Recent Developments in Aviation Law

Stephen C. Kenney
RECENT DEVELOPMENTS IN AVIATION LAW

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I. INTRODUCTION

THE FOLLOWING "Recent Developments in Aviation Law" article was originally presented as a paper and speech at the 1995 SMU Air Law Symposium. The article attempts to present a reasonably comprehensive report of aviation case law decisions from all United States jurisdictions that were published between November 1, 1993, the submission deadline for the 1993 report, and December 1994. Unpublished reported decisions are included, as well, to the extent they could be located using conventional resources. To all who participated in cases resulting in published decisions that are not included, the author extends his humble apology.

Although a summary of aviation case law decisions decided over slightly more than one year's time presents only a snapshot view of the state of the law, it is possible to identify certain trends. For example, the preemption of state law tort claims by federal law under the Aviation Deregulation Act of 1978, which was expanded significantly in the case law decisions of recent years, underwent a marked retrenchment in 1994, with fewer successful cases of preemption published. The Warsaw Convention, on the other hand, seems to have largely retained its historic vitality, although the case law authority continues to be split over several important issues, and the Convention itself continues to be frequently attacked by the aviation plaintiffs' bar.

In addition to aviation case law decisions, this year's article includes a selection of important cases decided outside of the aviation context that may have significant effects in future aviation cases. The author believes this is the first time such cases have been included in the continuing series of "Recent Developments" reports and hopes that the practice will be continued. This year's article also summarizes relevant statutory enactments, including, most prominently, the General Aviation Revitalization Act of 1994.
Because the summarized cases are of recent vintage, in considering their impact it is important to recognize that some may have been modified by subsequent court or legislative action. In addition, while the summarized cases are grouped under discrete subject headings corresponding to their dominant area of concern, many of the cases deal with multiple issues that are covered elsewhere in the article.

As with any project of this magnitude, many hands played a role in its creation. The author’s heartfelt appreciation goes to the following Kenney, Burd & Markowitz attorneys, without whose assistance this article would not have come to exist: Tom K. Hammitt, the editor of the article; James D. Caven; Adam S. Gruen; Stephen E. Kyle; George M. Moore; David R. Pearl; William F. Gutierrez; Philip D. Witte; and legal assistant Gordon Aber—all of whom contributed generously of their valuable time and effort.

II. JURISDICTION

A. PERSONAL JURISDICTION

In Durrett v. Cessna Aircraft Corp.,1 applying the long-arm statute of the forum state, Michigan, the United States District Court for the Eastern District of Michigan found personal jurisdiction lacking and dismissed the case. This personal injury action, which arose from the crash of a Cessna aircraft equipped with Wipaire floats, involved a challenge to the district court’s exercise of personal jurisdiction in a case where subject matter jurisdiction was based on diversity.

When federal subject matter jurisdiction is based solely on diversity of citizenship, the district court looks to the law of the forum state to determine whether personal jurisdiction exists over a defendant. As neither Cessna nor Wipaire are incorporated or have their principal places of business in Michigan, the state long-arm statute provided the sole possible basis for jurisdiction.2 Under that statute, plaintiffs were required to prove that the defendants carried on “continuous and systematic business” in Michigan.3 The district court examined the plaintiffs’ pleadings and affidavits in their most favorable light and found: (1) Cessna’s corporate headquarters and manufacturing facility were in Kansas; (2) Cessna did not operate any service centers,

3 Id. § 600.711(3).
dealerships, or subsidiaries in Michigan; (3) Cessna advertises in national publications; (4) Wipaire was a Minnesota corporation with its principal place of business in Minnesota; (5) Wipaire did not have an office in Michigan; (6) Wipaire did not maintain a bank account in Michigan; and (7) Wipaire did not have any representatives, agents, or dealers in Michigan. The court ruled that personal jurisdiction under the Michigan long-arm statute did not exist based on these facts.

The court then considered whether Cessna's subsidiary relationship with Textron, Inc., which was present in Michigan, affected its analysis. In reliance on Third National Bank in Nashville v. Wedge Group, however, the court ruled that Textron's presence did not create personal jurisdiction over its subsidiaries. The court, therefore, dismissed the action for lack of personal jurisdiction.

B. FOREIGN SOVEREIGN IMMUNITIES ACT (FSIA)

In Gould v. Aerospatiale Helicopter Corp., a wrongful death action under the Foreign Sovereign Immunities Act of 1976 (FSIA), the Ninth Circuit ruled that the United States subsidiary of a French state-owned corporation was not entitled to a bench trial, even though it was named as a defendant together with its parent. The action arose from an Idaho crash of a helicopter that was designed and manufactured by the foreign state-owned corporation and marketed in the United States by a wholly-owned domestic subsidiary. Also named as defendants were three individual United States citizens.

Previous to trial, the district court had denied the motion of the French parent and its United States subsidiary to strike plaintiff's jury trial demand on the ground that 28 U.S.C. section 1330(a) prohibits jury trials of actions against foreign sovereigns. These parties then admitted liability, and the court proceeded to try damages in a bench trial with respect to the foreign defendant and, in a simultaneous jury trial, against its domestic subsidiary.

On appeal, the Ninth Circuit rejected the domestic subsidiary's argument that it was entitled to a bench trial along with its parent. The court of appeals held that the plain language and
legislative history of the FSIA indicated that section 1330(a) only applies to "foreign states." The Ninth Circuit also noted the cases in which parallel jury/non-jury procedures had been employed in similar FSIA actions in other judicial circuits. Accordingly, the court ruled that section 1330(a) did not grant the right to a bench trial to the domestic subsidiary.

The Ninth Circuit case of *Sugimoto v. Exportadora de Sal, S.A. de C.V.* was an appeal that involved the second of two jurisdictional challenges raised by defendant Exportadora de Sal, S.A. de C.V. in a wrongful death action arising from the crash of an air taxi engaged by Exportadora to transport certain business visitors from its facility in Guerrero Negro, Mexico, to San Diego, California. Exportadora appealed an adverse judgment following a bench trial.

Exportadora, a salt manufacturer that is fifty-one percent owned by the Government of Mexico and forty-nine percent owned by Mitsubishi Corporation of Japan, claimed that the FSIA precluded the district court from exercising jurisdiction over plaintiff's action. In affirming the district court's rejection of the immunity defense, the Ninth Circuit invoked the "commercial activity" exception of the FSIA. Under this exception, a foreign state is subject to jurisdiction in the United States court if the action involves conduct that occurred in the course of commercial activity carried on in the United States. Citing the tortious conduct of the pilot, which occurred in U.S. air space, and Exportadora's conduct in arranging transportation for prospective business partners, the court of appeals held that the "commercial activity" exception applied.

The Ninth Circuit also rejected Exportadora's argument that it could not be held liable for the pilot's negligence on the theory that he was employed by an independent contractor. While acknowledging the general rule precluding liability under such circumstances, the court noted that the rule was so riddled with exceptions that "it is applied only when there is no good reason for departing from it." According to the court, "good

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8 40 F.3d at 1034.
9 Id. at 1035.
10 Id. at 1036.
11 19 F.3d 1309 (9th Cir.), cert. denied, 115 S. Ct. 581 (1994).
13 Id.
14 19 F.3d at 1311.
15 Id. at 1312 (quoting *Restatement (Second) of Torts* § 409 cmt. b (1977)).
reason" existed in this case due to Exportadora’s control of access to its facility.16

C. Forum Non Conveniens

The Fifth Circuit case of *Jorreblanca de Aguilar v. Boeing Co.*,17 an appeal regarding conflicts between federal and state procedural law, resulted from plaintiffs’ fourth attempt to pursue a wrongful death action in a United States court arising from a Mexicana Airlines crash in Mexico. In the first two attempts, plaintiffs had filed Texas and Illinois state court actions that defendants successfully removed to federal court and had dismissed on federal *forum non conveniens* grounds. The third attempt was filed in Washington state court and was dismissed on state *forum non conveniens* grounds. Seeking to capitalize upon a subsequent Texas Supreme Court decision that Texas common law would no longer countenance the *forum non conveniens* doctrine in wrongful death actions,18 plaintiffs again filed suit in Texas state court. After the action was removed, the district court denied plaintiffs’ motion to remand and again dismissed the action on federal *forum non conveniens* grounds.

In upholding the district court’s denial of the remand motion, the Fifth Circuit discounted affidavits executed by plaintiffs’ counsel stating that the amount in controversy was less than the $50,000 threshold for diversity jurisdiction.19 Citing rebuttal testimony offered by defendants, including the amounts plaintiffs had sought in their previous actions, the court found that the amount in controversy was in excess of the jurisdictional minimum.20 The court dismissed plaintiffs’ counsel’s affidavits as an “artful post-removal pleading in order to avoid the consequences of federal *forum non conveniens* law.”21

The court of appeals then turned to plaintiffs’ contention that Texas law should apply and held that federal *forum non conveniens* law should apply in diversity actions. Accordingly, the Fifth Circuit affirmed the dismissal after concluding, without

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16 Id.
17 11 F.3d 55 (5th Cir. 1993).
19 11 F.2d at 57.
20 Id. at 58.
21 Id.
substantive discussion, that the district court had not abused its discretion in dismissing on *forum non conveniens* grounds.\(^{22}\)

In 1993 the Texas legislature codified the doctrine of *forum non conveniens*.\(^{23}\) Affecting actions filed on or after September 1, 1993, the statute responds to the Texas Supreme Court’s abolition of the common law *forum non conveniens* doctrine in *Dow Chemical Co. v. Alfaro*.\(^{24}\) The statute establishes different tests applicable to claimants depending on whether they are or are not legal residents of the United States, and it creates several significant exceptions to the doctrine for particular types of lawsuits. The statute also specifically exempts injury or death actions arising from air transportation, provided the factual basis for the action has sufficient contacts with Texas. With respect to claimants who are not legal United States residents, the statute simply provides that the court may stay or dismiss an action on *forum non conveniens* grounds provided the court finds it “in the interest of justice” to do so.\(^{25}\)

Application of the doctrine to legal United States residents is limited to instances where the court determines that an out-of-state forum is more appropriate, based on several specified factors. The application of the doctrine is further restricted to cases where each defendant enters a written stipulation that it will submit to personal jurisdiction in the transferee forum and waives any statute of limitation defense that would be available in the transferee, but not the transferor, forum. The statute also exempts actions that are: (1) brought by legal residents of Texas; (2) allege that “acts” or “omissions” occurring in Texas were at least contributory causes of the claimant’s injury; (3) brought under specified federal statutes; or (4) involve asbestos or other toxic tort exposures.\(^{26}\) With respect to air transportation, the statute exempts injury and death actions that are “caused by a means of air transportation designed, manufactured, sold, maintained, inspected or repaired in this state or occurred while traveling in or on a means of air transportation during a trip originating from or destined for a location in this state . . .”\(^{27}\)

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\(^{22}\) *Id.* at 59.


\(^{24}\) 786 S.W.2d 674 (Tex.), *cert. denied*, 498 U.S. 1024 (1990).


\(^{26}\) *Id.* § 71.051(f)(1)-(3), (5).

\(^{27}\) *Id.* § 71.051(f)(4).
III. AIR CARRIER LIABILITY AND DEFENSES

A. PREEMPTION

1. Airline Deregulation Act (ADA) of 1978

a. Preemption of Personal Injury Claims

In the diversity action of *Doricent v. American Airlines, Inc.*,\(^{28}\) the United States District Court for the District of Massachusetts denied a defense motion for summary judgment based on federal preemption of plaintiff’s emotional distress and assault and battery claims under section 1305(a)(1) of the Federal Aviation Act\(^{29}\) as interpreted in *Morales v. Trans World Airlines, Inc.*\(^{30}\) The court, however, granted summary judgment for defendant on plaintiff’s state law civil rights claims, ruling that those laws would not be applied as none of the alleged tortious conduct occurred in Massachusetts.

The following facts were stipulated as true for purposes of summary judgment:

Plaintiff was a standby passenger on a flight from Haiti to New York and was the last to board the plane. While attempting to place his bags in the overhead compartment, a flight attendant yelled at him to sit down. As soon as plaintiff sat, the flight attendant yelled at him to put his bags in the overhead compartment. Plaintiff told the flight attendant not to yell at him, and the flight attendant responded by stating, “Get the black guy off the plane. He is staying in Haiti.” Another airline employee yelled that plaintiff was a Communist.

Haitian military guards who were standing at the stairs leading to the airplane then yelled, “Let us kill these Communist bastards. They are making all this trouble for the country when they come here.” They then began beating plaintiff. The airline captain intervened, verified that plaintiff was a United States citizen, and ordered the guards to desist.

Section 1305(a)(1) of the Federal Aviation Act bars any “state or political subdivision” from enacting or enforcing laws “relating to rates, routes or services” of any air carrier. In *Morales* the Supreme Court held that the plain meaning of “relating to” is extremely broad and extends to state statutes or actions that have some connection with or reference to “airline rates, routes

or services." Thus, any statute or action would be preempted if it had the "forbidden significant effect" on airline rates, routes or services, even if not specifically directed at them. The Massachusetts District Court, however, interpreting the purpose behind section 1305 as economic, held that preemption would hinge on the finding of economic impact on airline rates caused by the state action.

American also argued that plaintiff's claims should be preempted as relating to airline "services." The court rejected this argument, ruling that

[r]acial discrimination, the intentional infliction of emotional distress, and assault and battery have nothing whatsoever to do with any legitimate or quasi-legitimate industry-wide practice of affording airline services. Imposing liability for such conduct under Massachusetts law is not shown in any way to "significantly impact" an airline's ability to administer services, or set rates and routes.

American also argued that the Massachusetts civil rights statutes on which plaintiff based certain claims were inapplicable, in that all of the alleged tortious conduct occurred in Haiti. The court granted summary judgment as to these claims, reasoning that, because an appropriate injunction under the statutes could only be enforced within Massachusetts, the statutes could not be applied to conduct occurring in Haiti. Plaintiff was allowed to proceed with his claims for intentional infliction of emotional distress and assault and battery.

In Stagl v. Delta Air Lines, Inc., the United States Court of Appeals for the Second Circuit held genuine issues of material fact precluded summary judgment. In this personal injury action arising from a fall by an elderly passenger, the lower court rejected defendant air carrier's argument that claims arising from alleged negligence in supervising passengers in its terminal baggage areas were preempted by federal law as "relating to" rates, routes or services. The lower court, however, granted summary judgment for defendant, ruling that, under applicable New York law, air carriers do not owe the heightened, common-

31 Id. at 2031.
32 Id. at 2037-38.
33 1993 WL 437670 at *4-*5.
34 Id. at *5.
35 Id. at *7-*8.
carrier duty of care to passengers and are only subject to the ordinary negligence standard of care.

The accident occurred when plaintiff, while waiting to retrieve her bags from a baggage carousel, was struck by baggage that was dislodged by another passenger in retrieving his luggage. Plaintiff fell, breaking her hip. Applying ordinary negligence rules, the court ruled that the air carrier lacked any duty to protect plaintiff from the type of harm she encountered because the dangers associated with waiting near crowded baggage carousels are open and obvious. The court also found that preventive measures the air carrier could take would either be ineffective or unduly burdensome. With respect to the preemption argument, the court ruled that federal preemption was not meant to apply to ordinary premises liability claims.

In another Second Circuit case, Sedigh v. Delta Airlines, Inc., the action arose from plaintiff’s alleged wrongful ejection from defendant’s international flight. The court ruled that plaintiff’s state law claims were not preempted, but the court granted summary judgment for defendant under a statutory privilege authorizing air carriers to refuse transportation to persons when necessary in the interests of flight safety.

Plaintiff was ticketed on a Delta Airlines flight from the United States to Turkey. During a layover at Frankfurt International Airport in Germany, plaintiff commented, in favorable terms, “so this is the country where so many Jews were killed.” Plaintiff allegedly made various other comments about “killing all the Jews,” along with other defamatory comments about members of the Jewish faith and activated the lavatory smoke detector during the layover.

Nine armed United States federal marshals were on board the aircraft. Together with the captain, the marshals determined that plaintiff posed a security risk and removed him from the flight. Plaintiff was handed over to the German authorities, who arrested him for altering his passport. Plaintiff alleged that the German authorities kept him handcuffed for three days, beat him, and forced him to pay a fine for crimes he did not commit.

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37 Id. at 183-84.
38 Id. at 185.
39 Id. at 182.
Ultimately, plaintiff was returned to the United States on a Delta flight.

Plaintiff filed suit in the Supreme Court of New York (the trial court of that state), charging Delta with breach of contract, false imprisonment, slander, assault, and intentional infliction of emotional distress. Plaintiff's wife filed a related claim for loss of comfort. Plaintiffs sought damages in excess of $4 million. The case was removed to the United States District Court for the Eastern District of New York, and defendant moved for summary judgment.

The summary judgment motion raised two grounds: (1) federal preemption; and (2) the privilege to eject passengers who pose a threat to air safety. After carefully analyzing the ADA and Morales, the court found no preemption because "the proper focus should be on whether or not the specific common law action addresses matters about which the airlines wish or are likely to compete." The court, however, awarded summary judgment under the discretionary removal power granted by section 1511.

In Kay v. USAir, Inc., the United States District Court for the Eastern District of Pennsylvania ruled that ADA preemption did not apply to plaintiff's action for personal injuries sustained while disembarking from an aircraft. Plaintiff fell allegedly requesting but not receiving assistance in disembarking.

Plaintiff originally filed suit in the Court of Common Pleas for Philadelphia County, from which defendant removed, claiming removal jurisdiction under the ADA, and moved for summary judgment on the basis that plaintiff's state law claims were preempted. The federal district court overruled defendant's preemption argument, noting that "to hold that Section 1305(a)(1) of the ADA preempts state tort claims for negligence would be to leave plaintiff entirely without remedy." In the court's view, it was "inconceivable that Congress would have intended Section 1305(a)(1) of the ADA to act as a grant of total immunity to the airlines for any and all service-related negligence." The court cited with approval the dicta in Margolis v. United Airlines, Inc. in which the Eastern District of Michigan concluded that "Con-

42 112 S. Ct. at 2031.
43 850 F. Supp. at 200.
45 1994 WL 406548 at *2.
46 Id.
gress has expressed no intent to preempt traditional state law claims for negligence . . . [p]reemption under Section 1305 was not intended to be an insurance policy for air carriers against their own negligence.” 48

In Hodges v. Delta Airlines, Inc., 49 during a flight from the Caribbean to Miami, a passenger opened an overhead compartment directly above plaintiff, dislodging a case of rum, which fell on plaintiff, lacerating her left arm and wrist. The district court held that plaintiff’s action was preempted and plaintiff appealed. Although the Fifth Circuit favored the argument that ADA preemption does not generally apply to state common law personal injury claims, it held itself bound by its previous decision in Baugh v. Trans World Airlines, 50 in which it had affirmed a dismissal of a personal injury claim arising from a passenger’s foot being stepped on by a flight attendant.

In Chouest v. American Airlines, Inc., 51 plaintiffs, a husband and wife, brought personal injury actions in Louisiana state court arising from injuries the husband suffered while participating in ground transportation provided as part of defendant’s vacation package. Defendant removed the action to federal court on the basis of diversity and federal question jurisdiction, and plaintiffs sought remand, which the United States District Court for the Eastern District of Louisiana granted.

With respect to diversity jurisdiction, plaintiffs conceded that their claims were worth less than $50,000 each, and the district court noted that their broadly pleaded allegations were not inconsistent with plaintiffs’ admission.

With respect to the federal question jurisdiction, the district court considered, and ultimately rejected, defendant’s argument for preemption of plaintiffs’ state law causes under the ADA. The district court distinguished Morales 52 and the Fifth Circuit precedent in Baugh 53 in ruling that “ground transportation services, or an air carrier’s procurement of ground transportation services for its customers” are not air carrier “services,” even if they are included in a vacation package provided by the air carrier. 54

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49 4 F.3d 350 (5th Cir. 1993), reh’g granted, 12 F.3d 426 (5th Cir. 1994).
50 915 F.2d 693 (5th Cir. 1990).
52 112 S. Ct. at 2031.
53 915 F.2d at 693.
54 839 F. Supp. at 416.
In *Fenn v. American Airlines, Inc.*, the United States District Court for the Southern District of Mississippi denied the unopposed motion to dismiss of defendant American Airlines, Inc. under Federal Rules of Civil Procedure (FRCP) 12(b)(6), holding that plaintiff’s state law tort claims were not preempted.

While on an American flight, plaintiff, a registered nurse, noticed another passenger having trouble breathing. With the passenger’s and a flight attendant’s permission, plaintiff administered medical care until the airplane landed an hour later. The passenger then accused plaintiff of stealing her ring. Plaintiff was then detained by American employees. Subsequently, she filed an action in Mississippi state court for slander and false imprisonment, which American removed and moved to dismiss.

The court denied the motion, holding that preemption under the Federal Aviation Act does not apply to all claims relating to airline “safety.” The court explained that “[t]he intent of this distinction is to secure by federal preemption the benefits of economic deregulation of the airline industry, while maintaining the traditional role of state law in adjudicating bodily injury claims.” An airline’s failure to keep a passenger safe from harm, the court ruled, should not be preempted. The court then remanded the case to state court.

In *Bayne v. Adventure Tours USA, Inc.*, the United States District Court for the Northern District of Texas held that plaintiffs’ claims under the Texas Deceptive Trade Practices Act for breach of warranty, slander, emotional distress, and false imprisonment were not preempted and remanded the case to state court.

While on a charter flight, plaintiffs allegedly made repeated, unheeded complaints to airline employees about another passenger’s disruptive behavior. Upon landing, plaintiffs were taken into police custody, detained, and subjected to a luggage search. Plaintiffs sued in Texas state court. Defendants removed the action on the basis of federal preemption and then moved to dismiss. Plaintiffs filed a cross-motion for remand on the basis of lack of federal subject matter jurisdiction.

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56 Id. at 1223.
57 Id. at 1222-23.
58 Id. at 1223.
In rejecting defendant’s preemption argument, the district court quoted the Fifth Circuit’s recent ruling in *Hodges v. Delta Airlines, Inc.* that only “‘elements of the air carrier service bargain’ such as ‘ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself’ qualify as ‘services’ warranting broad protection from state regulation under section 1305.”

In *O’Hern v. Delta Airlines, Inc.*, the United States District Court for the Northern District of Illinois denied defendant’s FRCP 12(b)(6) motion to dismiss for failure to state a claim upon which relief could be granted, holding that plaintiff’s personal injury claims were not preempted. Plaintiff suffered a severe and permanent hearing loss when his flight allegedly descended too rapidly. Delta urged that the negligence claim was preempted as relating to airline “services.” The court disagreed, finding that “services” does not extend to all matters concerning passenger safety. Noting that section 1305 does not mention “safety,” the court ruled that state law negligence personal injury actions are not preempted because they concern safety aspects unrelated to “rates, routes or services.”

*Seligman v. Northwest Airlines, Inc.* concerned alleged discrimination against passengers with disabilities who potentially posed a danger to flight safety or to other passengers. Plaintiffs, a married couple, both suffered from Tourette’s Syndrome, a genetic disability associated with various symptoms including involuntary movements and vocalizations such as profanity. They were scheduled to fly on defendant’s airline from Detroit to San Francisco on the return portion of a round-trip ticket. At the Detroit Airport, plaintiffs allegedly advised the ticket agent of their disability, provided information concerning Tourette’s Syndrome, and requested early boarding in order to discuss their disability with the flight crew. The captain of the aircraft allegedly advised the plaintiffs that they could not fly on the aircraft because they might become disruptive. However, plaintiffs were allowed to board the flight. Plaintiffs alleged that during the flight they were treated badly by at least one flight

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60 F.3d 350 (5th Cir. 1993).
61 841 F. Supp. at 208.
63 Id. at 1267.
attendant. Plaintiffs thereafter filed suit in the United States District Court for the Northern District of California alleging two federal claims and nine state law claims. Defendant moved for dismissal averring that the complaint failed to state a claim upon which relief could be granted.

The court examined the Air Carrier Access Act of 1986 (ACAA)\(^{65}\) (an amendment to the Federal Aviation Act) to determine whether the air carrier had unlawfully discriminated against plaintiffs because of their handicap.\(^{66}\) The ACAA specifically prohibits denying transportation to handicapped individuals whose handicap may result in involuntary behavior that may “offend, annoy or inconvenience” crew members or other passengers.\(^{67}\) The Federal Aviation Act, however, provides that “subject to reasonable rules and regulations prescribed by the Secretary of Transportation, any carrier may refuse transportation of a passenger or property when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight.”\(^{68}\) The complaint stated that “the captain ordered the plaintiffs off the aircraft, claiming that plaintiffs were a hazard to other passengers.” The court found that the complaint did not allege that the captain was motivated by safety concerns but merely set forth grounds barring plaintiffs from the flight. The court also noted that even if it were assumed that the captain was acting out of concern for flight safety, his discretion was limited by the anti-discrimination provisions of the ACAA. Defendants also sought to rely on the Rehabilitation Act of 1973\(^{69}\) as supporting dismissal of plaintiffs’ action, which the Court also rejected.

In addition, defendant argued that plaintiffs’ state law claims were preempted under the ADA. The court, after examining the case law, concluded that “plaintiffs’ state law claims for improper treatment by airline employees during boarding and flights were related to airline services, and are therefore preempted by section 1305.”\(^{70}\) Accordingly, the Court dismissed plaintiffs’ state law claims.


\(^{67}\) 49 U.S.C.S. app. § 13764.


Finally, defendant sought to rely on the doctrine of primary jurisdiction to dismiss plaintiffs' tenth and eleventh causes of action for equitable relief. The court concluded that plaintiffs' claims for equitable relief rested on state law and, therefore, were preempted. However, to the extent that plaintiffs' claims for equitable relief rested on federal law, the claims were subject to agency resolution under the doctrine of primary jurisdiction.

In *Martin v. Eastern Airlines, Inc.*, the Florida appellate court held that federal preemption was an affirmative defense that must be raised in the defendant's answer to provide a basis for a motion to dismiss. In addition to ruling against defendant on this procedural ground, the court ruled that federal law did not preempt appellant's negligence action.

Appellant was struck on the head by a briefcase that fell out of the overhead compartment when a flight attendant opened the compartment. The action was filed in 1987 but was stayed until 1989 when a stipulation and order modifying Eastern's automatic bankruptcy stay was filed. Eastern raised the federal preemption issue for the first time in a motion to dismiss filed in 1992, well after the statute of limitations had run, which the trial court granted.

The appellate court reversed the dismissal, ruling that the federal preemption defense was waived when defendant failed to raise it in its answer. The court also held that reversal was proper on the merits, ruling that actions based on flight attendant negligence do not relate to airline services under *Morales*. In support, the court referred to two post-*Morales* cases indicating that the purpose of preemption was confined to ensuring against state actions that would frustrate the purposes of the Federal Aviation Act, which are related to allowing market forces to promote innovation, efficiency, and quality in air transportation. Quoting the two post-*Morales* cases, the court held that "'preemption was not intended to be an insurance policy for air carriers against their own negligence.'"
The New York Appellate Division case of *Harrell v. Champlain Enterprises, Inc.*77 arose from the death of a Champlain Enterprises airline mechanic traveling on an employee pass on board a company aircraft. In its answer to the complaint, defendant asserted that an express release provision contained in the employee's traveling pass precluded the action. To prevent the application of New York law, under which the release would not have absolved defendant for its own negligence, defendant argued that the ADA preempted New York law. Rejecting this argument, the trial court granted plaintiff's motion to strike the "release" defense. The appellate division affirmed, noting that the majority of federal courts addressing the issue had determined that most common law injury claims fall outside the preemptive scope of the Federal Aviation Act.78

On consideration of the defendant air carrier's motion for leave to amend its answer to include the affirmative defense of federal preemption,79 the New York trial court in *Hirsch v. American Airlines*80 *sua sponte* determined that plaintiff's claims were preempted and dismissed the action, and the appellate court affirmed.

While in the process of boarding defendant's flight from Los Angeles to New York, plaintiff's child became disruptive and unruly and was ordered to disembark. Plaintiff followed with her other child. Plaintiff then filed state law claims alleging damages arising from the incident.

