Recent Developments in Aviation Law

Donald R. Andersen
RECENT DEVELOPMENTS IN AVIATION LAW

DONALD R. ANDERSEN*

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A. Montreal Convention

THE MONTREAL CONVENTION is not an amendment to the Warsaw Convention. Rather, the Montreal Convention is an entirely new treaty that unifies and replaces the system of liability that derives from the Warsaw Convention. The Convention "applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking." The Convention was ratified by the United States on November 4, 2003.

1. Parties Liable

In McCarthy v. American Airlines, Inc., the U.S. District Court for the Southern District of Florida addressed the application of "actual carrier" and "contracting carrier" found in Chapter V (Articles 39 through 48) of the Montreal Convention. Defendants had moved for summary judgment on plaintiffs claims for injuries sustained whilst on board an American Eagle flight bound for Miami from the Bahamas. Specifically, the defend-
ants argued that Executive Airlines had conceded that it was the owner and operator of the aircraft, rendering it the carrier.\(^6\) Since under Article 17 of the Montreal Convention only the “carrier” is liable for damages arising from bodily injuries caused by an accident occurring on the aircraft, the court turned to the task of determining which defendant was the “carrier” for liability purposes.\(^7\)

The court, taking into account that neither the Montreal Convention nor the Warsaw Convention defined the term “carrier,” looked to cases that had been decided under the Warsaw Convention to provide the definition.\(^8\) Under those cases, there could only be one carrier: the operator of the aircraft.\(^9\) But the court noted that the Montreal Convention had included a whole chapter (Chapter V) addressing the distinction and relationship between a contracting carrier and an actual carrier, which was notably missing from the Warsaw Convention.\(^10\) As such, the court determined that it could not rely on the old Warsaw Convention case law definition of carrier to determine the parties liable under the Montreal Convention.\(^11\) What appeared to have troubled the court the most was Article 40 of the Montreal Convention, which states that “where there is a contracting carrier and an actual carrier, both carriers ‘shall, except as otherwise provided in [Chapter V], be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the contract, the latter solely for the carriage which it performs.’”\(^12\) The court concluded that the added language in Chapter V of the Montreal Convention meant that more than one carrier could be responsible for plaintiff’s injuries.\(^13\) Consequently, the court denied American Eagle’s motion for summary judgment on the grounds that the record showed that the flight was billed as an American Eagle flight, indicative of a code-sharing relationship with Executive Airlines.\(^14\) Accordingly, American Eagle was at the very least a “contracting car-

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\(^6\) Id. at *3.  
\(^7\) Id. at *4.  
\(^8\) Id.  
\(^9\) Id. at *4.  
\(^10\) Id. at *6–7.  
\(^11\) Id. at *9.  
\(^12\) Id. at *7.  
\(^13\) Id. at *9.  
\(^14\) Id. at *9–10.
rier," and therefore could be found liable under the Montreal Convention for plaintiff's injuries.\textsuperscript{15}

But to be liable for plaintiff's injuries, Article 17 of the Montreal Convention requires that the plaintiff prove that the injury was caused by an "accident."\textsuperscript{16} Plaintiff's injury in this instance resulted from his falling down the stairway as he was trying to check his luggage plane-side.\textsuperscript{17} Allegedly, a flight attendant touched him and caused him to lose his balance.\textsuperscript{18} Defendants moved for summary judgment, arguing that such incident did not constitute an accident.\textsuperscript{19} Since the Montreal Convention does not supply a definition of "accident," the court applied the U.S. Supreme Court's holding in \textit{Air France v. Saks},\textsuperscript{20} that "liability exists under the Warsaw Convention . . . 'only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger,"'\textsuperscript{21} and denied defendants' motion for summary judgment.\textsuperscript{22} In reaching its decision, the court compared plaintiff's case to the facts of \textit{Gezzi v. British Airways}, in which the Ninth Circuit held that a passenger who slipped on water on the stairs as he was embarking was an "accident" under the Warsaw Convention.\textsuperscript{23} The court stated that the plaintiff's fall from the stairs caused by external factors would, if true, constitute an "accident" under the Montreal Convention.\textsuperscript{24}

\textsuperscript{15} \textit{Id.} at *10.
\textsuperscript{16} \textit{Id.} at *13.
\textsuperscript{17} \textit{Id.} at *1-2.
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} \textit{Id.} at *14.
\textsuperscript{20} \textit{Id.} at *13 (citing \textit{Air France v. Saks}, 470 U.S. 392, 405 (1985)).
\textsuperscript{21} \textit{Id.} at *13. "[The parties] are in agreement that the term "accident" means the same thing under the Warsaw Convention and the Montreal Convention." \textit{Id.} at *13 n.5.
\textsuperscript{22} \textit{Id.} at *16-17.
\textsuperscript{23} \textit{Id.} at *14-15 (citing \textit{Gezzi v. British Airways}, 991 F.2d 603, 605 (9th Cir. 1993). "The presence of water on stairs that are used to provide access to an airplane . . . qualifies as an 'accident' because it was both 'unexpected or unusual' and 'external to' [the plaintiff]." \textit{Gezzi}, 991 F.2d at 605 (quoting \textit{Air France}, 470 U.S. at 405).
\textsuperscript{24} \textit{Id.} at *15. The court also rejected the defendant's argument that "an event's relationship to the operation of the aircraft is relevant to determining whether or not it is an 'accident,'" stating that "the Court concludes that this argument is not binding law in [the Eleventh Circuit], finds it unpersuasive, and declines to apply it here." \textit{Id.} at *15, *16. The court also denied summary judgment based upon preemption under the Airline Deregulation Act (ADA), stating that
Plaintiff also brought negligence claims against the defendants based on their failure to maintain the stairway in a safe condition, their alleged knowledge that the stairway was dangerous, and their failure to correct the problem. The court noted that, under the Montreal Convention, the Defendants have the burden to prove that they were not negligent, which imposes an even greater burden at summary judgment than in typical cases. As to the defendants' failure to maintain the stairway in a safe condition, the plaintiff offered evidence into the record that created an issue of material fact and, therefore, summary judgment was denied. Defendants also moved for summary judgment on the basis that the Federal Aviation Administration (FAA) regulations preempted plaintiff's design defect claim because the design of the aircraft complied with FAA standards. The court noted that the Eleventh Circuit had addressed a similar argument in Public Health Trust of Dade County v. Lake Aircraft and concluded that "where federal aircraft design regulations did not require, but did permit, the use of a safer design on aircraft, the regulations did not preempt a claim for negligence

[e]very claim in the Complaint references the Montreal Convention specifically, and there is nothing in the Complaint that would suggest that any of these claims arises under state common law . . . although the Defendants may be correct that the ADA preempts certain state law negligence claims, the Court concludes that this argument has no relevance here, where no state law claims have been asserted.

Id. at *18–19. Finally, the court denied summary judgment based upon preemption. First, the court rejected defendants' preemption defense because the claims were not limited to negligent design, noting that the plaintiff did not merely allege negligent design but also a "known dangerous condition on the stairway and that the Defendants failed to correct it." Id. at *11. The court also rejected defendants' preemption defenses relating to the claims that the stairway was negligently designed because the Eleventh Circuit, in Public Health Trust of Dade County v. Lake Aircraft, 992 F.2d 291 (11th Cir. 1993), had "concluded that where federal aircraft design regulations did not require, but did permit, the use of a safer design on aircraft, the regulations did not preempt a claim for negligence for failure to use the safer design." Id. at *11–12.

25 Id. at *12.
26 Article 21 of the Montreal Convention sets up a two tier damage scheme for passenger death and injury claims. (1) The carrier is strictly liable up to 100,000 Special Drawing Rights and (2) the carrier is not liable for damages beyond that amount if it shows that (a) the damages were not due to its negligence or wrongful acts or (b) the damages were solely due to the negligence or other wrongful act or omission of a third party. Montreal Convention art. 21, supra note 2.
28 Id. at *11.
for failure to use the safer design."\textsuperscript{29} The court, therefore, denied the defendants' motion for summary judgment.\textsuperscript{30}

In a last-ditch effort, the defendants moved for summary judgment claiming that the Airline Deregulation Act (ADA) preempted plaintiff's negligence claims; but, the court noted that the plaintiff had not brought a state claim.\textsuperscript{31} Rather, Plaintiff had pled two counts: (1) for strict liability under the Montreal Convention up to the liability limit and (2) for damages above the liability limit caused by Defendants' negligence.\textsuperscript{32} Since no state court causes of action had been pled, summary judgment was denied.\textsuperscript{33}

In \textit{American Home Assurance Co. v. Kuehne \& Nagel (AG \& Co.) KG}, the U.S. District Court for the Southern District of New York addressed whether the two-year period of limitation contained in Article 35 of the Montreal Convention is applicable to agents of the "actual carrier," even if the agent is not itself an air carrier.\textsuperscript{34} After K&N, the contracting carrier, was sued for damages to cargo by the plaintiff, it filed a third-party complaint against Polar, the actual carrier, and Alliance, Polar's ground-handling carrier, seeking indemnification and contribution.\textsuperscript{35} The third-party complaint was filed well over two years after the cargo was damaged.\textsuperscript{36}

K&N conceded that its claims against Polar, the actual carrier, were time-barred, but contended that Alliance, as agent for Polar, was not an "air carrier" and therefore the two-year bar did not apply.\textsuperscript{37} The court recognized that the case involved an international shipment of cargo from Germany to the U.S. and that both parties were signatories to the Montreal Convention.\textsuperscript{38} The court noted, however, that while the Montreal Convention controlled, there was little case law interpreting the two-year time limitation found in Article 35; therefore, since Article 29(1) of the Warsaw Convention contained the same time limitation provision, the court looked to cases that had been de-

\textsuperscript{29} \textit{Id.} at *11-12.
\textsuperscript{30} \textit{Id.} at *12.
\textsuperscript{31} \textit{Id.} at *17-18.
\textsuperscript{32} \textit{Id.} at *18.
\textsuperscript{33} \textit{Id.} at *19.
\textsuperscript{34} 544 F. Supp. 2d 261, 262 (S.D.N.Y. 2008).
\textsuperscript{35} \textit{Id.} at 262-63.
\textsuperscript{36} \textit{Id.} at 262.
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} \textit{Id.} at 263.
cided under the former treaty. The majority rule was that the two-year time limitation was a condition precedent to filing suit, a complete bar to filing, even in cases involving third-party complaints for contribution and indemnification. The court relied heavily on Split End, Ltd. v. Dimerco Express (Phils) Inc., a case directly on-point. In Split End, the District Court for the Southern District of New York held that "the two-year limit barred contribution and indemnification claims by a contract carrier against (a) the actual air carrier and (b) the air carrier's ground handling agent at the destination airport."

Further, the court noted that Article 30(1) of the Montreal Convention "specifically extends the conditions and limits of liability to the agents and servants of the air carrier" that are acting within the scope of their employment. The court disagreed with K&N's argument that Article 30(1) did not extend to Alliance because it was not an "air carrier," as the Convention makes no mention that this is a requirement and as it would be a significant departure from the case law decided under the Warsaw Convention. The court found that Alliance was Polar's agent and was acting within the scope of its employment. As such, K&N's claims against Alliance were time-barred under the Montreal Convention, and the court granted Alliance's motion for summary judgment.

In Best v. BWIA West Indies Airways Ltd., the court held that the Montreal Convention, where applicable, completely preempts state causes of action and is the exclusive remedy for a passenger. Plaintiff had booked a flight with BWIA West Indies Airways Ltd. (BWIA). She had full knowledge that "her itinerary placed her on a BWIA flight from JFK to Port of Spain, and then on a flight with another carrier, LIAT, from Port of Spain to Grenada." Her flight with BWIA occurred "without incident," but when she boarded her LIAT flight, a customs officer forcibly

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39 Id.
40 Id.
42 American Home, 544 F. Supp. 2d at 263.
43 Id. (quoting Split End, 1986 WL 2199, at *6).
44 Id. at 265.
45 Id.
46 Id. at 266.
47 Id.
49 Id. at 360–61.
50 Id. at 361.
removed her from her seat, drug her off the aircraft and onto the tarmac. Plaintiff brought claims against both LIAT and BWIA for injuries sustained. The court found that the relationship between BWIA and LIAT was that of successive carriers and that, under Article 36 of the Montreal Convention, "liability is limited to the carrier 'which performed the carriage during which the accident . . . occurred.'" The court noted the only exception to this rule is when, by express agreement, "the first carrier has assumed liability for the whole journey." Since the plaintiff did not allege that BWIA expressly assumed liability for the LIAT portion of the transportation, the court found that the plaintiff could only take action against LIAT.

The court was not persuaded by the plaintiff's argument that Article 39 of the Montreal Convention should apply. Articles 39 through 41 of the Montreal Convention extended liability to contracting carriers for harms incurred during the carriage of actual carriers but excluded successive carriers from that definition. The court noted that the relationships usually covered by Article 39 include "code share operations and operations where one carrier offers service using an aircraft and crew leased from another carrier." The court explained, "[c]ode sharing is an arrangement in which an airline sells a ticket under its name and code number, but the flight itself is operated by another airline." Because "[p]laintiffs [did] not allege that the LIAT flight was a code share flight with BWIA or that BWIA leased the LIAT plane and crew to offer service," and since the plaintiffs' itinerary receipt indicated only the LIAT code for the Spain-Grenada flight, the court concluded that the relationship between BWIA and LIAT was that of successive carriers. Therefore, Article 39 had no application to the case. Plaintiff also attempted to make an implied agency argument, but the court held that "Article 36 forecloses the possibility of any implied

51 Id. at 361.
52 Id. at 360.
53 Id. at 363.
54 Id.
55 Id. at 363, 364.
56 Id. at 363.
57 Id.
58 Id. at 364.
59 Id.
60 Id. at 364.
61 Id. at 365.
agency relationship." The court granted BWIA’s motion for summary judgment.

2. Exclusive Cause of Action

In Vigilant Insurance Co. v. World Courier, Inc., the U.S. District Court for the Southern District of New York considered a case in which the plaintiff brought two counts against the defendant under the Warsaw Convention and two counts against the defendant under state law for damages to a shipment of pharmaceuticals from England to Pennsylvania. World Courier had “subcontracted part of the door-to-door services to U.S. Airways and Priority Express.” An investigation revealed that when the shipment arrived in Pennsylvania, US Airways had stored the shipment in its warehouse for two days at a temperature different than that provided for by the air waybill. Further, “the shipment had been soaked during transit,” and the shipment was destroyed.

Defendant moved for summary judgment on the basis that the Montreal Convention governs and that plaintiff’s remedy is limited to Article 22 of the Convention. The court agreed with the defendant that any analysis should be done under the Montreal Convention, not the Warsaw Convention, since the shipment at issue took place after the Convention had been ratified. As such, the court, sua sponte, amended plaintiff’s Count I for “damages to cargo” so that the claim fell under the Montreal Convention instead of the Warsaw Convention. The court found that the Montreal Convention applied to plaintiff’s claims because the cargo was being transported by aircraft between member States. The court found that the time during which the pharmaceuticals were being stored in US Airways’ warehouse fell within the period of “carriage by air” contemplated by Article 18 of the Convention, rendering the defendant

62 Id.
63 Id.
64 No. 07 CV 194(CM), 2008 WL 2332343, at *1 (S.D.N.Y. June 4, 2008).
65 Id. at *2.
66 Id. at *3.
67 Id.
68 Id. at *1, *7.
69 Id. at *4 (stating that the Montreal Convention was ratified by the United States on Nov. 4, 2003, replacing “the Warsaw Convention as the treaty governing international carrier liability”).
70 Id. at *5.
71 Id. at *4–5.
liable for the damages sustained.\textsuperscript{72} Plaintiff’s recovery, however, fell under the Convention’s limits of liability, found in Article 22, which provides for a sum of “Seventeen Special Drawing Rights” per kilogram, i.e., $298.08.\textsuperscript{73} The court recognized that the plaintiff could have avoided the liability limitations of Article 22 of the Montreal Convention by making a “special declaration of interest in delivery at destination and [paying] a supplementary sum,” but had failed to do so.\textsuperscript{74} Plaintiff argued that the Montreal Convention did not apply to a “specialized accessorional service contract such as controlled ambient care.”\textsuperscript{75} The court disagreed, stating that Article 1 of the Convention “specifies that the convention applies to ‘all international carriage of . . . cargo.’”\textsuperscript{76}

Plaintiff’s second cause of action alleged that the Montreal Convention did not apply because the defendant did not issue its air waybill in a timely manner and did not meet the requirements of the Warsaw Convention.\textsuperscript{77} Again, the court noted that the plaintiff incorrectly referenced the Warsaw Convention and assessed whether it should permit plaintiff to amend its complaint.\textsuperscript{78} It determined that an amendment would be futile, since Article 9 of the Montreal Convention states that “[n]on-compliance with the provisions of Articles 4 to 8 shall not affect the existence or the validity of the contract of carriage which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability.”\textsuperscript{79}

\textsuperscript{72} Id. at *4; Montreal Convention, supra note 2, at art. 18 (providing that “[t]he carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air” (emphasis added)).

\textsuperscript{73} Vigilant Ins. Co., 2008 WL 2332343, at *6; see also Montreal Convention, supra note 2, at art. 22 (providing that “[i]n the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of 17 Special Drawing Rights per kilogram[ ].”).

\textsuperscript{74} Vigilant Ins. Co., 2008 WL 2332343, at *6. In such a case, Article 22 provides that the “carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the consignor’s actual interest in delivery at destination.” Montreal Convention, supra note 2, at art. 22.

\textsuperscript{75} Vigilant Ins. Co., 2008 WL 2332343, at *4.

\textsuperscript{76} Id.

\textsuperscript{77} Id. at *4.

\textsuperscript{78} Id.

\textsuperscript{79} Id. Article 4 provides that “[i]n respect of the carriage of cargo, an air waybill shall be delivered.” Montreal Convention, supra note 2, at art. 4. Article 5 deals with what must be included in the air waybill. Id. at art. 5. Article 6 provides that a “consignor may be required . . . to meet the formalities of customs, police and similar public authorities to deliver a document indicating the nature
Defendant's motion for summary judgment requesting that damages be limited under the Montreal Convention was granted.\textsuperscript{80} The court dismissed plaintiff's remaining state law based causes of action as preempted by the Montreal Convention.\textsuperscript{81}

In Matz v. Northwest Airlines, the U.S. District Court for the Eastern District of Michigan considered a case in which the plaintiffs moved to amend their complaint to add a claim under Michigan's consumer protection statute.\textsuperscript{82} Defendants opposed the motion on the ground that any state law claim is preempted by the Montreal Convention and any amendment would be futile.\textsuperscript{83}

The case arose from a flight from Detroit to Kilimanjaro International Airport through Amsterdam in February 2007.\textsuperscript{84} The claims alleged that plaintiffs' luggage was lost, that they "were denied a complimentary toiletry kit," that the return flight to Amsterdam was delayed thirty hours, that they "were not given accurate announcements" regarding the flight, and that the hotel at which the airline put them up was fifty miles away from the airport and was infested with vermin and that, as a result, they were bitten by insects.\textsuperscript{85} The complaint was originally filed in Michigan state court alleging breach of the contract of carriage.\textsuperscript{86} Defendants removed the case to federal court.\textsuperscript{87} Plaintiffs then sought leave to amend the complaint to assert a claim under the Michigan Consumer Protection Act (MCPA).\textsuperscript{88}

In determining whether a claim under the Michigan statute would be preempted, the court considered the three types of air carrier liability that the Montreal Convention covers: "Article 17 covers personal injury and damage to baggage; Article 18 covers
damage to cargo; and Article 19 covers damage due to delay.\footnote{Id. at *6. The fact that this case involves international carriage of person and baggage by aircraft brought the case within the scope of the Montreal Convention. Article 19 then determines whether the carrier is liable for damage occasioned by the delay, and Article 22 sets forth the limits of such liability. Montreal Convention, supra note 2, at art. 19, 22.} The court found that since plaintiff's alleged damage stemmed from delay in their flight and delivery of their baggage, the Montreal Convention was her "exclusive remedy."\footnote{Id. at *8–9.} If plaintiff could not recover under the Convention, she could not resort to state law.\footnote{Id.} Thus, it would be futile to allow plaintiff to amend the complaint.\footnote{Id.} The court denied plaintiff's motion for leave to amend her complaint.\footnote{Id.}

Unlike the preceding decisions in Vigilant Insurance Co. and Matz, the U.S. District Court for the Central District of California in Serrano v. American Airlines, Inc., remanded the case to state court on the grounds that the Montreal Convention did not "completely preempt Plaintiff's state law claims," and as such, the federal courts did not have exclusive jurisdiction.\footnote{No. CV 08-2256 AHM (FFMX), 2008 U.S. Dist. LEXIS 40466, at *1, *8 (C.D. Cal. May 15, 2008).} The court contrasted ordinary preemption, for which there is no exclusive federal jurisdiction, from complete preemption, in which the federal courts do have exclusive jurisdiction because "even if pleaded in terms of state law, [the cause of action] is in reality based on federal law."\footnote{Id. at *4–5 (quoting Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8 (2003)).} Specifically, the court found that when a state action substantively falls within the Montreal Convention, the Convention only serves to limit plaintiff's liability and remedies.\footnote{Id. at *7.}

In reaching its decision, the court looked to Article 29 of the Montreal Convention, entitled "Basis of Claims."\footnote{Id. (citing Montreal Convention, supra note 2, at art. 2a).} That Article provides that

\[\text{[i]n the carriage of passengers, baggage and cargo, any action for damages, however founded, \textit{whether under this Convention or in contract or in tort or otherwise}, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the per-}\]
sons who have right to bring suit and what are their respective rights.98

The court focused on the words in Article 29—"whether under this Convention or in contract or in tort or otherwise"—and interpreted them to mean that "not all damages actions involving carriage of passengers, baggage and cargo arise under the Convention."99

The court then attempted to harmonize two cases decided by the U.S. Supreme Court—El Al Israel Airlines, Ltd. v. Tseng100 and Zicherman v. Korean Air Lines Co.101—by stating that in those cases the Court did not address the issue of complete preemption to determine if removal was proper.102 Rather, the Supreme Court, in refusing to allow the plaintiffs to raise state claims not authorized by the Warsaw Convention, was ensuring that there is "uniformity in the law of international air travel."103 The Court reasoned that the "goal of uniform rules of liability, identified in Tseng and Zicherman, is not necessarily undermined by claims for relief based on local law, so long as those local laws are in accordance with the rules of the Convention."104 The Court stated that, since Tseng, there has been "a split in the cases dealing with the doctrine of complete preemption in the context of the Warsaw Convention."105 The Court chose to follow the holding in Rogers v. American Airlines, Inc., in which the District Court for the Northern District of Texas "held that the Warsaw Convention does not completely preempt state law claims" and "noted that the uniformity required by the Warsaw Convention may be achieved through 'exclusive remedies and liabilities,' not through a requirement that all such cases be brought in federal court."106 Thus, the goal of uniformity "relates to the remedy available, not to the forum adjudicating the remedy."107

98 Id. (citing Montreal Convention, supra note 2, at art. 2a) (emphasis added).
99 Id. at *7–8.
103 Id. at *11 (citing Tseng, 525 U.S. at 169–70).
104 Id. at *11.
105 Id. at *13.
106 Id. at *16–7 (quoting Rogers v. Am. Airlines, Inc., 192 F. Supp. 2d 661, 671 (N.D. Tex. 2001)).
107 Id. at *17 (citing Rogers, 192 F. Supp. 2d at 671). For a detailed and persuasive critical analysis of this case, see article entitled "The Impact of the Montreal Convention on the Aviation Legal Community—From the Perspective of One of the Drafters," authored by George N. Tompkins, Jr., presented at Embry Riddle
Similarly, in Narkiewicz-Laine v. Scandinavian Airlines Systems, the U.S. District Court for the Northern District of Illinois held that the Montreal Convention was not a complete preemption of state causes of action. Rather, a claimant can bring an action under the Convention or under contract or tort state law. In following Seventh Circuit precedent, under the Warsaw Convention, the court held that the Montreal Convention merely serves as an affirmative defense. Because the plaintiff’s complaint only alleged state causes of action, the court found that the Convention did not provide a basis for federal-question subject matter jurisdiction and granted plaintiff’s motion to remand.

In Schoeffler-Miller v. Northwest Airlines, Inc., the U.S. District Court for the Central District of Illinois considered a case in which the plaintiff contended that she suffered personal injuries while disembarking an international flight in Amsterdam. Plaintiff’s complaint was comprised of only common law negligence claims. Defendant removed the case, and the plaintiff filed a motion to remand. Unlike the decision of the U.S. District Court for the Northern District of Illinois in Narkiewicz-Laine, the court held that the Montreal Convention is “field preemptive” with respect to a plaintiff’s cause of action. It found that, although the plaintiff’s complaint was drafted as to only reference a state cause of action, her claim was in fact inherently federal. The court found that plaintiff’s negligence claim was within the scope of the Montreal Convention, was completely preempted by the terms of that treaty, and therefore arose

Aeronautical University’s 20th Anniversary Aviation Law and Insurance Symposium held in Orlando, Florida, Jan. 7–9, 2009.

109 Id.
110 Id. (citing Sompo Japan Ins., Inc. v. Nippon Cargo Airlines Co., 522 F.3d 776, 785 (7th Cir. 2008)); see also infra Part I.B.1.
113 Id. at *5.
114 Id. at *3
115 Id. at *5–6 (following the Eighth Circuit authority in Husmann v. Trans World Airlines, Inc., 169 F.3d 1151, 1153 (8th Cir. 1999), but failing to identify the more recent Seventh Circuit authority in Sompo Japan Ins., Inc. v. Nippon Cargo Airlines Co., 522 F.3d 776, 781 (7th Cir. 2008), which was followed by the court in Narkiewicz-Laine, 587 F. Supp. 2d at 890); see also supra notes 104–08 and accompanying text.
under federal law. As such, the plaintiff’s motion to remand was denied.

3. Accident

In *Ugaz v. American Airlines, Inc.*, the U.S. District Court for the Southern District of Florida addressed whether the defendant airline and the defendant airport were liable for injuries sustained by a passenger who fell while ascending an inoperable escalator within an airport sterile zone that led from the carrier’s jetway to the airport’s immigration checkpoint. Plaintiff originally filed her claim in state court, but defendants removed the action. The court found that it had federal subject matter jurisdiction, as the Montreal Convention was the proper law governing the plaintiff’s claims. As such, the court determined that all of the plaintiff’s state claims were preempted by the Convention. The court stated that “[f]or all air transportation to which the Montreal Convention applies, if an action for damages falls within one [of] the treaty’s damage provisions, then the treaty provides the sole cause of action under which a claimant may seek redress for his injuries.”

Since this case involved bodily injury, the court looked to Article 17 of the Montreal Convention. Under that Article, “a carrier is liable only for damage sustained when the ‘accident that caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.’” The court noted that the Eleventh Circuit has already “deduced three requirements that must be established to satisfy Article 17: ‘(1) an accident must have occurred; (2) injury or death must have occurred; and (3) the preceding two conditions must have occurred while embarking or disembarking during the flight itself.’” Since the second element was not at

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117 *Id.* at *9.
118 *Id.* at *11.
120 *Id.* at 1358.
121 *Id.* at 1358, 1360; *see also* Montreal Convention, *supra* note 2, at art. 1 (providing that the Convention “applies to all international carriage of persons, baggage or cargo performed by aircraft for reward . . .

122 *Id.* at 1360.
123 *Id.* at 1360.
124 *Id.*
125 *Id.*
126 *Id.* at 1361 (quoting Marotte v. American Airlines, Inc., 296 F.3d 1255, 1259 (11th Cir. 2002)).
issue in this case, the court focused its evaluation on the remaining elements.  

Element 1: The court assessed whether the injury in question qualified as an accident under Article 17.  

The court assessed whether the injury in question qualified as an accident under Article 17.  

The U.S. Supreme Court has pronounced the controlling interpretation of the term “accident” as “an unexpected or unusual event or happening that is external to the passenger.”  

The court further stated that “the ‘accident’ requirement . . . involves an inquiry into the nature of the event which caused the injury rather than the care taken by the airline to avert the injury.”  

The court found that, on the merits, there was “no evidence whatsoever that an inoperable escalator is an ‘unusual or unexpected event’ sufficient to constitute an ‘accident.’”  

The court stated that “[i]n this case, there were no foreign substances on the stairs, jostling passengers, or other direct outside influence that caused the Plaintiff’s fall apart from her own decision to climb an acknowledged inoperable escalator.”  

Element 3: To determine if plaintiff’s injury occurred while she was disembarking, the court adopted the Second Circuit’s widely used three-prong test that was set forth in Day v. Trans World Airlines, Inc.  

As stated by the court, “the Day test considers: (a) what the plaintiffs were doing (activity), (b) at whose direction (control), and (c) the location where the injury occurred.”  

The court further stated that “[t]o date, the Supreme Court has not defined the words ‘embarking’ or ‘disembarking’ in the context of Article 17,” and so the court applied the Day test to find that the plaintiff was disembarking the flight at the time of the incident.  

Specifically, the court found that  

Plaintiff was injured while ascending an inoperable escalator on her journey from the plane to customs and immigration. Under the second prong, she was doing so under the direction of American Airlines, who maintained the gate area and sterile zone and  

127 Id.  
128 Id. at 1364.  
129 Id. (quoting Air France v. Saks, 470 U.S. 392, 405, (1985)).  
130 Id. (quoting Air France, 470 U.S. at 407).  
131 Id. at 1366.  
132 Id.  
133 Id. at 1361 (citing Day v. Trans World Airlines, Inc., 528 F.2d 31, 33–34 (2d Cir. 1975)).  
134 Id.  
135 Id.  
136 Id. at 1363.
directed passengers to customs and immigration. Her location (third prong) was on one of the lower steps of the nonmoving escalator located in the sterile zone. She had only recently exited the jetway (or jet bridge). There was a close temporal and spatial relationship with the flight itself. The Plaintiff here was not a free agent roaming at will throughout the terminal, which several other courts have found to be a persuasive factor.\textsuperscript{137}

Although the injury occurred while the plaintiff was disembarking, she could not show that the injury was caused by an accident compensable under the Montreal Convention; consequently, the court granted summary judgment to American Airlines.\textsuperscript{138} As to the airport itself, the court granted summary judgment, reasoning that an airport is not a carrier and therefore it cannot be held liable where an action falls within the Convention's purview.

In \textit{Rafailov v. El Al Israel Airlines, Ltd.}, the U.S. District Court for the Southern District of Florida considered a case in which the plaintiff sought damages pursuant to the Montreal Convention for injuries she sustained when she slipped on a piece of plastic that was on the aircraft's floor.\textsuperscript{139} Under Article 17 of the Montreal Convention, a carrier is only strictly liable for bodily

\textsuperscript{137} \textit{Id.} at 1363 (internal citations omitted).
\textsuperscript{138} \textit{Id.} at 1375. The Court discussed the liability limitations of the Convention and also the defenses available to an air carrier under the Convention. The Court noted that the Montreal Convention imposed a different legal standard of recovery than that set forth in the Warsaw Convention. \textit{Id.} It stated that if an accident had been found, Defendant would have been "essentially held liable for proven damages up to '100,000 SDRs,'" approximately $135,000.00. \textit{Id.} at 1366-67 (citing Montreal Convention, Art. 21, subparagraph (1)). The court further stated that "if damages arising under Article 17 are not 'due to the negligence or other wrongful act or omission of the carrier or its servants or agents,' then [the carrier] would not be liable over that amount." \textit{Id.} at 1367 (citing Montreal Convention, \textit{supra} note 2, at art. 21). While this statement omits the burden of proof imposed on the carrier to show that it was not at fault, the court then quoted Article 20—pertaining to exoneration—which accurately states that the carrier has the burden of proof to show "that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation." \textit{Id.} (quoting Montreal Convention, \textit{supra} note 2, at art. 20). Importantly, "if the negligence of the injured party actually caused the injury in question," the carrier is wholly or partially exonerated under both Articles 20 and 21, including subparagraph (1). \textit{Id.} The Court found that the plaintiff's negligence caused the injury, so even if there were an accident, the plaintiff would not be entitled to recover under the Convention, nor would she have been able to recover under state law even if the Montreal Convention did not apply. \textit{Id.}

\textsuperscript{139} No. 06 CV 13318 (GBD), 2008 U.S. Dist. LEXIS 38724, at *3–4 (S.D.N.Y. May 13, 2008).
injuries due to an accident that occurred while on board the aircraft. The court noted that not every "incident or occurrence during a flight is an accident within the meaning of Article 17, even if the incident gives rise to an injury." The court adopted the U.S. Supreme Court's definition of accident, meaning liability only arises if the "passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger." The court found that "[t]he presence of a discarded blanket bag on the floor [was not] unexpected or unusual, and that it "would seem customary to encounter a certain amount of refuse on an airplane floor." The court found that the incident that caused the injury was not an "accident" under Article 17 of the Montreal Convention and, therefore, the plaintiff could not recover from the defendant. Consequently, the court granted defendant's motion for summary judgment.

In Mansoor v. Air France KLM Airlines, the U.S. District Court for the Southern District of California considered a case in which the plaintiff brought a claim under the Montreal Convention for personal injuries she sustained when she fell as a result of a hazard in the walkway onboard the aircraft. The defendant moved to dismiss her complaint for failure to state a claim, contending that plaintiff's injuries did not qualify as an Article 17 "accident." Defendant relied on a number of cases to support its position, including Rafailov in which the court held that slipping on an empty blanket plastic bag was not an accident because the presence of such a bag on the floor during flight is not unexpected or unusual, and Sethy v. Malev Hungarian Airlines, in which the court held that tripping over luggage left in an aisle during boarding was not an accident because "there is nothing unexpected or unusual about the presence of a bag in or [near] the aisle during the boarding process." The court

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140 Id. at *4–6.
141 Id. at *6 (quoting Air France v. Saks, 470 U.S. 392, 403 (1985)).
142 Id. (quoting Air France, 470 U.S. at 405).
143 Id. at *8.
144 Id. at *9–10.
145 Id.
147 Id.
148 Id. at *5–6 (citing No. 06 CV 13318 (GBD), 2008 U.S. Dist. LEXIS 38724, at *3 (S.D.N.Y. May 13, 2008).
149 Id. at *6 (quoting No. 98 CV 8722 (AGS), 2008 U.S. Dist. LEXIS 12606 (S.D.N.Y. Aug. 30, 2000).
distinguished those cases, stating that the present motion arises in the context of a motion under Rule 12(b)(6) and not Rule 56. The court found "that the hazard encountered by Plaintiff, whatever the precise nature of that hazard may be, is adequately alleged to be the cause of Plaintiff's injury. Furthermore, that hazard, as alleged, appears [to be] external to Plaintiff." The court "note[d] that an accident under Article 17 of the Montreal Convention is a flexible term that encompasses an 'assessment of all the circumstances surrounding a passenger's injuries.'" The court concluded that "[o]n a Rule 12(b)(6) motion the court is simply not able to assess the circumstances of Plaintiff's injuries," it denied the defendant's motion to dismiss, and did not render a decision on the merits of plaintiff's Montreal Convention Article 17 claim.

4. Venue

In Transvalue, Inc. v. KLM Royal Dutch Airlines, the defendant filed a motion to dismiss arguing that the U.S. District Court for the Southern District of Florida lacked subject matter jurisdiction pursuant to the Montreal Convention. Plaintiff had entered into a contract with defendant "to transport 1,487 kilograms of gold bullion from Mexico to Zurich[,] Switzerland . . . ." Plaintiff contended that two of the fifty-four boxes of gold bullion were missing when it arrived in Switzerland. The parties agreed that Article 33 of the Montreal Convention governed jurisdiction in this case.

Article 33(1) of the Montreal Convention provides that 'an action for damages under the Convention must be brought, at the plaintiff's option, in the territory of one of the States Party to the Convention before a court of: (1) the carrier's domicile, (2) the carrier's principal place of business, (3) the carrier's place of

150 Id. at *7.
151 Id. at *7–8. The district court stated that for the legal standard for "accident," the "Supreme Court held 'that liability under Article 17 of the [Montreal] Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger.'" Id. at *4–5 (citing Air France v. Saks, 470 U.S. 392, 405 (1985)).
152 Id. at *8 (quoting Air France, 470 U.S. at 397).
153 Id.
155 Id. at 1367–68.
156 Id. at 1368.
157 Id.
business through which the contract was made, or (4) the place of destination.\textsuperscript{158}

Plaintiff conceded that the defendant's domicile and principal place of business was the Netherlands.\textsuperscript{159} It conceded that "the place of destination of the lost cargo was Switzerland," but it argued that the United States was the "place of business through which the contract of transportation was made."\textsuperscript{160} It based this argument on the fact that defendant's employee in New York communicated with plaintiff in Florida about the air waybill; albeit, the plaintiff conceded that the air waybill was actually issued in Mexico.\textsuperscript{161} The court found plaintiff's argument unpersuasive and, following other circuit decisions, found that the place where the air waybill was issued was the place where the contract of carriage was made.\textsuperscript{162} The court granted defendant's motion to dismiss for lack of subject matter jurisdiction.\textsuperscript{163}

In \textit{Aikpitanhi v. Iberia Airlines of Spain}, the plaintiffs brought claims on behalf of their son, who died aboard defendant's flight while he was being deported back to Nigeria from Spain.\textsuperscript{164}

Plaintiffs assert Spanish law enforcement agents facilitated Decedent's death by giving him tranquilizers, handcuffing him, and chaining him to his seat, having gagged him with industrial strength rubber before \ldots\ placing him on the flight. Plaintiffs further contend the law enforcement officials took turns beating him. Plaintiffs claim that Defendant acted in concert with the law enforcement officials in covering the Decedent with a sack so other passengers on the flight could not \textit{see} the manner in which he was restrained.\textsuperscript{165}

Their son suffocated shortly after takeoff.\textsuperscript{166} Defendant filed a motion to dismiss contending that the court lacked subject matter jurisdiction under Article 33 of the Montreal Convention.\textsuperscript{167}

\begin{thebibliography}{167}
\bibitem{158} Id. (quoting Montreal Convention, \textit{supra} note 2, at art. 33(1)).
\bibitem{159} Id.
\bibitem{160} Id.
\bibitem{161} Id.
\bibitem{162} Id. at 1369 (distinguishing Eck v. United Arab Airlines, Inc., 360 F.2d 804 (2d Cir. 1996)).
\bibitem{163} Id.
\bibitem{165} Id. (emphasis added).
\bibitem{166} Id.
\bibitem{167} Id. at 873--74. The court noted that both Spain and Nigeria are signatories to the Montreal Convention and that since the case involved the carriage by air of
The court noted that, under Article 33, there are five different forums in which Plaintiffs could bring their claims against Defendant for the death of [their son]: (1) in the territory of the State Parties; (2) the domicile or principal place of business of Defendant; (3) the place where the ticket was bought; (4) the place of destination; or (5) the principal and permanent place of residence of the Decedent.68

Plaintiffs argued that the fact that the defendant was incorporated in Florida was evidence that it was domiciled in the United States.69 Since the Warsaw Convention's jurisdictional requirements were substantively similar, the court looked to Warsaw Convention case law to aid in defining what constituted "domicile."170 In In re Air Disaster Near Cove Neck, New York, the district court, in examining "domicile" as used in the Warsaw Convention, found that the drafters of the Warsaw Convention did not intend to authorize jurisdiction in two or more places simultaneously under the domicile provision.171 The court found that to adopt the plaintiffs' argument—that the defendant's place of incorporation was its domicile—however, "would render the other jurisdiction provisions in Article 33 redundant."172 "Incorporation as it is understood in American jurisdiction jurisprudence is inapplicable in this context."173 Plaintiff did not meet its burden of showing jurisdiction and the motion to dismiss was granted.174

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168 Id. at 875.
169 Id.
170 Id. The Montreal Convention added a fifth possible forum that did not exist under the Warsaw Convention: the principal and permanent residence of the passenger. This addition, however, did not substantively alter the previous provisions. Id.
171 Id. at 876 (citing In re Air Disaster Near Cove Neck, N.Y., 774 F. Supp. 718, 720 (E.D.N.Y. 1991).
172 Id. at 877.
173 Id. at 878.
174 Id. The court further rejected plaintiffs' arguments that jurisdiction was not limited to the venues prescribed in the Montreal Convention because the Montreal Convention was not the exclusive remedy for the plaintiffs' injury. The district court relied upon the Supreme Court's opinion in El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 161 (1999), stating that "Plaintiffs' cited case law predates the Tseng opinion, and merely illustrates the split of authority regarding the exclusivity issue before the Supreme Court resolved the question." Id.
Plaintiffs attempted to argue that the treaty was not the exclusive cause of action for their injury. But “the Supreme Court has stated that the Montreal Convention . . . affords the exclusive remedy for any personal injury suffered on board an international flight,” as in this case.

5. Limitation of Actions

In Chubb Insurance Co. of Europe, S.A. v. Menlo Worldwide Forwarding, Inc., third-party defendant Qantas Airways Limited filed a motion to dismiss United Parcel Service’s (UPS) third-party complaint on the grounds that it was time-barred by Article 35 of the Montreal Convention. UPS had issued an air waybill for shipment and carriage of an aircraft engine from New Zealand to Los Angeles. UPS had then contracted with Qantas to carry the aircraft engine but, when Qantas delivered the engine, it was damaged. Chubb Insurance sued UPS on November 14, 2006, and UPS ultimately settled. On September 18, 2007, UPS filed its complaint, seeking indemnity and contribution from Qantas. Qantas conceded that the Montreal Convention governed the case and claimed that UPS was time-barred by the Convention’s two-year limitation period as set forth in Article 35. UPS contended that Article 35 did not apply to third-party indemnity and contribution claims. It stated instead that Article 45 of the Convention governs and subjects claims for indemnity or contribution to the limitations of the forum state in which the case is being heard. But the court held that

175 Id. The court further addressed plaintiffs’ contention that the Convention does not provide a remedy for intentional torts and therefore jurisdiction in the federal courts in the United States was proper. Id. The court rejected that argument as well, noting that plaintiffs may have a remedy under the Montreal Convention for intentional torts, but that the exclusive remedy was under the Convention, and the venue therefore was determined by the Convention. Id.

176 Id.

177 Id.

178 Id.

179 Id.

180 Id.

181 Id.

182 Id. at 15,980.

183 Id.

184 Id. Article 45 states that

[i]n relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against the carrier or the contracting carrier, or against both together or separately. If the action is brought against only one of
Chapter V of the Montreal Convention—in which Article 45 is contained—does not establish a separate body of rules for indemnification or contribution actions independent of the requirements of the remainder of the Montreal Convention. Article 45 does not create an exception to Article 35, but gives a plaintiff the option of suing the actual contracting carrier, and gives the carrier sued the right to require the other carrier “to be joined in the proceedings, the procedure and effects being governed by the law of the court seised of the case.” The plain language of Article 45 refers to the procedure and effects of joinder. The limitation period for bringing an action “has nothing to do with whether or how a party is joined.” The two-year limitation period is absolute and there are no exceptions. To hold otherwise would destroy uniformity and predictability in cases involving transport by a carrier other than the contracting carrier. Since UPS did not file its complaint until a year after the limitation period expired, the court found that UPS’s claims were barred.

6. Damages

In In re Air Crash at Lexington, Kentucky, August 27, 2006, plaintiffs opposed Comair’s motion to amend its third-party complaint to add a claim for apportionment under Article 37 of the Montreal Convention. The issue before the court “boil[ed] down to the legal interpretation of Article 37 and whether Article 17 precludes an instruction that could limit the victim’s recovery of all damages from the carrier.”

Article 37 provides that the air carrier has a right of “recourse” against other responsible parties. Plaintiffs contend

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those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the court seised of the case.

Montreal Convention, supra note 2, at art. 45.
185 Chubb Ins., 32 Avi. Cases (CCH) at 15,980.
186 Id. (quoting Montreal Convention, supra note 2, at art. 45).
187 Id. at 15,981.
188 Id.
189 Id.
190 Id.
191 Id. at 15,982.
193 Id. at *7.
194 Montreal Convention, supra note 2, at art. 37. Article 37, entitled Right of Recourse Against Third Parties, provides that “[n]othing in this Convention shall
that the defendant’s right to recourse is limited to contribution or indemnity claims against third parties.\textsuperscript{195} Since “[t]he existence and extent of the right of recourse is determined by applicable local law,”\textsuperscript{196} the Kentucky federal court looked to its own state law to determine what form of recourse the defendant had.\textsuperscript{197} The court noted that Kentucky no longer recognizes joint and several liability, and that contribution is not a viable claim.\textsuperscript{198} In light of this, the court reasoned that “[i]f apportionment is not available as a possible means of recourse under the Convention, as Plaintiff contends, the effect would be to require Comair to pay more damages than the amount for which it is responsible.”\textsuperscript{199} The court appears to have been further persuaded by the fact that an apportionment instruction could be given with regard to the victim’s own negligence under Article 20 of the Montreal Convention.\textsuperscript{200} The court held that “Article 37 of the Montreal Convention does not preclude an apportionment instruction against a party whom reasonable jurors could determine was at fault.”\textsuperscript{201} The court granted Comair’s motion prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.” \textit{Id.}

\textsuperscript{195} In re Air Crash at Lexington, Ky., 2008 U.S. Dist. LEXIS 11255, at *4.

\textsuperscript{196} See Tompkins, supra note 103, at 25 (citing Sompo Japan Insurance, Inc. v. Nippon Cargo Airlines Co., 522 F.3d 776 (7th Cir. 2008)).

\textsuperscript{197} In re Air Crash at Lexington, Ky., 2008 U.S. Dist. LEXIS 11255 at *8.

\textsuperscript{198} Id.

