although the FAA owed a duty to the pilot and the decedent to provide accurate and complete weather information, the Macon, Georgia FSS briefer did not breach this duty.\textsuperscript{443} It was undisputed that the pilot controlled the type of information provided in the briefing and that it was the pilot who decided what route to fly.\textsuperscript{444} The court determined that the briefer provided all of the pertinent information available to her and did not breach any duty.\textsuperscript{445}

Moreover, the briefing, even if deficient, was not the proximate cause, or even a cause, of the accident.\textsuperscript{446} Despite the warnings given by the Gainesville briefer, the pilot flew towards eastern Tennessee.\textsuperscript{447} The court found that “even if [he] had been given additional warnings and been cautioned to fly a more westerly path, . . . he would not have heeded them.”\textsuperscript{448}

\textsuperscript{437} Id.
\textsuperscript{438} Id. at 821.
\textsuperscript{439} Id.
\textsuperscript{440} Id. at 824 (quoting Pierce v. United States, 679 U.S. 617, 621 (6th Cir. 1982)).
\textsuperscript{441} Id. at 825–26.
\textsuperscript{442} Id. at 826 (quoting Bauer v. United States, 789 F. Supp. 2d 944, 952 (N.D. Ill. 2002)).
\textsuperscript{443} Id. at 827.
\textsuperscript{444} Id.
\textsuperscript{445} Id.
\textsuperscript{446} Id.
\textsuperscript{447} Id.
\textsuperscript{448} Id.
D. REMOVAL TO FEDERAL COURT

1. Glorvigen v. Cirrus Design Corp.\textsuperscript{449}

This case arose out of the fatal crash of a Cirrus SR-22 aircraft.\textsuperscript{450} Plaintiffs sued on behalf of the decedents, asserting claims for insufficient ground training after plaintiff's purchase of the aircraft, as well as negligent design and manufacture of the aircraft.\textsuperscript{451} The manufacturer, Cirrus Design Corporation ("Cirrus"), filed a third party complaint against two employees of the Federal Aviation Administration ("FAA") Automated Flight Service Station, alleging that the FAA employees were negligent in providing weather information to the pilot.\textsuperscript{452} Cirrus sought indemnification and contribution from each employee if it were found liable.\textsuperscript{453}

The United States moved to dismiss the individually named FAA employees and substitute itself as the sole third-party defendant under the Federal Tort Claims Act ("FTCA").\textsuperscript{454} The FTCA provides exclusive federal jurisdiction in the event of negligence by government employees during the scope of their employment.\textsuperscript{455} It is up to the Attorney General to decide if, at the time when the alleged conduct occurred, the individual employees were within the scope of their employment with the federal government.\textsuperscript{456} If so, the Attorney General may certify that substitution of the United States as a defendant is proper.\textsuperscript{457}

Here, the Director of the United States Department of Justice Civil Torts Branch certified that the individuals were acting within the scope of their employment at the time of the incident.\textsuperscript{458} The court found no evidence to the contrary and permitted the substitution of the United States as the sole third-party defendant.\textsuperscript{459}

\textsuperscript{449} No. 06-2661 (PAM/RLE), 2006 U.S. Dist. LEXIS 91731 (D. Minn. Oct. 24, 2006).
\textsuperscript{450} Id. at *2.
\textsuperscript{451} Id. at *3.
\textsuperscript{452} Id. at *4.
\textsuperscript{453} Id.
\textsuperscript{454} Id. at *4–5.
\textsuperscript{455} Id. at *5.
\textsuperscript{456} Id. (citing 28 U.S.C. § 2679(d)(1) (2006)).
\textsuperscript{457} Id. (citing 28 U.S.C. §2679(d)(1)).
\textsuperscript{458} Id. at *7.
\textsuperscript{459} Id.
The court then turned to the question of whether removal was proper. First, the court considered plaintiffs' argument that the court did not have subject matter jurisdiction over the third-party claims against the United States. Plaintiffs argued that under the derivative jurisdiction doctrine, a federal court's subject matter jurisdiction is derivative of the jurisdiction of the state court from which the case was removed. Thus, although the federal court may have properly had subject matter jurisdiction if the action was originally filed in federal court, it will lack jurisdiction on removal if the state court did not have jurisdiction. Plaintiffs argued that because the FTCA claims belong exclusively in federal court, the state courts would lack subject matter jurisdiction over the third-party claims.

The court noted that in *North Dakota v. Fredericks*, the Eighth Circuit held that a 1985 amendment to 28 U.S.C. § 1441 eliminated the doctrine of derivative jurisdiction. Although the Eighth Circuit acknowledged that the 1985 amendment only referred to removals under §1441, it applied the policy underlying the amendment to other removal statutes and thus completely abandoned the doctrine. The court rejected plaintiffs' argument that *Fredericks* was no longer good law, or in the alternative, that a 2002 amendment to § 1441 indicated congressional intent to limit the abrogation of the derivative jurisdiction doctrine to removals under § 1441. The court noted that all of the decisions relied upon by plaintiffs were from outside the Eighth Circuit, but the *Glorvigen* court was bound to apply the decision in *Fredericks* as the law of the Eighth Circuit. Additionally, the court found that there was no indication that Congress intended to overturn the complete abandonment of the derivative jurisdiction doctrine. Finally, the court held that "applying the derivative jurisdiction doctrine to removals only under § 1441 would create arbitrary inconsistencies in determinations of sub-

460 Id.
461 Id.
462 Id. at *8 (citing Lambert Run Coal Co. v. Balt. & Ohio R.R., 258 U.S. 377, 382 (1922)).
463 Id. (citing Lambert, 258 U.S. at 382).
464 Id.
465 Id. (citing North Dakota v. Fredericks, 940 F.2d 333, 336 (8th Cir. 1991)).
466 Id. (citing Fredericks, 940 F.3d at 337-38).
467 Id. at *10, 12 (citing Barnaby v. Quintos, 410 F. Supp. 2d 142, 146 (S.D.N.Y. 2005)).
468 Id. at *12.
469 Id. at *12-13.
ject matter jurisdiction.” Accordingly, the court found that subject matter jurisdiction existed over the third-party claims as a result of its continued adherence to the abrogation of the derivative jurisdiction doctrine.

The court then considered whether it had subject matter jurisdiction over the third-party indemnification and contribution claims. With regard to the indemnification claims, the court concluded that plaintiffs were essentially contending that the defendant/third-party plaintiff failed to state a claim upon which relief could be granted. If this was so, the proper remedy was dismissal on the merits, which could occur only after the court invoked jurisdiction. With regard to the contribution claims, the court found that both Minnesota Rules and the Federal Rules of Civil Procedure allowed a third-party plaintiff to implead a person who is or may be liable to the third-party plaintiff. Accordingly, the court rejected plaintiffs’ argument that these claims were not ripe for review.

Finally, the court considered plaintiffs’ request to sever and remand the state law claims but retain jurisdiction over the third-party claims. The court declined this request, finding that the complaint and the third-party complaint revolved around the same injury and the same series of events. Policy considerations such as judicial economy warranted the disposition of all claims together. Further, the United States, as the third-party defendant, should be allowed the opportunity to elicit facts on issues of liability and comparative fault. Finally, it was unfair to force defendant to litigate two separate lawsuits when all issues could be addressed efficiently in one action.

X. FEDERAL AVIATION ACT OF 1958

The Federal Aviation Act of 1958 (the Act) authorizes the Federal Aviation Administration (FAA) to enact Federal Avia-

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470 Id. at *13 (citing Fredericks, 940 F.3d at 337).
471 Id. at *13-14.
472 Id. at *16-17.
473 Id. at *17.
474 Id. at *18 (quoting Fed. R. Civ. P. 14; Minn. R. 14.01 (2006)).
475 Id. at *18.
476 Id. at *20.
477 Id.
478 Id.
479 Id. (citing Kan. Pub. Employees Ret. Sys. v. Reimer & Kroger Assocs., Inc., 4 F.3d 614, 620 (8th Cir. 1993)).
480 Id. at *20-21.
tion Regulations (FAR). The Act provides federal jurisdiction for injunctive relief for a violation of the Act or a FAR, but there is no express or implied private right of action under the Act.

A. Federal Preemption

1. Duvall v. AVCO Corp.

Plaintiffs asserted product liability, negligence, and wrongful death claims arising out of the crash of a Cessna aircraft which resulted in the death of the pilot and two passengers. Defendants included the manufacturers of the aircraft, the engine, the fuel servo, and the fuel pump. Plaintiffs claimed that the accident was caused by the malfunction of the aircraft's engine and fuel servo.

Defendants moved to dismiss on the grounds that federal law preempts the entire field of aviation safety, which includes aircraft design and certification, relying on the Third Circuit's decision in Abdullah v. American Airlines, Inc. The court agreed, finding that "the Third Circuit did not limit its holding to piloting or aircraft operation, and specifically rejected the approach adopted by other courts that found only certain aspects of aviation safety to be preempted." The clear language of Abdullah indicates that the Third Circuit intended to preempt the entire field of aviation safety, and did not want to limit preemption to just piloting or operation. Accordingly, the action was dismissed.


Plaintiff's claims arose out of the crash of a Cessna 172S aircraft in which the pilot and a passenger were killed. The crash was caused by structural damage after a collision between

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481 See Montauk-Caribbean Airways, Inc. v. Hope, 784 F.2d 91, 97 (2d Cir. 1986).
482 See, e.g., id.
484 Id. at *3-4.
485 Id. at *4.
486 Id.
487 Id. at *7 (quoting Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 365 (3d Cir. 1999)).
488 Id. at *8 (quoting Abdullah, 181 F.3d at 365).
489 Id.
490 Id. at *8-9.
492 Id. at 826.
a bird and the aircraft. Plaintiff filed this wrongful death and survivor action alleging causes of action in both negligence and strict products liability in relation to bird collisions and the resultant structural damage under theories of failure to warn and inadequate design.

Defendant challenged plaintiff's claims on the grounds that they were impliedly preempted by the Federal Aviation Act (the Act). The court noted that implied preemption requires a finding that Congress intended the federal government to exclusively occupy the field. Yet, "[N]either the Supreme Court nor the Fifth Circuit have held that [the Act] preempts the entire field of aviation safety." Moreover, the court found that there was no legislative intent by Congress to preempt or occupy the entire field of aviation safety. Rather, the legislative history and text of the Act shows that state law tort claims may still be alleged and were not preempted.

In evaluating whether Congress intended to preempt the aviation safety field, the court found a "lack of a pervasive and precise regulatory scheme." The court explained that the FAA's three phase certification process for aircraft does not create such a pervasive regulatory scheme because it does not itself set forth safety and design standards. The certification process merely allows the FAA to monitor the aircraft's compliance with other regulations. The FAA regulations that do control the safety and design of an aircraft are broad and leave significant discretion to the manufacturer; thus, the court found that there was not a pervasive scheme of regulation. The court also noted that "the specific lack of bird strike regulations related to the Cessna Model 172S demonstrates the absence of a pervasive regulatory scheme and leaves room for state law claims on the issue."