In ruling that plaintiff's claims were preempted, the court relied on the section 1305(a)(1) preemption of state law claims that "significantly affect" air carrier "rates, routes or services."81 The court also relied on section 1511 of the Act, which allows a carrier to "refuse transportation of a passenger or property when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight."82

The court noted that courts within the Fifth and Eleventh Circuits had previously addressed the operation of these two sections and adopted their findings that Congress intended that

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78 Id. at 1004.
81 Id.
82 Id. at 608 (quoting 49 U.S.C. app. § 1511(a)).
regulation of boarding procedures, including boarding denials, be left to the FAA.85

In Kiefer v. Continental Airlines, Inc.,84 plaintiffs, husband and wife, successfully challenged the trial court’s grant of summary judgment to defendant air carrier in a case arising from personal injuries and loss of society they suffered as a result of an in-flight luggage fall from an overhead bin. The court of appeals for the First District of Texas, ruling that it was not bound to follow the decisions of the Fifth Circuit or other lower federal courts, but, instead, would “interpret federal law independently,” accepted plaintiffs’ argument that the ADA preemption was intended by Congress to affect economic issues only, not actions for personal injuries that passengers might incur while receiving air carrier services.85 Important to the court’s opinion was the fact that a finding of preemption would leave plaintiffs without legal remedy, in the absence of a clear congressional expression of such intent.86 The court based its analysis on its examination of the House, Senate, and Conference Reports, which lacked any express reference to personal injury lawsuits.87

b. Preemption of Air Carrier Business Practice Claims

In the Sixth Circuit case of Burke v. Northwest Airlines, Inc.,88 applying the doctrine of “complete preemption,” the United States District Court for the Eastern District of Michigan remanded this action, which alleged violations of the Texas Deceptive Trade Practices Act.89 Defendants moved for reconsideration on three grounds. In ordering remand, the court ruled that the following two-part test must be satisfied to support removal of an action under the doctrine of “complete preemption”: (1) a plaintiff’s claims were preempted under the Federal Aviation Act; and (2) the Act or its legislative history evidenced congressional intent to make such causes of action removable.90

84 882 S.W.2d 496 (Tex. App.—Houston [1st Dist.] 1994, writ granted).
85 Id. at 502.
86 Id.
87 Id. at 504.
90 819 F. Supp. at 1367.
Defendants’ first argument for reconsideration was based on preemption of the deceptive advertising claim under *Morales v. Trans World Airlines, Inc.* The court disagreed, ruling that plaintiffs’ action related to “non-rate” aspects of airline advertising, in that they claimed the airline falsely advertised that it provided safe, reliable transportation, and employed competent, well-trained people. The court further ruled that, even if defendants could satisfy the first prong of the “complete preemption” test, they had failed to show congressional intent to authorize removal of actions subject to the Federal Aviation Act.

Defendants’ second reconsideration argument alleged judicial error for not considering plaintiff’s negligence claim against the involved pilot as separate from his claim against the airline. Again, the court found no indication of legislative intent to warrant removal of the state court action.

Defendants’ final argument was that the court erred by failing to apply the law of the transferor forum, which supposedly authorized removal, in conformity with the Fifth Circuit’s ruling in *Trans World Airlines, Inc. v. Mattox.* The court distinguished *Mattox* as not applying the two-step analysis mandated by the Supreme Court.

*Wolens v. American Airlines, Inc.* was remanded to the Illinois Supreme Court by the United States Supreme Court for reconsideration in light of its decision in *Morales v. Trans World Airlines, Inc.* This class action suit against American Airlines, Inc. seeks damages and an injunction based on American’s alleged retroactive modification of its frequent flyer program. Upon interlocutory review, the appellate court held that the action for injunction comprised an attempt to regulate airline services and, thus, was preempted by federal law. Plaintiffs, however, were allowed to proceed with their damages claims.

American petitioned the United States Supreme Court for writ of certiorari. The Court vacated the judgment and re-

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91 112 S. Ct. at 2031.
92 819 F. Supp. at 1368.
93 *Id.*
94 *Id.* at 1369.
95 897 F.2d 773 (5th Cir. 1990).
96 819 F. Supp. at 1369-70.
98 112 S. Ct. at 2031.
manded the case for further consideration in light of *Morales*. The Illinois court found that plaintiff's claims for breach of contract and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act were only tenuously connected to airline rates, routes and services and were not preempted by section 1305(a)(1). The Illinois court majority reasoned that frequent flyer programs are peripheral to rather than essential to airline operations, and, therefore, that actions based on such services are not preempted. A dissenting justice views American's management of its frequent flyer program as indistinguishable from the alleged deceptive advertisement practices involved in *Morales*. The United States Supreme Court, for the second time, has granted certiorari.

In *Pearson v. Lake Forest Country Day School*, the Illinois appellate court affirmed the dismissal of plaintiff's action against defendant air carrier and one of its employees on the basis that state law actions based on air carrier policies and practices in denying boarding to passengers traveling on employee passes are preempted under the ADA.

Plaintiff, who was defendant's employee, sent her thirteen year old daughter on a school-chaperoned trip to Spain using an employee travel pass that allowed family members to travel on a stand-by basis. Plaintiff's daughter was denied boarding on her intended return flight from Madrid. She returned a day late after being accommodated overnight by a couple traveling stand-by, who also had been excluded from the flight. Plaintiff claimed that the flight from which her daughter had been excluded arrived in the United States with three empty seats.

In affirming the dismissal, the appellate court ruled that preemption would apply both to the denied boarding claim and to plaintiff's related defamation claim against an employee defendant, which was based on a letter he had written to the daughter's schoolteacher explaining the boarding denial and questioning plaintiff's judgment in having her daughter travel stand-by during a peak European travel period. The basis for the ruling was that the actions against both defendants rested

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101 626 N.E.2d at 208.
102 Id. at 208-09.
103 Id. at 211 (McMorrow, J., dissenting).
105 Id. at 1320.
upon state tort laws that, if enforced, would "significantly affect" air carrier services.\(^\text{106}\)

The appellate court, however, reversed the trial court's dismissal based on lack of personal jurisdiction over the employee defendant, finding that the employee defendant, who claimed to be specially appearing, had participated in the proceedings beyond simply contesting jurisdiction and, therefore, had generally appeared.\(^\text{107}\)

In the consolidated appeal of *Johnson v. American Airlines, Inc.*,\(^\text{108}\) the Illinois Appellate Court affirmed the Cook County Circuit Court's decision that plaintiffs' class action against American Airlines, Inc., and United Airlines, Inc., was preempted.

Plaintiffs bought reduced fare airline tickets that carried a twenty-five percent cancellation penalty. When plaintiffs canceled the tickets, the airlines kept twenty-five percent of the total ticket price, including twenty-five percent of the federal tax. Plaintiffs alleged that the airlines had breached the ticket contracts by retaining the federal tax portion.

Applying the rationale of *Morales v. Trans World Airlines, Inc.*,\(^\text{109}\) the Illinois Appellate Court held that:

> [T]he State law claims here clearly relate to the rates charged by airlines for reduced fare tickets. Furthermore, to allow plaintiffs to bring these State law claims would create exactly the type of rate inconsistency among States which Congress intended to prohibit by enacting the federal preemption language of section 1305(a)(1).\(^\text{110}\)

The court further ruled that, if plaintiffs wished to pursue their claims, they would be required to file a claim with the Department of Transportation, which has been specifically designated by Congress to administer and enforce consumer protection law.\(^\text{111}\)

\(^{106}\) *Id.*

\(^{107}\) *Id.* at 1318-19.


\(^{109}\) 112 S. Ct. at 2031.

\(^{110}\) 633 N.E.2d at 980.

\(^{111}\) *Id.* at 980 (citations omitted).
c. Preemption of Air Carrier Employment Practice Claims

The Fourth Circuit case of *Nellis v. Air Line Pilots Association*\(^{112}\) was an appeal that arose from a class action by 2400 former Eastern Airlines pilots against the Airline Pilots Association (ALPA).

The pilots alleged that ALPA induced them to strike against Eastern by promising that, if Eastern declared bankruptcy and was liquidated, ALPA would implement its Merger Fragmentation Policy. Under that policy, former Eastern pilots would receive assistance in obtaining positions with the airlines acquiring Eastern’s assets, with some retention of seniority for their years at Eastern. The pilots, alleging that ALPA failed to carry through on this process, filed a lawsuit alleging six causes of action: (1) the union had violated its federally mandated duty to provide fair representation; (2) ALPA breached its contractual duty to implement the Fragmentation Policy; (3) ALPA induced the pilots to rely on its promises to implement the Fragmentation Policy; (4) ALPA tortiously interfered with the pilots’ efforts to secure employment with the other airlines; (5) ALPA officials breached their fiduciary duties to the union under the Labor Management Reporting and Disclosure Act (LMRDA);\(^{113}\) and (6) ALPA unlawfully established a “custodianship” over the Eastern Master Executive Council, a subordinate union body that had coordinated union-related activities of ALPA-represented pilots employed by Eastern, in violation of 29 U.S.C. section 462.

On appeal, the Fourth Circuit affirmed the trial court’s grant of summary judgment for ALPA on the pilots’ first four causes of action. The court held that the state law claims of breach of contract and tortious interference with prospective employment relationships were preempted by ALPA’s federal law duty to provide fair representation and that ALPA had not breached this duty because its actions were not “arbitrary, discriminatory or in bad faith.”\(^{114}\) With regard to the fifth cause of action, the appellate court affirmed summary judgment for ALPA, ruling that the pilots could not assert a derivative claim against ALPA management absent a showing of harm suffered by the union itself.\(^{115}\) The appellate court also affirmed summary judgment on the sixth cause of action, ruling that ALPA’s custodianship had com-

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\(^{112}\) 15 F.3d 50 (4th Cir.), *cert. denied*, 115 S. Ct. 56 (1994).


\(^{114}\) 15 F.3d at 51.

\(^{115}\) *Id*. 
plied with both the union's constitution and federal law. Deeming it unnecessary, the Fourth Circuit did not reach the merits of ALPA's cross-appeal from the trial court's ruling that the pilots' fair representation claims arising from certain years were barred by a six-month statute of limitation.

In the Ninth Circuit case of Aloha Airlines, Inc. v. Ahue, the issue, on appeal from summary judgment in favor of the air carrier, was whether a Hawaiian statute, which required the carrier to pay for FAA-mandated physicals for its captains and first officers, was preempted by the Employee Retirement Income Security Act of 1974 (ERISA).

Pursuant to an agreement between Aloha and ALPA, Aloha pilots could choose two Health Maintenance Organizations for medical care. Aloha paid the entire cost of each health care plan. The plans differed in how they treated FAA-mandated medical exams. One plan paid the cost of one annual FAA exam and the other plan paid for an FAA-mandated medical examination only if the examination was required by a physician.

Aloha brought the underlying declaratory relief action after the Hawaii Department of Labor and Industrial Relations issued an opinion that the Hawaii statute required Aloha to pay for the FAA-mandated physicals. In unsuccessfully opposing Aloha's preemption argument under ERISA, the state argued that section 388-6(6) of the Hawaiian statute applied because the FAA examination did not provide the pilot with a "medical benefit," as defined by ERISA. Alternatively, the state argued that the statute was a criminal statute, and, therefore, was exempt from ERISA preemption. The Ninth Circuit affirmed, finding that the purpose of the FAA-mandated medical examination was not only to protect the public but also to evaluate various aspects of the pilot's health, which provided the pilot with a medical benefit within the meaning of ERISA.

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116 Id.
117 Id. at 52.
118 12 F.3d 1498 (9th Cir. 1993).
119 HAW. REV. STAT. § 388-6(6) (1994).
121 12 F.3d at 1503-04.
2. Warsaw Convention  

a. Scope of Preemption, Removal Jurisdiction  

In *Alvarez v. Servicios Aereos de Honduras, S.A.*, the United States District Court for the Southern District of Texas ruled that the Warsaw Convention exclusively controlled plaintiff's rights and remedies in this action and, therefore, that removal jurisdiction existed.

The action arose from an accident occurring in Managua, Nicaragua, on July 18, 1993, involving a Servicios Aeros de Honduras (SAHSA) Boeing 737. The flight originated in Miami, Florida, and was to terminate in San Jose, Costa Rica, with intermediate stops in Tegucigalpa, Honduras, and Managua, Nicaragua. During the scheduled intermediate stop in Managua, the airplane slid sideways down the runway. The passengers exited through the emergency exits after the airplane stopped. There were no fatalities.

On August 21, 1993, plaintiffs filed a personal injury suit against defendant SAHSA in Texas state court. On September 28, 1993, SAHSA filed a notice of removal under 28 U.S.C. sections 1337 and 1441, claiming the court had original jurisdiction pursuant to 28 U.S.C. section 1331 because thirty of the fifty-one plaintiffs had claims governed by the Warsaw Convention. Defendant further alleged that the court had supplemental jurisdiction over the remaining plaintiffs whose claims were not subject to the Warsaw Convention.

Plaintiffs moved to remand, arguing that the Warsaw Convention does not create an exclusive cause of action, but merely limits the damages remedy available. Plaintiffs further argued that even if the court had exclusive jurisdiction over the claimants who were subject to the Warsaw Convention, it did not have jurisdiction over the remaining claimants. The court found that cases arising out of international air transportation are governed by the Warsaw Convention and are within federal court original jurisdiction. The court was bound by the Fifth Circuit holding that the Warsaw Convention creates an exclusive cause of action preempting state law claims for personal injury. Accordingly, the court held that state law claims of those plaintiffs covered by the

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Warsaw Convention were preempted and, therefore, that removal was proper.\textsuperscript{124}

The court also examined 28 U.S.C. section 1367(a), which deals with supplemental jurisdiction. Looking to the legislative history of section 1367, the court noted that, in federal question cases, the district courts have authority to exercise supplemental jurisdiction over additional claims, including claims involving the joinder of additional parties.\textsuperscript{125} The court stated that the commentary to section 1367 made it clear that the statute restored the federal pendent jurisdiction that had been eliminated by the Supreme Court’s 1989 decision in \textit{Finley v. United States}.\textsuperscript{126} The court also examined the case of \textit{United Mine Workers of America v. Gibbs},\textsuperscript{127} regarding supplemental jurisdiction, and found that the constitutional limits identified in \textit{Gibbs} included all causes of action arising from a common nucleus of operative facts.\textsuperscript{128} The court determined that all of the claims asserted by the plaintiffs in the instant case arose from a common nucleus of operative facts, the crash of the aircraft. Therefore, under section 1367, the court had jurisdiction to adjudicate all the claims arising from the accident, including the claims of pendent parties.\textsuperscript{129} Therefore, plaintiff’s motion to remand was denied.\textsuperscript{130}

In \textit{Luna v. Compania Panamena de Aviacion, S.A.},\textsuperscript{131} an action arising from the crash in Panama of a Compania Panamena de Aviacion, S.A. (COPA) aircraft, the Southern District of Texas ruled that federal court jurisdiction under the Warsaw Convention is exclusive and, therefore, provides an adequate basis for removal jurisdiction, and it granted COPA’s motion to dismiss based on lack of personal jurisdiction.

Plaintiff’s decedent was a United States citizen who died in the crash. She had purchased her ticket through a Houston travel agent for carriage aboard a U.S. registered carrier from Houston to Panama, and then transferring to the ill-fated COPA flight. After the wrongful death action was removed from Texas state court, plaintiff moved to remand, contending that federal

\textsuperscript{124} Id. at 17,890.
\textsuperscript{125} Id. at 17,891.
\textsuperscript{127} 86 S. Ct. 1130 (1966).
\textsuperscript{128} 24 Av. Cas. at 17,891.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} 851 F. Supp. 826 (S.D. Tex. 1994).
jurisdiction under the Warsaw Convention is not exclusive in
that the Convention merely limits the available recovery and
does not govern a plaintiff's cause of action. After reviewing the
applicable precedents, the court determined that the weight of
authority and need for uniformity in air carrier liability rules
demonstrated that federal jurisdiction under the Warsaw Con-
vention is exclusive.152

After ruling that jurisdiction was proper, the court dismissed
the action for lack of personal jurisdiction over COPA.153 The
factors the court considered as significant included the follow-
ing: (1) COPA neither solicited nor transacted passenger busi-
ness in the United States; (2) decedent's ticket was issued on the
U.S. carrier's ticket stock and the U.S. carrier merely forwarded
to COPA its share of the ticket proceeds; and (3) although
COPA had entered into a maintenance contract with a U.S. busi-
ness, only two airplanes had been serviced in the United States.
The court held these contacts were inadequate to confer per-
sonal jurisdiction under Texas law.154 The court also ruled that
Panama's status as a signatory to the Warsaw Convention did
not, in and of itself, confer personal jurisdiction in the United
States over Panamanian air carriers.155

The United States District Court for the Eastern District of
Michigan remanded Patelczik v. Clarkston Travel Bureau, Inc. and
Northwest Airlines, Inc.,156 an action which arose from an airport
terminal slip-and-fall incident. In remanding the action to state
court, the district court ruled that both diversity jurisdiction and
federal question jurisdiction under the Warsaw Convention
were lacking.

Plaintiff had made reservations through defendant Clarkston
Travel Bureau for international transportation on Northwest
Airlines. She allegedly requested that defendant Clarkston re-
serve wheelchair assistance for her, which she did not receive.
Allegedly as a result, she was injured in a slip-and-fall accident
while waiting to board a Northwest Airlines shuttle bus during a
layover in Seattle.

Plaintiff filed her complaint in the Circuit Court for Oakland
County, Michigan, alleging state law theories of negligence,
breach of warranty, and breach of contract. Northwest removed the case, and plaintiff moved to remand. As plaintiff and defendant Clarkston were Michigan residents, diversity jurisdiction would be lacking unless defendant Clarkston had been "fraudulently joined" as a defendant. Northwest also contended that federal question jurisdiction existed under the Warsaw Convention.

To prove fraudulent joinder, the court ruled that defendants were required to show either that there was "absolutely no possibility" or that there was "no reasonable possibility" that plaintiff would be able to prove a cause of action against defendant Clarkston. The court held that defendant Clarkston was not fraudulently joined regardless of which standard was applied, as defendants had failed to rule out all state law theories of negligence alleged against defendant Clarkston.

Northwest also argued that plaintiff's action was preempted by Article 17 of the Warsaw Convention, which applies to claims arising from accidents that take place in the course of international transportation whether on board an aircraft, in the course of embarking, or in the course of disembarking. To determine whether plaintiff was embarking or disembarking, the court employed a three-part test based on the following: (1) the activity in which plaintiff was engaged; (2) who controlled the activity; and (3) the location of the activity.

The court held that plaintiff's activity did not involve either embarking or disembarking from an airplane because she was waiting for a shuttle bus. The court considered the level of control defendant Northwest exercised and found that defendant Northwest had instructed plaintiff to board a shuttle bus, not an airplane. The court also considered plaintiff's location at the time of the injury and held that she was in a common area of the airport, not in an area reserved for international flights. She had also not yet received her boarding pass. Accordingly, the court granted plaintiff's motion to remand.

The consolidated actions in Jack v. Trans World Airlines, Inc. comprised some 103 personal injury lawsuits filed in the Califor-
nia state court arising from the aborted takeoff of Trans World Airlines (TWA) Flight 843 from John F. Kennedy International Airport on July 30, 1992, bound for San Francisco. After the takeoff was aborted, the Lockheed L-1011 skidded to a stop, resulting in a post-crash fire that ultimately consumed the airplane after the passengers and crew had safely evacuated.

After TWA removed the actions of international passengers who had connected with Flight 103 as part of their international travel itineraries, plaintiffs moved to remand. The United States District Court for the Northern District of California denied the motion, holding that the international passengers’ claims were covered by the Warsaw Convention, which exclusively controlled their rights and remedies.

Recognizing that the presence of federal question jurisdiction is determined by the “well-pleaded complaint rule,” which requires that the federal question appear on the face of a “well-pleaded” complaint, the court noted as a corollary of the rule that “Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character.” The court also made note of existing precedent requiring courts to examine the intent of the Warsaw signatories to determine whether they intended that the treaty provide the exclusive cause of action for covered claims. The court noted:

After carefully reviewing the text, drafting history, and structure of the Warsaw Convention, the court believes that the Convention’s authors expected it to be the exclusive basis for recovery of damages arising from delay, lost or damaged goods, personal injury, and death during international flights. In short, the Warsaw Convention preempts state law causes of action, not just remedies . . .

The court, therefore, denied the remand motions, ruling that TWA’s removal of the actions was proper.

In another aspect of the TWA Flight 848 litigation, Jack v. Trans World Airlines, Inc., the United States District Court for the Northern District of California ruled that the numerous foreign plaintiffs would be required to travel to California for their

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144 Id. at 1220 (citation omitted).
145 Id. at 1226.
146 Id.
147 Id.
depositions to be taken (the flight had been destined for San Francisco). In so ruling, the court rejected plaintiffs' arguments that their fear of flying caused by the aborted takeoff accident precluded them from traveling to California, and noted that, having chosen to file their lawsuits in California, they were obligated to travel there for depositions.\footnote{Id. at *2.} Plaintiffs then petitioned for an interlocutory order from the Ninth Circuit overruling the court's decision, which the Ninth Circuit denied, after first issuing an alternative writ and entertaining briefing on the issue.

In a third aspect of the TWA Flight 843 litigation, Jack v. Trans World Airlines, Inc.,\footnote{854 F. Supp. 654 (N.D. Cal. 1994).} more than 120 lawsuits were filed in San Francisco Superior Court by plaintiffs seeking damages for physical injuries and emotional distress. Following the aborted takeoff, fire destroyed the airplane after the passengers and crew had safely evacuated. Some passengers, however, suffered minor physical injuries and many alleged emotional distress caused by the incident.

After removing the actions involving international travelers to the Northern District of California, TWA moved for partial summary judgment under the Warsaw Convention. TWA argued that the emotional distress claims of plaintiffs whose alleged distress had not resulted in physical manifestations were not compensable under the Convention, in reliance on the leading case of Eastern Airlines, Inc. v. Floyd.\footnote{499 U.S. 530 (1991).} TWA also argued that the Convention preempted plaintiffs' state law causes of action, and barred plaintiffs' claims for punitive damages.

Plaintiffs presented several legal challenges to summary judgment, including the following arguments: (1) that the Warsaw Convention was ineffective because it had not been properly ratified; (2) that the Convention unlawfully infringed upon the right to international travel; and (3) that the Convention unconstitutionally denied equal protection to international and domestic passengers traveling on the same flight. Plaintiffs also argued that the court should disregard the Warsaw Convention as having outlived its usefulness. The court rejected each of these arguments, as well as plaintiffs' contention that their claim

\footnote{Id. at *2.}
that TWA breached a "post-crash duty of care" was outside the scope of the Convention.\textsuperscript{152}

Regarding punitive damages, the court ruled that such damages were not recoverable under the Warsaw Convention, even in actions where air carriers were proven to have committed willful misconduct.\textsuperscript{153} In so holding, the court relied on the cases of \textit{In re Korean Airlines Disaster of September 1, 1983}\textsuperscript{154} and \textit{In re Air Disaster at Lockerbie, Scotland on December 21, 1988}\textsuperscript{155}

The court then turned to the major dispute between the parties, which concerned the compensability of plaintiffs' claims for emotional distress. TWA argued that even the passengers suffering impact injuries were barred from any emotional distress recovery unless the emotional distress itself had resulted in physical manifestations. The district court examined, in considerable detail, the application of the \textit{Floyd} case to the present facts, and analyzed four possible different approaches that could be applied to determine the recoverability of emotional distress damages. The court ultimately adopted the fourth approach, which: (a) limited recovery of emotional distress damages to plaintiffs suffering impact injuries to the emotional distress flowing from those injuries; (b) denied emotional distress recoveries to plaintiffs who had neither suffered impact injuries nor physical manifestations of their emotional distress from the accident; and (c) limited plaintiffs who had suffered physical manifestations of their emotional distress to damages flowing from those physical manifestations, and not from the accident in general.\textsuperscript{156} As a result, TWA's motion for partial summary judgment was granted, except as to plaintiffs whose emotional distress had resulted in physical manifestations.\textsuperscript{157}

In \textit{Union Iberoamericana v. American Airlines, Inc.},\textsuperscript{158} after finding that plaintiff's state law claims based on spoilage of a cargo of frozen lobster were not preempted by either the Warsaw Convention or the Federal Aviation Act, the United States District Court for the Southern District of Florida remanded the case to state court.

\textsuperscript{152} 854 F. Supp. at 662.
\textsuperscript{153} \textit{Id.} at 663.
\textsuperscript{154} 932 F.2d 1475 (D.C. Cir. 1991).
\textsuperscript{155} 928 F.2d 1267 (2d Cir. 1991).
\textsuperscript{156} 854 F. Supp. at 668.
\textsuperscript{157} \textit{Id.}
\textsuperscript{158} No. 93-2510-CIV, 1994 WL 395329 (S.D. Fla. July 20, 1994).
Plaintiff's claims were based on defendant air carrier's stowage of the lobster in an unrefrigerated compartment on board its aircraft. Plaintiff's state court complaint alleged breach of contract, willful misconduct, and negligence. In its answer, defendant contended that the action was governed by the Warsaw Convention and/or by section 403 of the Federal Aviation Act (the Act), 49 U.S.C. section 1373, and defendant removed the action to federal court on the basis of exclusive federal question jurisdiction.

While acknowledging that the Warsaw Convention "is the exclusive remedy against international air carriers for lost or destroyed cargo," the court ruled that, although the Convention limits liability, it does not preclude plaintiffs from pursuing state law causes of action "to obtain that limited remedy." The court also rejected plaintiff's argument for preemption under the Act, ruling that plaintiff's claims were neither specifically directed at regulating, nor would they have any significant effect upon, air carrier rates, routes, or services. Accordingly, the court held that the matter was improvidently removed and remanded to state court.

b. Timeliness of Action

In the United States District Court for the Southern District of New York case of Balani Impex Ltd. v. Malaysian Airline System Berhad, plaintiff Balani Impex Ltd. brought an action to recover for 116 cartons of shoes, which it claimed defendant lost in shipment. The court entered summary judgment for defendant based upon plaintiff's failure to commence the action within the two year limitation period found in Article 29 of the Warsaw Convention.

The plaintiff's shipper had contracted with defendant to ship 245 cartons of shoes, for which defendant issued an air waybill on December 14, 1990. Originally, all of the cartons were to go to Manila, Philippines. On December 27, 1990, the shipping instructions were changed to direct the entire consignment to Hong Kong. In Kuala Lumpur, while en route, the consignment was split, and, on December 30, 1990, 116 of the cartons went to Manila and were seized by the Philippine Bureau of Customs. The shoes were never seen again. In a letter dated Janu-

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159 Id. at *2.
160 Id. at *5.
January 9, 1991, plaintiff notified defendant that part of the shipment did not arrive in Hong Kong. After defendant refused voluntarily to compensate plaintiff for the loss, plaintiff commenced this action on February 8, 1993.

The parties agreed that the Warsaw Convention was applicable. Defendant contended that the action was not filed within the two year limitation imposed by Article 29 of the Warsaw Convention. Three events trigger the limitation: (1) the date of arrival at destination; (2) the date the aircraft was due to arrive at the destination; or (3) the date on which the transportation stopped. Defendant argued that the time in which to bring the action started running at the latest on January 9, 1991, when plaintiff communicated its knowledge of the loss to defendant.

Despite plaintiff’s arguments to the contrary, the court ruled that there was no genuine issue as to any material fact. The 116 cartons arrived in Manila on December 30, 1990, and plaintiff was aware of the misdelivery on January 9, 1991. Further, the goods never arrived at Hong Kong at all, much less on plaintiff’s January 11, 1991, deadline. At the very latest, plaintiff knew by January 11, 1991, that the shipment had gone awry. Therefore, the latest date upon which the suit could have been timely commenced was January 11, 1993, and plaintiff did not initiate the action until February 8, 1993. Accordingly, the court granted defendant Malaysian Airlines’ motion for summary judgment.

In another case from the United States District Court for the Southern District of New York, Royal Insurance Co. v. Emery Air Freight Corp., plaintiff-in-subrogation brought an action against the defendant air carrier for negligence and breach of contract for damages to a shipment of ceramic substrate that occurred during transportation from the United States to South Korea. Defendant moved to dismiss, contending that plaintiff had failed to comply with the time restrictions imposed by Articles 26 and 29 of the Warsaw Convention. Defendant also filed a third-party action against Singapore Airlines Ltd. (SIA) seeking contribution or indemnification. SIA moved to dismiss the third-party claim as untimely, arguing on similar grounds.