\textsuperscript{199} Id. Plaintiff relied on an Eleventh Circuit case decided under the Warsaw Convention but, as the Kentucky federal court noted, that case recognized that “a carrier should not ‘pay more damages than the amount for which it is responsible.’” \textit{Id.} at *7 (citing Cortes v. American Airlines, Inc., 177 F.3d 1272, 1305 (11th Cir. 1999)).

\textsuperscript{200} Id. at *9 (quoting Montreal Convention, supra note 2, at art. 20). It is not expressly stated whether plaintiffs’ claims exceeded the 100,000 SDR limit for which the carrier is strictly liable, subject only to exoneration for any negligence of the victim under Article 20. See Montreal Convention, supra note 2, at art. 21. However, in view of the fact that the claims were for wrongful death and the fact that the air carrier was defending against such claims, even though there clearly was no fault on the part of any of the passengers for the accident, it is likely that the claims did exceed the 100,000 SDR limit. Only as to claims in excess of 100,000 SDR may the carrier defend the claim by showing that it exercised due care or that the injury was caused by the act of a third person, under Article 21. \textit{Id.} Because the carrier would have available the defenses under Article 21 for claims in excess of the 100,000 SDR limit, which permit the carrier to avoid or shift responsibility, the application of Kentucky law of apportionment would not conflict with the application of Article 21 the Convention. See id.

\textsuperscript{201} Id. at *10.
to amend its third party complaint to add claims for apportionment under Article 37 of the Convention.202

In *In re Air Crash at Lexington, Kentucky,* the court dismissed punitive damage claims asserted against one of the aircraft's pilots.203 Plaintiffs had conceded that the Montreal Convention, if applicable, precluded punitive damage claims against the air carrier, but argued that the language of Article 30(1), which extended the same "conditions and limits of liability which the carrier itself is entitled to invoke under [the] Convention" to agents or servants acting within the scope of their authority, was modified by the language of Article 30(3), which stated that limitations on liability were "not applicable when the servant's or agent's conduct causing damage was 'done with intent to cause damage or recklessly and with knowledge that damage would probably result.'"204

The court examined the jurisprudence under the Warsaw Convention, particularly the decisions rejecting punitive damages, because to permit such damages would undermine the basic purposes of the Warsaw Convention of certainty and uniformity.205 The court concluded that the Montreal Convention was patterned after the Warsaw Convention, and the section by section comparison was intended to show where they differed from one another.206 "While the Montreal Convention in Article 21 'eliminates all arbitrary limits on air carrier liability with respect to accident victims,'"207 Article 29 also expressly prohibits punitive damages, stating that in any such action pursuant to the Montreal Convention, "punitive, exemplary or any other non-compensatory damages are not recoverable."208 The court recognized that within the Montreal Convention there are "limits on the liability of carriers or their servants or all conditions for recovery[,]" such as the limit on the amount of damages for "delay of passengers, baggage or cargo to 4150 Special Drawing Rights (SDRs)" and for "destruction, loss, damage or delay of baggage to 1000 [SDRs]."209 The court held that these

202 *Id.*
204 *Id.* at *6.
205 *Id.* at *8–11.
206 *Id.* at *13.
207 *Id.* at *12.
208 *Id.*
209 *Id.* at *13.
limitations on the amount of damages contained within the Convention itself were the subject of Article 30(3), and that nothing in that article was intended to expand the scope of remedies available under the Montreal Convention to include the punitive damages expressly prohibited under Article 29.\textsuperscript{210} The court held that such a limitation was essential to assuring the "cardinal purpose of the Warsaw Convention, . . . is to 'achiev[e] uniformity of rules governing claims arising from international air transportation. . . . Interpreting the Montreal Convention to allow punitive damage claims against servants would 'undoubtedly destroy uniformity' since [n]o other signatory allows them."\textsuperscript{211}

B. \textsc{Warsaw Convention}

1. \textit{Exclusive Cause of Action}

In \textit{Sompo Japan Insurance, Inc. v. Nippon Cargo Airlines Co.}, the Seventh Circuit Court of Appeals considered a case in which the insurer as subrogee to the rights of Hitachi Data Systems Corporation (HDS), brought an action against Yusen Air and Sea Service Company (Yusen), Nippon Cargo Airlines (NCA), and Pace Air Freight (Pace).\textsuperscript{212} HDS had contracted with Yusen to transport computer equipment from Japan to Indiana.\textsuperscript{213} Yusen then contracted with NCA to transport the cargo by air to Chicago's airport.\textsuperscript{214} HDS retained Pace to transport the cargo from O'Hare to Indiana.\textsuperscript{215} Some of the cargo was damaged while it was being transferred from the loading dock to Pace's trucks at NCA's cargo facility at the Chicago airport.\textsuperscript{216} The value of the damage to the cargo was $271,304.\textsuperscript{217} Plaintiff settled with Yusen for $8,500 and with Pace for $100,000.\textsuperscript{218} Plaintiff moved for summary judgment against NCA, seeking damages under the Warsaw Convention, as amended.\textsuperscript{219} NCA filed a cross-motion for summary judgment, seeking a setoff for the settlement

\textsuperscript{210} \textit{Id.}
\textsuperscript{211} \textit{Id. at *14.}
\textsuperscript{212} 522 F.3d 776, 778 (7th Cir. 2008).
\textsuperscript{213} \textit{Id.}
\textsuperscript{214} \textit{Id.}
\textsuperscript{215} \textit{Id.}
\textsuperscript{216} \textit{Id.}
\textsuperscript{217} \textit{Id.}
\textsuperscript{218} \textit{Id. at 779.}
\textsuperscript{219} \textit{Id.}
amount that plaintiff had received from Yusen and Pace. The district court awarded the plaintiff $74,450.84, the maximum amount permitted by the Warsaw Convention, as amended by Montreal Protocol No. 4. In doing so, the court took the $271,304 proven damages and the setoff of the $108,500 settlement amount, reducing the value of damage to the cargo to $167,114. The court then awarded the maximum amount permitted under the Warsaw Convention of $74,450.84.

NCA appealed the decision claiming that the setoff should have been against the limited liability amount, not the proven damages, rendering judgment against NCA to $0. Plaintiff also appealed the district court’s decision to deny pre-judgment interest.

The Seventh Circuit noted that, under the Warsaw Convention, NCA is presumptively liable for damages to the goods while they were in its possession; however, that liability is capped by the Warsaw Convention, as amended by Montreal Protocol No. 4, which amended the Convention by increasing the damage cap to cargo to 17 SDRs per kilogram.

Sompo contended that the Warsaw Convention contained its own setoff provision under Article 25A. But the appellate court found that Article 25 "addresses whether an airline may effectively be held liable for damages above the Convention’s liability cap because of judgments against its agents. . . . [It] fulfills the purpose of the Convention by precluding suits against agents that could increase effectively the liability of the airlines." Article 25 does not deal with joint and several liability where the "money flows from different sources."

The Convention precludes both state causes of action and suits against agents because of their potential to erode the effectiveness of the treaty’s liability limitations. The airline’s relationship to joint tortfeasors is merely an “auxiliary issue,” however, and

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220 Id.
221 Id.
222 Id.
223 Id.
224 Id.
225 Id.
226 Id. at 779–80.
227 Id. at 781.
228 Id. at 782.
229 Id.
uniformity in this context is, under the scheme of the Convention, less important.\textsuperscript{230}

Further, the Convention expressly recognizes a right of recourse in favor of the carrier against other tortfeasors, thereby refusing to explicitly preempt state based rights of setoff and contribution.\textsuperscript{231}

The court then looked to Illinois state law to determine NCA's right of setoff.\textsuperscript{232} Under Illinois law, NCA was entitled to a setoff.\textsuperscript{233} The Seventh Circuit concluded that the district court had correctly applied the setoff to the full amount of the damages and, therefore, "because [the] post-settlement uncompensated damages far exceeded Sompo's liability under the Warsaw Convention, the award of $74,450.84 was correct."\textsuperscript{234}

The court also emphasized that the following italicized language of Article 24 of the Convention applies to the carriage of cargo: "any action for damages, however founded, \textit{whether under this Convention or in contract or in tort or otherwise}, can only be brought subject to the conditions and limits of liability set out in this Convention."\textsuperscript{235} The court interpreted this to mean "that an action may be brought in contract or in tort" and that the Convention's limitation of liability provisions merely serve as an affirmative defense to such state causes of action and that the limited preemption under the Convention does not preclude the application of state contribution claims but only precludes claims "to the extent that those state rules conflict with [the Convention's] own regulatory structure."\textsuperscript{236}

\textsuperscript{230} Id.
\textsuperscript{231} Id.
\textsuperscript{232} Id. at 782–83.
\textsuperscript{233} Id. at 786–87.
\textsuperscript{234} Id. at 789.
\textsuperscript{235} Id. at 785. In doing so, however, the court, having concluded that state law must govern rights of contribution against a party under the Warsaw Convention, was faced with deciding whether the liability of a party under Warsaw was that of a "joint tortfeasor" under state law. \textit{Id.} at 786. The court stated that since the Warsaw Convention created an affirmative defense, the underlying liability of the party may have been in contract or in tort, thereby satisfying the state law requirement that a party must have been a joint tortfeasor in order to obtain contribution. \textit{Id.} at 785–86. Hence, the discussion of whether the Warsaw Convention created an exclusive cause of action was only incidental to the court's analysis of whether state contribution law would support a contribution claim or not.

\textsuperscript{236} Id. at 785. The court further noted that two other circuit courts of appeals in Lloyd v. American Airlines, Inc., 291 F.3d 503, 516–17 (8th Cir. 2002), and Cortes v. American Airlines, Inc., 177 F.3d 1272, 1305 (11th Cir. 1999) had permitted contribution under the Warsaw Convention, and that those cases pro-
In *Raddatz v. Bax Global, Inc.*, the U.S. District Court for the Eastern District of Wisconsin considered a case in which the plaintiff brought state based claims for negligence and breach of contract for the untimely release and delivery of a shipment of elephant hides from Zimbabwe to Chicago, Illinois. The defendant removed this case to federal court and filed a motion to dismiss arguing that the Warsaw Convention preempted plaintiff's state causes of action. The court, which sits in the Seventh Circuit, found that the Warsaw Convention did apply, but questioned how broad the Convention's preemptive breadth was. The court followed its Circuit's precedent and found that Article 24 of the Warsaw Convention does not completely preempt state-law based causes of action; rather, the court held that where a state-law based action is alleged, the Convention only limits the plaintiff's recovery. "The liability limitation provisions of the Warsaw Convention simply operate as an affirmative defense." Defendant's motion to dismiss was denied and the plaintiff was permitted to amend his complaint to conform to the Warsaw Convention. The court determined that the amendment would relate back to his original filing, and therefore, he was in compliance with the two-year statute of limitations imposed by the Warsaw Convention.

In *Campbell v. Air Jamaica, Ltd.*, the U.S. District Court for the Southern District of Florida considered a case in which a Jamaican resident sued Air Jamaica claiming that his return flight from Jamaica to Fort Lauderdale was dishonored and sought damages under the Warsaw Convention. The court held that "there is no cause of action for total non-performance of a contract under the Warsaw Convention." Plaintiff's flight was not delayed, rather, defendant failed to perform under the con-

vided further support for the "conclusion that the Warsaw Convention is compatible with a state law contribution scheme..." *Id.* at 786.


238 *Id.* at *2. Presumably because Zimbabwe is not a signatory under the Montreal Convention, the Court applied the Warsaw convention.

239 *Id.* at *4, *6.

240 *Id.* at *7–8.

241 *Id.* at *8.

242 *Id.* at *10.

243 *Id.*


245 *Id.* at *2.
tract. A claim for non-performance cannot be brought under the Convention. Further, the court determined that it did not have jurisdiction to hear the case because there was no diversity between the parties and the amount in controversy did not exceed $75,000. The court granted defendant’s motion to dismiss.

In *Hesamzadeh v. Schenker, Inc.*, the U.S. District Court for the Southern District of Texas denied plaintiff’s motion to remand. Defendant had contracted to ship the plaintiff’s goods from Texas to Dubai. Due to an alleged failure to follow export regulations, the U.S. Government seized the goods and destroyed them. Plaintiff contended that the goods were seized and destroyed before the operation of international law. But the court found the argument unpersuasive, stating that “the damages Plaintiff seeks are based on alleged losses that resulted when goods were in possession of the Defendant-shipper and being shipped in accordance with federal export law and the Warsaw Convention.” Thus, even though the complaint only alleged state law contract and tort claims, the fact that the case would require interpretation of the Convention presented a federal question. Furthermore, the court held that “[c]ases arising out of international air transportation are governed by the Warsaw Convention and are within federal court original jurisdiction.”

2. **Warsaw Notice Requirements**

In *Warner Lambert Co. v. LEP Profit International, Inc.*, the Court of Appeals for the Third Circuit found that the defendants could not availing themselves of the liability limitations provided for in the Warsaw Convention because the air waybills governing

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246 Id.
247 Id. at *3.
248 Id.
249 Id. at *4.
251 Id.
252 Id.
253 Id. at *4.
254 Id. Since the United Arab Emirate is a party to the Montreal Convention, it is unclear why the court makes reference to the Warsaw Convention as opposed to the Montreal Convention.
255 Id.
256 Id. (quoting Luna v. Compagnie Panamena de Aviacion, 851 F. Supp. 826, 829 (S.D. Tex. 1994)).
the shipment had failed to include the shipment's agreed stopping places, as required under Article 8(c) of the Warsaw Convention.\textsuperscript{257}

3. "Carriage by Air"

In Levy v. United Parcel Systems, the U.S. District Court for the District of New Jersey considered a case in which the plaintiff brought a cause of action against United Parcel Systems, as successor entity of Emery Freight, in state court for breach of contract, claiming that one of his paintings had been lost during transportation by Emery Freight from France to New York.\textsuperscript{258} United Parcel Systems removed the action and filed a motion to dismiss arguing that the plaintiff's claims were barred under the Warsaw Convention's two-year time limitation.\textsuperscript{259} The shipment occurred in October 2000, and plaintiff only filed his claim in 2006.\textsuperscript{260} The court stated that a party trying to show that the Warsaw Convention applies must prove

- (1) that the goods at issue [were] shipped via international transportation by aircraft;
- (2) that, at the time the goods were shipped, the country of destination and the country from which the goods were shipped were signatories to the Warsaw Convention;
- (3) that the damage to the goods in question occurred during carriage by air.\textsuperscript{261}

Plaintiff attempted to argue that "the loss occurred after the end of 'carriage by air.'"\textsuperscript{262} But the court noted that,

When a contract for transportation includes door-to-door transportation under a single air waybill and the goods remain in the carrier's actual or constructive possession, courts hold that the presumptive period of carriage by air is extended until the time of delivery. Thus, the air waybill in this case served to extend the

\textsuperscript{257} 517 F.3d 679, 682–83 (3rd Cir. 2008) (rejecting the district court's conclusion that Article 8 (c) only requires notice of the "international nature of the shipment"). The court stated that "we find the jurisprudence of the Court of Appeals for the Second Circuit, which requires the listing of all stopping places contemplated by the carrier and which represents the 'prevailing' view in this area [cits. omitted], to be both persuasive and on point." \textit{Id.} at 682.

\textsuperscript{258} No. 06-5738 (FSH), 2008 U.S. Dist. LEXIS 11543, at *1–2 (D.N.J. Feb. 14, 2008).

\textsuperscript{259} \textit{Id.} at *1.

\textsuperscript{260} \textit{Id.} at *1–2.

\textsuperscript{261} \textit{Id.} at *5–6.

\textsuperscript{262} \textit{Id.} at *6.
presumptive liability period of "carriage by air" through delivery to Plaintiff's premises.\textsuperscript{263}

The court concluded that the Warsaw Convention applied and that plaintiff's claims were time-barred under the Convention's two-year limitation for commencing an action.\textsuperscript{264} Defendant's motion for summary judgment was granted.\textsuperscript{265}

In *Universal Imports, Inc. v. Federal Express Corp.*, the U.S. District Court for the Middle District of Florida considered a case in which the plaintiff brought causes of action in state court alleging that Federal Express Corporation (FedEx) had delivered his package to the wrong address.\textsuperscript{266} The defendant removed the case, contending that the district court had jurisdiction because the Warsaw Convention preempts plaintiff's state causes of action or, in the alternative, federal common law or the ADA control.\textsuperscript{267}

The shipment was sent from India in March 2003 and was delivered in Florida in April 2003.\textsuperscript{268} The plaintiff argued that the Warsaw Convention was inapplicable because the misdelivery occurred after the package had been processed at the airport and passed on to FedEx personnel for ground delivery.\textsuperscript{269} The district court held that the Warsaw Convention only applies to air transportation.\textsuperscript{270} The court cited *Victoria Sales Corp. v. Emery Air Freight, Inc.*, a Second Circuit case stating that "[t]he plain language of Article 18 draws the line at the airport's border."\textsuperscript{271} The court further noted that Article 18(3) "excludes from the

\textsuperscript{263} Id. at *6–7 (citing Jaycees Patou, Inc. v. Pier Air Int'l, Ltd., 714 F. Supp. 81 (S.D.N.Y. 1989)).

\textsuperscript{264} Id. at *7–8.

\textsuperscript{265} Id. at *8. Again, presumably the court applied the Warsaw Convention because delivery occurred in 2000 and the Montreal Convention did not become effective until Nov. 4, 2003.

\textsuperscript{266} No. 8: 08-CV-00309-T-30TGW, 2008 U.S. Dist. LEXIS 60758 (M.D. Fla. July 30, 2008).

\textsuperscript{267} Id. at *3–4.

\textsuperscript{268} Id. at *1–2. Presumably because the shipment occurred in Oct. 2003, the court applied Warsaw Convention, since the Montreal Convention still had not come into effect.

\textsuperscript{269} Id. at *5.

\textsuperscript{270} Id. at *6. "The carrier [is] liable for damage sustained . . . if the occurrence which caused the damage so sustained took place during the transportation by air. [Article 18(3)] excludes from the definition of transportation by air 'any transportation by land, by sea, or by river performed outside an airport.'" Id. (citing Montreal Convention, *supra* note 2, at art. 18(1), 18(3)).

\textsuperscript{271} Id. (citing Victoria Sales Corp. v. Emery Air Freight, Inc., 917 F.2d 705,707 (2d Cir. 1990)).
definition of transportation by air 'any transportation by land, by sea, or by river performed outside an airport.' The court reasoned that if the package was misdelivered, the misdelivery occurred outside the airport during carriage by land and, therefore, the Warsaw Convention did not apply. Accordingly, the court granted plaintiff's motion to remand the case.

4. "Accident"

In Doe v. United Airlines, Inc., the plaintiff's father brought charges against the defendant on behalf of his daughter, a minor, after his daughter had been sexually assaulted by Samson, another passenger, during a United Airlines flight from the United States to Korea. The court granted defendant's motion for summary judgment on the grounds that the plaintiff could not show that she had suffered bodily injury within the meaning of the Warsaw Convention. Since this was an international flight involving the carriage of persons, the Warsaw Convention applied to the plaintiff's claims. To recover under the Convention, the plaintiff had to show that she "suffer[ed] (1) bodily injury in (2) an accident that occurred while (3) on board, embarking, or disembarking." The court

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272 Id. It is unclear why the court omitted the remaining language of Article 18(3):

If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.

Montreal Convention, supra note 2, at art. 18(4); cf. Levy v. United Parcel Systems, No. 06-5738 (FSH), 2008 U.S. Dist. LEXIS 11543 (D.N.J. Feb. 14, 2008) (in which the plaintiff could not identify the location of the loss and in which the court applied the presumption to hold that the loss occurred during the "carriage by air" and therefore was subject to the Warsaw Convention).


274 Id. at *9–11. The court also rejected arguments that plaintiff's state law claims pled in the complaint where in reality federal common law claims, or that the claims were preempted by the Airline Deregulation Act. Id. The court held that any federal common law limitations on liability were merely affirmative defenses that did not provide a basis for federal question removal jurisdiction, and that the ADA did not preempt "'routine' contract claims" or "'run-of-the-mill' injury claims." Id. at *9 (citing Read-Rite Corp. v. Burlington Air Express, Ltd., 186 F.3d 1190, 1197 (9th Cir. 1999), and Greer v. Fed. Express, 66 F. Supp. 2d 870, 872 (W.D. Ky. 1999)).


276 Id.

277 Id. at 1505.

278 Id. at 1505–06.
looked to *Eastern Airlines, Inc. v. Floyd*, in which the Supreme Court determined that the term “bodily injury” was to be narrowly construed, concluding that a carrier cannot be held liable for stand-alone mental injury damages.\(^{279}\) To be liable under Article 17, an accident has to have caused the passenger to “suffer death, physical injury, or physical manifestation of injury.”\(^{280}\)

The plaintiff argued that she suffered from post-traumatic stress disorder, with change in her brain and nervous system.\(^{281}\) The court noted that the majority of courts have found “that alterations in an individual’s body and behavior intrinsically or characteristically associated with mental distress do not constitute bodily injury under the Warsaw Convention. This rule encompasses alterations or changes in an individual’s brain and nervous system characteristically tied to PTSD.”\(^{282}\)

Plaintiff attempted to argue that Samson’s actions by themselves constituted bodily injury, even if they did not cause bodily injury.\(^{283}\) The court, again following the *Floyd* definition of bodily injury, carefully analyzed the cases involving the definition of “injury,” distinguished those cases that had found such a physical contact to constitute an “accident,” and found that nothing in Article 17 provided for a passenger recovering from physical contact, no matter how offensive, in the absence of the requisite bodily injury.\(^{284}\)

In *Kim v. Northwest Airlines*, the plaintiff was a passenger who claimed that the defendant failed to provide her with food and drink, resulting in her not being able to take her medication.\(^{285}\) The failure to take her medication allegedly resulted in her having some form of psychological injury.\(^{286}\) Plaintiff had filed her complaint four years after the incident and therefore was time-barred under the Warsaw Convention’s two-year statute of limitation.\(^{287}\) Regardless, the court held that she had failed to state a claim under the Convention, since “mental or psychic injuries

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\(^{279}\) Id. at 1506 (citing *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 536–42 (1991)).

\(^{280}\) Id. at 1508.

\(^{281}\) Id.

\(^{282}\) Id. at 1512.

\(^{283}\) Id. at 1513.

\(^{284}\) Id. at 1514–15.


\(^{286}\) Id.

\(^{287}\) Id. at *8–9.
unaccompanied by physical injuries are not compensable under Article 17 of the Convention."\(^{288}\)

In *Twardowski v. American Airlines, Inc.*, the Ninth Circuit Court of Appeals considered consolidated appeals from summary judgment in favor of air carriers for claims against them based on failure to warn of the risk of Deep Vein Thrombosis (DVT).\(^{289}\) The plaintiffs claimed that several public agencies had requested that the carriers issue such warnings; but the court held "that developing DVT in-flight is not an ‘accident’... and that failing to warn about its risk is not an ‘event’ for purpose of liability for an ‘accident’ under Article 17."\(^{290}\)

An "accident" is an "unexpected or unusual event or happening that is external to the passenger"... "when the injury indisputably results from the passenger’s own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17... cannot apply."\(^{291}\)

The court further held that,"[g]eneralized requests by public agencies to warn are quite different from the particularized requests by individual passengers for assistance, and the airline’s response to them[.]"\(^{292}\) The plaintiffs contended that the carriers had represented that preventing passenger injury was a priority.\(^{293}\) But, the court found that just because airlines have stated that avoiding injury is a priority, does not mean that every injury to a passenger is an "‘event’ for purpose of liability for an ‘accident’ under Article 17."\(^{294}\)

5. *Embarking and Disembarking*

In *Pacitti v. Delta Air Lines, Inc.*, the U.S. District Court for the Eastern District of New York considered a case in which the plaintiff brought claims for injuries he suffered when he fell from a wheelchair being pushed by a Delta agent.\(^{295}\) Plaintiff was being transported between connecting flights in the terminal at John F. Kennedy International Airport (JFK).\(^{296}\) The

\(^{288}\) *Id.* at *9.

\(^{289}\) 535 F.3d 952, 958 (9th Cir. 2008).

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

\(^{291}\) *Id.* at 959–60.

\(^{292}\) *Id.* at 960.

\(^{293}\) *Id.* at 958.

\(^{294}\) *Id.*


\(^{296}\) *Id.* at *3–4.*
court found that the Warsaw Convention did not apply since the plaintiff was not in the process of disembarking or embarking a flight.\textsuperscript{297} The court remarked that the terms “embarking” and “disembarking” are not defined by the Convention, which has “allowed courts to apply a flexible fact-specific approach to resolving cases under Article 17.”\textsuperscript{298} “Generally speaking, courts within [the Second Circuit] and elsewhere have declined to hold that a passenger who is injured in the common area of a terminal is subject to the Warsaw Convention.”\textsuperscript{299} The court found that the area of the terminal the plaintiff was being transported through qualified as a common area, since it was utilized by multiple airlines for domestic and international flight and also had a restaurant within it.\textsuperscript{300} Plaintiff argued that he was not acting as a free agent because he was being pushed by an agent of Delta and was therefore under Delta’s control.\textsuperscript{301} The court followed the holding in \textit{Dick v. American Airlines, Inc.}, by finding that “a passenger who requests to be transported in a wheelchair is not, by virtue of such request, submitting to the airline’s control.”\textsuperscript{302} Further, after falling out of the wheelchair, the plaintiff walked to the gate.\textsuperscript{303} The fact that plaintiff’s accident occurred approximately ninety-five yards away from the departure gate also factored into the court’s decision.\textsuperscript{304} “In embarkation cases, courts generally have applied the Warsaw Convention only where the plaintiff had already passed through the departure gate.”\textsuperscript{305} The court found plaintiff’s claim that he only had fifteen minutes to board his next flight the only argument with plausible merit; however, since Delta requires passengers to board their flights ten minutes prior to departures, to a degree, plaintiff “was not free to engage in any pursuits of his own choosing except at risk of missing his plane.”\textsuperscript{306} But, the

\textsuperscript{297} Id. at *19–20.
\textsuperscript{298} Id. at *12 (citing \textit{Day v. Trans World Airlines, Inc.}, 528 F.2d 31, 33 (2d Cir. 1975)) (discussing the “Day factors”).
\textsuperscript{299} Id. at *13 (citing \textit{Rabinowitz v. Scandinavian Airlines}, 741 F. Supp. 441, 446 (S.D.N.Y. 1990), stating that “courts have consistently refused to extend coverage of the Warsaw Convention to injuries incurred within the terminal, except in those cases in which plaintiffs were clearly under the direction of the airlines.”).
\textsuperscript{300} See id.
\textsuperscript{301} Id. at *16.
\textsuperscript{302} Id. at *17 (citing \textit{Dick v. Am. Airlines, Inc.}, 476 F. Supp. 2d 61, 64 (D. Mass. 2007)).
\textsuperscript{303} Id.
\textsuperscript{304} Id.
\textsuperscript{305} Id. at *17–18.
\textsuperscript{306} Id. at *18.
court rested with the fact that he was still "almost one hundred yards, and several gates, away from Gate 9, and he was in a common area of the airport accessible to domestic and international passengers alike" when the injury occurred.\textsuperscript{307}

In Bowe v. Worldwide Flight Services, Inc., the Florida Third District Court of Appeals considered a case in which a request had been made for a wheelchair for Mrs. Ferguson, an elderly woman, which was not fulfilled.\textsuperscript{308} The plane had landed at a free-standing building and the plaintiffs took an American Airlines bus to the main terminal.\textsuperscript{309} The plaintiffs then took an escalator up, at which time the elderly woman fell backwards onto the other plaintiffs.\textsuperscript{310} The court held that the Warsaw Convention did not apply to the county as it is not a carrier within the meaning of the treaty.\textsuperscript{311} It held that Worldwide, as agent of American, and American itself, both fell within the definition of carrier, and therefore, the Warsaw Convention applied to both entities.\textsuperscript{312}

The court moved on to the next part of its analysis—whether plaintiffs were disembarking.\textsuperscript{313} The court recognized that the "term does not automatically exclude events transpiring . . . within an airline terminal building."\textsuperscript{314} It adopted the three-prong test used by other courts to determine whether plaintiffs are entitled to seek recovery under the Convention: "(1) the passenger's activity at the time of the accident; (2) the passenger's whereabouts at the time of the accident; and (3) the amount of control being exercised by the carrier at the time of the injury."\textsuperscript{315} The court found that American had failed to show the absence of any material fact concerning its control

\textsuperscript{307} Id. at *19.
\textsuperscript{308} 979 So. 2d 423, 424–25 (Fla. Dist. Ct. App. 2008).
\textsuperscript{309} Id. at 425.
\textsuperscript{310} Id. at 424–25.
\textsuperscript{311} Id. at 426.
\textsuperscript{312} Id.
\textsuperscript{313} Id.
\textsuperscript{314} Id. at 427.
\textsuperscript{315} Id. (citing Day v. Trans World Airlines, Inc., 528 F.2d 31, 33 (2d Cir. 1975)).
over the area where plaintiffs fell. The court could not make a determination as to whether plaintiffs were disembarking for purposes of the Warsaw Convention and reversed the summary judgment and remanded the case to the trial court for further proceedings.

6. Damages

In Muoneke v. Compagnie Nationale Air France, the U.S. District Court for the Southern District of Texas denied the plaintiff's motion for reconsideration and request for attorneys' fees. In her motion, plaintiff contends that the defendant forced her to check luggage that she had intended to carry on to the aircraft. While the luggage was checked, she alleges that items went missing. Plaintiff argues that defendant's liability for her loss should be subject to the higher limit of recovery applicable to carry-on bags under the Warsaw Convention, since the only reason she checked the bag was because defendant required her to do so at the last minute. The court held that the luggage was checked, so the checked bag limit of the Warsaw Convention applied. Further, the Warsaw Convention limitation on damages was not altered by the fact that the defendant did not give her time to rearrange the contents of her bag before requiring her to check it. The court denied plaintiff's motion for

316 Id.
317 See id.
319 Id. at *2.
320 Id.
321 Id. at *2. The district court had previously denied plaintiff's motion to remand on the grounds that the Warsaw Convention governed the case. See Order (Feb. 27, 2006), Muoneke, 2008 U.S. Dist. LEXIS 23369. The court had also granted summary judgment to defendant on the basis that the plaintiff had failed to comply with the Convention's notice of loss requirements. See Final J. (Apr. 14, 2006), Muoneke, 2008 U.S. Dist. LEXIS 23369. The Court of Appeals for the Fifth Circuit affirmed the district court's denial of motion to remand, but held that there were issues of material fact as to whether plaintiff had provided notice of loss. Muoneke, 247 Fed. Appx. 570, 572 (5th Cir. 2007). Consequently, although the 2008 district court opinion does not state that plaintiff is referring to the Warsaw Convention liability limitations with regard to recovery for carry-on luggage versus checked luggage, the assumption is being made based on the history and holdings of this case. See generally Warsaw Convention, at art. 22 (listing the limit of liability for checked and carry-on luggage).
322 Muoneke, 2008 U.S. Dist. LEXIS 23369, at *2. (The satchel was checked; the checked limit applies.).
323 Id. at *2–3 ("Neither Air France's misperception of a rush nor its rudeness—if either was in fact the case—avoids the damage limitation.").
reconsideration.\textsuperscript{324} The court also denied plaintiff's request for attorneys' fees, reasoning that the amount prayed for surpassed the carrier's liability for checked luggage and would undermine the Convention, which "was not intended to set an amount that would fully compensate travelers for the cost of lost baggage."\textsuperscript{325} In \textit{Nissan Fire and Marine Insurance Co. v. Bax Global, Inc.}, the U.S. Court of Appeals for the Ninth Circuit determined that by ratifying Montreal Protocol No. 4 in 1999, the United States automatically became a party to the Hague Protocol.\textsuperscript{326} Therefore, because plaintiff's claims regarding cargo damaged during shipment from the United States to Hong Kong arose in 2001, the district court should have applied provisions of the Hague Protocol to decide the issue of recovery.\textsuperscript{327} The court also held that the district court had erred by applying federal common law to the issue of attorneys' fees, since the Warsaw Convention, as amended by the Hague Protocol, permits the court to apply its own law in determining whether to award "expenses of litigation."\textsuperscript{328} The court, however, held that the district court did not abuse its discretion when it awarded prejudgment interest pursuant to federal statute, since the Hague Protocol was silent on the issue of the rate of prejudgment interest.\textsuperscript{329}

\section*{II. AIR CARRIER LIABILITY}

In \textit{In re Air Crash at Lexington, Kentucky, August 27, 2006}, the district court held that partial summary judgment should be entered in favor of the airline defendants on plaintiffs' claims against the airlines alleging breach of implied warranties associated with the purchase of the airline tickets.\textsuperscript{330} The district court concluded that Kentucky law applied to these claims and that the implied warranties contained in Kentucky's version of the Uniform Commercial Code (UCC) did not apply to the provision of services.\textsuperscript{331} The court also noted that prior to the adoption of the UCC, passengers on common carriers could bring an action for personal injuries based upon either tort or contract,
but that the contract claim depended upon the express contract between the parties.\textsuperscript{332} Since the adoption of the UCC, however, the Kentucky appellate courts had declined on several occasions to judicially extend the implied warranties created by statute to include services.\textsuperscript{333} Accordingly, the district court concluded that "plaintiffs [had] no viable breach of warranty claim under Kentucky law against the [air carriers]."\textsuperscript{334}

In \textit{In re Air Crash at Lexington, Kentucky, August 27, 2006}, the district court granted summary judgment to defendant Delta Airlines on plaintiffs’ claims that Delta was negligent, that it was vicariously liable for any negligence of Comair, and that it had breached implied warranties arising under its contract with the passengers aboard the Comair flight that crashed upon take off in Lexington, Kentucky.\textsuperscript{335} The allegations of negligence against the air carrier focused on the conduct of the flight crew in taking off in the darkness from the wrong runway, mistakenly taking off from an unlighted, shorter runway, rather than the longer, lighted runway on which they had been cleared to take off by the control tower.\textsuperscript{336} Comair is a wholly-owned subsidiary of Delta and its flights are operated as Delta flights under a code-sharing arrangement between the two airlines.\textsuperscript{337} The district court first examined the allegations that Delta had been negligent and concluded that no Delta employees had been involved in the alleged negligent conduct and that the role of Delta employees was primarily in making reservations and checking in passengers at the terminal.\textsuperscript{338} Once the passengers proceeded to the boarding gate, they were boarded on the flight by Comair employees, their luggage was placed on the aircraft by Comair employees, and the flight was operated by Comair employees.\textsuperscript{339} For those reasons, the district court granted summary judgment as to the claims of direct negligence against Delta.\textsuperscript{340}

Plaintiffs also claimed that Delta was vicariously liable for the negligence of Comair based either on common law agency prin-

\textsuperscript{332} See id. at *29.
\textsuperscript{333} Id. at *28–31.
\textsuperscript{334} Id. at *31.
\textsuperscript{335} No. 5:06-CV-316-KSF, 2008 U.S. Dist. LEXIS 53103, at *31 (E.D. Ky. July 8, 2008).
\textsuperscript{336} Id. at *9–10.
\textsuperscript{337} Id. at *16.
\textsuperscript{338} Id. at *17–19.
\textsuperscript{339} Id. at *17–18.
\textsuperscript{340} Id. at *19.
ciples or under the "common enterprise" doctrine.\textsuperscript{341} The district court first examined the issue of agency under Kentucky law and it considered Kentucky decisions involving franchisor-franchisee relationships.\textsuperscript{342} Kentucky courts had previously held that a franchisor is not liable under agency principles for the torts of the franchisee's employees unless the franchisor has the right and the ability to control the activities of the franchisee.\textsuperscript{343} The district court applied the same principles to the present case and concluded that there was no evidence that Delta had control over the aircraft, dispatching the flight, the conduct of the flight, or the conduct of the flight crew.\textsuperscript{344} Similarly, the flight crew was hired, trained, and employed by Comair.\textsuperscript{345} Based upon the absence of either the right or the ability to control the flight crew, whose alleged negligence caused the accident, the district court granted summary judgment to Delta.\textsuperscript{346}

The district court next considered plaintiffs' "common enterprise" claims and held that Kentucky law does not recognize the "common enterprise" doctrine as a basis for tort liability.\textsuperscript{347} Instead, the Kentucky cases upon which the plaintiffs relied were actually concurrent negligence claims giving rise to joint and several liability under Kentucky law.\textsuperscript{348} To assert such a claim, the agents or employees of both defendants must have been concurrently negligent, resulting in plaintiffs' injuries.\textsuperscript{349} In this case, since the district court had concluded that there was no evidence of any negligence by any Delta employees, the doctrine of concurrent negligence did not apply and the district court granted summary judgment in favor of those claims as well.\textsuperscript{350}

Finally, for the same reasons that the district court had granted summary judgment to all of the air carrier defendants as discussed above, with regard to plaintiffs' breach of implied warranty claims against all the air carriers, under Kentucky law,
the district court granted summary judgment against plaintiffs on the implied warranty claims as well.\textsuperscript{351}

In \textit{Raube v. American Airlines, Inc.}, the U.S. District Court for the Northern District of Illinois granted summary judgment to defendant in a slip-and-fall case involving a fall on a jet bridge from the aircraft to the terminal.\textsuperscript{352} The district court held that the passenger was in the process of disembarking from the aircraft and, therefore, was owed the "highest duty of care" as a passenger aboard a common carrier.\textsuperscript{353} Nevertheless, the plaintiff failed to identify any specific dangerous condition as a proximate cause of the fall, but admitted that the fall occurred when "nudged" by another passenger on the jet bridge.\textsuperscript{354} She did not testify that she fell as a result of any uneven surfaces on the jet bridge.\textsuperscript{355} Furthermore, the defendant had affirmatively shown that it was not aware of any dangerous condition on the jet bridge at the time of the fall and that signs warned passengers of uneven surfaces on the jet bridge.\textsuperscript{356}

In \textit{Rodriguez v. JetBlue Airways Corp.}, the California appellate court held that a Transportation Security Administration (TSA) agent's claims against the air carrier for permitting a passenger to carry an excessively large bag through the security check point were barred by the doctrine of "primary assumption of the risk."\textsuperscript{357} The court thoroughly examined the authorities under what is often called the "firefighter's rule," and concluded that third persons had no duty to protect employees from the very conditions that they were hired to confront or that were inherent in their employment, such as handling passengers' luggage at the security check point.\textsuperscript{358} The court stated that such a rule did not apply to conduct that might cause additional risk over and above that inherent in the employment, but the risks inherent in the employment were assumed and there is no cause of

\textsuperscript{351} \textit{Id.} at *28-30.
\textsuperscript{352} 539 F. Supp. 2d 1028, 1036 (N.D. Ill. 2008).
\textsuperscript{353} \textit{Id.} at 1033-35.
\textsuperscript{354} \textit{Id.} at 1035-36.
\textsuperscript{355} \textit{Id.} at 1035.
\textsuperscript{357} No. RG05199079, 2008 WL 788689, at *5-6 (Cal. Ct. App. 2008).
\textsuperscript{358} \textit{Id.} at *3-6.
action against those creating those risks. The court also concluded that the employee is often in the best position to avoid the consequences associated with those risks and, also, that imposing a duty on airlines to weigh each passenger’s carry-on luggage before allowing it to proceed to the security check point would create an additional burden on a system already heavily burdened by security concerns. Finally, the court noted that the imposition of such a duty was “particularly unnecessary because of the highly regulated and structured nature of airport security screening and the ability of TSA and its screeners to cope with the risks presented by heavy luggage.”

In Rottman v. El Al Israel Airlines, a foreign air carrier was held liable for damages incurred by a passenger who missed his international flight because a travel agent had booked him on a domestic connecting flight that arrived after the closing time of the international flight. The passenger had bought tickets from a travel agent for travel between Baltimore and Tel Aviv. The passenger was to take a flight from Baltimore Washington International Airport (BWI) to JFK on a domestic airline and then from JFK to Tel Aviv on El Al Israel Airlines (El Al). The ticket issued by the travel agent from BWI to JFK did not allow the passenger sufficient time to comply with El Al’s rule requiring that passengers check in at least three hours before departure. The passenger was deemed a “no show” when he did not show up three hours before departure and was forced to purchase a ticket to Tel Aviv from a different airline. The passenger sued El Al for breaching the parties’ contract by refusing to transport him.

The court held that the airline did not breach the contract because the passenger did not attempt to check in until less than one hour before the flight’s departure. However, the small claims court stated that “the court’s inquiry does not end

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359 Id. at *5.
360 Id.
361 Id.
363 Id. at 886.
364 Id.
365 Id. at 887.
366 Id. at 886.
367 Id. at 885. This was a small claims action and the court described the action against El Al as an action “for breach of contract for bumping [the plaintiff] from its flight and not arranging alternative transportation.” Id.
368 Id. at 887.
here,” noting that “[t]he ticket issued by the travel agent to [the plaintiff] made it impossible for him to comply with El Al’s rule requiring a minimum of three hours for check-in.” The airline attempted to argue that it was not liable because the travel agent was the airline’s independent contractor, not its agent. The court disagreed and found that the travel agent, who was bound by the foreign air carrier’s rules, had acted as the carrier’s agent when it sold the ticket. Therefore, the carrier, as principal, was responsible for the travel agent’s error, and judgment was rendered for the passenger in the amount of the purchase price of his replacement ticket.

In Alitalia Linee Aeree Italiane v. Airline Tariff Publishing Co., the federal district court granted summary judgment in favor of the defendant Airline Tariff Publishing Co. (ATPCO) in a case stemming from ATPCO’s posting of certain Alitalia fares without noting that the fares were only available in a “low season.” In 1986, Alitalia, the national carrier of Italy, and ATPCO, a company that collects and electronically distributes fare data to nearly all of the world’s airfare quotation and airline ticketing systems, entered into a written contract that governed ATPCO’s provision of fare data services to the airline. The contract contained a clause in which ATPCO disclaimed liability for consequential damages resulting from any error made in incorporating or distributing Alitalia’s fare data. The contract also contained ATPCO’s agreement to act as Alitalia’s “agent” for purposes of incorporating and distributing the airline’s fare data.

In early February 2004, Alitalia sent a fax to ATPCO setting forth instructions for reducing fares during the airline’s “low season.” In entering the fare information into ATPCO’s database, an ATPCO employee made a coding mistake—the employee typed the number “41” rather than “40” into a certain field—which resulted in the reduced fares being entered, and subsequently distributed, without any date restriction.

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369 Id.
370 Id.
371 Id. at 888.
372 Id. at 888-89.
374 Id. at 286-87.
375 Id. at 287.
376 Id.
377 Id. at 288.
378 Id. at 288-89.
mistake was not caught until three days later, after numerous customers had bought Alitalia tickets at a heavily discounted fare, causing an alleged loss to Alitalia of over $3.7 million.\textsuperscript{379}

Alitalia filed suit, alleging breach of contract, breach of fiduciary duty, negligence, and gross negligence.\textsuperscript{380} ATPCO defended the suit based on the limitation of liability clause, and the court granted summary judgment in favor of ATPCO on that basis.\textsuperscript{381} The court held that the limitation of liability clause applied to ATPCO's error and precluded Alitalia from recovering its lost-revenue consequential damages from ATPCO.\textsuperscript{382} Furthermore, the court held that, even though ATPCO had been acting as Alitalia's "agent," Alitalia's breach of fiduciary duty cause of action was also subject to the limitation of liability clause.\textsuperscript{383} Finally, the court rejected Alitalia's negligence and gross negligence causes of action because the parties' duties to each other were set forth in the contract.\textsuperscript{384} In sum, the court found that all of Alitalia's claims against ATPCO were contractual in nature and that Alitalia had contracted away its ability to recover via the limitation of liability clause.\textsuperscript{385}

In Hanson v. America West Airlines, Inc., an airline was held not liable for the loss of a passenger's carry-on bag containing valuable personal property.\textsuperscript{386} The passenger, a roboticist, forgot to take his carry-on bag with him when he exited the plane.\textsuperscript{387} The passenger's bag contained "an artistically and scientifically valuable robotic head modeled after famous science fiction author Philip K. Dick."\textsuperscript{388} Upon contacting the airline to report the loss, the passenger was allegedly informed by a representative of the airline that the airline had found his bag and that "special security procedures" would be taken to protect and return the bag to him.\textsuperscript{389} However, the bag was never returned.\textsuperscript{390}

The passenger sued the airline for conversion, negligence, and involuntary bailment, seeking damages for the value of the

\textsuperscript{379} Id. at 289.
\textsuperscript{380} Id. at 286, 289.
\textsuperscript{381} Id. at 293.
\textsuperscript{382} Id.
\textsuperscript{383} Id. at 294–95.
\textsuperscript{384} Id. at 295.
\textsuperscript{385} Id.
\textsuperscript{386} 544 F. Supp. 2d 1038, 1044 (C.D. Cal. 2008).
\textsuperscript{387} Id. at 1039–40.
\textsuperscript{388} Id. at 1039.
\textsuperscript{389} Id. at 1040.
\textsuperscript{390} Id.
The airline removed the case to federal court. The airline then moved for summary judgment on the grounds that its contract of carriage, which provided that the airline "assumes no responsibility or liability for baggage, or other items, carried in the passenger compartment of the aircraft," barred any recovery by the passenger, given that the passenger had notice of the limited liability provision. The court agreed with the airline and rejected the passenger's argument that (1) the airline materially deviated from the original contract of carriage and that (2) the airline employee who promised the passenger that the head would be delivered to him had altered the original contract of carriage, causing the airline to become liable for the loss of the head. The court also held that even if the airline employee had the authority to alter the contract of carriage, which the court held the employee did not, the passenger presented no evidence that the airline had breached the altered contract, stating that the airline "may have done everything as promised, only to fall victim to a head hunting thief or other skullduggery." The court concluded by stating that "[w]hen Plaintiff chose to enter the Contract of Carriage with Defendant he agreed, among other things, to limit Defendant's liability for lost baggage," and "[f]ailing to show relief from that agreement, Plaintiff is bound by the terms of that [agreement]."