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493 Id.
494 Id. at 826–27.
495 Id.
497 Id.
498 Id. at 830.
499 Id.
500 Id. at 832–33.
501 Id. at 833.
502 Id.
503 Id.
504 Id. at 834.
The court recognized that the circuit courts are split as to whether the field of aviation safety is preempted by the Act.\textsuperscript{505} The court explained that the Third Circuit expressly held, in \textit{Abdullah v. American Airlines},\textsuperscript{506} that federal law preempts the entire field of aviation safety.\textsuperscript{507} However, in \textit{Cleveland v. Piper Aircraft Corp.},\textsuperscript{508} the Tenth Circuit held that “Congress did not indicate a ‘clear and manifest intent to occupy the field of airplane safety to the exclusion of state common law.’”\textsuperscript{509} According to the \textit{Monroe} court, the facts of this case were akin to those in \textit{Cleveland}, where an individual sued an aircraft manufacturer for negligent design.\textsuperscript{510} \textit{Abdullah}, on the other hand, involved claims brought by commercial airline passengers against a commercial airline for personal injury.\textsuperscript{511} Therefore, the court adopted the Tenth Circuit’s holding and found that the field of aviation safety was not preempted by the Act.\textsuperscript{512}

3. \textit{Yarbrough v. AVCO Corp.}\textsuperscript{513}

Plaintiffs’ claims arose out of the crash of a Piper PA 18-150 aircraft in which both the pilot and passenger on board were killed.\textsuperscript{514} Plaintiffs claimed that defendants violated the Tennessee Products Liability Act when they designed and manufactured the engine and carburetor, including installation.\textsuperscript{515} Defendants removed the case to federal court asserting that the court had original jurisdiction over plaintiffs’ claims.\textsuperscript{516} Specifically, defendants argued that plaintiffs’ claims were preempted because the FAA certified that the plane’s engine and carburetor satisfied the FAA regulations.\textsuperscript{517}

The court noted that only complete preemption is relevant at the removal stage of the proceedings.\textsuperscript{518} Therefore, the court disregarded any arguments regarding federal preemption as a

\textsuperscript{505} Id.
\textsuperscript{506} 181 F.3d 363 (3d Cir. 1999).
\textsuperscript{507} Monroe, 417 F. Supp. 2d at 835.
\textsuperscript{508} 985 F.2d 1438 (10th Cir. 1993).
\textsuperscript{509} Id. at 1442 (quoting \textit{Piper Aircraft Corp.}, 985 F.2d at 1444).
\textsuperscript{510} Monroe, 417 F. Supp. 2d at 835.
\textsuperscript{511} Id.
\textsuperscript{512} Id. at 835–36.
\textsuperscript{514} Id. at *2.
\textsuperscript{515} Id.
\textsuperscript{516} Id. at *3.
\textsuperscript{517} Id.
\textsuperscript{518} Id. at *9–10.
The court explained that complete preemption occurs when "the preemptive force of a statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for the purposes of the well-pleaded complaint rule." Once an area of law has been completely preempted, any claim based on the preempted state law is considered to arise under federal law and federal jurisdiction is proper. The court found that defendants based their preemption-related claims on cases that discussed the defense of federal field preemption, not the doctrine of complete preemption. The court determined that these cases were inapplicable at the remand stage of the proceedings because defendants did not assert complete preemption and provided no support for the application of the doctrine. Accordingly, the court found no basis for removal.

4. *Drake v. Laboratory Corp. of America Holdings* "A former flight attendant who was terminated from his employment for failing a drug test sued laboratories and other persons involved in the allegedly faulty testing. Plaintiff had been terminated from his employment by Delta Airlines ("Delta") because airline officials thought he failed a federally required drug test. Plaintiff contended that the tests were carried out in a way contrary to both industry standards and federal regulations.

In arriving at its decision, the court set forth a two-step analysis to ascertain if preemption will be applied to a state law claim. First, state law is preempted if it "covers the subject matter" of the federal rule. Thus, when a specific portion of the FAA regulations is addressed by a state law, that state law is preempted. Second, "state law is preempted if it 'cover[s] the
subject matter of drug . . . testing of aviation personnel performing safety-sensitive functions."\textsuperscript{532} As a result, some state laws may "cover the subject matter" of the drug testing of aviation personnel even if they regulate issues not specifically addressed by the FAA regulations.\textsuperscript{533} However, for such laws to be preempted, their relationship to such drug testing must be "so substantial as to interfere with the consistency and uniformity of the federal regulatory scheme."\textsuperscript{534} The Drake court considered the FAA regulations regarding drug testing of aviation industry employees, noting that the regulations provide detailed guidance regarding what must be included in drug testing programs.\textsuperscript{535} However, the FAA regulations do not specifically address laboratory negligence, nor do they establish a minimum standard of care for laboratory employees.\textsuperscript{536}

The court applied this analysis to plaintiff’s claims and found that plaintiff relied only on state common law to provide a remedy for violation of the federal regulations.\textsuperscript{537} Because the FAA regulations do not address remedies, the court held that state law did not cover the subject matter of the regulations and was therefore not preempted.\textsuperscript{538} As none of plaintiff’s causes of action were based entirely on preempted state law, the court allowed the claims to proceed.\textsuperscript{539}

5. *McMahon Helicopter Services, Inc. v. United States*\textsuperscript{540}

Plaintiff, McMahon Helicopter Services, sued the United States, Wayne County Airport Authority ("the Airport Authority"), and other defendants seeking a recovery for damages sustained to plaintiff’s helicopter when it hit a light pole on the Airport Authority’s property.\textsuperscript{541} The Airport Authority had installed the light pole in 1986 or 1987.\textsuperscript{542} The pole at issue was one of six sixty-five-foot poles installed next to the south cargo ramp to facilitate cargo handling at night.\textsuperscript{543} Although the

\begin{itemize}
\item \textsuperscript{532} Id.
\item \textsuperscript{533} Id.
\item \textsuperscript{534} Id.
\item \textsuperscript{535} Id. at 56.
\item \textsuperscript{536} Id. at 57.
\item \textsuperscript{537} Id. at 63–64.
\item \textsuperscript{538} Id. at 64.
\item \textsuperscript{539} Id. at 66.
\item \textsuperscript{541} Id. at *2.
\item \textsuperscript{542} Id. at *6.
\item \textsuperscript{543} Id.
\end{itemize}
lights stopped functioning during the 1990s, they were never re-

moved. On December 22, 2003, McMahon's helicopter

struck one of the poles while attempting to land. As a result,

the helicopter sustained significant damage.

Plaintiff contended that the Airport Authority breached its
duty of care by allowing the inoperative light poles to stay in

place without informing airport users of their presence. Defendants argued that such claims were preempted because the

FAA regulates potential obstructions in airspace under 14 C.F.R.

77, which requires that the FAA and the airport conduct a re-

view of potential obstructions for any new construction or altera-

tion. Such a review of the six light poles was conducted annually. At all times, the poles were found to be in compli-

ance with the regulations and were not deemed to be obstructions.

The court agreed with the Airport Authority, finding that

there are specific federal regulations governing obstructions in

navigable air space and that the FAA had specifically considered

the light pole at issue and found it not to be an obstruction. Further, the FAA had full authority for civil aeronautics, which

includes the promulgation and enforcement of safety regula-

tions. Thus, the court held that the FAA establishes the stan-

dard of care and preempts the field.

6. Center for Bio-Ethical Reform, Inc. v. City of Honolulu

Plaintiff, an advocacy group, sued the City and County of

Honolulu seeking declaratory judgment and a preliminary in-

junction to prevent enforcement of an ordinance prohibiting

aerial tow-banners. Plaintiff alleged that federal law pre-

empted enforcement of the municipal ordinance.

544 Id.
545 Id. at *10–11.
546 Id. at *11.
547 Id. at *21.
548 Id. at *9, *21.
549 Id. at *9.
550 Id. at *9–10.
551 Id. at *27.
552 Id. at*23, *27.
553 Id. at *27.
554 455 F.3d 910 (9th Cir. 2006).
555 Id. at 916.
556 Id.
FAA regulations do not allow civilian aircraft to operate over densely populated areas, and require a certificate of authorization to operate in such airspace. Before towing its banners, plaintiff obtained a certificate from the FAA authorizing aerial banner towing in the designated area. The certificate stated that it "does not constitute a waiver of any State law or local ordinance."

The City and County of Honolulu, as part of a well-established system regulating outdoor advertising with the goal of protecting the scenic landscape, passed an ordinance banning aerial tow banners. Plaintiff sought to prohibit enforcement of the ordinance, arguing that the FAA "occupies the entire field of tow banner regulation" and, therefore, the ordinance conflicted with the FAA certificate of authorization. The court rejected plaintiff's argument, relying on Skysign International, Inc. v. City of Honolulu, a Ninth Circuit case involving a nearly identical challenge based on federal preemption. The court held that Congress and the FAA did not exert their statutory authority to such a degree that it would constitute field preemption. Even though Congress authorized the FAA to develop applicable regulations, the court found that there was no affirmative indication that the FAA sought to fully occupy the field of aerial advertising. Accordingly, the ordinance was not preempted.


Plaintiff's complaint arose out of the crash of a Cirrus SR-22 aircraft, resulting in the death of the pilot and the sole passenger. Defendant, Cirrus Design Corporation ("Cirrus"), sold the aircraft to the pilot and also designed and manufactured the

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557 Id.
558 Id.
559 Id.
560 Id. at 915.
561 Id. at 917.
562 276 F.3d 1109 (9th Cir. 2002).
563 Ctr. for Bio-Ethical Reform, 455 F.3d at 917.
564 Id.
565 Id.
566 Id.
568 Id. at *2.
aircraft. Plaintiff claimed that Cirrus failed to provide the pilot with enough training to operate the SR-22. Specifically, plaintiff charged that Cirrus did not include instruction on instrument flight rules operations, which would have trained the pilot on procedures to follow in marginal weather conditions. Cirrus removed the action to federal court on the grounds that plaintiff's claims involved federal issues. Alternatively, Cirrus argued that the Federal Aviation Act completely preempted any state-law claim based on the failure to provide adequate pilot training, justifying federal question jurisdiction.

The court first considered whether plaintiff's claims raised significant federal issues. The question was "whether a state-law claim raises a federal issue, 'actually disputed and substantial,' which the Court may address 'without disturbing any congressionally approved balance of federal and state judicial responsibilities.'" The court noted that federal question jurisdiction requires that the federal issue be "dispositive and 'at the heart of the state-law . . . claim.'" Although the case implicated the Act and its regulations, the court found this was not dispositive as to whether plaintiff could maintain a claim under state law. Moreover, the fact that Congress did not provide a federal cause of action or preempt state remedies within the Act suggested to the court that "Congress did not intend to create a substantial federal question over cases implicating the FAA . . . ." Thus, the court found no federal question jurisdiction in these cases because they did not raise a significant enough federal issue.

The court then turned to preemption. Because the question at issue was whether removal was proper under the doctrine of complete preemption, the inquiry was whether the federal statute provided both substantive and remedial provisions and clearly indicated that the remedial provision was the exclusive

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569 Id.
570 Id.
571 Id. at *2–3.
572 Id. at *3.
573 Id.
574 Id. at *5.
575 Id. at *5–6 (quoting Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 314 (2005)).
576 Id. at *8 (quoting Crable, 545 U.S. at 320).
577 Id.
578 Id. at *8–9.
579 Id. at *9.
580 Id.
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remedy.\textsuperscript{581} However, the focus of the FAA was not to provide a remedy for injuries caused by safety violations, but rather to provide safety standards for pilots and aircraft.\textsuperscript{582} Therefore, complete preemption did not apply because the FAA did not provide an express remedy for a violation.\textsuperscript{583}

B. No-FLY List

1. Ibrahim v. Department of Homeland Security\textsuperscript{584}

While checking-in at the United Airlines ticket counter at San Francisco International Airport, plaintiff was identified as a person on the "No-Fly List."\textsuperscript{585} After the initial identification, a series of phone calls were made to confirm her identity as a person on the No-Fly List, which concluded with an agent of the federal government ordering plaintiff's detention.\textsuperscript{586} She was handcuffed and escorted out of the airport to a San Francisco police station.\textsuperscript{587} She remained in police custody for over two hours, during which several officers questioned and searched her.\textsuperscript{588} The Federal Bureau of Investigation ordered her release.\textsuperscript{589} The following day, plaintiff again began her journey and was put through heightened screening at each stop on the trip.\textsuperscript{590} After arriving at her destination, plaintiff's student visa was taken away by the United States Embassy.\textsuperscript{591}

Plaintiff sued various departments and federal government officials, including the Department of Homeland Security (the "federal defendants"), the City of San Francisco, its airport, and its police department (the "San Francisco defendants"), and United Airlines, Inc. ("United").\textsuperscript{592} Her claims challenged the constitutionality of the "No-Fly List" and her arrest and interrogation.\textsuperscript{593}

\textsuperscript{581} Id. at *18–19.
\textsuperscript{582} Id. at *13.
\textsuperscript{583} Id. at *19.
\textsuperscript{585} Id. at *9–10.
\textsuperscript{586} Id. at *10.
\textsuperscript{587} Id.
\textsuperscript{588} Id.
\textsuperscript{589} Id. at *11.
\textsuperscript{590} Id.
\textsuperscript{591} Id. at *12.
\textsuperscript{592} Id.
\textsuperscript{593} Id. at *13.
All defendants, with the exception of the San Francisco defendants, filed motions to dismiss.\textsuperscript{594} The court relied upon \textit{Green v. Transportation Security Administration}\textsuperscript{595} in ruling upon plaintiff’s constitutional challenges to the No-Fly List.\textsuperscript{596} Like the \textit{Green} court, the court here dismissed plaintiff’s challenges to the No-Fly List since TSA orders, such as the No-Fly List, are subject to special review procedures that divest the district courts of jurisdiction.\textsuperscript{597}