Plaintiff alleged that its subrogor, Corning, Inc., had delivered a number of pallets of ceramic substrate to Emery on November 16, 1989. According to plaintiff, when the pallets were

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162 Id. at *3.
163 Id.
delivered to Corning Korea on November 21, 1989, the ceramic substrate was found to have been damaged from being loaded upside down. Emery alleged that Corning did not complain until more than a week had passed from the time of the delivery of the goods in Korea. Plaintiff, however, produced an internal memo dated November 23, 1989, from a Corning Korea employee discussing the damage. Corning claimed that this memo was sent by facsimile to defendant and that Corning Korea notified defendant of the problem by telephone on November 27, 1989. Plaintiff filed its summons and complaint on November 11, 1981, and served it the next day. Defendant initiated the third-party action against SIA on January 6, 1982.

Article 29 of the Warsaw Convention provides that the right to damages shall be extinguished if an action is not brought within two years, based on (1) the date of arrival at destination; (2) the date the aircraft was due to arrive at the destination; or (3) the date on which the transportation stopped. Article 26 of the Warsaw Convention further provides that, in claims for damages to goods, the carrier must be notified of a damaged shipment, in writing, within seven days of receiving the damaged shipment.

Defendant argued that Article 29 did not apply to third-party actions between carriers, in reliance on Canadian case authority. The court held that the limited persuasive value of the Canadian case was clearly outweighed by the contrary holdings of cases decided by the Southern District of New York. Defendant next argued that Corning failed to provide timely notice, as required by Article 26, and failed to bring the action within the two-year period established by Article 29. However, the court held that the evidence established that delivery of the damaged goods occurred on November 21, 1989, and that Corning notified Emery in writing and by telephone not later than November 27, 1989. As the action was commenced on November 11, 1991, the court ruled that it had been filed within the two-year limitation period.

In considering SIA's motion to dismiss the third-party complaint on the ground that it was not filed within the two-year time limit, the court found that the motion raised a question of

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165 Id. at 634 (citations omitted).
166 Id. (citations omitted).
167 Id.
168 Id. at 635.
first impression regarding the application of Article 29 to third-party actions. Courts are divided on whether Article 29 constitutes a condition precedent to suit or a statute of limitations that courts may apply flexibly in accordance with local law. Subparagraph (2) of Article 29 potentially creates confusion in stating that "[t]he method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted." The court ruled that subparagraph (2) could be interpreted to allow local statutes of limitations to modify the limitation period in Article 29.

After analyzing case law decisions from other jurisdictions, the court, however, concluded that the two-year limitation period would not be tolled in third-party cases. The court discussed legislative history which showed that the drafters of the Warsaw Convention specifically considered and rejected a provision that would have allowed tolling, if such were permitted by the law of the forum court. Because it was uncontested that defendant's third-party action was filed more than two years after the delivery date for the damaged substrates, the court granted SIA's motion to dismiss.

c. Occurrences and Injuries Covered

In the diversity action of Curley v. American Airlines, Inc., plaintiff alleged that he was detained and searched by Mexican authorities after having been falsely identified by the captain of his American Airlines flight as having smoked marijuana in the aircraft lavatory. Defendant unsuccessfully sought summary judgment on the grounds that plaintiff's state law causes of action were preempted by the Warsaw Convention and by the Federal Aviation Act as amended by the ADA.

On Christmas day, 1990, plaintiff and a friend boarded an American Airlines flight for Puerto Vallarta, Mexico, at La Guardia International Airport. As plaintiff disembarked in Puerto Vallarta, he was asked how long he intended to stay in Mexico and then was detained by an armed customs officer. Ultimately, he was released and allowed to complete his ten-day Mexican holiday.

169 834 F. Supp. at 634 (citations omitted).
170 Id. at 635.
171 Id. at 635-36.
172 Id. at 636.
The plaintiff later learned that the captain of the flight had advised American Airlines’ ground crew after a flight attendant informed him of her suspicions that the plaintiff was suspected of smoking marijuana. He also learned that the ground crew had advised the Mexican authorities. At his attorney’s suggestion, plaintiff underwent a psychological evaluation and was diagnosed as suffering from post-traumatic stress disorder.

Plaintiff subsequently filed this action, claiming that he had been strip searched and cavity searched, that his life and freedom had been threatened, that his body had been touched by loaded firearms, that he had been forced to stand naked in front of others of both sexes, that he had been verbally humiliated, that his belongings had been searched, and that he had been examined against his will by a person claiming to be a doctor. Defendant contended that plaintiff’s causes of action were preempted by Article 17 of the Warsaw Convention or, alternatively, by section 1305 of the Federal Aviation Act.

The United States District Court for the Southern District of New York stated that the applicability of the Warsaw Convention turned on whether plaintiff’s injuries were caused by an accident within the meaning of Article 17. The court found that defendant’s suspicion that plaintiff had been smoking marijuana did not relate to operations of the aircraft or occur in the course of embarking or disembarking. The court also ruled that the report of suspected marijuana smoking did not constitute an “accident” within the contemplation of the Convention. The court also found defendant’s preemption argument based on the Federal Aviation Act insupportable. The court found that the captain’s passing on to ground personnel accurate or inaccurate suspicions concerning a passenger had no relation to air carrier rates or routes, nor did it refer to any services normally expected of flight personnel. Consequently, the defendant’s motion for summary judgment was denied.

In the Fourth Circuit case of *Sakaria v. Trans World Airlines, Inc.*, appellants, the decedent’s widow and children, unsuccessfully appealed from summary judgment for defendant in a wrongful death action against Trans World Airlines (TWA) arising from a death by heart attack that plaintiffs’ claim was caused

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175 846 F. Supp. at 282.
176 *Id.* at 282-83.
177 *Id.* at 283.
178 *Id.* at 284-85.
by events associated with a terrorist attack at the airport during an intermediate stop in Rome. In affirming dismissal, the court of appeals ruled that plaintiffs' claims were insupportable whether considered under the Maryland wrongful death act, plaintiffs' contract theory, or the Warsaw Convention, due to the lack of evidence linking the decedent's heart attack with any acts or omissions by TWA.

Decedent had booked passage on a TWA flight from New York to Athens unaware that the flight included a scheduled stop in Rome. Due to a terrorist attack in the TWA terminal, the aircraft was parked on a remote section of the tarmac after landing, and the passengers were kept on board the aircraft for some two hours before being allowed to disembark. The passengers were not exposed to the aftermath of the terrorist attack. Approximately two hours later, the passengers were bused back to the airplane, which continued on to Athens.

Decedent was met at the airport by a friend, who recalled decedent as looking pale and terrified with black circles under swollen eyes, and who testified that decedent "held his throat and neck and complained of thirst while recounting his experience in Rome in angry, excited tones."180 The next day, the decedent was driven on a seven-hour journey from Athens to Volos, a remote village. After arriving, decedent refused to eat and several times broke down in tears while describing events in Rome. He retired to bed early that evening and the following morning was found dead. His autopsy established the cause of death as a heart attack.

As noted, the district court granted summary judgment on all counts.181 As for the contract theory, the court found there was no breach, as the stop in Rome was a scheduled part of the flight. As for the state wrongful death action, which was premised on TWA's alleged negligence in making the scheduled landing in Rome while there was a terrorist attack there, the court ruled that there was no evidence to support a finding of proximate causation between TWA's alleged negligence and decedent's death. Furthermore, even if breach of contract or negligence were found, the court ruled, as a matter of law, that decedent's death was not a foreseeable result of any such breaches of duty.182 With respect to the Warsaw Convention,
the court of appeals reversed the trial court's ruling that plaintiff had waived the issue by failing to make proper pleadings and held that this cause of action, too, foundered for lack of proof of causation.\textsuperscript{183}

Plaintiffs also argued on appeal that the summary judgment should be vacated for the refusal of the magistrate judge and the trial judge to hear oral argument on the motion. The court of appeals rejected this argument, after noting that the summary judgment record was fairly developed and argued, and would not have been added to substantively by oral argument.\textsuperscript{184}

In \textit{Pasinato v. American Airlines, Inc.},\textsuperscript{185} the United States District Court for the Northern District of Illinois granted partial summary judgment for the defendant air carrier, ruling that its flight attendant's failure to prevent a piece of luggage from falling from an overhead compartment did not comprise "willful misconduct," as required to avoid the $75,000 damages limitation imposed by the Warsaw Convention.\textsuperscript{186}

Plaintiff was severely injured during an international flight when the flight attendant opened an overhead bin and a heavy tote bag fell out. Significant factors to the court's finding that the flight attendant had not acted with willful misconduct were the facts that she opened the bin with both hands, in order to have one ready to guard against falling items, and that she actually attempted to catch the falling luggage.\textsuperscript{187} The court also ruled that the flight attendant had not acted recklessly, finding that she had only been involved in six previous similar occurrences, in each of which the falling items had been light in weight and did not cause any injuries.\textsuperscript{188} The court also found that plaintiff failed to produce evidence that defendant's employee training was inadequate with respect to use of the overhead compartments.\textsuperscript{189}

In \textit{Beaudet v. British Airways, PLC},\textsuperscript{190} on cross-motions for summary judgment, the United States District Court for the Northern District of Illinois ruled that the Warsaw Convention did not apply to plaintiff's cause of action on the basis that her injuries

\begin{thebibliography}{9}
\bibitem{183} 8 F.3d at 168-73.
\bibitem{184} Id. at 170.
\bibitem{185} No. 93 C 1510, 1994 U.S. Dist. LEXIS 5676 (N.D. Ill. Apr. 28, 1994).
\bibitem{186} Id. at *1.
\bibitem{187} Id. at *7-*8.
\bibitem{188} Id. at *8.
\bibitem{189} Id. at *11.
\bibitem{190} 853 F. Supp. 1062 (N.D. Ill. 1994).
\end{thebibliography}
were not sustained during the course of "embarking" or "international transportation."\textsuperscript{191} Therefore, the court ruled plaintiff was authorized to proceed with her state law causes of action and her recovery would not be limited to the $75,000 cap authorized under the Convention.\textsuperscript{192}

Plaintiff held a ticket for air travel between London and Chicago. She arrived at the airport over three hours before her flight and spent some of her time in a lounge the defendant maintained for its passengers on a different floor from the boarding gates. The accident occurred more than an hour before boarding for plaintiff's flight would begin when plaintiff slipped and fell on a recently mopped floor near a magazine rack, pulling the rack down onto her. Plaintiff fractured her pelvis and suffered a permanent, three-quarter-inch shortening of one leg. She rejected defendant's $75,000 offer of judgment, contending that the Warsaw Convention did not apply to her claim.

In dealing with the liability issues, the court quoted Article 17 of the Convention, which states that the Warsaw liability and damages rules apply to injuries sustained by passengers while "on board the aircraft or in the course of any operations of embarking or disembarking."\textsuperscript{193} In its summary judgment motion, the air carrier contended the plaintiff was in the course of embarking when the accident occurred. To determine the issue, the court applied a "totality of the circumstances" test that placed particular emphasis on the issues of location of the accident, activity in which the passenger was engaged, and air carrier control factors.\textsuperscript{194} Under this test, the court ruled that the Warsaw Convention was inapplicable based on the following findings: (1) plaintiff was on a floor of the terminal building different from the boarding gate; (2) plaintiff's activity at the time of the accident was directed toward obtaining reading material, not boarding an airplane; and (3) the defendant lacked control over plaintiff, who was acting entirely under her own direction. In addition, as some courts add an "imminence" factor to this test, the court noted that plaintiff's boarding was at least an hour away when the accident occurred.\textsuperscript{195}

\textsuperscript{191} Id. at 1067, 1072.
\textsuperscript{192} Id. at 1074.
\textsuperscript{193} Id. at 1067.
\textsuperscript{194} Id.
\textsuperscript{195} 853 F. Supp. at 1067-68.
The United States District Court for the Eastern District of Missouri case of *Hamdeh v. American Airlines, Inc.*\(^{196}\) claimed damages arising from a slip-and-fall at Heathrow Airport in London that occurred while plaintiff was ascending an escalator on her way to make her American Airlines flight connection after a layover. At issue on the parties' cross-motions for summary judgment was whether plaintiff was "embarking" on defendant's international flight when the accident occurred, in order to invoke strict liability under Article 17 of the Convention.

The court noted that the relevant facts were undisputed. Plaintiff and her husband had arrived at Heathrow Airport on a KLM flight from Amsterdam, with the purpose of connecting with an American Airlines flight to Chicago. The plaintiff and her husband had used the escalator at the direction of defendant's employee. The escalator, however, was located in the "common use" area of the terminal, which was used by some forty-one carriers. The defendant's transfer desk was located approximately 750 to 1000 feet from where plaintiff fell, the gate where her flight was to board was some 2500 feet away from the escalator, and plaintiff had not yet initiated her boarding check-in procedures at the transfer desk.

In affirming summary judgment for the defendant, the court ruled that

> [t]hree factors are primarily relevant when determining whether an accident occurred "in the course of any of the operations of embarking" an airplane: (1) the location of the accident; (2) the activity in which the injured person was engaged; and (3) the control by the defendant of such injured person at the location and during the activity taking place at the time of the accident.\(^{197}\)

Applying these factors to the foregoing facts, the court ruled that plaintiff was not engaged in embarking on defendant's flight when the accident occurred.\(^{198}\)

*Lathigra v. British Airways PLC*\(^{199}\) concerned the applicability of the Warsaw Convention to an air carrier that had acted as ticket agent vis-à-vis plaintiffs, rather than as an air carrier *per se.*

Plaintiffs were British Airways passengers returning from Seattle to Madagascar. The final leg of the flight was a connecting flight on Air Mauritius from Nairobi to Antananarivo. Plaintiffs'
return flight was reconfirmed with British Airways, which had issued the tickets and had reconfirmed appellants' reservations, but had neglected to advise appellants that the Air Mauritius leg of their flight had been discontinued. Plaintiffs were stranded in Nairobi for five days. Subsequently, they filed a negligence action in Washington state court, which defendant removed under the Warsaw Convention. Defendant then successfully moved for summary judgment on the basis that plaintiffs' claims were time-barred.

The Ninth Circuit reversed the summary judgment, holding that the Warsaw Convention did not apply to plaintiffs' action.\(^{200}\) The court of appeals noted that plaintiffs did not allege that [defendant was] negligent in issuing the Air Mauritius portion of their tickets. The common thread in this dispute is the question of whether BA's conduct in reconfirming a flight reservation is the service of an 'air carrier' in the course of performing a contract for international transportation by air . . . . If so, the Convention governs and we must affirm. If that conduct is more properly analogized to the service of an independent ticketing agent who could be subject to a state law negligence claim, appellants can survive the limitations hurdle.\(^{201}\)

The court of appeals then ruled that the alleged negligence did not occur during the performance of the contract of carriage, but happened days before, when defendants mistakenly reconfirmed plaintiffs' reservations on a non-existent flight. The court, therefore, ruled that plaintiffs' alleged damages did not rise from a delay in the transportation by air for purposes of Articles 19 and 30 (2) of the Warsaw Convention.\(^{202}\) Finally, the Ninth Circuit rejected plaintiffs' argument based on federal pre-emption, ruling that the "conduct of which appellants complain in no way serves the goals of airline deregulation."\(^{203}\)

In *Schwartz v. Lufthansa German Airlines*,\(^{204}\) plaintiff allegedly drank a bottle of beer approximately one hour before her flight from Los Angeles to Frankfurt, a Bloody Mary three hours after takeoff, a one-and-a-half-glass bottle of wine with dinner, and another Bloody Mary within one hour afterward. Approximately an hour later, while in the lavatory, she fell and fractured her right ankle. The flight attendants who assisted her afterward no-

\(^{200}\) Id. at 537.

\(^{201}\) Id. (citations omitted).

\(^{202}\) 41 F.3d at 537-38.

\(^{203}\) Id. at 540.

\(^{204}\) No. CV 91-2952, 24 Av. Cas. (CCH) ¶ 17,841 (C.D. Cal. June 29, 1993).
ticed that she smelled of alcohol, was speaking incoherently, and appeared to be intoxicated. They also examined the lavatory and testified that there were no slippery substances on the floor. When the plane landed in Frankfurt, some six-and-one-half hours after plaintiff’s fall, the physicians who treated her at the airport testified that she still smelled of alcohol, was loud and argumentative, and appeared to be intoxicated.

The United States District Court for the Central District of California ruled that the case was governed by the Warsaw Convention and that, to recover, plaintiff was required to prove that she was injured as the result of an “accident” as that term is defined under Article 17 of the Convention. That section requires that an injury be caused by an unexpected or unusual event that is external to the passenger for liability to arise. Plaintiff’s injury was caused by her intoxication, an “internal” factor. The court, therefore, concluded that defendant was not liable for plaintiff’s injury.

d. Recoverable Damages

In Eichler v. Lufthansa German Airlines, plaintiff was a passenger on a Lufthansa flight from Frankfurt to New York. Instead of boarding from a gate, the passengers were bused to the tarmac where the airplane was parked. Lufthansa, for security reasons, was conducting positive baggage identification. While claiming her luggage, plaintiff stumbled and fell over a piece of luggage that apparently had been placed behind her on the tarmac by another passenger, breaking her arm.

The parties agreed that plaintiff was in the process of embarking and, therefore, that her case fell within Article 17 of the Warsaw Convention. The issues to be decided by the United States District Court for the Southern District of New York were whether plaintiff was negligent, the extent of any comparative negligence, and the appropriate damages, if any, to award for her injuries.

Plaintiff had only sought damages for pain and suffering. The court ruled that the sum of $50,000 represented fair and reasonable compensation for plaintiff’s past and future suffering. The more challenging issue for the court to resolve was whether

205 Id.
206 Id. at 17,843.
208 Id. at *11.
comparative negligence principles could be applied in cases where the defendant was held liable under the principles of absolute liability, as under the Warsaw Convention. The court reasoned that the concept of “comparative causation” rather than “comparative fault” should be applied in such cases to reduce liability.\textsuperscript{209} The court, however, also ruled that plaintiff had not acted negligently in that the luggage over which she had fallen had apparently been placed behind her while she was standing, and, therefore, she reasonably should not be expected to have seen it.

In \textit{Federal Insurance Co. v. Air Express International, Corp.},\textsuperscript{210} the United States District Court for the Southern District of New York granted partial summary judgment for the defendant air carrier, holding that plaintiffs’ claims were not governed by the Warsaw Convention, but that its recovery was limited to the contractual terms enumerated on the carrier’s cargo air waybill.\textsuperscript{211}

Plaintiff’s subrogor contracted with defendant to ship two packages of Belgian roses extract from the Netherlands to New Jersey. Plaintiff did not declare a special value for the shipment on defendant’s house waybill. The house waybill identified New York as the destination.

The two packages were delivered to John F. Kennedy International Airport, where they were accepted by defendant and transported by truck to its storage facility at Newark Airport in New Jersey. When defendant tendered delivery to plaintiff nearly two weeks later, however, only one of the packages was located. The missing package was valued at $52,000.

In the ensuing subrogation action, defendant moved for summary judgment limiting its liability to $9.07 per pound or $20.00 per kilogram, pursuant to the Warsaw Convention.\textsuperscript{212} The court noted that the Convention allows for breaks in “undivided transportation,” provided the parties regarded the sequence as a single operation. However, as the waybill stated the destination was New York and the package was lost after leaving the JFK airport premises, the court held the Convention inapplicable.\textsuperscript{213} The court further ruled that plaintiff’s recovery was subject to the liability limitations on defendant’s house waybill, which, like the

\begin{footnotes}
\item[209] Id. at *12, *14.
\item[210] No. 91 Civ. 4681 (SWK), 1994 U.S. Dist. LEXIS 5991 (S.D.N.Y. May 9, 1994).
\item[211] Id. at *1, *7, *11.
\item[212] Id. at *3.
\item[213] Id. at *6-*8.
\end{footnotes}
Warsaw Convention, limited recovery to $9.07 per pound or $20.00 per kilogram. The court rejected plaintiff’s contention that it did not have notice of the waybill terms, finding that plaintiff was a sophisticated business entity that had made more than 400 shipments per year with defendant. Under the terms of the house waybill, moreover, plaintiff could have declared a special value for the shipment for an additional fee, thereby avoiding the damages limitations.214

In Kalok Corp. v. Circle Freight International,215 defendant Circle Freight contracted to transport 1728 hard disk drives owned by plaintiff from the Philippines to the United States. Defendant Northwest Airlines performed the actual transportation of the disk drives. When the disk drives arrived in California, the packaging used to protect them in shipment was found to be crushed. Plaintiff tested all 1728 units and found that seventy-eight had been damaged. The cost for testing the units was $17,070.

Defendant Circle moved for summary judgment to limit its liability according to the weight of the seventy-eight damaged units. Under this analysis, Circle’s liability would be limited to $1365 (78 units times .875 kilograms, times $20 (250 francs) per kilogram). Plaintiff argued that it should be allowed to recover damages up to $31,440.00, based on the weight of the entire shipment. Defendant Northwest moved for summary judgment claiming that its responsibility for the shipment was discharged when Circle accepted a check from Northwest as compensation.

Plaintiff contended that the weight of the entire shipment should be the basis for the damages calculation, arguing that: (1) all of the drives sustained damage within the meaning of the Convention; (2) the value of all of the drives was affected by the damage; (3) the Convention considers the weight of the entire shipment in setting a maximum limit on liability that is not reduced in cases of partial damage; and (4) the parties’ contract, as expressed in the air waybill, required calculation of damages based on the weight of the entire shipment. Defendant Circle conceded that consequential damages were recoverable but argued that they were limited to the weight of the goods actually damaged.

In accepting plaintiff’s arguments, the United States District Court for the Northern District of California distinguished com-

214 Id. at *11.
puter components from other types of goods in that their effectiveness is called into question by rough handling. As the rough treatment made it necessary to test the drives before they could be sold for fair market value, the court ruled that the handling had tangibly diminished the value of each disk drive.\(^{216}\) The court, therefore, held that the total weight of the shipment would be used in calculating the damages available under the Warsaw Convention and that plaintiff could recover up to \$31,440.00.\(^{217}\)

The court, noting that the air waybill defined damage to include "any damage, delay, or loss of whatsoever nature," ruled that this language was more specific than the language in the Warsaw Convention, and it defined damage as including losses of indeterminate nature.\(^{218}\) The court, therefore, concluded that the contractual language supported the view that the costs of testing were compensable damages.\(^{219}\)

In support of its argument that its liability was discharged when it tendered compensation to Circle, Defendant Northwest argued that Circle's acceptance comprised an accord and satisfaction of its liability to plaintiff. According to Northwest, Circle had been acting as plaintiff's agent. The court rejected this argument, ruling that Northwest had not proved that Circle was authorized by plaintiff to act as its agent, and denied Northwest's motion for summary judgment.\(^{220}\)

\(e.\) Proper Forum

In *Shen v. Japan Airlines*,\(^{221}\) the federal district court dismissed the action for lack of personal jurisdiction and insufficient service of process. Plaintiffs were United States resident aliens who had traveled from New York to Shanghai aboard a U.S. registered air carrier. In Shanghai, plaintiffs purchased round trip tickets to Tokyo on defendant Japan Airlines (JAL). Upon arrival in Tokyo, the Japanese Immigration Bureau refused plaintiffs admission and directed JAL to detain plaintiffs and place them on the next flight to Shanghai.\(^{222}\)

\(^{216}\) *Id.* at 17,770.

\(^{217}\) *Id.* at 17,770-71.

\(^{218}\) *Id.* at 17,771.

\(^{219}\) *Id.*

\(^{220}\) 24 Av. Cas. (CCH) at 17,772.


\(^{222}\) *Id.* at *1.*
Plaintiffs filed their action in the Southern District of New York, claiming false arrest and malicious prosecution against the defendants, who allegedly kept them in custody for over fifteen hours without food, illegally searched them, seized their passports and luggage, and forced their return to Shanghai. Defendants moved for summary judgment on the basis of lack of personal jurisdiction.

The court stated that Article 28(1) of the Warsaw Convention designates four places in which an action under the Convention may be brought: (1) the carrier's domicile; (2) the carrier's principal place of business; (3) the place of the carrier's business through which the contract had been made; or (4) the destination. The court found that JAL's domicile and principal place of business were Japan. However, the court rejected plaintiffs' argument that the place of business through which the contract had been made was New York, inasmuch as plaintiffs had paid for their tickets with an American Express card in a transaction that cleared through New York. Plaintiffs also argued that their destination should be considered New York, as their travel originated there. The court rejected the argument because plaintiffs' flight could not be considered a single operation. Also, insofar as JAL's activities were directed by Japanese governmental authorities, the court held that the act-of-state doctrine required dismissal.

The court also dismissed plaintiffs' action against the Japanese Immigration Bureau for lack of subject matter jurisdiction and failure to effect service as required under the FSIA.

In Esa v. Olympic Airways, the United States District Court for the Central District of California dismissed the action against a Greek air carrier, which arose from the loss of a $1700 computer from a passenger's luggage during a round-trip flight from Saudi Arabia to the United States, based on its finding that it lacked "treaty jurisdiction" under the Warsaw Convention. Although it dismissed the action, the court questioned why the carrier "would rather incur significant legal expenses defending this action than pay what appears to be a perfectly legitimate and inexpensive claim."

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223 Id. at *2-*3.
224 Id. at *4-*5.
226 Id. at *8.
RECENT DEVELOPMENTS

The action was originally filed in the small claims division of the Los Angeles County Municipal Court, from which defendant removed to federal court and moved for dismissal under the Warsaw Convention. Article 28 of the Convention authorizes the filing of an action in only four places: (1) the domicile of the air carrier; (2) the principal place of business of the carrier; (3) the place where the contract of transportation was made, i.e. where the ticket was issued; or (4) the place of destination.

Applying Article 28 to the present action, the court found the following: (1) defendant's domicile and principal place of business were Greece; (2) the passenger's round-trip ticket was purchased in Saudi Arabia; and (3) the "destination" of travel ticketed as a round-trip is the original place of departure, which was Saudi Arabia in this case. Accordingly, the court dismissed the action.

In Cortes v. Delta Air Lines, Inc., 227 the Florida appellate court affirmed summary judgment in favor of both defendants, Avianca and Delta Airlines, Inc., in an action arising from a trip-and-fall of an elderly passenger after the carriers allegedly failed to provide her with requested wheelchair services. The judgment as to Avianca was based on the lack of treaty jurisdiction under the Warsaw Convention, and the judgment against Delta was based on lack of proximate cause. 228

Plaintiff was a sixty-two year old infirm woman who traveled on Delta from Montreal to Miami, where she was to connect with an Avianca flight to Columbia. Upon arriving in Miami, plaintiff was not furnished with a wheelchair or other assistance, as she had requested of Delta. She then made her way, unassisted, to the Avianca ticket counter to check in for the Columbia flight. She again requested assistance, which was not provided. Plaintiff fell after leaving the Avianca counter, while attempting to use an escalator.

As noted above, Article 28 of the Warsaw Convention limits the places where an action may be filed to the carrier's domicile or principal place of business, the place where the contract for transportation was made, or the destination of the involved flight. As Avianca's domicile and principal place of business were Columbia, and as Canada was the place where the contract for transportation was made and was the destination, the court

228 Id. at 109-10.
found treaty jurisdiction lacking. Summary judgment in Delta's favor was affirmed under the doctrine of superseding cause, which the court found applicable as a matter of law due to the series of events, including Avianca's failure to provide plaintiff with requested assistance and the lengthy time plaintiff spent in the terminal before falling on the escalator, that intervened between Delta's acts and the incident.

B. Korean Airline Flight 007 Cases

In In re Korean Airlines Disaster of September 1, 1983 litigation arising from the shooting down of Korean Airlines (KAL) Flight 007 by Soviet fighter aircraft, KAL unsuccessfully sought, by way of a FRCP 60 motion, to obtain a new trial based on "newly-discovered" evidence several years after the original trial. The evidence consisted of the 1993 International Civil Aviation Organization's (ICAO) report analyzing digital flight data recorder (DFDR) and cockpit voice recorder (CVR) data that were retrieved, which KAL contended supported its defense to the willful misconduct charge on which it had suffered an adverse judgment.

In 1989, the judgment in the KAL Flight 007 liability trial came before the District of Columbia District Court of Appeals. The central question in that appeal was whether the verdict of willful misconduct against the KAL flight crew, which rendered the Warsaw Convention liability limitations inapplicable, should be affirmed. The dispositive issue can be summarized simply as, "at what point did the flight go off course and why?"