In *St. Paul Fire and Marine Insurance Co. v. Delta Air Lines, Inc.*, the district court denied Delta's motion for summary judgment on a contract claim brought by an insurance company acting as a subrogee of a freight forwarding company. Delta argued that summary judgment was proper because the subrogor did not comply with a notice-of-claim clause, since it did not expressly state in the notice it provided to Delta either the nature of the loss or the amount of damages. The district court initially determined that federal jurisdiction was proper since federal common law governs actions for damage to interstate air

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391 Id.
392 Id.
393 Id. at 1041.
394 Id. at 1041-42.
395 Id. at 1042-43.
396 Id. at 1043.
397 Id. at 1044.
398 Id.
399 583 F. Supp. 2d 466, 467, 471 (S.D.N.Y. 2008).
400 Id. at 469-71.
ships.\textsuperscript{401} The court reasoned that the purpose of a notice-of-claim requirement is to allow the carrier to begin an investigation into the claim and that the notice provided Delta with all the information it needed to initiate an investigation into the matter.\textsuperscript{402}

III. FOREIGN SOVEREIGN IMMUNITIES ACT

Absent a statutory or treaty-based exception to the grant of immunity, foreign states, their agencies, and instrumentalities are immune from suit in federal court.\textsuperscript{403} The Foreign Sovereign Immunities Act (FSIA) grants immunity "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act."\textsuperscript{404} The FSIA recognizes an additional exception to the general grant of immunity if "the foreign state has waived its immunity either explicitly or by implication."\textsuperscript{405}

A. Applicability

\textit{Auster v. Ghana Airways Ltd.} is an excellent example of the interplay between the FSIA and international treaties, specifically the Warsaw Convention.\textsuperscript{406} There, the court found that because the Warsaw Convention did not apply to claims brought against a foreign state and its agencies and instrumentalities on behalf of passengers injured or killed on a domestic flight, it could provide no basis for a waiver the defendants' immunity under the Foreign Sovereign Immunity Act of 1976.\textsuperscript{407} On June 5, 2000, Airlink Flight 200 took off from Tamale, Ghana, en route to Accra, Ghana.\textsuperscript{408} The aircraft crashed on approach in Accra, killing one passenger and injuring two others.\textsuperscript{409} Plaintiffs brought this action seeking damages against the Republic of Ghana, Airlink (the name given to the commercial operations of the Ghana Air Force), and Ghana Airways Ltd., which is wholly-

\textsuperscript{401} Id. at 468 (citing Nippon Fire & Marine Ins. Co. v. Skyway Freight Sys., Inc., 235 F.3d 53, 59 (2d. Cir. 2000)).
\textsuperscript{402} Id. at 471.
\textsuperscript{404} 28 U.S.C. § 1604.
\textsuperscript{406} 514 F.3d 44 (D.C. Cir. 2008).
\textsuperscript{407} Id. at 46 (citing 28 U.S.C. §§ 1602–1611).
\textsuperscript{408} Id. at 46.
\textsuperscript{409} Id.
owned by Ghana. The court first found that all three defendants were "foreign states" within the meaning of the FSIA so that, absent some exception, the defendants were immune from suit. The court then analyzed whether, under the Warsaw Convention, to which both the United States and Ghana are signatories, the flight in question constituted "international transportation." A flight constitutes international transportation, so as to come within the ambit of the Warsaw Convention, if it is part of an international itinerary "regarded by the parties as a single operation." Both the passengers and defendant carrier must regard the itinerary at issue as an international one. Even though the plaintiffs presented evidence that they believed the Airlink flight within Ghana was part and parcel of a single, international itinerary, the evidence indicated that the carrier did not. The tickets for the trip from Tamale to Accra were marked "DOMESTIC" and did not refer to any international flight. Further, "Airlink operated only domestic flights and had no operations outside Ghana." Therefore, the court held that the Warsaw Convention did not apply to the passengers' flight and the entire action should have been dismissed for lack of subject matter jurisdiction because the defendants retained their sovereign immunity.

In *La Reunion Arienne v. Socialist People's Libyan Arab Jamahiriya*, the D.C. Circuit affirmed the district court's determination that it had subject matter jurisdiction over the claims of a French insurer against the Libyan government and certain Libyan officials acting in their individual capacities. The French company had brought the claims seeking subrogation of compensation payments it made to the survivors and estates of certain victims of the September 1989 terrorist bombing of a French airliner over Africa in which seven U.S. citizens had been killed. The insurer alleged in its complaint that the district

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410 Id. at 45–46.
411 Id. at 46.
412 Id. at 46–48.
413 Id. at 46.
414 Id. at 47.
415 Id. at 47. ("The convention requires notice [to the air carrier of the international character of the flight], not clairvoyance.").
416 Id.
417 Id.
418 Id. at 48.
419 533 F.3d 837, 843–44 (D.C. Cir. 2008).
420 Id. at 840.
court had subject matter jurisdiction under the "terrorism exception" to foreign sovereign immunity." The terrorism exception provides no immunity for foreign states from American jurisdiction "in cases in which 'money damages are sought against a foreign state for personal injury or death that was caused by an act of . . . aircraft sabotage,'" and further provides that the "immunity for the foreign state is not waived if in such a case 'neither the claimant nor the victim was a national of the United States.'"

The court first found that even though the appeal was interlocutory in nature, it had jurisdiction to hear the petition because the appeal met the "collateral order" exception to the general bar to interlocutory appeals. The court pointed out that when the issue on appeal is jurisdictional immunity, forcing a party to delay appeal until final judgment "cannot repair the damage" caused by forcing the defendant to litigate a case that should never have gone forward in the first place.

Second, the court held that the district court did not lack subject matter jurisdiction under the FSIA. The court was not persuaded by Libya's argument that subject matter jurisdiction was lacking because the FSIA prohibits claims by third-party corporate claimants. The court explained that the payments made by the French company "to the victims' families and their estates were for money damages for the deaths of the victims, i.e., for the same claims for money damages that the families and their estates could make directly against Libya under the FSIA." Because an assignee or subrogee owns the substantive right of the victim, and because these validly assigned or subrogated claims would legally be considered personal injury claims under traditional common law principles, the claims were not prohibited by FSIA. In addition, the court explained that the victims were nationals of the United States, even though the ultimate claimant, the insurance company, was not. The court

421 Id. at 840–41 (citing 28 U.S.C. § 1602 et seq. (2006)).
422 Id.
423 Id. at 842.
424 Id. at 843.
425 Id. at 840–41, 845.
426 Id.
427 Id.
428 Id. at 844–45.
429 Id.
stated that, "if either the claimant or the victim is a national of the United States, then immunity is waived."\textsuperscript{430}

**B. Damages**

In *Pugh v. Socialist People's Libyan Arab Jamahiriya*, the court awarded damages in accordance with state and federal law, as well as prejudgment interest, to the estates and survivors of the seven American victims of the bombing of a foreign airliner over the African nation of Niger by agents of the Libyan government in 1989.\textsuperscript{431} The action was brought by "[t]he Estates of the seven American decedents, 44 of their immediate family members, and Interlease," the owner of the aircraft, under the terrorism exception to the Foreign Sovereign Immunities Act of 1976.\textsuperscript{432} The named defendants included the Socialist People's Libyan Arab Jamahiriya, the Libyan External Security Organization, and "six high-ranking Libyan government officials sued in their personal capacities."\textsuperscript{433} To determine the validity of the plaintiffs' substantive tort claims, including claims for survival, wrongful death, intentional infliction of emotional distress, battery, and loss of consortium, the court applied the various laws of the states in which the plaintiffs' family members were domiciled at the time of the bombing or where the estates of the victims were probated.\textsuperscript{434} After determining the appropriate amount of damages under the respective state's law for each plaintiff, the court trebled the damages against the individual Libyan defendants in accord with the statutory trebling provision of the Anti-Terrorism Act of 1991.\textsuperscript{435} That statute provides that

\begin{quote}
[a]ny national of the United States injured in his or her person, property, or business... may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorneys' fees.
\end{quote}

The court did not treble the damages assessed against the Socialist People's Libyan Arab Jamahiriya and the Libyan External Security Organization because treble damages cannot be pur-

\textsuperscript{430} Id. at 844.
\textsuperscript{432} Id. at *3 (citing 28 U.S.C. § 1605(a)(7) (2006)).
\textsuperscript{433} Id. at *3-4.
\textsuperscript{434} Id. at *126.
\textsuperscript{435} Id. at *127 (citing 18 U.S.C. § 2333(a) (2000)).
\textsuperscript{436} Id.
sued against the foreign state itself.\textsuperscript{437} The court, in its discretion, also awarded prejudgment interest to the plaintiffs, finding such an award particularly appropriate in this case because of the defendants' persistent delay tactics over the course of the litigation.\textsuperscript{438} The court was quick to point out that the award was not made to penalize the defendants but to compensate the plaintiffs fully for the time value of money.\textsuperscript{439}

IV. FEDERAL AVIATION ACT OF 1958

A. Federal Aviation Act of 1958—Federal Preemption—Air Carrier and Aircraft Operator Liability

In Booth v. Santa Barbara Biplanes, LLC, the California appellate court upheld a release against liability, even though it concluded that the appellee, Santa Barbara Biplanes, LLC, was a common carrier under California law.\textsuperscript{440} The California court relied upon a California statute that provides that releases set forth in "special contracts" between passengers and common carriers are enforceable provided they (1) do not release claims for "gross negligence, fraud, or willful wrong" by the carrier;\textsuperscript{441} (2) there had been no violation of law or statute alleged in the activity;\textsuperscript{442} and (3) the common carrier is not providing an essential service or otherwise providing a service in the public interest.\textsuperscript{443} The California appellate court also rejected an argument that such releases were preempted by the Federal Aviation Act of 1958 (FAA of 1958) because, according to the California appellate court, even though the regulations promulgated by the FAA under the Act wholly occupied the regulation of air safety,\textsuperscript{444} the regulations were not inconsistent with this standard because the Federal Aviation Act only required that aircraft not be operated in a "careless or reckless" manner.\textsuperscript{445} The California appellate court held that such a standard was the equivalent of "gross negligence," and that the California law upholding releases for lesser negligence or misconduct was not inconsistent with that federal standard and therefore was en-

\textsuperscript{437} Id.
\textsuperscript{438} Id. at *129–30.
\textsuperscript{439} Id. at *131.
\textsuperscript{441} Id. at 1177.
\textsuperscript{442} Id.
\textsuperscript{443} Id. at 1178.
\textsuperscript{444} Id. at 1180 (citing Montalvo v. Spirit Airlines, 508 F.3d 464 (9th Cir. 2007)).
\textsuperscript{445} Id. at 1181.
The court also recognized that the FAA of 1958 not only expressly preserved state law remedies, which include remedies for personal injury resulting from negligence, but also preserved state law defenses to such actions, such as the release defense at issue in this case.\textsuperscript{447}

In \textit{Diana v. NetJets Services}, the superior court denied motions to dismiss filed by defendants NetJets and Midwest Air Traffic Control Services (Midwest).\textsuperscript{448} Plaintiff's claims arose from an incident in which he was walking in the grassy median adjacent to a taxiway on the way to another aircraft when he was struck by the wing of a taxiing NetJets aircraft.\textsuperscript{449} The complaint alleged that the NetJets pilots were acting "negligently and carelessly" and that the accident was due to the "negligence and carelessness of the airmen."\textsuperscript{450} In an extensive analysis of federal preemption cases, the Connecticut trial court adopted the reasoning and preemption analysis of \textit{Aldana v. Air East Airways, Inc.}\textsuperscript{451} and \textit{Abdullah v. American Airlines, Inc.},\textsuperscript{452} concluding that federal regulations impliedly preempted the field of aviation safety, and that the proper standard of care in any tort action would be a federal standard.\textsuperscript{453} The court concluded that the appropriate "comprehensive" federal standard of care for such claims was whether the aircraft had been operated in a "careless or reckless" manner as prohibited in 14 C.F.R. § 91.13(a).\textsuperscript{454} While the allegations of the complaint did not refer to a federal standard, the court denied the motion to dismiss based on the legal sufficiency of the allegations in the complaint.\textsuperscript{455} Notwithstanding preemption of the standard of care, however, the trial court followed the reasoning of earlier U.S. Supreme Court

\textsuperscript{446} Id.
\textsuperscript{447} Id.
\textsuperscript{449} Id. at *1.
\textsuperscript{450} Id. at *6.
\textsuperscript{451} 477 F. Supp. 2d 489 (D. Conn. 2007).
\textsuperscript{452} 181 F.3d 363 (3rd Cir. 1999).
\textsuperscript{453} \textit{Diana}, 2007 WL 4822585, at *6.
\textsuperscript{454} Id. at *4. Notably, the trial court included footnote 17, describing the application of the "careless or reckless" standard in other cases, in which such "careless or reckless" allegations were held to be sufficient since the complaint "alleges conduct that constitutes an extreme departure from ordinary care in a situation that involves a high degree of danger." \textit{Id.} at *7 n.17.
\textsuperscript{455} Id. at *7.
cases,\(^{456}\) which held that Congress did not intend to preempt all tort actions (for example, by expressly requiring airlines to carry liability insurance), and that the savings clause of the FAA of 1958 expressly preserved state law remedies, such as claims for personal injury.\(^{457}\) The court held that the federal preemption of the standard of care did not require dismissal because state courts routinely apply federal standards of care, particularly where state law remedies are claimed as expressly permitted under the FAA of 1958.\(^{458}\)

In \textit{Landis v. US Airways, Inc.}, the federal magistrate in the U.S. District Court for the Western District of Pennsylvania considered a motion to dismiss filed by defendant US Airways and a motion for judgment on the pleadings filed by defendant Boeing, in a case involving personal injuries resulting from a nose gear collapse during push back from the terminal.\(^{459}\) Plaintiff alleged that prior to push back, the flight crew had been advised that the nose wheel was not aligned with the nose of the aircraft, but the flight crew ignored this information and the aircraft was pushed back.\(^{460}\) Applying the combination of the U.S. Supreme Court’s recent decision in \textit{Bell Atlantic Corp. v. Twombly}\(^{461}\) to find that the district court could consider whether the factual allegations were sufficient “to raise a right to relief above the speculative level” in considering the pleadings, and the Third Circuit’s decision in \textit{Abdullah v. American Airlines, Inc.},\(^{462}\) which held that the FAA of 1958 completely preempts the field of aviation safety, the federal magistrate dismissed the plaintiff’s complaint.\(^{463}\) Even though the plaintiff referred to the FAA of 1958 and generally alleged facts that demonstrated “careless or reckless operation,” which the federal magistrate found necessary to establish a violation of the federal standard of care, she failed to identify and allege in the complaint the specific regulations violated.\(^{464}\) In the absence of references in the pleadings to specific regulations, the federal magistrate concluded that the allegations of the complaint of “careless and reckless” operation did not rise above


\(^{457}\) \textit{Diana}, 2007 WL 4822585, at *2.

\(^{458}\) \textit{Id.} at *5–6.


\(^{460}\) \textit{Id.}


\(^{462}\) 181 F.3d 363 (3rd Cir. 1999).


\(^{464}\) \textit{Id.} at *11.
the speculative level in asserting claims for relief.465 Significantly, the federal magistrate's opinion referred to references in the complaint to common law standards of care, and state statutes and ordinances, as being insufficient to state a claim.466 Finally, the federal magistrate also dismissed the express warranty

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465 Id. at *14. This case demonstrates the impracticality of using the provisions of Part 91 of the Federal Aviation Regulations as the sole standard of care in tort cases. If the standard of care is merely "careless or reckless" operation as referred to in Part 91, then it is a speculative legal standard—meaning anything from "gross negligence" as suggested in Booth and Diana—to simply meaning that an accident occurred due to pilot error (without a mechanical or systems malfunction), and therefore the pilot must have been "careless" in some aspect of operation, as is frequently seen in the context of FAA regulatory proceedings against pilots. To attempt to solve this problem of uncertainty by requiring reference to specific regulations, as the federal magistrate did in this case, simply imposes an additional impractical hurdle. This is because the specific provisions of Part 91 (and other FAA regulations) do not attempt to describe all of the standards for safe operation of an aircraft as is evidenced by the volumes of additional materials published by the FAA regarding aviation safety, from the Airman's Information Manual, to flight training manuals for private pilots, instrument pilots, flight instructors, and advisory circulars. Even the manufacturer's FAA approved flight manuals prescribe standards for safe operation. If only the regulations themselves are the standard, then the wisdom contained in all of these other publications will be irrelevant to a claim of negligence under the new federal standard. On the other hand, if they are all relevant and the FAA then becomes the sole source of information as to safe aviation practices, either directly or by approving other publications such as FAA approved manufacturers flight manuals, then the standard has returned very close to that of the reasonably prudent pilot—as defined by the common law of negligence in every jurisdiction—except that the jury in evaluating the reasonably prudent pilot standard will not be able to refer to any non-FAA publication or authority in deciding what is and is not a prudent course of conduct. Additionally, there are many ways that pilots can cause accidents and personal injuries that have not even been expressly discussed in the FAA publications, or that seem so obvious that they would never be in a specific FAA publication; for example, "scud running" in uncontrolled Class G airspace or low visibility accidents in marginal VFR conditions (both legal, but not necessarily prudent), spatial disorientation in VFR conditions on dark nights over remote areas by pilots not adequately trained to fly on instruments (again, legal, but not necessarily prudent), and undoubtedly many more that may not be technically a violation of a regulation or may not even be specifically referenced in the applicable FAA publications, but are clearly unsafe and avoidable by prudent practices. Requiring a rigid regulatory-based standard of care, as in Landis, is neither practical nor sufficient in defining a standard of care for all of these liability cases. Such a standard is the equivalent of requiring a claimant to allege and prove negligence per se in every case, and it is significantly different than the tort standard of care in other areas of tort law. It is questionable whether any act of Congress evinces an intent to replace the "reasonably prudent pilot" standard of care in aviation personal injury cases, particularly since the FAA of 1958 includes an express savings clause for state remedies.

466 Id. at *9.
claims because there were no allegations as to the content of any express warranty, or any allegation that Boeing intended to extend the terms of any express warranty to her as a third-party beneficiary, or that she was even aware of the terms of any express warranty.\textsuperscript{467}

In \textit{Elassaad v. Independence Air, Inc.}, the district court granted summary judgment against a personal injury plaintiff who alleged that Delta violated federal regulations relating to disabled passengers on aircraft by failing to offer a wheelchair to the plaintiff, an above the knee amputee who used crutches rather than a wheelchair.\textsuperscript{468} The plaintiff fell and injured his shoulder upon disembarking.\textsuperscript{469} The plaintiff did not ask for or receive assistance in disembarking.\textsuperscript{470} The district court noted preliminarily that "federal law establishes the applicable standards of care in the field of air safety," preempting the entire field from state and territorial regulation.\textsuperscript{471} The court held that the airline had not violated federal law because federal law only required the provision of a wheelchair if (1) the passenger requested one or (2) an airline employee offered assistance and the plaintiff accepted it.\textsuperscript{472} The district court further held that the airline was not required to inform the plaintiff of the availability of a wheelchair, in the absence of a request for a wheelchair, because the plaintiff did not use a wheelchair.\textsuperscript{473} Finally, the district court held that the plaintiff could not make out a claim based upon a violation of the more general "careless or reckless" standard because the more specific standards under 14 CFR 382.39, 382.7 and 382.45(a)(2) applied, and because plaintiff did not establish any support for his claim that failure to offer a wheelchair constituted careless or reckless conduct.\textsuperscript{474}

\section*{B. Federal Preemption—Federal Aviation Act of 1958—Manufacturer's Liability}

In \textit{Wong v. Precision Airmotive, LLC}, the district court denied a motion for judgment on the pleadings seeking to assert a complete defense to all product liability claims based upon implied

\textsuperscript{467} \textit{Id.} at *14.
\textsuperscript{468} No. 05-2328, 2008 WL 3895566, at *1 (E.D. Pa. Aug. 20, 2008).
\textsuperscript{469} \textit{Id.}
\textsuperscript{470} \textit{Id.}
\textsuperscript{471} \textit{Id.}
\textsuperscript{472} \textit{Id.}; see also 14 CFR §§ 382.39, 382.7 (2008).
\textsuperscript{473} \textit{Elassaad}, 2008 WL 3895566, at *1; see also 14 CFR § 382.45(a)(2) (2008).
\textsuperscript{474} \textit{Elassaad}, 2008 WL 3895566, at *2.
The district court held that state law product liability standards had long coincided with federal regulation in this field,\textsuperscript{476} that Congress had specifically rejected legislation seeking to create a national product liability standard in 1990,\textsuperscript{477} and that subsequent federal legislation had included specific express preemption provisions relating to the federal statute of repose under the General Aviation Revitalization Act of 1994 (GARA).\textsuperscript{478} The district court also relied upon the Tenth and Eleventh Circuit decisions in \textit{Cleveland v. Piper Aircraft Corp.}\textsuperscript{479} and \textit{Public Health Trust v. Lake Aircraft, Inc.},\textsuperscript{480} which rejected implied field preemption of aviation product liability cases based in part upon Congress's express preemption of airline routes, rates, and services in the ADA.\textsuperscript{481} The district court concluded that the reasoning of those cases was reinforced by the express preemption provisions contained in Congress's subsequent enactment of GARA.\textsuperscript{482} The decision in this case suggests that the better approach for manufacturers seeking to establish a federal preemption defense is to seek a ruling from the court based upon conflict preemption on specific issues of defect, rather than field preemption. Once the case has moved beyond the pleading stage, any conflicts between specific defect claims and specific federal aircraft design and manufacturing regulations\textsuperscript{483} can be more clearly identified and established from the record, and summary judgment may be appropriate.

\textsuperscript{475} No. 05cv1604 (WWE), 2008 U.S. Dist. LEXIS 2201, at *5, *8 (D. Conn. June 10, 2008).

\textsuperscript{476} Id. at *5 (citing Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 299 (1976)).

\textsuperscript{477} Id. at *6–7 (citing S. Rep. No. 101-303 (May 23, 1990), relating to the proposed General Aviation Accident Liability Standards Act).

\textsuperscript{478} Id. at *7.

\textsuperscript{479} 985 F.2d 1438 (10th Cir. 1993).

\textsuperscript{480} 992 F.2d 291 (11th Cir. 1993).

\textsuperscript{481} Wong, 2008 U.S. Dist. LEXIS 2201, at *7–8.

\textsuperscript{482} Id.

\textsuperscript{483} Of course, in such cases, a claimant will rely upon the claim that federal standards are only “minimum standards.” However, many federal regulations do not permit alternative methods of design or standards, and in those cases, conflict preemption may still exist notwithstanding any attempt to characterize such a federal regulation as merely a “minimum standard.” This is the approach apparently applied in part by Cirrus in \textit{Glorvigen v. Cirrus Aircraft Corp.}, discussed below. Again, the specific requirements of the particular FAA design regulation and whether the regulation accommodates alternative designs are critical to a claim of conflict preemption.
In *Glorvigen v. Cirrus Design Corp.*, the federal district court denied the aircraft manufacturer’s motion for summary judgment claiming “complete preemption” of the field of aviation safety by the FAA of 1958, and “conflict preemption” claims that it would be impossible for Cirrus “to comply with both FAA standards and state negligence standards.”\(^4\) The district court, relying on its previous decision in *Glorvigen v. Cirrus Design Corp.* (Glorvigen I),\(^4\) held that Congress had expressed no federal intent of field preemption and, specifically, that the “federal regulations were intended to prevent accidents and not to ‘provide a remedial mechanism for individuals injured by a violation of aviation safety standards,’ and that ‘state tort remedies remain for violation of the federally established standards of care.’”\(^4\) The district court also found no “clear and manifest purpose” to supersede state authority by federal statutes and regulations, and that the savings clause in the FAA of 1958\(^4\) “evinces a clear congressional intent against conflict preemption.”\(^4\)

V. AIRLINE DEREGULATION ACT—FEDERAL PREEMPTION

In *Hanni v. American Airlines, Inc.*, plaintiff Kathleen Hanni, a passenger on an American Airlines flight from San Francisco, connecting at Dallas Fort Worth Airport, to Mobile, Alabama, filed a class action suit against defendant American Airlines, Inc. on December 28, 2007.\(^4\) Plaintiff’s claims arose from a seven hour trip that allegedly took over fifty hours due to various delays and included nine-and-one-half hours confined in the airplane on the tarmac.\(^4\) Plaintiff’s complaint included claims for false imprisonment, intentional infliction of emotion distress, negligence, breach of contract, and intentional misrepresentation.\(^4\) Defendant moved to dismiss the complaint on the basis that plaintiff’s claims were preempted by the FAA of 1958 and

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\(^4\) No. 06-2661 (PAM/JSM), 2008 U.S. Dist. LEXIS 10899, at *8–9 (D. Minn. Feb. 11, 2008).
\(^4\) Id. at *9 (citing 49 U.S.C. Section 40120(c) (2000 & Supp. V 2006)).
\(^4\) Id.
\(^4\) Id. at *1–2.
\(^4\) Id.
the ADA and, in the alternative, on the basis that each of plaintiff's causes of action failed to state a claim upon which relief could be granted and that plaintiff failed to plead her fraud claim with particularity.492 The court granted the motion in part and denied it in part.493 The court found that "Plaintiff's claims were field preempted by the [FAA of 1958] to the extent they were based on Defendant's decision to re-route her flight from Dallas Fort Worth Airport to the Austin Airport rather than delaying or cancelling it,"494 and that "Plaintiff's claims were explicitly preempted by the ADA to the extent that they were controlled by specific regulations."495 However, because the bulk of the claims related to the airline's actions after the flight had been diverted, the court held that the claims survived preemption because they were not related to safety and were not the type regulated by federal safety regulations.496 As to the plaintiff's breach of contract claim, the court held that the claim "was explicitly preempted by the ADA to the extent it was based on a breach of the implied covenant of good faith and fair dealing."497 Finally, the court held that Plaintiff failed to allege facts sufficient to state a claim for false imprisonment, negligence, breach of contract or fraud, and that the plaintiff could seek punitive damages on her surviving tort claims.498

On May 15, 2008, the plaintiff filed a first amended complaint, again alleging claims for false imprisonment, negligence, breach of contract, and fraud, and additionally, asserting causes of action for conversion, civil conspiracy, and a claim pursuant to Racketeer Influenced and Corrupt Organizations Act (RICO).499 Defendant attempted to get the court to revisit its preemption analysis regarding explicit preemption under the ADA, but the court declined to do so.500 Defendant next argued that the plaintiff failed to comply with the court's order, dismissing the original complaint by failing to allege facts sufficient to support her claims.501 In its July 11, 2008 order, the court addressed each of plaintiff's claims in turn. As to plaintiff's false

492 Id.
493 Id. at *25–26.
494 Id. at *2.
495 Id. at *2–3.
496 Id. at *4–5.
497 Id. at *3.
498 Id.
499 Id. at *3–4.
500 Id. at *4–5.
501 Id. at *5.
imprisonment claim, the plaintiff alleged that the defendant would not let her off the plane during the lengthy stop on the ground and that her confinement was unlawful.\textsuperscript{502} But, the FAA of 1958 gives pilots "broad authority over passengers," providing that the pilot is responsible for their safety and the ultimate authority on the airplane's operation.\textsuperscript{503} With this in mind, the court found plaintiff's false imprisonment claim to be "conclusory," and dismissed the claim.\textsuperscript{504} The court also dismissed plaintiff's claim for intentional infliction of emotional distress for failing to allege "facts to support a finding that Defendant acted with the intent of causing her distress."\textsuperscript{505} As to plaintiff's negligence claim, the plaintiff stated that the defendant violated its duty as a common carrier by depriving the plaintiff of her basic needs while being kept on the aircraft.\textsuperscript{506} The court denied defendant's motion to dismiss these claims, stating that there are no specific controlling regulations, and common carriers are held to a heightened standard of care.\textsuperscript{507} Additionally, the plaintiff asserted that the Contract of Carriage required defendant to reroute passengers on the next flight with available seats, but defendant refused to do so.\textsuperscript{508} The court stated that, if true, this could establish a breach of contract claim.\textsuperscript{509} Plaintiff also attempted to assert a claim of fraud, specifically, that she relied on fraudulent statements made by the defendants regarding remaining in the aircraft; the court dismissed this claim, finding that the plaintiff failed to adequately allege that she reasonably relied on fraudulent statements.\textsuperscript{510} Plaintiff claimed that the defendant wrongfully withheld her luggage, and brought an action for conversion.\textsuperscript{511} Since the plaintiff was not claiming her luggage was lost or damaged, the court held that the claims were not preempted, but doubted plaintiff's ability to prove damages.\textsuperscript{512} The court granted plaintiff leave to amend

\textsuperscript{502} Id. at *5–6.
\textsuperscript{503} Id. at *6.
\textsuperscript{504} Id.
\textsuperscript{505} Id. at *7–8.
\textsuperscript{506} Id. at *9–10.
\textsuperscript{507} Id.
\textsuperscript{508} Id. at *15–16.
\textsuperscript{509} Id. at *15.
\textsuperscript{510} Id. at *20–22.
\textsuperscript{511} Id. at *22.
\textsuperscript{512} Id. at *23.
the complaint as to her civil conspiracy claim. Finally, plaintiff's RICO claim was dismissed without prejudice.

On August 13, 2008, the plaintiff filed a third amended complaint, following a stipulation between the parties that her second amended complaint could be amended. The court dismissed "Plaintiff's negligence allegations that include charges of false imprisonment, intentional infliction of emotional distress and violation of the Fourth Amendment" with prejudice, stating that the court's July 11, 2008, order only permitted the plaintiff to assert allegations for "failure to provide adequate food, water, restroom facilities and ventilation in violation of its duties as a common carrier." Similarly, as to plaintiff's breach of contract claim, in which plaintiff alleged that the defendant failed to meet plaintiff's special needs by denying her access to medications that were in her checked baggage, in violation of the Contract of Carriage, the court dismissed the claim with prejudice because the court had not given the plaintiff leave to amend this portion of her complaint. Plaintiff's claim for civil conspiracy based on negligence and breach of contract was dismissed with prejudice because, as the court stated, civil conspiracy based on negligence and breach of contract is not a supportable cause of action. Plaintiff's claim of conspiracy to commit fraud was also dismissed with prejudice because the plaintiff failed to plead "reasonable reliance."

In addition, in filing her third amended complaint, the plaintiff moved for

an order certifying an interlocutory appeal on the portions of the July 11, 2008, order which dismissed with prejudice the causes of action in [plaintiff's first amended complaint] and for false imprisonment, intentional infliction of emotional distress and fraud, and parts of the causes of action for negligence and breach of contract.

The court denied plaintiff's motion, stating that "an interlocutory appeal on the issues identified by Plaintiff will not advance
the ultimate termination of the litigation" and because there were "no exceptional circumstances warranting interlocutory appeal." 521 Finally, the plaintiff moved to appeal based on the collateral order doctrine, which the court denied on the basis that plaintiff can appeal after a final judgment is entered. 522 While granting in part and denying in part defendant's motion to dismiss the third amended complaint, the court stated that the plaintiff could, without filing an amended complaint, pursue the following claims: (1) negligence based on defendant's failure to provide food, water, restroom and ventilation; (2) breach of contract claim to the extent it is based on paragraph five or eighteen of the Contract of Carriage, and (3) conversion. 523

In Farash v. Continental Airlines, Inc., the U.S. District Court for the Southern District of New York determined that a pro se passenger's tort claims were not preempted by the ADA, 524 but nevertheless found that the claims were patently frivolous and failed to state a cognizable tort claim under New York law. 525 The plaintiff was asked by a flight attendant to vacate his first-class aisle seat for a window seat in a different row so that an adult and his pre-teen son could sit next to each other. 526 The plaintiff alleged that the flight attendant harassed him throughout the flight and that the flight attendant's conduct was discriminatory behavior predicated upon the passenger "having Semitic looks and a middle eastern last name." 527 The plaintiff asserted negligence, gross negligence, and civil assault. 528 The court relied upon Rombom v. United Air Lines, Inc. 529 for its preemption analysis and considered a three-part test that involves whether the alleged tortious activity (1) involved an "airline service"; (2) directly or tenuously affected the airline service; and (3) was reasonably necessary to the provision of the airline service. 530 As the case was decided upon a motion to dismiss, the court accepted as true the passenger's allegations of discriminatory intent and ruled that the claims for discriminatory seat reassignment and discriminatory reporting to an air marshal...
were not preempted because actions predicated upon a discriminatory intent do not constitute actions "reasonably necessary" for the provision of airlines services and thus fail the third prong of the Rombom test.\footnote{Id. at 364–66.} The court ruled that the claims based on the quality of in-flight services and post-flight customer service were preempted because the alleged conduct was reasonable and did not constitute the type of outrageous behavior needed to defeat preemption.\footnote{Id. at 366.}

In \textit{Eagle Air Medical Corp. v. Colorado Board of Health},\footnote{570 F. Supp. 2d 1289, 1295 (D. Colo. 2008).} the court relied on the \textit{Younger} abstention doctrine to grant a state agency’s motion to stay an air ambulance company’s suit for declaratory and injunctive relief.\footnote{Id. (relying on Younger v. Harris, 401 U.S. 37 (1971)).} The company asserted that certain Colorado regulations governing the licensing of air ambulances are preempted by the FAA of 1958 and the ADA.\footnote{Id. at 1290.} The Colorado state agency temporarily revoked the air ambulance’s accreditation pending investigation of a crash,\footnote{Id.} and the agency argued that the case should be stayed pending resolution of the air ambulance’s appeal of the state accreditation decision.\footnote{Id. at 1291.} Under the \textit{Younger} abstention doctrine, a federal court must refrain from exercising jurisdiction when the federal case interferes with an ongoing state proceeding that implicates an important state interest, and the state provides an adequate forum to adjudicate the claim.\footnote{Id. at 1293.} The court disagreed with the argument that the \textit{Younger} test should not be considered because the preemption claim was "facially conclusive"\footnote{Id. at 1295.} and instead relied on the reasoning in \textit{Morales v. Trans World Airlines, Inc.}\footnote{504 U.S. 374 (1992).} to find that it was not apparent that "the ADA’s preclusion of state regulation of carrier ‘price, route, or service' equates to preclusion of state regulation of emergency medical air transportation service."\footnote{Eagle Air Med., 570 F. Supp. 2d at 1293.} Turning to preemption based upon \textit{Younger} abstention, the court found that the accreditation issue implicated an important state interest\footnote{Id. at 1295.} and relied upon
the Tenth Circuit's decision in *Amanatullah v. Colorado Board of Medical Examiners*\(^{543}\) to determine that a Colorado state agency's temporary revocation of accreditation pending the results of an investigation conducted by another state agency qualified as an ongoing state proceeding.\(^{544}\)

In *Malik v. Continental Airlines, Inc.*\(^{545}\) the Fifth Circuit affirmed the dismissal of Plaintiff Anjum Malik's (Malik) state law claims and federal discrimination claims and reversed the dismissal of Malik's federal common law claim for lost luggage, remanding that claim to the district court.\(^{546}\) Malik, an Indian-secular Muslim, was flying from Austin to Rhode Island via New Jersey and had brought her only luggage on board, which contained various valuables, including antique and exotic jewelry.\(^{547}\) While the plane was taxiing, Malik was informed by a flight attendant that the overhead compartment was full and that her luggage had been moved to the plane's under-cabin compartment.\(^{548}\) Malik's luggage was lost and never found.\(^{549}\) Continental refused to compensate Malik for her losses and stated that the contract of carriage placed its maximum liability at $2,800.\(^{550}\) Malik filed suit alleging conversion and invasion of privacy (under state law) and racial and religious discrimination (under various federal statutes).\(^{551}\)

The Fifth Circuit affirmed the district court's dismissal of Malik's state law claims for conversion and invasion of privacy as preempted by the ADA.\(^{552}\) The court held that "state law claims having a 'connection' with an airline's baggage handling services are 'preempted by § 41713(b)(1)."\(^{553}\) When Malik argued that her state tort claims do not relate to a "service" since she did not anticipate Continental converting her luggage into checked luggage, the court disagreed.\(^{554}\) The court also did not

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\(^{543}\) *Amanatullah*, 187 F.3d 1160, 1163 (10th Cir. 1999).

\(^{544}\) *Eagle Air Med.*, 570 F. Supp. 2d at 1294.

\(^{545}\) No. 08-50373, 2008 U.S. App. LEXIS 23178 (5th Cir. Nov. 10, 2008).

\(^{546}\) Id. at *1–2.

\(^{547}\) Id. at *2.

\(^{548}\) Id. at *3.

\(^{549}\) Id. at *3–4.

\(^{550}\) Id. at *4.

\(^{551}\) Id.

\(^{552}\) Id. at *5, *8–11 (citing Airline Deregulation Act, 49 U.S.C. § 41713 (2000)).

\(^{553}\) Id. at *8 (citing Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992); Casas v. Am. Airlines, Inc., 304 F.3d 517, 525 (5th Cir. 2002); Hodges v. Delta Airlines, Inc., 44 F.3d 334, 335 (5th Cir. 1995)).

\(^{554}\) Id. at *9.
accept Malik's argument that, "like the personal injury claims in Hodges, [her claims] are not preempted by [the ADA] because they relate to the 'operation and maintenance of aircraft' rather than 'service' of baggage handling." The Fifth Circuit also affirmed the dismissal of Malik's federal claims for racial and religious discrimination under 42 U.S.C. §§ 1981, 1982, 2000 et seq. and 49 U.S.C. § 40127 for failing to plead facts in support of intentional discrimination as required by the applicable statutes. The court stated that "Malik has failed to allege any facts establishing a connection between Continental's actions and her racial and religious background." Finally, as to Malik's claim for lost luggage under federal common law, which the district court did not address, the Fifth Circuit remanded this claim to the district court. The court noted that the "federal common law provides airline passengers with a cause of action for lost luggage."

In Qayyum v. US Airways, Inc., plaintiff Rima Qayyum filed suit in federal court against defendant US Airways after allegedly being refused boarding on her flight. The federal district court granted in part defendant's motion to dismiss based on ADA preemption of her state law claims and on the lack of state action as to a § 1983 claim, but denied the motion to dismiss the remaining federal civil rights claims. On August 9, 2006, eight days prior to plaintiff's flight, "British authorities uncovered a plot to use liquid explosives to bring down [airplanes]." "As a result, the TSA banned all liquids, gels, and creams from carry-on containers." On August 17, 2006, facial cream and a bottle of water were discovered in Plaintiff's carry-on bag at the security check line. While plaintiff's items were subjected to a field test for explosives, plaintiff alleged that "other passengers were simply allowed to throw away prohibited items." The initial field tests came back positive, and plaintiff

555 Id. at *10-11.
556 Id. at *11-13.
557 Id. at *13.
558 Id.
559 Id. (citing Casas v. Am. Airlines, Inc., 304 F.3d 517, 521 (5th Cir. 2002)).
561 Id. at *2-5.
562 Id. at *5.
563 Id. at *3.
564 Id.
565 Id.
566 Id.
was subjected to a nine and a half hour interrogation.\textsuperscript{567} When laboratory results revealed plaintiff’s carry-on items contained no explosive materials, plaintiff was issued a ticket for the first morning flight.\textsuperscript{568} Although laboratory results showed her items contained no explosives, US Airways did not allow plaintiff to redeem her ticket and board her flight.\textsuperscript{569} Plaintiff filed suit against US Airways, asserting six causes of action.\textsuperscript{570}

Plaintiff brought a federal claim under 42 U.S.C. § 1981, which is intended “to protect the equal right of ‘all person[s] within the jurisdiction of the United States to make and enforce contracts without respect to race.’”\textsuperscript{571} The court found that the claim was supported by allegations that US Airways refused to allow plaintiff to board her flight and denied the motion to dismiss the claim.\textsuperscript{572} Despite US Airways’s insistence that it does not receive federal assistance sufficient to meet the statutory requirement,\textsuperscript{573} the court also did not dismiss plaintiff’s federal claim of discrimination under Title VI of the 1964 Civil Rights Act, stating that the claim is at least plausible on its face.\textsuperscript{574} Plaintiff also asserted a federal claim for relief under 42 U.S.C. § 1983, which gives citizens a private cause of action to remedy violations of the rights secured by the Constitution, but because plaintiff failed to allege that US Airways acted under the color of state law, an essential element of a § 1983 claim, the court dismissed this claim.\textsuperscript{575}

The court held that plaintiff’s state law claims were preempted by the ADA and dismissed all such claims.\textsuperscript{576} The court found that plaintiff’s state law claims have a “connection with or reference to airline ‘rates, routes, or services.’”\textsuperscript{577} Specifically, the court stated that plaintiff’s claims of negligence and negligent training and supervision directly implicate a boarding decision and, therefore were preempted by the ADA.\textsuperscript{578} Moreover,

\begin{itemize}
\item \textsuperscript{567} Id.
\item \textsuperscript{568} Id. at *4.
\item \textsuperscript{569} Id. at *4–5.
\item \textsuperscript{570} Id. at *5.
\item \textsuperscript{571} Id. at *5–6.
\item \textsuperscript{572} Id. at *6–7.
\item \textsuperscript{573} Id. at *8.
\item \textsuperscript{574} Id. at *8–*9.
\item \textsuperscript{575} Id. at *9.
\item \textsuperscript{576} Id. at *10–*12.
\item \textsuperscript{577} Id. at *10 (citing Morales v. Trans World Airlines, 504 U.S. 374, 379–80 (1992)).
\item \textsuperscript{578} Id. at *11.
\end{itemize}
the court found that plaintiff's claim of intentional infliction of emotional distress relied in part on denial of boarding and, therefore was preempted.\textsuperscript{579} Finally, the court held that plaintiff's state claims of false accusations and detainment also related to boarding procedures, which "falls squarely within the scope of preemption."\textsuperscript{580}

In \textit{Westways World Travel, Inc. v. AMR Corp.},\textsuperscript{581} the Ninth Circuit Court of Appeals reversed the district court's decision to grant summary judgment to the defendants on their breach of contract claim.\textsuperscript{582} In this breach of contract action brought by a group of travel agents against an air carrier and an airline ticket clearinghouse, the Ninth Circuit held that the ADA did not preempt breach of contract claims.\textsuperscript{583} Quoting an earlier U.S. Supreme Court decision, the Ninth Circuit found that the ADA does not preempt "court enforcement of contract terms set by the parties themselves."\textsuperscript{584} Furthermore, summary judgment for the defendants on the breach of contract claim was not appropriate because a provision in the parties' Agent Reporting Agreement requiring travel agents to "comply with all instructions of the carrier" was ambiguous.\textsuperscript{585} The Ninth Circuit affirmed the trial court's grant of summary judgment to the defendants on plaintiffs' RICO claims, holding that the plaintiffs could not demonstrate the predicate racketeering activity required under the statute.\textsuperscript{586} Likewise, the appellate court affirmed the district court's decision to decertify a class action by the travel agents, recognizing its "very limited review" of a trial court's decision to decertify a class,\textsuperscript{587} and holding that the trial court had not abused its discretion in concluding that "individual inquiries would predominate over common questions of law and fact."\textsuperscript{588}

In \textit{Air Transport Ass'n of America, Inc. v. Cuomo}, an air carriers' trade group challenged the New York State Passenger Bill of Rights.\textsuperscript{589} The New York legislature enacted the Passenger Bill

\textsuperscript{579} Id. at *11-*12.
\textsuperscript{580} Id. at *12.
\textsuperscript{581} 265 Fed. Appx. 472 (9th Cir. 2008).
\textsuperscript{582} Id. at 475.
\textsuperscript{583} Id.
\textsuperscript{584} Id. (quoting Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 222 (1995)).
\textsuperscript{585} Id.
\textsuperscript{586} Id. at 474.
\textsuperscript{587} Id. at 475.
\textsuperscript{588} Id. at 476.
\textsuperscript{589} 520 F.3d 218, 219 (2d Cir. 2008).
of Rights after "a series of well-publicized incidents during the winter of 2006–2007 in which airline passengers endured lengthy delays grounded on New York runways, some without being provided water or food."590 The air carriers’ trade group filed suit in U.S. District Court for the Northern District of New York seeking declaratory and injunctive relief on the grounds that the Passenger Bill of Rights is preempted by the ADA and violated the Commerce Clause of the U.S. Constitution.591 The district court held that the Passenger Bill of Rights was not expressly preempted by the ADA because it was not "related to a price, route, or service of an air carrier."592 The Second Circuit reversed, holding that the Passenger Bill of Rights is related to a price, route, or service of an air carrier.593 The Second Circuit found a majority of the circuits to have construed "service" under the ADA to include boarding procedures, baggage handling, and food and drink,594 while the Third and Ninth Circuits construed service more narrowly.595 The Second Circuit then held:

requiring airlines to provide food, water, electricity, and restrooms to passengers during lengthy ground delays does relate to the service of an air carrier and therefore falls within the express terms of the ADA’s preemption provision. As a result, the substantive provisions of the PBR [(Passenger Bill of Rights)], codified at section 251-g(1) of the New York General Business Law, are preempted.596

In view of its determination that the New York Passenger Bill of Rights was preempted by the ADA, the court declined to address the scope of any FAA preemption.597

In Manassas Travel, Inc. v. Worldspan, L.P., a travel agency claimed that a computer reservation system had intentionally in-

590 Id. at 220.
591 Id.
592 Id. (citing Air Transport Ass’n of Am., Inc. v. Cuomo, 528 F. Supp. 2d 62, 66–67 (N.D.N.Y. 2007) (quoting 49 U.S.C. §41713(b)(1))).
593 Id. at 221. Finding that there is no implied private right of action for Air Transport under the ADA, the Second Circuit nevertheless held that "Air Transport was entitled to pursue its preemption challenge through its Supremacy Clause claim." Id.
594 Id. at 223 (collecting cases from the 1st, 4th, 5th, 7th, and 11th Circuits).
595 Id.
596 Id.
597 Id. at 225.
The travel agency alleged breach of contract and sought "extra-contract[ual] relief, such as attorneys' fees, exemplary damages, and interest." Defendant Worldspan conceded that the breach of contract claims were not preempted by the ADA, but contended that the extra-contractual relief was preempted by the ADA. Finding that other courts had held that claims for punitive damages are preempted by the ADA in cases alleging breach of contract, the district court dismissed the claim for punitive damages. Defendant Worldspan also contended that the two remaining claims, intentional interference with business relationships and civil conspiracy, were preempted by the ADA. The district court dismissed those claims on other grounds and did not reach the issue of preemption with respect to those claims.