Plaintiff’s claims against United and the federal defendants were dismissed for failure to state a claim.\textsuperscript{598} The court held that United’s alleged conduct consisted of initially identifying plaintiff’s name on the No-Fly List and calling the police.\textsuperscript{599} These actions were insufficient to establish a violation of California tort law or 42 U.S.C. § 1983, which creates a private right of action against state actors for the violation of civil rights under the U.S. Constitution.\textsuperscript{600} Under state law, United enjoyed an unqualified privilege for reporting possible criminal conduct, and plaintiff failed to prove an exception to that privilege by showing that the communication was made with malice or animus.\textsuperscript{601} The section 1983 claim was insufficient because private persons compelled to act at the government’s behest are not liable unless some independent motive or hostility is proven, and plaintiff did not make such a showing.\textsuperscript{602} Similarly, the federal defendants’ conduct was insufficient to hold them liable under section 1983, as there was no proof that they acted in concert with state officials or otherwise under the color of state law.\textsuperscript{603} Moreover, plaintiff could not maintain state law causes of action against the federal defendants.\textsuperscript{604}

XI. FEDERAL AVIATION ADMINISTRATION AUTHORIZATION ACT OF 1994

The Federal Aviation Administration Authorization Act of 1994 prevents a state from enacting or enforcing a "law, regula-

\begin{itemize}
\item \textsuperscript{594} Id. at *14.
\item \textsuperscript{595} \textit{351 F. Supp. 2d 1119} (W.D. Wash. 2005).
\item \textsuperscript{596} \textit{Id. at *18–20}.
\item \textsuperscript{597} \textit{Id. at *18–20}.
\item \textsuperscript{598} \textit{Id. at *40, *42}.
\item \textsuperscript{599} \textit{Id. at *37}.
\item \textsuperscript{600} \textit{Id. at *37, *41}.
\item \textsuperscript{601} \textit{Id. at *38}.
\item \textsuperscript{602} \textit{Id. at *39–40}.
\item \textsuperscript{603} \textit{Id. at *41–42}.
\item \textsuperscript{604} \textit{Id. at *42}.
\end{itemize}
tion, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle . . . .”

A. Federal Preemption

1. New Hampshire Motor Transport Association v. Rowe

Plaintiffs, trade associations representing air and motor carriers, challenged Maine’s Tobacco Delivery Law, alleging that some of the law’s provisions were preempted by the Federal Aviation Administration Authorization Act of 1994 (“FAAAA”). Plaintiffs challenged two provisions of the Tobacco Delivery Law. The first, section 1555-C, required a retailer who sells tobacco products directly to consumers to use a carrier that will make certain that:

1. the purchaser of the tobacco products is the same person as the addressee of the package;
2. the addressee is of legal age to purchase tobacco products and sign for the package; and,
3. if the addressee is under 27 years of age, that she show a valid government-issued identification verifying that she is old enough to purchase tobacco products.

The second provision, section 1555-D, made it illegal to knowingly give tobacco products to a consumer in Maine if the tobacco products were bought from an unlicensed retailer. This provision also stated that a delivery person was “deemed to know” that a package contained tobacco if it “(1) so indicates on any side other than the side directly opposite the label, [citation omitted], or (2) was shipped by a person listed by the Attorney General as an unlicensed tobacco retailer.”

The court noted that the text of the FAAA preemption provision was modeled after the preemption provision of the Airline Deregulation Act (ADA), and, thus, the court relied on decisions interpreting that provision. The court adopted the

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606 448 F.3d 66 (1st Cir. 2006).
607 Id. at 69.
608 Id. at 69–70.
609 Id. at 70; ME. REV. STAT. ANN. tit. 22, § 1555-C(3)(C) (2004).
610 Rowe, 448 F.3d at 70.
611 Tit. 22, § 1555-D; Rowe, 448 F.3d at 70.
612 Rowe, 448 F.3d at 75.
Supreme Court’s definition of “relating to” in the ADA context and held that the FAAAA preempts any state law that has a connection with or reference to a carrier’s rates, routes, or services.\textsuperscript{613} The proper focus under the FAAAA, as under the ADA, is “on the effect that a state law has on carrier operations, not on the state’s purpose for enacting the law.”\textsuperscript{614}

Applying this analysis, the court concluded that the first challenged provision of the Tobacco Delivery Law, section 1555-C, “related to” carrier services and was therefore preempted under the FAAAA.\textsuperscript{615} The court rejected the state Attorney General’s argument that state law must impose a direct regulation on carriers for there to be preemption under FAAAA.\textsuperscript{616} This interpretation was inconsistent both with the “related to” language of the statute and the FAAAA’s purpose to prohibit states from policing carrier operations.\textsuperscript{617} The court also rejected the Attorney General’s alternative argument that there was no preemption because a carrier could choose not to deliver tobacco products in Maine.\textsuperscript{618} Again, this rationale was inconsistent with the goal of the FAAAA to establish an atmosphere in which market forces, rather than state regulatory schemes, drive carrier operations.\textsuperscript{619}

The court next considered whether the section 1555-D ban on knowingly delivering tobacco products purchased from unlicensed retailers was preempted by the FAAAA.\textsuperscript{620} The court found that because this provision did not compel carriers to alter their delivery methods, its effect on services was too weak to justify preemption.\textsuperscript{621} Accordingly, the first part of this provision was not preempted.\textsuperscript{622} However, while Maine was permitted to ban a carrier from “knowingly transporting contraband tobacco products,” it was not permitted to determine the procedures that carriers should use to locate these products in a delivery chain.\textsuperscript{623} The imposition of constructive knowledge upon a carrier if the package was “marked as containing tobacco or if

\begin{itemize}
  \item \textsuperscript{613} Id. at 78.
  \item \textsuperscript{614} Id. at 77.
  \item \textsuperscript{615} Id. at 78–80.
  \item \textsuperscript{616} Id. at 79.
  \item \textsuperscript{617} Id.
  \item \textsuperscript{618} Id. at 80.
  \item \textsuperscript{619} Id.
  \item \textsuperscript{620} Id.
  \item \textsuperscript{621} Id.
  \item \textsuperscript{622} Id.
  \item \textsuperscript{623} Id. at 81.
\end{itemize}
the seller’s name appears on the Attorney General’s list,” impermissibly affected carrier services.\textsuperscript{624} Compliance with this provision would require deviations from standard delivery procedure and thus improperly “relates to” carrier services.\textsuperscript{625} Thus, the second part of section 1555-D was preempted.\textsuperscript{626}

\section*{XII. GENERAL AVIATION REVITALIZATION ACT}

The General Aviation Revitalization Act of 1994\textsuperscript{627} (GARA) sought to address concerns regarding the costs of tort claims upon manufacturers of general aviation aircraft.\textsuperscript{628} GARA imposes an eighteen-year statute of repose with respect to product liability claims involving general aviation aircraft.\textsuperscript{629}

\subsection*{A. Sheesley v. Cessna Aircraft Co.\textsuperscript{630}}

The pilot and two passengers were killed on August 22, 2000, during the crash of a Cessna 340A shortly after takeoff from Rapid City, South Dakota.\textsuperscript{631} The airplane was manufactured in 1977 and underwent a RAM Series IV upgrade in 1986 that increased the horsepower.\textsuperscript{632} The wastegate elbow on the exhaust of the left engine was exchanged with a new part.\textsuperscript{633} Although disputed, the engine log indicated that the wastegate was manufactured by Cessna.\textsuperscript{634}

Plaintiffs filed three actions in the United States District Court for the District of South Dakota, which were consolidated.\textsuperscript{635} According to plaintiff, a crack in the left wastegate elbow caused the accident.\textsuperscript{636} The crack enabled hot exhaust to leak from the wastegate elbow and heat a firewall, behind which a fuel line was located.\textsuperscript{637} The heat from the firewall allegedly vaporized the fuel in the fuel line, causing the left engine to stall, resulting in

\begin{footnotes}
\item[624] Id.
\item[625] Id.
\item[626] Id. at 81–82.
\item[631] Id. at *7, *10.
\item[632] Id. at *7.
\item[633] Id.
\item[634] Id. at *7–8.
\item[635] Id. at *11.
\item[636] Id.
\item[637] Id.
\end{footnotes}
Defendants contended that pilot error was the sole cause of the accident. Cessna and Teledyne moved for summary judgment contending that GARA's eighteen year statute of repose barred plaintiffs' claims. Cessna argued that the GARA repose period began in 1977, when the airplane was delivered to its first purchaser. Plaintiffs countered that the repose period restarted in 1986, during the replacement of the left engine wastegate elbow. Plaintiffs also argued for application of the "knowing misrepresentation, concealment, or withholding exception" within GARA.

The court noted that under "GARA § 2(a)(2), a new eighteen year period begins when a new part is added to an aircraft if this part is alleged to have caused an accident." The court held that under this rolling repose provision, the repose period rolled in 1986, when the new wastegate was replaced, and that the crash therefore occurred within the repose period. The court made clear, however, that the "rolling repose provision only applied in this case if the new wastegate valve caused the crash." The court also held that questions of fact existed as to whether Cessna manufactured the wastegate elbow and rejected plaintiffs' argument that, even if Cessna was not the actual manufacturer of the part, it should be deemed the manufacturer under federal regulations because it owned the type certificate for the exhaust system.

Relying on an unpublished Ninth Circuit opinion, LaHaye v. Galvin Flying Serv., Inc., Cessna also argued that plaintiffs' defective design claims were barred under GARA because the design of the wastegate elbow was over eighteen years old. The

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638 Id.
639 Id.
640 Id. at *13.
641 Id. at *15.
642 Id.
645 Id. at *19.
646 Id. at *18.
648 144 F. App'x. 631 (9th Cir. 2005), cert. denied, 547 U.S. 1019 (2006).
court rejected this argument, stating the LaHaye decision is “unpersuasive” as it “provided no rationale or reasoning to support its conclusory finding that GARA’s rolling provision requires a substantive design alteration within the [eighteen] years preceding the accident.”

The court found that GARA’s “misrepresentation, concealment, or withholding exception” did not apply because plaintiffs “presented no evidence indicating that Cessna misrepresented, concealed, or withheld information from the FAA.”

As to Teledyne’s motion, the court agreed that plaintiffs’ claims were barred by GARA since the subject engine was delivered to its first customer in 1975. The court also rejected plaintiffs’ argument that Teledyne should be considered a “manufacturer” of the wastegate elbow based solely on the fact that it held a type certificate for this part.

B. CROMAN CORP. V. GENERAL ELECTRIC CO.

A Sikorsky S-16A helicopter owned by plaintiff, Croman Corp., crashed near Lakehead, California on March 26, 2002, following an apparent loss of power in one of its engines. As a result, plaintiff commenced an action seeking to recover damages under theories of strict products liability, negligence, and breach of express and implied warranties.

General Electric, the manufacturer of the helicopter’s turbine engine and other components, and Sikorsky Aircraft Corporation and United Technologies Corporation, the designer and manufacturer of the helicopter, moved for summary judgment on the grounds that plaintiff’s claims were barred by GARA. The helicopter was delivered to its first customer in 1987, and the engine in question was purchased by plaintiff in 1977. Thus, it was undisputed that delivery of the helicopter and its parts occurred at least eighteen years prior to the accident.