The plaintiffs argued that the KAL flight crew had been off course for some five hours, including the three spent flying in Soviet airspace, that the aircraft had missed all its designated waypoints, and that every possible explanation for the course deviation supported a finding of willful misconduct. As evidence, plaintiffs relied on United States radar information showing that Flight 007 deviated off course shortly after taking off from Anchorage and that the deviation increased as the flight proceeded. Information obtained by ICAO from Russian and Japanese radar substantially supported this allegation.

229 Id. at 109.
230 Id. at 110.
232 Id. at 20.
233 Id. at 24.
In addition, plaintiffs presented the testimony of two experts. Each testified that KAL 007's crew must have known that they were off course. Both experts also testified that the flight crew knew of the extreme danger associated with straying into Soviet airspace. The nature and extent of the deviation, the experts opined, was such that the pilots either intentionally flew off course or systematically and repeatedly ignored fundamental, mandatory navigation procedures.234

KAL did not call any pilots, but, instead, relied on the testimony of an FAA air traffic controller and an Air Force defense radar observer who were on duty that night. Both witnesses testified that they had not seen any indication that the aircraft had deviated from its flight path. KAL also introduced the 1983 ICAO Air Navigation Commission Report, which showed no direct evidence that the crew was aware of the deviation. In sum, KAL argued that the flight had proceeded off course only after reaching the last waypoint, as a defense to plaintiffs' contention that the pilots had given false position reports. KAL argued that the alternative was to hold that the flight crew had lied in making every position report and had engaged in a conspiracy to do so. Based on this evidence, the jury's verdict of willful misconduct was upheld on appeal.

In 1993, ICAO published a report reviewing the digital DFDR and CVR retrieved from KAL Flight 007. Based on this evidence, the ICAO report found that KAL Flight 007 had deviated from course within minutes of takeoff. The evidence showed that the aircraft missed all of its designated waypoints, by increasing margins. The DFDR data served to confirm the radar information from Alaskan FAA and military facilities introduced by plaintiffs at trial—for example, a chart of the flight path based on the DFDR data, which was included in the 1993 report, was almost identical to the plaintiffs' trial exhibits, except the chart in the ICAO report showed an even greater course deviation than plaintiffs had alleged.235

In addition, unlike the 1983 ICAO report, the 1993 ICAO report found that KAL 007's crew failed to use their INS as required but instead flew on a constant magnetic heading and failed to perform the mandatory cross-check navigation procedures. One of plaintiffs' trial experts reviewed the 1993 report and concluded that it substantially confirmed the views he had

234 Id.
235 Id.
expressed at trial. The 1993 report did, however, state that there was no direct evidence establishing that the crew was aware the flight was off course.\textsuperscript{236}

By way of the instant motion, KAL sought to introduce the 1993 report as newly-discovered evidence. The court ruled that the flight and voice recorder data had existed since the disaster occurred and were “newly discovered,” although they could not be produced because of the one year limitation of the rule. Finally, the court rejected KAL’s argument that the residual clause of FRCP 60(b)(6) applied, ruling that subsection was only effective where none of the other rule clauses applied.\textsuperscript{237}

In addition, the court of appeals held that KAL’s motion lacked merit because the 1993 ICAO report actually supported the willful misconduct verdict, by offering conclusive proof that the flight crew flew the aircraft off course for more than five hours. The court concluded that the “newly discovered” evidence did not in any manner warrant a new trial.\textsuperscript{238}

In \textit{Ocampo v. Korean Airlines Co., Ltd.},\textsuperscript{239} plaintiff sued individually and as personal representative of his late wife’s estate in this KAL Flight 007 action. After the consolidated trial before the United States District Court for the District Court of Columbia, which resulted in a jury finding against KAL for willful misconduct that was affirmed on appeal, plaintiff sought damages under the Warsaw Convention and the Death on the High Seas Act (DOHSA).\textsuperscript{240} The jury’s damages award included compensation for the loss of decedent’s services, society, companionship, love and affection, and mental anguish. KAL then sought to move the court for judgment as a matter of law that damages for loss of society and mental anguish were not recoverable under DOHSA and sought to strike those portions of the damages award.\textsuperscript{241}

The court noted that plaintiff’s rights and remedies were based on both the Warsaw Convention and DOHSA, and it noted that the Second Circuit has permitted awards for loss of society under the Convention. Accordingly, the court permitted the award for that portion of plaintiff’s damages.\textsuperscript{242} The court,

\textsuperscript{236} 156 F.R.D. at 25.
\textsuperscript{237} \textit{Id.} at 22-23.
\textsuperscript{238} \textit{Id.} at 26.
\textsuperscript{241} 1994 WL 38785 at *1.
\textsuperscript{242} \textit{Id.}
however, ruled that the Convention does not allow recovery for a plaintiff’s mental anguish when the plaintiff is a non-passenger outside of the zone of danger.\textsuperscript{243}

The case of \textit{Hollie v. Korean Airlines Co., Ltd.}\textsuperscript{244} concerned, among other things, the identification of appropriate wrongful death beneficiaries in actions under the DOHSA. The statute limits wrongful death beneficiaries to “the decedent’s wife, husband, parent, child or dependent relative.”\textsuperscript{245} Thus, any relative other than those specifically identified must demonstrate financial dependency to recover damages.

In this appeal from a DOHSA wrongful death action arising from the death of one of the 269 passengers on board KAL Flight 007, plaintiffs included the decedent’s sister, brother, aunt, and four nieces and nephews. In post-trial motions, defendants challenged the recovery by certain plaintiff/relatives on the basis that they had not proved they were dependent upon the decedent. Defendants also argued as a matter of law that decedent’s nieces and nephews lacked standing to recover damages for their loss of decedent’s nurture, care, and guidance. Finally, defendants sought to set aside the jury’s award for decedent’s pre-death pain and suffering as lacking support in the evidence, or, alternatively, to reduce this portion of the award to $30,000.\textsuperscript{246}

Noting that the Second Circuit had not defined a test for determining dependency in DOHSA actions, the United States District Court for the Southern District of New York turned to the case law decided under the Longshoremen’s & Harbor Workers’ Compensation Act, in which a dependency test had been adopted.\textsuperscript{247} In reliance on these cases, the district court ruled that “a relative who is not a wife, husband, parent, or child of the decedent must separately establish both dependency and pecuniary loss in order to recover damages under DOHSA.”\textsuperscript{248} The court further ruled that “dependency” is “‘an independent element which must be established in addition to pecuniary loss.’”\textsuperscript{249} The district court then examined the testimony presented at trial, viewed in the light most favorable to the non-

\textsuperscript{243} \textit{Id.} at *83.

\textsuperscript{244} No. 83 Civ. 7988 (PNL) (NRB), 1994 WL 38785 (S.D.N.Y. Feb. 7, 1994).

\textsuperscript{245} \textit{Id.} at *2 (emphasis added).

\textsuperscript{246} \textit{Id.} at *1-\textsuperscript{*2}.

\textsuperscript{247} \textit{Id.} at *3.

\textsuperscript{248} \textit{Id.} at *4 (emphasis added).

\textsuperscript{249} 1994 WL 38785 at *4 (citation omitted).
moving party, and concluded that there was sufficient evidence to support a finding that all of the plaintiffs were dependents who had lost financial support, as both of decedent's siblings were disabled and the nieces and nephews were minors.\textsuperscript{250}

The district court then considered the nieces' and nephews' standing to recover damages for the loss of decedent's nurture, care, and guidance. After examining the case law, the district court determined that, typically, only a decedent's minor children were entitled to receive compensation for such losses.\textsuperscript{251} Plaintiffs, however, contended that decedent had provided nurture, care, and guidance in place of her sister, who was legally blind, uneducated, unemployed and apparently was herself in need of care. The court, therefore, held that these losses to the nieces and nephews would be compensable, so long as decedent had been freely acting \textit{in loco parentis} for them. However, the court found that the evidence did not support this conclusion.\textsuperscript{252}

With respect to decedent's pain and suffering, defendants argued that the plaintiffs had failed to prove that decedent was conscious following the missile attack that downed Flight 007. The court, however, found that sufficient circumstantial evidence existed from which the jury could infer that decedent endured conscious pain and suffering.\textsuperscript{253} The court upheld the $150,000 jury award for this damages element as being consistent with the verdicts in other KAL Flight 007 cases.\textsuperscript{254} The district court, therefore, upheld the jury award with respect to every element but the nieces' and nephews' recovery for the loss of decedent's nurture, care, and guidance, which the court set aside.

In \textit{Estate of Zarif v. Korean Airlines Co., Ltd.},\textsuperscript{255} the United States District Court for the Eastern District of Michigan ruled on plaintiff's various damages claims arising from the death of his adoptive mother in the KAL Flight 007 shootdown. The case was tried before the court as the result of plaintiff's waiver of his right to jury trial (five other KAL Flight 007 damages cases were returned to the Eastern District of Michigan following the con-

\textsuperscript{250} Id. at *5.
\textsuperscript{251} Id. at *6.
\textsuperscript{252} Id.
\textsuperscript{253} Id. at *8.
\textsuperscript{254} 1994 WL 38785 at *9.
solidated liability trial—four were tried before juries and the other one settled).\textsuperscript{256}

Plaintiff had been adopted in 1958. He and his adoptive mother were particularly close. After graduating high school, plaintiff had lived at home until age twenty-three. Afterward, he returned home every weekend from out of town to spend his time with her. After her death, plaintiff testified that he had, on one occasion, sought psychiatric help for his loneliness. Plaintiff also testified that he suffered physical changes after his mother's death, including a disruption of his sleeping pattern, but failed to offer any other evidence on this issue. Plaintiff alleged damages claims for the following: (1) his mother's pre-death pain and suffering; (2) plaintiff's lost society, services and care; and (3) lost economic support.

In considering the claim for decedent's pain and suffering, the court examined, in great detail, the evidence of what transpired after the missile attack and found, in conformity with the 1993 ICAO report, that Flight 007 had remained airborne for approximately twelve minutes after being struck. The court also found that the passengers had the opportunity to don their oxygen masks, which had dropped from the overhead panels. The court found, however, that the massive decompression would have caused the passengers acute pain. The court then examined in detail the post-attack trauma that would have been befallen the passengers, and rejected as speculative the opinions of defense experts that the passengers were unconscious within moments following the attack.\textsuperscript{257} The court awarded decedent's estate $1 million for her pain and suffering.\textsuperscript{258}

With respect to plaintiff's claim for loss of nurture, the court declined to award compensation due to the lack of evidence that plaintiff was economically dependent on his mother or expected any "pecuniary benefit from a continuance of the deceased's life."\textsuperscript{259} The court also noted that the decedent had more than fulfilled her responsibility to plaintiff in this manner. The court also dismissed plaintiff's claim for economic loss as not supported by the evidence.\textsuperscript{260}

\textsuperscript{256} Id. at 1342.
\textsuperscript{257} Id. at 1342-44, 1347-48.
\textsuperscript{258} Id. at 1349.
\textsuperscript{259} Id. at 1350 (citation omitted).
\textsuperscript{260} 937 F. Supp. at 1350.
With respect to plaintiff's claim for grief and mental anguish, the court ruled that the plaintiff could only recover if his mental condition had resulted in physical injury. The court found that this had not been shown in this case. Finally, the court awarded plaintiff $500,000 for the loss of his mother's society.261

C. PAN AM FLIGHT 103 CASES

In In re Pan Am Corp.,262 one phase of the Pan Am Flight 103 litigation, the Second Circuit ruled that 28 U.S.C. section 157 authorized the United States District Court for the Southern District of New York to order plaintiffs' personal injury actions transferred from Florida state court to the United States District Court for the Southern District of Florida. The district court was aware of defendants' ultimate intent of moving the Southern District of Florida for transfer to the Eastern District of New York or of moving for dismissal under the doctrine of forum non conveniens pursuant to 28 U.S.C. section 1407(c)(ii).263

In 1991, some 549 residents of Lockerbie, Scotland, filed wrongful death and personal injury actions against Pan Am and others in the Florida state court, premised upon the breach of the United Kingdom Civil Aviation Act, which held aircraft owners strictly liable for injuries caused by material falling from aircraft. Plaintiffs selected Florida due to the fact that Pan Am and Alert Management Systems (a co-defendant) were present there. Three months later, Pan Am filed for reorganization in the Southern District of New York, automatically staying plaintiffs' actions. The stay was subsequently lifted to allow the Florida litigation to proceed on the issue of defendants' liability.

Pan Am then moved the district court for an order transferring the Florida state court actions to the Southern District of Florida under 28 U.S.C. section 157(b)(5). The Second Circuit noted that Pan Am, with commendable candor, advised the district court that, if its motion were granted, it intended to transfer the cases to the Eastern District of New York, where the Judicial panel on Multi-District Litigation had consolidated the other tort cases against Pan Am. Plaintiffs appealed from the district court's transfer order, arguing that section 157(b)(5) only authorized transfers from state courts to the United States

261 Id. at 1351-52.
262 16 F.3d 513 (2d Cir. 1994).
263 Id. at 514-15.
district court where the bankruptcy was proceeding or to the
court where plaintiffs' cause of action arose.\textsuperscript{264} On appeal, plaintiffs argued that the bankruptcy court erred
in ruling that the transfer was proper under section 157(b)(5). The court of appeals, however, ruled that "the transfer motion
should be made to the district court in the district where the
bankruptcy is proceeding. If the transfer motion is met with a
cross-motion to abstain, the presumption is that 'transfer should
be the rule, abstention the exception.'"\textsuperscript{265}

The court of appeals was also unpersuaded by plaintiffs' argu-
ment that the court should look beyond the immediate transfer
request to recognize defendants' "ultimate scheme" to transfer
the actions to a forum that was not appropriate under section
157. The court of appeals noted that section 157 was enacted to
expand the district court's venue-fixing powers, with an eye to
centralizing adjudication of bankruptcy, and found that the dis-
trict court could order a section 157 transfer without consider-
ing any party's ultimate plans. The court also noted that, if Pan
Am's scheme to relocate the cases after the initial transfer
proved improper, the district court could simply deny any mo-
tion to transfer from the Southern District to the Eastern Dis-
trict of New York.\textsuperscript{266}

\textit{In re Air Disaster at Lockerbie, Scotland, on December 21, 1988}\textsuperscript{267} was an appeal from the final judgments entered by the United
States District Court for the Eastern District of New York in
two cases arising from the terrorist bombing of Pan Am Flight
103 over Lockerbie, Scotland. The district court awarded the
first plaintiff $9,225,000, the second plaintiff $9,000,000, and
the third plaintiff $1,735,000. Defendants challenged both the
jury finding of liability and the amounts of the damage awards.

The terrorist bombing of Flight 103 resulted in, among other
things, a consolidated thirteen week liability trial controlling all
of the Flight 103 cases filed against Pan Am in the United States.
At the close of that trial, the jury returned a special verdict find-
ing defendants guilty of willful misconduct. The jury had been
instructed that, although the Warsaw Convention generally lim-
ited a carrier's liability for damages to $75,000 per passenger,
the limit does not apply if the jury finds that the carrier acted

\begin{footnotes}
\item[264] \textit{Id.}
\item[265] \textit{Id.} at 516 (citation omitted).
\item[266] \textit{Id.}
\item[267] 37 F.3d 804 (2d Cir. 1994).
\end{footnotes}
with "willful misconduct" in causing a plaintiff's damages. In this regard, the liability trial centered on Pan Am's alleged non-compliance with FAA directives concerning inspection of "unaccompanied" baggage.

The jury found that Pan Am had willfully disobeyed these directives, resulting in the unaccompanied luggage containing the explosive device being loaded on board the aircraft. Subsequent to the liability phase of the trial, the jury awarded compensatory damages to the three plaintiffs. The cases of the 207 other passengers would be affected by the outcome of this appeal.

The Second Circuit characterized the defendants' arguments on appeal as falling into four categories:

(1) the exclusion of evidence relating to Pan Am and Alert's alleged non-compliance with ACSSP regulations concerning unaccompanied baggage;

(2) the admission of evidence showing other alleged misconduct on appellants' part, coupled with a disallowance of defense testimony concerning alternative causation theories;

(3) challenges to various other evidentiary rulings; and

(4) challenges to the damages awards.268 With only a few exceptions, the court of appeals dismissed each of defendants' arguments on these issues.

With respect to the first issue on appeal, the main line of excluded evidence allegedly would have proved the FAA's oral waiver excusing Pan Am from complying with the relevant security regulations. Defendants argued they believed they were in compliance with FAA regulations and, therefore, could not be found to have committed any willful breach. Defendants also argued that the court improperly barred evidence of their compliance with applicable British safety regulations (requiring X-rays of luggage transferred from other air carriers) that also could have negated the inference of willful misconduct.269

Regarding the oral waiver argument, the court of appeals noted that the relevant regulations expressly required that waiver applications and approvals be in writing and that "Pan Am offered no proof that it ever applied for a written exemption."270 The Second Circuit also noted that Pan Am's chairman

268 Id. at 812.
269 Id.
270 Id. at 815.
admitted that the Pan Am knew that waivers had to be in writing.\textsuperscript{271}

The Second Circuit also noted that, in excluding testimony of the alleged oral waivers, the trial court had properly treated the proffered evidence as an attempt to mount "a so-called government authorization defense," which was improper because any oral waivers by the FAA would have been ineffective as exceeding the agency's authority. The court of appeals also noted that evidence of the alleged oral waiver would be "irrelevant since Pan Am was charged with knowing the regulations, including those that stated amendments and exemptions to the regulations must be in writing."\textsuperscript{272}

In addition, defendants sought to argue that the security measures in place at Heathrow conformed with legal requirements and that any nonconformities were due to innocent mistakes regarding the law. Applying the maxim that "ignorance of the law is no excuse," the Second Circuit rejected this argument as well, noting that the applicable regulations were clear in their requirements.\textsuperscript{273}

The Second Circuit, no doubt painfully aware of the harshness of the exclusion order, further held that, even if the trial court had erred, the error was harmless because the record was "replete with evidence that wholly undermines Pan Am's claim of good faith" and that "the overwhelming evidence" at trial established that Pan Am had ignored repeated warnings and signals that its existing security measures were insufficient.\textsuperscript{274} In the Second Circuit's view, this evidence "overwhelmingly supported the jury's conclusion that but for Pan Am's wholly inadequate terrorist prevention techniques and its deliberate indifference and overt acts of willfulness, the bombing and the senseless loss of life would not have occurred."\textsuperscript{275}

With respect to the appellants' argument concerning the exclusion of the evidence of the applicable British regulations, the court of appeals noted that the exclusion of the documentary evidence did not amount to an abuse of discretion. The appellants sought to place before the trial court documentary evidence in the form of British Department of Transport

\textsuperscript{271} Id.
\textsuperscript{272} 37 F.3d at 816.
\textsuperscript{273} Id. at 817-19.
\textsuperscript{274} Id. at 819.
\textsuperscript{275} Id. at 820.
documents and circulars to the effect that Pan Am's reliance on X-raying interline bags would have complied with British security directives. The court of appeals noted that the exclusion of the evidence was proper on the basis that it was irrelevant, vague, and remote. The court of appeals, however, emphasized that appellants had presented a strong defense to the jury that any bomb in the luggage should have been visible on X-ray, a fact to which the parties had stipulated.276

The second issue on appeal alleged trial court error in admitting evidence of other alleged misconduct on appellants' part, coupled with a disallowance of defense testimony concerning alternative causation theories. The court of appeals, however, affirmed the trial court's admission of this evidence, ruling that evidence of Pan Am's conduct with regard to passenger safety in general was properly received. With respect to the exclusion of appellants' expert witness testimony concerning other possible causation theories, the court of appeals ruled the exclusion was within the trial court's broad discretion.277 The court of appeals also ruled that the trial court's rulings limiting cross-examination and expert testimony was "unremarkable and without error."278

With respect to the third issue on appeal—appellant's further evidentiary objections—the court of appeals, after examining each argument, ruled that none of the trial court's rulings comprised reversible error.279

With respect to the fourth issue on appeal, the court of appeals vacated one of the loss of society awards for a determination of whether the plaintiffs, some of whom were adult offspring, were financially dependent on the deceased family members. The court of appeals also ruled that the trial court erred in failing to instruct the jury that damages for the loss of a parent's care and guidance should have been limited to the period of a child's minority, absent a showing of specific circumstances that the parental guidance had "a pecuniary value beyond the irreplaceable values of companionship and affection."280

In concluding, the majority opinion commented that this was "not a paradigm of a perfect trial. The critical question though

276 Id. at 820-21.
277 37 F.3d at 823-24.
278 Id. at 825.
279 Id.
280 Id. at 830 (citation omitted).
is whether the trial was fair. Here we are satisfied . . . that defendants received a fair trial." 281

One judge dissented on the basis that the evidentiary exclusions had deprived appellant's of a fair trial. This judge departed from the majority's analysis on the basis of his view that the proper focus was not on whether Pan Am had willfully violated regulations but whether it used X-ray screening techniques with knowledge that injury to passengers would probably result, or with reckless disregard of the probable consequences.

D. DEATH ON THE HIGH SEAS ACT (DOHSA) CASES 282

In Preston v. Frantz, 283 plaintiffs unsuccessfully appealed the dismissal of their state law claims for survival damages in this DOHSA action arising from the death of their son in a helicopter crash on a flight from the Connecticut mainland to Nantucket Island.

The dismissal was based on the district court's conclusion that Connecticut law, which allowed recovery of a decedent's lost future earnings in a survival action, was preempted by general federal maritime law. 284 In its discussion, the Second Circuit noted that the gradual expansion of federal maritime law required recognition of an expanding scope of preemption. 285 The court also rejected plaintiffs' argument that the helicopter accident did not have a sufficient maritime nexus to justify applying maritime law, noting that the helicopter had been engaged in a traditional maritime activity—providing transportation between an island and the mainland—when the accident occurred. 286

In Boswell v. Bludworth Bond Shipyards, Inc., 287 on summary judgment, the United States District Court for the Southern District of Texas found that a stepchild is an appropriate beneficiary of a wrongful death action under general maritime law. 288

281 37 F.3d at 846.
283 11 F.3d 357 (2d Cir. 1993), cert. dismissed, 115 S. Ct. 31 (1994).
285 11 F.3d at 358.
286 Id. at 358-59.
288 Id. at 464.
Plaintiff's decedent drowned in the capsize of a line handling boat. In the ensuing wrongful death action against the shipowner and shipyard, defendants argued that the decedent's stepchild lacked standing to maintain a wrongful death action because she had not been formally adopted. The court found that DOHSA controls the determination of wrongful death beneficiaries, which the act defines as "decedent's wife, husband, parent, child, or dependent relative," without expressly mentioning unadopted stepchildren. Defendants argued the court should look to Texas law to determine what familial relations should be recognized under DOHSA, under which the stepchild would be ineligible. The court instead looked to DOHSA and federal case law interpreting the Longshoremen's and Harbor Workers' Act, under which a pragmatic, rather than a legalistic, interpretation of the "dependent relative" was applied. Accordingly, the court ruled that the unadopted stepchild was an appropriate wrongful death beneficiary.

In *Davis v. Bender Shipbuilding and Repair Co., Inc.*, interpreting the Jones Act, the DOHSA, and general maritime law, the Ninth Circuit affirmed the district court's ruling that the estates of seamen who drown on the high seas cannot recover lost future earnings in a survival action.

*Davis* involved claims by the estates of seamen who drowned in the Bering Sea while trapped in a sinking ship. The seamen died without dependant heirs. The Ninth Circuit affirmed the district court's ruling that, although survival actions are viable under general maritime law, general maritime law does not enhance or replace statutory remedies. The seamen's estates had remedies available under both the Jones Act and the DOHSA, neither of which provides for recovery of future earnings in a survival action.

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289 *Id.* at 468.
292 854 F. Supp. at 463.
293 *Id.* at 464.
294 27 F.3d 426 (9th Cir.), *cert. denied*, 115 S. Ct. 510 (1994).
296 27 F.3d at 450.
297 *Id.* at 428.
E. Other Air Carrier Liability

1. Liability and Defenses

a. Standard of Care

In *Andrews v. United Airlines, Inc.*, the Ninth Circuit ruled that an air carrier's standard announcement upon arrival, which warns that baggage stored in overhead bins could shift during flight, did not, as a matter of law, fulfill its duty to provide adequate safety for passengers.

The action arose from a serious head injury suffered by plaintiff when a briefcase fell from an overhead bin. Plaintiff did not allege that the air carrier's personnel were negligent in storing the briefcase or in opening the bin, but merely that her injury was foreseeable and that the air carrier did not prevent it. The air carrier successfully moved for summary judgment, from which plaintiff appealed.

In reversing the summary judgment, the Ninth Circuit noted that in 1987 the air carrier had received 135 reports of items falling from overhead bins and that installing netting inside of the bins would not necessarily be prohibitively expensive or inconvenient. The Ninth Circuit held that the issue of whether the air carrier had fulfilled its obligation to protect its passengers simply by reciting its standard arrival announcement presented a jury question.

In *Steering Committee v. United States*, the Ninth Circuit affirmed the trial court's ruling that the pilots of an Aeromexico DC-9 involved in a mid-air collision with a single-engine Piper Aircraft over Cerritos, California, were not negligent in any manner related to the causes of the accident. An advisory jury found the United States fifty percent liable for the crash.

The collision, which resulted in the deaths of all sixty-four persons aboard the DC-9, the three persons on board the Piper, and fifteen persons on the ground, occurred while the Aeromexico flight crew was in contact with an FAA facility while inbound for landing at Los Angeles International Airport. The district court consolidated actions for wrongful death, personal injury, and property damages against the estate of the Piper pi-

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298 24 F.3d 39 (9th Cir. 1994).
299 Id. at 42.
300 Id. at 41.
301 Id. at 40-42.
302 6 F.3d 572 (9th Cir. 1993).
303 Id. at 573-74.
lot, Aeromexico, and the United States. The court bifurcated the liability and damages issues. Aeromexico did not dispute liability for those suing for damages not to exceed $75,000 per passenger, pursuant to the Warsaw Convention.

A jury was impaneled to decide the liability of the Piper pilot's estate and to render an advisory verdict regarding the United States' liability. The jury found each of these defendants fifty percent liable and further found that the Aeromexico crew had not acted negligently.

The government requested an interlocutory appeal, claiming the district court erred in applying the California Evidence Code, which establishes a presumption of negligence in cases involving statutes, ordinances, or administrative regulations. The government also claimed the court erred in articulating the standard of care applicable to pilots under the "see-and-be-seen" federal aviation regulation. The Ninth Circuit granted interlocutory appeal over all liability issues in the case.

The district court focused on the definition of the appropriate standard of care under the see-and-be-seen vigilance requirement. The court had ruled that "[t]he requirement . . . 'is one of vigilance to see and avoid those aircraft the pilot could reasonably be expected to see. [The rule] does not require pilots to see all other aircraft.' " On appeal, the Ninth Circuit defined "vigilance" as the care that a reasonably prudent pilot would exercise under the circumstances. The panel ruled that "the reasonably prudent pilot need not be superhuman in seeing and avoiding other aircraft, but he or she must scan the sky with such frequency and respond with such precision as is possible."

Expert evidence was presented to the district court that a reasonably vigilant Aeromexico crew would not have seen the Piper until it was too late to do anything about it. Although the government presented contrary evidence, the district court was not required to accept that evidence. In light of the evidence presented, the Ninth Circuit ruled that the district court's ruling that the Aeromexico crew was diligent and professional was not clearly erroneous.

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304 CAL. EVID. CODE § 669(a) (West 1995).
305 14 C.F.R. § 91.67(a) (1986) (codified at 14 C.F.R. § 91.113(b) (1995)).
306 Id. at 573-74.
307 Id. at 579 (citation omitted).
308 Id.
309 Id.
310 6 F.3d at 580.
In *Fillpot v. Midway Airlines, Inc.*, the Illinois Appellate Court affirmed summary judgment for the defendant air carrier in a case arising from a passenger’s slip-and-fall on a natural accumulation of ice while walking across the tarmac to the terminal building after deplaning in a winter storm. In affirming the judgment, the appellate court rejected the air carrier’s argument that, after a passenger deplanes, the carrier should only be subjected to the ordinary negligence standard of care. Even under the elevated standard of care required of common carriers, however, the appellate court held that defendant had not breached its duty to plaintiff. The basis for the ruling was that, under Illinois premises liability law, “absent a contractual duty, a landowner does not have a duty to remove or take other precautions against the dangers inherent in natural accumulations of snow or ice.”