In Alaska Airlines, Inc. v. Carey, an air carrier sued a travel agency, alleging misuse of its frequent flyer program benefits. The travel agency counterclaimed, alleging antitrust violations and various state law claims including fraud, conversion, defamation, and tortious interference with business expectancy. Citing the Supreme Court's decision in American Airlines, Inc. v. Wolens, the district court held that the travel agency's state law counterclaims were preempted by the ADA. With respect to the remaining antitrust claims comprising the defendants' counterclaims, the district court found that there were factual disputes which could not be resolved in a 12(b)(6) motion and denied the carrier's motion to dismiss the antitrust counterclaims.

In In re Korean Airlines Co. Antitrust Litigation, a class action suit was filed on behalf of purchasers of tickets of two foreign air carriers. The issue in this case was whether the term "air car-

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599 Id. at *6.
600 Id.
601 Id. at *6–7.
602 Id.
603 Id.
605 Id. at *5.
606 Id. at *11 (citing Am. Airlines, Inc. v. Wolens, 513 U.S. 219 (1995)).
608 Id. at *12–13.
rier” in the ADA included foreign air carriers.\textsuperscript{610} Acknowledging that the statute’s explicit definition of “air carrier” would appear to exclude foreign air carriers, the district court nonetheless deferred to the weight of authority applying the provision to foreign air carriers.\textsuperscript{611} Defendants listed more than a dozen cases applying the ADA to preempt state law claims brought against foreign air carriers. The trial court discussed several of the decisions, and concluded that “while the plain language of the ADA preemption provision arguably suggests that ‘air carrier’ is limited to domestic air carriers, Plaintiffs [sic] fail to explain why this Court should ignore the uniformity of opinion holding to the contrary.”\textsuperscript{612} Having concluded that “air carriers” includes foreign air carriers, the district court dismissed plaintiffs’ state law claims under various state antitrust and consumer protection laws that related to the “price of an air carrier”.\textsuperscript{613} Finding that the defendants still faced the consequences of violating federal antitrust law, the district court also dismissed plaintiffs’ state law claims related to pricing.\textsuperscript{614}

In \textit{Al-Tawan v. American Airlines, Inc.}, plaintiffs, all of Iraqi descent, filed suit alleging they were discriminated against by the airline because the pilot identified them as security risks and had them removed from the airplane.\textsuperscript{615} The plaintiffs brought federal and state law claims.\textsuperscript{616} The district court addressed two issues: (1) what must a plaintiff plead to state a claim for discrimination, under 42 U.S.C. § 1981, when the airline asserts its statutory authority, under 49 U.S.C. § 44902(b) of the FAA of 1958, to remove a passenger it deems a security risk;\textsuperscript{617} and (2) whether the ADA preempts a plaintiff’s state law tort claims of false imprisonment, intentional infliction of emotional distress, and negligence.\textsuperscript{618}

The court first found that the highest priority in air commerce under the FAA of 1958 is safety.\textsuperscript{619} A pilot has “very broad” discretion in determining which passengers “might be” a

\begin{thebibliography}{99}
\bibitem{610} Id. at 1216.
\bibitem{611} Id. at 1216–19.
\bibitem{612} Id. at 1219.
\bibitem{613} Id. at 1220–21 (citing \textit{Morales v. Trans World Airlines, Inc.}, 504 U.S. 374, 383 (1992)).
\bibitem{614} Id. at 1221.
\bibitem{616} Id.
\bibitem{617} Id. at 928–31.
\bibitem{618} Id. at 932–40.
\bibitem{619} Id. at 929.
\end{thebibliography}
safety risk to the passengers and crew.\textsuperscript{620} The court found that § 44902(b) not only creates an affirmative defense, but is an affirmative grant of permission to the air carrier to exercise discretion in protecting the safety of a plane and its passengers.\textsuperscript{621} The district court held that an airline is not subject to liability for discrimination unless a decision to refuse transport is arbitrary and capricious.\textsuperscript{622} The court found that the plaintiff had alleged sufficient facts to establish that the defendant’s motivation did not involve safety concerns, but was rather an arbitrary and racially-motivated decision.\textsuperscript{623} The court concluded, however, that the plaintiffs’ burden would be a “heavy one” at summary judgment.\textsuperscript{624}

The court then addressed whether the ADA preempts a plaintiff’s state law tort claims of false imprisonment, intentional infliction of emotional distress, and negligence.\textsuperscript{625} The court held that a claim for false imprisonment is not preempted by the ADA.\textsuperscript{626} The court agreed that the “ADA is intended to preempt economic regulation of airlines by states[, but] is not a safe harbor for airlines from civil tort claims.”\textsuperscript{627} The court also found that an intentional infliction of emotional distress claim is not preempted where a plaintiff alleges that an airline held him without any legitimate safety or security justification.\textsuperscript{628} Finally, the court found that the ADA generally “does not preempt negligence actions against airlines based upon theories of failure to train and failure to supervise if those actions are not related to the airline’s rates, routes, or services.”\textsuperscript{629} The court noted that each of the three state law claims could be revisited at summary judgment.\textsuperscript{630}

In \textit{Butler v. United Air Lines, Inc.}, plaintiff filed a breach of contract claim because she was prevented from boarding a flight for which she had purchased a ticket.\textsuperscript{631} The airline claimed it

\textsuperscript{620} \textit{Id.}
\textsuperscript{621} \textit{Id.} at 930.
\textsuperscript{622} \textit{Id.}
\textsuperscript{623} \textit{Id.} at 931.
\textsuperscript{624} \textit{Id.}
\textsuperscript{625} \textit{Id.} at 932–40.
\textsuperscript{626} \textit{Id.} at 939.
\textsuperscript{627} \textit{Id.} at 938.
\textsuperscript{628} \textit{Id.} at 939.
\textsuperscript{629} \textit{Id.} at 940.
\textsuperscript{630} \textit{Id.}
properly denied her passage because her credit card payment had been denied. Plaintiff showed that she received emails confirming her reservation and that her credit card statement reflected a re-bill of the ticket. Plaintiff further alleged she was told repeatedly that she had a valid reservation. The court found that the applicable carriage agreement created a binding contract. The court found that the airline had not cited any particular tariff provision that prohibited its employee from re-ticketing the flight and that the employee did not follow the airline’s procedures. The airline’s motion for summary judgment on plaintiff’s contract and fraud claims was denied. The court also found, however, that the plaintiff’s state law consumer protection actions were preempted by the ADA. The court held that the ADA preempts claims based on state law obligations outside the parties’ agreement. Since the California Consumer Protection Act claims sought to regulate airline competition in the carrier’s marketing practices, the ADA preemption was in effect.

In *De Jesus v. American Airlines, Inc.*, the court found that a deceptive advertising claim filed against American Airlines by the Puerto Rican government was preempted by the ADA. The court found that the ADA preempts any attempt by a state to regulate an airline’s selection and design of marketing mechanisms. The court found that any state activity regarding airline advertising relates to the airline’s rates, routes, or services and is completely preempted. The court thus granted the carrier’s motion for judgment on the pleadings.

In *Cathedral of Hope v. Fedex Corporate Services, Inc.*, a suit involving a misdelivered package, Cathedral of Hope (CH) and Fedex Corporate Services, Inc. (FedEx) each moved for summary judg-

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632 Id. at *8–9.
633 Id. at *7–8.
634 Id. at *1–5.
635 Id. at *11.
636 Id.
637 Id.
638 Id. at *16.
639 Id. at *13.
640 Id. at *13–14.
641 Id. at *15.
643 Id. at 351.
644 Id. at 353.
645 Id. at 355.
The court denied CH's motion and granted in part and denied in part FedEx's motion. "Ceridian Payroll Services [(Ceridian)] contracted with FedEx to deliver to CH a package containing payroll checks and related documents" containing personal and financial information. "Ceridian completed a FedEx Airbill for the delivery of the package[, which] incorporated by reference the terms of the FedEx Service Guide." The FedEx Service Guide contained a liability limitation clause stating that "unless a higher value is declared and paid for, our liability for each package is limited to US $100." A FedEx employee mistakenly delivered the Ceridian package to a thief (rather than to a CH employee), who greeted the FedEx employee in CH's parking lot and stated that he would sign for and accept delivery of the package. "CH later discovered that the payroll checks had been cashed, accounts and charge accounts had been opened using employees' information, employees' accounts had been overdrawn, and forged driver licenses had been obtained."

CH sued FedEx, claiming that FedEx "breached its contract with Ceridian under the terms of the Service Guide, and that as an intended third-party beneficiary of the contract, CH [was] entitled to recover $20,000 [sic] in contractual damages and $15,000 [sic] in attorney's fees," and, if the liability limitation provision is enforceable, an additional $100 in damages and $15,000 in attorney's fees. CH moved for summary judgment on this basis. FedEx argued that CH's claims were preempted by the ADA and that FedEx's liability was limited to $100. CH replied that FedEx was estopped from invoking the Service Guide's liability limitations provision because (1) FedEx made pre-suit verbal offers to settle in excess of $100; and (2) FedEx waived invocation of the liability provision through its pre-suit offers. FedEx moved for summary judgment on the basis that

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647 Id.
648 Id.
649 Id. at *1–2.
650 Id. at *2.
651 Id.
652 Id. at *2.
653 Id. at *3.
654 Id.
655 Id.
656 Id.
(1) CH's claims, request for attorney's fees, and its equitable estoppel and waiver defenses were all preempted by the ADA, and (2) that its liability for breach of contract was limited to $100.657

The court held that CH was not entitled to summary judgment on its breach of contract claim because it had not established beyond peradventure that FedEx was liable under the terms of the Service Guide.658 The court held that CH's negligence and gross negligence claims were preempted by the ADA and must be dismissed with prejudice.659 Following Trujillo v. American Airlines, Inc.,660 the court explained that CH's breach of contract claim was the means by which it could enforce any rights as a third-party beneficiary of the agreement between Ceridian and FedEx and, therefore CH's negligence and gross negligence claims were preempted.661 The court declined to decide the issue of whether CH's reliance on the doctrines of equitable estoppel and/or waiver were preempted by the ADA and stated that, even assuming that the defenses are not preempted, FedEx was entitled to summary judgment dismissing these defenses.662

The court found that CH could not establish each of the requisite elements of equitable estoppel since there was no proof that FedEx concealed the existence of the $100 liability limitation and no proof that CH did not have knowledge, or was without means of knowledge, of the liability limitation.663 The court also held that CH could not establish each of the requisite elements of waiver, since there were no facts demonstrating that FedEx intended to waive its right to invoke the liability limitation.664

Finally, the court held that CH's request for attorney's fees were not preempted by federal law, citing Samtech Corp. v. Federal Express Corp.,665 where the court stated that "[a] state statute permitting recovery of attorney's fees is 'too tenuous, remote, or peripheral' to be subject to preemption."666

In Feldman v. United Parcel Service, Inc., the Southern District of New York granted summary judgment in favor of defendant UPS on plaintiff Ron Feldman's state law claims for fraud, mis-
representation, deceptive business practices, tortious interference, breach of duty, and fraudulent inducement as to the contract for carriage. The court found that these claims were preempted by the ADA. However, the court rejected UPS’s motion for summary judgment on Feldman’s state law claims as they related to the parties’ contract claims for “failure to deliver” and claims based on the insurance contract relating to the shipment.

Feldman shipped a diamond ring valued at $57,000 through UPS. Feldman asked to purchase insurance on the ring and was told that he could only purchase insurance up to $50,000. UPS delivered the ring and when the box reached its destination, the recipient discovered that the ring was missing. The court rejected his state law tort claims to the extent that they related to his loss of shipment but construed the complaint to allege a claim based upon federal common law negligence. The court then denied UPS’ motion for summary judgment, finding questions of fact regarding the communication to the customer of the notice provided of the limitations on liability contained in the UPS tariff. Additionally, Feldman was allowed to proceed with his state law claims based on the contract and on the insurance agreement. These claims were not preempted by the ADA.

In McMullen v. Delta Air Lines, Inc., the district court granted Delta’s motion to dismiss nine claims involving Delta’s alleged failure to properly collect and distribute a tax on persons flying into Mexico. The court first determined that the claims were

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669 Id. at *62.

670 Id. at *72–73.

671 Id. at *2.

672 Id. at *6.

673 Id. at *7–8.

674 Id. at *33.

675 Id. at *55.

676 Id. at *72–73.

677 Id.

preempted by the ADA because they related to Delta's "price, route, or service," and then found that the claims were not entitled to an exception to preemption that, as stated in American Airlines, Inc. v. Wolens, applies only when airlines breach their "own, self-imposed undertakings" rather than a state-imposed obligation.

In Med-Trans Corp. v. Benton, the district court granted an air ambulance provider declaratory and preliminary injunctive relief against North Carolina's enforcement of state regulations of air ambulance services, based on federal preemption by the ADA. The court first determined that the ADA expressly preempted North Carolina's Certificate of Need (CON) law which conditions the licensing of an air ambulance provider upon demonstration that existing air ambulance services in the state could not accommodate the projected public need for the services. The court rejected North Carolina's argument that its CON law was not subject to preemption because it was limited to purely intrastate activity, and instead found that the purpose underlying the CON law directly contravenes the pro-competition purposes underlying the ADA. The court then determined that certain Emergency Medical Services (EMS) laws and regulations, such as a requirement that an air ambulance synchronize its voice-radio communications with local EMS, were purely medical regulations that were appropriate state regulations and not preempted; while other regulations, such as a requirement that an air ambulance have very high frequency (VHF) aircraft frequency transceivers and provide continuous 24-hour service, were aviation regulations and thus preempted by the ADA. The district court subsequently entered permanent injunctive relief in accordance with a proposed injunction jointly filed by the parties.

679 Id. at *7.
681 Id. at *12.
683 Id. at 736.
684 Id.
685 Id. at 740.
686 Id. at 739–40.
VI. FEDERAL PREEMPTION—OTHER FEDERAL STATUTES

A. AIR CARRIER ACCESS ACT OF 1986—DISCRIMINATION IN BOARDING

In Wright v. American Airlines, Inc., the Missouri district court determined that the Air Carrier Access Act (ACAA), which prohibits air carriers from discriminating against private individuals, does not confer a private right of action.\(^{688}\) The district court’s decision parted from the governing law in the circuit as stated in Tallarico v. Trans World Airlines, Inc.,\(^{689}\) because Tallarico was based upon an analysis of private causes of action that the Supreme Court has since refined.\(^{690}\) The district court determined that Congress intended the ACAA to preclude alternate means of enforcement given the powers that the ACAA grants to the Department of Transportation (DOT).\(^{691}\) The ACAA gives the DOT the power to compel compliance, revoke an airline’s certificate, or impose fines.\(^{692}\) The ACAA also authorizes the DOT to initiate an action in a federal district court or to request that the Department of Justice do so.\(^{693}\) A private individual can request that the DOT’s enforcement decision be reviewed by a United States Court of Appeals.\(^{694}\)

In Thomas v. Northwest Airlines Corp., the district court granted in part and denied in part an airline’s motion to dismiss the claims of five disabled individuals alleging that the airline discriminated against them by imposing obstacles against disabled individuals and failing to provide adequate access or assistance on the aircraft and throughout the terminal.\(^{695}\) The plaintiffs alleged violations of the ACAA, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act.\(^{696}\) The airline defended on grounds that the ACAA does not provide a private right of action, that the Americans with Disabilities Act explicitly bars claims against an airline, and that the Rehabilitation Act

\(^{688}\) 249 F.R.D 572, 575 (E.D. Mo. 2008).
\(^{689}\) Id. at 574 (citing Tallarico v. Trans World Airlines, Inc., 881 F.2d 566 (8th Cir. 1989)).
\(^{690}\) Id. (citing Alexander v. Sandoval, 532 U.S. 275, 286 (2001)).
\(^{691}\) Id. at 575.
\(^{692}\) Id.
\(^{693}\) Id.
\(^{694}\) Id.
\(^{696}\) Id. at *1-*2.
does not apply to airline carriers. The court relied on Alexander v. Sandoval to find that the ACAA does not create a private right of action. The court's analysis of the Americans with Disabilities Act claim focused on whether airline service qualifies as "specified public transportation" under that act, which bars discrimination on the basis of disability in "public accommodations," which "is defined to include 'a terminal, depot, or other station used for specified public transportation.'" Finding that the Americans with Disabilities Act only stripped "aircraft" and not "airline-controlled terminals" from the definition of specified public transportation, the court determined that the Americans with Disabilities Act claim could not proceed against the aircraft, but could proceed as to the allegation that the terminal did not meet its provisions. The court also commented that the airline's interpretation of the ACAA would allow it to discriminate against disabled individuals in its multiple WorldClubs situated throughout the airport. The Rehabilitation Act prohibits discrimination against individuals with disabilities in any program or activity that receives federal financial assistance, and the airline argued that it does not receive such federal assistance and that the Supreme Court and the Eleventh Circuit have found that the Rehabilitation Act does not apply to commercial airline carriers. The district court denied the airline's motion to dismiss finding that discovery was needed to examine the contractual relationship between the airline and the airport in order to determine whether the airline had suffi-

697 Id. at *4.
698 Id. at *6-7 (citing Alexander v. Sandoval, 532 U.S. 275, 286-87 (2001)).
699 Id. at *12.
700 Id. at *13 (citing 42 U.S.C. § 12181(7)(G) (2006)).
701 Id. at *13* (citing 42 U.S.C. § 12181(10)).
702 Id. at *15-16.

Therefore, a clear distinction must be drawn between aircraft, which is covered by the ACAA, and the terminal, which is covered by the ADA. A precise line defining the scope of ADA coverage within the terminal and the ACAA coverage attendant to aircraft can only be drawn after the parties are afforded discovery in the case.

703 Id. at *15.
704 Id. at *17 (citing United States Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 605-06 (1986)).
705 Id. (citing Shotz v. Am. Airlines Inc., 420 F.3d 1332, 1334, 1336-37 (11th Cir. 2005)).
706 Id.
cient control over the federally funded airport so as to qualify the airline as a recipient of federal funds and thus subject it to the Rehabilitation Act.\textsuperscript{707}


In \textit{Rowe v. New Hampshire Motor Transportation Ass'n}, the U.S. Supreme Court ruled that the Federal Aviation Administration Authorization Act of 1994 preempted two provisions of a Maine statute which regulated and restricted the sale and delivery of tobacco products purchased via the internet or other electronic means.\textsuperscript{708} The Court ruled the statute was preempted because it was connected with or referenced carrier rates, routes, or services, and state laws are preempted if they do so.\textsuperscript{709} Although the statute was specifically directed at shippers, its effect was on the carriers' provision of delivery services.\textsuperscript{710} The Court also addressed the issue whether there was a public health exception to the preemption, as the state of Maine argued that the statute was designed to prevent underage smoking.\textsuperscript{711} The Court ruled there was no public health exception among the enumerated exceptions to preemption.\textsuperscript{712} The Court ruled the states still have alternative means to prevent underage smoking.\textsuperscript{713}

VII. FEDERAL TORT CLAIMS ACT

Generally, in the absence of a waiver of sovereign immunity, federal courts lack jurisdiction to hear claims against the United States. The Federal Tort Claims Act (FTCA), however, waives the government's sovereign immunity for:

personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.\textsuperscript{714}

\textsuperscript{707} Id. at *19.
\textsuperscript{708} 128 S. Ct. 989, 993 (2008).
\textsuperscript{709} Id. at 995.
\textsuperscript{710} Id. at 996.
\textsuperscript{711} Id.
\textsuperscript{712} Id. at 996–97.
\textsuperscript{713} Id. at 998.
The act excludes independent contractors from its definition of "employee." 715 Thus, under the FTCA, a determination of whether an individual may be considered a federal employee is the amount of control the federal government has over the individual’s physical performance. In addition, the government may be shielded under the discretionary function exception of the FTCA. 716 This exception insulates the government from liability for claims based upon a government employee’s acts or omissions in performing a discretionary function or duty that involves an element of judgment or choice as long as the judgment is of the kind that the discretionary function exception was designed to shield. If the FTCA does not apply to an action so as to waive the government’s sovereign immunity, the claims against the government must be dismissed for lack of subject matter jurisdiction.

Supinski v. United States is illustrative of both the determination of whether an individual may properly be considered an employee of the government for purposes of the FTCA and whether the discretionary function exception applies. 717 There, the trial court dismissed the plaintiff’s complaint against the U.S. government for lack of subject matter jurisdiction, finding that the FTCA did not waive the government’s sovereign immunity. 718 The plaintiff brought the action as the personal representative of the estates of two passengers who were killed in the crash of a small airplane. 719 The complaint alleged that the flight instructor and the designated pilot examiner who had certified the plane’s pilot were federal employees and were negligent in certifying the pilot. 720 As such, the complaint alleged that the government was responsible for plaintiff’s injuries. 721 Further, the plaintiff argued that the government was liable for the FAA’s negligent issuance of a certificate to the flight school that trained the airplane’s pilot and in failing to suspend or revoke the certification. 722 Finally, the plaintiff alleged that the government was liable because the FAA had negligently hired,

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718 Id. at *11, *18.
719 Id. at *2.
720 Id.
721 Id.
722 Id.
trained, and supervised the FAA employee who had ultimately approved the pilot's certification.\textsuperscript{723}

First, the court found that neither the flight instructor nor the designated pilot examiner were federal employees because the government did not exercise sufficient control over their performance.\textsuperscript{724} The evidence presented showed that a private firm employed the instructor, set her training schedule, assigned her students, set the fees charged for her services, and directly supervised her in the performance of her duties.\textsuperscript{725} The evidence also showed that the designated pilot examiner was self-employed, did not have a contract with the FAA to work as a designated pilot examiner, and did not pay any percentage of his fees to the FAA.\textsuperscript{726} The mere fact that both had applied standards prescribed by federal regulations in assessing the pilot's fitness for certification did not render either an employee of the government.\textsuperscript{727}

Second, the court found that, as to allegations that the employer of the flight instructor "failed to meet the curriculum, qualification and/or operation requirements of 14 C.F.R. Part 141,"\textsuperscript{728} and that the FAA therefore was "negligent in issuing [the employer's] certificate and in failing to suspend or revoke it,"\textsuperscript{729} the government was shielded from liability by the discretionary function exception of the FTCA.\textsuperscript{730} The court was not persuaded by plaintiff's argument that the FAA's negligence in certifying the flight school and failing to decertify the flight school rendered the government liable.\textsuperscript{731} The court found that "[a]ll of the applicable regulations [regarding flight school certification] speak in the permissive and they do not set forth a fixed or readily ascertainable standard which the FAA must apply in certifying a flight school."\textsuperscript{732} Therefore, the court agreed with the government that the certification of a flight school was a discretionary activity.\textsuperscript{733} Moreover, the plaintiff failed to point to any regulation that required the FAA to decertify a flight school.

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\textsuperscript{723} & Id. \\
\textsuperscript{724} & Id. at *11. \\
\textsuperscript{725} & Id. at *9. \\
\textsuperscript{726} & Id. \\
\textsuperscript{727} & Id. at *10. \\
\textsuperscript{728} & Id. at *11. \\
\textsuperscript{729} & Id. \\
\textsuperscript{730} & Id. at *16–17. \\
\textsuperscript{731} & Id. \\
\textsuperscript{732} & Id. at *14. \\
\textsuperscript{733} & Id. \\
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school. The court also rejected plaintiff’s argument that the applicable state law established an analogous duty, finding that Missouri law did not “recognize a duty in tort to properly interpret and apply regulations,” or any other alternative duty.

Third, the court explained that the FTCA did not apply to waive the government’s sovereign immunity for the alleged negligent hiring, training, and supervision of the FAA employee that approved the pilot’s certification because “[d]ecisions concerning the hiring, training, and supervising of federal employees and independent contractors fall within the discretionary function exception.”

In *U.S. Aviation Underwriters Inc. v. United States*, the court granted the government’s motion for summary judgment, finding that the action, which alleged that government weather forecasters had negligently failed to warn an aircraft crew of clear air turbulence, was barred under the discretionary function exception of the FTCA. The plaintiffs alleged that this negligence resulted in the fatal crash of an aircraft following its encounter with clear air turbulence conditions. The plaintiffs attempted to argue that the discretionary function exception did not apply in this case because the actual occurrence of clear air turbulence sufficient to warrant the issuance of warnings had deprived the forecasters of their discretion to fail to issue warnings. The National Weather Service Instructions state

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734 Id. at *16.
735 Id. at *17 (citing Cent. Airlines, Inc. v. United States, 169 F.3d 1174 (8th Cir. 1999)) (claim against the FAA for misinterpreting regulations dismissed because Missouri does not have comparable duty).
736 Id. at *18. However, the court denied the United States’ Motion to Dismiss relating to plaintiff’s claim that a specific named FAA employee allowed the pilot to take the practical flight test and issued a pilot certificate to him when he did not meet the regulatory requirements for the practical flight test, holding that the issue of whether the FAA employee was actually involved in the training or testing of the pilot was “a factual determination that does not implicate the jurisdictional matters presently under consideration and [would] not be addressed at that time.” Id. at *20, *22. The court had previously granted the specifically named employee’s motion to dismiss claims against him in his individual capacity on the grounds that the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. § 2679(d)(1), based upon the Attorney General’s certification that he was “acting within the scope of his office or employment at the time of the incident out of which the claim arose.” Supinski v. United States, No. 4:07-CV-963 (CEJ), 2007 U.S. Dist. LEXIS 87757 at *2 (E.D. Mo. Nov. 29, 2007) (quoting § 2679(d)(1), (2)).
738 Id. at 1409.
739 Id.
that such warning "will be issued" when moderate to severe clear air turbulence is occurring. The court explained that the determination of whether moderate to severe clear air turbulence is occurring required discretion, and the mandatory language of the instructions only mandated a response after the discretionary decision already had been made. Therefore, because the government never decided that significant clear air turbulence was occurring, the instruction never required a response.

In In re Air Crash at Lexington, Kentucky, August 27, 2006, the district court dismissed most of the claims against the U.S. government, brought pursuant to the FTCA, finding instead that the FTCA did not waive the government's sovereign immunity because state law did not provide for private liability under similar circumstances. The plaintiff, Comair, alleged (1) that the government breached a duty to correct, repair, replace, inspect, and/or approve the configuration, design, lighting, marking and signage at the airport and a breached its duty to oversee construction and to inspect for conformance with federal rules; (2) that the government breached its duty to provide accurate information regarding this configuration, signage, marking, and lighting of the airport and to provide instructions or warnings to the crew that such items were not accurately reflected on a chart produced by Jeppesen, an independent firm; (3) that the government breached a duty to inform the crew regarding construction activities at the airport; and (4) that the allegedly unreasonable schedule of the air traffic controller on duty at the time of the crash contributed to the accident. The court explained that the government, and specifically the FAA, did not have any duty to insure compliance with its discretionary regulatory authority to prescribe minimum safety standards for airports. Rather, the responsibility for compliance with FAA regulations and for reporting airport conditions rests squarely with the airport. In addition, the court found that the FAA had not violated the Kentucky "Good Samaritan" doctrine.
The court found that the FAA had assumed no duty with respect to Comair because the FAA never undertook to render any "services" to Comair.\(^{748}\) Additionally, Comair had failed to show that the government’s alleged failure to use care in certifying Blue Grass Airport’s Airport Certification Manual increased the risk of harm to Comair or turned a nonhazardous condition into a hazardous one, as required by the Good Samaritan Doctrine.\(^{749}\) With regard to the air traffic controller’s schedule, the court stated that it “may fall within the discretionary function exception” to the FTCA, but because the issue of scheduling appeared to be “intertwined” with Comair’s allegations regarding the air traffic controller’s negligence it would be premature to dismiss Comair’s claims regarding the scheduling.\(^{750}\) The court “reserve[d] consideration of the discretionary function exception pending presentation of the evidence at trial.”\(^{751}\)

In *Fina Air, Inc. v. United States*, the District of Puerto Rico dismissed an air carrier’s claim against the U.S. government alleging that the FAA was negligent in certifying the flight school to which the carrier had sent its pilots for training, finding that the claim was barred by the FTCA.\(^{752}\) *Fina Air* (Fina) filed a petition with the FAA requesting a Part 135 Certificate to conduct commercial aviation operations.\(^{753}\) The FAA “informed Fina that [its pilots] had to be certified by a qualified flight academy in order to receive the Part 135 Certificate.”\(^{754}\) Fina then sought the FAA’s permission to use the Pan Am International Flight Academy to train its personnel.\(^{755}\) Fina alleges that an FAA employee investigated Pan Am, and Pan Am was ultimately approved and certified as a qualified academy.\(^{756}\) Fina then invested approximately $350,000 in training its personnel at Pan Am.\(^{757}\) The FAA then approved and issued Fina’s Part 135 Certificate.\(^{758}\) Sometime later, the FAA informed Fina “that its pilots had been flying illegally because Pan Am was not a qualified

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\(^{748}\) *Id.* at *45–46.*  
\(^{749}\) *Id.* at *46.*  
\(^{750}\) *Id.* at *50–51.*  
\(^{751}\) *Id.* at *51.*  
\(^{752}\) 555 F. Supp. 2d 321, 322 (D.P.R. 2008).  
\(^{753}\) *Id.*  
\(^{754}\) *Id.* at 322–23.  
\(^{755}\) *Id.* at 323.  
\(^{756}\) *Id.*  
\(^{757}\) *Id.*  
\(^{758}\) *Id.*
academy and therefore could not have certified Fina's pilots.  

The FAA required Fina to ground its aircraft.  

The court found that the claim was barred by the FTCA's "negligent misrepresentation" exception to the waiver of sovereign immunity.  

Although the carrier had argued that the FAA was liable because it had been negligent in performing an operational task, that is the certification of the flight school, the court determined that the underlying basis of the claim was the carrier's detrimental reliance on an FAA representation that the school had been qualified to train and certify the plane's pilots.  

The court also found that the claim failed to satisfy the FTCA's "private analogous conduct" requirement because the carrier had presented no evidence that a private person would be liable under the applicable territorial law for providing inaccurate information to another who needed the information to achieve certification.  

In Cahill v. United States, the U.S. District Court for the Middle District of Florida found that it did have jurisdiction over the claims of the survivors and estates of the victims of an aircraft accident against the United States under the FTCA.  

The court, however, entered judgment in favor of the government, finding that the government was not liable for damages stemming from the crash of a twin engine Beech 58P Baron during a landing attempt at a controlled airport.  

On July 2, 2003, the Beech 58P Baron crashed on approach at the Memphis International Airport in Memphis, Tennessee.  

The survivors and the estates of the victims of the crash each sued the United States under the FTCA.  

The court consolidated the four cases.  

The plaintiffs alleged that the air traffic controllers at the airport failed to maintain appropriate separation between the victims' plane and a larger plane that had landed on a nearby runway minutes earlier.  

This loss of separation, according to

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759 Id.
760 Id.
761 Id. at 325–28 (citing 28 U.S.C. § 2680(h) (2006)).
762 Id. at 327.
763 Id. at 326.
765 Id. at *33.
766 Id. at *4–5.
767 Id. at *3 (under 28 U.S.C. § 1346(b) and 28 U.S.C. §§ 2671 et seq. (2006)).
768 Id.
769 Id. at *4.
the plaintiffs, caused the victims' plane to encounter strong wake turbulence on approach, which, in turn, caused the plane to crash.\textsuperscript{770} The FAA has created separation standards to avoid just such hazards.\textsuperscript{771} The evidence presented to the court was clear that the victims' aircraft was less than four nautical miles, the amount of separation required by the FAA standards for the two aircraft, behind the larger aircraft at the relevant time.\textsuperscript{772} The court determined that the air traffic controllers had a duty to maintain the minimum separation standard between the two aircraft and that the controllers breached this duty.\textsuperscript{773} An expert for the government testified, however, that atmospheric conditions near the ground at the time of the accident would have caused the wake turbulence to deteriorate rapidly.\textsuperscript{774} Therefore, according to the government, wake turbulence could not have caused the accident.\textsuperscript{775} Other eyewitness testimony supported the conclusion that wake turbulence did not cause the accident.\textsuperscript{776} The court ultimately determined that "[t]he overwhelming weight of the evidence showed that the Baron did not encounter the wake turbulence created by the Embraer."\textsuperscript{777}

In \textit{Farag v. United States}, the United States District Court for the Eastern District of New York denied the U.S. government's motion for summary judgment on plaintiffs' claims under the FTCA.\textsuperscript{778} The plaintiffs, two friends of Arabic ethnicity, boarded a domestic commercial flight in San Diego, California, bound for New York City.\textsuperscript{779} Also on the flight were two undercover federal counterterrorism agents.\textsuperscript{780} The two U.S. agents stated that the plaintiffs acted "suspiciously" during the flight primarily because they changed seats to sit near one another, spoke loudly to one another in English and Arabic, and one suspect repeatedly looked at his watch during the flight as if he were timing

\textsuperscript{770} \textit{Id.} at *4-5.
\textsuperscript{771} \textit{Id.} at *7 (citing Fed. Aviation Admin., Order 7110.65N, Air Traffic Control).
\textsuperscript{772} \textit{Id.} at *8, *13-14.
\textsuperscript{773} \textit{Id.} at *27, *33.
\textsuperscript{774} \textit{Id.} at *11.
\textsuperscript{775} \textit{Id.}
\textsuperscript{776} \textit{Id.} at *16-*17.
\textsuperscript{777} \textit{Id.} at *30.
\textsuperscript{778} 587 F. Supp. 2d 436, 443 (E.D.N.Y. 2008).
\textsuperscript{779} \textit{Id.}
\textsuperscript{780} \textit{Id.} at 442-43.
certain intervals. Upon arrival in New York City, the plaintiffs were met by a significant law enforcement presence, detained, transported to a police station, and placed in jail cells, interrogated, and finally released some hours later. The plaintiffs brought suit against the United States under the FTCA, as well as against the two undercover U.S. agents.

With regard to the FTCA claims against the United States, the court first observed that the plaintiffs had complied with the administrative prerequisites for suing the United States by filing written notices of their claim pursuant to 28 U.S.C. § 2401(b).

The court also determined that, unlike the individual agents, qualified immunity is a defense unavailable to the United States in actions brought under the FTCA.

The court then analyzed the substantive merits of plaintiffs' claims under the FTCA. Plaintiffs' FTCA claims were premised upon their contentions that the two undercover agents committed the common law torts of false arrest and false imprisonment. In cases filed under the FTCA, the court observed that it must apply the "substantive law of the place where the events occurred[,]" in this case, New York. Under New York law, the court found that a plaintiff could prevail on a claim for false arrest if the plaintiff showed that his arrest was not based on probable cause. The court determined that the plaintiffs were, in fact, "arrested" based on: (1) the officers' show of force and restraint of the plaintiffs' movement at the airport terminal; (2) the transportation of the plaintiffs to the police station, their confinement in jail cells, and the custodial interrogation; and (3) the duration of plaintiffs' confinement and interrogation.

The court then explained that the government lacked probable cause to arrest the plaintiffs. First, the court opined that all of the non-ethnic factors, including the alleged conduct of the plaintiffs during the flight, cited by the government in support of its argument were, in fact, "benign" and did not tend to sup-

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781 Id. at 443–44
782 Id. at 442.
783 Id.
784 Id. at 448.
785 Id. at 452.
786 Id. at 452–470.
787 Id. at 451.
788 Id. (quoting Castro v. United States, 34 F.3d 106, 110 (2d Cir. 1994)).
789 Id. at 452; Jenkins v. City of New York, 478 F.3d 76, 84 (2d Cir. 2007).
790 Id. at 452–53.
791 Id. at 460.
port a finding of probable cause. In fact, the court stated that "it cannot rationally be held that if, hypothetically, the plaintiffs were two Caucasian traveling companions speaking French, or another non-Arabic language which the agents did not understand, 'a person of reasonable caution' would have believed that they were engaged in terrorist surveillance." Second, the court held that the plaintiffs' ethnicity could not be used as a factor to establish probable cause. Therefore, plaintiffs' claims under the FTCA survived the government's motion for summary judgment.

VIII. GENERAL AVIATION REVITALIZATION ACT

In *Karim Slate v. United Technologies Corp.*, the California Court of Appeals considered the application to the General Aviation Revitalization Act (GARA) to a case involving a July 2003 crash of a Sikorsky helicopter manufactured in the 1950's. Plaintiff alleged that the crash was caused by a failure of the input bevel pinion (IBP) gear in the helicopter's intermediate gear box. The intermediate gear box had been removed and replaced in 1991 by a third party. The replacement IBP gear was manufactured by Fenn Manufacturing. It had been "shot peened" in 1991 or 1992 in accordance with directions Sikorsky issued in 1984.

*Id.* at 458–59.

*Id.* at 458 (quoting *United States v. Delossantos*, 536 F.3d 155, 158 (2d Cir. 2008)).

*Id.* at 466–68. The court stated as follows:

Even granting that all of the participants in the 9/11 attacks were Arabs, and even assuming *arguendo* that a large proportion of would-be anti-American terrorists are Arabs, the likelihood that *any given airline passenger* of Arab ethnicity is a terrorist is so negligible that Arab ethnicity has no probative value in a particularized reasonable-suspicion or probable-cause determination.

*Id.* at 464.

*Id.* at 471.


*Id.* at *1–2. The helicopter was originally manufactured and sold for the U.S. Navy, and Sikorsky also alleged a government contractor defense, but because the trial court had granted summary judgment to Sikorsky on the General Aviation Revitalization Act, the government contractor defense was not an issue on appeal. *Id.* at *2–3.

*Id.* at *2–3.

*Id.* at *2.

*Id.*

*Id.*
The California Court of Appeals first analyzed Sikorsky's defense that it could not be liable in strict liability and tort because it was not a manufacturer of the IBP gear, however, the court rejected that argument finding that "the doctrine of strict liability in tort may be applied where injury occurs as the proximate result of a defect in the design of the product," even though the defendant was not the manufacturer of the part. 802

The California Court of Appeals next considered the application of GARA to the IBP gear installed in 1991 or 1992 (the accident was in 2003). 803 The court concluded that "a new part may be the redesigned element of a used part," and that the rolling statute of repose would apply "to the element of the part that had been redesigned." 804 The court considered the effect of Sikorsky's recommendation that the gear be "shot peened" and concluded that a "shot peened" part would be significantly stronger than the non-"shot peened" part and, therefore, "shot peening" created a new part that triggered a new 18-year period of repose, as to the design, "beginning on the date of completion of the replacement." 805 The court concluded that the completion of the replacement occurred when the "shot peened" (that is, in the court's language "redesigned") IBP part was first installed in the helicopter in late 1991 or 1992, less than 18 years before the accident. 806

In reaching this decision, the court relied upon the U.S. Court of Appeals for the Ninth Circuit's opinion in *Caldwell v. Enstrom Helicopter Corp.*, 807 and a prior California Court of Appeals decision in *Hiser v. Bell Helicopter Textron, Inc.*, 808 which involved, respectively, allegations that revisions to the flight manual within eighteen years prior to the accident restarted the statute of repose "if that revision is alleged to have caused the accident," and allegations that a redesigned fuel flow switch installed fifteen years before the accident pursuant to a "technical bulletin," failed "because of a defective design." 809 Accordingly, the Ninth Circuit reversed the summary judgment in favor of

802 Id. at *5–6 (citing Hyman v. Gordon, 111 Cal. App. 3d 769, 773 (Cal. Dist. Ct. App. 1973)).
803 Id. at *7–14.
804 Id. at *8.
805 Id. at *11 (quoting General Aviation Revitalization Act, 49 U.S.C. § 40101 (2000)).
806 Id.
807 230 F.3d 1155 (9th Cir. 2000).
809 Id. at *9–13.
Sikorsky, noting that in order for Sikorsky to prevail on a GARA defense, it would have to “show through undisputed evidence that shot peening the IBP gear was not a cause of the accident or that [plaintiff] did not have, and could not acquire, evidence to show that shot peening the IBP was a cause of the accident.”

In Brewer v. Parker Hannifin Inc., the Ninth Circuit Court of Appeals considered the application of GARA to Parker Hannifin parts that had been overhauled by another company (Aero) since their manufacture in 1984. Plaintiff argued that certain subsequent mailings and manuals issued by Parker Hannifin were “parts capable of restarting GARA.” The court distinguished its prior decision in Caldwell v. Enstrom Helicopter Corp. by stating that the substantial changes to the pump involved in this case (which it referred to as “cannibalized subparts of Aero-overhauled products”), precluded a finding that any of the Parker Hannifin manuals which replaced “other manuals pertinent to a particular [Parker Hannifin] pump,” were related to the “... part of the general aviation aircraft product’ that is ‘alleged to have caused the death, injury or damage’” in this case. Accordingly, these mailings and manuals failed to “trigger GARA’s rolling statute of repose.”

In Blazevska v. Raytheon Aircraft Co., the Ninth Circuit Court of Appeals considered the application of GARA to claims asserted in the United States arising from an accident outside the United States. The case involved the 2004 crash in Bosnia of a Beechcraft King Air 200 manufactured in 1980. The aircraft had been sold to the Republic of Macedonia in 1980 and was transporting the President of Macedonia and other government officials to Bosnia when it crashed in rain and fog while attempting to land. Plaintiffs filed a product liability action in federal district court based upon diversity jurisdiction and alleging product liability claims for defects and lack of crashworthiness under

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810 Id. at *14.
812 Id. at **2–3.
813 See id.
814 Id. (citing Caldwell v. Enstrom Helicopter Corp., 230 F.3d 1155 (9th Cir. 2000)).
815 Id.
816 Id. at *3.
817 522 F.3d 948, 950 (9th Cir. 2000).
818 Id.
819 Id.
Macedonian law. The Ninth Circuit Court of Appeals affirmed summary judgment for the manufacturer on the grounds that the application of GARA did not implicate the presumption against the extraterritorial application of U.S. law. The court relied upon prior decisions holding that GARA "acts not just as an affirmative defense, but instead 'creates an explicit statutory right not to stand trial' [in federal and state courts in the United States] for claims arising from products first sold more than eighteen years before the filing of the lawsuit. The court examined cases involving the extraterritorial effect of statutes regulating conduct within the United States and concluded that if the conduct to be regulated occurred in the United States, then the presumption against the extraterritorial effect of U.S. law was not implicated. In this case, the court concluded that the conduct regulated by the statute at issue, namely the trial of a product liability case in U.S. courts, was purely domestic, and therefore the application of the statute was not precluded by the presumption against extraterritoriality.

In Johnson v. Precision Airmotive, LLC, the district court denied without prejudice the motions for summary judgment of defendants AlliedSignal, Inc., Avco Corporation, Bendix Corporation, Honeywell, Inc., Honeywell International, Inc., and Textron, Inc. (which it referred to as "the manufacturing defendants") based upon GARA and the Indiana Statute of Repose. The case involved the crash of what is only referred to in the decision as an "airplane" in Indiana, resulting in the deaths of four passengers. The opinion does not recite any other facts regarding the aircraft (other than that it was 29 years old at the time of the accident), the cause or circumstances surrounding the accident, the owner, operator or occupants of the aircraft, and only refers generally to the fact that the "manufacturing defendants" (who were alleged to have "manufactured original or replacement parts for the airplane or airplane en-

\[820\] Id.  
\[821\] Id.  
\[822\] Id. at 951 (quoting Estate of Kennedy v. Bell Helicopter Textron, Inc., 283 F.3d 1107, 1110 (9th Cir. 2002)).  
\[823\] Id.  
\[824\] Id. at 952–54.  
\[825\] Id. at 953.  
\[827\] Id. at *3.
gine) were only a “handful” of the defendants. However, plaintiff’s counsel submitted an extensive affidavit under Federal Rule of Civil Procedure 56(f) stating that the engine and engine parts had been “overhauled, converted, and replaced on various occasions.” The court concluded that, while original parts on the aircraft may have been more than eighteen years old, it was not possible without further discovery to determine the age of any replacement parts. The court rejected the argument that GARA establishes an “absolute right not to stand trial,” as stated by the Ninth Circuit Court of Appeals in Estate of Kennedy v. Bell Helicopter Textron, Inc., and refused to limit discovery to the GARA issues on the grounds that it would be difficult to separate those issues from other issues, particularly in view of plaintiff’s claims that GARA did not apply based upon the misrepresentation exception, and the parties had shown no ability to resolve issues without court intervention. The court concluded that it would be best to allow discovery as to the cause of the accident, the parts involved in the accident, and then address the issue of whether any of those specific parts were more than eighteen years of age and whether GARA applied to bar any action based on those parts. The court denied the motions for summary judgment without prejudice and granted the Rule 56(f) motion filed by plaintiffs to permit discovery before requiring a response to the motion for summary judgment. The court concluded by noting that discovery was scheduled to last for almost a year and a half and there “may well come a point later in the litigation prior to the close of discovery when consideration of defendants’ GARA motion is appropriate.” Finally, as to the Indiana statute of repose, the court declined to rule on any choice of laws issues on the grounds that it would be premature, and that the law of one state might apply to one set of defendants or a particular issue, and the court did not want to make a ruling at that time on motions involving only a “handful” of defendants, that might affect other defendants.