650 Id. at *24.
651 Id. at *28.
652 Id. at *35.
653 Id. at *37.
655 Id. at *3.
656 Id. at *4.
657 Id.
658 Id. at *6–7.
659 Id. at *7.
To establish that GARA applied, defendants had the burden of demonstrating that the helicopter qualified as a "general aviation aircraft," meaning that it had a maximum seating capacity of under twenty passengers when the FAA airworthiness certificate or type certificate was originally issued, and that the aircraft was not "engaged in scheduled passenger-carry operations" when the accident occurred.\textsuperscript{660} The parties disputed which FAA airworthiness certificate was relevant for determining the helicopter's seating capacity.\textsuperscript{661} Plaintiff argued for utilizing the first airworthiness certificate, which was issued in 1962 in the "experimental" category and did not contain a designation as to the number of passengers.\textsuperscript{662} GE and Sikorsky, on the other hand, argued that a subsequent airworthiness certificate issued in 1967 was controlling.\textsuperscript{663} The certificate issued in 1967 listed the classification as "restricted."\textsuperscript{664} The certificate was limited to the "[t]ransportation of cargo in the furtherance of operators' or lessees' business only," and thus did not allow for the transport of passengers.\textsuperscript{665} Plaintiff asserted that the first airworthiness certificate issued is the only certificate relevant to the GARA inquiry.\textsuperscript{666}

Under GARA, "general aviation aircraft" means "any aircraft for which a type certificate or an airworthiness certificate has been issued by . . . [the FAA], which, at the time such certificate was originally issued, had a maximum seating capacity of fewer than 20 passengers . . . ."\textsuperscript{667} The court concluded that, in accordance with the applicable FAA Order,\textsuperscript{668} the definition of "original," as respects the issuance of airworthiness certificates, includes the scenario where an aircraft is issued a subsequent airworthiness certificate in another classification.\textsuperscript{669} Accordingly, the 1967 airworthiness certificate was deemed control-

\textsuperscript{661} Croman, 2006 U.S. Dist. LEXIS 82391, at *8–9.
\textsuperscript{662} Id. at *8, *10.
\textsuperscript{663} Id. at *8.
\textsuperscript{664} Id.
\textsuperscript{665} Id.
\textsuperscript{666} Id.
\textsuperscript{668} Fed. Aviation Admin., Order No. 8130.2F, Airworthiness Certification of Aircraft and Related Products (2005).
\textsuperscript{669} Croman, 2006 U.S. Dist. LEXIS 82391, at *9.
As such, the aircraft was deemed a general aviation aircraft for purposes of GARA. As plaintiff further argued that GARA did not protect GE because the engine that allegedly caused the accident was first installed in a helicopter that was not a general aviation aircraft. In fact, the engine was purchased for installation in another helicopter, which had a maximum seating capacity of thirty-nine passengers. Additionally, plaintiff contended that the fuel manifold at issue was first installed in a non-general aviation aircraft. Plaintiff argued that GE "cannot acquire GARA protection by virtue of subsequent installation on some other aircraft ..." In response, GE argued that the relevant inquiry was the status of the aircraft or its components at the time of the accident, not at the time of delivery.

Citing Kennedy v. Bell Helicopter Textron, Inc., the court held that the "relevant focus under GARA when determining whether an aircraft meets the definition of a 'general aviation aircraft' is the accident aircraft; not other aircrafts in which the engine or other components were previously installed." Accordingly, the claims against the manufacturers were dismissed.

XIII. FORUM NON COVENIENS

The forum non conveniens doctrine is used by courts to decline jurisdiction even where there is subject matter jurisdiction and personal jurisdiction, and venue is otherwise proper in the case. To obtain dismissal under the doctrine, the moving party must show that an adequate alternative forum is available, that the "public" and "private" interest factors weigh in favor of dismissal, and that the plaintiff can reinstate the suit in the alternative forum without undue inconvenience or prejudice. The "public" interest factors include administrative difficulties due

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670 Id. at *10.
671 Id.
672 Id. at *13.
673 Id. at *14.
674 Id.
675 Id.
676 Id.
677 283 F.3d 1107, 1112 (9th Cir. 2002).
679 Id. at *28.
681 Id. at 506–09.
to court congestion, the burden of jury duty on a community with no relation to the litigation, interest in having localized controversies decided at home, and litigation in a forum familiar with the applicable law. The "private" factors include the accessibility to sources of proof, the availability of process to compel unwilling witnesses to attend, the costs incurred from the attendance of willing witnesses, and the enforceability of any judgment obtained.

A. *Da Rocha v. Bell Helicopter Textron, Inc.*

Plaintiffs' claims arose out of the crash of a helicopter in the Amazon rain forest of Brazil that resulted in personal injuries and death to the passengers. The helicopter was registered in Brazil and was operated by a privately owned Brazilian company. It had been manufactured by Bell Helicopter, a Delaware corporation headquartered in Texas. The engine was manufactured by Rolls Royce, a Delaware corporation with its principal place of business in Indiana. Bell Helicopter designed the aircraft in Texas and Canada, and the engine was designed, manufactured, and tested in Indiana. Almost all of the relevant witnesses and all of the documents concerning the design, manufacture, and testing of the helicopter and engine were located in Texas, Indianapolis, and Canada. Plaintiffs brought suit in the Southern District of Florida and defendants sought dismissal on the grounds of *forum non conveniens.*

The court first considered the availability of an adequate alternative forum, noting that the availability requirement is generally satisfied if the defendant is "amenable to process in the other jurisdiction." Bell Helicopter and Rolls Royce stipulated that they would submit to the jurisdiction of the Brazilian

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682 *Id.* at 508–509.
683 *Id.* at 508.
685 *Id.* at 1320–21.
686 *Id.*
687 *Id.* at 1321.
688 *Id.*
689 *Id.*
690 *Id.*
691 *Id.* at 1320.
692 *Id.* at 1322 (internal quotation and citation omitted).
Accordingly, Brazil was an available alternative forum.\textsuperscript{694} The court then turned to application of the public and private interest factors.\textsuperscript{695} The court began its analysis by noting that although the presumption in favor of plaintiff's choice of forum is ordinarily strong, the presumption has less force for foreign plaintiffs.\textsuperscript{696} Therefore, the court did not give deference to plaintiffs' choice of forum.\textsuperscript{697}

Next, the court considered the private interest factors and determined that the parties would have greater access to proof in Brazil, as that was where the accident occurred and where all the eyewitnesses and relevant documents were located.\textsuperscript{698} Perhaps most importantly, the court's subpoena power could not be used to compel the third party witnesses to testify or produce documents in the United States.\textsuperscript{699} In Brazil, however, the court would have the power to compel witnesses to attend and the production of documents.\textsuperscript{700} The court also explained that defendants could not join the operator of the helicopter in the United States action because a United States court could not exercise personal jurisdiction over the company.\textsuperscript{701} On the other hand, the operator could be easily joined in Brazil.\textsuperscript{702} Finally, the court noted that plaintiffs and many of the third-party witnesses spoke Portuguese and would "be able to more fully participate . . . in proceedings that are conducted in their native language."\textsuperscript{703} Accordingly, the court found that the private interest factors heavily favored dismissal.\textsuperscript{704}

The court then considered the public interest factors.\textsuperscript{705} The court agreed with the defendants that it did not make sense to utilize the resources of a busy United States court to try the cases.\textsuperscript{706} The problems of obtaining documents and witness tes-

\textsuperscript{693} Id.
\textsuperscript{694} Id.
\textsuperscript{695} Id.
\textsuperscript{696} Id. at 1322–23.
\textsuperscript{697} Id. at 1323.
\textsuperscript{698} Id. at 1324.
\textsuperscript{699} Id.
\textsuperscript{700} Id.
\textsuperscript{701} Id.
\textsuperscript{702} Id.
\textsuperscript{703} Id.
\textsuperscript{704} Id.
\textsuperscript{705} Id. at 1325.
\textsuperscript{706} Id.
timony, coupled with the necessity of employing translators for testimony and documents, would be inefficient, time consuming and costly. \footnote{707} Additionally, it would be an unfair burden to compel jurors to sit on these trials to resolve cases with no connection to the community. \footnote{708} The court further found that Brazil had a much stronger local interest in resolving these cases and concluded that the relevant public interest factors also weighed in favor of dismissal. \footnote{709}

### B. Siddi v. Ozark Aircraft Systems, LLC \footnote{710}

Plaintiffs’ claims arose when Flash Airlines (Flash) Flight 604 crashed into the Red Sea off the coast of Egypt. \footnote{711} The flight was en route from Egypt to Paris, France. \footnote{712} All those aboard the aircraft were killed. \footnote{713} The aircraft had been manufactured by Boeing Company and was sold and delivered to International Lease Finance Corporation (ILFC). \footnote{714} The aircraft was repaired by Ozark Aircraft Systems (Ozark), which maintained an aircraft repair station authorized by the FAA. \footnote{715} ILFC leased the aircraft to Flash, an Egyptian air carrier. \footnote{716} Plaintiffs alleged that in February 2003, Flash informed ILFC that the aircraft’s rudder power control unit and autopilot had a defect. \footnote{717} Plaintiffs claim that ILFC and Ozark represented to Flash that the alleged defect did not pose a safety hazard. \footnote{718} Plaintiffs sued defendants ILFC and David Fulford, an ILFC employee (“defendants”), as well as other parties, in the Western District of Arkansas, alleging negligence and product liability theories. \footnote{719} Defendants moved to sever and dismiss the claims against them based on the doctrine of forum non conveniens. \footnote{720}

As a preliminary matter, the court addressed whether the claims against defendants could be severed from the action

\footnotesize{\textit{Id.}}
\footnotesize{\textit{Id.}}
\footnotesize{\textit{Id.} at 1325–26.}
\footnotesize{\textit{No. 05-5170, 2006 U.S. Dist. LEXIS 84882 (W.D. Ark. Nov. 21, 2006).}}
\footnotesize{\textit{Id.} at *2.}
\footnotesize{\textit{Id.}}
\footnotesize{\textit{Id.} at *4.}
\footnotesize{\textit{Id.} at *3.}
\footnotesize{\textit{Id.}}
\footnotesize{\textit{Id.} at *4.}
\footnotesize{\textit{Id.}}
\footnotesize{\textit{Id.}}
\footnotesize{\textit{Id.} at *4.}
\footnotesize{\textit{Id.}}
\footnotesize{\textit{Id.} at *8–9.}
\footnotesize{\textit{Id.} at *2.}
RECENT DEVELOPMENTS under Rule 21 of the Federal Rules of Civil Procedure.\textsuperscript{721} The court concluded that, at most, these defendants were joint tortfeasors.\textsuperscript{722} Accordingly, the severance of these claims would not impair plaintiffs’ ability to obtain complete relief or cause any party to incur inconsistent obligations.\textsuperscript{723} Thus severance was proper.\textsuperscript{724}

The court then considered dismissal pursuant to the \textit{forum non conveniens} doctrine.\textsuperscript{725} The court considered the private interest factors and found that they weighed in favor of dismissal.\textsuperscript{726} Defendants were willing to submit to the jurisdiction of a French court and to waive any statute of limitations defense.\textsuperscript{727} Thus, there was an adequate alternative forum. Further, plaintiffs, beneficiaries, and decedents, were all from France in this case.\textsuperscript{728} Information regarding plaintiffs’ damages was, in large part, located in France.\textsuperscript{729} The critical witnesses and documents concerning Flash’s operations and the subject aircraft were in Egypt.\textsuperscript{730} Further, some of the witnesses were beyond the subpoena power of the United States courts, but “could be secured through a French court.”\textsuperscript{731} Similarly, documents and other evidence in Flash’s possession would be more readily available to a French court.\textsuperscript{732} All of the United States documents and witnesses were within the control of defendants and would therefore be accessible to a French court.\textsuperscript{733} Further, given that litigation arising from this accident was already pending in the French courts, “dismissal [was] warranted to avoid the possibility of inefficient and duplicative proceedings.”\textsuperscript{734}

The court then turned to the public interest factors and determined that these factors also warranted dismissal.\textsuperscript{735} The court found that France had a great interest in the controversy’s out-

\begin{itemize}
\item \textsuperscript{721} Id. at *13.
\item \textsuperscript{722} Id. at *14.
\item \textsuperscript{723} Id.\textsuperscript{724} Id.
\item \textsuperscript{725} Id. at *15.
\item \textsuperscript{726} Id. at *20–21.
\item \textsuperscript{727} Id. at *18.
\item \textsuperscript{728} Id. at *19.
\item \textsuperscript{729} Id.
\item \textsuperscript{730} Id.
\item \textsuperscript{731} Id.
\item \textsuperscript{732} Id.
\item \textsuperscript{733} Id.
\item \textsuperscript{734} Id. at *20.
\item \textsuperscript{735} Id. at *21.
\end{itemize}
come, while the United States' interest was minimal. Because both the public and private interest factors weighed in favor of dismissal, defendants' motion was granted.

C. Van Schijndel v. Boeing Co.

Plaintiffs, Dutch citizens, sued defendants, Boeing Company and Goodrich Corporation ("Defendants"), in the United States District Court for the Central District of California, for claims arising from the crash of Singapore Airlines (SIA) Flight SQ006 at Chiang Kai-Shek International Airport in Taipei, Taiwan. A collision occurred between the airplane and construction equipment when the airplane attempted to take off from a closed runway that was undergoing repairs. Plaintiffs' complaint asserted products liability claims against defendants.