*Sheffer v. Springfield Airport Authority* was an action that also arose from a passenger’s slip-and-fall on an icy airport tarmac. The Illinois Appellate Court reversed the plaintiff’s verdict, ruling that the defendant air carrier did not have any duty to passengers to remove or provide warnings of natural accumulations of ice.

b. Employment Practices

In *Norris v. Hawaiian Airlines, Inc.*, airline mechanic Norris appealed the appellate court’s dismissal of his complaint for retaliatory discharge to the Hawaii Supreme Court. Norris had been employed by Hawaiian Airlines for approximately six months when the incident giving rise to his discharge occurred. While conducting a pre-flight inspection of an Hawaiian Airlines DC-9, Norris noticed a worn tire. When the tire and bearing were removed, Norris noted that an axle sleeve was scarred and grooved. In Norris’ opinion, and that of other mechanics, the sleeve was unsafe and should have been replaced. After his supervisor ordered that the tire be replaced without changing

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312 *Id.* at 238.
313 *Id.* at 241.
314 *Id.* at 242.
315 *Id.*
317 *Id.* at 1071-72.
the sleeve, Norris refused to sign the maintenance record for the work. After Norris’ supervisor told him he would be fired if he did not sign the maintenance item, Norris still refused and was eventually terminated. Norris then commenced a union grievance procedure and sued the airline for wrongful discharge.

Finding that the dispute arose from Norris’ concern for the safety of the flying public, and not from workplace safety concerns, the Hawaii Supreme Court concluded that the Railway Labor Act (RLA) did not preempt Norris’ claim. The court then analyzed whether Norris’ complaint stated a claim arising under Hawaii law. The court found that state tort claims existed and rejected the defendant’s arguments that the state claims only applied to “at-will” employees, not to union members.

The United States Supreme Court granted the air carrier’s petition for certiorari but upheld the Hawaii court’s finding that the RLA did not preempt Norris’ state court causes of action. The Supreme Court applied the analysis set forth in Lingle v. Norge Division of Magic Chef, Inc. Lingle holds that state law is preempted by the Labor Management Relations Act only if a state law claim is depends upon the interpretation of a collective bargaining agreement to which the plaintiff is subject.

The Ninth Circuit case of Baker v. Delta Airlines, Inc. was an appeal from consolidated cases brought by pilots and flight engineers of Delta Airlines arising from Delta’s refusal to allow pilots to extend their employment after age sixty as second officers (flight engineers), a process known as “two-step downbidding.”

The pilots had all been employees of Western Airlines prior to its acquisition by Delta. Western had been under a court injunction to allow two-step downbidding. The first group of plaintiffs had already reached age sixty while working for Western and had been trained, or were in the process of beginning training, as second officers when Delta acquired Western. Delta informed them after the takeover that they would not be eligible to continue employment with Delta as second officers because Delta’s policy prevented two-step downbidding. These plaintiffs

320 842 P.2d at 645.
321 Id.
323 Id. at 409-10.
324 6 F.3d 632 (9th Cir. 1993).
alleged that Delta, as a successor to Western, was required to employ them as second officers pursuant to the court order that bound Western.  

Another group of plaintiffs were former Western captains who were under age sixty when Delta took over Western. Upon reaching age sixty, Delta refused to allow them to two-step downbid. These plaintiffs alleged that Delta’s policies violated the Age Discrimination and Employment Act (ADEA).  

The final plaintiff had been employed as a second officer by Delta for thirty-one years and was forced to retire when he reached his sixtieth birthday. He alleged that Delta’s policy violated the ADEA and that the violation was willful.  

As to the first group of plaintiffs, the Ninth Circuit ruled that Delta was a successor to Western and was bound by the order.  

As to the second group of plaintiffs, the court reviewed evidentiary issues from the findings in Delta’s favor below. Plaintiffs argued that the lower court had abused its discretion in excluding internal Delta memoranda related to the age sixty rule. The court held that exclusion of the documents was not harmless error.  

As to the flight engineer’s ADEA claim, Delta challenged the finding below that its violation of the ADEA was willful. Delta claimed that in forcing the flight engineers to retire at age sixty it had relied on *Iervolino v. Delta Airlines, Inc.*, wherein the Eleventh Circuit had affirmed a jury’s finding that Delta’s age sixty rule was lawful. The Ninth Circuit agreed that Delta’s reliance on *Iervolino* constituted good faith as a matter of law.  

In *Bowdry v. United Airlines, Inc.*, prospective employees who qualified for first-hire status under the ADA sued United alleging violation of the ADA. The United States District Court for the District of Colorado held that the prospective employees had the duty to notify prospective employers that they were asserting first-hire rights, over plaintiffs’ argument that they were not required to give notice of their first-hire rights except upon request. The court noted that, if plaintiffs’ view was correct,
“the prospective employing carrier will not know which applicants to treat as protected employees” and that neither the ADA, federal regulations, case law, nor common sense imposed on the air carrier an affirmative duty in this respect. The court, therefore, granted defendant’s summary judgment motion as to plaintiffs who had not given notice of their first-hire status but denied summary judgment as to the plaintiffs who had given notice.

In Lay v. St. Louis Helicopter Airways, Inc., plaintiff unsuccessfully appealed the trial court’s grant of summary judgment for defendants in this action for wrongful termination, fraud, and tortious interference with a business expectancy arising from his discharge as an emergency medical services helicopter pilot.

Appellant had been a full-time helicopter pilot for several years with defendant St. Louis Helicopter Airways, which contracted with the Area Rescue Consortium of Hospitals (ARCH) to provide emergency transportation services. After he refused to make three flights because of dangerous weather conditions, the director of ARCH told plaintiff’s employer that he did not want plaintiff dispatched on ARCH flights anymore. Plaintiff, an “at-will” employee, was then terminated from his employment.

The Missouri Court of Appeals affirmed summary judgment on the wrongful termination cause, ruling that plaintiff was an at-will employee and could be discharged with or without cause. The court rejected plaintiff’s argument that he fell within the “public policy” exception to the at-will doctrine, based on his failure to produce evidence of “the codes and regulations” for the operation of aircraft that plaintiff had argued demonstrated “a clear mandate of public policy promoting aviation safety.”

On the fraud cause, the court affirmed summary judgment against plaintiff’s claim that his employer had fraudulently represented that he expected his pilots to comply with the operations manual and with FAA regulations. In dismissing this argument, the court of appeals noted that, although plaintiff alleged that he was terminated for refusing to make the flights, he had testified in his deposition that he had been terminated be-

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333 Id.
335 Id. at 176.
cause "he hadn't satisfied someone at ARCH," a reason he had not challenged in opposing summary judgment.\textsuperscript{396}

The plaintiff also asserted a claim for intentional interference with a business expectancy against ARCH and its director, arguing that the statements of ARCH’s director were motivated by improper purposes. Specifically, plaintiff argued that the ARCH director intended to cause him to violate FAA regulations, pilot codes of conduct, and his operations manual. The court of appeals affirmed summary judgment on this cause, too, noting that the ARCH director had not requested plaintiff’s termination and that ARCH had the contractual right to identify pilots it did not want dispatched on ARCH flights.\textsuperscript{397} The court of appeals also noted that the evidence did not support an inference that the director’s statements were motivated by anything other than legitimate corporate reasons.\textsuperscript{398}

c. Civil Rights

In the unpublished opinion of\textit{ Commercial Energies, Inc. v. United Airlines, Inc.},\textsuperscript{399} the Fourth Circuit affirmed in part, reversed in part, and remanded the district court’s grant of defendant’s motion to dismiss for failure to state a claim upon which relief can be granted.

Scott, Commercial Energies’ general counsel, and Dodds, its President and Chairman of the Board, traveled aboard United Airlines flight 342 from Denver to Washington, D.C. on business. While deplaning at Dulles International Airport, Dodds decided he would exit the aircraft at row 9, instead of using the exit door indicated by United flight personnel. Flight attendant McArthur grabbed Dodds’ shoulder, but Dodds pulled away and continued his exit. Scott followed through the same exit with other passengers.

Inside the terminal, United personnel summoned airport police who asked Dodds and Scott if they “were the two black men who attacked a stewardess.”\textsuperscript{400} Scott replied that he would discuss the incident “whenever the person[s] who purportedly had claimed that Professor Scott and Mr. Dodds had done anything wrong were present for the discussion.”\textsuperscript{401} Scott attempted to

\begin{footnotesize}
\textsuperscript{396} Id. at 177.
\textsuperscript{397} Id. at 178.
\textsuperscript{398} Id. at 178-79.
\textsuperscript{399} No. 93-1725, 1994 WL 251849 (4th Cir. June 10, 1994).
\textsuperscript{400} Id. at *1.
\textsuperscript{401} Id. at *2.
\end{footnotesize}
enter a nearby conference room and the police arrested both men. Dodds was charged with assault and battery of a flight attendant and Scott with obstruction of justice. The charges against Scott were dismissed at the preliminary hearing, and the trial judge later dismissed the charges against Mr. Dodds.

Commercial Energies, Dodds, and Scott filed their complaint against United, Metropolitan Washington Airport Authority, Officers Smeal and Harris, and United employee McArthur in the United States District Court for the Eastern District of Virginia at Alexandria, alleging civil rights violations, false imprisonment, interference with prospective business advantage, and malicious prosecution. The malicious prosecution cause of action was abandoned because it was time barred by the applicable statute of limitations.

The district court dismissed the complaint upon defendants' FRCP 12(b)(6) motion for failing to state a claim upon which relief can be granted.

The court of appeals affirmed the dismissal of the 42 U.S.C. section 1983 civil rights conspiracy count against the private parties because of insufficient allegations of state action. The court also affirmed the dismissals of the common law counts. The private parties did not make any arrest and, therefore, could not be held responsible for a false arrest. In addition, under Virginia law, in order to allege interference with prospective business advantage, the tortious conduct must be aimed at injuring the plaintiff's business and not merely incidental to it. The court of appeals, however, reversed and remanded the dismissal of plaintiffs' civil rights claims under 42 U.S.C. section 1985 because the allegations were sufficient to allege that defendants' actions were motivated by race.

d. Detention of Excluded Aliens

Aliens without United States visas may legally enter the country, under certain conditions, as part of their "immediate and continuous transit through the United States." This process is called "transit without visa" (TWOV). In addition, any alien who attempts to gain admission to the United States fraudu-

\[342\] Id. at *4.
\[343\] Id.
\[344\] 1994 WL 251849 at *4.
\[345\] Id.
\[347\] Id.
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lently or without proper documentation is excludable. These aliens, however, may request political asylum and remain in the United States while their requests are pending.

Air carriers transporting TWOV aliens into the United States are required by the Immigration and Naturalization Service (INS) to have on file “immediate and continuous transit agreements.” Form I-426, an INS transit agreement, authorizes air carriers to make intermediate stops in the United States for service and fueling in return for their guarantee that TWOV aliens will travel on to their country of destination. Form I-426 requires that the carrier shall remove from the United States any alien who is not entitled to TWOV status.

The Form I-426 agreements hold air carriers responsible for the costs associated with delays in removing excluded aliens from the United States. What is not clear is whether the air carriers are liable for the costs of maintaining excluded aliens in custody while their asylum requests are pending.

_Aerolineas Argentinas v. United States_ consisted of two consolidated actions by air carriers seeking reimbursement of their expenses in maintaining excluded aliens while their asylum requests were pending. The aliens involved were nationals of the Peoples Republic of China, Lebanon, and Somalia, and possibly other countries, as many had destroyed their travel documents en route. The carriers asserted that jurisdiction in the Court of Federal Claims was proper under the Tucker Act, which provides for jurisdiction over “any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.” Although the carriers argued that jurisdiction was proper under each of the five prongs of the Tucker Act, the court rejected each basis and dismissed the action.

550 Id.
551 Id.
552 Id.
553 31 Fed. Cl. 25 (1994).
The carriers first argued that jurisdiction was proper under the immigration user fee statute. This statute imposes a $5 user fee, which air carriers collect and remit to the government, for the immigration inspection of passengers arriving in the United States. The user fees are kept in a separate account within the general fund of the United States Treasury for disbursement to the attorney general for expenses incurred in conducting immigration inspections or in detaining and deporting "excludable aliens arriving on commercial aircraft and vessels." The court ruled that a federal statute may support claims court jurisdiction under two circumstances: (1) a plaintiff claims to have been improperly required to pay money to the government, directly or in effect, and seeks return of all or part of the sum; and (2) where the provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum. The court ruled that jurisdiction was improper on either basis, as the carriers had paid private security service, not the government, to maintain the aliens in custody and because the statute only authorized reimbursement of the attorney general's expenses, not expenses incurred by private parties.

The air carriers next argued that the government's requirement that they pay the aliens' detention expenses comprised a "taking" in violation of Fifth Amendment due process. The court dismissed this argument after applying a three-factor test emphasizing: (1) the character of the government action; (2) the economic impact of the regulation on the plaintiff; and (3) the extent to which the regulation interfered with "distinct investment-backed expectations." The court's analysis stressed that transporting TWOV aliens into the United States was not a "right" of air carriers, that the expenses were not so great as to deprive air carriers of their economic rights to conduct business properly, and that the air carriers had decided to risk incurring the costs of detaining TWOV aliens in return for their business.

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556 Id. § 1356(d), (f).
557 Id. § 1356(h)(2)(A).
558 31 Fed. Cl. at 30 (citing Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007 (Ct. Cl. 1967)).
559 Id. at 30-33.
560 Id. at 33.
561 Id. at 35.
The air carriers next argued that requiring them to pay the detention expenses breached the INS’s agreement under Form I-426, which does not expressly allocate this cost to carriers. Alternatively, they argued that an implied-in-fact contract was created by the INS’s order to detain the aliens. The court rejected both arguments, ruling that claims court jurisdiction does not embrace suits against government officials based on contracts made “in the implementation of a sovereign function” and that the implied contract claim was, at best, a quasi-contract claim based on quantum meruit over which the court lacks jurisdiction. The court also characterized the Form I-426 agreement as a revocable license, instead of a contract.

The air carriers also argued that the claims court had jurisdiction under 28 U.S.C. section 1491(a)(1), which authorizes claims “for liquidated or unliquidated damages in cases not sounding in tort.” Stating that every noted decision under this heading was actually an illegal exaction case, the court rejected this argument as well.

Finally, the air carriers argued that the regulations authorizing the INS to require carriers to pay detention costs were inconsistent with 8 U.S.C. section 1356(g), which arguably provides that immigration services for excludable aliens will be provided at no cost to air carriers. The court dismissed this basis for jurisdiction in a footnote, as fitting neither statutory category discussed above and as requiring the court to consider injunctive relief, which is beyond the Court of Federal Claims’ jurisdiction. The court also ruled that it was bound to defer to an agency’s reasonable interpretation of a statute it was charged with administering.

In Argenbright Security v. Ceskoslovenské Aeroline, the United States District Court for the Southern District of New York held the defendant air carrier liable for the cost of maintaining an illegal alien stowaway while his petition for political asylum was

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362 Id.
363 31 Fed. Cl. at 36 (citing Merritt v. United States, 267 U.S. 338, 340-41 (1925)).
364 Id. at 36.
366 31 Fed. Cl. at 87.
367 Id. (citing Bowen v. Massachusetts, 487 U.S. 879, 905 & n.40 (1988)).
368 Id. at 30 n.6.
pending. The court then dismissed the air carrier’s third-party action against the INS for reimbursement.

The subject alien arrived in New York from Czechoslovakia in 1992 as a stowaway on defendant’s aircraft. At the instruction of the INS, he was detained by plaintiff security service for approximately six weeks until his petition for asylum was decided. Subsequently, plaintiff sued the air carrier for the cost of detaining the stowaway. That action was settled, leaving the air carrier to pursue its third-party claim against the INS.

The cost of detaining an “excluded” alien prior to deportation are charged to the transporting air carrier.\(^{370}\) INS regulations provide that a stowaway may be paroled into the carrier’s custody pending adjudication of an asylum claim.\(^{371}\) The INS, however, has not expressly stated whether stowaways should be considered as “excluded” aliens. The court, noting that a stowaway’s only possibility for admittance to the United States is through asylum, ruled that stowaways are “automatically excluded from the very outset,”\(^{372}\) and, therefore, qualify as “excluded” for purposes of recovering detention costs.\(^{373}\)

Alternatively, the air carrier argued that its liability should be limited to the $3000 “penalty” cap authorized in 8 U.S.C. section 1323(d). The court rejected this argument, holding that section 1323 applied as a sanction for failure to deport or detain an alien and was unrelated to recovery of costs of detention under 8 U.S.C. section 1227(a).\(^{374}\)

e. Limitation by Contract

In Csizmazia v. Sabena Belgian World Airlines,\(^{375}\) enforcing the two-year limitation period that was printed on the defendant air carrier’s passenger ticket stock and included in its tariff filed with the Department of Transportation, the United States District Court for the Eastern District of New York dismissed this action on defendant’s unopposed motion for judgment on the pleadings. The court enforced the contractual limitation period after finding that the Warsaw Convention did not apply to plaintiff’s action and declined to consider the issue of whether the

\(^{372}\) 849 F. Supp. at 281.
\(^{373}\) Id.
\(^{374}\) Id. at 282.
action was preempted by the Airline Deregulation Act (ADA) of 1978.

Plaintiff had filed suit in the civil court of the City of New York, Queens County, alleging that he had purchased tickets for himself and his family for a round-trip with defendant from New York to Budapest with intermediate stopovers in Belgium. Plaintiff alleged that when he purchased the tickets, the travel agent agreed that if plaintiff’s health deteriorated while on the trip he could change the date of his return flight in return for a $100 fee. Plaintiff claimed his health deteriorated while in Hungary and that his doctor advised that he not return to New York as scheduled. Defendant, however, allegedly refused to allow plaintiff to change his return flight, and instead required him to purchase a new ticket. Plaintiff then returned to New York on his scheduled flight but required hospitalization in both Brussels and New York. Plaintiff then filed this action for his medical expenses and lost wages for the period he was hospitalized.

Defendant removed the action to federal court and sought dismissal on several grounds including: (1) the two-year statute of limitation under the Warsaw Convention; (2) the two-year limitation period contained in defendant’s tariff and printed on passengers’ tickets; and (3) the ADA preemption. Plaintiff neither filed opposing papers nor appeared for argument. The court held that the Warsaw Convention was inapplicable, as plaintiff’s health problem had not been caused by an “accident” within the meaning of the Convention.\[576\] The court enforced the contractual limitation period after finding that the air carrier had properly included the limitation in the tariff it filed under section 403(a) of the Federal Aviation Act.\[577\] Thus, the court did not have to consider the ADA preemption issue.\[578\]

f. Miscellaneous

In the Sixth Circuit appeal of *Northwest Airlines, Inc. v. Tennessee State Board of Equalization*,\[579\] various air carriers successfully challenged the district court’s dismissal of their action seeking to enjoin the State of Tennessee from enforcing its method of taxing property physically located within the state. The carriers argued that the high rate of taxation imposed discriminated

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\[576\] *Id.* at 20520.

\[577\] *Id.* at 20521-22.

\[578\] *Id.*

\[579\] 11 F.3d 70 (6th Cir. 1993).
against interstate commerce. The action was dismissed on the district court’s finding that it lacked jurisdiction under the Tax Injunction Act to enjoin Tennessee’s enforcement of its tax structure.

The Tax Injunction Act prohibits district courts from enjoining or otherwise restricting the levy of state taxes where there is a “plain, speedy, and efficient remedy” available in the state’s courts. The air carriers argued that the state remedies, which only provided the carriers with a hearing before the Board of Equalization and a right to petition for review with the Tennessee Courts of Appeals, were inadequate. The primary basis for their argument was that the Board of Equalization had already taken an adverse position on the issue in unrelated litigation pending in federal court.

The Sixth Circuit held that the issues raised on appeal concerned a factual determination reached in the state process before the Board of Equalization. Pursuant to Tennessee rules of procedure, factual, as opposed to legal, determinations of the Board are not subject to review by the Tennessee Court of Appeals. Because the board was the sole arbiter of the factual determination, the court of appeals held that the air carriers did not have a “plain, speedy, and efficient” remedy available to them through the state proceedings.

In Transcontinental Freight Systems, Inc. v. Air France, granting defendant’s motion for partial summary judgment under the Interstate Commerce Act, the United States District Court for the Northern District of Illinois ruled that en route delays of freight transported by a foreign air carrier were insufficient to change the character of the shipment from the “continuous movement” recognized under 49 U.S.C. section 10526(c)(8)(B). Consequently, the court ruled that defendant was not required to pay plaintiff the full shipping rate filed in plaintiff’s Interstate Commerce Commission (ICC) tariff where defendant had successfully negotiated a lower rate.

Transcontinental Freight Systems, Inc. (TFS), an Illinois-based motor freight carrier, made more than 300 shipments of

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581 See, e.g., Retirement Fund Trust of Plumbing v. Franchise Tax Bd., 909 F.2d 1266, 1271-72 (9th Cir. 1990).
582 11 F.3d at 72.
583 Id.
584 Id. at 74.
585 No. 92-C-8161, 1994 WL 736026 (N.D. Ill. Apr. 6, 1994).
freight under contract with Air France between December 20, 1989, and August 23, 1991. After Air France transported the freight to the United States, TFS would receive the delivery at the airport and transport it to recipients. TFS would also pick up freight from the recipients and transport it to the airport for shipment by Air France. Freight would sometimes sit, either at the airport or at the recipients’ places of business, for several days.

During the time in question, TFS billed Air France at a rate considerably lower than that filed in its ICC tariff. Air France paid the charged amounts in full. Subsequently, TFS sought payment from Air France of the difference between the rates it had charged and the rates filed in its ICC tariff. TFS argued that, under 49 U.S.C. section 10761(a), it was not authorized to charge lower rates than specified in its tariff. The court granted Air France’s motion for summary judgment, ruling that, under 49 U.S.C. 10526(a)(8)(B), foreign air carriers with proper authorization from the Department of Transportation are not required to pay tariff rates but may negotiate lower rates, so long as the carriage in question is part of a “continuous movement.”

In rejecting TFS’s argument that the en route delays changed the character of the carriage, the court further ruled that the shipper’s intent at the commencement of transportation fixes the character of the shipment.

In Idris v. Hanson, after conducting a de novo review under Pennsylvania law, the Ninth Circuit affirmed summary judgment in favor of the cross-defendant air carrier on a baggage service claim. The underlying action concerned a personal injury arising out of the cross-complainant’s baggage handling operations. On appeal, the baggage service charged the district court with error in finding, as an undisputed fact, that it had failed to notify the air carrier of its indemnity claim “without undue delay” as required under the parties’ contract. The Ninth Circuit ruled that “in the absence of extenuating circumstances, the question [of] whether notice was reasonable and therefore timely, has been one for the court.”

The court of appeals also rejected the baggage handler’s argument that an indemnitor was required to demonstrate that it was

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386 Id. at *1.
387 Id. at *8.
388 No. 91-55022, 1993 WL 385449 (9th Cir. Sept. 29, 1993).
389 Id.
prejudiced by the late notice to sustain a defense. In doing so, the court distinguished the Pennsylvania Supreme Court case of *Brakeman v. Potomac Insurance Co.* on the basis that the notice-prejudice rule had been developed in insurance litigation involving contracts of adhesion.

In *Continental Airlines, Inc. v. Intra Brokers, Inc.*, the Ninth Circuit upheld a permanent injunction precluding the defendant broker from selling plaintiff’s non-transferable discount flight coupons. The action arose from defendant’s purchase and resale of the coupons, which prohibited barter, sale, or redemption for cash.

The Ninth Circuit rejected the broker’s argument that the air carrier either had waived or was estopped from seeking an injunction, based on its alleged verbal assurances to brokers for more than a year after the coupons were first issued that it would not enforce the restrictions. The court noted that the filing of the lawsuit strongly indicated that no permanent waiver was intended and held the estoppel doctrine inapplicable because the broker failed to establish detrimental reliance on any continued waiver of the restrictions in the future. The court also ruled that the carrier was not required to prove that it would suffer monetary damages, as it had the contractual right to enforce the restrictions regardless of financial impact.

2. Damages — Limitation by Contract

In *Gluckman v. American Airlines, Inc.*, granting defendant’s motion to dismiss certain causes of action and denying its motion for summary judgment, the United States District Court for the Southern District of New York ruled: (1) that no cause of action lies for a pet’s emotional distress or pain and suffering; (2) that the pet lacks standing to sue; and (3) that the extent of an air carrier’s duty to notify passengers of the conditions under which their pets would be transported raised factual issues for the jury’s decision.

Plaintiff sued American Airlines for negligence in causing the death of his pet, a two-and-a-half-year-old golden retriever named Floyd, on a flight from Phoenix to New York. Plaintiff

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391 24 F.3d 1099 (9th Cir. 1994).
392 Id. at 1103-04.
393 Id.
394 Id. at 1105.
alleged that American failed to warn him that Floyd would be transported in an environment that was not air-conditioned while the airplane was on the ground. The temperature in Phoenix had reached 115 Fahrenheit that day.

Plaintiff’s action included tort claims for intentional and negligent infliction of emotional distress, loss of companionship, and for Floyd’s pain and suffering. The action included a punitive damages claim based on the tort of “outrage.” Plaintiff also alleged that American had breached its contractual duty to deliver Floyd in the same healthy condition in which the airline received him.

Pursuant to FRCP 12(b)(6), American moved to dismiss plaintiff’s first four causes of action, arguing that New York law does not recognize a cause of action for emotional distress caused by an animal’s suffering and that an animal has no standing to sue. The court granted this motion.\textsuperscript{996}

American also moved, pursuant to FRCP 56, for summary judgment limiting plaintiff’s damages under his breach of contract claim in accordance with the liability limitations on its ticket stock. Noting that plaintiff was not an experienced air traveler and had never shipped an animal before and that American did not inquire about Floyd’s value, explain alternative shipping options, or suggest that Floyd not ride in the non-air-conditioned cargo hold, the court denied summary judgment holding that whether plaintiff had adequate notice regarding the liability limitations was a fact issue.\textsuperscript{997}

In\textsuperscript{998} Wagman v. Federal Express Corp.,\textsuperscript{844 F. Supp. 247 (D. Md. 1994), aff’d, 47 F.3d 1166 (4th Cir. 1995).} the United States District Court for the District of Maryland granted partial summary judgment limiting defendant’s liability to $100, as stated on the defendant delivery service’s airbill, in an action arising from the late delivery of a package. The package contained a complaint initiating a lawsuit. Because of the delayed delivery of the complaint, the lawsuit was barred by the statute of limitation. Plaintiff claimed the entire amount of damages he and his family had allegedly suffered in an automobile accident, the subject of the time-barred action, against the delivery company.

In granting partial summary judgment, the court found that both the airbill and defendant’s delivery envelope bore numerous, clear, and prominent warnings concerning the liability limi-

\textsuperscript{996} Id. at 159.

\textsuperscript{997} Id. at 162-63.

\textsuperscript{998} 844 F. Supp. 247 (D. Md. 1994), aff’d, 47 F.3d 1166 (4th Cir. 1995).
tation, which also notified customers of their option to declare an excess value in return for a supplemental fee.\textsuperscript{399} The court ruled that federal law, which controls the liability of interstate common carriers for loss, damage, or delay of goods in transit, validates liability limitations, particularly if the shipper has reasonable notice and an opportunity to avoid the limitation by paying an increased fee.\textsuperscript{400} The court also rejected plaintiff's attempt to avoid the limitation by claiming that the delayed delivery was tortiously caused, ruling that the liability limitation would apply in any event.\textsuperscript{401} The court also held that federal law preempted plaintiff's advertising misrepresentation claim.\textsuperscript{402}

IV. SELLERS' AND MANUFACTURERS' LIABILITY AND DEFENSES

A. General Aviation Revitalization Act of 1994

For well over a decade, manufacturers have complained that the cost of liability insurance made it economically unfeasible to continue production of general aviation aircraft. The manufacturers cited drastic declines in domestic production figures, with attendant losses of jobs, as substantive proof of the "products liability crisis." The General Aviation Revitalization Act of 1994\textsuperscript{403} (the Act) represents Congress' long-awaited effort to address these concerns.