828 Id. at *1–11.
829 Id. at *9.
830 Id. at *9–10.
831 Id. at *6 (quoting Estate of Kennedy v. Bell Helicopter Textron, Inc., 283 F.3d 1107 (9th Cir. 2002)).
832 Id. at *6–9.
833 Id. at *8–9.
834 Id. at *9–10.
835 Id. at *10.
836 Id. at *10–11.
In *Moyer v. Teledyne Continental Motors, Inc.* the appellate court initially affirmed summary judgment in favor of defendant Teledyne Continental Motors, Inc. (TCM), the engine manufacturer, and defendants Piedmont Hawthorne Aviation, Inc, and Divco, Inc., both of which were involved in overhaul and repair of a TCM engine.\(^{837}\) The Pennsylvania Superior Court of Appeals has granted reargument of this appeal by order entered October 23, 2008, and has withdrawn the opinion in this case discussed below.\(^{838}\) For this reason, the following discussion is included only for purposes of comparison with any later opinion that may be rendered upon reargument and is not precedential.

The lawsuit arose from a 2003 accident involving a single-engine Beech V35B aircraft first delivered to the original purchaser in April 1982.\(^{839}\) The accident occurred when the aircraft collided with trees during an emergency landing attempt following an engine failure.\(^{840}\) Plaintiff claimed that the engine failure was the result of the failure of a repair weld in the engine crankcase.\(^{841}\) The repair weld had been performed by Divco during the course of an engine overhaul by Piedmont Hawthorne.\(^{842}\) Plaintiff further claimed that TCM had issued a service bulletin approving the use of welding to repair crankcases, when it knew that the practice of welding crankcases was not a safe method of repair, particularly in high stress areas.\(^{843}\)

Defendant TCM contended that the claim was barred by GARA because the lawsuit was commenced more than eighteen years after the product was first sold to a customer.\(^{844}\) Plaintiff argued that GARA was not applicable and also argued that if it was applicable, the case fell within two of the statutory exceptions to the eighteen-year statute of repose.\(^{845}\) Initially, the court considered plaintiff's argument that the service letter, issued in 1990, was a new "part" based upon the decision in *Cald-
well v. Enstrom Helicopter Corp. 846 In Caldwell, the court held that the FAA-approved flight manual constituted sale of a "part" for purposes of the statutory exception that triggers the eighteen-year time period because it contained the instructions necessary for the safe operation of the aircraft and therefore was inseparable from the aircraft. 847 The Moyer court distinguished Caldwell on the grounds that the service letter was not the equivalent of a manual, and "that given the continual issuance of service bulletins on a variety of topics, if the statute of repose were triggered every time a service bulletin was issued, the intent of GARA, that is, ‘to ameliorate the impact of long-tail liability on a declining American aviation industry,’ would be eviscerated." 848 Furthermore, the court concluded that the service bulletin was not defective, stating that "it was not the service bulletin that failed but the crankcase." 849 Plaintiff also argued that TCM had knowingly misrepresented or concealed the hazards associated with weld repairs of the crankcase. 850 The court concluded, however, that plaintiff had not met the burden of proving "scienter, or active obstruction, or even of proving that the weld in this instance was done pursuant to the specific service bulletin at issue." 851 Finally, plaintiff argued that issuance of the service bulletin was not an act of manufacturing and therefore TCM was being sued, not as the manufacturer (which would be barred by GARA), but as an "engine rebuilder/overhauler." 852 The court declined to rule on that argument because it was not properly presented by the issues on appeal. 853 A dissenting opinion would have reversed summary judgment at that stage of the case on the grounds that the service bulletin, which replaced a prior warning against repair welds of the crankcase, with approval of such repairs, "fit[ ] comfortably within the terminology and scope of GARA’s rolling provision “as any other part of such aircraft.” 854

Defendant Piedmont Hawthorne had sought summary judgment on the grounds that there was no evidence of negligence

846 Id. at 16,693 (citing Caldwell v. Enstrom Helicopter Corp., 230 F.3d 1155 (9th Cir. 2000)).
847 Id. (citing Caldwell, 230 F.3d at 1157).
848 Id. (citing Prigden v. Parker Hannifin Corp., 916 A.2d 619, 622 (Pa. 2007)).
849 Id.
850 Id. at 16,694.
851 Id.
852 Id.
853 Id.
854 Id. at 16,697.
in the performance of the overhaul.\textsuperscript{855} Piedmont relied upon the Federal Aviation Regulations related to repairs to show that it was required to follow the manufacturer’s instructions in performing the overhaul, and that it had done so.\textsuperscript{856} Plaintiff’s expert had been critical of Piedmont Hawthorne for relying on the TCM recommendations in overhauling the engine with a repair weld in the crankcase.\textsuperscript{857} The court held that Piedmont was not charged with being negligent, but in simply performing the overhaul, as it was required to do, in reliance upon the engine manufacturer TCM’s recommendations.\textsuperscript{858} Accordingly, the court affirmed summary judgment for Piedmont Hawthorne.\textsuperscript{859} The dissent, again, would have reversed the summary judgment on the grounds that a genuine issue of fact existed as whether the repairs were performed “in a manner which would satisfy FAA airworthiness standards.”\textsuperscript{860}

As will be discussed below, Defendant Divco, Inc., a Tulsa, Oklahoma company was dismissed for lack of personal jurisdiction.

**IX. JURISDICTION AND PROCEDURE**

**A. Personal Jurisdiction**

In *Vibratech, Inc. v. Frost*, the Georgia Court of Appeals affirmed the trial court’s denial of defendant Vibratech’s motion to dismiss, finding that the assertion of personal jurisdiction over the defendant was proper under both the Georgia Long Arm Statute and the United States Constitution’s Due Process Clause.\textsuperscript{861} The plaintiffs, the airplane owner and the estates of five decedents, brought actions against Vibratech, the manufacturer of a necessary component part of the engines onboard a twin-engine aircraft that crashed in Tennessee, following take off on one leg of a flight originating in Georgia with two planned stops in Tennessee.\textsuperscript{862} Plaintiffs alleged that Vibratech, a defunct Delaware corporation with no offices or agents in Georgia, had negligently manufactured the component part

\textsuperscript{855} Id. at 16,694.

\textsuperscript{856} Id. at 16,695.

\textsuperscript{857} Id.

\textsuperscript{858} Id.

\textsuperscript{859} Id.

\textsuperscript{860} Id. at 16,697.


\textsuperscript{862} Id. at 187.
and that the malfunction of that part, in whole or in part, caused the deadly crash.\textsuperscript{863} Vibratech was the sole supplier of that part to Teledyne Continental Motors, Inc. (TCM), the engine manufacturer, and had shipped that part to TCM in Alabama for installation in the TCM engine at issue.\textsuperscript{864} The court noted that an earlier Georgia decision involving TCM had established that shipment of an engine by TCM to a Georgia maintenance facility for installation in an aircraft owned by a Georgia resident satisfied the "stream of commerce" requirements as to TCM.\textsuperscript{865}

The trial court concluded that jurisdiction was proper under subsection (1) of Georgia's long arm statute, which provides for jurisdiction over any defendant "transacting any business" within Georgia.\textsuperscript{866} The appellate court agreed.\textsuperscript{867} The court explained that a defendant's contacts with Georgia need not be direct to satisfy the long arm statute.\textsuperscript{868} Rather,

\begin{quote}
[i]n considering whether a Georgia court may exercise jurisdiction over a nonresident based on the transaction of business, [the court applied] a three-part test: [j]urisdiction exists on the basis of transacting business in [Georgia] if (1) the nonresident defendant has purposefully done some act or consummated some transaction in [Georgia], (2) if the cause of action arises from or is connected with such act or transaction, and (3) if the exercise of jurisdiction by the courts of [Georgia] does not offend traditional fairness and substantial justice.\textsuperscript{869}
\end{quote}

A court uses the first two prongs of this test to determine whether a defendant establishes the minimum contacts necessary for exercising jurisdiction.\textsuperscript{870} If the court determines that sufficient minimum contacts exist, then it must evaluate other factors to determine the reasonableness of exercising jurisdiction in Georgia, including: the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution to controversies, and the shared interest of the states in

\textsuperscript{863} Id.
\textsuperscript{864} Id.
\textsuperscript{865} Id. at 189.
\textsuperscript{866} Id. at 188, 191.
\textsuperscript{867} Id. at 191.
\textsuperscript{868} Id. at 190.
\textsuperscript{869} Id. at 189 (quoting Aero Toy Store v. Grieves, 279 Ga. App. 517–518 (Ga. Ct. App. 2006)).
\textsuperscript{870} Id.
furthering substantive social policies. The court found that Vibratech's commercial activity satisfied all of these requirements. Vibratech had placed its component part, which was alleged to have caused the fatal accident, into the stream of commerce by supplying it to TCM with the expectation that its part would be purchased by consumers throughout the United States, including consumers in Georgia.

In *D'Jamoos v. Pilatus Aircraft Ltd.*, the U.S. District Court for the Eastern District of Pennsylvania considered a case in which the manufacturer of the Pilatus PC-12 aircraft, a Swiss corporation, moved for dismissal due to lack of personal jurisdiction. The case arose from an accident in Pennsylvania on landing at State College, Pennsylvania. The aircraft had been manufactured in Switzerland, sold to a French company, then a Swiss company, and then a Massachusetts company, which then sold it to a Rhode Island LLC, which owned it at the time of the crash. Pilatus has no office or employees in the United States, but has a U.S. subsidiary in Colorado that is responsible for marketing and selling the PC-12 aircraft "throughout the Western hemisphere." The subsidiary's dealer that services the mid-Atlantic region is based in Baltimore, Maryland. Pilatus purchases approximately $120,000 to $330,000 per year from Pennsylvania companies, which is less than one per cent of its

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871 *Id.*
872 *Id.*
873 *Id.* at 190. The court stated that

[The shipment of the damper in this case was not an isolated transaction. Evidence in the file indicates that Vibratech and TCM had a longstanding business arrangement. The two parties apparently entered into a supply contract, under which Vibratech sold as many as several hundred dampers per year to TCM for incorporation into its airplane engines. [footnote omitted, but references fact that 'an aircraft engine by its very nature is 'inherently appropriate' for interstate travel.'] In addition, the two parties entered into a side agreement in which TCM agreed to indemnify Vibratech to carry the company as an additional insured on an aviation liability policy. The certification of insurance to Vibratech under this agreement indicates that the geographical limit of the coverage is "Worldwide."]

875 *Id.* at *3–4*.
876 *Id.* at *4*.
877 *Id.* at *4–5*.
878 *Id.* at *5*.
Pilatus sent its employees into Pennsylvania on only one occasion in the early 2000's. Plaintiffs contended that the court had both specific and general jurisdiction over Pilatus for claims arising from the Pennsylvania accident.

The court first considered specific jurisdiction noting that Pennsylvania law recognized “tort out/harm in” jurisdiction over entities causing harm in Pennsylvania from acts outside Pennsylvania. Nevertheless, the exercise of such jurisdiction must comport with procedural due process notions of “fair play and substantial justice.” Plaintiff argued that jurisdiction was proper under the stream of commerce theory because it was foreseeable that a defect in the aircraft might result in harm in Pennsylvania. The court considered *Pennzoil Products Co. v. Colelli & Associates, Inc.*, which involved the sale of crude oil by an out of state producer to an oil refiner which then distributed its products in Pennsylvania. Like the crude oil producer, plaintiffs argued that Pilatus had “placed its aircraft into the stream of commerce with the intent to exploit the United States market.” However, the court concluded that the aircraft had not been sold in Pennsylvania and that none of the subsequent sales of the accident aircraft had taken place in Pennsylvania or involved Pennsylvania residents, the aircraft did not reach Pennsylvania through any distribution network, and Pilatus had no physical presence in Pennsylvania. The court essentially concluded that the presence of the aircraft in Pennsylvania was fortuitous, and that the actions of Pilatus were more like those of the New Jersey auto dealer in *World-Wide Volkswagen Corp. v. Woodson* and that “[t]his single, isolated incident involving a product that Pilatus sold in Europe is not enough to support jurisdiction in Pennsylvania.”

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879 *Id.*
880 *Id.*
881 *Id.* at *10.
882 *Id.*
883 *Id.* at *11.
884 *See id.*
885 *Id.* at *9–11 (citing Pennzoil Prods. Co. v. Colelli & Assocs., Inc., 149 F.3d 197 (3rd Cir. 1998) (applying Pennsylvania law)).
886 *Id.* at *13–14.
887 *Id.* at *14.
888 *Id.* at *18 n.5. The court noted that there were six PC-12 aircraft registered to owners having addresses in Pennsylvania.
889 *Id.* at *4, *18.
891 *Id.* at *15 (citing *World-Wide Volkswagen*, 444 U.S. at 297).
stated that under either the test set forth by Justice O'Connor or the less stringent test set forth by Justice Brennan in Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County,892 neither Pilatus nor its U.S. subsidiary are directly involved in marketing the aircraft in the United States once they are sold to dealers.893 Furthermore, the court concluded that the stream of commerce theory was "not entirely apposite in this case, because the subject aircraft did not enter Pennsylvania through any stream of commerce,"894 but that "[t]he plane's only connection to Pennsylvania was that it was flying over Pennsylvania and attempting to land at a Pennsylvania airport when it crashed."895 Finally, the court concluded that "specific jurisdiction exists where a defendant purposefully directs his activities at a forum and the harm arises out of or is related to those activities."896

The court also rejected the argument that general jurisdiction existed because neither Pilatus nor its U.S. subsidiary have a physical presence, mailing address, phone number, employee, shareholder or bank account in Pennsylvania.897 Neither company advertises locally in Pennsylvania, and only through publications with nationwide circulation.898 Neither company had made any direct sales in Pennsylvania for five years, and sales by an independent distributor normally do not constitute the type of contacts required for general jurisdiction.899 The court also rejected arguments relating to the volume of sales in the United States generally, limiting its consideration to the contacts with the State of Pennsylvania for purposes of a general jurisdiction analysis.900 Moreover, the court rejected plaintiff's arguments that mere evidence of past sales to Pennsylvania residents was sufficient to support general jurisdiction, because to do otherwise, the court noted, would be to "inject the stream of commerce theory "in this instance relating only to the distribution of other products not involved in causing plaintiffs' harm" into the general jurisdiction context,"901 and that the "stream of com-

894 Id. at *19.
895 Id.
896 Id. at *20.
897 Id. at *22–23.
898 Id. at *23.
899 Id. at *24.
900 Id. at *25–26.
901 Id. at *26.
merce theory, . . . provides no basis for exercising general jurisdiction over a nonresident defendant." 902 Finally, in rejecting arguments that Pilatus had purchased products from Pennsylvania suppliers, the court echoed the same analysis described below in Pease v. Kelly Aerospace, Inc., 903 by referring to Helicopteros Nacionales de Colombia, S.A. v. Hall 904 and the Supreme Court's rejection of evidence of substantial unrelated purchases by the defendant from the forum state for purposes of attempting to establish general jurisdiction over a defendant. 905

Having determined that the Pennsylvania courts did not have specific or general jurisdiction over Pilatus, the court next turned to plaintiffs' motion to transfer the case to Colorado, the principal place of business of Pilatus's U.S. subsidiary. 906 The court noted that transfer under 28 U.S.C. § 1631 requires that the transferee court be one "in which the action . . . could have been brought at the time it was filed." 907 The court considered the relationship between Pilatus and its wholly-owned U.S. subsidiary and concluded that the mere presence of a wholly-owned subsidiary does not subject the parent corporation to jurisdiction in the state in which the subsidiary is subject to jurisdiction. 908 Instead, it must be established that the subsidiary is the "mere instrumentality" or "alter ego" of the parent in order to attribute the subsidiary's contacts to the parent. 909 The court concluded that the mere fact of overlapping directors, that the president of the subsidiary later became the president of Pilatus and that the companies have the same logo, is insufficient to establish that it is the "mere instrumentality" or "alter ego" of Pilatus in the absence of evidence that the subsidiary is undercapitalized, that most of its business is with the parent, that the parent finances the subsidiary and pays its expenses, or that its

902 Id. at *27.
905 Id. at *27–28 (noting that in Helicopteros, defendant's major purchases (almost 80% of its total purchases) and regular employee visits to the forum were insufficient to establish general jurisdiction). Pilatus's contacts with Pennsylvania are minimal compared to those in Helicopteros.
906 Id. at *29.
907 Id. (quoting 28 U.S.C. § 1631 (2006)).
908 Id. at *34.
909 Id.
directors act on direction from Pilatus.910 Thus, because “Pilatus, on its own, does not have the systematic and continuous contacts with Colorado that would subject it to general jurisdiction there,”911 and “plaintiffs have not provided clear evidence that [the subsidiary] is Pilatus’s alter ego,”912 the court concluded that transfer to Colorado would not be proper under § 1631 and denied the motion to transfer.913

In Moyer v. Teledyne Continental Motors, Inc., the Pennsylvania Superior Court of Appeals considered personal jurisdiction over Divco, Inc., which had been involved in overhaul and repair of a TCM engine.914 As discussed above, the court of appeals has granted a request for reargument in that case, and has withdrawn the opinion discussed below.915 It is included in this article for purposes of comparison with any later opinion and not as precedent.

Divco, a Tulsa, Oklahoma company, objected to personal jurisdiction in Pennsylvania.916 The lawsuit arose from a 2003 accident involving a single-engine Beech V35B aircraft first delivered to the original purchaser in April 1982.917 The accident occurred when the aircraft collided with trees during an emergency landing attempt following an engine failure.918 Plaintiff claimed that the engine failure was the result of the failure of a repair weld in the engine crankcase.919 The repair weld had been performed by Divco during the course of an engine overhaul by Piedmont Hawthorne.920 Plaintiff further claimed that TCM had issued a service bulletin approving the use of welding to repair crankcases, when it knew that the practice of welding crankcases was not a safe method of repair, particularly in high stress areas.921

The court affirmed Divco’s dismissal on the grounds that it had insufficient contacts with Pennsylvania to support personal

910 Id. at *36.
911 Id. at *37.
912 Id.
913 Id.
917 Id. at 2.
918 Id.
919 Id. at 2–3.
920 Id. at 3.
921 Id. at 8.
Divco, Inc. had minimal sales to Pennsylvania residents (less than 1.5%) each year. While Divco maintained a web site, it did not sell parts directly over the internet using an interactive web site. The only use of the web site was to enable prospective customers to request information, or to enable existing customers to check on the status of an order, and no orders were taken through the internet unless the person was an existing customer and then the billing was not done electronically. Under Pennsylvania case law, even in cases involving specific jurisdiction, there must be sufficient continuous contacts with the State of Pennsylvania that it would be reasonable for the defendant to expect that it might be haled into court in Pennsylvania. Based upon the limited contacts with Pennsylvania in this case, the court held that there were insufficient contacts to support personal jurisdiction over Divco, Inc.

In Pease v. Kelly Aerospace, Inc. the U.S. District Court for the Middle District of Alabama considered a case in which defendant Main Turbo, a California corporation, overhauled a turbocharger manufactured by Kelly Aerospace, an Alabama corporation. The turbocharger had been manufactured in Alabama and installed on an aircraft engine manufactured by Lycoming, a Pennsylvania corporation, and installed on a Piper aircraft thereafter sold to an Ohio resident. The Ohio resident contracted with an Ohio corporation to overhaul the turbocharger, and the Ohio corporation sent the turbocharger to Main Turbo in California for the overhaul. Main Turbo overhauled the turbocharger in California and returned it to Ohio, where the Ohio corporation reinstalled it on plaintiff's aircraft.

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922 Id. at 13.
923 Id.
924 Id.
925 Id.
926 Id. at 11.
927 Id.
928 No. 2:07cv8340-ID, 2008 U.S. Dist. LEXIS 48187 (M.D. Ala. June 20, 2008), recon. denied 2008 U.S. Dist. LEXIS 84788 (M.D. Ala. Aug. 4, 2008). Notably, on motion for reconsideration, plaintiff requested that instead of dismissal, the case should be transferred to the U.S. District Court the Central District of California. The district court rejected that request as untimely stating that it was not raised prior to the request for reconsideration and that such a request was not an appropriate grounds for requesting reconsideration under F.R.Civ.P. 59(e).
930 Id. at *5–6.
931 Id.
Thereafter, the aircraft on which the turbocharger was installed suffered an engine failure and crashed in Tennessee. Plaintiff brought suit in Alabama against Kelly Aerospace, Lycoming and Main Turbo.

Main Turbo filed its motion to dismiss for lack of personal jurisdiction. Plaintiff contended that either specific or general jurisdiction existed. The court applied the Alabama long arm statute, which has been interpreted as extending personal jurisdiction to the fullest extent permitted under the U.S. Constitution. The court described Main Turbo as having its principal place of business in California, owning no property in Alabama and having no place of business in Alabama. Main Turbo purchased parts from Kelly Aerospace on other occasions (although the parts used to overhaul the engine at issue had been purchased from a Texas company). The court noted that Main Turbo maintained an informational web site that did not allow customers to post messages or place orders. The court also noted that Main Turbo did not advertise locally in Alabama and only occasionally advertised nationally in Trade-A-Plane Magazine. Less than one-half of one percent of its national business, both in number of units overhauled and revenue, had been with Alabama residents during the four years prior to the accident.

The court first reviewed the issue of specific jurisdiction and concluded that the mere fact that the part overhauled had been manufactured in Alabama was not a sufficient contact with the State of Alabama to conclude that the claims arose out of any contacts between Main Turbo and the State of Alabama or any of its residents. The court distinguished this case from one in which a resident of Alabama may have sustained injuries in Alabama as a result of the conduct of the defendant. The court

932 Id.
933 Id. at *6.
934 Id.
935 Id. at *2.
936 Id. at *9.
937 Id. at *10.
938 Id. at *5-7.
939 Id. at *14-15.
940 Id. at *8.
941 Id.
942 Id. at *8-*9.
943 Id. at *13.
944 Id. at *14.
noted that in such cases "a state's 'direct interest in the cause of action' is heightened if the harm occurs in the forum and if the plaintiff resides in the forum."945 The court concluded that in this case, involving a non-resident plaintiff, who was not injured in Alabama, there was simply "no evidence of any activity by Main Turbo 'in the forum state' which is related to the causes of action . . . ."946 Furthermore, the unilateral activity of the plaintiff in purchasing a product manufactured in Alabama did not establish such a contact.947 Finally, the court concluded that "the contacts were not 'such that [the defendant] should reasonably anticipate being haled into court [in Alabama]" in this case.948

The court next considered the issue of general personal jurisdiction and determined Main Turbo had none of the contacts with Alabama normally associated with doing business in the state, such as agents for service of process, business operations, solicitation of business, contracts, employees or ownership of real or personal property in the state.949 Furthermore, the limited revenues (approximately $16,000 over four years) from Alabama customers, which constituted less than one half of one percent of total revenues, outweighed the fact that those revenues were derived from Alabama customers with repeat business.950 The court could not "overlook the fact" that those revenues were small in comparison with Main Turbo's overall business.951 Comparing that percentage of revenues to those of defendants in other reported cases involving general jurisdiction, the court concluded that those revenues were not significant.952 Finally, the court rejected the argument that Main Turbo had purchased a substantial volume of parts from Kelly Aerospace in Alabama, comparing that argument to the argument rejected by the U.S. Supreme Court in Helicopteros Nacionales de Colombia, S.A. v. Hall953 in which plaintiff argued unsuccessfully for personal jurisdiction because the defendant

945 Id. (citing Bearry v. Beech Aircraft Corp., 818 F.2d 370, 374 (5th Cir. 1987)).
946 Id. at *15 (citing Sloss Indus. Corp. v. Eurisol, 488 F.3d 922, 925 (11th Cir. 2000)).
947 Id. at *16.
948 Id. at *17 (citing Vermeulen v. Renault U.S.A., Inc., 985 F.2d 1534, 1546 (11th Cir. 1993)).
949 Id. at *18–19.
950 Id. at *20–21.
951 Id. at *21.
952 Id. at *24.
purchased 80 percent of its helicopter fleet, as well as $4,000,000 in spare parts, from the forum state.\textsuperscript{954} The court stated that these purchases, as in Helicopteros, were unrelated to the instant lawsuit and insufficient to support the court's exercise of general personal jurisdiction.\textsuperscript{955}

B. Federal Jurisdiction—Removal—Federal Preemption

In Gonzalez v. Ever-Ready Oil, Inc., the U.S. District Court for the District of New Mexico remanded a personal injury action against US Airways alleging violations of the New Mexico dram shop act and state liquor laws.\textsuperscript{956} US Airways had removed the case on the grounds that the FAA of 1958 and the applicable Federal Aviation Regulations (FARs) preempted state law and raised substantial, disputed issues of federal law creating subject matter jurisdiction under 28 U.S.C. § 1331.\textsuperscript{957}

The district court reviewed the interface between federal and state law and concluded that an issue existed as to whether the applicable standard to be applied in determining liability was a federal or state standard.\textsuperscript{958} Nevertheless, if federal law provided the standard of care, the court concluded that the application of federal law to the specific facts of each case involved only the application of well-established federal law, and did not involve "substantial and disputed" federal issues.\textsuperscript{959} In such fact specific cases, the reasoning of the U.S. Supreme Court in finding federal subject matter jurisdiction in Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing.\textsuperscript{960} was not applicable because that case involved primarily the interpretation of federal law, and it was not dependent upon the resolution of any disputed fact relating to the dispositive question of federal law.\textsuperscript{961} Instead, the court concluded that the present case was similar to Empire Healthchoice Assurance, Inc. v. Mc-

\textsuperscript{954} \textit{Id.} at *25.
\textsuperscript{955} \textit{Id.} at *24.
\textsuperscript{956} No. 07-1181 JP/DJS, slip op., 12 (D.N.M. May 2, 2008).
\textsuperscript{957} \textit{Id.}
\textsuperscript{958} \textit{Id.} at 8 (the court declines to resolve the question of whether federal aviation law preempts state law standards of care in tort claims involving sale of alcoholic beverages on board commercial flights.).
\textsuperscript{959} \textit{Id.}
\textsuperscript{960} \textit{Id.} at 9 (citing Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg., 545 U.S. 308 (2005)).
\textsuperscript{961} \textit{Id.}
Veigh,\textsuperscript{962} which the Supreme Court stated was "poles apart" from \textit{Grable} because it was "fact-bound and situation-specific" in its resolution, rather than "presenting a nearly 'pure issue of law.'"\textsuperscript{963} Thus, the court concluded that the rule in \textit{Grable} providing federal subject matter jurisdiction in cases turning primarily on the interpretation of a federal law to otherwise undisputed facts, was narrowly limited to such cases.\textsuperscript{964}

The court also considered the effect of federal preemption of aviation safety regulations and concluded that any such federal preemption was not intended to create federal subject matter jurisdiction in the broad class of aviation cases because Congress had not created a federal cause of action for cases involving air safety, federal subject matter jurisdiction was not necessary for uniform application of federal law in cases involving air safety, and perhaps most importantly, the adoption of federal subject matter jurisdiction in all cases involving aviation safety would "extend \textit{Grable} and the arising-under jurisdiction well beyond the scope the Justices are willing to tolerate," and would "move a whole category of suits to federal court."\textsuperscript{965} Indeed, the court observed that the effect of such a finding of federal court removal subject matter jurisdiction in every case in which federal law provides the applicable standard would be to substantially expand the scope of federal jurisdiction and "move a whole category of suits to federal court," thereby changing the balance between federal and state court jurisdiction.\textsuperscript{966} The court concluded that in this case "[t]o allow any state tort claim with an element of federal aviation law into federal court, particularly when Congress has not created a federal cause of action, appears to be inconsistent with congressional judgment about the scope of federal courts' jurisdiction over state law tort claims involving aviation."\textsuperscript{967}

In \textit{Collins v. America West Airlines, Inc.}, the court remanded an action against an air carrier by representatives of individuals who had been killed in an automobile accident caused by an intoxicated motorist who allegedly had been served alcoholic

\textsuperscript{962} Id. at (citing Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 699 (2006)).
\textsuperscript{963} Id. at 4 (citing Empire Healthchoice, 547 U.S. at 700–01).
\textsuperscript{964} Id.
\textsuperscript{965} Id. at 11 (quoting Bennett v. Southwest Airlines Co., 484 F.3d 907 (7th Cir. 2007)).
\textsuperscript{966} Id. at 16,349 (quoting Bennett, 484 F.3d at 911).
\textsuperscript{967} Id.
beverages aboard one of the carrier's flights in violation of state liquor control and dram shop statutes because the court found that it lacked subject matter jurisdiction.\textsuperscript{968} The carrier argued that the court had jurisdiction to hear the claims because they raised substantial, disputed issues of federal law relating to the regulation of the national airline industry, which required resolution as a predicate for the plaintiffs to obtain the relief they sought.\textsuperscript{969} The court was not persuaded, choosing instead to follow the "thorough and thoughtful opinion" in \textit{Gonzales}, which held that personal injury or wrongful death claims arising from the service of alcoholic beverages on commercial airline flights (including the issue of whether federal preemption required the application of a federal standard of care rather than the state law standard alleged by plaintiffs) were not "legally sufficient to invoke federal jurisdiction."\textsuperscript{970}

In \textit{Goonewardena v. AMR Corp.}, the U.S. District Court for the Eastern District of New York held that it lacked original jurisdiction and supplemental jurisdiction over a suit filed by plaintiff Prasanna W. Goonewardena (Goonewardena) alleging that AMR Corp. had discriminated against him based upon his race, creed, color, and national origin by refusing his request for overnight accommodation when his flight was cancelled and for removing him from his flight the next day on the basis that he was ill.\textsuperscript{971} Goonewardena originally filed the suit in New York state court, and defendants removed the action to federal court.\textsuperscript{972} Goonewardena, proceeding \textit{pro se}, amended the complaint to limit his damages to less than $75,000, withdrew his claim under the Civil Rights Act of 1964, and moved the district court to remand the case to state court based on lack of jurisdiction.\textsuperscript{973}

The first issue before the court was whether, because of the doctrine of complete preemption, the court had original jurisdiction over Goonewardena's remaining state claims.\textsuperscript{974} Citing

\textsuperscript{968} No. Civ 08-78 MCA/WDS, slip op., 1 (D.N.M. May 12, 2008).
\textsuperscript{969} \textit{Id.} at 2.
\textsuperscript{970} \textit{Id.} at 3.
\textsuperscript{971} No. 08-cv-4141, 2008 U.S. Dist. LEXIS 96013, *9-10 (E.D.N.Y. Nov. 25, 2008).
\textsuperscript{972} \textit{Id.} at *2.
\textsuperscript{973} \textit{Id.} at *1-3.
\textsuperscript{974} \textit{Id.} at *4. The court noted that by amending the complaint to attempt to eliminate a basis for federal subject matter jurisdiction, the propriety of removal was not affected as that it determined as of the time of the removal. The court concluded that both diversity and the federal civil rights claims provided a basis
Sullivan v. American Airlines, Inc.,975 the court stated that "[u]nder the complete-preemption doctrine, certain federal statutes are construed to have such 'extraordinary' preemptive force that state-law claims coming with the scope of the federal statute are transformed, for jurisdictional purposes, into federal claims—i.e., completely preempted."976 While defendants attempted to argue that the suit arose under federal law simply because defendants may have been able to raise ordinary pre-emption under the FAA of 1958 or ADA as a defense, the court disagreed.977 Rather, the court held that in order for Defendants to have shown that the FAA of 1958 and ADA completely preempted state law, they would have to establish that Goonewardena's claims were "in actuality nothing more than claims brought under the FAA of 1958 and the ADA, clothed as claims under the New York Human Rights Law."978 Because neither the FAA of 1958 nor the ADA provides a private right of action, the court found that this would be impossible for defendants to establish—Goonewardena could not have brought his claims under either of those federal statutes.979 For these reasons, the court held that it lacked original jurisdiction over Goonewardena's state law claims.980

Because Goonewardena had withdrawn all claims over which the court had original jurisdiction, the second issue before the court was whether the court should assert supplemental jurisdiction over the remaining state law claims981 In light of Goonewardena having withdrawn his single federal claim very early in the litigation, the court declined to exercise supplemental jurisdiction over the remaining claims and remanded the case to state court.982

for removal and that the removal had been proper. Nevertheless, upon amendment that eliminates the claims providing federal subject matter jurisdiction, the court may in its discretion continue to hear the case based on supplemental jurisdiction or it can remand the case. In this instance, in order to determine whether the court could decline to exercise supplemental jurisdiction and remand the case, it was necessary to first determine whether, as a result of the amendment, any other basis for federal subject matter jurisdiction existed. Id. at *2-4.

975 Id. at *4 (quoting Sullivan, 424 F.3d 267, 271-72 (2d Cir. 2005)).
976 Id. at *4-5.
977 Id. at *5-6
978 Id. at *6.
979 Id. at *6-7.
980 Id. at *8.
981 Id.
982 Id. at *9.
In *Ray v. American Airlines, Inc.*, the Arkansas district court denied the plaintiff's motion to remand and found that an airline passenger's state law claims against an air carrier arising out of the diversion, extended ground stop, and delay of her flight were properly removed to federal district court.\(^{983}\) The court determined that it had jurisdiction under diversity of citizenship, and explained that the complaint contained sufficient allegations to support a potential recovery exceeding the court's jurisdictional amount of $75,000 in an individual case or $5,000,000 in the aggregate in a class action.\(^{984}\) Although the complaint contained no specific amount of damages sought, the court found that the carrier proved by a preponderance of the evidence that the amount in controversy exceeded the jurisdictional amount.\(^{985}\) The court based its findings at least in part on a settlement letter sent by plaintiff's counsel to the defendant, demanding a $50,000 payment to plaintiff for her individual claim, and a $5,000,000 payment for the class action claim, as well as $74,900 for another passenger who had filed an identical claim in California and a $5,000,000 payment to settle the class action claim in the California case.\(^{986}\) The court determined, over plaintiff's objections, that Federal Rule of Evidence 408 did not prohibit the use of the purportedly-confidential settlement letter for the limited purpose of establishing the amount in controversy, even though the letter would be inadmissible to establish liability or the invalidity of the claim or its amount.\(^{987}\)

### C. Jurisdiction—Removal—Montreal and Warsaw Conventions

The cases involving preemption by the Montreal and Warsaw Conventions are discussed above in Section I.

### D. Procedure: Federal Jurisdiction—Removal—Federal Officer Removal

In *Swanstrom v. Teledyne Continental Motors*, the federal district court granted plaintiff's motion to remand the case to the Circuit Court of Mobile County, Alabama.\(^{988}\) Defendant Cirrus Corporation removed the case to federal court on the grounds

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\(^{984}\) *Id.* at *13.

\(^{985}\) *Id.*

\(^{986}\) *Id.* at *10-11.

\(^{987}\) *Id.* at *11-12.

\(^{988}\) 531 F. Supp. 2d 1325, 1333 (S.D. Ala. 2008).
that the defendant's actions implicated by plaintiff's claims that the design of the firewall of the Cirrus aircraft involved in the accident did not meet FAA regulations, resulting in a right to federal officer removal under 28 U.S.C. § 1442(a). The court recognized that the claims specifically related to the certification of the design of the firewall as meeting FAA regulations by FAA Designated Engineering Representatives (DERs), who were acting on behalf of the FAA, even though they were also employees of the aircraft manufacturer. However, the district court noted that neither of these DERs were named as defendants, and the allegations did not identify a specific FAA representative whose conduct resulted in the alleged claims. The court noted that federal officer removal was not available where the conduct alleged was "mere[ly] participation in a regulated industry... unless the challenged conduct is closely linked to detailed and specific regulations." And while the "manufacturing [of] an airplane and its parts is highly regulated by the FAA,... expanding participat[ion] in a regulated industry to allow removal under the federal officer removal statute is not the purpose or intent of the statute." The court concluded that "removal is appropriate only where the FAA representative has been specifically named and the allegations relate to conduct of the FAA representative while acting in the capacity of an FAA representative."

E. FORUM NON CONVENIENS

In In re Air Crash Near Peixoto de Azeveda, Brazil, on September 29, 2006, the trial court granted a motion by defendants for dismissal on the grounds of forum non conveniens. Plaintiffs had brought numerous actions in the United States on behalf of passengers who were killed in the crash of a foreign airliner during a domestic flight within Brazil. Those actions were referred to a multi-district panel. All of the plaintiffs were "Brazilian citizens and residents, and the decedents they represent[ed] were

989 Id. at 1329.
990 Id. at 1332.
991 Id.
992 Id. at 1331-33 (quoting King v. Provident Bank, 428 F. Supp. 2d 1226, 1231 (M.D. Ala. 2006)).
993 Id. at 1332.
994 Id. at 1333.
996 Id. at 275-76.
997 Id. at 275.
all Brazilian citizens and residents at the time of their deaths.\textsuperscript{998} The defendants included both residents of the United States and Brazilian entities.\textsuperscript{999} At the time of the crash, it was the deadliest air disaster in Brazilian history.\textsuperscript{1000} Brazilian authorities had undertaken an investigation of the accident, numerous court proceedings had been commenced in Brazil, a criminal action was proceeding in Brazilian federal court, and numerous civil actions had been brought against the Brazilian airline in Brazilian courts.\textsuperscript{1001} Most of the defendants agreed, as a condition of dismissal of the Multi-district litigation (MDL) proceeding, to consent to the jurisdiction of the Brazilian courts, to toll the applicable statute of limitations for a period of 120 days after dismissal, to make available to the Brazilian courts any witnesses or documents in their possession, custody, or control that the Brazilian court may deem relevant, and to pay any post-appeal judgment awarded against them by a Brazilian court.\textsuperscript{1002} The court explained that a determination of whether an action should be dismissed for \textit{forum non conveniens} requires a three-step process.\textsuperscript{1003} First, the court must determine the degree of deference properly accorded the plaintiff's choice of forum.\textsuperscript{1004} Second, the court must determine whether the defendant's proposed alternative forum, in this case Brazil, was available and adequate to adjudicate the dispute.\textsuperscript{1005} Third, the Court must balance certain public and private interests implicated in the choice of forum.\textsuperscript{1006} Generally, a plaintiff who chooses their home forum is due great deference because that forum is presumed to be convenient.\textsuperscript{1007} On the other hand, "when a foreign plaintiff chooses a U.S. forum it 'is much less reasonable' to presume that the choice was made for convenience."\textsuperscript{1008} To determine whether the plaintiff's choice was truly motivated by convenience in such

\textsuperscript{998} Id. at 275–76.
\textsuperscript{999} Id. at 276–77.
\textsuperscript{1000} Id. at 277.
\textsuperscript{1001} Id.
\textsuperscript{1002} Id. at 277–78.
\textsuperscript{1003} Id. at 278 (quoting Norex Petroleum Ltd. v. Access Indus., Inc., 416 F.3d 146, 153 (2d Cir. 2005) (internal quotations omitted)).
\textsuperscript{1004} Id. (quoting Norex, 416 F.3d at 153 (internal quotations omitted)).
\textsuperscript{1005} Id. (quoting Norex, 416 F.3d at 153 (internal quotations omitted)).
\textsuperscript{1006} Id. at 279.
\textsuperscript{1007} Id. (quoting Iragorri v. United Tech. Corp., 274 F.3d 65, 74 (2d Cir. 2001) (internal quotations omitted)).
a case, the court applies a sliding scale and examines: "(1) the convenience of the plaintiff's residence in relation to the chosen forum; (2) the availability of witnesses or evidence to the forum district; (3) the defendant's amenability to suit in the forum district; (4) the availability of appropriate legal assistance; and (5) other reasons related to convenience or expense."\(^\text{1009}\)

The court is not required to examine every factor because the analysis tends to be highly factual.\(^\text{1010}\) The plaintiffs argued that they should be accorded the full deference a resident plaintiff would receive because the United States and Brazil had entered into a treaty guaranteeing Brazilian citizens equal access to U.S. courts.\(^\text{1011}\) The court disagreed with plaintiffs, noting that the treaty language cited by the plaintiffs, "by its express terms, require[d] that the signatories' courts be open to foreign nationals who happen to be located within the territory of the other."\(^\text{1012}\) There was no indication that the plaintiffs were physically located within the United States or had ever even visited the U.S.\(^\text{1013}\) The court also pointed out that the defendants would be subject to jurisdiction in Brazil, that the plane was owned and operated by a Brazilian airline while within the jurisdiction of Brazilian air traffic control, and that significant evidence from certain Brazilian entities would not be available in the U.S. but likely would be available in Brazil.\(^\text{1014}\) On the other hand, the only evidence that might not have been available in Brazil was the live testimony of the pilots, both U.S. citizens.\(^\text{1015}\) Although the court recognized the importance of the pilots' testimony, the court also pointed out that they could be required to provide testimony via letters rogatory.\(^\text{1016}\) If the case were to proceed in the United States, however, the parties may not have access to the testimony of the Brazilian air traffic controllers because they could refuse to testify in the U.S. on sovereign immunity grounds.\(^\text{1017}\) Thus, because the plaintiffs' choice of forum was granted a lesser degree of deference, the court found that "the action should be dismissed only if the chosen forum is

\(^{1009}\) Id. at 279-80 (quoting Irigarri, 274 F.3d at 72 (2d Cir. 2001) (internal quotations omitted)).

\(^{1010}\) Id. at 280.

\(^{1011}\) Id.

\(^{1012}\) Id. at 281.

\(^{1013}\) Id.

\(^{1014}\) Id.

\(^{1015}\) Id.

\(^{1016}\) Id. at 281-82.

\(^{1017}\) Id.
shown to be genuinely inconvenient and the alternate forum significantly preferable."1018

The court found that Brazil was an available alternate forum.1019 Most of the defendants had expressly agreed to submit to the jurisdiction of the Brazilian courts for purposes of these actions.1020 Experts for both parties also agreed that Brazil had grounds under its Code of Civil Procedure to assert personal jurisdiction over all of the defendants, including those who had not expressly agreed to submit to jurisdiction.1021 The court also found that Brazil was an adequate alternate forum.1022 The court found that any potential delay occasioned by the Brazilian judicial system would be "sufficiently minimal" relative to any delay in the United States and that whether the cases could be consolidated in Brazil was not determinative of the adequacy factor.1023

Finally, the court engaged in a balancing of the private and public interest factors. The court identified the private interest factors as follows:

(1) the relative ease of access to sources of proof; (2) the availability of compulsory process for attendance of unwilling witnesses; (3) the cost of obtaining attendance of willing witnesses; (4) issues concerning the enforceability of a judgment; and (5) all other practical problems that make trial of a case easy, expeditious, and inexpensive—or the opposite.1024

The court noted that many of the entities "centrally involved in the accident" would not be subject to personal jurisdiction in the United States, but all of the current defendants and the other important entities would be subject to personal jurisdiction in Brazil.1025 The court further found that the parties may be unable to compel testimony and evidence in the United

1018 Id. (quoting Bigio v. Coca-Cola Co., 448 F.3d 176,179 (2d Cir. 2006)).
1019 Id. at 284–85.
1020 Id at 282–83.
1021 Id at 283. The two U.S. pilots of the business jet involved in the collision with the airliner that resulted in the litigation by the representatives of the passengers of the airliner did not sign declarations consenting to jurisdiction in Brazil—leading that court to evaluate Brazilian jurisdiction over the pilots and to conclude that it was a "near certainty that Brazil [would] exercise jurisdiction over the legacy pilots . . . . In any event, the Court [made] the dismissal conditioned on jurisdiction being exercised by Brazil." Id.
1022 Id. at 284.
1023 Id. at 284–85.
1024 Id. at 285.
1025 Id.
States from the Brazilian entities, but if the cases went forward in Brazil, the parties would likely have access to all of the Brazilian entities, and the witnesses and evidence under their control. The court also determined that much of the evidence was located in Brazil, including most importantly the wreckage, the accident site, the flight data recorder, and cockpit voice recorder. The defendants had also agreed to pay any final post-appeal judgment awarded against them by a Brazilian court, so the fourth factor weighed in favor of dismissal. In sum, the court appeared to conclude that the private interest factors weighed in favor of proceeding in Brazil, where litigation was already pending and where plaintiffs' private interest concerns could be accommodated, thus resulting in dismissal of the present U.S. case.

The court identified the public interest factors as follows:

(1) the administrative difficulties flowing from court congestion;
(2) the local interest in having controversies decided at home;
(3) the interest in having a trial in a forum that is familiar with the law governing the action; (4) the avoidance of unnecessary problems in conflict of laws or in application of foreign law; and (5) the unfairness of burdening citizens in an unrelated forum with jury duty.

The court determined that the first factor did not tend to favor or disfavor dismissal because the court could accommodate the cases on its calendar and there was no indication of significant court congestion in either U.S. courts or in the Brazilian courts. With regard to the second factor, the court stated that Brazil's interest in resolving the controversy was "obvious," and that it outweighed the United States' interest, even though some of the defendants were U.S. residents who carried on manufacturing activities within the United States. The court then found that, even though the United States' interest paled in comparison to Brazil's, it would not be unfair to burden U.S. citizens with jury duty on this matter because the cases involved companies headquartered in the United States, two pilots who lived in the United States, and avionics equipment was created in the United States and regularly used by aircraft flying

1026 Id. at 286.
1027 Id. at 287.
1028 Id.
1029 Id. at 287-88.
1030 Id. at 288.
1031 Id.
throughout the United States. The fifth factor did not support dismissal. The court explained that the third and fourth factors did favor dismissal because there was at least some likelihood that if the court retained jurisdiction, it would be obligated to apply Brazilian law to part of or the entire case and that it may have to apply the substantive state law of transferor because this was a multi-district case.