Initially, the court dismissed plaintiffs' claims on the grounds of forum non conveniens, finding that an adequate alternative forum for the case existed, among other places, in the country of Singapore and that dismissal was preferable in light of the private and public interest. Subsequently, the court's ruling was reversed and remanded by the Ninth Circuit. The Ninth Circuit pointed out that the lower court identified three fora that were possibly more convenient for the litigation of the case, when it should have resolved "whether any single forum would have been a more convenient forum than the district court in Los Angeles." Defendants renewed their motion to dismiss in conformance with the Ninth Circuit's ruling and claimed that "the balancing of private and public interest factors favor[ed] litigation in Singapore."

The court concluded that dismissal on the grounds of forum non conveniens was appropriate. First, the court found that Singapore was an adequate alternative forum, as defendants were amenable to service of process in that forum. Defendants renewed their motion to dismiss in conformance with the Ninth Circuit's ruling and claimed that "the balancing of private and public interest factors favor[ed] litigation in Singapore."

The court concluded that dismissal on the grounds of forum non conveniens was appropriate. First, the court found that Singapore was an adequate alternative forum, as defendants were amenable to service of process in that forum.

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736 Id.
737 Id. at *22.
739 Id. at 768-69.
740 Id. at 768.
741 Id.
742 Id.
743 Id.
744 Id.
745 Id.
746 Id. at 769.
747 Id. at 775.
ants had agreed to submit to the jurisdiction of the Singapore courts and to waive any statute of limitations defense that might apply to the re-filed claims for sixty days. Defendants also agreed to make available in the Singapore action "any evidence or witnesses in their possession, custody or control." Finally, defendants agreed to pay any final judgment a Singapore court might award against them. The court noted that when a defendant voluntarily submits to the jurisdiction of a foreign forum, it is not necessary to analyze the details of the foreign forum's laws. However, defendants were also able to show that plaintiffs would have an adequate remedy in Singapore.

The court then considered the private interest factors and found that the factors weighed in favor of dismissal. First, evidence would be the most accessible to a Singapore court because Singapore was the center of the litigation arising from the flight. Additionally, the Singapore court could gain access to evidence which the American court could not control, including the testimony of the three flight crew members who are residents of Singapore, SIA witnesses and records concerning the flight crew's training and qualifications, SIA training and operations manuals and personnel, evidence produced during the Singaporean investigation of the accident, and, most importantly, the aircraft's maintenance records.

The court also found that the other private interest factors weighed in favor of dismissal. Although plaintiffs were residents of the Netherlands and the defendants were citizens of the United States, the fact that numerous relevant witnesses resided in Singapore counted strongly in favor of allowing the action to proceed in Singapore. These Singaporean witnesses could not be reached by compulsory process in the United States, but could be reached by compulsory process in Singapore. Further, defendants were willing to transport to Singapore all evidence within their possession, custody, and

748 Id.
749 Id. at 774.
750 Id.
751 Id. at 775.
752 Id.
753 Id. at 775, 778.
754 Id. at 776.
755 Id. at 776–77.
756 Id. at 778–81.
757 Id. at 778.
758 Id. at 779.
Finally, allowing plaintiffs to sue these defendants in the United States while concurrent proceedings were pending in Singapore presented a risk of prejudice. The court also found that the public interest factors weighed in favor of dismissal. The court determined that court congestion was not an issue in Singapore, while the Central District of California was "one of the busiest districts in the [United States]." Allowing the case to proceed in this court would impair the opportunity for local litigants to try their cases. Further, California had a minimal interest in the case, while Singapore had a significant interest in the litigation.

Because the public and private interest factors weighed in favor of dismissal, and because Singapore was an adequate alternative forum, the court dismissed the case.

XIV. CHOICE OF LAW

A. In re Air Crash at Belle Harbor, New York on November 12, 2001

This litigation resulted from the crash of an Airbus A-300 aircraft, operated as American Airlines (American) Flight 587, at Belle Harbor, New York. Everyone on board the aircraft died, five Belle Harbor residents were killed, and other residents suffered injuries and sustained damage to their property. A National Transportation Safety Board (NTSB) investigation found that the "aircraft's vertical stabilizer and rudder separated in flight and fell into the water" over Jamaica Bay. No longer capable of flight, the aircraft crashed into the residential neighborhood of Belle Harbor. Defendants petitioned the court for a determination that (1) New York law should govern the passenger, crew, and ground cases; (2) the Warsaw Convention applied to all passenger claims against American Airlines; and

759 Id.
760 Id. at 780.
761 Id. at 785.
762 Id. at 782.
763 Id.
764 Id.
765 Id. at 785.
767 Id. at *1.
768 Id. at *1-2.
769 Id. at *8.
770 Id.
(3) French law applied to claims against Airbus for punitive damages.\textsuperscript{771}

The court addressed the threshold question of whether admiralty jurisdiction could be exercised over the claims that arose from the deaths of the Flight 587 passengers.\textsuperscript{772} The court articulated the test for admiralty jurisdiction: (1) the alleged wrong must have occurred over navigable waters; and (2) there must be a sufficient nexus between the incident and a maritime activity.\textsuperscript{773} The sufficient nexus test involves two distinct inquiries.\textsuperscript{774} First, the incident must have a "potentially disruptive impact on maritime commerce,"\textsuperscript{775} and second, the incident must bear a significant relationship to traditional maritime activity.\textsuperscript{776} The court noted that the "potential effects" test does not look to the "particular facts of the incident," but to the incident's general features.\textsuperscript{777} The inquiry is "whether the incident [can] be seen within a class of incidents that pose[ ] more than a fanciful risk to commercial shipping."\textsuperscript{778}

The court found that both prongs of the nexus test were satisfied.\textsuperscript{779} The court noted that the federal courts are almost unanimous in finding a "significant relationship to maritime activity" when the transoceanic or island voyage would have been conducted by sea, but for air travel.\textsuperscript{780} In this case, as the aircraft was scheduled to make a 1500 mile transoceanic flight, it is unquestionable that it bore a "significant relationship to traditional maritime activity."\textsuperscript{781} The court also found that a determination of "potential impact on maritime commerce" was supported by the accident's general features.\textsuperscript{782}

Additionally, the court found that the location test was satisfied.\textsuperscript{783} It is undisputed that losing the vertical stabilizer and rudder over Jamaica Bay rendered the aircraft incapable of

\textsuperscript{771} Id. at *2.
\textsuperscript{772} Id. at *21.
\textsuperscript{773} Id. at *23–26.
\textsuperscript{774} Id. at *26.
\textsuperscript{775} Id.
\textsuperscript{776} Id.
\textsuperscript{777} Id. at *30.
\textsuperscript{778} Id. at *31 (citing Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 539 (1995)).
\textsuperscript{779} Id. at *32.
\textsuperscript{780} Id. at *26–27.
\textsuperscript{781} Id. at *28.
\textsuperscript{782} Id. at *31.
\textsuperscript{783} Id. at *36.
flight and made the deaths of all on board inevitable.\textsuperscript{784} Thus, the accident occurred over the navigable waters of Jamaica Bay.\textsuperscript{785} As both the location and the nexus tests were met, the passenger claims fell within the federal courts’ admiralty jurisdiction.\textsuperscript{786}

The next inquiry for the court was whether admiralty jurisdiction displaced state law with regard to compensatory damages for wrongful death.\textsuperscript{787} The court noted at the outset that exercising admiralty jurisdiction “does not result in automatic displacement of state law;” however, state legislation does not apply when “it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations.”\textsuperscript{788} The court noted the absence of an admiralty statute for the “wrongful death of non-seafarers in territorial waters.”\textsuperscript{789} Thus, the general maritime death action recognized by the Supreme Court in \textit{Moragne v. States Marine Lines, Inc.}\textsuperscript{790} governed here.\textsuperscript{791} Such an action encompassed claims for negligence, unseaworthiness, and strict products liability.\textsuperscript{792} It also recognized a survival action for an estate.\textsuperscript{793}

However, it remained in question whether the \textit{Moragne} cause of action preempted the state wrongful death and survival statutes.\textsuperscript{794} The court noted that the Supreme Court addressed this question in \textit{Yamaha Motor Corp. v. Calhoun}\textsuperscript{795} and concluded that \textit{Moragne} did not preclude the “concurrent application of state wrongful death statutes.”\textsuperscript{796} The court followed the majority of federal courts and held that \textit{Moragne} created a floor for recovery, not a ceiling.\textsuperscript{797} While courts may augment the \textit{Moragne}
remedy with state law that allows for greater damages, they cannot apply state law that narrows recovery.\footnote{Id. at *47.}

In order to determine whether state law applied in this case, it was necessary for the court to determine whether the applicable state law would result in a more- or less-generous recovery than the Moragne remedy.\footnote{Id.} The court applied “admiralty choice-of-law rules to determine which state law [would] supplement the general maritime death action.”\footnote{Id. at *50–51.} In Lauritzen v. Larsen,\footnote{345 U.S. 571 (1953).} a case involving the wrongful death of a seaman, the Supreme Court outlined seven factors to be considered in the choice of law analysis:

(1) the place of the wrongful act;
(2) the law of the flag;
(3) the allegiance or domicile of the injured seaman;
(4) the allegiance of the defendant ship owner;
(5) the place where the contract of employment was made;
(6) the inaccessibility of a foreign forum; and

The court found that here, the domicile of the parties and the place of injury were the most important factors in determining compensatory damages.\footnote{Id. at *52.} As the place of injury for the passenger suits was New York, and only two passengers were not domiciled in New York, the law of New York was the applicable state law.\footnote{Id. at *52–54.} Because New York law did not permit recovery of non-pecuniary damages in wrongful death actions, the available remedy was less generous than that provided by the Moragne maritime action.\footnote{Id. at *54.} Thus, compensatory damages were correctly measured by the general maritime law.\footnote{Id.}

The court next determined that damages for loss of society are recoverable in a Moragne action.\footnote{Id. at *54–55.} The court found that the Supreme Court, in Sea-Land Services, Inc. v. Gaudet,\footnote{414 U.S. 573 (1974).} permitted recovery “for funeral expenses and loss of decedent’s support,
household services, parental nurture, training, education and guidance to his children, and loss of society.”

The court also held that punitive damages could be recovered under general admiralty law. There was no applicable admiralty statute barring punitive damages, and the majority of courts considering the issue have allowed recovery of punitive damages in death cases governed by general maritime law.

Finally, the court considered which forum’s law would apply to punitive damages claims against Airbus. The court explained that conflict-of-law issues should be decided under depecage, an issue-specific approach that recognizes that, in an action, different fora may have varying degrees of interest with respect to the various facts and elements of a claim or defense. Since the goals of punitive damages differ from those of compensatory damages, it was appropriate to apply different laws to the two types of recovery. The punitive damages inquiry should focus on “the defendant’s principal place of business” and “the place where the misconduct that is the subject of the punitive damages claim took place.” Applying this analysis to the passenger claims, the court was unable to make a determination of the appropriate forum, due to the uncertainty as to the place of the relevant conduct.

With regard to the ground claims, the court found that the law of New York governed punitive damages against Airbus. The court determined that the claims brought by the ground plaintiffs were within the federal courts’ diversity jurisdiction. Therefore, choice of law issues were governed by the forum state of New York. New York’s choice of law rules require that New York law be used to determine punitive damages, as that was the forum with the most significant interest in having its law applied to the ground plaintiffs’ claims.

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810 Id. at *69–70.
811 Id.
812 Id. at *72.
813 Id.
814 Id. at *74.
815 Id. at *75.
816 Id. at *82.
817 Id. at *86.
818 Id. at *85.
819 Id.
820 Id. at *86.
XV. CLASS ACTION CERTIFICATION

A. IN RE NIGERIA CHARTER FLIGHTS CONTRACT LITIGATION

Plaintiffs were passengers who purchased plane tickets for round-trip travel between the United States and Nigeria. Without notice, the defendant-air-carrier cancelled plaintiffs’ flights. Plaintiffs sought certification of two classes: those who were stranded in the United States because they could not “use the return portion of their ticket to Nigeria,” and those who were not transported from Nigeria back to the United States.