The Act establishes a statute of repose limiting the time in which a lawsuit arising from an incident involving a general aviation aircraft can be brought against a manufacturer. Subject to certain significant limitations, the Act states that no civil action for personal injury, wrongful death, or property damage arising out of an accident involving a general aviation aircraft may be brought against the aircraft manufacturer, or the manufacturer of any new component part, after the applicable limitation period.\textsuperscript{404}

The limitation period is eighteen years, measured from the date the aircraft was first delivered to the purchaser or lessee, if delivered directly from the manufacturer, or the date when the aircraft was first delivered to a person engaged in the business of

\textsuperscript{399} Id. at 248-49.
\textsuperscript{400} Id. at 250.
\textsuperscript{401} Id. at 250-51.
\textsuperscript{402} 49 U.S.C. app. § 1305(a) (1988).
\textsuperscript{404} Id. § 2(a).
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selling or leasing such aircraft. In the case of any new component part alleged to have caused the accident, the limitation period begins on the date when the new component part was installed.

For purposes of the Act, a general aviation aircraft is any aircraft for which a type certificate or an airworthiness certificate has been issued by the FAA and which had, at the time the certificate was issued, a maximum seating capacity of fewer than twenty passengers. To be covered under the Act, however, the aircraft must not have been engaged in scheduled passenger-carrying operations, as defined under the Federal Aviation Act, at the time of the accident.

The Act expressly supersedes any state law to the extent the law permits a covered civil action to be brought after the applicable limitation period. Furthermore, the Act only applies prospectively.

The exceptions to coverage under the Act are significant. First, the Act does not apply if a claimant specifically pleads, and eventually proves, that the aircraft or component part manufacturer knowingly misrepresented, concealed, or withheld from the FAA relevant performance, maintenance, or operational information in applying for a type or airworthiness certificate. Second, the Act does not apply if the claim involves the injury or death of a person who was a passenger for purposes of receiving treatment for a medical or other emergency. Third, the Act does not apply to claims for death or injury suffered by a person who was not on board the aircraft at the time of the accident. Fourth, the Act does not apply to an action brought under a written warranty which, but for the Act, would have been enforceable.

While each of the foregoing exceptions apply in limited circumstances, the ultimate effect of each will have to be developed through case law. The third exception, for example, may

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405 Id. § 3.
406 Id. § 2(a)(2).
407 Id. § 2(c).
408 Pub. L. No. 103-298, § 2(c).
409 Id. § 2(d).
410 Id. § 4(b).
411 Id. § 2(b)(1).
412 Id. § 2(b)(2).
413 Pub. L. No. 103-298, § 2(b)(3).
414 Id. § 2(b)(4).
have interesting effects. That exception, which deals with claims arising from injury or death of a person not on board the aircraft, would clearly apply in actions arising from injuries to persons on the ground and, possibly, in mid-air collision cases, as well.

The Act applies only to actions against manufacturers of aircraft or component parts, in their capacities as manufacturers.\(415\) While the legislative history indicates that the purpose of this language is to make the Act inapplicable to, for example, a manufacturer’s liability predicated upon maintenance or repair work, the products liability laws of many states impose strict liability upon manufacturers in their capacities as “sellers.” A literal reading of the Act could potentially provide a loophole in such instances. In addition, the Act does not protect sellers other than manufacturers and does not address whether contribution or indemnification actions by non-manufacturer sellers would be subject to the statute of repose.

B. **Government Contractor Defense**

The Sixth Circuit case of *Dean v. Sikorsky Aircraft*\(416\) involved a collision of two UH-60A “Blackhawk” helicopters at Fort Campbell in March 1988 that killed several United States Army personnel. The heirs filed wrongful death actions in the United States District Court for the Middle District of Tennessee, alleging defects in the design of the aircraft and the night vision goggles worn by the pilots. After the cases were consolidated, the defendants moved for summary judgment under the federal common-law government contractor defense recognized by the United States Supreme Court in *Boyle v. United Technologies Corp.*\(417\)

Under *Boyle*, liability for design defects in military equipment cannot be imposed pursuant to state law when:

1. the United States approved reasonably precise design specifications;
2. the equipment conformed to those specifications; and
3. the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.\(418\)

\(415\) *Id.* § 2(a).


\(418\) *Id.* at 512.
Manufacturers of military products are shielded from tort liability for product design defects if all three parts of the Boyle test are met. Applying the three-prong Boyle test, the district court found: (1) the pertinent contractual provisions met the first Boyle element by providing "reasonably precise specifications" for the design of the aircraft, which were reviewed and approved by the government; (2) there was no dispute that the aircraft and goggles were manufactured in conformity with the designs; and (3) the contractors warned the government of any known relevant hazards unknown to the government. The court granted summary judgment for the defendants, and the Sixth Circuit affirmed.

In Miller v. United Technologies, a Connecticut state court granted defendants' United Technologies Corp., General Dynamics Corp., and Chandler-Evans, Inc., motion for summary judgment on the basis of government contractors immunity as defined in Boyle v. United Technologies Corp. These wrongful death products liability actions were brought in Connecticut state court by plaintiff Miller as administrator of the estates of two deceased Egyptian military pilots who died in a crash after the main fuel pump failed during the flight of an F-16 jet fighter owned and operated by the Egyptian Air Force.

General Dynamics Corp. delivered the F-16 to the United States Air Force on March 12, 1982. The airplane was later transferred to the Egyptian government pursuant to an agreement reached between the United States and Egypt during the Camp David Accords. It was undisputed that the crash followed the failure of the main fuel pump resulting from a known problem of cavitation erosion.

The court found that the first part of the Boyle test was met because General Dynamics and the Air Force developed reasonably precise specifications, which were incorporated into a design subsequently reviewed and approved by the government. The court found the defense was still valid even though the government later directed Chandler-Evans to develop a new pump in an effort to cure the cavitation problem, ruling that "the contractor is not deprived of the defense for a government ap-

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419 1994 WL 6045 at *1.
420 Id. at *2.
422 487 U.S. at 500.
proved product because it works with the government to develop an improved product."^424

The court found that the second part of the Boyle test was satisfied because the fuel pump was manufactured in conformity with government approved specifications.\(^425\) The court also found that the cavitation problem was known to the government at the time of manufacture, relieving the supplier of any duty to warn.\(^426\)

C. Economic Loss Doctrine

Bocre Leasing Corp. v. General Motors Corp.\(^427\) required the United States District Court for the Eastern District of New York to construe the "economic loss" doctrine, which generally limits the purchaser of a product to contract remedies in cases where the incident resulted only in damage to the product itself. The action arose from an incident involving a helicopter purchased from a used aircraft broker equipped with an engine manufactured by defendant. Plaintiff's lawsuit sought direct and consequential economic losses based on negligence and strict products liability.

The court granted summary judgment, relying on the leading case of East River Steamship Corp. v. TransAmerica Delaval, Inc.,\(^428\) which states that there is "no cause of action in tort ... when a defective product purchased in a commercial transaction malfunctions, injuring only the product itself and causing purely economic loss."^429\) The court rejected plaintiff's argument that the East River rule would not apply to plaintiffs lacking contractual privity with a defendant, noting that East River also involved a plaintiff who was a remote purchaser.\(^430\)

On appeal, the Second Circuit certified to the New York Court of Appeals the question of whether the economic loss rule would be recognized under New York law even in cases where contractual privity is lacking. The court of appeals held that a buyer in an arms length commercial transaction could not recover in tort under either strict products liability or negligence

\(^{424}\) Id.
\(^{425}\) Id. at *7.
\(^{426}\) Id. at *9.
\(^{428}\) 476 U.S. 858 (1986).
\(^{429}\) 840 F. Supp. at 232.
\(^{430}\) Id. at 234.
theory for damage caused by a defect in the product where only the product itself was damaged.\textsuperscript{431} Accordingly, the certified question was answered in the negative.\textsuperscript{432}

In *Midwest Helicopter Airways v. Sikorsky Aircraft*,\textsuperscript{433} the United States District Court for the Eastern District of Wisconsin ruled that plaintiff, an insurer subrogated to the interests of the lessee of a helicopter, would be limited to contract remedies in an action arising from the crash of the helicopter. The claim arose from a crash that occurred after the tail rotor drive system failed. As subrogee, plaintiff sought consequential damages including: (1) the insured's expense in locating, acquiring, and upgrading a replacement helicopter; (2) the lost revenue that would have been generated had the helicopter not crashed; and (3) certain expenses incurred in investigating the accident and storing the wreckage. The action was founded on negligence and strict liability tort theories.

Defendant moved for summary judgment, averring that recovery for these consequential damages was barred under Wisconsin's "economic loss doctrine," which generally precludes recovery in products actions not alleging personal injury or damage to property other than the product itself. The court granted the motion after ruling that Wisconsin had adopted the economic loss doctrine and after citing with favor United States Supreme Court cases describing economic losses as being the "core concern of contract law."\textsuperscript{434} Accordingly, the court dismissed the tort claims after noting that neither the Wisconsin legislature nor the courts had extended the concept of privity to embrace remote-purchaser parties.\textsuperscript{435}

In *Rocky Mountain Helicopters v. Bell Helicopter*,\textsuperscript{436} the purchaser of a used helicopter sued the helicopter manufacturer for negligence, breach of warranty, and misrepresentation. Plaintiff/appellant Rocky Mountain Helicopters, Inc. purchased a used Model 214B helicopter manufactured by Bell Helicopter Textron, Inc., in 1981. According to Rocky Mountain's complaint, it discovered that water had been trapped inside the rotor blades from the helicopter being used for logging operations in Alaska. Rocky Mountain removed the rotor blades and shipped

\textsuperscript{431} 84 N.Y.2d at 694.
\textsuperscript{432} Id.
\textsuperscript{433} 849 F. Supp. 666 (E.D. Wis.), aff'd, 42 F.3d 1391 (7th Cir. 1994).
\textsuperscript{434} Id. at 671.
\textsuperscript{435} Id.
\textsuperscript{436} 24 F.3d 125 (10th Cir. 1994).
them to Bell for evaluation. One rotor blade was repaired and the other replaced at a total cost of approximately $130,000. When Bell refused to pay the cost of the repair and replacement, Rocky Mountain filed this action in the United States District Court for the District of Utah, which the court dismissed pursuant to FRCP 12(b)(6).

In reviewing the dismissal, the Tenth Circuit applied the choice of law provisions of Utah, the forum state. Utah courts apply the “most significant relationship” analysis to determine choice of law in a tort action.\(^4\)\(^7\) Considering that the helicopter was manufactured in Texas and that the parties had past dealings in Texas, the court held that Texas law governed resolution of the tort claim.\(^4\)\(^8\) The Tenth Circuit then ruled that, although there was a split in authority, the most recent pronouncements by the Texas Supreme Court indicated that Texas would not recognize tort actions for purely economic losses.\(^4\)\(^9\) The court also ruled that, while not formally embraced under Utah law, the courts would apply the “most significant relationship” analysis to determine the choice of law in contract actions.\(^4\)\(^\circ\) The Tenth Circuit was persuaded that Texas law was appropriately applied in dismissing the contract action as well.\(^4\)\(^\text{l}\)

Rocky Mountain also claimed breach of warranty and misrepresentation based on Bell’s statements to the FAA that the helicopter blades were designed to prevent water trapping. With regard to the warranty claim, the Tenth Circuit noted that Rocky Mountain did not have contractual privity with Bell and, therefore, could not recover under an express warranty theory unless it could show that Bell should have expected Rocky Mountain to rely on these statements.\(^4\)\(^\text{m}\) Under the misrepresentation cause, the court held Rocky Mountain must show that Bell made the statements to the FAA intending that Rocky Mountain act upon them.\(^4\)\(^\text{n}\) Because it found these elements lacking, the Tenth Circuit affirmed the dismissals of these claims.\(^4\)\(^\text{p}\)

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\(^{4\text{7}}\) Id. at 128.
\(^{4\text{8}}\) Id. at 129.
\(^{4\text{9}}\) Id. at 129-30.
\(^{4\text{o}}\) Id. at 129.
\(^{4\text{l}}\) Id. at 129.
\(^{4\text{m}}\) 24 F.3d at 129.
\(^{4\text{n}}\) Id. at 130.
\(^{4\text{p}}\) Id. at 132.
D. AGENCY AND SUCCESSIONS’ LIABILITY

In Cosgrove v. McDonnell Douglas Helicopter Co., a case arising from a crash caused by a progressive fatigue failure, the owner, lessee, and pilot of the subject helicopter filed a products liability action against the manufacturer. As affirmative defenses, the manufacturer alleged that each plaintiff was comparatively at fault for their failure to properly inspect and maintain the helicopter but did not assert any counterclaims for contribution. The jury found that proper inspection and maintenance by any of the plaintiffs would have prevented the failure.

The evidence also revealed that a nonparty to the action, a mechanic, was also comparatively at fault for failing to conduct proper inspections and maintenance. Plaintiffs had hired the mechanic, as an independent contractor, to conduct a pre-purchase inspection, which, the jury found, would have detected the progressive failure in time had it been done properly. After plaintiffs purchased the helicopter, they hired the mechanic as an employee to work for them in maintaining the helicopter.

With respect to attributing the mechanic’s liability to any of the parties, the United States District Court for the District of Minnesota instructed the jury that any negligence of the mechanic occurring after he became an employee was attributable to the lessee-plaintiff. In its special verdict, the jury allocated comparative fault between the mechanic’s acts as an independent contractor and as the lessee-plaintiff’s employee and returned fault apportionments with respect to the parties.

After the jury verdict was received, defendant moved the court to attribute the mechanic’s negligence as an independent contractor to plaintiff-owner on the basis that the owner allegedly had a non-delegable duty to inspect and to maintain the helicopter, or, alternatively, that the mechanic had been acting as the owner’s agent while acting as an independent contractor. The court rejected defendant’s arguments on both bases, specifically holding that the duty to inspect and to maintain the helicopter was not non-delegable.

Defendant also moved for leave to amend its answer to assert counterclaims for contribution against the plaintiffs based on their comparative fault. Defendant feared that it would be prejudiced if it could not offset plaintiffs’ recovery in proportion to their comparative fault. The court denied leave to amend,
ruling that defendant’s argument that he would be prejudiced was premature, insofar as the Minnesota Comparative Fault Statute allows parties a full year after judgment is entered to move the court to reallocate liability among solvent parties to compensate for a negligent party’s insolvency.

E. False Claims Act

In United States v. Northrop, the Ninth Circuit remanded this qui tam suit for a factual determination of whether plaintiff was “an original source” of information used by the government to prosecute its False Claims Act (the Act) case against Northrop Corporation.

A private citizen may bring a civil action for damages “for the person and for the United States Government” under the Act. If the government takes over the action, it has “primary responsibility for prosecuting the action.” The person who brought the action may continue as a party and is entitled to recover fifteen to twenty-five percent of any proceeds, unless the action is based primarily on information discovered independently by the government. In such case, the qui tam plaintiff is entitled to recover no more than ten percent.

In the present case, Boeing Corporation contracted with Northrop for Northrop to supply flight data transmitters for Air Force cruise missiles. The transmitters were required to tolerate a maximum low temperature of minus-65 degrees Fahrenheit. The damping fluid used by Northrop, however, solidified at minus-50 degrees Fahrenheit. Northrop allegedly concealed this fact by falsifying tests and failing to properly inspect.

In early 1987, plaintiff, a former Northrop employee, supplied federal investigators with information and evidence that Northrop falsified tests on the transmitters. In October 1987, plaintiff and another Northrop employee filed suit under the Act alleging improper inspection procedures and falsification of test results. The government intervened in the action and filed an amended complaint. The government obtained an indictment against Northrop that included plaintiff’s false test allegations, along with a separate allegation that Northrop used inadequate

\[446\] Minn. Stat. § 604.02 (West 1988).
\[447\] 5 F.3d 407 (9th Cir. 1993), cert. denied, 114 S. Ct. 1543 (1994).
\[449\] Id. § 3730(c)(1).
\[450\] Id. § 3730(d)(1).
damping fluid in the transmitters. Northrop pleaded guilty to the fraudulent testing and inspection allegations. The charges concerning the damping fluid were dismissed.

Plaintiff was then allowed to sever his complaint and proceed on the counts not adopted by the government. He attempted to amend his complaint to allege the damping fluid fraud allegations. In order to maintain this additional allegation, plaintiff had to demonstrate he was “an original source” of the information and that the information was not publicly disclosed. Under the rationale of *Wang v. FMC Corp.*, plaintiff would be “an original source” if “(1) he has ‘direct and independent knowledge of the information on which his allegation is based’; and (2) that he ‘has voluntarily provided information to the Government before filing’ his qui tam action.” Plaintiff would also have to show that he played some part, either directly or indirectly, in the public disclosure of the allegations of the proposed amendments. Additionally, Northrop argued that plaintiff could not maintain the amendment because he accepted the terms of the settlement the government reached with Northrop after the government intervened in the original action and that plaintiff could not inject the new claim over the government’s objection.

The Ninth Circuit remanded the case “to determine whether the government’s disclosure of the damping fluid allegations was the result of a criminal investigation that was instigated as a consequence of the information [plaintiff] provided to the government.” If the district court finds plaintiff was an original source under these guidelines, the court would then consider Northrop’s independent arguments.

V. UNITED STATES GOVERNMENT TORT LIABILITY AND DEFENSES

A. DISCRETIONARY FUNCTION EXCEPTION

*Sutton v. Earles* was the second appeal in consolidated personal injury and wrongful death actions arising from the collision of a pleasure boat with a Navy mooring buoy. The accident occurred in the waters of the United States Naval Weapons Station at Huntington Harbor, California. The plaintiffs, who in-

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451 975 F.2d 1412 (9th Cir. 1992).
452 *Id.* at 1417 (citation omitted).
453 5 F.3d at 412.
454 26 F.3d 903 (9th Cir. 1994).
cluded the four survivors and representatives of the five persons killed in the accident, filed negligence claims against the United States pursuant to the Suits in Admiralty Act (SIAA).  

In the previous appeal, the Ninth Circuit vacated the district court’s finding of government liability and remanded the case for reconsideration in light of the discretionary function exception of the Federal Tort Claims Act. In the second appeal, the United States challenged the trial court’s application of the discretionary function exception and various aspects of the plaintiffs’ damages awards.

With regard to the discretionary function exception issue, the district court found against the government on the following negligence causes of action:
1. failure to take adequate precautions to monitor the safety of boaters traversing Weapons Stations waters;
2. failure to maintain a system of boater permits, as allegedly required by certain federal regulations;
3. abandonment of a previous policy for briefing boaters on rules and regulations for traversing Weapons Stations waters;
4. failure to foresee that minimally qualified boaters would be operating in Weapons Station waters;
5. failure to foresee that intoxicated boaters would traverse Weapons Station waters or to take reasonable actions to protect harbor users;
6. failure to mark the harbor speed limit adequately or with lighted signs;
7. failure to illuminate the mooring buoy in question; and,
8. abandonment of a previous system allowing boaters easier access to information regarding the Weapons Station.

After conducting a *de novo* review of the district court’s ruling that the discretionary function exception did not apply to any of these negligence causes of action, the Ninth Circuit ordered a reversal with respect to the first through fifth and eighth causes. As for the sixth and seventh causes, the Ninth Circuit ruled that the Navy’s failure to provide adequate warnings of obstructions to navigation it had placed in the water did not involve “social, economic, or political policy” and, therefore, was not a protected, discretionary function. The Ninth Circuit also re-

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456 26 F.3d at 907.
457 Id. at 910.
jected the government’s argument against recognizing a federal common-law duty to warn in SIAA actions.458

With regard to the issue of damages, the government challenged the district court’s damages awards on several grounds, including the award of loss-of-society damages to the parents of certain decedents absent proof of financial dependency and the use of “across-the-board” damages amounts. The Ninth Circuit affirmed both aspects of the awards.459 With respect to loss-of-society damages, the Ninth Circuit ruled that proof of dependency was not required in an SIAA action, in contrast to recent holdings of the Second, Fifth, and Sixth Circuits and the treatment of such claims under the Jones Act and DOHSA. With respect to the “across-the-board” awards, the Ninth Circuit affirmed on the basis that damages need not be awarded with mathematical certainty and that the amounts awarded were not “grossly excessive or monstrous,” or lacking in evidentiary support.460

In *Jet Power, Inc. v. United States*,461 the United States District Court for the Southern District of Florida dismissed plaintiff’s civil rights and Federal Tort Claims Act claims arising from the FAA’s issuance of an airworthiness directive requiring that certain engines repaired by plaintiff, a FAA-certified service facility, be recalled due to inadequate repairs and overhauls. The district court found that plaintiff’s claims were “inextricably intertwined” with the propriety of the airworthiness directive, review of which is reserved by statute to the United States Circuit Courts of Appeals.

Plaintiff had originally filed a lawsuit challenging the validity of the airworthiness directive. After that action was dismissed, plaintiff proceeded with the present action alleging that various civil rights violations occurred in the issuance of the airworthiness directive and asserted a Federal Tort Claims Act cause against the United States. Plaintiff alleged: (1) that the defendants conspired to violate its rights; and (2) that the United States had wrongfully refused to rescind the airworthiness directive and to provide adequate supervision over other defendants’ conduct. The government moved to dismiss.

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458 *Id.* at 911-12.
459 *Id.* at 920.
460 *Id.* at 914-18.
By statute, FAA orders are subject to review by the United States Circuit Courts of Appeals. Airworthiness directives have been held to be "orders" for purposes of the statute. Thus, the issue presented in the motion to dismiss was whether the exclusive jurisdiction of the courts of appeals could be circumvented by collaterally attacking the validity of an FAA order in a district court civil rights action.

The district court concluded that such a collateral attack was not authorized under existing law. The court noted that, while the plaintiff took painstaking measures to downplay the importance of the airworthiness directive to its action, the allegations underlying the civil rights and tort claims were "inescapably intertwined" with the issuance and interpretation of the airworthiness directive. Thus, to resolve the liability issues, the court would necessarily have to determine the validity of the airworthiness directive, a task reserved by statute to the courts of appeals. Accordingly, the district court held that it lacked subject matter jurisdiction over plaintiff's civil rights and Federal Tort Claims Act claims and dismissed the action.

B. AIR TRAFFIC CONTROL NEGLIGENCE

In Remo v. United States, plaintiffs brought a Federal Tort Claims Act action alleging air traffic controller negligence in connection with the midair collision of two light airplanes. At trial, the United States District Court for the Eastern District of Pennsylvania held that the evidence established that the controller was not negligent in allegedly failing to observe one of the aircraft on his radar or in timing the release of the other aircraft from radar services in preparation for its landing at an uncontrolled airport.

The action involved a mid-air collision between a Beech A36 Bonanza and a Cessna 182 that killed all seven passengers on board. The wrongful death plaintiffs alleged that the air traffic controller breached his duty to warn the Cessna pilot of the presence of the Bonanza. Plaintiffs also alleged that the air traffic controller prematurely released the Cessna to the common traffic advisory frequency (CTAF) at the destination airport, as

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462 Id. at 17,920.
463 Id.
464 Id. at 17,920-21.
the airplane was still within the airport radar service area of a neighboring, controlled airport.

Based on expert testimony reconstructing the flight path of the aircraft, the court held that the Bonanza would not have appeared on radar.\textsuperscript{467} The court also held that the air traffic controller properly released the Cessna to the CTAF because no conflicting traffic was displayed on his radar.\textsuperscript{468}

The Federal Tort Claims Act wrongful death action in Budden \textit{v. United States}\textsuperscript{469} was based on alleged negligence by a Flight Service Station (FSS) weather briefer in failing to provide the decedent pilot with an adequate preflight weather briefing. On appeal, the Eighth Circuit, applying Nebraska law, affirmed the trial court's judgment that the pilot's continuation of the flight into deteriorating weather constituted the intervening, sole proximate cause of his crash, relieving the United States of liability even though the court found that the flight briefer had acted negligently.

The crash occurred on an evening Visual Flight Rules (VFR) helicopter ambulance flight. The pilot had called the Omaha FSS for a weather briefing. Although the briefer had three types of forecasts available (the Chicago area forecast, various terminal forecasts, and transcribed weather broadcasts (TWEBs)), the briefing only included information from the terminal forecasts. These forecasts did not mention the possibility of rime icing,\textsuperscript{470} freezing drizzle, and cloud ceilings below 1000 feet, which were included in the area forecast and TWEBs. The crash occurred in freezing drizzle in an area with cloud ceilings of 500-1000 feet. The evidence indicated that the weather had worsened gradually as the helicopter proceeded on its flight.

In affirming the judgment, the majority ruled that "[w]hile [the briefer] knew or should have known that the pilot would rely on the weather information in taking off on the flight, the briefer was not duty bound to anticipate that [the pilot] would continue the mission despite weather conditions which mandated aborting the flight."\textsuperscript{471} Strongly dissenting, one judge

\begin{footnotes}
\item[467] \textit{Id.} at 367.
\item[468] \textit{Id.} at 368.
\item[469] 15 F.3d 1444 (8th Cir. 1994).
\item[470] Rime icing is icing that occurs when an aircraft passes through a cloud. 15 F.3d at 1447 n.3.
\item[471] 15 F.3d at 1450.
\end{footnotes}
called the majority's ruling "a complete aberration under Nebraska law and any other existing law."\footnote{Id. at 1446.}

The wrongful death action of \textit{Webb v. United States}\footnote{840 F. Supp. 1484 (D. Utah 1994).} arose from a triple-fatality Piper PA-28-181 crash near the Roswell, New Mexico airport on February 5, 1988. The heirs of the pilot and the two passengers alleged that FAA Flight Service specialists at the Cedar City, Utah, and Roswell FSSs, and the Roswell Tower controllers, had negligently failed to provide pertinent weather information to the pilot before he departed Salt Lake City and while en route to Roswell. At the close of the trial, the United States District Court for the District of Utah ruled that the government's failure to advise the pilot of adverse weather conditions at Roswell was a contributing cause of the accident.

The pilot was VFR-rated only, with just 122 hours of total time, and had obtained his license only a few months before the accident. He had contacted the Cedar City FSS several times for weather information before departure. Due to computer problems, Cedar City lacked the latest information concerning weather at Roswell. The court determined that the Cedar City FSS personnel were negligent in failing to inform the pilot that he would need to obtain additional weather information. Because the pilot had made an en route stop near Albuquerque, however, the court did not find this negligence to be a proximate cause of the crash.

While on the ground at Albuquerque, a friend advised the pilot to check Roswell weather because of the possibility that a weather system had moved into southern New Mexico. After takeoff from Albuquerque, the pilot contacted the Roswell FSS and was advised that the Roswell weather included a measured, variable overcast ceiling at 1000 feet with five miles of visibility, with a remark that the ceiling appeared to be at 500 feet, variable to 1400 feet. In response to the pilot's further inquiry, the FSS specialist confirmed that the Roswell airport was still operating under VFR. The specialist did not, however, advise the pilot of the possibility of whiteout associated with the low cloud ceiling and snow on the ground, nor did he recommend against proceeding under VFR.

Within minutes after the pilot received this weather report, the Roswell FSS made a special weather observation that indicated a broken ceiling at 600 feet, a 1600-foot overcast, and visi-
bility of five miles. The airport then went under Instrument Flight Rules (IFR). The Roswell FSS did not communicate this information to the pilot, although it did relay it to Roswell Tower.

When the pilot contacted Roswell Tower, he was informed of the special observation and that the field had gone IFR. At that time, the pilot was twenty-four miles northwest of Roswell at 9500 feet and was flying in clear skies with sufficient fuel to return to Albuquerque. Instead, he requested a special VFR clearance into Roswell, which the tower controllers granted. Subsequently, the controllers advised the pilot of the presence of twenty-eight-inch-high banks of snow alongside the active runway but did not caution the pilot of the danger of whiteout. The crash occurred after the pilot, in attempting the special-VFR approach, apparently tried to execute a 180-degree turn while at only 200-300 feet above ground level. The court found that the crash occurred after the pilot experienced whiteout, of which the government should have warned, and that the controllers also should have warned the pilot against proceeding VFR. 474 The court held the government forty percent at fault for causing the accident. 475

In Worthington v. United States, 476 a Federal Tort Claims Act case alleging air traffic controller negligence, the Eleventh Circuit reversed the district court’s ruling that spatial disorientation suffered by the pilot was a superseding cause of his crash, which killed the pilot and his three passengers.