In sum, the court found that, while the private and public interest factors “fall on both sides of the aisle, and down the middle,” because of the “lack of jurisdiction . . . over potentially liable parties and the lack of compulsory process over witnesses and evidence in Brazil, together with other considerations,” the United States was a “genuinely inconvenient” forum and Brazil was “significantly preferable,” and therefore granted the motion to dismiss based on forum non conveniens.

In Van Schijndel v. Boeing Co., the Ninth Circuit affirmed the trial court’s dismissal of product liability claims against U.S. aircraft manufacturer Boeing Company on the grounds of forum non conveniens. The court explained that a district court faced with a motion to dismiss on the grounds of forum non conveniens must examine: “(1) whether an adequate alternative forum exists, and (2) whether the balance of private and public interest factors favors dismissal.” In weighing the private interest factors, the court determined that the trial court had properly considered that many important witnesses and much of the evidence relative to contributory causes of the plaintiffs’ alleged injuries was located in Singapore. The court recognized that it is appropriate to give the location of evidence regarding an air carrier’s contributory fault substantial weight in conducting a forum non conveniens analysis in a product liability case. Furthermore, some of the evidence in the foreign forum had a nexus with the product liability claim because the air carrier, Singapore Airlines, was in possession of the aircraft’s maintenance records. As to the public interest factors, the

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1032 Id.
1033 Id.
1034 Id. at 288–89.
1035 Id. at 289–90.
1036 263 Fed. Appx. 555, 557 (9th Cir. 2008).
1037 Id.
1038 Id.
1039 Id.
1040 Id.
court determined that the trial court did not abuse its discretion because it had considered and acknowledged the interest of the United States as a whole, and not merely California, in the lawsuit before concluding that the interest of the foreign state was greater.\textsuperscript{1041}

In \textit{Clerides v. Boeing Co.}, the Seventh Circuit held that the trial court did not abuse its discretion in dismissing, on the grounds of \textit{forum non conveniens}, an action against an aircraft manufacturer with its manufacturing facilities headquartered in Washington state by citizens and residents of Cyprus who were the personal representatives of an individual (also a Cypriot citizen) who died when an airplane operated by an air carrier incorporated and based in Cyprus crashed in Greece.\textsuperscript{1042} The parties conceded on appeal that Greece and Cyprus were both adequate and available fora.\textsuperscript{1043} Thus, the court considered only the private and public interest factors.\textsuperscript{1044} The court found that the private interest factors favored dismissal because the vast majority of the relevant evidence was in Greece and Cyprus.\textsuperscript{1045} The only evidence in the United States was evidence relevant to the product liability claim against Boeing, which Boeing agreed to make available in Greece or Cyprus.\textsuperscript{1046} In addition, compulsory process was available in Cyprus and Greece for witnesses who would not be subject to compulsory process in the United States.\textsuperscript{1047} The court also found that the public interest factors favored dismissal.\textsuperscript{1048} Although “the court did not have sufficient evidence to enable it to assess the congestion of the courts in Greece or Cyprus,” the appellate court held that the trial court reasonably found this factor would be neutral because the median time to trial in the Northern District of Illinois was twenty-four months.\textsuperscript{1049} In addition, “Greece and Cyprus had an interest in protecting the health and safety of its residents,” which included 111 of the 115 decedents.\textsuperscript{1050} Not one decedent was a United States resident, on the other hand.\textsuperscript{1051} Greece and

\begin{thebibliography}{9}
\bibitem{1041} \textit{Id.}
\bibitem{1042} 534 F.3d 623, 625–26 (7th Cir. 2008).
\bibitem{1043} \textit{Id.} at 629.
\bibitem{1044} \textit{Id.}
\bibitem{1045} \textit{Id.} at 629–30.
\bibitem{1046} \textit{Id.} at 629.
\bibitem{1047} \textit{Id.}
\bibitem{1048} \textit{Id.} at 630.
\bibitem{1049} \textit{Id.}
\bibitem{1050} \textit{Id.}
\bibitem{1051} \textit{Id.}
\end{thebibliography}
Cyprus had both demonstrated an interest in the case through their investigations into the crash.\footnote{1052} Finally, the court determined that jurors in the Northern District of Illinois had no local connection to the case, including "the development and manufacture of the Boeing systems likely involved in the crash."\footnote{1053} The Court of Appeals found that the trial court's consideration of the public factors was also reasonable.\footnote{1054} Based upon review of the trial court's analysis of the private and public factors, the appellate court found that the district court did not abuse its discretion and affirmed the \textit{forum non conveniens} dismissal.\footnote{1055}

\section*{F. Procedure—Judicial Review of Administrative Rulings}

Courts strictly construe their authority to review administrative rulings. Practitioners should take care to bring such actions before the appropriate court. In many cases, the federal court of appeals is the appropriate venue, while in other cases the federal district court or even the Court of Federal Claims may have jurisdiction. Practitioners should also be mindful of any procedural prerequisites to filing a claim against an administrative body in federal court. A failure to bring the action in the appropriate forum or to satisfy all prerequisites can be fatal to a claim.

\subsection*{1. Jurisdiction}

In \textit{Diaz Aviation Corp. v. Alvarez}, the U.S. District Court for the District of Puerto Rico explained the exclusive jurisdiction provision of 49 U.S.C. § 46110, which grants exclusive jurisdiction to the federal courts of appeals to hear certain challenges to federal agency actions.\footnote{1056} The court dismissed an air carrier’s claims against the FAA and some of its employees arising out of the suspension of the carrier’s operating certificate because the claims were within the exclusive jurisdiction of the federal appeals court.\footnote{1057} Section 46110(c) provides that the courts of appeals have "exclusive jurisdiction to affirm, modify, or set aside" orders of the NTSB or the FAA.\footnote{1058} The court explained that the carrier’s complaint went to the circumstances that gave rise

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\begin{itemize}
  \item \footnote{1052} \textit{Id.}
  \item \footnote{1053} \textit{Id.}
  \item \footnote{1054} \textit{Id.}
  \item \footnote{1055} \textit{Id.}
  \item \footnote{1056} 556 F. Supp. 2d 94, 99 (D. P.R. 2008).
  \item \footnote{1057} \textit{Id.} at 98–99.
  \item \footnote{1058} \textit{Id.} at 97.
\end{itemize}
}
to the suspension of its certificate and the alleged motivations and actions of certain FAA employees, which were inescapably intertwined with a review of the FAA’s suspension order. A claim is “inescapably intertwined with a review of administrative orders when the plaintiff challenges the procedures and merits of the order.” Although the carrier had framed its complaint as deprivation of property without due process of law—a constitutional claim that the carrier argued would be within the purview of the federal district court—the court decided that the claims went directly to the merits of a previous agency adjudication.

In MacLean v. Department of Homeland Security, the Ninth Circuit found that it had jurisdiction to review a TSA order that an air marshal’s text message to the media regarding the alleged cancellation of certain missions on overnight flights contained “sensitive security information.” The court observed that the order was supported by a reviewable record (even though there was no notice and comment period or other opportunity for the marshal to present evidence), and was a definitive statement of the agency’s position regarding the contents of the text message, and had an immediate and prospective impact upon the marshal’s challenge of his subsequent termination.

On the other hand, in Ibrahim v. Department of Homeland Security, the Ninth Circuit held that the federal district court retained original jurisdiction over a Malaysian Muslim passenger’s Administrative Procedure Act (APA) claim regarding the placement of her name on the federal government’s no-fly list. The district court had ruled that it lacked jurisdiction under 49 U.S.C. § 46110(a) to consider the plaintiff’s claims against the federal government because “the no-fly list is an ‘order’ [of the Transportation Security Administration] under the ambit of 46110.” The Ninth Circuit disagreed, explaining that putting the passenger’s name on the list was an order of an agency not named in § 46110, and, therefore, the district court retained ju-

1059 Id. at 98.
1060 Id. (citing Green v. TSA, 351 F. Supp. 2d 1119, 1127 (W.D. Wash. 2005)).
1061 Id. at 95, 99.
1062 543 F.3d 1145, 1149 (9th Cir. 2008).
1063 Id.
1064 538 F.3d 1250, 1255 (9th Cir. 2008).
1065 Id. at 1254.
risdiction to review that agency's order under the APA. In addition, the Ninth Circuit disagreed that the decision to place a person on the watch list was an "order" subject to appellate review, pointing out that "[t]here was no hearing before an administrative law judge; there was no notice-and-comment procedure. For all we know there is not an administrative record of any sort for us to review." The court opined that if any court were to review the government's decision to place the passenger's name on the no-fly list, "it [made] sense that it be a court with the ability to take evidence."

The Ninth Circuit further held that dismissal of the passenger's claims against certain federal officials acting in their official capacities was proper. The court explained that the officials, like the government itself, cannot be liable for state-law torts unless Congress has waived the government's sovereign immunity. Plaintiff argued that Congress had done so through the FTCA. The court pointed out that the FTCA "only waives sovereign immunity if a plaintiff first exhausts her administrative remedies," which the passenger failed to do before filing her complaint. Moreover, the passenger did not request a stay of the litigation in district court so that she could attempt to exhaust her administrative remedies while the litigation was pending.

1066 Id. at 1255. The court explained that the district court retained jurisdiction because the terrorist watch list was compiled by the Terrorist Screening Center, which is "part of the Federal Bureau of Investigation," not one of the specifically named agencies over which the federal courts of appeal have exclusive jurisdiction under 49 U.S.C. § 46110(a) (2000 & Supp. V 2006). Id.

1067 Id. at 1256. The court noted that the lack of notice or a comment period was not fatal to appellate review in cases in which there was an express statutory command requiring appellate review, but that, in this case, in which there was no express statutory command, it was supportive of the court's conclusion that Congress did not intend the courts of appeals to have exclusive jurisdiction of decisions to place persons on the terrorist watch list. Id.

1068 Id.

1069 Id. at 1257.

1070 Id. at 1258 (citing Gibbons v. United States, 75 U.S. 269, 274–76 (1869)).

1071 Id.

1072 Id.

1073 Id. The court also considered the dismissal of Nevins claims and tort claims against another federal agent, sued only in his individual capacity. The court reversed the dismissal of those claims, holding that even though the agent resided in and apparently acted only in Virginia, his actions resulting in plaintiff's arrest in California were sufficient to establish personal jurisdiction in California because of their effect on a California resident. The court noted that the agent
In *Jan's Helicopter Service, Inc. v. FAA*, the Federal Circuit affirmed the district court's transfer to the Court of Federal Claims of actions by two aircraft operators seeking damages from the FAA for the issuance of alleged unauthorized orders that resulted in the grounding of the operators' aircraft. The operators alleged that the orders constituted unlawful takings in violation of the Fifth Amendment of the U.S. Constitution and sought compensation in excess of $10,000 each from the U.S. government. The court determined that under the Tucker Act, 28 U.S.C. § 1491(a)(1), only the Court of Federal Claims has jurisdiction over any claim against the U.S. government founded upon either the U.S. Constitution or any act of Congress that exceeds $10,000. Therefore, the district court lacked subject matter jurisdiction over the actions, and its transfer to the Court of Federal Claims was proper, as long as the claims fell within the Act's waiver of sovereign immunity.

The court then determined whether the operators' claims fell within the terms of the Tucker Act's waiver of sovereign immunity. The court explained that for the waiver to apply, "the claim must be one for money damages against the United States, and the claimant must demonstrate that the source of the substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'" In deciding this issue, the court stated that it was "undisputed that the Takings Clause of the Fifth Amendment is a money-mandating source for purposes of [the] Tucker Act . . . ." The court of appeals held that the district court had correctly decided that the Court of Federal Claims had subject matter jurisdiction over the operators' claims and that the

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had not raised any defenses under the Federal Tort Claims Act and therefore did not consider that issue. *Id.* at 1258–59.

1074 525 F.3d 1299, 1301–02 (Fed. Cir. 2008).
1075 *Id.* at 1303.
1076 *Id.* at 1304.
1077 *Id.* at 1304–05.
1078 *Id.* at 1305.
1079 *Id.* at 1306 (quoting United States v. Mitchell, 463 U.S. 206, 216–17 (1983)). The court explains that "because the Tucker Act itself does not create a substantive cause of action, . . . a plaintiff must identify a separate source of substantive law that creates the right to money damages." *Id.* (citing Fisher v. United States, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc in relevant part)).
1080 *Id.* at 1309.
case was properly transferred from the District Court of Guam to the Court of Federal Claims.\textsuperscript{1081}

In \textit{Adams v. FAA}, the petitioners were commercial airline pilots who reached the age of 60 before December 13, 2007 . . . [and had] filed requests for an exemption with the FAA from the regulation barring them from flying commercial aircraft after they turned 60. The FAA denied their requests for exemption and the petitioners filed petitions for review in the U.S. Court of Appeals \textsuperscript{sic} under 49 U.S.C. § 46110(a), which permits direct challenges to an order issued by [the FAA].\textsuperscript{1082}

The U.S. court of appeals held that the Fair Treatment for Experienced Pilots Act (FTEPA), 49 U.S.C. § 44729, which raised the maximum age limit for pilots flying large commercial aircraft to sixty-five, expressly repealed the regulation that was the Age 60 Rule, making the petitions moot.\textsuperscript{1083} The pilots asserted that their petitions could not be dismissed as moot, since the statute itself is a "constitutionally-prohibited bill of attainder and a violation of their rights to due process and equal protection," because "it denies such pilots any seniority or benefits from their prior (pre-age 60) years of service if they are hired or rehired by an airline prior to reaching age 65."\textsuperscript{1084} The U.S. court of appeals held that it had no jurisdiction to consider constitutional questions unrelated to the FAA's Rule 65 order, promulgated under FTEPA.\textsuperscript{1085} As long as the pilots could "satisfy the usual Article III standing requirements, their facial challenges to the [FTEPA] had to be brought first in the district court," which has original jurisdiction over federal question claims.\textsuperscript{1086}

2. \textit{Procedural Prerequisites}

In \textit{Curran v. National Transportation Safety Board}, the Ninth Circuit denied a pilot's request for review of the National Transportation Safety Board's (NTSB) dismissal of his appeal of the 120-day suspension of his commercial pilot's certificate.\textsuperscript{1087} The NTSB dismissed the appeal because the pilot failed to file a

\textsuperscript{1081} \textit{Id.} at 1310.
\textsuperscript{1082} 550 F.3d 1174, 1175 (D.C. Cir. 2008).
\textsuperscript{1083} \textit{Id.}
\textsuperscript{1084} \textit{Id.} at 1175–76.
\textsuperscript{1085} \textit{Id.} at 1176.
\textsuperscript{1086} \textit{Id.}
\textsuperscript{1087} 266 Fed. App'x. 645, 645–46 (9th Cir. 2008).
timely appeal brief or provide good cause for the untimeliness of his appeal.\textsuperscript{1088} The court explained that

where the NTSB dismisses an appeal for failure to file a timely brief, the court's jurisdiction is restricted (1) to deciding if the NTSB's order dismissing the appeal as untimely was arbitrary or capricious; and, if not, (2) to addressing a limited number of substantive issues, such as constitutional claims raised on appeal that the NTSB could not have addressed.\textsuperscript{1089}

The court found that the dismissal was not "arbitrary" or "capricious" because the pilot was warned about the timeliness requirement "numerous times," the brief was weeks late, and the pilot proffered no cause, much less "good cause" for the late filing.\textsuperscript{1090} In addition, the court found that no issue raised on appeal could not have been litigated before the NTSB.\textsuperscript{1091}

Similarly in \textit{Nadal v. FAA}, the Tenth Circuit held that it lacked subject matter jurisdiction over a petition seeking review of an order of the NTSB affirming the suspension of a pilot's airman certificate because the pilot did not file his petition until three days after the filing deadline.\textsuperscript{1092} The court explained that "statutory provisions specifying the timing of review are mandatory and jurisdictional."\textsuperscript{1093} The court therefore dismissed the petition for lack of subject matter jurisdiction.\textsuperscript{1094}

In \textit{Armstrong v. FAA}, the Court of Appeals for the D.C. Circuit dismissed as moot a pilot's appeal of an FAA order that determined that an "emergency" existed entitling the FAA to revoke his private pilot certificate immediately.\textsuperscript{1095} The emergency characterization permitted the Administrator to impose the order and revoke his certificate without first providing the pilot an opportunity to respond to allegations that the pilot had violated certain federal aviation regulations.\textsuperscript{1096} The characterization also "prevented [the pilot] from obtaining a stay of the order while he appealed it to the National Transportation Safety Board."\textsuperscript{1097} The pilot did appeal the order itself to the NTSB,
but failed to request review of the underlying emergency determination within two days of receiving that order. Because of this failure, the pilot forfeited his right to an administrative appeal of the emergency determination and instead petitioned the court of appeals for review of the determination pursuant to 49 U.S.C. § 46110(a). While the appeal was pending before the court of appeals, an administrative law judge (ALJ) "affirmed all the violations found by the Administrator but reduced the sanction to a 10-month suspension of the pilot's private pilot certificate." Both the pilot and Administrator cross-appealed the ALJ's decision to the NTSB. Ultimately, the NTSB granted the Administrator's appeal and reinstated the order revoking the pilot's certificate. The court of appeals found that once the NTSB resolved the pilot's appeal, the emergency determination ceased to have any effect. The court was not persuaded by the pilot's contention that his case fell within the exception to mootness for cases "capable of repetition, yet evading review." The court explained that the pilot failed to show that he would again be subjected to the alleged illegality, specifically, that he was likely to obtain a new private pilot certificate and again be subject to an emergency determination. Further, the court explained that the issue presented—"whether it was arbitrary and capricious for the Administrator to make an emergency determination under the specific factual circumstances of this case"—would not arise again. Finally, the pilot's case did not "evade review" because it was the pilot's own delay that allowed his case to become moot.

3. Standing

In *St. John's United Church of Christ v. FAA*, the D.C. Circuit dismissed the petition of a cemetery owner and two municipalities challenging an FAA grant to the city of Chicago for the expansion of O'Hare International Airport on the grounds that

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1098 Id.
1099 Id. (citing 49 U.S.C. § 44709 (e)(3)).
1100 Id.
1101 Id. at 1296.
1102 Id.
1103 Id.
1104 Id.
1105 Id. (quoting Weinstein v. Bradford, 423 U.S. 147, 149 (1975)).
1106 Id.
1107 Id.
1108 Id. at 1296–97.
the petitioners lacked standing.¹¹⁰⁹ Chicago planned to acquire land in nearby Elk Grove Village and the Village of Bensenville for the expansion.¹¹¹⁰ Bensenville complained that the acquisition would destroy its parkland and affordable housing, and Elk Grove complained that the acquisition would deprive it of tax revenues.¹¹¹¹ In addition, the expansion plans required the relocation of St. Johannes Cemetery, which St. John’s complained would substantially burden religious exercise.¹¹¹² The court determined that all of the petitioners lacked standing because even a favorable ruling for the petitioners would not redress their injuries.¹¹¹³ The court, first focusing on the timing of specific grants related to various parts of the project, noted that “[b]ecause FAA’s $29.3 million grant reimbursed Chicago for completed work that did not affect the petitioners, how the grant causes their injuries is a mystery.”¹¹¹⁴ The court then focused on petitioners’ arguments that all of the grants, including those for portions of the project yet to be completed and totaling $337 million, should be considered.¹¹¹⁵ The court also rejected that argument, finding that the $337 million pledged by the FAA played a “‘minor role’ and Chicago could replace it with other sources of funding.”¹¹¹⁶ For the foregoing reasons the court held that petitioners had not demonstrated “that the $29.3 million grant has caused their injuries,” and dismissed the case for lack of standing.¹¹¹⁷

Conversely, in Town of Winthrop v. FAA, the U.S. First Circuit Court of Appeals held that a municipality located next to an airport did have standing under Article III of the Constitution to petition for review of an FAA final order permitting the construction of a new taxiway at the airport.¹¹¹⁸ The municipality alleged that the FAA acted arbitrarily and capriciously in deciding that it did not need to prepare a supplemental environmental impact statement before issuing a final order permitting the construction of a new taxiway at Boston’s Logan International

¹¹⁰⁹ 520 F.3d 460, 461 (D.C. Cir. 2008).
¹¹¹⁰ Id.
¹¹¹¹ Id.
¹¹¹² Id.
¹¹¹³ Id. at 461–62.
¹¹¹⁴ Id. at 462 (emphasis added).
¹¹¹⁵ See id.
¹¹¹⁶ Id. at 463.
¹¹¹⁷ Id.
¹¹¹⁸ 535 F.3d 1, 7 (1st Cir. 2008).
The municipality claimed that the additional taxiway would lead to greater use of Logan and, therefore, to greater environmental impacts. The court explained that "Article III standing requires an injury-in-fact to a cognizable interest, a causal link between that injury and the respondent's action, and a likelihood that the injury could be redressed by the requested relief." The court then stated that "[t]o establish injury-in-fact in a 'procedural injury' case, like the present one, 'petitioners must show that 'the government act performed without the procedure in question [here, sufficient NEPA review] will cause a distinct risk to a particularized interest of the petitioner.'" The court found that the petitioner had reasonably and adequately alleged that they feared harm-in-fact should the new taxiway construction go forward as approved by the FAA.

4. Federal Taking under Fifth Amendment and Federal Law

In Huntleigh USA Corp. v. United States, the U.S. Court of Appeals for the Federal Circuit affirmed the judgment of the Court of Federal Claims in favor of the United States, dismissing Huntleigh USA Corp.'s (Huntleigh) claims under the Fifth Amendment and Section 101(g)(2) of the Aviation and Transportation Security Act (ATSA) related to the nationalization of passenger and baggage screening in commercial aviation. Huntleigh provided baggage and passenger screening for seventy-five separate air carriers at thirty-five different airports when Congress enacted the ATSA, assigning all airport screening responsibilities to the TSA rather than commercial airlines, "effectively eliminat[ing] the market" for Huntleigh's services. The court, as a threshold matter, concluded that Huntleigh's contracts with commercial air carriers were in fact "cognizable property interests" under the Fifth Amendment. However, the court held there was no "taking" under relevant authority be-

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1119 Id. at 3.
1120 Id.
1121 Id. at 6 (citing Sprint Commc'ns Co. v. APCC Servs., Inc., 128 S. Ct. 2531, 2535–36 (2008); Save Our Heritage, Inc. v. FAA, 269 F.3d 49, 55 (1st Cir. 2001)).
1122 Id. (citing City of Dania Beach v. FAA, 485 F.3d 1181, 1185 (D.C. Cir. 2007)) (quoting Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 663 (D.C. Cir. 1996) (en banc)).
1123 Id. at 7.
1124 525 F.3d 1370, 1373–74 (Fed. Cir. 2008).
1125 Id. at 1374–75.
1126 Id. at 1377–78.
cause Huntleigh’s contracts were merely rendered impossible, not appropriated.\textsuperscript{1127} The court also concluded that no compensation was due under §101(g)(2) of the ATSA, which requires payment of due compensation whenever the TSA, through its responsibilities under the ATSA, assumes a contract to conduct screening services, because the government had not assumed any of Huntleigh’s contracts but merely took over the responsibilities under those contracts directly.\textsuperscript{1128} In reaching this conclusion, the court rejected Huntleigh’s suggested interpretation of §101(g)(2), that compensation was due whenever the government “assumed the functions . . . performed by private parties” pursuant to screening contracts, as rendering §101(g)(2) superfluous, because §101(g)(1) already required the TSA to take over the responsibilities of private entities performing screening services in commercial air travel.\textsuperscript{1129}

X. CHOICE OF LAW

In In re Air Crash at Lexington, Kentucky, August 27, 2006, the district court evaluated the applicability of competing state laws regarding damages and determined that Kentucky law applied to prescribe the forms of damages that might be recovered by plaintiffs.\textsuperscript{1130} Notably, in doing so, the district court applied the choice of law rules of New York in one case,\textsuperscript{1131} and the choice of law rules of Kentucky in the other two cases, even though the plaintiff in one of those cases was a resident of New Mexico.\textsuperscript{1132} The New York choice of law rules were applied in the case involving a New York resident which had originally been filed in federal court in New York based on diversity jurisdiction.\textsuperscript{1133} The Kentucky choice of law rules were applied in the two cases filed in Kentucky—one in state court that was removed to federal court based on supplemental jurisdiction—and the other filed in Kentucky federal court based on diversity jurisdiction.\textsuperscript{1134}

Under the New York “interest analysis” conducted in the case originally filed in New York, the court evaluated the competing

\textsuperscript{1127} Id. at 1378–82.
\textsuperscript{1128} Id. at 1383–84.
\textsuperscript{1129} Id. at 1382–83.
\textsuperscript{1131} Id. at *2.
\textsuperscript{1132} Id. at *2, 6–8.
\textsuperscript{1133} Id. at *2.
\textsuperscript{1134} Id. at *1–2.
interests under rules established in *Neumeier v. Kuehner* (the *Neumeier* rules) and the cases applying those rules.\textsuperscript{1135} Plaintiff argued that even though the *Neumeier* rules normally prescribed the application of the law of the state where the accident occurred if one of the parties is domiciled in that state (under the second *Neumeier* rule), not all of the defendants were domiciled in Kentucky; they all had substantial contacts with New York, and the court should consider the third *Neumeier* rule which allows the law of the situs of the tort to be displaced if it “will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.”\textsuperscript{1136} Nevertheless, the court concluded that the domicile of the Comair defendants in Kentucky dictated the application of the second *Neumeier* rule and the application of Kentucky law for the Comair defendants.\textsuperscript{1137} The court also concluded that all of the claims against Delta derived from its relationship with the Kentucky-domiciled Comair defendants even though Delta was not domiciled in Kentucky; therefore, there was no basis for disregarding the domicile of the Comair defendants to apply a different law as to the damage claims against Delta.\textsuperscript{1138}

The court then applied the Kentucky choice of law analysis to the cases originally filed in Kentucky.\textsuperscript{1139} The Kentucky choice of law rule in tort cases is that Kentucky law should be applied if “Kentucky has enough contacts to justify applying Kentucky law,” even though those interests may not necessarily be the most significant contacts.\textsuperscript{1140} Under that rule, the court concluded that because the accident occurred in Kentucky and the forum was Kentucky, the court “‘should’ apply Kentucky law.”\textsuperscript{1141} Even as to the New Mexico resident, the court concluded that he owned property and operated a business in Kentucky, made intentional decisions to travel to Kentucky, and to associate himself with Kentucky in a significant way, such that the application of Kentucky law was “not merely fortuitous.”\textsuperscript{1142}

\textsuperscript{1135} *Id.* at *3–6* (citing *Neumeier v. Kuehner*, 286 N.E.2d 454 (1972)).

\textsuperscript{1136} *Id.* at *4*.

\textsuperscript{1137} *Id.* at *6*.

\textsuperscript{1138} *Id.*

\textsuperscript{1139} *Id.* at *6–8*.

\textsuperscript{1140} *Id.* at *6*.

\textsuperscript{1141} *Id.* at *7* (quoting *Adam v. J.B. Hunt Transp.*, Inc. 130 F.3d 219, 231 (6th Cir. 1997)).

\textsuperscript{1142} *Id.* at *8*. 
In *Taylor v. Mooney Aircraft Corporation*, the Third Circuit considered an appeal from a Pennsylvania federal district court relating to dismissal of plaintiffs' claims against two manufacturers, Mooney and Honeywell, based upon the application of Georgia law and its ten-year statute of repose.\(^{1143}\) The case arose from an aircraft accident involving two Georgia residents on a flight from Georgia to New York.\(^{1144}\) Due to weather, the flight terminated in Pennsylvania, and upon its resumption back to Georgia, the aircraft crashed in Pennsylvania, due to a mechanical difficulty shortly after takeoff approximately 10 miles from the airport.\(^{1145}\) At the time of the accident, the aircraft was owned by the Georgia resident and based in Georgia.\(^{1146}\) It had originally been designed and manufactured by Mooney in Texas and sold in 1987 to a purchaser in Michigan.\(^{1147}\) The court also noted that "Honeywell is a Delaware Corporation with its principal place of business in New Jersey."\(^{1148}\)

The district court had granted the motion for summary judgment on the grounds that under Pennsylvania's "flexible [choice of law] rule which permits analysis of the policies and interests underlying the particular issue before the court,"\(^{1149}\) only Georgia had an interest in the litigation and that Pennsylvania had no interest in applying its substantive products liability law.\(^{1150}\) The Third Circuit reached the same result; however, it was critical of the district court's analysis for failing to analyze the specific issue to which the choice of law analysis was to be applied.\(^{1151}\) The appellate court focused on the statute of repose, and concluded that an "actual" conflict existed, so it was necessary to examine the governmental policies underlying the law of Georgia and the law of Pennsylvania *as to that issue* in
order to determine whether a "true, false, or unprovided for conflict" existed.\textsuperscript{1152} If one state had no interest in that issue, then there was no true conflict, and the state having the interest in the issue should be applied under the "substantial interest" analysis.\textsuperscript{1153}

The court examined the interest of Georgia in enacting a statute of repose and concluded that because of concerns over national products liability litigation, the State of Georgia had chosen to limit product liability actions to 10 years.\textsuperscript{1154} The court concluded that it was in Georgia's interest to limit such liability "whenever a party to a products liability case is a Georgia resident."\textsuperscript{1155}

On the contrary, Pennsylvania had not enacted a statute of repose.\textsuperscript{1156} The court examined Pennsylvania products liability law and concluded that it was enacted "only to protect 'the consuming public,'" and not the general public.\textsuperscript{1157} Presumably, the court viewed the "consuming public" as consumers within Pennsylvania. The court concluded that "Georgia has a strong interest in applying its statute of repose, while Pennsylvania has no interest that would be impaired if its law were not applied," thus only a false conflict existed.\textsuperscript{1158} Under these circumstances, the court concluded that Georgia statute of repose should be applied to bar plaintiff's claims, and affirmed the summary judgment in favor of Mooney and Honeywell.\textsuperscript{1159}

XI. INSURANCE COVERAGE

A. Aviation Insurance—Coverage

In \textit{Abdel v. North American Insurance Co.}, the district court denied cross-motions for summary judgment for hull and liability coverage on the grounds that there was a genuine issue of material fact regarding statements made by the insurer's representative to the insured student pilot relating to the qualifications of the flight instructor in the insured aircraft.\textsuperscript{1160}

\textsuperscript{1152} \textit{Id.} at 93.
\textsuperscript{1153} \textit{Id.} at 95.
\textsuperscript{1154} \textit{Id.} at 94.
\textsuperscript{1155} \textit{Id.}
\textsuperscript{1156} \textit{Id.} at 95.
\textsuperscript{1157} \textit{Id.}
\textsuperscript{1158} \textit{Id.}
\textsuperscript{1159} \textit{Id.}
\textsuperscript{1160} No. 3:06-1192, 2008 U.S. Dist. LEXIS 6013 at *22 (M.D. Tenn. Jan. 28, 2008).
During the application process, the instructor pilot was referred to in a quote and in the application as a Certified Flight Instructor (CFI) meeting the "Open Pilot Warranty." The court agreed that terms defined in the policy that was ultimately issued would control in the event of any conflict between any prior representations, quotes or statements in the application; however, the term "Open Pilot Warranty" was not defined in the policy or elsewhere. Instead, the quote, application, and policy also referred to requirements for additional pilots to be approved to operate the aircraft. The court held that it could not as a matter of law conclude that the term "Open Pilot Warranty" was the equivalent of the term "Additional Pilots Requirement," particularly since both had been used in the same documents.

The flight instructor operating the aircraft at the time of the accident did not meet the requirements because he was 21 years of age (v. 25 years of age), had logged 567.1 hours (v. 1,000 hours) Pilot in Command (PIC) time, and he had not flown the accident aircraft before, but had flown a similar make aircraft owned by his uncle on occasion and therefore may not have had the required 25 hours in the same make and model as the accident aircraft. The insured student pilot provided deposition testimony that he had asked the insurance representative about the required qualifications of the CFI, and that the insurance representative had told him that most flight instructors would meet the "Open Pilot Warranty" and it would be best not to name a specific flight instructor as an approved pilot because if he changed instructors, more paperwork would be necessary to add a new instructor as an approved pilot. The court held that summary judgment could not be granted to the insurer because there were genuine issues of fact as to what the insured student pilot had been told regarding the requirements of the CFI and the meaning of the phrase "Open Pilot Warranty."

\[1161 \text{Id. at \#2.} \\
1162 \text{Id. at \#14-17.} \\
1163 \text{Id. at \#17-18.} \\
1164 \text{Id. at \#18.} \\
1165 \text{Id. at \#9-10, \#17. The court stated that "at the time of the accident in question, Wilson did not meet the 'Additional Pilot Requirement.'" Id. at \#16.} \\
1166 \text{Id. at \#9-10.} \\
1167 \text{Id. at \#20.} \\
1168 \text{Id. at \#20.} \]
The court also held that genuine issues of material fact precluded summary judgment to the insured student pilot because, while the insured student pilot testified that he had done some pre-flight planning and preparation, he was in the back seat asleep on the accident leg of the flight so there was a question of fact as to whether the flight was a training flight on which the CFI was acting as his instructor.\textsuperscript{1169}

**B. Policy Exclusions**

In *Sugar Financial Group, Inc. v. The Insurance Co. of the State of Pennsylvania*, the U.S. District Court for the Western District of Washington, applying Arizona law, held that the exclusions in the insurance policy issued by AIG Aviation were not ambiguous and that the failure of the pilot to meet the requirements of the pilot endorsement precluded coverage for physical damage to the aircraft.\textsuperscript{1170} The aircraft was a twin-engine Cessna 421 and the pilot endorsement required that the pilot hold a "current and valid FAA Private, Commercial, or ATP pilot certificate rating and endorsements applicable to [the] aircraft, including an instrument rating" and have "1000 total logged hours as pilot-in-command of aircraft . . . [which includes] 50 hours same make and model as [the] aircraft [and] 500 hours multi-engine powered fixed wing aircraft."\textsuperscript{1171} All parties conceded that the pilot did not have an instrument rating and approximately 400 hours total logged time.\textsuperscript{1172} The aircraft crashed in "bad weather, icing, poor visibility, and turbulence."\textsuperscript{1173}

The policy also included the following exclusion:

This insurance does not apply: 1. under any coverage . . . c) when the aircraft is in flight: i) with your knowledge and consent for either an unlawful purpose or for other than the Approved Use; ii) when a special permit or waiver is required by the FAA; iii) if piloted by a person other than: (1) a pilot specified in [the Pilot Endorsement]; (2) a pilot employed by an FAA approved repair station while the aircraft is in their care, custody or control for the purpose of maintenance, repair or test flight.\textsuperscript{1174}

\textsuperscript{1169} *Id.* at *21–22.


\textsuperscript{1171} *Id.* at *3.

\textsuperscript{1172} *Id.* at *5.

\textsuperscript{1173} *Id.*

\textsuperscript{1174} *Id.* at *4.
The insured argued that the failure to include the word "or" or the word "and" in the preceding exclusion rendered it ambiguous and that it should be construed in the manner most favorable to the insured. In other words, the exclusion required that the conditions be read in the conjunctive and that coverage applies unless all of the conditions of the exclusion were met.

The court rejected this argument on the grounds that in determining whether an ambiguity existed, the court must examine "the exclusion in question, the public policy considerations involved and the transaction as a whole." The court concluded that the insured's argument would result in only one super exclusion which the court regarded as "an absurdity." The conditions by their nature were separate and disparate events, which under the insured's interpretation would result in exclusion of coverage only in the event of "a host of wholly unrelated, highly unlikely conditions [that] occurred simultaneously." The court stated that such an interpretation "would not permit AIG to calculate or limit its risk, and the ultimate result of such a reading would be to deprive the public of aircraft insurance entirely."

The court concluded that, notwithstanding the absence of the word "or," the proper interpretation of the exclusion was that it applied in the event of any one of the conditions and since the pilot clearly did not meet the requirements of the pilot endorsement, no coverage applied under the policy for the physical damage to the aircraft.

XII. PRODUCT LIABILITY

A. Successor Liability

In Dalrymple v. Fairchild Aircraft Inc., the federal district court granted summary judgment to defendant Fairchild Aircraft Incorporated (FAI) arising from the crash of a Merlin IVC aircraft manufactured by a predecessor corporation, Swearingen Air-

\[\text{Id. at} \,*7.\]
\[\text{Id. at} \,*8.\]
\[\text{Id. at} \,*9-10 \,(\text{quoting Ohio Cas. v. Henderson, 939 P.2d 1337, 1339 (Ariz. 1997)})\].
\[\text{Id. at} \,*10.\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Id. at} \,*11.\]
craft Corporation (Swearingen). The aircraft, operated by Flightline, Inc., had crashed off the coast of Spain allegedly as a result of a lightning strike that resulted in an electrical failure. Plaintiff's decedent was a passenger aboard the aircraft. Plaintiff alleged that FAI failed to warn of the vulnerability of the Merlin IVC to withstand a power loss due to a lightning strike. An intermediate predecessor, Fairchild Aircraft Corporation (FAC), issued a service bulletin recommending replacement of a diode which might short out due to a lightning strike causing the relay in the main battery bus to become de-energized leading to a loss of electrical power. FAI had delivered a complete set of service bulletins, including the service bulletin at issue, to Flightline in 2001, approximately 9 months before the accident.

The court addressed the issue of FAI's liability under several theories espoused by plaintiff. First, plaintiff relied upon the Federal Aviation Regulations which impose a duty on Type Certificate holders to inform the FAA of dangerous conditions in aircraft manufactured by them. FAI held the Type Certificate for the Merlin IVC originally issued to its predecessor, Swearingen, at the time of the accident, but neither manufactured the aircraft nor "had possession, custody, or control of or performed any maintenance or repair on the Aircraft." The district court emphasized that the language of the regulation, which states that the duty to report applies to aircraft that the Type Certificate holder "manufactured," interpreting it as limiting that duty only to the holder at the time of manufacture and not to any subsequent holder, including the successor corporation in this case.

In addition to a federal regulatory duty, plaintiff also asserted breach of common law duties. Because the accident occurred outside the territorial waters of the United States, the court applied the Death on the High Seas Act (DOHSA).

1183 Id. at 793.
1184 Id.
1185 Id. at 797.
1186 Id. at 793.
1187 Id.
1188 Id. at 796–97.
1189 Id. at 793.
1190 Id. at 796–97.
1191 Id. at 796.
1192 Id. at 795.
Under DOHSA, the court applies federal common law.\textsuperscript{1193} Plaintiffs argued that under federal common law, a manufacturer has a duty to warn.\textsuperscript{1194} The court, however, concluded that even if there was a duty to warn, there was no evidence of a failure to warn because the service bulletin delivered to Flightline warned of the risk to the diode in the event of a lightning strike.\textsuperscript{1195} The court rejected plaintiff's argument that there might be some other unarticulated, let alone demonstrated, vulnerability to electrical failure due to lightning strike.\textsuperscript{1196}

Finally, the court rejected plaintiff's argument that FAI might be liable to plaintiff under a theory that it had undertaken a voluntary duty, which was relied upon, resulting in an increase of the risk to plaintiff's decedent.\textsuperscript{1197} The court concluded that the only evidence was that FAI's undertaking to provide the service bulletin actually made the aircraft safer (based upon the FAA's adoption of the service bulletin in an Airworthiness Directive), not that it increased the risk.\textsuperscript{1198} Moreover, there was no evidence that Flightline ever performed the service bulletin, precluding any contention that, by following and relying upon FAI's recommendation, the aircraft had become more dangerous.\textsuperscript{1199} Accordingly, the district court granted summary judgment to FAI on all of plaintiff's claims.\textsuperscript{1200}

**B. PRODUCT LIABILITY—LIABILITY OF CHART MANUFACTURER**

In \textit{In re Air Crash At Lexington, Kentucky, August 27, 2006}, the court reconsidered the motion of defendant Jeppesen for summary judgment on all claims asserted by the Crew Plaintiffs.\textsuperscript{1201} Jeppesen had published the airport charts carried by the flight crew of Comair flight 5191 which crashed in the darkness on August 27, 2006, in Lexington, KY, following an attempted take off from the incorrect, unlighted runway.\textsuperscript{1202} The taxi to the correct runway required the aircraft to cross the incorrect run-

\textsuperscript{1193} Id. at 796.
\textsuperscript{1194} Id.
\textsuperscript{1195} Id. at 797.
\textsuperscript{1196} Id. at 798.
\textsuperscript{1197} Id. at 799.
\textsuperscript{1198} Id.
\textsuperscript{1199} Id. at 799.
\textsuperscript{1200} Id. at 799.
\textsuperscript{1201} No. 5:06-cv-316-KSF, 2008 U.S. Dist LEXIS 61159, at *10 (E.D. Ky. Aug. 7, 2008). The “Crew Plaintiffs” were the surviving first officer and the survivors and representatives of the deceased captain and flight attendant. Id.
\textsuperscript{1202} Id. at *14.
way, however, the flight crew taxied on to the incorrect runway, which was insufficient in length for take off, resulting in the accident.1203 Additionally, the incorrect runway was not lighted at the time of the take off, while the correct runway was lighted.1204

Prior to the Crew Plaintiffs' motion for reconsideration, the court had granted summary judgment in favor of Jeppesen on all of these claims, but had neither expressly stated that there was "no just reason for delay," nor entered a separate judgment.1205 The Crew Plaintiffs had filed a notice of appeal, and, subsequently, also filed the motion for reconsideration based on a claim of "'newly discovered' evidence."1206 The court ruled that, in the absence of a final judgment, the order was interlocutory; the filing of the notice of appeal did not divest the court of jurisdiction to reconsider its prior order as a motion for leave to alter or amend its prior interlocutory order under Federal Rule of Civil Procedure 59.1207

The Crew Plaintiffs argued that the testimony of Jeppesen's expert that it was "probable" that the flight crew referred to the chart prior to taxi, rebutted the court's basis for summary judgment and created a genuine issue of material fact as to whether the flight crew was misled by the chart during the taxi to the incorrect runway.1208 The court considered the testimony of the expert, but rejected the Crew Plaintiffs' argument that the pre-taxi statement and any reference to the chart was evidence that the chart was used by the captain during the taxi, including a fifty-second hold short before taxiing on to the incorrect runway for takeoff, or that the flight crew was "misled" by the chart in taxiing on to the incorrect runway.1209 The court concluded that the absence of any subsequent reference to the chart during taxi and prior to take off resulted only in speculation as to whether the flight crew ever referred to the chart during the taxi, the hold, or the take off on the incorrect runway, particularly since both crew members had substantial prior experience at the Lexington airport.1210 The court further noted that all parties agreed that the chart accurately depicted the pavement

1203 Id. at *14, *17.
1204 Id. at *14.
1205 Id. at *10.
1206 Id. at *10-11.
1207 Id. at *13.
1208 Id. at *10-11.
1209 Id. at *15-17.
1210 Id. at *15-19.
both at the location of the incorrect runway and leading to the correct runway, and therefore there was no evidence that the flight crew was "misled by the chart." The court noted that Jeppesen's expert had further testified that if the flight crew had been referring to the chart and had seen their position on the field and the route to the correct runway as depicted on the chart, they would have "absolutely crossed" the incorrect runway to get to the correct runway. In granting summary judgment, the court noted that "there are many possible causes for why the pilots did not [taxi to the correct, lighted runway], but the Crew Plaintiffs have not produced any evidence that the Jeppesen chart was a substantial factor in causing the crash," and:

'Where an accident could have resulted for any number of reasons, the plaintiff has failed to establish the necessary proximate cause.' When a party attempts to establish causation by circumstantial evidence, 'the evidence must be sufficient to tilt the balance from possibility to probability.' The Crew Plaintiffs' evidence regarding the Jeppesen chart has never risen to that level.

The court denied the motion to reconsider the grant of summary judgment to Jeppesen on all counts of the Crew plaintiffs complaints.

C. LIABILITY FOR TRAINING

In Glorvigen v. Cirrus Design Corp., the federal district court analyzed plaintiff's claims for alleged deficient training under general negligence principles and held that the voluntary undertaking to provide "transition training" that included use of the autopilot by non-instrument rated pilots created a duty to provide such training. The court held that evidence that this training component was not given to the pilot precluded summary judgment, and that the issue of liability would be decided based upon the "reasonably prudent designer and manufacturer" standard. The court further recognized Minnesota au-

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1211 Id. at *16.
1212 Id. at *17.
1213 Id. at *19.
1214 Id. (citations omitted).
1215 Id.
1217 Id. at *13.
authority that any negligence claim should focus on whether the training was given, and not merely the "general quality of the instructors" or the "nuances of educational processes and theories." The court also denied summary judgment on the manufacturer's defenses that it had contracted out the training to a third-party, and that the third-party was an independent contractor. The court held that the issue of agency was a question of fact that precluded summary judgment. Finally, the district court granted the manufacturer summary judgment on the strict liability and warranty claims, finding that there was no evidence submitted in opposition to the summary judgment motion that would support a claim that the aircraft was unsafe or defective. In In re Cessna 208 Series Aircraft Products Liability Litigation, the federal district court considered FlightSafety's motion for summary judgment relating to claims arising from the crash of a Cessna 208 (Caravan) in icing conditions. Plaintiffs alleged that

1. FlightSafety . . . failed to properly instruct the pilots . . . on how to avoid ice accumulation, the unusual dangers of airframe icing associated with the Cessna Caravan and how to control the Cessna Caravan should ice accumulation occur, . . . [and] failed to exercise reasonable care in performing flight training services;
2. . . . fraudulently failed to disclose information about icing conditions with the Cessna Caravan; and
3. . . . breached express and implied warranties . . . concerning . . . training and safety instructions and the aircraft itself.