The court considered the prerequisites to class certification set forth in Rule 23(a) of the Federal Rules of Civil Procedure. First, the court considered the numerosity requirement of Rule 23(a)(1), which requires that the proposed class be “so numerous that joinder of all members is impracticable.” The court noted that in the Second Circuit, a class of more than forty people is “presumed to meet the numerosity requirement.” The proposed classes contained an estimated 3,000 to 4,000 people. Therefore, the court found that the numerosity requirement was satisfied.

The court then turned to the commonality, typicality, and adequacy requirements of Rule 23(a)(2). The court found that the commonality requirement was satisfied, as all plaintiffs based their claims on identical terms and conditions of their tickets. The typicality requirement also was satisfied, as each class member made similar arguments regarding the cancellation of their flights without notice. Further, plaintiffs had sufficiently shown that representation was adequate, as plaintiffs’ counsel were “competent to handle the case” and there were “no conflicts of interest among class members.”

822 Id. at 299.
823 Id.
824 Id.
825 Id. at 301.
828 Id.
829 Id.
830 Id.
831 Id.
832 Id.
833 Id.
The court next examined whether class certification was appropriate under Rule 23(b).\textsuperscript{834} The court found that the only appropriate grounds for certification was pursuant to Rule 23(b)(3), which permits certification if (1) the court finds “that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members,” . . . and (2) “a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”\textsuperscript{835} The court found that both of these requirements were satisfied.\textsuperscript{836} First, plaintiffs’ claims did not “rely on individualized representations,” and common proof was necessary to establish their claims.\textsuperscript{837} Additionally, to the extent that plaintiffs needed to establish reliance, the representations relied upon were made to the entire class.\textsuperscript{838} The court rejected defendants’ argument that the individualized damages inquiries in this case destroyed predominance, finding that if courts considered “the need for individualized damage determinations,” few class actions could be maintained.\textsuperscript{839} Similarly, the court rejected the argument that the mere possibility of conflicts among applicable state laws precluded class certification.\textsuperscript{840}

The court also concluded that a class action was superior to other methods of adjudication given “the prohibitive cost [to plaintiffs] of proceeding individually.”\textsuperscript{841} Further, the significant size of the proposed classes and the number of actions that had been consolidated made class action certification the most fair and efficient method for adjudication of these actions.\textsuperscript{842} Because all of the requirements of Rule 23 were met, the court certified a single class of all passengers to whom defendants failed to provide transportation between Nigeria and the United States.\textsuperscript{843}

\textsuperscript{834} Id.
\textsuperscript{835} Fed. R. Civ. P. 23(b)(3); Nigeria Charter, 233 F.R.D. at 304, 306.
\textsuperscript{836} Nigeria Charter, 233 F.R.D. at 306.
\textsuperscript{837} Id. at 304.
\textsuperscript{838} Id. at 305.
\textsuperscript{839} Id.
\textsuperscript{840} Id. at 306.
\textsuperscript{841} Id.
\textsuperscript{842} Id.
\textsuperscript{843} Id.
B. Richards v. Delta Air Lines, Inc.\textsuperscript{844}

Plaintiff lost a piece of baggage during an international flight that terminated in Atlanta, Georgia.\textsuperscript{845} Plaintiff filed a claim with Delta seeking the fair-market value of her baggage and its contents.\textsuperscript{846} In response, Delta advised plaintiff that because her "journey involve[d] international travel, liability for loss [of her baggage] is governed by [the Warsaw Convention]."\textsuperscript{847} Delta further informed plaintiff that, under article 22(2) of the Warsaw Convention, its liability was capped at $20.00 per kilogram.\textsuperscript{848} The letter continued: "Since [Delta's] maximum allowable weight is thirty-two kilograms per bag, our check for $640.00, which is the maximum reimbursement, will be mailed under separate cover."\textsuperscript{849} Plaintiff cashed the check upon receipt.\textsuperscript{850}

Citing Cruz v. American Airlines, Inc.,\textsuperscript{851} plaintiff filed a class-action suit against Delta.\textsuperscript{852} The court in Cruz held that a carrier was only entitled to the Warsaw Convention's "liability limitation for lost or damaged baggage" when the carrier records the weight of the luggage on the passenger's baggage ticket.\textsuperscript{853} Plaintiff claimed that Delta failed to record the weight of the baggage as a matter of practice and was therefore liable for the full market value of the lost or damaged baggage.\textsuperscript{854} The putative class consisted of approximately three thousand people who received less than the fair market value for their lost or damaged baggage between December 17, 1997, and March 3, 1999.\textsuperscript{855} The complaint sought a declaratory judgment stating that Delta was liable for the market value of the class members' baggage because it unlawfully availed itself of the Warsaw Convention's liability limitations.\textsuperscript{856} The complaint also requested damages on behalf of each class member equaling the difference between

\textsuperscript{844} 453 F.3d 525 (D.C. Cir. 2006).
\textsuperscript{845} Id. at 526.
\textsuperscript{846} Id.
\textsuperscript{847} Id.
\textsuperscript{848} Id.
\textsuperscript{849} Id.
\textsuperscript{850} Id.
\textsuperscript{851} 193 F.3d 526 (D.C. Cir. 1999).
\textsuperscript{852} Richards, 453 F.3d at 526.
\textsuperscript{853} Id. at 530.
\textsuperscript{854} Id. at 527.
\textsuperscript{855} Id.
\textsuperscript{856} Id.
the amount Delta paid and the fair market value of the lost or damaged luggage.\textsuperscript{857}

Following cross-motions for summary judgment, which were denied based on the existence of triable issues of fact as to Delta's accord and satisfaction defense, plaintiff moved for class certification pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure.\textsuperscript{858} Three years after the commencement of the action, a motion "to enlarge the previous class certification motion" to include a request for Rule 23(b)(3) class certification was filed.\textsuperscript{859} The district court denied class certification, finding that although the class satisfied the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation, it did not satisfy either Rule 23(b)(2) or (b)(3).\textsuperscript{860}

With respect to Rule 23(b)(2), the district court cited In re Veneman,\textsuperscript{861} which held that certification under the Rule "is not appropriate where plaintiff's claims are predominately for monetary relief."\textsuperscript{862} Concerning Rule 23(b)(3), the district court explained that "the plaintiff must show that 'questions of law or fact common to the members of the class predominate . . . and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.'"\textsuperscript{863} The district court held that the class did not satisfy this standard because "Delta's accord and satisfaction affirmative defense . . . will require the application of varying state laws and a case-by-case factual inquiry."\textsuperscript{864} A motion for reconsideration was filed and the district court denied the motion.\textsuperscript{865}

\textsuperscript{857} Id.
\textsuperscript{858} Id. Under Rule 23(b)(2) of the Federal Rules of Civil Procedure, a class action may be maintained if the prerequisites of Rule 23(a) (numerosity, commonality, typicality, and adequacy of representation) are satisfied and "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." FED. R. CIV. P. 23(b)(2).
\textsuperscript{859} Richards, 453 F.3d at 527–28. Under Rule 23(b)(3) of the Federal Rules of Procedure, in addition to satisfying the prerequisites of Rule 23(a), the court must find "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3).
\textsuperscript{860} Richards, 453 F.3d at 528.
\textsuperscript{861} 309 F.3d 789 (D.C. Cir. 2002).
\textsuperscript{862} Richards, 453 F.3d at 528 (quoting In re Veneman, 309 F.3d at 792).
\textsuperscript{863} Id.
\textsuperscript{864} Id.
\textsuperscript{865} Id.
On appeal to the District of Columbia Circuit, the court initially determined that it had jurisdiction to consider the appeal of the district court's refusal to certify the class.\textsuperscript{866} The court then moved on to the merits of the appeal.\textsuperscript{867}

The circuit court affirmed the district court's decision denying class certification.\textsuperscript{868} The circuit court agreed that Rule 23(b)(2) certification was not available because this section was not intended to extend to cases seeking predominately monetary damages, and the complaint clearly sought monetary damages on behalf of each class member.\textsuperscript{869} The circuit court likewise agreed that Rule 23(b)(3) certification was inappropriate, not only because it was untimely, but because the arguments in favor of class certification under this Rule were inconsistent and failed to establish that a class action was the best way to resolve the controversy.\textsuperscript{870}

\section*{XVI. INSURANCE COVERAGE}

\subsection*{A. Policy Exclusions}

1. \textit{AIG Aviation, Inc. v. Holt Helicopters, Inc.}\textsuperscript{871}

In this case, plaintiff Holt Helicopters, sued to recover for damage to a Robinson R-22 helicopter that crashed in New Mexico on October 20, 2001, while herding cattle.\textsuperscript{872} The helicopter was insured under a policy issued by National Union Fire Insurance Company and managed by AIG Aviation, Inc.\textsuperscript{873}

The declarations page of the policy provided a "Pilot Warranty Completion" amendment that provided coverage if the helicopter was being operated by certain named pilots.\textsuperscript{874} The amendment also provided coverage if the helicopter was being piloted by "any commercial pilot with rotary wing ratings properly certified by the FAA" and with a minimum of 1000 logged hours in rotary wing aircraft, including 100 hours in a Robinson R-22.\textsuperscript{875} Additionally, the policy contained an exclusion stating that the policy did not provide coverage to the insured if the

\begin{thebibliography}{871}
\bibitem{866} Id. at 529.
\bibitem{867} Id.
\bibitem{868} Id. at 532.
\bibitem{869} Id. at 550.
\bibitem{870} Id. at 531–32.
\bibitem{871} 198 S.W.3d 276 (Tex. App.—San Antonio 2006, pet. denied).
\bibitem{872} Id. at 278.
\bibitem{873} Id.
\bibitem{874} Id.
\bibitem{875} Id. at 279.
\end{thebibliography}
helicopter was being piloted by a pilot other than those specified in the declarations.876

The pilot operating the helicopter at the time of the accident was not named in the policy and had only logged 685 logged flying hours, well short of the 1000 requirement.877 Accordingly, AIG declined coverage under the applicable exclusion.878

Plaintiff commenced an action in Texas state court alleging "breach of contract, wrongful denial of its claim, and violations of the [Texas] Insurance Code."879 The parties filed cross-motions for summary judgment on the issue of whether AIG could decline coverage "without establishing a causal connection between the crash and [the pilot’s] lack of experience."880 The trial court granted plaintiff partial summary judgment, ruling that plaintiff was entitled to coverage unless AIG proved at trial that the pilot’s lack of experience caused or contributed to the accident.881 At trial, the jury found, among other things, that AIG did not establish a causal connection between the accident and the pilot’s experience.882 The trial court entered judgment in favor of plaintiff.883

On appeal, AIG argued that the trial court erred in ruling that AIG was required to establish causation between the accident and the pilot’s lack of experience.884 AIG asked the appellate court to break from the Texas Supreme Court’s decision in Puckett v. U.S. Fire Insurance Co.,885 which held that an insurer cannot avoid liability unless the alleged breach of the policy is causally connected to the accident.886 AIG argued that the decision in Puckett was not in keeping with the majority of jurisdictions on this issue and that the decision in Puckett was contrary to general rules of contract that require a court to give full effect to the plain meaning of the contract.887 The court, however, noted that the Texas Supreme Court in Puckett gave considera-

876 Id.
877 Id.
878 Id. at 278.
879 Id.
880 Id. at 279.
881 Id.
882 Id.
883 Id.
884 Id.
885 678 S.W.2d 936 (Tex. 1984).
886 Holt, 198 S.W.3d at 279–80.
887 Id. at 280.
tion to, and rejected, the same arguments. Puckett was still good law and thus the court was bound to follow it. AIG’s remaining arguments were rejected and the trial court’s judgment was affirmed.

2. Griffin v. Old Republic Insurance Co.

Robert Griffin was seriously injured when an airplane insured by Old Republic Insurance Company (Old Republic) crashed in his backyard. The policy excluded coverage when “the Airworthiness Certificate of the aircraft is not in full force and effect” or when “the aircraft has not been subjected to the appropriate airworthiness inspection(s) as required under current applicable Federal Air Regulations for the operations involved.” The aircraft did not have a current airworthiness certificate at the time of the crash.

Griffin filed an action in Nevada state court against the pilot of the aircraft and his wife. Old Republic then filed an action in the United States District Court, District of Nevada, seeking a declaratory judgment that it had no obligation to pay damages to Griffin or the pilot because the policy did not cover an airplane without a current airworthiness certificate. The district court granted summary judgment to Old Republic, holding that under Nevada law, there need not be a causal connection between the accident and the exclusion for an insurer to avoid liability.