The accident occurred during an attempted missed instrument approach at Jacksonville, Florida. The evidence indicated that the pilot was spatially disoriented upon reaching decision height, and veered left, striking a group of trees. The ensuing wrongful death action against the United States was based on alleged air traffic controller negligence in failing to provide material weather information that was known to the controllers involved. This information included: (1) visibility at the airport had deteriorated to one-sixteenth of a mile; (2) the tower controller had been unable to see an aircraft landing previously; (3) that aircraft’s pilot had reported the base of the fog as 100 feet, and had difficulty taxiing because of the fog; and (4) another pilot, who had previously executed a missed approach, reported

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474 Id. at 1521.
475 Id.
476 21 F.3d 399 (11th Cir. 1994).
the fog extended to 250 feet above the surface. Approach control had also been late in handing off the decedent’s flight to the tower controller.

According to plaintiff, the decedent’s widow, the controller’s negligence had aggravated the pilot’s disorientation by increasing his workload, a theory on which the district court had discredited plaintiff’s experts. The Eleventh Circuit reversed on this point, finding that the evidence compelled the conclusion that the controller’s actions had contributed to the pilot’s disorientation and resulting crash.477

The final issue addressed by the Eleventh Circuit was whether decedent’s negligence in executing the missed approach was a superseding cause of the crash, breaking the chain of proximate causation as to the United States. The court of appeals ruled that the air traffic controllers’ negligence was a proximate cause of the decedent’s disorientation, that his subsequent negligence was foreseeable, and, accordingly, the court reversed the judgment.478

C. OTHER GOVERNMENT LIABILITY

In Alaska Airlines, Inc. v. Johnson,479 the General Services Administration (GSA) appealed on behalf of the United States from a United States District Court for the District of Columbia ruling that certain post-payment audits of airline transportation bills were not authorized by law and that the United States was required to return money withheld from the airlines based on the improper audits.

The case addressed the government’s practice of transporting its employees by purchasing individual tickets subject to “controlled capacity” fares. In the post-deregulation environment, there may be limited numbers of seats available at different fares on any given flight. If a government employee has chosen a date and flight, the regulations governing the transport of government employees require that the employee be provided with the lowest cost ticket to the destination, unless a higher cost service is determined to be more advantageous to the government.

At issue was the GSA’s assumption that the government was always entitled to the lowest fare regardless of whether any seats set aside for that type of fare remained open. The GSA did not

477 Id. at 403.
478 Id. at 406-07.
479 8 F.3d 791 (D.C. Cir. 1993).
consider the seat limitations available at the time of purchase in performing its audits or in determining what was to be paid by the government.

The circuit court held that the government was not per se entitled to the lowest applicable fare and that it was improper for the GSA to place a burden on the airlines to prove at audit that there were no seats available at the lower fares. The court of appeals upheld the district court order requiring the government to return withheld funds to the airlines, but it declined to award post-judgment interest on the basis that there must be a specific waiver of sovereign immunity for interest to be recoverable against the government.

The case of USAir, Inc. v. United States Department of the Navy arose when, in October 1994, a civilian Navy employee boarded a flight operated by the defendant air carrier's predecessor-in-interest, wrapped his briefcase in his garment bag, and stored both in an overhead compartment. The employee admitted that the briefcase probably was unstable when he closed the bin. A short time later, a flight attendant opened the bin, and the briefcase fell on a passenger's head, causing injuries for which he incurred over $92,000 in medical expenses.

After the plaintiff successfully sued the air carrier, recovering $550,000 in damages, the air carrier brought a contribution action under the Federal Tort Claims Act. The district court entered summary judgment for the government, finding, as a matter of law, that the Navy employee had not acted negligently and that, even if he had, the flight attendant's negligence was a superseding cause.

The Ninth Circuit reversed, concluding that triable issues existed with respect both to the Navy employee's negligence and to whether the flight attendant's acts comprised a superseding cause. Reversal on the negligence issue was based on the employee's admissions that the briefcase was precariously stored and that he could have requested a flight attendant's assistance or repositioned the briefcase himself. With respect to the superseding issue, the court of appeals applied California law defining a superseding cause as an intervening cause that is not reasonably foreseeable at the time the defendant's negligence

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480 Id. at 795.
481 Id. at 798.
482 14 F.3d 1410 (9th Cir. 1994).
483 Id. at 1412-13.
occurs. The Ninth Circuit reversed on this issue, determining that the Navy employee should have foreseen that his briefcase might fall if the bin were opened. The Ninth Circuit remanded the case with instructions that fault be apportioned between USAir and the Navy.

In United States v. 1980 Lear Jet, Inc., Lear Jet appealed from the district court's judgment limiting its recovery on a mechanic's lien that it filed against an aircraft seized by the United States to the principal amount, excluding costs and interest. The Ninth Circuit reversed, holding that under applicable Arizona law the lienholder was entitled to recover each of these elements of its lien.

The aircraft involved was a 1980 Lear Jet owned by Aere Servicios Ejecutivos Sinaloenses S.A. de C.V. (ASES) that the government had seized under federal forfeiture statutes applicable to property used in, or obtained from the proceeds of, criminal acts. Prior to the government's seizure, ASES had entered into a maintenance and repair agreement with Learjet, under which Learjet had performed $55,736.53 in work for which it had not been paid.

Following the seizures, Learjet filed a claim with the district court to recover the amount of its repair bills plus costs, fees, and interest. The district court limited Learjet's recovery to the principal amount. On appeal, Learjet argued that it was entitled to recover costs incurred in protecting its claim in the forfeiture proceeding, as well as interest that had been lost on the principal during the three years the government spent in resolving the matter. The Ninth Circuit agreed, rejecting the government's argument that the doctrine of sovereign immunity insulated it from liability for anything more than the principal amount. The Ninth Circuit explained that Learjet was not actually suing the government but was merely asserting its statutory right to recover the full amount of its lien against property. Under applicable Arizona law, the court held, Learjet was entitled to recover the lien principal, along with costs and statutory interest. The case was remanded to the district court for further proceedings.

485 14 F.3d at 1413.
486 Id. at 1414.
487 38 F.3d 398 (9th Cir. 1994).
488 Id. at 401.
489 Id. at 402.
In *Roscoe v. Department of Forestry*, the appellant unsuccessfully appealed the dismissal of his negligence action against the California Department of Forestry (CDF) for setting a backfire that caused 200 acres of his property to burn. In upholding the dismissal, the California Court of Appeals affirmed the trial court's view that a CDF helicopter was not a "motor vehicle" within the meaning of an exception to government immunity for injuries caused by negligence in the operation of emergency motor vehicles.

The action related to CDF's actions in combatting a forest fire occurring in northern California in August 1990, when a CDF helicopter accidentally started the backfire in the wrong location. The court of appeals held the CDF was immunized from tort liability by Government Code section 850.4, which provides a broad immunity in favor of fire-fighting entities. Plaintiff claimed that a statutory exception applied, which authorized tort actions arising from negligent operations of "emergency vehicles." This argument foundered, however, on the court's interpretation of the terms "motor vehicle" and "vehicle," which was based on California Vehicle Code definitions phrased in terms of vehicles moving upon roads or rails, i.e., other than air vehicles.

VI. AIRPORTS AND FIXED BASE OPERATORS

A. PERSONAL INJURY ACTIONS

In the interlocutory appeal of *Estate of Cook v. Gran-Aire, Inc.*, the Wisconsin Court of Appeals affirmed the trial court's ruling that strict liability would not be applied in a wrongful death action against the owner of an aerobatics instruction airplane that crashed, killing the pilot and his flight instructor.

The action arose from the crash of a 1980 Bellanca Decathlon that the NTSB found was caused by improper welding in the manufacturing process, which caused fatigue cracking that resulted in a right wing separation during the decedent's instructional flight. Defendant, who owned the airplane and employed the flight instructor, also owned several other airplanes that were leased to pilots for an hourly fee. The Decathlon, however,

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491 Id. at 19471-72.
492 Id. at 19471.
493 513 N.W.2d 652 (Wis. Ct. App.), review denied, 520 N.W.2d 89 (Wis. 1994).
was never leased and was used only for instruction by defendant’s employees. Although Wisconsin extends strict products liability to lessors, the court of appeals ruled that the defendant was not a lessor with respect to the Decathlon, as the airplane never left the possession and control of defendant or his employees, as was required for a lease to be found. 494

In *Blum v. RES Associates, Ltd.*, 495 the Georgia Court of Appeals ruled that the present operator of an airport where an airplane was cannibalized during a former operator’s tenure was not liable to the airplane owner under a successor-in-interest theory. The case arose from property damage to an airplane occurring in 1988. The owner first filed an action for breach of oral contract against the operator who leased the airport from 1986 until 1991, then amended the complaint to add the operator who took over the airport in 1991.

The bases for the amendment were the new operator’s lease with the county and the asset purchase agreement between the present and former operators. In affirming the directed verdict for the present operator, the appellate court ruled that nothing in the airport lease with the county bound the new operator to the former leaseholder’s liability for the incident and that the asset purchase agreement only included liabilities on contracts that were existing at the time the assets were transferred in 1991, more than three years after the airplane owner’s storage contract with the previous leaseholder had lapsed. 496 The former operator of the airport entered into a consent judgment with the airplane owner.

**B. LAND AND USE REGULATIONS**

In *Northwest Airlines, Inc. v. County of Kent, Mich.*, 497 the United States Supreme Court affirmed the Sixth Circuit’s ruling that the user fee structure at Kent International Airport in Grand Rapids, Michigan, which is owned by Kent County, was not violative of the federal Anti-Head Tax Act (AHTA) 498 or the Commerce Clause. The Court rejected the arguments of certain commercial airlines that the fee structure unlawfully favored general aviation users.

494 *Id.* at 653.
496 *Id.*
Seven commercial airlines had challenged the airport's "cost of services" fee allocation system, which apportioned costs among three types of users: (1) commercial air carriers; (2) general aviation users; and (3) airport concessionaires. The airport allocated its air-operations costs entirely to air carriers and general aviation users. Terminal maintenance costs, on the other hand, were allocated only to airlines and concessionaires, such as restaurants and car rental agencies, in proportion to the square footage of each tenant's space. The airport, moreover, only charged general aviation users some twenty percent of their allocated costs, while charging market rates for leased terminal space that were well in excess of actual costs. The surplus generated from terminal leases was used to subsidize the general aviation shortfall and to generate surplus revenues that added more than $1 million per year to the airport's reserve fund.

After the county unilaterally increased the air carriers' fees, they challenged the new rates, attacking: (1) the airport's failure to allocate air operation costs to concessionaires, who derived substantial benefits from the air operations; (2) the surplus generated by charging market rates for terminal space; and (3) the airport's failure to charge general aviation users their full allocated costs. The air carriers alleged that these factors rendered the fees unreasonable and were thus violative of the AHTA, which prohibits states and their subdivisions from collecting user fees other than "reasonable rental charges, landing fees and other service charges from aircraft operators for the use of airport facilities" under the Airport and Airway Improvement Act of 1982 (AIAA). The air carriers also challenged the fee structure as violative of the Commerce Clause. The district court ruled that the air carriers possessed an implied right of action under the AHTA but had no cause of action under the AIAA or the Commerce Clause. The court ultimately found that the fee structure did not violate the AHTA.

The AHTA prohibits levying a "fee or other charge directly or indirectly on persons traveling in air commerce or on the carriage of persons traveling in air commerce." Section 1513(b) contains a savings clause allowing airports to levy "reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities."

Because the Court lacked guidance as to a standard for reasonableness of fees under the AHTA, it employed the measure of reasonableness of fees used in a Commerce Clause analysis, as delineated in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*502 Under *Evansville*, a fee is reasonable if it (1) is based on some fair approximation of use of the facilities; (2) is not excessive in relation to the benefits conferred; and (3) does not discriminate against interstate commerce.508 Applying this test, the Court found the county’s levy on the air carriers was reasonable and, therefore, passed muster under the AHTA. The Court ruled that the airport’s decision to allocate air operations costs to the air carriers and general aviation users, but not to concessionaires, represented a “‘fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed’”504 and that the air carriers’ fees were not “‘excessive in comparison with the governmental benefit conferred.’”505 The Court also rejected the air carriers’ argument that it was mandatory to take into account concession revenues in deciding whether the air carrier fees were reasonable.506

With respect to the air carriers’ argument that general aviation users were being undercharged, the Court found that the carriers had failed to submit any evidence establishing that the general aviation users were engaged in interstate commerce, and it exempted general aviation on this basis. With respect to the argument that the airport was overcharging concessionaires in order to amass surpluses, the Court ruled that the statute did not authorize judicial review of the propriety of such surpluses, in that the AHTA only requires that the fees charged not be “‘excessive in relation to costs incurred by the taxing authorities.’”507 In addition, section 1513(b) of the statute only discusses fees charged to “‘aircraft operators,’” not concessionaires.508 The Court found it unnecessary to determine whether a private right of action existed under the AHTA.509

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503 *Id.* at 716-17.
504 114 S. Ct. at 864.
505 *Id.* at 865.
506 *Id.*
507 *Id.*
508 *Id.*
509 114 S. Ct. at 861.
In *Board of County Commissioner v. FAA*, the court upheld the FAA's approval of the City and County's plan to relocate the cargo facilities at the new Denver International Airport without requiring a supplemental environmental impact statement (EIS). The FAA's record of decision (ROD) filed December 24, 1992, determined that "implementation of the proposed [airport layout plan] revisions will not affect the quality of the human and natural environment in a significant manner or to a significant extent not already considered in the [original] 1989 EIS."

Petitioners filed a complaint challenging the FAA's decision on two grounds: (1) that the ROD was erroneous; and (2) that the FAA had failed to ensure the relocation met the requirements set forth in the Clean Air Act. The court, in rejecting petitioners' first argument under the "clear error of judgment" rule, noted that the ROD indicated that relocation would reduce airplane taxi distances and the distances traveled by cargo ground vehicles, reducing exhaust emissions below the levels pertaining to the original EIS. With respect to petitioners' second argument that the FAA violated section 7506(a) of the Clean Air Act, the court noted that the FAA found the airport "conforming" in a 1989 evaluation of airport plans and that petitioners failed to cite any material nonconformity in the subsequent plans. The court also noted that the city of Denver had a continuing duty to assure the airport met appropriate standards and that any later-discovered nonconformity could be addressed if and when necessary. Petitioners also argued that the FAA had violated its duty to ensure that the new airport would be operated safely and efficiently, which the court rejected as speculative.

In *City of Grapevine v. Department of Transportation*, approval of the FAA's funding of a plan to expand the Dallas/Forth Worth International Airport (DFW) was found proper after a petition opposing the expansion was brought by various individuals and subdivisions of the State of Texas. Petitioners chal-

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510 18 F.3d 953 (D.C. Cir. 1994).
511 Id.
512 Id. (quoting the FAA's ROD).
514 18 F.3d at 953.
515 Id.
516 Id.
lenged the funding on several grounds, including: (1) the FAA's alleged categorical exclusion of certain items from its Final Environmental Impact Study (FEIS); (2) the FAA's failure to consider certain alternatives to the expansion; and (3) the FAA's alleged error in determining that the expanded airport would not create noise that would interfere with the historical use of nearby properties.\footnote{518} 

FAA Order 5050.4A allows the FAA to exclude certain items, such as ground transportation improvements, on a categorical basis from being considered in the FEIS. Petitioners argued that the FAA was nevertheless required to consider the "overall cumulative impact of the proposed action and the consequences of subsequent related actions."\footnote{519} The court rejected this argument as negating the exclusion option. The court also found that, in any event, the FAA had considered the cumulative environmental effects of several excluded categories of improvements.\footnote{520}

Petitioners also contended the FAA did not sufficiently consider alternatives to the planned expansion, such as off-site locations and "wayport" facilities for connecting flights. The court, however, found that the FAA had considered such alternatives and had found that they could not be completed in a timely manner.\footnote{521} 

Petitioners also argued that the FAA erred in applying noise "use" standards appropriate for "residential properties" to the nearby "historical sites." Under these measurements, the FAA contended that the airport noise at the historical sites potentially affected by the expansion was too low to constitute an incompatible "use" within the meaning of section 4(f) of the Department of Transportation Act.\footnote{522} The court accepted the FAA's use of residential property noise standards, after finding that the historical sites involved were being used as private residences.\footnote{523}

Finally, petitioners argued that approval of the west runway expansion was unlawful in that the FAA did not complete the review process required by the National Historic Preservation
Act (NHPA). The court ruled that the FAA had not violated the NHPA, after finding that the approval was conditioned upon successful completion of a subsequent reevaluation.

The case of *Northwest Airlines, Inc. v. FAA* involved the issue of a passenger facility charge (PFC). In 1990, the Federal Aviation Act (Act) was amended to allow airports to petition the FAA for permission to impose a PFC on passengers. Under the Act, PFCs are only authorized for use in financing specific airport projects. The statute also requires that the airport provide written notice of proposed PFCs to air carriers, identifying the projects to be financed.

Memphis-Shelby County Airport Authority petitioned the FAA for permission to impose a $3.00 PFC to fund four projects, and it proposed a fifth, alternative project to be funded if the FAA disapproved any of the first four. In its written notice to petitioner and other airlines, however, the airport failed to identify the fifth project. The FAA approved the petition, including funding of the fifth project if any of the first four could not be implemented in a timely manner.

Petitioner challenged the FAA's approval on the basis that the FAA had failed to consider the potential economic and competitive burden of the PFC on the airline industry, which petitioner argued was required under the general "public interest" criteria specified in the Act. The district court had interpreted the PFC statute as only requiring the FAA to consider specified criteria, including the enhanced capacity, safety or security, noise reduction, and opportunities for enhanced competition that were presented by a proposed PFC project, under which the proposed projects were deemed as appropriate. On appeal, the District of Columbia Circuit rejected the bulk of petitioner's arguments, but it did hold that the FAA violated the consultation provisions of the PFC statute and that the airport had failed to give notice of the proposed fifth alternative project, precluding the use of PFC funds for that project.

In *Kansas v. United States*, appellants brought an unsuccessful, three-prong constitutional challenge to the Wright Amend-
ment, section 29 of the International Air Transportation Competition Act of 1979,\textsuperscript{530} which forbids airlines from offering direct interstate flights from Love Field in Dallas, with certain exceptions for limited charter and commuter airline service, and for flights to contiguous states. Appellants’ challenge was based on the Port Preference Clause, the First Amendment, and the right of interstate travel. The District of Columbia Circuit affirmed the district court’s grant of the government’s summary judgment motion.\textsuperscript{531}

The Wright Amendment was enacted out of concern that the viability of Dallas-Forth Worth Airport (DFW) could be undermined if Southwest Airlines, which refused to leave Love Field for DFW, was allowed to operate on an unrestricted basis. Under the amendment, interstate passengers flying from Love Field were required to make an intermediate stop in one of the contiguous states and to change airplanes prior to arriving at their final destinations. Passengers were also required to buy separate tickets for the different flights, and they were not allowed to check baggage through to the final destination.

The Port Preference Clause states that “no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.”\textsuperscript{532} The clause was enacted in response to a pre-Constitution federal law requiring ships sailing to Baltimore to “enter and clear” at Norfolk. This requirement, in effect, allowed Virginia to tax vessels bound for Chesapeake Bay, deterring ships from using those Maryland ports. The court rejected the Port Preference Clause argument because a preference between two airports in the same state did not violate the clause and because air traffic inbound to Texas was not required to make an intermediate stop in any other state.\textsuperscript{533}

Appellants next argued that the Wright Amendment violated the rights to free access to interstate travel. The court rejected this argument based on a finding that the purpose of the Amendment was to promote interstate travel by channeling traffic through the new DFW airport. The court ruled that any deterrent effect the Amendment might have was trivial.\textsuperscript{534}

\begin{itemize}
  \item \textsuperscript{530} Pub. L. No. 96-192, 94 Stat. 35, 48-49 (1980).
  \item \textsuperscript{531} 16 F.3d at 437.
  \item \textsuperscript{532} U.S. Const. art. I, § 9, cl. 6.
  \item \textsuperscript{533} 16 F.3d at 440-41.
  \item \textsuperscript{534} Id. at 441-42.
\end{itemize}
Appellants’ last argument was that the Wright Amendment violated the right to free speech because it prevented Southwest from “offer[ing] for sale” transportation outside the contiguous-state area. Southwest was only allowed to provide information about further travel upon customer request. The court, citing \textit{Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico},\textsuperscript{535} stated that the commercial speech in question could be restricted provided “the government’s interest in doing so is substantial, the restrictions directly advance the government’s asserted interest, and the restrictions are no more extensive than necessary to serve that interest.”\textsuperscript{536} Applying this rule, the court found that the Wright Amendment expressed the government’s substantial interest in ensuring that adequate facilities would exist for interstate travel in the Dallas-Fort Worth area and that the advertising ban was narrowly tailored in proportion to the interests it served.\textsuperscript{537}

In \textit{County of Westchester v. Commissioner of Transportation},\textsuperscript{538} the Second Circuit, applying Connecticut law, reversed a summary judgment declaring that Westchester County had gained a prescriptive aviation easement over Connecticut property for use by Westchester County Airport. The basis for the reversal was that the use of airspace as an approach zone was not “adverse,” an essential element for an easement by prescription.\textsuperscript{539}

Defendants were Connecticut landowners whose property was near the airport adjacent to the border in New York. The approach zone for Runway 29 was almost entirely in Connecticut. Several trees on defendants’ property had grown into the mandatory “clear zone” airspace for this runway, which shortened its useable length by approximately 1300 feet and prevented its use by larger airplanes. Prior to filing the action, the county offered to trim the trees, but the defendants refused to cooperate.

The parties agreed before the district court that New York choice of law rules indicated that Connecticut law would apply. After motions in the district court, the county’s only remaining claims were state law claims, including a claim of a prescriptive aviation easement.

\textsuperscript{535} 478 U.S. 328, 340 (1986).
\textsuperscript{536} 16 F.3d at 442.
\textsuperscript{537} Id. at 443.
\textsuperscript{538} 9 F.3d 242 (2d Cir. 1993), \textit{cert. denied}, 114 S. Ct 2102 (1994).
\textsuperscript{539} Id. at 247.
The county sought two separate easements: (1) an “aviation or flight” easement, giving it a right to use airspace above defendants’ properties; and (2) a clearance easement, giving the county the right to cut down the obstructing trees. The district court granted summary judgment for the county on the prescriptive easement claim, and it certified the question of whether the clearance easement was included in the aviation easement to the Second Circuit pursuant to 28 U.S.C. section 1292(b). The Second Circuit certified the question to the Connecticut Supreme Court, which found, instead, that the county’s use of the airspace was not “adverse,” an essential element for a prescriptive easement. The basis for the Connecticut court’s finding was that, to be “adverse,” a use must be such that a landowner would have a right of action against the user and that defendants lacked any right of action because federal law bars the issuance of state law injunctions affecting aircraft use of United States airspace. Based on this ruling, the Second Circuit reversed the county’s summary judgment.

Jade Aircraft Sales, Inc. v. City of Bridgeport was a case in which plaintiff had previously sued defendants for their alleged unfair denial of access to the runway at Sikorsky International Airport, where plaintiff hoped to operate an aircraft service facility from his adjacent land. In that action, plaintiff had won a jury award totaling $2 million in compensatory damages, plus punitive damages of $37,900 from each defendant. The subject of the action was defendants’ alleged wrongful denial of airport access with the intent of depressing the value of plaintiffs’ adjacent land. Defendants allegedly had offered plaintiff airport access, but only in return for conveying the land to defendants for a price that plaintiff contended fell below just compensation.

In the present action, plaintiff sought a permanent injunction allowing him airport access. The court ruled that a permanent injunction was unauthorized, as plaintiff was unable to show that his legal remedy of damages was inadequate, or that plaintiff would be denied airport access if he reapplied, as some ten years had passed since defendants had first refused access and all of the key players had since relinquished their authority regarding airport policy and procedure. The court ruled that the absence

540 Id. at 246.
541 Id.
of a threat of continuing or future injury made a permanent injunction unwarranted.\textsuperscript{548}

In \textit{Hawley v. City of Cleveland},\textsuperscript{544} Cleveland taxpayers challenged the city's lease of airport space to the Catholic Diocese for use as a chapel as violating the Establishment Clause of the First Amendment to the Constitution.\textsuperscript{545} The district court's entry of judgment in favor of defendants was affirmed on appeal by the Sixth Circuit.

In analyzing appellants' Establishment Clause claim, the Sixth Circuit applied the test announced by the United States Supreme Court in the seminal case of \textit{Lemon v. Kurtzman},\textsuperscript{546} as refined in subsequent cases. To pass constitutional muster, the district court held that the lease was required to have a secular purpose that, as its primary effect, neither advances nor inhibits religion and which does not foster an excessive government entanglement with religion.\textsuperscript{547} In upholding the lease, the district court concluded that the chapel served the secular purpose of accommodating the religious needs of travelers, would not cause a reasonable observer to conclude that the city endorsed the Catholic religion, and did not constitute an excessive government entanglement, a holding that was affirmed on appeal.\textsuperscript{548}

In \textit{Gustafson v. City of Lake Angelus},\textsuperscript{549} the United States District Court for the Eastern District of Michigan held that certain city zoning ordinances restricting seaplane operations were preempted by federal law based on its finding that the applicable federal statutes and regulations indicated a congressional intent to preempt the field.

Plaintiff, a seaplane pilot, owned a waterfront home on Lake Angelus in Michigan. After plaintiff landed a seaplane on the lake, he was advised by local authorities that two city zoning ordinances barred seaplane operations. These ordinances prescribed minimum operating altitudes and restricted seaplane landings on Lake Angelus. Plaintiff then filed this action, challenging the ordinances as being preempted by federal law,

\begin{itemize}
\item \textsuperscript{545} \textit{Id.} at 12.
\item \textsuperscript{544} 24 F.3d 814 (6th Cir. 1994).
\item \textsuperscript{546} U.S. CONSTR. amend. I.
\item \textsuperscript{547} 403 U.S. 602 (1971).
\item \textsuperscript{548} 24 F.3d at 822.
\item \textsuperscript{549} \textit{Id.}
\item \textsuperscript{549} 856 F. Supp. 320 (E.D. Mich. 1993).
\end{itemize}
among other issues. The parties filed cross-motions for summary judgment.

In considering the cross-motions, the court referred to section 1508(a) of the Federal Aviation Act (the Act), which states that "[t]he United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, including the airspace above all inland waters," and FAR Part 91, which prescribes rules governing all aspects of aircraft operations, including minimum safe altitudes. The court found that the comprehensive nature of these laws and regulations indicated Congress' intent that federal law occupy this field, and it ruled that the city ordinances were preempted.

In the appeal of Board of Commissioners v. Isaac, the Tenth Circuit affirmed the FAA's decision to withdraw proposed funding for the construction of a major cargo hub at Front Range Airport near the new Denver International Airport (DIA).

Petitioners, who advocated funding of the proposed cargo hub, were concerned that the air cargo facilities at DIA were inconveniently located and did not provide ready access to interstate highways. In 1991, they proposed expanding Front Range Airport, an existing general aviation facility, into a cargo hub. The FAA approved the expansion in a March 1992 ROD. Later, the FAA issued a funding letter allocating $15 million to the project, "subject to revision after bids have been opened; and . . . subject to signed leases with the air cargo carriers." The funding was only for the fiscal year of 1992, with any future funding conditioned on enactment of "new legislation." The expansion of Front Range began, and carriers and service businesses signed lease options, while others expressed their interest, but only if the FAA provided further funding.

In August 1992, DIA officials decided to relocate air cargo operations from the north side of the airport to the south side, thereby eliminating the significant problems associated with DIA's previously proposed cargo operations. Air carriers began abandoning Front Range to return to DIA. When the "signed

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552 856 F. Supp. at 326.
553 18 F.3d 1492 (10th Cir. 1994).
554 Id. at 1495.
leases” referenced in the ROD failed to materialize, the FAA withdrew the ROD and funding for the Front Range project.

Petitioners sought review of the FAA’s actions, stating that there was no substantial evidence supporting the reversal of the agency’s position and that the FAA’s decisions were arbitrary and capricious. In reviewing the record, the court found the crux of the ROD was the assumption that DIA was not a viable air cargo facility. However, once DIA decided to switch its cargo location, DIA became an economically viable alternative to Front Range. The court, therefore, ruled that the withdrawal of the ROD was not arbitrary and capricious. The court also ruled that it was prohibited by section 701(a)(2) of the APA from reviewing a FAA decision to withdraw tentative funding, which the court found was committed to the agency’s discretion.