The federal district court, applying Texas law, denied the motion for summary judgment as to the claims of "educational malpractice," choosing to follow an earlier ruling by the Texas state court judge prior to removal, denying a prior motion for summary judgment as to these claims. The court observed that there were no Texas cases rejecting claims of "educational malpractice," even though other states had done so in order to avoid attempting to formulate and apply legal standards "by

1218 Id. at *10–11 (citing Alsides v. Brown Inst., Ltd., 592 N.W.2d 468, 473 (Minn. App. 1999)).
1219 Id. at *14.
1220 Id.
1221 Id. at *15–18.
1223 Id. at 1157.
1224 Id. at 1158.
which to evaluate an educator,” the “inherent uncertainties about causation and the nature of damages in light of such intervening factors as a student’s attitude, motivation, temperament, past experience, and home environment, and in order to avoid embroiling courts “into overseeing day-to-day operation of schools” and a potential for a flood of litigation. The court also examined two subsequent decisions granting summary judgment to FlightSafety on such claims. Nevertheless, the court followed Doe v. Yale University, which recognized claims for breach of a common law duty not to cause physical injury by negligent conduct during a course of instruction, and the dissent in Page v. Klein Tools, Inc., involving allegations that a utility pole climbing school had taught an improper technique for using pole climbing equipment resulting in a subsequent sixty foot fall. The court also distinguished claims for specific promises and claims that did not “involve an inquiry into the nuances of educational processes and theories.” Based upon those authorities, the district court concluded that the state trial court judge’s earlier ruling was a reasonable application of Texas law and denied FlightSafety’s motion for summary judgment.

The district also denied FlightSafety’s motion for summary judgment based on federal preemption. The court declined to find preemption in the field of aviation safety, in part because the FAA had taken no position that its regulations preempted state law in this field. The court then considered the possibility of conflict preemption, but concluded that FlightSafety had not shown that it would have been impossible to provide the instruction at issue and also comply with FAA regula-

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1225 Id.
1227 Id. at 1159 (discussing Doe v. Yale Univ., 748 A.2d 834, 839 (Conn. 2000)).
1228 Id. (discussing Page v. Klein Tools, Inc., 610 N.W.2d 900 (Mich. 2000)).
1229 Id. (discussing Alsides v. Brown Inst., Ltd., 592 N.W.2d 468, 473 (Minn. App. 1999), which, despite dismissing claims based on the general quality of education and competence of professors, nevertheless “recognized that . . . claims for breach of contract, fraud or misrepresentation are cognizable to the extent that they allege that the institution failed to perform on specific promises and such claims would not involve an inquiry into the nuances of educational processes and theories.”). Id.
1230 Id.
1231 Id. at 1161.
1232 Id. at 1161 n.3.
The court also considered plaintiffs' implied and express warranty claims. The district court held that there was no sale of goods or other relationship to the "repair or modification of existing tangible goods or property" to support the application of the implied warranty of good and workmanlike performance. Nevertheless, the district court denied the motion for summary judgment as to the express warranty claims on the grounds that the summary judgment motion had been based upon federal preemption, and the district court held that there was no federal preemption of an express warranty claim for the same reasons that it had found no federal preemption for the "educational malpractice" claims.

XIII. FEDERAL AVIATION ADMINISTRATION LITIGATION

A. AIRPORT FUNDING AND EQUAL ACCESS TO AIRPORTS

In R/T 182, LLC v. FAA, the Sixth Circuit affirmed an FAA order, holding that a based-user fee did not unjustly discriminate against aircraft based at the Portage County Airport, Ravenna, Ohio. The Sixth Circuit concluded that the order was supported by substantial evidence and was not a "rule" requiring notice and comment. The plaintiff, R/T 182, brought an action under 49 U.S.C. § 47107(a) challenging a fee charged to...
airport-based users depending upon weight of the aircraft and frequency of use as "unjust discrimination" on the ground that the fee was not charged to transient users.\textsuperscript{1241} The FAA concluded that the fee was not "unjust" because the process of billing and collecting the fees from transient users could cost more than the fees generated in revenue and because transient users have no business relationship with the airport.\textsuperscript{1242} The Sixth Circuit also rejected the plaintiff's argument that the order was, in essence, a "rule" that required notice and comment, noting that the entire process, from the filing of the complaint to the appeal, was adjudicatory in nature.\textsuperscript{1243}

In \textit{BMI Salvage Corp. v FAA}, the Eleventh Circuit reversed and remanded an order of the Federal Aviation Administrator dismissing the complaint of BMI Salvage Corp. (BMI) and its affiliate Blueside Services, Inc. (Blueside) against Miami-Dade County, Florida.\textsuperscript{1244} The complaint had alleged that the airport operator had engaged in unjust discrimination in violation of 49 U.S.C. § 47107 and Federal Grant Assurance 22(a) (implementing 49 U.S.C. § 47107).\textsuperscript{1245} Specifically, BMI, a company engaged in the business of deconstructing aircraft, and Blueside, an affiliate of BMI formed for the purpose of obtaining a long-term lease in order to become a fixed-base operator, alleged that the airport operator granted long-term leases and leases to occupy and/or construct facilities to certain tenants but not BMI and Blueside.\textsuperscript{1246} The Federal Aviation Administrator dismissed the complaint on the grounds that the tenants who received the more favorable leases were not similarly situated to BMI and Blueside.\textsuperscript{1247} Among the reasons cited by the Administrator for concluding that the tenants were not similarly situated: one comparator tenant was a repair service, whereas BMI was a demolition service, and another comparator tenant, a fixed-base operator, was an established business, whereas Blueside was a start-up.\textsuperscript{1248} The Eleventh Circuit held that these differences were per se insufficient to justify the difference in treatment and remanded the case to permit the airport operator

\textsuperscript{1241} Id. at 308.
\textsuperscript{1242} Id.
\textsuperscript{1243} Id. at 310.
\textsuperscript{1244} 272 F. App'x. 842, 843 (11th Cir. 2008).
\textsuperscript{1245} Id. at 844.
\textsuperscript{1246} Id. at 845.
\textsuperscript{1247} Id.
\textsuperscript{1248} Id. at 848.
to present legally and factually sufficient justifications for the difference in treatment.\textsuperscript{1249}

\textbf{B. Federal Aviation Administration Enforcement Actions}

In \textit{Nadal v. FAA}, the Tenth Circuit affirmed an NTSB order affirming a sixty-day suspension for a runway incursion.\textsuperscript{1250} The petitioner raised numerous evidentiary objections to admissibility of documents, presence of expert witnesses in the proceedings, admission of hearsay evidence, and the completeness of hypothetical questions to expert witnesses.\textsuperscript{1251} The Tenth Circuit reviewed the order only to determine whether the rulings were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."\textsuperscript{1252} The court held that each of these decisions was correct, that the evidence was admissible in administrative proceedings, and that any error was harmless because none of the evidence contravened the evidence that the runway incursion had occurred and petitioner had not testified that he was confused by any markings or lighting regarding the "hold short" line and, therefore, evidence of other similar runway incursions was irrelevant to show the confusing character of the runway intersection.\textsuperscript{1253} The court also affirmed the NTSB decision not to accept a late request for reconsideration on the grounds that such a request is addressed to the discretion of the agency, and that there was no abuse of discretion in refusing to accept the late request for reconsideration.\textsuperscript{1254} Finally, petitioner raised "ineffective assistance of counsel" as a defense and the Tenth Circuit affirmed that the only context in which that defense is available in civil litigation is in immigration cases and refused to extend the defense to FAA certification proceedings.\textsuperscript{1255}

In \textit{Gabbard v. FAA}, the Sixth Circuit affirmed an NTSB order affirming a revocation of a pilot's certificates on the grounds that the pilot had knowingly operated an aircraft while having a prohibited drug (cocaine) in his system.\textsuperscript{1256} The pilot was given a random drug test by his employer and approximately twenty-

\textsuperscript{1249} \textit{Id.} at 852–53.
\textsuperscript{1250} 281 F. App'x. 814, 818 (10th Cir. 2008).
\textsuperscript{1251} \textit{Id.} at 816–17.
\textsuperscript{1252} \textit{Id.}
\textsuperscript{1253} \textit{Id.} at 816–17.
\textsuperscript{1254} \textit{Id.} at 817.
\textsuperscript{1255} \textit{Id.} 817–18.
\textsuperscript{1256} 532 F.3d 563, 564 (6th Cir. 2008).
four hours later, the pilot operated a charter jet aircraft. The results of the drug test came back positive and the FAA issued the emergency revocation order.

The pilot argued on appeal that the ingestion of the cocaine had been inadvertent because someone gave him a cocaine-laced cigarette the evening before the drug test (approximately forty-four hours before the charter flight), which he put down after realizing that it contained cocaine. The pilot argued that the FAA presented no expert testimony that the cocaine had not metabolized and was present in his system at the time of the flight. The pilot also argued that the inadvertent use of the drug was a defense to the positive drug test and the revocation of his medical certificate.

The Tenth Circuit, while critical of the FAA for emphasizing the dangers of aircraft operation with drugs in the pilot’s system and then not presenting any expert testimony to prove that the drugs remained at the time of the flight, found that the NTSB had not abused its discretion in finding that the drug was present because the laboratory report, to which petitioner had not objected, contained the statement that it may take up to forty-eight hours for the drugs to fully metabolize. The court also was critical of the petitioner’s failure to present any expert testimony of his own on this issue.

As to the inadvertent ingestion, the court noted that such subjective explanations are not considered “legitimate medical explanation[s]” such that a drug test result should be changed from positive to negative. The pilot also sought to appeal to basic “principles of justice” that would preclude a “professional death penalty” for inadvertent cocaine use by noting that the petitioner had given other conflicting versions of the cocaine use, including the possibility that it was from plastic surgery or from being around others smoking cocaine, and, more importantly, the petitioner knew that he had ingested cocaine, but chose not to report it to his employer and pilot the charter

1257 Id.
1258 Id.
1259 Id. at 565–66.
1260 Id. at 565.
1261 Id. at 566.
1262 Id. at 565–66.
1263 Id. at 565.
1264 Id. at 566.
flight. Additionally, when asked about the use, the petitioner had intentionally misrepresented the potential source of the cocaine metabolites in his system. Finally, as in Nadal, the pilot made an ineffective assistance of counsel argument, which the Sixth Circuit, like the Tenth Circuit in Nadal, refused to extend to civil proceedings such as FAA administrative actions.

XIV. EVIDENCE AND DISCOVERY

In In re Air Crash at Lexington, Kentucky, August 27, 2006, the federal magistrate rejected the arguments of the air carrier, FAA, Airline Pilots Association (ALPA), and Regional Airline Association, that safety reports submitted voluntarily by airline pilots to the air carrier and the FAA under the Aviation Safety Action Program (ASAP) were privileged and should not be produced in discovery pursuant to a protective order prohibiting public disclosure or use of the documents produced for any purpose other than the litigation. The magistrate concluded that the FAA regulations under which ASAP was established only provided protection against “public disclosure,” certain uses in FAA enforcement actions, and action against the pilots by the employer. However, the regulations expressly recognized that the reports may be produced pursuant to an appropriate court order. The magistrate also rejected arguments that the reports should be privileged pursuant to ICAO guidelines to member states that urge protection for safety reporting safety information, or under federal or state common law privileges, including the self-critical analysis privilege.

The magistrate generally adopted the U.S. Supreme Court’s approach in University of Pennsylvania v. EEOC, rejecting a common law privilege for certain “peer review” reports in cases

\[\text{Id. at 566–67} (noting that "[petitioner] may have smoked crack cocaine inadvertently, but he did not fly the jet inadvertently or do so without the knowledge that he had recently smoked crack cocaine."). Id. at 567.\]

\[\text{Id. at 566–67} (noting "[n]or did he inadvertently misrepresent to the medical review officer the potential source of the cocaine metabolites found in his system."). Id. at 567.\]


\[\text{Id. at *44–46.}\]

\[\text{Id. at *44.}\]

\[\text{Id. at *43.}\]

\[\text{Id. at *47–52.}\]

\[\text{Id. at *45 (citing Univ. of Pa. v. EEOC, 493 U.S. 182, 198 (1990)).}\]
in which it appeared that Congress or federal regulators, such as the FAA, apparently had already balanced the competing concerns associated with the applicability of a privilege to such reports or could have provided a privilege for such reports.\textsuperscript{1274} The magistrate also concluded that the qualified judicial privilege recognized in \textit{In re Air Crash Near Cali, Colombia on December 20, 1995}, had not been followed by subsequent courts and was not applicable in this case.\textsuperscript{1275}

The magistrate also rejected a state law privilege for self-critical analysis on the grounds that the Kentucky Supreme Court had previously declined to adopt a judicial privilege for self-critical analysis, and that even if the privilege were recognized, the disclosure of such reports to a third-party, the FAA, would preclude the application of the privilege in this case.\textsuperscript{1276}

Finally, the magistrate concluded that the plaintiffs had demonstrated substantial need for the reports to examine air carrier employees and otherwise provide evidence relating to plaintiffs' claims for punitive damages.\textsuperscript{1277}

Subsequently, the U.S. District Court for the Eastern District of Kentucky in \textit{In re Air Crash at Lexington, Kentucky, August 27, 2006}, also overruled the carrier's objections and adopted the magistrate's order.\textsuperscript{1278} The objections were supported by Southwest Airlines and by the Air Transport Association as amici.\textsuperscript{1279} The district court considered the carrier's argument that the magistrate had failed to consider the effect of disclosure on the ASAP reporting program, but rejected those arguments because disclosure in litigation was not the equivalent of "public" disclosure with which the drafters of the statute were concerned.\textsuperscript{1280} The submission of such information to the FAA (and any limitations on the FAA's disclosure) did not make the underlying reports in the hands of the carrier privileged,\textsuperscript{1281} and the statute

\begin{itemize}
  \item \textsuperscript{1274} \textit{Id.} at *40–41 (citing 49 U.S.C. \S 1154 (2000 & Supp. V 2006), which prohibits discovery of cockpit voice recorder transcripts not made available to the public by the NTSB, and noting that Congress had expressly precluded discovery of cockpit voice recordings except under certain prescribed conditions, including previous public disclosure or necessity for a party to receive a fair trial.).
  \item \textsuperscript{1275} \textit{Id.} at 47 (citing \textit{In re Air Crash Near Cali, Colombia on Dec. 20, 1995}, 959 F. Supp. 1529 (S.D. Fla. 1997)).
  \item \textsuperscript{1276} \textit{Id.} at *51–52.
  \item \textsuperscript{1277} \textit{Id.} at *52–53.
  \item \textsuperscript{1278} 545 F. Supp. 2d 618, 624 (E.D. Ky. 2008).
  \item \textsuperscript{1279} \textit{Id.} at 619.
  \item \textsuperscript{1280} \textit{Id.} at 621.
  \item \textsuperscript{1281} \textit{Id.}.
\end{itemize}
itself, the legislative history and the regulations specifically referred to disclosure pursuant to a court order, including disclosure "in litigation between an air carrier and an individual who alleges he was harmed by the air carrier’s negligence."\textsuperscript{1282} According to the district court, this regulatory history demonstrated that "the FAA expressly contemplated that there could be disclosure [of ASAP reports] . . . in carrier negligence cases."\textsuperscript{1283} The district court also overruled a request for in camera review of the reports prior to the issuance of a court order to determine materiality, noting that the statute did not impose any such restriction on "court orders" and that the discovery request was specifically limited to "reports that are particularly relevant to [plaintiffs’] claims."\textsuperscript{1284}

The district court also affirmed the ruling that the reports were not protected by a common law privilege, on the grounds that Congress had specifically permitted disclosure pursuant to a "court order," and that such a provision indicated "that Congress ha[d] considered the relevant competing concerns but has not provided the privilege itself" and therefore the court was reluctant to recognize a common law privilege.\textsuperscript{1285} Additionally, the court held that the privilege for critical self-evaluation was not applicable because the information was not limited to "in house" review and the federal provision for disclosure pursuant to a "court order" demonstrated that "the FAA itself does not hold ASAP information in strict confidence."\textsuperscript{1286} The court also agreed with the magistrate that the federal provision allowing for disclosure pursuant to a "court order" precluded the application of a state law privilege for the reports and information.\textsuperscript{1287}

Finally, the court noted that at least one deponent had remembered several incidents "involving a runway incursion and wrong runway events," but had been unable to remember the details.\textsuperscript{1288} The district court concluded that "[w]hen relevant, contemporaneous records are available, . . . ‘[t]he allowance of the privilege to withhold evidence that is demonstrably

\textsuperscript{1282} Id. at 621–22 (quoting 66 Fed. Reg. 33,797 setting forth the FAA's position relating its proposal to enact 14 C.F.R. § 193.7(f)).
\textsuperscript{1283} Id. at 622.
\textsuperscript{1284} Id.
\textsuperscript{1285} Id. at 623 (quoting magistrate's order).
\textsuperscript{1286} Id. at 623–24 (quoting In re Air Crash at Belle Harbor, New York, 02 MDL 1448, at 16 (S.D.N.Y. Aug. 14, 2007) (order requiring "disclosure of specific ASAP reports".).
\textsuperscript{1287} Id. at 624.
\textsuperscript{1288} Id.
relevant...would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts.”

In In re Air Crash at Lexington, Kentucky, August 27, 2006, the district court held that cockpit voice recorder (CVR) audio tape recordings were admissible.1290 The air carrier had moved to exclude the use of the audio tape recordings at trial under Federal Rules of Evidence 402 and 403.1291 The district court first noted that the Sixth Circuit encouraged the admissibility of relevant evidence so as not to “deprive plaintiffs of their legitimate right to place before the jury the circumstances and atmosphere of the entire cause of action which they have brought into the court, replacing it with a sterile or laboratory atmosphere . . . .”1292 The district court also noted that “Rule 403 does not exclude evidence because it is strongly persuasive or compellingly relevant. . . . The truth may hurt, but Rule 403 does not make it inadmissible on that account.”1293

The United States opposed the air carrier’s motion to exclude the audio tapes, and claimed that it was necessary to “allow[ ] the jury to hear the pitch and inflection of the pilots’ conversation and other sounds revealing a crew inattentive to the task of piloting a commercial airliner.”1294 The United States argued that the audio tapes were prejudicial precisely because they were material, and that the air carrier had “failed to carry its burden to show any prejudice [was] unfair and substantially outweigh[ed] the probative value of the evidence.”1295 Finally, the United States had no objections “to reasonable restrictions on the use of the CVR tape so as to prevent its use ‘for purposes other than for the proceeding.’”1296 In addition, plaintiffs argued that the jury should be allowed to hear the audio tape in open court in order to support “their burden of proof for punitive damages.”1297 The district court concluded that “the tone of voice, pitch, and inflection of the pilots statements . . . are completely absent from [the] printed page” of the transcript, and

1289 Id. (quoting United States v. Nixon, 418 U.S. 683, 712 (1974)).
1291 Id. at *5.
1292 Id. at *4 (quoting In re Beverly Hills Fire Litigation, 695 F.2d 207,217 (6th Cir. 1982)).
1293 Id. at *4–5 (quoting In re Air Crash Disaster, 86 F.3d 498 (6th Cir. 1996)).
1294 Id. at *6.
1295 Id. at *7.
1296 Id.
1297 Id.
that "[p]laintiffs need the audio recording to prosecute their claims and meet their heightened burden to prove gross negligence." 1298

In In re Air Crash At Lexington, Kentucky, August 27, 2006, the court held that various safety recommendations issued by the NTSB were inadmissible based on 49 U.S.C. § 1154(b). 1299 The court analyzed the interplay between section 1145(b) and the NTSB's own regulations set forth in 49 C.F.R. § 835.2 (which divide NTSB reports into two groups: factual reports and analytical reports containing the Board's determinations and conclusions as to probable cause). 1300 Pursuant to its regulations, the NTSB does not oppose the use of factual reports in evidence, while it opposes the use of reports containing the Board's conclusions and determinations. 1301 The United States filed a motion in limine to exclude the safety recommendations, and the passenger plaintiffs argued that the Board's own regulations did not specifically mention safety recommendations and include a probable cause determination, the recommendations do not usurp the function of the jury and should be admissible. 1302 The court concluded that the issue was essentially a matter of statutory construction and that the agency's interpretation of its own regulations, while not controlling in this case because Congress had not explicitly granted the NTSB rule-making authority in this area, were "entitled to some deference and is persuasive." 1303

The issue was whether safety recommendations were admissible factual reports or conclusions and determinations of the Board precluded under the statute. In one prior decision, it had been held that safety recommendations were conclusions and determinations of the Board. 1304 Moreover, in this case, the United States submitted an opinion letter from the general counsel of the NTSB stating that the Board "opposes any use of NTSB safety recommendations in civil actions for damages. It has been the NTSB's long-standing position that safety recom-

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1298 Id. at *8.
1300 Id. at *18–19.
1301 Id. at *19.
1302 Id. at *20–21.
1303 Id. at *21, *28.
1304 Id. at *26–27 (citing In re Jacoby Airplane Crash Litigation, No. 99-6073 (HAA) (D.N.J. Sept. 19, 2007)).
mendations are covered by the statutory prohibition against the use or admission of NTSB reports.\textsuperscript{1305}

The court concluded that, while the NTSB’s regulation did not refer to safety recommendations, the Board’s policy was entitled to deference and was persuasive.\textsuperscript{1306} Additionally, the court concluded that the language of the statute “reflects an intent to encompass within the statute more than just the probable cause determination. The statute precludes admission of any ‘part of a report of the Board, related to an accident or the investigation of an accident.’”\textsuperscript{1307} The safety recommendations “arose out of and are related to the investigation of one or more accidents.”\textsuperscript{1308} Additionally, the statutory restrictions on testimony of NTSB investigators reflected “Congress’ ‘strong * * * desire to keep the Board free of the entanglement of such suits.’”\textsuperscript{1309} The court concluded that admitting such recommendations “would surely ‘exert an undue influence on litigation,’” and that the court, as had prior courts, saw “little difference between introduction of safety recommendations or probable cause reports.”\textsuperscript{1310} Based on this analysis, the court concluded that “safety recommendations of the NTSB are encompassed within the meaning of “a report of the Board, related to an accident or an investigation of an accident” and are therefore inadmissible under 49 U.S.C. § 1154(b).\textsuperscript{1311}

In \textit{In re Air Crash At Lexington, Kentucky, August 27, 2006}, the court considered a motion to strike all or portions of the testimony and exhibits from a deposition taken by plaintiffs of a Comair captain who was also a member of the Air Line Pilots Association’s Central Air Safety Committee.\textsuperscript{1312} The witness testified during deposition to certain communications he had made to Comair, prior to the crash, regarding “sterile cockpit violations and runway incursions.”\textsuperscript{1313} The witness had not been designated as an expert witness and his deposition testimony was taken after the deadline for identifying expert witnesses.\textsuperscript{1314}

\textsuperscript{1305} \textit{Id.} at *19.
\textsuperscript{1306} \textit{Id.} at *28–29.
\textsuperscript{1307} \textit{Id.} at *29.
\textsuperscript{1308} \textit{Id.}
\textsuperscript{1309} \textit{Id.}
\textsuperscript{1310} \textit{Id.} at *30.
\textsuperscript{1311} \textit{Id.}
\textsuperscript{1312} No. 5:06-cv-KSF, 2008 U.S. Dist LEXIS 58482, at *1–2 (E.D. Ky. July 31, 2008).
\textsuperscript{1313} \textit{Id.} at *2–3.
\textsuperscript{1314} \textit{Id.} at *7.
Comair objected to the use of the testimony at trial on the grounds that the witness (1) was not designated as an expert witness; (2) lacked personal knowledge on a number of matters; (3) testified regarding subsequent remedial measures; (4) testified regarding Comair's submission to the NTSB; (5) testified regarding "hearsay and hearsay within hearsay;" and (6) gave testimony that may be given "preemptive weight and thereby cause . . . extreme prejudice at trial."\textsuperscript{1315}

The court initially ordered that in view of the credibility of the witness on "such a critical issue," "his testimony at trial must be live and in person," and his deposition used only in keeping with the "rules relating to any live witness; for example, for purposes of impeachment."\textsuperscript{1316} The court then excluded any opinions requiring "technical or other specialized knowledge," as permitted under Federal Rule of Evidence 702 because the witness had not been designated as an expert witness before the deadline.\textsuperscript{1317} The court ruled that, as a lay witness who may provide opinions under Federal Rule of Evidence 701, those opinions could not "apply knowledge and familiarity . . . beyond that of the average lay person," and cautioned Plaintiffs that his testimony must satisfy the requirements of Federal Rule of Evidence 701.\textsuperscript{1318} The court reserved ruling on all other objections until trial, but noted plaintiffs' arguments that the testimony as to recommendations to Comair might be admissible for various reasons, including notice, impeachment, feasibility, and rebuttal of Comair's expected testimony regarding a "high commitment to flight safety and to correct factual inaccuracies in Comair's submission to the NTSB."\textsuperscript{1319} The court also noted Comair's argument that testimony regarding proposed safety measures which Comair considered after the crash would violate the prohibition against evidence of subsequent remedial measures under Federal Rule of Evidence 407.\textsuperscript{1320}

\section*{XV. CRIMINAL LAW}

In \textit{United States v. Murphy}, the court held that expert testimony regarding the defendant's post-traumatic stress disorder or

\textsuperscript{1315} Id. at *3--*4.
\textsuperscript{1316} Id. at *7.
\textsuperscript{1317} Id.
\textsuperscript{1318} Id. at *7--8 (quoting United States v. White, 492 F.3d 380, 403 (6th Cir. 2007)).
\textsuperscript{1319} Id. at *5--6, *8.
\textsuperscript{1320} Id. at *3--4, *8.
other mental disease was inadmissible for the purpose of negating the defendant's mens rea or the voluntariness of the defendant's actions because the crime with which he was charged was a general intent, as opposed to a specific intent, crime.\textsuperscript{1321} "On March 15, 2007, [the defendant] boarded a plane in New York bound for Los Angeles.\textsuperscript{1322} [D]uring the flight, [the defendant] allegedly acted in an irrational, agitated, and aggressive manner."\textsuperscript{1323} The defendant was indicted on "one count of intimidating two flight attendants and thereby interfering with and lessening their ability to perform their duties, in violation of 49 U.S.C. \$ 46504."\textsuperscript{1324} The defendant sought to introduce expert testimony that he had severe post-traumatic stress disorder (PTSD) and that when he was in a PTSD-induced dissociative state, he lost "rational and voluntary control of his behavior."\textsuperscript{1325} The proffered testimony would have further established that he was in such a state during the March 15, 2007, flight and, therefore, the defendant would have lacked the mental capacity to commit the crime in question, namely the "intimidation of a flight attendant."\textsuperscript{1326} Further, the defendant asserted that the testimony would have established that "his actions were involuntary or automatic."\textsuperscript{1327}

The court explained that evidence of diminished mental capacity is admissible under only two conditions: (1) "such evidence may negate the \textit{mens rea} of a 'specific intent' crime;" and (2) the "expert testimony is limited to a diagnosis, the facts upon which the diagnosis is based, and the characteristics of any mental disease or defect from which a defendant suffered during the relevant time period."\textsuperscript{1328} The court did not address the second condition, finding that the crime charged was a general intent crime because it did "not require knowledge or appreciation of the wrongfulness of the act" but merely required that the act was done "voluntarily and intentionally, and not because of mistake or accident."\textsuperscript{1329} The court noted particularly that the statutory language defining the offense of interference made no

\begin{thebibliography}{9}
\bibitem{1321} 556 F. Supp. 2d 1232, 1237 (D. Colo. 2008).
\bibitem{1322}  Id. at 1234.
\bibitem{1323}  Id.
\bibitem{1324}  Id.
\bibitem{1325}  Id. at 1235.
\bibitem{1326}  Id.
\bibitem{1327}  Id.
\bibitem{1328}  Id. (citing United States v. Jackson, 8 F. Supp. 2d 1239, 1241 (D. Colo. 1998)).
\bibitem{1329}  Id. (citing United States v. Blair, 54 F.3d 639, 642 (10th Cir. 1995)).
\end{thebibliography}
mention of a specific intent, stating, "[i]f Congress had intended the statute to require specific intent to interfere with the performance of the duties of a flight crew, 'the statute would have said "with the intent" to interfere.' In the absence of an explicit statement that a crime requires specific intent," the court noted that it was bound to assume the statute required only general intent.

The court similarly found that the offense of intimidation did not require a specific intent to intimidate. The court explained that "[i]t is common knowledge that a person may intimidate another without intentionally making a direct or even veiled threat." Thus, even though the defendant may not have intended to injure or frighten anyone on board, the offense of intimidation could be proven by showing that the defendant's conduct and words "would place an ordinary, reasonable person in fear." If the defendant's actions created a reasonable apprehension of bodily harm among the flight attendants, it was irrelevant whether the defendant specifically intended to intimidate them.

Finally, the court held that where expert testimony was expressly excluded as to general intent crimes, the same expert testimony could not be admitted on the issue of "voluntariness." The court stated that the likelihood that such testimony would confuse the jury as to the issues of general intent outweighed the probative value of such testimony on the issue of "voluntariness," and that, while due process "prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the..."

\[\text{1330 Id. (quoting 49 U.S.C. § 46504 (2000 & Supp. V 2006), which states, in pertinent part: An individual . . . who, by assaulting or intimidating a flight crew member or flight attendant of the aircraft, interferes with the performance of the duties of the member or attendant or lessens the ability of the member or attendant to perform those duties, or attempts or conspires to do such an act, shall be fined under title 18, imprisoned for not more than 20 years, or both.).} \]

\[\text{Id. (quoting United States v. Grossman, 131 F.3d 1449, 1451 (11th Cir. 1997)).} \]

\[\text{1331 Id. (quoting United States v. Lewis, 780 F.2d 1140, 1142-43 (4th Cir. 1984)).} \]

\[\text{1332 Id. at 1237.} \]

\[\text{1333 Id. at 1236.} \]

\[\text{1334 Id. at 1236-37.} \]

\[\text{1335 Id.} \]

\[\text{1336 Id.} \]

\[\text{1337 Id. at 1237.} \]
ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.\textsuperscript{1338}

XVI. LABOR AND EMPLOYMENT

A. AGE DISCRIMINATION

In \textit{Equal Employment Opportunity Commission v. Exxon Mobile Corp.}, the District Court for the Northern District of Texas denied the Equal Employment Opportunity Commission’s (EEOC) motion for a temporary restraining order and preliminary injunction against defendant Exxon Mobile Corporation in an action under the Age Discrimination in Employment Act (ADEA) brought by the EEOC on behalf of several pilots who were retired on their sixtieth\textsuperscript{1339} birthday under Exxon’s corporate mandatory retirement policy.\textsuperscript{1340} The district court held that Exxon demonstrated a likelihood of success on its defense that age was a “bona fide occupational qualification” (BFOQ), which is a statutory affirmative defense to the ADEA.\textsuperscript{1341} The district court concluded that the FAA’s mandatory retirement age, upon which the Exxon corporate policy was modeled, was highly probative of Exxon’s BFOQ defense because of the “congruence” between the work performed by commercial airline pilots and the work performed by Exxon pilots.\textsuperscript{1342}

In \textit{Miller v. American Airlines, Inc.}, the Seventh Circuit affirmed the district court’s summary judgment on the plaintiffs’ complaint alleging that American Airlines’ mandatory retirement policy under the ADEA was both discriminatory in application and on its face.\textsuperscript{1343} The plaintiffs were flight engineers and the terms and conditions of plaintiffs’ employment were governed by a collective bargaining agreement (CBA) and its supplement (Supplement U), which provided that a flight engineer’s salary

\begin{footnotesize}
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\item \textsuperscript{1338} \textit{Id.} (citing Clark v. Arizona, 548 U.S. 735, (2006)).
\item \textsuperscript{1339} The FTEPA was passed subsequent to the filing of the lawsuit. However, the district court concluded that its analysis was unaffected by the raising of the mandatory retirement age to sixty-five. Subsequent to the passage of the FTEPA, Exxon also raised its mandatory retirement age to sixty-five.
\item \textsuperscript{1340} No. 3:06-cv-1732-Ky, 2007 U.S. Dist. LEXIS 39071, at *27 (N.D. Tex. Apr. 28, 2008).
\item \textsuperscript{1341} \textit{Id.} at *25.
\item \textsuperscript{1342} \textit{Id.}
\item \textsuperscript{1343} 525 F.3d 520, 521–22 (7th Cir. 2008).
\end{itemize}
\end{footnotesize}
would be guaranteed "until his normal flight engineer retirement date," which was the pilots' 65th birthday. The district court ordered a stay of the action pending arbitration under the Railway Labor Act (RLA), after concluding "that the plaintiffs' claims involved a minor dispute over the terms in a [CBA]." After arbitration, the district court deferred to the arbitrator's decision that the CBA did not guarantee flight engineers comparable pay beyond the normal retirement age of sixty-five. The Seventh Circuit affirmed the district court's holding, noting that only arbitral boards under the RLA have the authority to interpret CBAs. As for the allegation that Supplement U was discriminatory on its face, the Seventh Circuit concluded that this argument was not properly before the court because it was not included in plaintiffs' EEOC charge. It merely alleged that plaintiffs suffered discrimination when they were not offered positions with a comparable salary after retirement age, which the Seventh Circuit considered to be a much narrower charge than the allegation that the policy was discriminatory on its face.

In Vaughn v. Air Line Pilots Ass'n, International, the district court dismissed the claims of current and former pilots of US Airways who had either reached or were close to their mandatory retirement age against ALPA and RSA, an equity sponsor of US Airways during one of two bankruptcies. The claims were related to the termination of the pilots' original pension plan and the creation of two successor retirement plans, which were increasingly less favorable than the original pension plan to pilots who were close to retirement age. The original plan was a defined benefits plan (DB Plan). The DB Plan was replaced by a defined contribution plan (DC Plan I), which required the airline to make contributions to the plan

\[1344\] Id. at 522.
\[1345\] Id. at 522-23.
\[1346\] Id. at 523.
\[1347\] Id. at 524. The Seventh Circuit noted that its holding did not mean that employees are always precluded from bringing an ADEA claim in federal court if the dispute involves a collective bargaining agreement; however, if the success of the claim is dependent upon the interpretation of a collective bargaining agreement, the court could not consider it. Id.
\[1348\] Id. at 525-26.
\[1349\] Id. at 527.
\[1350\] 395 B.R. 520, 528 (E.D.N.Y. 2008).
\[1351\] Id. at 533.
\[1352\] Id. at 529.
based upon each pilot's contribution rate, up to 100% of the pilot's salary, with each pilot's contribution determined by a formula designed to help the pilot achieve a certain target upon retirement.\footnote{Id. at 533.} Under this plan, the airline was required to make higher contributions for pilots who were close to retirement age.\footnote{Id.} DC Plan I was later replaced by DC Plan II, which required the airline to make contributions to each pilot's individual account at 10% of the pilot's salary.\footnote{Id. at 553.}

The pilots sued ALPA for breach of the duty of fair representation, for age discrimination under sections 623(c) and (i) of ADEA, and for racketeering under RICO, 18 U.S.C. § 1962.\footnote{Id. at 541.} The district court dismissed all of plaintiffs' claims and denied leave to amend.\footnote{Id. at 541.} The district court dismissed plaintiffs' duty-of-fair-representation claims on the grounds that ALPA's conduct was not without rational basis or explanation; ALPA was under no obligation to accede to its members' preferences even if a vote had taken place; DC Plan I actually discriminated in favor of older pilots; and ALPA was not required to achieve "absolute equality among its members" so long as there is a "'legitimate, rational reason for the union's conduct.'"\footnote{Id. at 539 (quoting Ramey v. Dist. 141, Int'l Ass'n of Machinists and Aerospace Workers, No. 99-cv-434, 2002 U.S. Dist. LEXIS 26670, at *9–10 (E.D.N.Y. Nov. 4, 2002)).}

The district court dismissed the ADEA claims under § 623(c) on the grounds that the pilots' sole allegation of discrimination, that the younger pilots would have more time to accumulate retirement benefits was a function of compound interest and the time value of money rather than discrimination and was thus insufficient to make out a prima facie case of discrimination\footnote{Id. at 541. In support of this conclusion, the district court relied upon a series of cases, notably, Cooper v. IBM Pers. Pension Plan, 457 F.3d 636 (7th Cir. 2006), holding that the implementation of a cash-balance plan in lieu of a defined benefits plan did not constitute age discrimination when older employees receive fewer benefits than younger employees upon retirement. Id. at 541–42.} and on the grounds that the ADEA's safe harbor provision, found in § 623(f)—the "'equal cost or equal benefits'" rule—precluded plaintiffs' claims, because the payments made were

\begin{itemize}
  \item \footnote{Id. at *19.}
  \item \footnote{Id. at 528–29.}
  \item \footnote{Id. at 529.}
  \item \footnote{Id. at 529.}
\end{itemize}
not disparate.\textsuperscript{1361} The district court also dismissed plaintiffs' claims under § 623(i) of the ADEA, "which makes it unlawful to cease or reduce the rate at which benefits accrue or are contributed to" under a pension plan, on the grounds that neither DC Plan ceased or reduced the amount of contributions based on age.\textsuperscript{1362}

The district court dismissed the plaintiffs' RICO claims against ALPA on the grounds that the predicate acts alleged failed to give rise to an inference of fraudulent intent and allege a pattern of racketeering activity.\textsuperscript{1363} The district court dismissed the RICO claims against RSA, which was an equity sponsor of the airline during one of the two bankruptcies, because plaintiffs alleged only a single fraudulent act, fraud in connection with a bankruptcy case under Chapter 11, which is insufficient to establish a claim under RICO, which requires two or more predicate acts in order to establish a pattern of racketeering activity.\textsuperscript{1364}

In Carswell v. Air line Pilots Ass'n, International, the District Court for the District of Columbia dismissed plaintiff's claims for breach of contract against ALPA and the AFL-CIO for age discrimination under the ADEA against his airline employer, US Airways, arising from the pilot's forced retirement upon reaching the age of sixty.\textsuperscript{1365} The district court dismissed the age discrimination claims on the grounds that the FAA regulations creating a mandatory retirement age were a bona fide occupational qualification (BFOQ) and held that the airline was under no duty to offer the plaintiff another position on its own initiative.\textsuperscript{1366} The district court also rejected the pilot's claim that the airline owed him a fiduciary duty to seek an exemption to the FAA regulations requiring mandatory retirement.\textsuperscript{1367} The district court dismissed the breach of contract claim against the AFL-CIO on the grounds that there was no evidence that ALPA was acting as an agent on behalf of the AFL-CIO, even though there was a link to the AFL-CIO website on ALPA's website; the AFL-CIO and ALPA shared some mutual officers and directors

\textsuperscript{1361} Id. at 543.
\textsuperscript{1362} Id. at 545.
\textsuperscript{1363} Id. at 549.
\textsuperscript{1364} Id. at 553.
\textsuperscript{1366} Id. at *116–20. The court noted that plaintiff failed to apply for another job with the airline for which he was qualified. Id. at 117–18.
\textsuperscript{1367} Id. at 116.
and the two unions had occasionally filed joint documents with public agencies, because none of these activities involved the exercise of control over ALPA by the AFL-CIO. The district court dismissed the plaintiff’s breach of contract claim against ALPA on the grounds that mandatory arbitration was required under the RLA, because this was a “minor dispute” involving the interpretation of a CBA.

In Adams v. FAA, the petitioners were commercial airline pilots who reached the age of sixty before December 13, 2007, and had filed requests for an exemption with the FAA, from the regulation barring them from flying commercial aircraft after they turned sixty. The FAA denied their requests for exemption and the petitioners filed petitions for review in the D.C. Circuit under 49 U.S.C. § 46110(a), which permits direct challenges to an order issued by the FAA. The D.C. Circuit held that the Fair Treatment for Experienced Pilots Act (FTEPA), 49 U.S.C. § 44729, which raised the maximum age limit for pilots flying large commercial aircraft to sixty-five, expressly repealed the regulation that was the Age 60 Rule, making the petitions moot. The pilots asserted that their petitions could not be dismissed as moot, because the statute itself is a constitutionally-prohibited bill of attainder and a violation of their rights to due process and equal protection, because it denies such pilots any seniority or benefits from their prior (pre-age sixty) years of service if they are rehired by an airline prior to reaching age sixty-five. The U.S. court of appeals held that it had no “jurisdiction to consider constitutional questions unrelated to the FAA’s [Rule 65] order,” promulgated under FTEPA. If the pilots could “satisfy Article III standing requirements, their facial challenges” to the FTEPA must be brought first to the district court, “which has original jurisdiction over federal question claims.”

B. WRONGFUL TERMINATION

In Borodkin v. Omni Air International, Inc., the Ninth Circuit affirmed the district court’s grant of summary judgment in favor

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1368 Id. at 124.
1369 Id. at 124–25.
1370 550 F.3d 1174, 1175 (D.C. Cir. 2008).
1371 Id.
1372 Id.
1373 Id. at 1175–1176.
1374 Id. at 1176.
1375 Id.
of defendants on plaintiff’s claims for “tortious discharge” (wrongful termination) and defamation under Nevada law arising from plaintiff’s failed alcohol test. The Ninth Circuit held that Nevada law does not protect “an employee who was been terminated for failing an alcohol test” because such a cause of action does not express public policy or protect public safety. The Ninth Circuit further held that the Pilot Records Improvement Act (PRIA), 49 U.S.C. § 44703(i)(1) “prohibits actions against air carriers that have provided pilot records to a prospective employer if the pilot has signed a release of liability,” which the plaintiff did, thus barring plaintiff’s defamation claim. The Ninth Circuit rejected the plaintiff’s argument for application of the exception under PRIA created for cases in which the air carrier knew the information was false and maintained it in violation of a federal criminal statute, because the information was not maintained in violation of a criminal statute.

C. TORTIOUS INTERFERENCE

In Rachford v. Airline Pilots Ass’n, International, the Ninth Circuit affirmed the district court’s dismissal of plaintiff’s claims for tortious interference and negligent disruption of two agreements, a CBA and a letter of agreement, entered into between the Emery pilots’ union and the defendants, which contracts allegedly required defendant Emery Air Freight Corp to fund Emery World Airlines’ maintenance. Since the plaintiffs’ claims involved the interpretation of a CBA, they were preempted under the RLA, which requires mandatory arbitration. And, since the arbitrator concluded that the letter of agreement and CBA did not contain the obligation that plaintiff claimed was disrupted, plaintiff’s claims for negligent and tortious interference must fail.

1376 279 F. App'x. 517, 518 (9th Cir. 2008).
1377 Id. at 518.
1378 Id.
1379 Id. at 518–19. The only criminal statute identified by plaintiff was 18 U.S.C. § 1001, which prohibits the making of false statements “in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States.” However, the court concluded that this statute was inapplicable because the alleged false information was provided to another airline rather than the government. Id.
1380 284 F. App'x. 473, 474 (9th Cir. 2008).
1381 Id. at 475.
1382 Id.
D. FEDERAL AND STATE WHISTLEBLOWER STATUTES

In *Gervasio v. Continental Airlines, Inc.*, plaintiff Gervasio was terminated from his job with Continental Airlines, Inc. after he "escorted a relative through an unauthorized security check point" on the fifth anniversary of the September 11th attacks.\(^{1383}\) The plaintiff then won reinstatement through Continental's internal appeals process, but failed to receive a Port Authority ID within six months of reinstatement, which was a condition precedent to reinstatement.\(^{1384}\) Plaintiff filed suit on September 11, 2007, alleging that Continental violated the New Jersey Conscientious Employee Protection Act (CEPA) when it terminated him for reporting violations of federal security regulations.\(^{1385}\) The action was removed to federal court under the theory that plaintiff's state law claims were preempted by the ADA.\(^{1386}\) The district court, noting a split among the circuits, concluded that the ADA did not preempt claims under state whistleblower protection laws where the claims were not directly related to prices, routes, or services of an air carrier and because the employee's actions did not have the possibility of grounding any particular flight, any connection to Continental's services would be too remote and attenuated for these claims to be preempted.\(^{1387}\) The district court remanded the action to state court.\(^{1388}\)

In *In re UAL Corp.*, the bankruptcy court disallowed a former employee's claim for damages under the Whistleblower Protection Program of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (49 U.S.C. § 42121 (2000)) (WPP).\(^{1389}\) The WPP protects employees of air carriers from retaliation for providing air safety information to their employers or to the FAA.\(^{1390}\) The former employee, Mark Sassman, was terminated for repeatedly coming in late to work without filling out an "exception form," documenting his late arrival time, and thereby receiving pay for hours not actually worked.\(^{1391}\) The air-


\(^{1384}\) *Id.* at *2–3*.

\(^{1385}\) *Id.* at *4*.

\(^{1386}\) *Id*.

\(^{1387}\) *Id.* at *9–11*.

\(^{1388}\) *Id.* at *12*.

\(^{1389}\) No. 02-48191, 2008 Bankr. LEXIS 441, at *2–3* (N.D. Ill. Feb. 15, 2008).

\(^{1390}\) *Id.* at *2*.