Griffin appealed to the Ninth Circuit Court of Appeals, which certified the following question of law to the Nevada Supreme Court:

Under Nevada law, may an insurer deny coverage under an aviation insurance policy for failure to comply with an unambiguous requirement of the policy or is a causal connection between the insured’s noncompliance and the accident required?

888 Id.
889 Id.
890 Id. at 288.
891 133 P.3d 251 (Nev. 2006).
892 Id. at 252–53.
893 Id. at 253 (internal quotation and punctuation and citation omitted).
894 Id.
895 Id.
896 Id.
897 Id.
898 Id.
The Nevada Supreme Court answered the question in the affirmative, holding that:

"insurers need not establish a causal connection between a safety-related aviation policy exclusion and the loss in order to exclude coverage so long as the exclusion is unambiguous, narrowly tailored, and essential to the risk undertaken by the insurer."

B. September 11, 2001 Coverage Disputes

1. PMA Capital Insurance Co. v. US Airways, Inc.

Following the September 11, 2001, terrorist attacks on the World Trade Center in New York, the FAA issued a Notice to Airmen (NOTAM) that ordered "all civilian aircraft to land or stay on the ground." Shortly thereafter, the attack on the Pentagon occurred, and Ronald Reagan Washington National Airport (Reagan National Airport) was evacuated and closed. Although other airports throughout the country were allowed to reopen several days after the attacks, a Temporary Flight Restriction issued by the FAA closed the air space within twenty-five nautical miles of Reagan National Airport. As a result, the airport remained closed for approximately two weeks, and US Airways could not conduct commercial flights from the airport until October 4, 2001.

US Airways filed a claim under a policy issued by PMA Capital Insurance Company (PMA) for business interruption losses. PMA, in turn, declined coverage. US Airways then filed an action in Virginia state court and was granted judgment in its favor. On appeal to the Virginia Supreme Court, the issue was whether "[i]t was error for the trial court to find that any payments received by US Airways from [the] federal [government] pursuant to the [Air Transportation Safety and System Stabilization Act (ATSSSA)] were not recoveries under the [policy's] set-off provision."

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899 Id. at 256–57.
900 626 S.E.2d 369 (Va. 2006).
901 Id. at 371.
902 Id.
903 Id.
904 Id.
905 Id.
906 Id.
907 Id. at 371–72.
908 Id. at 372.
The policy provided that "all salvages, recoveries, and payments, excluding proceeds from subrogation and underlying insurance recovered or received prior to a loss settlement under this policy shall reduce the loss accordingly." US Airways contended that the ATSSSA was never intended to reduce insurance proceeds. PMA countered that the plain language of the policy required a reduction for these payments.

The court held that the amounts received from the federal government under the ATSSSA constituted a "payment" or "recovery" under the policy, requiring a reduction in US Airways' claim. The court stated that in ruling that US Airways was not required to reduce its claims for the amounts recovered from the government, "the trial court essentially re-wrote the Policy and made a new contract between PMA and US Airways." As US Airways received $310 million from the federal government under the ATSSSA, an amount that was in excess of the policy limits, judgment was entered in favor of PMA.

2. United Air Lines, Inc. v. Insurance Co. of Pennsylvania

In this case, United Air Lines, Inc. ("United") sought coverage for the lost earnings it sustained as a result of the September 11, 2001, terrorist attacks. United commenced an action in the United States District Court, Southern District of New York, seeking a declaratory judgment and damages for breach of contract under a $25 million "Property Terrorism & Sabotage" insurance policy issued by the Insurance Company of the State of Pennsylvania (ISOP).

United's ticket office in the World Trade Center was destroyed and ISOP conceded that United was entitled to recover under the policy for lost earnings resulting from the physical damage. United's facilities at Ronald Reagan Washington National Airport ("Reagan National Airport"), however, were not damaged as a result of the attacks.

909 Id. at 371 (internal punctuation omitted).
910 Id.
911 Id. at 372.
912 Id. at 374.
913 Id.
914 Id.
915 439 F.3d 128 (2d Cir. 2006).
916 Id. at 128.
917 Id.
918 Id.
919 Id.
Following cross-motions for summary judgment, the district court granted summary judgment in favor of ISOP, holding that the terms of the policy did not provide coverage for alleged lost earnings that were not directly related to the damage sustained to United's offices at the World Trade Center. On appeal to the Second Circuit Court of Appeals, the issue was whether United could recover "for its lost earnings caused by the . . . disruption of flight service" and the temporary closing of Reagan National Airport, despite the fact that no physical damage was sustained to United's facilities at Reagan National Airport.

The Second Circuit found that the policy covered losses for business interruption "caused by damage to or destruction of the Insured Locations." Losses relating to damage to the World Trade Center location were therefore recoverable. However, the court held that those losses that were attributable solely to the government suspension of air service, and not "damage to or destruction of" a United location, were not compensable under the policy.

Nor did the Second Circuit find that the policy's "civil authority" clause provided coverage for these losses. Under this clause, United would have been entitled to coverage if it had been blocked by the government from accessing its property as "a direct result of damage to adjacent premises." United argued that the Pentagon, which is located approximately one mile from United's facilities at Reagan National Airport, was an "adjacent premises." The court questioned the logic of this argument and noted that, even if it was an "adjacent premises," the claimed lost earnings were not a "direct result" of the damage to the Pentagon. Rather, the losses stemmed from government efforts to avoid a future attack by closing Reagan National Airport, which resulted in the suspension of United's services from that airport. Accordingly, the court held that

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920 Id. at 130.
921 Id. at 128.
922 Id. at 130.
923 Id.
924 Id.
925 Id.
926 Id. at 134.
927 Id.
928 Id.
929 Id.
there was no coverage for these losses. The judgment of the district court was affirmed.

3. In re September 11th Liability Insurance Coverage Cases

In accordance with the Air Transportation Safety and System Stabilization Act (ATSSSA), those injured in and around the World Trade Center site and their legal successors were given the option of pursuing compensation from the specially created Victim Compensation Fund, or filing suit in the Southern District of New York. These cases, alleging claims against the Port Authority and its lessees, were consolidated before District Judge Alvin K. Hellerstein of the Southern District.

In June 2006, Judge Hellerstein decided a summary judgment motion filed by the primary and excess insurers who covered the lessees of Towers One and Two of the World Trade Center. The motions sought declarations that the respective liability insurance policies did not extend coverage for defense costs. With the exception of one insurer, the motions were granted and it was declared that the operative instruments did not include a duty to defend. In fact, the court held that the operative instruments “explicitly excluded defense costs” when the terrorist attacks occurred on September 11, 2001.

In so ruling, the court determined that regulation 107 of the New York Insurance Law does not, in this case, impose a duty to provide defense costs since the equities do not favor the court rewriting the clear language of the parties’ bargained-for agreement. However, the operative instrument with one excess insurer, Royal Insurance Company, did undertake the duty to

930 Id. at 135.
931 Id.
933 Id. at 110.
934 Id.
935 Id. at 108.
936 Id. at 130–31.
937 Id. at 116. Since some insurance agreements, most significantly the primary and umbrella coverage, were in binder form on September 11, 2001, Judge Hellerstein held that these instruments were the legally operative agreements, rather than the final policies issued later. See id. at 115.
938 Id. at 108.
939 Id. at 118–19. Judge Hellerstein also suggests that one or more of the “various exceptions” to Regulation 107 noted in earlier decisions applies, but there is no explicit discussion of which of those exceptions now applies. See id. at 119.
"defend beyond any exhausted limits of the underlying policies."\textsuperscript{940}

XVII. ECONOMIC LOSS RULE

A. \textit{Isla Nena Air Services, Inc. v. Cessna Aircraft Co.}\textsuperscript{941}

On August 30, 2003, plaintiff's plane, a Cessna 208B, was damaged when it was forced to make an emergency landing.\textsuperscript{942} Plaintiff, "a short-haul commercial airline" in Puerto Rico, commenced an action against Cessna Aircraft Co. (Cessna), the aircraft manufacturer, and Pratt & Whitney Canada Corp. (PWC), the engine manufacturer, to recover for the damage sustained to the aircraft and its components, including the destruction of the engine.\textsuperscript{943} It was not disputed that a defect in the aircraft caused the forced landing and the damage to the aircraft.\textsuperscript{944}

The defendants moved to dismiss plaintiff's claims.\textsuperscript{945} Plaintiff premised its claims on strict liability and negligence theories, seeking to recover economic losses from the loss of the aircraft, repair to the aircraft, loss of business income, and lost profits.\textsuperscript{946} Defendants claimed that plaintiff's claims were barred by the economic loss rule under both admiralty and Puerto Rico law.\textsuperscript{947} In essence, the economic loss rule provides that a party cannot recover in tort when a defective product harms only the product itself, instead of a person or other property.\textsuperscript{948} Rather, the party seeking recovery is limited to the remedies available under the applicable warranty or sales contract.\textsuperscript{949} Since plaintiff did not allege any claims for personal injury or damage to other property, the case turned on whether the economic loss rule would apply.\textsuperscript{950}

The district court ruled that the economic loss rule applied to both of plaintiff's theories of recovery, thus requiring dismissal.\textsuperscript{951} The court applied the two-part test from \textit{Executive Jet Avia-}

\textsuperscript{940} Id. at 126.
\textsuperscript{941} 449 F.3d 85 (1st Cir. 2006).
\textsuperscript{942} Id. at 86.
\textsuperscript{943} Id.
\textsuperscript{944} Id. at 88.
\textsuperscript{945} Id.
\textsuperscript{946} Id. at 86.
\textsuperscript{947} Id. at 87.
\textsuperscript{948} Id.
\textsuperscript{949} Id. at 88–89.
\textsuperscript{950} Id. at 86–87.
\textsuperscript{951} Id. at 87.
tion, Inc. v. City of Cleveland, Ohio 952 and held that both prongs of the test were satisfied, which triggered the application of the economic loss rule.953 In the alternative, the court held that Puerto Rico law would also apply the economic loss rule, even though the Puerto Rico Supreme Court had yet to address the issue.954 Thus, plaintiff's strict liability and negligence claims were dismissed.955

On appeal, the First Circuit Court of Appeals decided not to rule upon the issue of whether admiralty law applied to the case.956 After consulting Puerto Rico law, the court held that the Puerto Rico Supreme Court would apply the economic loss rule in this case.957 The court stated that an action predicated on article 1802 of Puerto Rico's Civil Code, which provides that a "person who by an act or omission causes damage to another party through fault or negligence shall be obligated to repair the damage so done," is barred by the economic loss rule where the defective product only harms itself.958 Thus, the lower court's decision was affirmed, albeit on slightly different grounds, and plaintiff's claims seeking recovery of economic losses from the crash were properly dismissed.959

XVIII. COMMON LAW NEGLIGENCE

A. Gorfinkle v. U.S. Airways, Inc.960

Plaintiff was allegedly injured while trying to retrieve his luggage from a U.S. Airways baggage claim area.961 The luggage was stacked two or three bags high in a roped off area.962 Plaintiff entered the roped off area, climbed onto the stacked luggage, and walked on the stacks looking for his baggage.963 He

952 409 U.S. 249, 268 (1972); see Isla Nena Air Servs., Inc. v. Cessna Aircraft Co., 380 F. Supp. 2d 74, 77 (D.P.R. 2005) ("first, 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.") (emphasis in original).
953 Isla Nena Air Servs., 449 F.3d at 87.
954 Id.
955 Id.
956 Id. at 88.
957 Id.
958 Id. (internal citation ommitted).
959 Id. at 91, 93.
960 431 F.3d. 19 (1st Cir. 2005).
961 Id. at 21.
962 Id.
963 Id.
tried to pull a suitcase out from under two other bags, lost his balance and fell, injuring himself.\textsuperscript{964}

Plaintiff, a Massachusetts resident, filed a negligence claim against U.S. Airways.\textsuperscript{965} The court concluded that summary judgment was appropriate because walking on top of stacked luggage was an open and obvious danger, such that U.S. Airways owed no duty of care to plaintiff.\textsuperscript{966} The court noted that under Massachusetts law, a property owner does not have a duty to protect or warn a visitor from dangers that are “obvious to persons of average intelligence.”\textsuperscript{967} The court held that walking across stacked luggage is an open and obvious danger.\textsuperscript{968} Here, an ordinarily intelligent plaintiff would have recognized the risk of falling if he tried to walk on top of stacked luggage.\textsuperscript{969} Accordingly, U.S. Airways owed no duty to plaintiff.\textsuperscript{970}