\(^{1391}\) *Id.* at *6–7*. The airline did not use timecards, relying instead on an honor system whereby the employees would notify the airline of a late arrival using an "exception form." If no exception form is filled out, then the employee is presumed to have worked his full shift. *Id.*
line opposed the claim on the grounds that the officials who ultimately terminated the former employee did not know about the complaints and that, even if the officials involved in the termination did know about the safety complaints, the airline proved by clear and convincing evidence that it would have terminated Sassman in the absence of the protected activity.\textsuperscript{1392} The bankruptcy court agreed, holding that the airline was not liable for Sassman's discharge under the WPP.\textsuperscript{1393}

In \textit{Hafer v. U.S. Department of Labor Administrative Review Board}, the Ninth Circuit affirmed the dismissal of a whistleblower claim against United Airlines after that claim was discharged in bankruptcy.\textsuperscript{1394} Timothy Hafer, an employee of United Airlines, initially filed a complaint under the WPP with OSHA, which was determined to be "meritless" by the OSHA investigator.\textsuperscript{1395} Hafer appealed to an administrative law judge, who upheld the investigator's determination.\textsuperscript{1396} Hafer then filed an appeal with the Administrative Review Board of the Department of Labor.\textsuperscript{1397} The Review Board issued a stay of the appeal pending United Airlines' bankruptcy proceedings and then dismissed the appeal once the confirmation order was entered.\textsuperscript{1398} On appeal, the Ninth Circuit upheld the Review Board's dismissal on the grounds that the confirmation order enjoined the continuation of all claims against United Airlines discharged by the confirmation order, and concluded that the WPP does not fall within any of the exceptions to discharge and does not create a separate and unique exception to discharge.\textsuperscript{1399}

In \textit{Garland v. US Airways, Inc.}, the Third Circuit affirmed the dismissal of an airline pilot's claims for employment discrimination in part because the pilot failed to exhaust his administrative remedies in pursuing his claims.\textsuperscript{1400} The court explained that the pilot failed to demonstrate that he exhausted his claims with the EEOC, a necessary prerequisite to bringing an action for race and age discrimination under Title VII in federal court.\textsuperscript{1401}

\begin{itemize}
\item \textsuperscript{1392} \textit{Id.} at *59.
\item \textsuperscript{1393} \textit{Id.}
\item \textsuperscript{1394} 277 F. App'x. 739, 740 (9th Cir. 2008).
\item \textsuperscript{1395} \textit{Id.} at 740.
\item \textsuperscript{1396} \textit{Id.}
\item \textsuperscript{1397} \textit{Id.}
\item \textsuperscript{1398} \textit{Id.}
\item \textsuperscript{1399} \textit{Id.} at 741.
\item \textsuperscript{1400} 270 Fed. Appx. 99, 103 (3d Cir. 2008).
\item \textsuperscript{1401} \textit{Id.} at 103.
\end{itemize}
In *Carter v. Aero Mechanical Industries, Inc.*, plaintiff filed a complaint in state court alleging a violation of New Mexico common law arising from his termination following his refusal to sign-off on inadequate work and his subsequent complaint to the FAA. The defendant removed the case, claiming preemption of the claims under the WPP. The district court remanded the action to state court on the grounds that the allegedly protected activity did not directly affect prices, routes, or service and, therefore, did not implicate the WPP. In reaching this conclusion, the district court noted a split among the circuits, with the Eighth Circuit holding that any whistleblower claim that implicates FAA regulations is preempted by the WPP and the Third and Eleventh Circuits holding that preemption occurs only if the protected actions have an impact on prices, routes, or service.

In *Rollins v. Administrative Review Board*, the Tenth Circuit affirmed the decisions of the Administrative Review Board dismissing a complaint filed by an airline employee who alleged that he had been fired in violation of the WPP. The Administrative Review Board held that the complaint had not been filed within the ninety-day period following the alleged violation as required under Section 42121(b)(1) of WPP and refused to consider an argument raised for the first time on appeal that an oral complaint was made within the ninety-day limitations period. The Tenth Circuit, reviewed the decision under an “arbitrary, capricious, or abuse of discretion” standard, and affirmed the decision, noting the Board’s determination that the limitations period ran from the communication of the decision rather than the consequences of that decision was in line with relevant authority. The Tenth Circuit also held that the Board’s decision not to consider a belatedly raised argument on appeal was nothing other than an application of uniformly applied procedural rules.

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1403 Id. at 17,265.
1404 Id.
1405 Id.
1406 No. 07-9521, 2008 U.S. App. LEXIS 7260, at *1–2 (10th Cir. 2008).
1407 Id. at *7–8.
1408 Id. at *5–6.
1409 Id. at *8.
E. Railway Labor Act

In United Airlines, Inc. v. Air Line Pilots Ass'n, International, United Airlines filed a complaint for declaratory judgment and injunctive relief under § 2, First of the RLA against ALPA and various individual members of an ALPA committee known as the Industrial Relations Committee (IRC), alleging that ALPA had been engaged for more than a year-and-a-half in a campaign to pressure United Airlines to reopen the parties’ CBA. United Airlines claimed ALPA promoted activities that were unlawful under the RLA, including encouraging the pilots to “work-to-rule,” to refuse to waive provisions of their contract that were otherwise waivable, to refuse voluntary flight assignments known as “junior/senior manning,” to increase fuel consumption, to refuse to operate aircraft with deferrable maintenance items, and to take excessive time in pre-flight cockpit checks. The court entered a preliminary injunction in favor of United Airlines. More specifically, the court concluded that ALPA violated its duty under § 2, First of the RLA to exert every reasonable effort to avoid any interruption to commerce. Instead, ALPA published communications and directives to continue the slowdown campaign and, accordingly, injunctive relief was warranted under the RLA. The district court rejected ALPA’s argument that the dispute was a “minor dispute” over the interpretation of the CBA over which the district courts lack jurisdiction. Rather, the court concluded that this was a “major dispute,” in light of ALPA’s campaign to reopen the CBA, and, even if it were a “minor dispute,” ALPA was forbidden under the RLA from exercising self-help in the form of concerted action, which is a violation of the RLA. The court further held that United Airlines’ claims were not barred by the RLA’s six month statute of limitations, because this was a continuing violation, which extended into the limitations period.
The court also held that United Airlines' claims were not barred by the doctrine of laches, because the evidence did not support a claim that United Airlines slept on its rights and because there is no evidence that other, earlier actions, such as filing a grievance, "would have resolved the disputes between the parties."\textsuperscript{1419} The court rejected ALPA's defense that the Norris-LaGuardia Act's basic policy against the injunction of activities of labor unions would bar an injunction in this instance, because the general provisions of the act do not apply in the face of the more specific provisions of the RLA, which permits injunctive relief.\textsuperscript{1420} Moreover, § 7(a) of the Norris-LaGuardia Act does not deprive a court of jurisdiction to issue an injunction if unlawful acts have been threatened and will be committed or continued unless restrained, and ALPA's unlawful concerted action would likely continue in the absence of an injunction.\textsuperscript{1421} Finally, the district court evaluated the four factors traditionally considered in evaluating the propriety of injunctive relief: likelihood of success on the merits, irreparable harm, the balance of hardships, and the public interest; it concluded that these factors, considered on a sliding scale, warranted injunctive relief against the union.\textsuperscript{1422}

In \textit{International Ass'n of Machinists and Aerospace Workers v. Varig, S.A.}, Varig, S.A. appealed the decision of the district court entering judgment in favor of sixteen former employees of Varig, represented by the IAM, for severance pay, vacation and sick day accruals due under a CBA.\textsuperscript{1423} Varig, in bankruptcy proceedings in Brazil, decided to pay out the amounts due over a ten year period, as part of its plan of reorganization.\textsuperscript{1424} The Second Circuit affirmed the judgment in favor of the former employees, rejecting Varig's argument that this was a "minor dispute" regarding the interpretation of the CBA over which the National Railroad Adjustment Board has exclusive jurisdiction.\textsuperscript{1425} Rather, according to the Second Circuit, this was a major dispute because the provisions of the CBA were "unambiguous and require[d] no contractual interpreta-

\begin{itemize}
  \item \textsuperscript{1419} Id. at *121-22.
  \item \textsuperscript{1420} Id. at *122-25.
  \item \textsuperscript{1421} Id. at *125-28.
  \item \textsuperscript{1422} Id. at *127-29.
  \item \textsuperscript{1423} 302 F. App'x. 10, 11 (2d Cir. 2008).
  \item \textsuperscript{1424} Id. at 11-12.
  \item \textsuperscript{1425} Id. at 12.
\end{itemize}
Therefore, mandatory arbitration was not required.\textsuperscript{1426} In \textit{Silva v. Continental Airlines, Inc.}, the plaintiff alleged that he had been terminated in retaliation for engaging in a union organizing drive.\textsuperscript{1428} Shortly before his termination, and shortly after the plaintiff met with union representatives, he was investigated for "harassment" of a co-worker over joining the union.\textsuperscript{1429} The plaintiff, who was suspended without pay and ultimately terminated, filed suit alleging unlawful retaliation under the RLA. The district court denied summary judgment to the defendant on the grounds that (1) the individuals responsible for disciplining the plaintiff knew of his union activity, (2) these same individuals made various statements that were open to an inference of anti-union animus, and (3) the union "failed to show that it would have taken the same action even if the [p]laintiff had not been involved in union activity."\textsuperscript{1430} Therefore, under the burden-shifting methodology, originally developed under the National Labor Relations Act, summary judgment was inappropriate.\textsuperscript{1431}

In \textit{Addington v. US Airline Pilots Ass'n.}, the plaintiffs were a group of pilots formerly employed by America West Airlines, Inc. prior to a merger between America West and US Airways.\textsuperscript{1432} The pilots brought suit against US Airways and U.S. Airline Pilots Association (USAPA) for injunctive relief and damages arising from the defendants' failure to implement a seniority list (the Nicolau Award) created as a result of binding arbitration held in accordance with a Transition Agreement between, among other parties, the former pilots of America West (the West Pilots) and US Airways (the East Pilots).\textsuperscript{1433} The seniority "list gave West Pilots seniority over East Pilots who were

\textsuperscript{1426} Id.
\textsuperscript{1427} Id. The Second Circuit in its decision also declined to extend comity to the bankruptcy proceedings in Brazil, noting that there was nothing in the plan that would prevent non-adhering post-petition creditors from pursuing claims against Varig in foreign courts and that a permanent injunction issued in ancillary bankruptcy proceedings in New York provided that post-petition creditors, such as the employees, who chose not to adhere to the plan could assert their rights in U.S. courts. \textit{Id.}
\textsuperscript{1429} Id.
\textsuperscript{1430} Id. at *8.
\textsuperscript{1431} Id.
\textsuperscript{1433} Id.
on furlough at the time of the merger, gave 517 East Pilots seniority over all West Pilots, and [then] blended the seniority of the West Pilots and the remaining East Pilots."\(^{1434}\) The East Pilots, dissatisfied with the Nicolau award, formed a new union, USAPA, comprised of only East Pilots, for the primary purpose of implementing a date-of-hire seniority list.\(^{1435}\) The West Pilots then brought "this action against USAPA and US Airways seeking damages for lost wages and benefits[,] a permanent injunction requiring the parties to negotiate a single [CBA, and] a preliminary injunction against furloughing . . . West Pilot[s]."\(^{1436}\) The district court dismissed the claims against the airline on the grounds that the dispute between the West Pilots and the airline was a "minor dispute" under the RLA, over which it had no jurisdiction and even if it had subject matter jurisdiction, no preliminary injunction would be issued because the employees had an adequate remedy and the balance of hardships favored the airline.\(^{1437}\) The district court held that the union breached its duty of fair representation, because the union was formed for the purpose of imposing a date-of-hire scheme on the minority membership in disregard of an arbitrated compromise (the Nicolau Award), causing injury to the West Pilots.\(^{1438}\) There was no duty to exhaust administrative remedies under the RLA, because the RLA provides no extrajudicial remedy for grievances between unions and employees where the allegation is that the union breached its duty of fair representation.\(^{1439}\) Exhaustion of remedies was not required under the Norris-LaGuardia Act (NLGA), because the Supreme Court has repeatedly held that the NLGA's requirement of exhaustion of remedies does not apply to compel a union to perform its statutory duty of fair representation.\(^{1440}\) Nor, according to the district court, was exhaustion of remedies required contractually, as USAPA's Constitution and other internal documents did not create an internal union grievance procedure that would have applied to this dispute.\(^{1441}\) Accordingly, the district court ordered a bifurcation of this dispute into separate

\(^{1434}\) Id. at 1056–57.

\(^{1435}\) Id. at 1057.

\(^{1436}\) Id. at 1058.

\(^{1437}\) Id. at 1062–64.

\(^{1438}\) Id. at 1057.

\(^{1439}\) Id. at 1065–66.

\(^{1440}\) Id. at 1065.

\(^{1441}\) Id. at 1066.
arbitration proceedings against the airline and judicial proceedings against the union.\textsuperscript{1442}

In \textit{Office and Professional Employees International Union v. Air Methods Corp.}, the District Court of Colorado ruled in favor of the plaintiff unions who were seeking to enforce the decision of a System Board of Adjustment (System Board) created under the terms of a CBA negotiated by Air Methods, an air medical transportation services company that employs pilots, and the plaintiff unions.\textsuperscript{1443} The plaintiff unions filed a grievance with the System Board alleging that Air Methods refused to pay pilots "who perform a workover and ultimately worked in excess of twelve (12) hours during a workover shift in a manner consistent" with the CBA.\textsuperscript{1444} "The System Board found in favor of the unions."\textsuperscript{1445} Air Methods refused to comply with the System Board's award and argued that it exceeded its authority in issuing its decision.\textsuperscript{1446}

The district court, pursuant to the RLA, has the authority to review a System Board decision on narrow grounds.\textsuperscript{1447} The court upheld the award of the System Board and granted the plaintiff unions' motion for summary judgment because (1) the record did not demonstrate that there was any procedural irregularity which resulted in fundamental unfairness to either of the parties\textsuperscript{1448} and (2) "the System Board's interpretation of the CBA was not 'wholly baseless and completely without reason'" and instead could be "reconciled with a reasonable interpretation of the CBA."\textsuperscript{1449}

In \textit{Brietigam v. United Parcel Service Co.}, the Western District of Kentucky granted the plaintiff-pilot's motion to remand the case back to state court because it determined that the question on whether the plaintiff's state law claim is preempted by the RLA "is a matter that the state court [could] decide."\textsuperscript{1450}

The pilot originally filed a complaint in state court alleging a wage dispute between the pilot and his former employer,

\textsuperscript{1442} \textit{Id.} at 1067.
\textsuperscript{1444} \textit{Id.} at *4–5.
\textsuperscript{1445} \textit{Id.} at *5.
\textsuperscript{1446} \textit{Id.} at *10.
\textsuperscript{1447} \textit{Id.} at *2.
\textsuperscript{1448} \textit{Id.} at *10.
\textsuperscript{1449} \textit{Id.} at *11.
UPS removed the case to federal court alleging that the pilot's claims arise under the RLA "because they are based on an alleged breach of the [CBA] between UPS" and the pilot's union. The pilot claims that his "[c]omplaint alleges only a state law claim for wages and he" asked for the case to be remanded back to state court.

The district court remanded the case because it found that the state court was equipped to determine whether the claim could proceed or be dismissed in favor of the RLA's administrative procedures.

In Marcoux v. American Airlines, Inc., the Eastern District of New York granted defendants' motion for summary judgment, denied plaintiffs union members' motion for summary judgment on plaintiffs' duty of fair representation claims and denied plaintiffs class certification as moot.

Plaintiff flight attendants filed claims against American Airlines, Inc., its affiliates, the union, and certain union officers alleging violations of the RLA and for breach of the duty of fair representation. Plaintiffs also asked for certification as representatives of a class of plaintiffs. After the events of September 11, 2001, American Airlines requested wage concessions from its unions. The union in this case, the Association of Professional Flight Attendants (Union), ultimately agreed to make certain concessions and executed new agreements with American. The plaintiffs claimed violations of the RLA and violation of the duty of fair representation.

The plaintiffs claimed that the amendments to the CBA violated the RLA. However, the court dismissed this claim and found that the plaintiffs, as individual employees, did not have a private right of action under the RLA § 142 Seventh and § 152 First. Plaintiffs' claim under RLA § 152 Fourth was also dis-

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1451 Id. at *2.
1452 Id.
1453 Id.
1454 Id. at *8.
1456 Id. at *1–2.
1457 Id. at *2.
1458 Id. at *5–6.
1459 Id. at *45–46.
1460 Id. at *50.
1461 Id.
1462 Id. at *53, *56–58.
missed because they "failed to show that the integrity of the Union and its ability to bargain on the employees' behalf were compromised by Company conduct." Instead, only the Union could claim a private right of action under the RLA. With respect to the duty of fair representation, the court dismissed those claims and found that there was no "triable issue of fact" regarding whether the Union's conduct was "arbitrary, discriminat[ing], or in bad faith."

In *International Brotherhood of Teamsters v. North American Airlines*, the Ninth Circuit affirmed the Northern District of California's denial of the Teamster's motion for a preliminary injunction against North American Airlines. The Teamsters initially sought preliminary and permanent injunctive relief from North American's unilateral alteration of the pilots' working conditions. The Ninth Circuit found that the RLA did not create a status quo requirement that would prohibit a carrier from unilaterally altering the terms and conditions of employment once negotiations toward an initial CBA had begun, but before the agreement had been completed.

North American "is a certified air carrier engaged in scheduled and charter passenger service, as well as service for the Department of Defense." The airline employs 120 pilots. In January 2004, the National Mediation Board certified the [Teamsters] as the collective bargaining representative for the pilots and the parties began "negotiations for an initial [CBA] in April 2004." In November 2004, North American notified its employees that it would be cutting costs due to turbulent times facing the airline industry. In order to reduce costs, the airline made scheduling changes, instituted cost sharing for health premiums and reduced senior management salaries. With respect to the pilots, North American sought to achieve a "12-18% reduction in its flight deck costs per block hour."

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1463 *Id.* at *67.
1464 *Id.*
1465 *Id.* at *80.
1466 518 F.3d 1052, 1053 (9th Cir. 2008).
1467 *Id.* at 1055.
1468 *Id.* at 1061.
1469 *Id.* at 1053-54.
1470 *Id.* at 1054.
1471 *Id.*
1472 *Id.*
1473 *Id.*
1474 *Id.*
discussing its plan with the Teamsters, North American decided that the pilots were “unwilling to provide the necessary cooperation for a successful overhaul of the schedule.” North American then made the unilateral decision to reduce pilot costs through wage deductions. The Teamsters applied for mediation services with the National Mediation Board and proceedings began on December 13, 2004.

The Teamsters filed this complaint in January 2005, after North American’s changes took effect. The Teamsters alleged that North American violated its obligations under § 2, First and Fourth of the RLA by “unilaterally altering the pilots’ rates of pay, rules, and working conditions after the parties had commenced negotiations regarding an initial [CBA].” The union “sought preliminary and permanent injunctive relief from any unilateral alteration to the pilots’ working conditions” and asked for a “return to the working conditions that existed prior to the beginning of the negotiations.”

The Ninth Circuit found that, because no CBA had been completed, the RLA did not impose a status quo requirement on the employer during this pre-agreement time frame, regardless of whether negotiations had been instituted.

In Earle v. NetJets Aviation, Inc., the Sixth Circuit Court of Appeals refused to overturn an arbitrator’s decision upholding NetJets Aviation, Inc.’s decision to terminate Richard Earle, one of NetJets’ pilots. NetJets terminated Earle after it took him almost six hours to reach a drug-testing facility near his gateway airport. NetJets suspended, then terminated Earle, because it viewed the delay as a constructive refusal to submit to a drug and alcohol test pursuant to the requirements of NetJets’ Federal Aviation Administration-required Alcohol Misuse Prevention Program contained within the CBA between the pilot union and NetJets. Under the CBA, NetJets could not terminate Earle unless it was for “just cause.”

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1475 Id.  
1476 Id.  
1477 Id.  
1478 Id. at 1055.  
1479 Id.  
1480 Id.  
1481 Id. at 1060.  
1482 262 F. App’x. 698, 699 (6th Cir. 2008).  
1483 Id. at 700.  
1484 Id.  
1485 Id.
The arbitrator, after reviewing the CBA and the Alcohol Misuse Prevention Program, found that a violation of the drug program could be considered “just cause” under the CBA and NetJets acted within its authority by terminating Earle.\textsuperscript{1486} The arbitrator considered Earle’s reasons for his delay, including his claim that he had lied to NetJets on the day of the drug test and told them that he was closer to the facility than he actually was which resulted in increased driving time and traffic.\textsuperscript{1487} The arbitrator also considered Earle’s claim that under the CBA pilots were only subject to drug tests after arriving at work.\textsuperscript{1488}

The sole issue in this case was whether, in resolving any legal or factual disputes, the arbitrator was, “arguably construing or applying the contract.”\textsuperscript{1489} The Sixth Circuit found that there was no evidence that the arbitrator “was doing anything other than trying to reach a good-faith interpretation of the contract” and therefore, the arbitration award must be enforced.\textsuperscript{1490}

In \textit{Naugler v. Air Line Pilots Ass’n}, the Eastern District of New York dismissed an eight-count first amended complaint filed by the plaintiff-pilots against their union, ALPA.\textsuperscript{1491} ALPA served as the plaintiffs’ exclusive collective bargaining representative.\textsuperscript{1492} The plaintiffs are US Airways “pilots who agreed to work for MidAtlantic Airways[ ] during their furlough from US Airways.”\textsuperscript{1493} They alleged that ALPA “misrepresented and concealed the fact that MidAtlantic was a division of US Airways and not a wholly-owned subsidiary, in order to ‘secretly recall’ them” to US Airways without giving them the rights owed to them under the CBA.\textsuperscript{1494} The plaintiffs claimed that ALPA breached its duty of fair representation under the RLA and also violated the RICO.\textsuperscript{1495}

The court dismissed four of the pilots’ duty of fair representation claims as time-barred under the six-month statute of limita-
tions.\textsuperscript{1496} The court found that the plaintiffs, outside of the six-month time frame, were provided actual notice, that the terms of the MidAtlantic employment was negotiated without regard to MidAtlantic's actual corporate form.\textsuperscript{1497} The court also dismissed as time-barred, two of the pilots' claims which alleged that ALPA failed to submit a 2004 modification of pay rates to the members for ratification.\textsuperscript{1498} The pilots' final duty of fair representation claim was dismissed because the court found that the plaintiffs knew or should have known the truth regarding MidAtlantic and any efforts by ALPA to conceal that information could not have caused any harm.\textsuperscript{1499}

The RICO action was also dismissed because it failed to state a claim under the RICO statute.\textsuperscript{1500} The court found that the plaintiffs were obligated to provide more than "labels and conclusions" in its cause of action.\textsuperscript{1501}

Nonetheless, the court permitted the plaintiffs to file a supplemental complaint to their first amended complaint alleging a new violation of ALPA's fair duty of representation which allegedly occurred after the filing of the amended complaint.\textsuperscript{1502} The plaintiffs alleged that ALPA knowingly stipulated to the introduction of an erroneous seniority list during an arbitration regarding the integration of seniority lists after the merger of US Airways and America West Airlines, Inc.\textsuperscript{1503}

In \textit{Air Line Pilots Ass'n v. National Labor Relations Board}, the Ninth Circuit rejected the National Labor Board's (NLRB) finding that it had jurisdiction over a dispute which was properly governed by the RLA.\textsuperscript{1504}

In 1990, pursuant to the RLA, ALPA was certified by the National Mediation Board as the representative of DHL Airways pilots.\textsuperscript{1505} "ALPA is the oldest and largest labor organization in the United States" and represents airline pilots covered by the RLA.\textsuperscript{1506} Its "membership includes over 62,000 pilots."\textsuperscript{1507} At

\begin{flushleft}
\textsuperscript{1496} Id. at *23.  \\
\textsuperscript{1497} Id. at *30.  \\
\textsuperscript{1498} Id. at *31.  \\
\textsuperscript{1499} Id. at *33.  \\
\textsuperscript{1500} Id. at *43.  \\
\textsuperscript{1501} Id. at *41 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007)).  \\
\textsuperscript{1502} Id. at *51.  \\
\textsuperscript{1503} Id. at *47.  \\
\textsuperscript{1504} 525 F.3d 862, 870 (9th Cir. 2008).  \\
\textsuperscript{1505} Id. at 864.  \\
\textsuperscript{1506} Id.  \\
\end{flushleft}
the time of [this] dispute, ALPA [also] "represented approximately seventeen pilots of Ross Aviation, Inc." Ross's "pilots are covered by the National Labor Relations Act" (NLRA) and "ALPA is considered a labor organization within the meaning of the" NLRA.

DHL Airways is a subsidiary of DHL Holdings, a company in the business of picking up, sorting and carrying documents, small parcels, and other freight on a time-sensitive basis. ALPA and DHL Airways entered into a CBA in 1998. The scope clause within the CBA provides that DHL Airways shall use DHL pilots for all present and future flying for the airline. It also provides that it will use DHL pilots to the maximum extent possible. DHL Holdings also agreed that any of its successors would be bound by this clause.

"The DHL [companies] restructured its U.S. operations in both March 2001 and July 2003." DHL Holdings transferred the ground operation of DHL Airways to a new subsidiary called DHL Worldwide Express, Inc. The air operations remained with DHL Airways.

This dispute began after DHL Holdings sold its remaining shares of DHL Airways in July 2003. Following the sale, DHL Airways was wholly owned by a group of independent investors and its new name became ASTAR Air Cargo. "ASTAR and DHL Worldwide entered into a new Aircraft, Maintenance and Insurance Agreement with respect to the provision of freight services." "[I]n March 2003, the parent company of DHL Holdings announced an agreement to merge with Airbone, Inc." who was also engaged in the business of delivering time-sensitive documents. Airbone had a flying subsidiary called

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1507 Id.
1508 Id.
1509 Id.
1510 Id.
1511 Id.
1512 Id.
1513 Id.
1514 Id.
1515 Id. at 864.
1516 Id.
1517 Id.
1518 Id. at 865.
1519 Id. at 864.
1520 Id.
1521 Id. at 865.
ABX. Once the merger was complete, "ABX became an independent company and Airborne, consisting only of air operations, became a wholly-owned subsidiary of DHL Holdings. ABX entered in an aircraft, maintenance and insurance agreement with Airborne."  

In June 2003, "ALPA sent DHL Holdings a letter [stating] that the flying generated by the former Airborne operations would be subject to the scope provisions of DHL Airways (now ASTAR) CBA." After meeting with DHL Holdings, ALPA submitted a grievance against DHL Holdings and DHL Worldwide alleging violations of the CBA and requesting arbitration.  

DHL Holdings then filed an action against ALPA in the Southern District of New York [seeking] a declaratory judgment that the [CBA] did not require that ASTAR perform future flying on behalf of Airborne. In the alternative, DHL Holdings sought an order that ALPA's claim over the Airborne work was a representation dispute within the exclusive jurisdiction of the National Mediation Board under the [RLA]. 

ALPA responded and asked the court to submit the "dispute to arbitration, declare that the [CBA] was in full force and effect, and [prevent] DHL Holdings from implementing any agreement with ABX [where any] flying on behalf of DHL Airways ... would be performed by non-ASTAR pilots."  

In September 2003, "ABX filed a Charge with the NLRB against ALPA alleging that, by filing the grievance and attempting to force DHL Holdings not to do business with ABX, ALPA had violated the [NLRA]. The District Court action was stayed pending resolution of ABX's Charge." An administrative law judge held a hearing on the NLRB's complaint against ALPA and found that ALPA committed the violations alleged. The judge specifically found that the NLRB had jurisdiction over the matter based on ALPA's representation of the seventeen Ross Aviation employees who, although not involved

1522 Id.
1523 Id.
1524 Id.
1525 Id.
1526 Id.
1527 Id.
1528 Id. at 865–66.
1529 Id. at 866.
1530 Id.
1531 Id.
in the present dispute, were covered by the NLRA. On review, one member of the NLRB disputed the findings on the grounds that the dispute should have been adjudicated under the RLA, not the NLRA.

The Ninth Circuit, after reviewing these facts, concluded that, "in determining that it had jurisdiction over this dispute, the Board misapplied" Supreme Court precedent. The Court found that none of ALPA's NLRA employee members are involved in this case. As a result, these facts concern ALPA's efforts to enforce the scope clause regarding only air transportation work on behalf of only RLA covered pilots. The court found that, "[t]his is fundamentally a [RLA] dispute and, as such, [it] is 'pro tanto, exempt from the [NLRA].'"

In Global Aero Logistics Inc. v. Air Line Pilots Ass'n, International, the Eastern District of New York enjoined ALPA from prosecuting its grievances against plaintiffs Global Aero Logistics Inc. and ATA Airlines, Inc. before the ATA-Pilots Association System Board because it found that the National Mediation Board had the exclusive jurisdiction to adjudicate ALPA's grievances.

ATA is an airline with scheduled passenger service in the United States and to Mexico with a fleet of 29 aircraft. ATA is a subsidiary of Global” Aero. ALPA represents ATA's pilots and negotiated a CBA with ATA. "In February 2008, ALPA filed two grievances after” Global Aero acquired World Holdings, the parent company of World Airlines and North American Airlines. First, ALPA claimed that under the CBA, Global Aero's acquisition of World Airlines and North American Airlines entitles ATA crewmembers to seniority integration and an integrated CBA. Second, ALPA alleged that World Air-

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1532 Id. at 867.
1533 Id.
1534 Id. at 868.
1536 Id.
1537 Id. at 870 (quoting Jacksonville Terminal, 394 U.S. at 377).
1539 Id. at *2.
1540 Id. at *3.
1541 Id.
1542 Id. at *4–5.
1543 Id. at *5–6.
lines and North American Airlines are alter egos of ATA and Global Aero "has diverted work from ATA crewmembers."\(^{1544}\)

In April 2008, ATA filed for bankruptcy and "shut down its flight operations [without any] advance notice to ALPA or its pilots."\(^{1545}\) As a result, ALPA tried to accelerate the scheduling of the arbitration.\(^{1546}\) When ATA and Global Aero would not agree to the acceleration, "ALPA filed an adversary proceeding . . . in the bankruptcy court to compel arbitration."\(^{1547}\) The parties executed a "settlement agreement" where ALPA "agreed to dismiss the adversary proceeding in exchange for Global [Aero] and ATA's commitment to proceed with the arbitration on dates earlier than August."\(^{1548}\) The settlement agreement listed dates for the arbitration to take place.\(^{1549}\) The settlement agreement also noted that each party reserved its position on whether "the [g]rievances should be heard together or sequentially."\(^{1550}\) Additionally, the parties discussed the location of the hearing.\(^{1551}\)

Despite the existence of the settlement agreement, ATA and Global Aero sought an injunction which would prohibit ALPA from prosecuting its grievances before the System Board provided for in the CBA. The court found that the grievances raise representation issues where the National Mediation Board (NMB), pursuant to the RLA, has exclusive jurisdiction.\(^{1552}\) The court found that the plaintiffs, by entering into the settlement agreement, did not waive their right to judicial review of substantive arbitrability.\(^{1553}\) As a result, because the NMB had exclusive jurisdiction and the plaintiffs satisfied injunctive relief requirement, ALPA was prohibited from pursuing its grievances through the System Board.\(^{1554}\)

In \textit{Russell v. American Eagle Airlines, Inc.}, the Eastern District of New York dismissed the amended petition of Plaintiff Oswald Russell, a former quality control inspector for defendant American Eagle Airlines, Inc., a common carrier subject to the

\(^{1544}\) Id. at *6.

\(^{1545}\) Id. at *6–7.

\(^{1546}\) Id. at *7.

\(^{1547}\) Id.

\(^{1548}\) Id.

\(^{1549}\) Id.

\(^{1550}\) Id. at *8.

\(^{1551}\) Id.

\(^{1552}\) Id. at *13.

\(^{1553}\) Id. at *22.

\(^{1554}\) Id.
As a quality control inspector, Russell inspected the work of aircraft mechanics and also performed non-destructive testing on metal at different locations. Because of employee shortages, Russell was often asked to work on unscheduled dates or while he was on vacation. Although he usually worked at JFK Airport, he was also sometimes asked to work at other airports. When working at JFK, Russell manually recorded his attendance in an “exceptions log” because he could not use American Eagle’s fingerprint scanning system.

In February 2006, Russell’s supervisors opened an investigation into the length of his road trips to other locations. After the investigation revealed that no grounds existed for claims of impropriety, his supervisors shifted the investigation to Russell’s time records. Russell’s supervisor claimed that he made false entries into his non-destructive testing logs by recording results for dates that he was not at work. Russell was suspended and eventually terminated. Russell’s union filed a grievance on his behalf which led to arbitration. The arbitration board upheld American Eagle’s decision to terminate. Russell complained that the arbitrator refused to accept into evidence “exceptions logs” that would show that he was at work on the dates that American Eagle claimed that he was off or on vacation.

The court dismissed Russell’s amended petition because his allegation that the arbitrator failed to admit the “exceptions logs” into evidence was not grounds on which the court can review the arbitration award. The court further noted that, “the scope of judicial review of arbitration awards rendered pursuant to the RLA is ‘among the narrowest known to the law.’” According to the court, the transcript of the arbitration hearing demonstrates that the “exception logs” were ex-

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1556 Id. at *3.
1557 Id.
1558 Id.
1559 Id. at *3-4.
1560 Id. at *4.
1561 Id.
1562 Id.
1563 Id.
1564 Id.
1565 Id. at *5.
1566 Id. at *5-6.
1567 Id. at *8.
1568 Id.
cluded pursuant to the CBA and an agreement between the parties.\footnote{1569} The Board considered the plaintiff's arguments but chose to rely on other types of evidence.\footnote{1570} The court found that as a matter of law, Russell could not claim a due process violation because his allegations "offer no more than an attack on the arbitrator's conclusions."\footnote{1571}

In \textit{CareFlite v. Office and Professional Employees International Union}, the Northern District of Texas found that the Office and Professional Employees International Union's (Union) grievances were minor disputes subject to mandatory and binding arbitration as mandated by the RLA.\footnote{1572} Any attempt by the parties' CBA to remove the grievances from arbitration is unenforceable.\footnote{1573}

Plaintiff CareFlite is a Texas helicopter emergency medical-transport service subject to the RLA.\footnote{1574} The Union represents the helicopter pilots that work for CareFlite.\footnote{1575} CareFlite terminated a helicopter pilot after he did not timely obtain an Airline Transport Pilot Certification (Certification) which was required under the parties' CBA.\footnote{1576} The certification "is the highest-level certification that a pilot can obtain but it is not required by the FAA."\footnote{1577} The CBA stated that a termination because of a pilot's failure to obtain a timely certification is non-grievable and non-arbitrable.\footnote{1578} The Union filed a grievance alleging that the pilot should have been given additional time to obtain certification.\footnote{1579} The arbitrator reinstated the pilot and ordered him to take and pass any required examinations.\footnote{1580} Almost a year after his termination, the pilot was reinstated.\footnote{1581} Under the CBA, the pilot would have to obtain certification within three weeks after his reinstatement.\footnote{1582} The Union asked for additional time to obtain certification due to the time lost because

\begin{itemize}
\item \footnote{1569} Id. at *9.
\item \footnote{1570} Id. at *12.
\item \footnote{1571} Id. at *12.
\item \footnote{1573} Id. at *22.
\item \footnote{1574} Id. at *2–3.
\item \footnote{1575} Id. at *2.
\item \footnote{1576} Id. at *6.
\item \footnote{1577} Id. at *5 n. 3.
\item \footnote{1578} Id. at *4–*5.
\item \footnote{1579} Id. at *6.
\item \footnote{1580} Id.
\item \footnote{1581} Id.
\item \footnote{1582} Id.
\end{itemize}
of the pilot’s previous unjust discharge. CareFlite refused the request and the Union filed a grievance alleging that CareFlite would not give the pilot adequate time to obtain certification. After the three weeks passed, CareFlite terminated the pilot and the Union filed another grievance. The Union denied both grievances and stated that the CBA provisions made the pilot’s termination non-grievable and non-arbitrable. The Union appealed to a System Board of Adjustment and CareFlite filed a declaratory action in federal court seeking a ruling that the System Board lacked jurisdiction.

The court found that the RLA mandatory procedures for handling minor disputes, such as this one, cannot be altered by a CBA. The court further noted that the “Union’s grievances involve minor disputes because they involve the interpretation of an existing CBA between the parties.” Because Congress intended that the arbitration procedures under the RLA to be the ultimate means for settling small disputes, any provision in the CBA attempting to exclude the Union’s grievances from arbitration is unenforceable.

In Hastings v. Wilson, the Eighth Circuit affirmed a lower court’s decision dismissing an Employee Retirement Income Security Act (ERISA) class action lawsuit brought by employees of Northwest Airlines, Inc. The plaintiffs brought breach of fiduciary duty claims against the alleged fiduciaries of two separate pension plans.

The district court found, and the appellate court agreed, that the ERISA action regarding the first pension plan was subject to the RLA mandatory arbitration provision which divested the federal court of subject matter jurisdiction. The court rejected the plaintiffs’ claim that Congress did not intend the RLA’s mandatory arbitration provision to apply to ERISA claims. The court stated that the RLA’s mandatory arbitration provision

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1583 Id. at *7.
1584 Id.
1585 Id.
1586 Id. at *7-8.
1587 Id. at *8.
1588 Id. at *16.
1589 Id. at *20.
1590 Id. at *21-22.
1591 516 F.3d 1055, 1058 (8th Cir. 2008).
1592 Id. at 1058.
1593 Id. at 1059.
1594 Id.
applies to ERISA claims if the pension plan is a CBA or is maintained pursuant to a CBA. The plaintiffs did not dispute that the pension plan was maintained pursuant to CBAs. The court also found that this dispute was a minor dispute subject to arbitration under the RLA. With respect to the second pension plan, the court found that the plan representatives did not have standing to bring suit because they were not participants, beneficiaries, or fiduciaries of the plan.

In Hedman v. Northwest Airlines, Inc., the District Court of Minnesota dismissed the ERISA claims of Jan Hedman, a former employee of defendant Northwest Airlines, Inc. The court dismissed Hedman’s claims for lack of subject matter jurisdiction and found that the RLA mandated that the claim be subject to arbitration.

Hedman stopped working for Northwest Airlines due to a disability. After Hedman was no longer able to work, he filed for disability benefits under Northwest’s pension plan. In December 2005, Northwest denied the claim. In April 2007, Hedman filed his complaint alleging that Northwest’s decision violated ERISA. The court found that the pension plan was subject to the RLA's mandatory arbitration provision because it was maintained pursuant to the CBA between Northwest and Hedman’s union. Therefore, this dispute was a minor dispute subject to the RLA’s arbitration requirement. The court also stated that it lacked the subject matter jurisdiction necessary to force Northwest to arbitrate the claim and toll the expired arbitration deadline.

In Carmona v. Southwest Airlines Co., the Fifth Circuit reversed the district court’s dismissal of a male flight attendant’s (Carmona) disability and gender discrimination claims against his
employer, Southwest Airlines Co.\textsuperscript{1608} The district court claimed that it did not have subject matter jurisdiction over the employee’s claims because his employment was governed by a CBA and thus, his claims were subject to adjudication under the RLA.\textsuperscript{1609} The appeals court disagreed and remanded the claims, because the suit did not require an interpretation of the CBA and was not precluded from judicial review.\textsuperscript{1610}

The CBA contained attendance provisions which assigned a point system to absences.\textsuperscript{1611} Employees who were assessed over twelve points were subject to termination.\textsuperscript{1612} Under the point system, Carmona had was terminated for excessive absences.\textsuperscript{1613} Carmona took absences for illness which were not considered excused absences.\textsuperscript{1614} Carmona alleged that he was assessed attendance points and denied medical leave where similarly situated female flight attendants were not assessed points or were granted medical leave and were not terminated for exceeding twelve points.\textsuperscript{1615} Carmona also claimed that Southwest discriminated against him because of his “disability.”\textsuperscript{1616} Carmona alleged that the CBA procedures were applied in a discriminatory fashion, not that the procedures were fundamentally discriminatory.\textsuperscript{1617} As a result, the appellate court found that Carmona’s claims did not require the interpretation of the CBA and the district court did have jurisdiction to hear the claims.\textsuperscript{1618}

In\textsuperscript{1619} Bate v. International Brotherhood of Teamsters Local Union 1108, the Southern District of Ohio dismissed the claims of the plaintiff-employee’s claims against NetJets Aviation, Inc., the International Brotherhood of Teamsters Local Union 1108 (the Union), and the president of the Union. The plaintiff claimed that the Union breached its duty of fair representation; NetJets and the Union breached the CBA, that the Union breached an implied contract with the plaintiff, and that the Union president is personally liable for the alleged breaches by

\textsuperscript{1608} 536 F.3d 344, 345 (5th Cir. 2008).
\textsuperscript{1609} Id. at 347.
\textsuperscript{1610} Id.
\textsuperscript{1611} Id. at 345.
\textsuperscript{1612} Id.
\textsuperscript{1613} Id. at 346.
\textsuperscript{1614} Id.
\textsuperscript{1615} Id.
\textsuperscript{1616} Id.
\textsuperscript{1617} See id. at 348.
\textsuperscript{1618} Id. at 351.
\textsuperscript{1619} No. 2:08-cv-100, 2008 WL 3008976, at *1 (S.D. Ohio Aug. 1, 2008).
the Union. The dispute began after the plaintiff was re-
moved from the Union maintained electronic message board lo-
cated on the Union's website. The plaintiff claimed that
Union members posted sexually harassing messages about plain-
tiff on the message board. Plaintiff complained to the Union
and to NetJets and they did not address the matter. The
Union also claimed that plaintiff violated the terms of the mes-
sage board by posting strong dissatisfaction with the proposed
terms of the amendments to the CBA. Eventually, Plaintiff
was permanently expelled from the message board.

The court dismissed plaintiff's fair representation claim
against the Union because it concerned his relationship with the
Union and not his relationship with NetJets. As a result,
there was no duty of fair representation. The court dis-
missed plaintiff's claim that NetJets breached the CBA because
the court lacked the subject matter jurisdiction to hear the
claims because it was a minor dispute preempted by the RLA
and under its exclusive jurisdiction.

Similarly, the court dismissed plaintiff's claim that the Union
breached an implied contract to address the inappropriate com-
ments on its website because it could only have a basis in a state
law action. The court found that a claim for breach of the
CBA against the Union could only have a basis in a pendent
state law claim and because all of the federal claims were being
dismissed, the court declined to hear those claims. With re-
spect to the president of the Union, the court dismissed the
claims because breach of the duty of fair representation was
made against bargaining representatives, not against individual
union members or officers.

1620 Id. at *3.
1621 Id. at *1.
1622 Id.
1623 Id.
1624 Id.
1625 Id.
1626 Id. at *5.
1627 Id.
1628 Id. at *7.
1629 Id. at *8.
1630 Id.
1631 Id. at *9.
F. Wage and Hour

In *Blackwell v. SkyWest Airlines, Inc.*, the plaintiff, was employed by SkyWest Airlines, Inc. as a Cross-Utilized Agent, responsible for ticketing and boarding assistance, baggage handling and location, marshaling aircraft into and out of gates, and coordinating operations between other agents, air traffic control, and the airplanes.\footnote{1632} She filed suit against her former employer for multiple violations of California’s wage and hour laws.\footnote{1633} SkyWest sought summary judgment or, in the alternative, summary adjudication on eighteen separate issues of law and fact.\footnote{1634} The district court denied the motion for summary judgment and denied in part and granted in part the motion for summary adjudication.\footnote{1635} More specifically, on plaintiff’s claims that she was not paid for every hour she worked, the district court denied summary adjudication, as issues of fact remained.\footnote{1636} As for plaintiff’s claim that SkyWest failed to pay her overtime in violation of California’s state wage and hour law, the district court held SkyWest was exempt from state overtime claims under state law, which creates an exemption for employers who have entered into a CBA in accordance with the RLA.\footnote{1637} The district court further held that plaintiff’s claims for violations of California law relating to overtime, meal time, and rest time were preempted by the RLA because they involved the interpretation of a CBA, even if they also implicated state laws, and were thus “minor disputes” under the RLA.\footnote{1638} The district court also concluded that plaintiff’s claims under California law relating to the provision of rest and meal times were also preempted by the ADA, because they would have the force and effect of regulating SkyWest’s services, prices, and routes.\footnote{1639} The district court denied the airline’s motion for

\footnotetext[1632]{No. 06cv0307 DMS (AJB), 2008 U.S. Dist LEXIS 97955, at *2 (S.D. Cal. Dec. 3, 2008).}
\footnotetext[1633]{Id. at *1.}
\footnotetext[1634]{Id.}
\footnotetext[1635]{Id. at *2.}
\footnotetext[1636]{Id. at *14–15.}
\footnotetext[1637]{Id. at *27. In reaching this determination, the district court concluded that the agents’ representative, SAFA, was a “representative” under the RLA. *Id.* at *17–25. The district court further concluded that written policies called “Standard Practices,” which governed the terms and conditions of plaintiff’s employment, constituted a collective bargaining agreement. *Id.* at *25–27.}
\footnotetext[1638]{Id. at *42.}
\footnotetext[1639]{Id. at *53–*54. The district court concluded that plaintiff provided a “service” to passengers because part of her duties involved marshaling flights into}
summary adjudication on its claimed right to offset some $15,000 in travel benefits against plaintiff’s claims because SkyWest did not possess an enforceable claim for repayment of those benefits.\textsuperscript{1640} The district court also denied SkyWest’s request for summary adjudication on plaintiff’s claim for “waiting time penalties” under California law, which imposes penalties for willful failure to pay wages due at termination, because disputes of fact remained whether the failures were “willful.”\textsuperscript{1641} Finally, the district court held that plaintiff’s claims under California’s Unfair Business Practices Act were preempted by the ADA.\textsuperscript{1642}

boarding gates, inspecting and documenting damage to aircraft and coordinating activity between air traffic control, the aircraft and the agents, and her claims relating to mandatory rest and meal times under California law would impact the provision of those services. \textit{Id.} at *48–49. State law mandatory rest and meal times would also affect prices and routes because the additional labor costs would increase prices and reduce or eliminate routes. \textit{Id.} at *53–54.

\textsuperscript{1640} \textit{Id.} at *55–*57.
\textsuperscript{1641} \textit{Id.} at *57–59.
\textsuperscript{1642} \textit{Id.} at *59.