B. \textit{Earley v. United Airlines}\textsuperscript{971}

Plaintiff filed this negligence claim against United Airlines (United) alleging that as she was getting into her seat, the tray table in front of the unoccupied seat next to her suddenly fell and struck her.\textsuperscript{972} Plaintiff alleged that she lost her balance and fell.\textsuperscript{973} She did not report the incident while on the plane, despite feeling pain in her knee.\textsuperscript{974} She asserted that the tray table randomly fell open several more times throughout the flight, but she did not report the problem.\textsuperscript{975}

Plaintiff's negligence claims were grounded in negligence \textit{per se}, \textit{res ipsa loquitur}, and general negligence.\textsuperscript{976} Under her negligence \textit{per se} theory, plaintiff claimed that United violated federal regulations that require “an airline to stow food, beverage and tray tables during taxiing, take-off and landing.”\textsuperscript{977} The court

\begin{flushleft}
\textsuperscript{964} \textit{Id.} \\
\textsuperscript{965} \textit{Id.} \\
\textsuperscript{966} \textit{Id.} at 23. \\
\textsuperscript{967} \textit{Id.} at 24. \\
\textsuperscript{968} \textit{Id.} \\
\textsuperscript{969} \textit{Id.} \\
\textsuperscript{970} \textit{Id.} at 24–25. \\
\textsuperscript{971} No. 2:05-cv-0835, 2006 U.S. Dist. LEXIS 70439 (S.D. Ohio Sept. 28, 2006). \\
\textsuperscript{972} \textit{Id.} at *1–2. \\
\textsuperscript{973} \textit{Id.} at *2. \\
\textsuperscript{974} \textit{Id.} \\
\textsuperscript{975} \textit{Id.} \\
\textsuperscript{976} \textit{Id.} at *7. \\
\textsuperscript{977} \textit{Id.}
\end{flushleft}
rejected this theory for several reasons. First, under applicable Ohio law, violating an administrative rule is not negligence \textit{per se}, only potential evidence of negligence. Second, the federal regulations concern stowing tray tables specifically "while [the plane] is taxiing, taking off, and landing." Here, the incident occurred nearly one hour into the flight. Thus, it was unclear whether there was any violation of the regulations and there was no genuine issue of material fact enabling plaintiff to prove negligence \textit{per se}.

The court then turned to plaintiff's \textit{res ipsa loquitur} theory, noting that for plaintiff to succeed under the doctrine, she must prove that:

1. the instrumentality causing the injury was, at the time of the injury, or at the time of the creation of the condition causing the injury, under the exclusive management and control of the defendant; and
2. the injury occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed.

In this case, the evidence did not sufficiently support an inference that United had exclusive control of the tray table at all times prior to it falling on plaintiff. The evidence did not eliminate "the possibility that someone other than United also exercised control of the tray table" prior to the accident. As a matter of law, this possibility negated any inference that United retained exclusive control of the tray table and defeated plaintiff's \textit{res ipsa loquitur} claim.

Finally, the court considered plaintiff's ordinary negligence claim. The court concluded that it was undisputed that United, as a common carrier, owed plaintiff the "highest degree of care consistent with practical operations of the carrier." However, there were no genuine issues of material fact as to

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978 Id. at *10.  
979 Id.  
980 Id. at *11.  
981 Id.  
982 Id.  
983 Id. at *12–13.  
984 Id. at *17.  
985 Id.  
986 Id.  
987 Id. at *17–18.  
988 Id. at *19.
whether that duty was breached.\textsuperscript{989} It was impractical for United to inspect each tray table’s working condition at all times during a flight.\textsuperscript{990} There was neither evidence that United had notice of a faulty tray table nor was there evidence that the tray table had a defect.\textsuperscript{991} Without knowledge of a defect, a jury did not have a basis for concluding that United was negligent.\textsuperscript{992}

XIX. TRAVEL AGENTS AND ONLINE TICKET SELLERS

A. \textit{Worldspan, L.P. v. Orbitz, LLC}\textsuperscript{993}

This case was premised upon the alleged misconduct of defendant Orbitz, LLC (Orbitz), an online travel agency, in accessing data gathered and maintained by plaintiff Worldspan, LP (Worldspan).\textsuperscript{994} Plaintiff sued in the Northern District of Illinois, alleging violations of the Consumer Fraud and Abuse Act (CFAA) and breach of contract.\textsuperscript{995} Upon defendant’s motion to dismiss, the court considered whether plaintiff had sufficiently stated a claim under the CFAA.\textsuperscript{996}

The complaint alleged that defendant violated section 1030(a)(5)(A)(iii) of the CFAA by intentionally accessing “a protected computer ‘without authorization’ and thereby causing damage.”\textsuperscript{997} Though the complaint alleged Orbitz accessed plaintiff’s data, the agreements between Orbitz and Worldspan attached to the complaint indicated that Orbitz was given access to the data.\textsuperscript{998} An amended agreement, however, limited the nature of Orbitz’s access to the information.\textsuperscript{999}

The court held that the nature of plaintiff’s complaint was not that defendant accessed plaintiff’s data without authorization, but rather that defendant exceeded its authorization under the amended agreement.\textsuperscript{1000} Thus, the facts as presented in the pleadings did not state a claim under the CFAA.\textsuperscript{1001} Plaintiff ar-
gued that "unauthorized access" is the same as "exceeding authorized access," but the court noted that the CFAA explicitly distinguishes between the two types of conduct.\footnote{Id. at *12.}

In the alternative, the court noted that plaintiff failed to adequately allege it was damaged, as defined in the CFAA.\footnote{Id. at *14.} The CFAA defines damages as "any impairment to the integrity or availability of data, a program, a system, or information."\footnote{Id. (quoting 18 U.S.C. § 1030(e)(8) (2006)).} Plaintiff claimed it was damaged by the mere "taking of information," which the court held was insufficient.\footnote{Id. at *15.} Thus, plaintiff's claim under the CFAA was dismissed and since it was the only federal claim asserted, the court also dismissed the state law claims for breach of contract based on lack of jurisdiction.\footnote{Id. at *14, *16.}

**B. Tokarz v. LOT Polish Airlines\footnote{No. 96-CV-3154 (FB) (JMA), 2006 U.S. Dist. LEXIS 72118 (E.D.N.Y. Sept. 29, 2006).}**

Tokarz, doing business as J.J. Store ("Plaintiff"), sued LOT Polish Airlines (LOT) for events arising from LOT's termination of its contract with plaintiff.\footnote{Id. at *2.} The contract permitted plaintiff to sell airline tickets on LOT's nonstop flights between New York and Poland and to receive commissions in certain instances for its sales, including base and volume commissions.\footnote{Id. at *4.} LOT permitted its agents to take a portion of their commissions directly from the sales they made, which many agents, including plaintiff, used as a means to reduce the airfare.\footnote{Id. at *4–5.} Though this price reduction practice violated every agent's agreement with LOT, LOT rarely took action on the violations.\footnote{Id. at *7.} Yet, LOT did take action against plaintiff; namely LOT terminated the contract because LOT believed that plaintiff, unlike the other travel agents, was markedly reducing prices below its published fares by the full amount of its entitled commissions.\footnote{Id.} In its complaint, plaintiff asserted claims for antitrust violations, breach of contract, fraud, and tortuous interference with prospective eco-
nomic advantage against LOT.\textsuperscript{1015} Specifically, plaintiff alleged that LOT conspired with competing travel agents to fix retained commissions and ticket prices.\textsuperscript{1014} According to plaintiff, LOT terminated its commission agreement with plaintiff after it received a letter signed by six competing travel agents, which complained that plaintiff was discounting tickets below LOT’s published fares in violation of the agreement.\textsuperscript{1015}

After a bench trial in the United States District Court, Eastern District of New York, the court dismissed all of plaintiff’s claims except those related to the payment of unpaid commissions.\textsuperscript{1016} The court found that plaintiff failed to establish that LOT terminated the contract “in furtherance of a common plan” with others and that LOT did not conspire to fix commissions or ticket prices in violation of antitrust laws.\textsuperscript{1017}

Plaintiff’s antitrust claims were premised on federal (the Sherman Act) and New York (the Donnelly Act) laws that were materially identical.\textsuperscript{1018} Plaintiff claimed that LOT’s termination of the contract was meant to assist plaintiff’s competitors—specifically, other agents selling LOT’s airline tickets—by fixing their retained commissions and ticket prices.\textsuperscript{1019} The court noted that plaintiff had the burden of showing that defendant’s decision to terminate its contract was something more than the lawful unilateral conduct of a single enterprise.\textsuperscript{1020} Plaintiff’s showing that six travel agents complained to LOT about plaintiff’s price-cutting practices merely demonstrated that the agents were upset, not that they colluded to have plaintiff’s contract terminated.\textsuperscript{1021} Likewise, even though the relevant provision of the contract prohibited price-cutting and LOT regularly failed to terminate the contracts of other agents reducing airfare, plaintiff’s price-cutting practice was far more severe than that of other agents, thus justifying a departure from defendant’s “usual indifference.”\textsuperscript{1022} In short, there was insufficient evidence of a “common plan” between LOT and its other agents.\textsuperscript{1023}

\begin{thebibliography}{9}
\bibitem{1013} Id. at *2.
\bibitem{1014} Id. at *12–13.
\bibitem{1015} Id. at *6.
\bibitem{1016} Id. at *14.
\bibitem{1017} Id. at *12–13.
\bibitem{1018} Id. at *9.
\bibitem{1019} Id. at *8–9.
\bibitem{1020} Id. at *9–10.
\bibitem{1021} Id. at *9–10.
\bibitem{1022} Id.
\bibitem{1023} Id.
\end{thebibliography}
Plaintiff's three other claims were also dismissed. First, the breach of contract claim was insufficient because the agreement clearly stated that it could be terminated by either party upon thirty days' written notice, which LOT complied with when it terminated the agreement. Second, the tortuous interference claim failed because plaintiff could not show that LOT acted "solely out of malice, or used dishonest, unfair, or improper means" when the contract was terminated. Lastly, the fraud claim was dismissed because plaintiff could not adequately show that "but for the [alleged] misrepresentation [in negotiating the contract], it would have secured more favorable terms" in its contract with LOT. Plaintiff, however, was permitted to seek recovery for the unpaid commissions it earned while the contract was still in effect.

XX. GROUND VICTIM DAMAGES

A. Lawler v. American Airlines, Inc. (In re Air Crash at Belle Harbor, New York on November 12, 2001)

As a result of the American Airlines aircraft crash on November 12, 2001, plaintiff sued Airbus and American Airlines on his own behalf and on behalf of three children with respect to the death of two family members in the crash, as well as damage to personal and real property as a result of the crash. Both defendants moved for partial summary judgment regarding plaintiff's claims for mental injuries, such as those claims "for grief, sorrow, shock, and mental distress." The court ruled for defendants, holding that, under New York law, recovery in wrongful death cases is limited to losses for pecuniary injuries—not "loss of consortium, mental anguish, or grief damages." Thus, plaintiff's alleged mental injuries related to the decedent's wrongful death were not recoverable as a matter of law.
In addition, plaintiff could not recover alleged mental injuries under a personal injury or bystander theory, as a matter of law. Respectively, the children-claimants and plaintiff were not themselves physically injured as a result of the crash, and they were neither in the zone of danger nor witnesses of their family members’ deaths from the zone of danger. Also, the court held that New York law precludes the recovery of damages for mental injuries arising from damage to property, including plaintiff’s family residence.

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Fed. Express Corp. v. Dep’t of Transp., 434 F.3d 597 (D.C. Cir. 2006)

1034 Id.
1035 Id.
1036 Id.
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N.H. Motor Transp. Ass’n v. Rowe, 448 F.3d 66 (1st Cir. 2006)
Sobol v. Cont’l Airlines, No. 05 CV 8992 (LBS), 2006 U.S. Dist. LEXIS 71096 (S.D.N.Y. Sept. 26, 2006)
United Air Lines, Inc. v. Ins. Co. of Pa., 439 F.3d 128 (2d Cir. 2006)