Petitioners also argued that the FAA was equitably estopped from reversing its original funding decision. The court, citing Penny v. Giuffrida, ruled that a party seeking estoppel against the government must establish affirmative misconduct. The court also noted that petitioners had failed to meet their burden of proving misrepresentation or concealment.

Finally, petitioners argued that a conflict of interest existed between the DIA airport administrator and the FAA, an argument the court found was waived by petitioners’ failure to raise it below.

In Banner Advertising, Inc. v. People, the Colorado Supreme Court found that an ordinance by the City of Boulder that prohibited commercial signs towed by aircraft was preempted by federal law and, therefore, was not enforceable.

Banner Advertising, Inc. originally appealed from the Boulder Municipal Court’s finding that Banner had twice violated a Boulder ordinance specifically prohibiting commercial sign towing by aircraft. On both occasions, Banner had received FAA authorizations to conduct commercial banner towing. Banner appealed to the Boulder District Court, which rejected its pre-emption arguments by focusing on the wording of the FAA certificate issued to Banner. The certificate stated that the authorization did not “constitute a waiver of any state law or

556 897 F.2d 1543 (10th Cir. 1990).
557 18 F.3d at 1499.
558 Id.
559 868 P.2d 1077 (Colo. 1994).
local ordinance not otherwise preempted by the United States Constitution or Federal Statute or Regulation.' 560 The Boulder District Court found that the FAA, by the wording of its certificate, had left room for local regulation. The Colorado Supreme Court disagreed with the lower court, finding that the FAA certificate language only stated a fundamental principle of the doctrine of federalism, and it held that the ordinance was preempted.561

In Kleiser, Inc. v. Airport Commission,562 plaintiffs appealed from the involuntary dismissal of their action at the close of their case-in-chief, arising from an action against the Airport Commission for alleged violations of public bidding law in failing to award contracts to the highest bidder.

The action concerned a lease for a tract of land owned by the Airport Commission. Plaintiffs contended that they submitted the highest bid but that it was rejected by the commission. On appeal, plaintiffs argued that the commission acted arbitrarily and capriciously in failing to award the lease to the highest bidder. The Louisiana Court of Appeals, however, rejected this argument, finding that the commission had acted in good faith. The court affirmed the dismissal based on the fact that the party receiving the contract had properly satisfied the bidding requirements.563

In Maryland Aviation Administration v. Newsome,564 the Maryland Court of Special Appeals affirmed the trial court’s reversal of a state Department of Transportation Board of Airport Zoning Appeals order denying a variance that was sought by a home construction contractor. The variance, if granted, would have allowed the contractor to develop single-family homes within the Baltimore-Washington International Airport (BWI) Noise Zone.

Appellee sought to build a single-family housing complex consisting of twenty-seven houses on land near BWI, which was intended to house an estimated sixty-eight people. The board’s denial of the variance was based on the location of the property within the BWI Noise Zone, an estimate that airport noise was not expected to decrease in the area, and that the population

560 Id. at 1079.
561 868 P.2d at 1084.
563 Id. at 753-54.
density in the proposed development would be significantly greater than in its surroundings. On appeal to the trial court, appellee successfully argued that the board had exceeded its discretion in considering factors other than airport noise in denying the variance.

The court of special appeals affirmed the trial court decision after reviewing the BWI Noise Zone regulations, finding their purpose to be limiting airport noise exposure by developing plans for monitoring and abating noise impact, in part by regulating land use within the BWI Noise Zone. The appellate court also found that the regulations did not authorize the board to regulate population densities within the BWI Noise Zone and, therefore, that the board's denial of the variance was arbitrary and capricious due to its consideration of density factors.

In Sharp v. Howard County Board of Appeals, the latest round of a fifteen year land use dispute over a private airstrip, the Maryland Court of Special Appeals rejected the challenge by a group of nearby property owners to the county zoning board's decision granting the airstrip owners a special zoning exception allowing its use. The court found that the zoning board had acted within its discretion in granting the special exception, which was based on a finding that the use of the land as an airstrip did not cause any adverse effects above and beyond those inherently associated with such excepted uses, irrespective of their location within the county. Specifically, the appellate court noted the uncontroverted testimony that the airstrip was well-maintained, that the special use exception that was granted only allowed three aircraft to be based at the airstrip, and that the owners had prohibited pilots using the airstrip from over-flying the three local schools. The court also noted the results of a study indicating: (1) since 1983, only 341 takeoffs and landings, or one every five-and-one-half days, had been recorded at the airstrip and (2) the zoning board had determined the noise associated with the airstrip was within the state's maximum for property zoned for single family, detached homes.

In announcing its decision, the appellate court admitted that it had "no illusion that this [o]rder will end the string of appeals

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565 Id. at 474.
566 Id. at 474-75.
568 Id. at 259.
569 Id. at 252-53.
and remands" over the land use dispute, and commented, "Id imperfектum manet dum confectum erit (it ain't over until it's over)." 570

In State v. Metropolitan Airports Commission, 571 the Minnesota Supreme Court, ruling that federal law relating to the operation of airports preempts the enforcement of state and municipal noise pollution regulations, reversed a court of appeals ruling that had reversed the trial court's grant of summary judgment for the defendant Metropolitan Airports Commission (MAC).

This action arose from the attempt of certain public interest groups to enforce Minnesota Pollution Control Agency (MPCA) noise regulations against the MAC, which is the proprietor of the Minneapolis-St. Paul airport. Plaintiff/appellants were non-profit organizations seeking a declaratory judgment that the airport's commission was subject to the noise pollution regulations authored by the MPCA. The issue before the court of appeals was whether these state regulations were preempted by federal law. Although issues of aircraft flight, airspace management, and aircraft noise are generally controlled by federal law, airport operators may impose nondiscriminatory restrictions, even if they directly control aircraft flight.

In San Diego Unified Port District v. Gianturco, 572 the Ninth Circuit upheld the validity of MPCA restrictions, as applied to MAC, because the restrictions neither directly controlled aircraft flight, nor attempted to do so indirectly by compelling an airport proprietor to restrict aircraft flight. The court contemplated the possibility that enforcement of the noise standards would result in attempts to control aircraft flight, but it left that issue for future consideration.

In Malone Parachute Club, Inc. v. Town of Malone, 573 a skydiving club's challenge to a town board resolution prohibiting skydivers from landing on public airport property, without first obtaining liability insurance naming the town as an additional insured, was upheld in this New York action. The club unsuccessfully challenged the order on three bases: (1) that the order was preempted by federal law; (2) that the order lacked a rational basis; and (3) that the order was passed in violation of local open public meetings laws.

570 Id. at 249.
571 520 N.W.2d 388 (Minn. 1994).
572 651 F.2d 1306 (9th Cir. 1981).
With respect to the first issue, the club argued that the order conflicted with an FAA regulation requiring that airports receiving federal funds be made available for all aeronautical users, including skydivers. While acknowledging the general preemption rule, the court noted that it was subject to an exception allowing municipalities to enact regulations in their capacities as airport proprietors, so long as the regulations do not directly conflict with existing federal statutes or regulations. The court ruled that the regulation cited by the club as preemptive permitted municipalities to impose “reasonable” limitations on skydiving, including the requirement for liability insurance.\(^\text{574}\)

The club’s “rational basis” and “open meeting laws” challenges fared no better. The court ruled that the requirement that liability insurance be provided for the town was reasonable.\(^\text{575}\) Although the court noted a possible violation of the open meeting laws, it found that the challenge order was eventually passed at an open meeting. Thus, the court allowed the town resolution to stand.

In the case of *Town of Brookhaven v. Spadaro*,\(^\text{576}\) the town of Brookhaven, New York, sought a permanent injunction prohibiting defendants from operating an airstrip and FBO on private property. A small portion of the property was zoned for use as a gasoline station and the remainder was zoned for residential use. On appeal, the appellate division reversed the summary judgment for defendants. The reversal was based on alleged representations made by defendants to the Town Board in 1961 that they intended to operate an aircraft repair facility when the portion of property was rezoned to authorize the gasoline station.

Defendants argued, before the appellate division, that because they had revealed their intended use of the property when they petitioned for rezoning of the portion of property in 1961, the repair facility was established as a valid nonconforming use. Defendants argued that their use of the adjoining property as an airstrip constituted a valid “accessory use” to the repair facility.

The appellate division, however, rejected defendants’ contention that the Town Board’s rezoning of the portion of the property for business thereby authorized a non-permitted use of the

\(^{574}\) *Id.* at 688.

\(^{575}\) *Id.*

\(^{576}\) 612 N.Y.S.2d 175 (N.Y. 1994).
property "to begin or to continue." The court noted that defendants' rezoning petition merely indicated that the property was purchased for various purposes, some of which were conforming uses. The court ruled that these facts did not support the inference urged by defendants.

The court gave even less credence to defendants' attempts to justify use of the residentially zoned portion of the property as an airstrip, which normally would be an unlawful use. The court found no authority for transforming a prohibited use into a permitted one, merely on the basis that the use was "accessory" to the use of an adjoining parcel.

In *Nelson v. McMinn County*, plaintiff, who lived adjacent to the McMinn County Airport, had unsuccessfully applied to the county commissioners for permission to have "through the fence" access to the airport. After the county denied his application, plaintiff attempted to donate the land to the county under a reservation requiring the county to lease the land back to him and to allow airport access from the property. When the county refused, plaintiff brought an action for a declaration that the county was required to accept the land donation, as it had accepted a similar donation with another landowner a decade-and-a-half previously.

After the trial court granted the county's motion for summary judgment, plaintiff appealed on two issues: (1) that the trial court erred in failing to allow him a trial on the merits; and (2) absent a compelling reason, the county could not deny him permissive use of the airport while granting the same privilege to another. The Tennessee Court of Appeals affirmed the summary judgment, finding an absence of any triable issue of material fact that the county had acted illegally, arbitrarily, or capriciously. The court also observed that "it is elementary that a party cannot be required to accept title to real property against his will."

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577 Id. at 177.
578 Id.
579 Id.
581 Id. at *2.
582 Id.
C. MECHANIC’S LIENS

In Harriss & B & H Aircraft Sales, Inc. v. Norsworthy & DBS Investments, Inc., the Texas Court of Appeals affirmed summary judgment in favor of an aircraft owner against a fixed base operator’s attempt to enforce an artisan’s lien for hangar space and parts that were ordered but not installed on the owner’s aircraft.

Texas statutory law authorizes an artisan’s lien in favor of a person who “repairs and performs maintenance work.” As the ordered parts had never been installed on defendant’s airplanes, the court held the lien invalid because the repairs and maintenance had not been performed. In addition, as the statute does not expressly authorize liens for storage charges, unlike other Texas statutes creating artisan’s liens, the court held the lien invalid as to those charges as well.

In an unpublished portion of its opinion, the appellate court also affirmed summary judgment on the issue that the one and a half percent monthly interest charged by the FBO was usurious, as it was in excess of the six percent per annum legal rate, but it reversed summary judgment against the FBO owner, as his personal participation in setting the interest rate was disputed.

In Louisiana Bank of Ouachita Parish v. Zadoorian, the Louisiana court determined that a repairman’s lien for aircraft repairs held priority over a chattel mortgage only with respect to repair work that was requested before the mortgage was recorded.

On November 6, 1991, the FBO took in defendant’s 1966 Piper airplane for an annual inspection. On November 21, 1991, while the airplane was undergoing the inspection, the owner pledged it as security for a $120,000 note executed by the plaintiff bank. A UCC-1 form recording the chattel mortgage was filed on December 9, 1991, and a FAA aircraft security agreement was filed on December 23, 1991.

In August 1992, plaintiff bank filed a petition for executory process. The FBO, which had stopped work on the Piper but had retained it in its possession, intervened in the lawsuit to assert a statutory repairman’s lien. The court determined that the repairman’s lien had priority over the chattel mortgage for work.

583 869 S.W.2d 600 (Tex. App.—San Antonio 1994, no writ) (partial publication).
585 869 S.W.2d at 602.
requested prior to December 9, 1991, when the UCC-1 form was filed, even if the work was actually performed after that date.\textsuperscript{587} Except for storage fees incurred from the time plaintiff bank filed its petition, the FBO's claim for fees incurred for services requested after December 9, 1991, was disallowed. The basis for the ruling was that the statute creating the repairman's lien only authorized recovery for services requested while the chattel property remained in the repairman's possession, which the court concluded would terminate with recording of the chattel mortgage.\textsuperscript{588}

\textbf{VII. PRACTICE AND PROCEDURE}

\textbf{A. Contribution and Indemnity}

In the Fifth Circuit case of \textit{National Union Fire Insurance Co. v. Care Flight Air Ambulance Service, Inc.}\textsuperscript{589} defendants/appellants General Electric Capital Corporation (GECC) and Avemco Insurance Co. appealed from a summary judgment in favor of National Union Fire Insurance Co. of Pittsburgh, Pa., arguing that the insured's conversion of its leased aircraft extinguished its rights to indemnification under a hull policy issued by National Union. The Fifth Circuit affirmed, applying Texas law. GECC leased a Piper airplane to Care Flight Air Ambulance Service, Inc., under a written lease that prohibited Care Flight from subleasing the airplane without GECC's consent. The lease also required Care Flight to obtain hull insurance, which it did through National Union. The National Union policy contained a breach of warranty endorsement that excluded coverage for losses caused by conversion of the aircraft by the named insured or under its direction. Care Flight subsequently entered an unauthorized sublease, in violation of the GECC lease. Care Flight's lessee, in turn, subleased the airplane to the person who was in possession when it was seized by Colombian authorities for violations of that nation's air traffic laws.

GECC's insurer, Avemco, paid $2.5 million in settlement of the loss and then, by way of subrogation, demanded indemnification from National Union under the Care Flight policy. On appeal, Avemco challenged the district court's holding that Care Flight's unauthorized sublease was, as a matter of law, a

\textsuperscript{587} \textit{Id.} at 644.  
\textsuperscript{588} \textit{Id.}  
\textsuperscript{589} 18 F.3d 323 (5th Cir.), \textit{cert. denied,} 115 S. Ct. 293 (1994).
conversion under the National Union policy. National Union cross-appealed from the court's order denying its attorneys fees.

Applying Texas law, the Fifth Circuit rejected appellants' contention that the facts used to establish a breach of contract could not also serve to establish the tort of conversion. The court further held that Texas law recognizes the tort of conversion where a party uses chattel in a manner inconsistent with its authorization.\(^5\) Finally, the court held that the owner's formal demand for return of the property is not necessary to establish conversion in cases where the demand would have been futile.\(^6\)

Appellants next argued that the war risk endorsement to the National Union policy should have afforded coverage because Columbia "confiscated" the airplane. The court also rejected this argument because the war risk endorsement of the policy stated that it neither varied, altered, waived, nor extended any of other terms of the policy.\(^7\) Furthermore, the court held that once Care Flight converted the aircraft, subsequent events such as confiscation could not, as a matter of law, revise the extinguished insurance coverage. The court also awarded National Union its attorneys fees in defending this action, but not for a separate, related lawsuit that had been filed in the United States District Court for the Eastern District of Texas.

In Avemco Insurance Co. v. Cessna Aircraft Co.,\(^8\) an unsuccessful appeal from the dismissal of an action for indemnity and contribution, the Tenth Circuit held, over a vigorous dissent, that a subrogated insurer would be treated as "the pleader" for purposes of FRCP 13(a). The basis for both the district court's dismissal and the Tenth Circuit's affirmance was that the insurer, for purposes of procedural as well as substantive law, "stands in the shoes" of the insured litigation party.\(^9\) The dismissal resulted from the insured pilot's neglect, in an action filed by an injured passenger, to file a counterclaim against Cessna for indemnity or contribution for the pilot's settlement of another injured passenger's claim.

The action arose from the crash of a Cessna airplane owned by the pilot, in which two passengers were injured. One passen-

\(^5\) Id. at 328.
\(^6\) Id.
\(^7\) Id. at 325.
\(^8\) 11 F.3d 1198 (10th Cir. 1993).
\(^9\) Id. at 1000.
ger reached a settlement agreement with the pilot, which the insurer funded. The other passenger filed actions against the pilot and Cessna, which were consolidated. Prior to the consolidation, Cessna filed a third-party complaint against the pilot, based on alleged negligence in causing the crash. The pilot did not file a counterclaim against Cessna for indemnity or contribution for the settlement with the first passenger, but, along with his insurer, subsequently filed a separate action.

The dismissal and affirmance were based on the following findings: (1) that the insurer’s subrogation action was a compulsory counterclaim in the second passenger’s lawsuit because it arose out of the same “transaction or occurrence” (the crash); and (2) that the insurer should, like the pilot-insured, be treated as the “pleader” for purposes of FRCP 13(a). The dissenting judge argued vigorously that the “plain language” of the compulsory counterclaim rule precluded construing the term “pleader” to include a party’s insurer.595

B. CONFLICTS OF LAW

The matter of Spring v. United States596 concerned the application of conflicts of law rules in a Federal Tort Claims Act wrongful death action where the negligence and the resulting accident occurred in different states. The case arose from decedent’s death in the crash of a Piper Cherokee at Gambrill State Park in the Blue Ridge Mountains of Maryland, on a flight from Louisville, Kentucky. After being cleared for final approach to land, the decedent strayed off course and crashed. Plaintiff, the administrator of the estate of the deceased, claimed that the negligence of the air traffic controllers at Dulles International Airport and Baltimore-Washington International Airport were proximate causes of decedent’s death, in that both groups of controllers should have observed the decedent’s flight going off course and should have provided warnings.

Before the United States District Court for the Eastern District of Virginia, the government sought to have Maryland law apply while plaintiff advocated that Virginia law apply. The parties’ positions resulted from the fact that the Maryland wrongful death statute limits recovery by parents for the deaths of adult children to pecuniary losses, while the Virginia statute apparently does not. The district court then analyzed the different

595 Id. at 1003 (Holloway, J., dissenting).
approaches to the problem of which state’s “whole law” should be applied, in view of a recognized split in authority between application of the law of the place where each act of negligence occurred and application of the whole law of the place of the last act or omission or of the act or omission having the most significant causal effect. After finding that both Virginia and Maryland law follow the rule of lex loci delicti in tort actions for substantive law purposes, and lex fori for procedural law, the court held that it was immaterial which approach was used. The court then determined that the “place of the wrong” was Maryland and, therefore, held that the Maryland wrongful death statute would be applied.

The court next considered the issue of whether the damages aspect of the wrongful death statutes should be considered as a matter of substantive or procedural law, as the lawsuit had been filed in Virginia. The court ruled that the limitation of a parent’s right to recover for the death of an adult child to the pecuniary loss was properly deemed as substantive law. The court also noted that, under Maryland law, statutory definitions of recoverable damages were clearly recognized as substantive, which reflected the majority view, while Virginia law was lacking in authority on the issue.

The case of In re Air Disaster at Ramstein Air Base, Germany on August 29, 1990 concerned the applicable choice of law arising from the USAF C-5A Galaxy crash at Ramstein Air Base in Germany, which killed thirteen of the seventeen persons on board. Defendants Lockheed Corp. and General Electric Co. removed seven of the wrongful death actions to federal court, with six removed to the United States District Court for the Southern District of Florida and one removed to the United States District Court for the Western District of Texas. Defendants then successfully moved the Judicial Panel on Multi-District Litigation for transfer of the Florida cases to the Western District of Texas, where they moved the court for an order that Georgia law, which would bar plaintiffs’ claims on the basis of

598 See Bowen v. United States, 570 F.2d 1311, 1318 (7th Cir. 1978).
599 833 F. Supp. at 577.
600 Id. at 578.
601 Id.
the ten year statute of repose, would apply to liability issues. Plaintiffs, who favored the application of Texas law, opposed.

A transferee court presiding over diversity actions consolidated under the multi-district rules is bound to apply the choice of law rules of the transferor courts. As both Texas and Florida employed the "most significant relationship" approach of the Restatement (Second) of Conflicts of Law, however, the court found no conflict in this area.

The court then ruled that Georgia liability law would apply because the airplane was designed and manufactured in Georgia, entered into the stream of commerce in Georgia, and the injury-causing conduct occurred there. The court also noted that Lockheed's principal place of business was in Georgia, while General Electric's place of incorporation and principal place of business were New York. In addition, the court stated that "to hold that a manufacturer must defend itself against the laws of the state simply because an injured plaintiff is a citizen of that state circumscribes the Restatement's objective of certainty, predictability, and uniformity of results," and the court noted that the present cases involved plaintiffs from five different states.

C. EVIDENCE AND TRIAL PRACTICE

In Bancorp Mortgage Co. v. Bonner Mall Partnership, an action arising from a settling defendant's motion to have the judgment below vacated as moot after the United States Supreme Court granted the defendant's petition for United States certiorari, the Court severely restricted the availability of vacatur in federal court cases where an appeal or other review procedure has been mooted through settlement. Even though the parties may have voluntarily agreed in the settlement to permit vacatur, the Supreme Court warned that the doctrine will only be applied to settled cases under "exceptional circumstances."

The underlying dispute concerned the propriety of a bankruptcy reorganization plan that Bonner had filed under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Idaho. Bancorp had moved to suspend

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603 Id. at 19436.
604 Id. at 19436-37.
605 Id. at 19439.
606 115 S. Ct. 386 (1994).
607 Id. at 393.
the automatic stay of its intended foreclosure on certain Bonner-held properties, arguing that Bonner's reorganization plan was unconfirmable as a matter of law. After the bankruptcy court granted the motion, the United States District Court for the District of Idaho reversed a ruling and the Ninth Circuit affirmed, leading to Bancorp's filing of a petition certiorari. After the petition was granted, Bonner stipulated to a consensual plan of reorganization, which the parties agreed constituted a settlement that mooted the case. Bancorp then requested the Supreme Court to exercise its power under 28 U.S.C. section 2106 to vacate the judgment of the court of appeals, which Bonner opposed.

In declining to vacate the judgment, the Supreme Court used, as the departure point for its analysis, the leading case on vacatur, United States v. Munsingwear, Inc.610 In Munsingwear, the United States had sought injunctive and monetary relief for violation of a price control regulation. While the United States' appeal from dismissal of its complaint was pending, the commodity at issue was decontrolled, mooting the case. The Supreme Court interpreted Munsingwear to stand for the proposition that vacatur should be granted in cases where appellate review was "prevented through happenstance," as where a case on review has "become moot due to circumstances unattributable to any of the parties" or where "mootness results from the unilateral action of the party who prevailed in the lower court."611 However, the court ruled that cases in which mootness occurred through settlements to which both parties voluntarily agreed fell outside of the scope of the cases in which vacatur should ordinarily be applied.612

The Supreme Court's analysis placed great weight on the strong public interest in "the orderly operation of the federal judicial system" and the public value of judicial precedents, which the Court stated "are not merely the property of private litigants."613 Perhaps due to this focus on the public interest in the maintenance of judgments, the Court's analysis placed correspondingly little emphasis on the parties' rights to freedom of contract. Accordingly, the Court ruled that vacatur would only be granted, under "exceptional circumstances," in cases termi-

611 115 S. Ct. at 390 (emphasis added) (quoting Munsingwear, 340 U.S. at 36).
612 Id. at 390-91.
613 Id. at 386.
nated through settlement. Although the Court did not specify what circumstances it would deem "exceptional," it expressly cautioned that "exceptional circumstances do not include the mere fact that the settlement agreement provides for vacatur."\(^{614}\) In *dicta*, the Court stated that its ruling should be considered as having equal effect on requests for vacatur lodged at the appellate court level as on vacatur requests presented to the Supreme Court.\(^{615}\)

*Commander Properties v. FAA*\(^{616}\) involved a class action suit against Beech Aircraft Corp. and its owner, Raytheon Corp., based on the allegedly defective wing design of certain King Air models, which required a costly modification. Plaintiffs had obtained an order from the Kansas district court staying the class action while they sought the FAA's determination of whether the wing design was defective. After the FAA determined that the design was not defective, so long as airworthiness directives were complied with and the aircraft was flown within its approved flight envelope, plaintiffs unsuccessfully petitioned the District of Columbia Circuit Court of Appeals for review. The basis for plaintiffs' petition was that the FAA's determination comprised a judgment on the common law claims raised in their complaint, which was beyond the FAA's authority. The D.C. Circuit denied the petition, noting that the FAA had confined its analysis to FAA regulations concerning testing for strength and load requirements and had not mentioned plaintiffs' common law claims. The D.C. Circuit noted that the FAA had merely found that the aircraft at issue had passed initial certification testing and were currently considered airworthy after compliance with the airworthiness directives.\(^{617}\)

In *Lamkin v. Braniff Airlines, Inc.*,\(^{618}\) the United States District Court for the District of Massachusetts granted summary judgment after plaintiff failed to produce evidence that the defendant air carrier had acted negligently in any manner causing plaintiff's burn injuries, which occurred when a cup of hot coffee spilled on plaintiff's tray table when the passenger in the seat ahead reclined the seat back.

Plaintiff offered one expert who had admitted at his deposition that he had no knowledge about the proper temperature

\(^{614}\) *Id.* at 393.

\(^{615}\) *Id.*

\(^{616}\) 11 F.3d 204 (D.C. Cir. 1993).

\(^{617}\) *Id.* at 206.

for coffee served on airline flights, the proper functioning of coffee makers installed on air carrier aircraft, the defendant's training procedures for coffee service, or any alleged defects in the tray tables attached to passenger seat backs. Plaintiff, moreover, failed to show that there was any defect in the coffee maker that would have caused the coffee to be unusually hot, nor did she identify any evidence to show that the crew should have known that the coffee was extremely hot. Plaintiff also argued that the doctrine of *res ipsa loquitur* applied to her case, which the court rejected after finding that the type of accident involved was not one that necessarily implicated air carrier negligence.\footnote{Id. at 33.} The court also rejected plaintiff's failure to warn claim because she herself knew the coffee was hot, as she had placed the cup on the tray table to allow it to cool.\footnote{Id. at 32.}

In *Farley v. Cessna*,\footnote{No. 93-6948, 1994 WL 396479 (E.D. Pa. July 22, 1994).} on Cessna's cross motion for a protective order, the United States District Court for the Eastern District of Pennsylvania held that plaintiff's discovery requests seeking documents relating to design specifications and engineering drawings for components of Cessna's Model C-140 aircraft and other high-wing Cessna aircraft, which contained proprietary information, were subject to protection.

Plaintiff, a passenger, was injured in a crash of a 1946 Cessna Model C-140 single engine aircraft. He alleged that the airplane became fuel-starved, lost power, and descended uncontrollably during climb out. He further alleged that his injuries were sustained solely because of the defective and dangerous design of the aircraft. During discovery, plaintiff requested specific information, which Cessna agreed to provide, subject to a protective order. Plaintiff refused to comply with this condition, resulting in Cessna's cross-motion for a protective order.

Using the factors identified in *Pansy v. Borough of Stroudsburg*,\footnote{23 F.3d 772, 787 (3d Cir. 1994).} the court balanced plaintiff's need for information against the injury that might result if uncontrolled disclosure were compelled. The court determined that Cessna was entitled to a protective order based on the following factors:

1) Cessna specifically identified the proprietary information it sought to protect;
2) Cessna, as a private litigant, had a strong privacy interest in protecting this information from disclosure to counterfeit parts manufacturers;

3) an uncontrolled disclosure could threaten public health and safety by encouraging manufacture of counterfeit parts; and

4) the protective order would not cause undue hardship to Farley.629

The court issued the protective order limiting disclosure of the documents to the litigants, counsel, and experts in this case. The court also indicated its willingness to revisit this issue if plaintiff could demonstrate Cessna manufactured faulty fuel systems.

In Engebretsen & Hartford Insurance Co. v. Fairchild Aircraft Corp.,624 plaintiff, a commuter airline pilot, appealed to the Sixth Circuit from a defense judgment in his lawsuit for injuries sustained in a landing incident involving the Fairchild Metro III he was flying. The flight had been on final approach to the Greater Cincinnati International Airport in Covington, Kentucky, when the flight crew, sensing an uncommanded nose-down pressure on the controls, disconnected the automatic stall avoidance system (SAS)—a stick-pusher—installed in the aircraft. Apparently in the belief that the system remained engaged and was malfunctioning, however, the crew then landed at a speed approximately fifty percent faster than normal. Some time later, the pilot discovered that he had sustained back injuries and went on flight disability status. The cause of the SAS malfunction was traced to inch-deep water pooling in the belly of the aircraft where the system was installed.

Plaintiff filed suit in the District Court for the Eastern District of Kentucky; alleging that the Metro III design was defective in that the SAS could malfunction in the event of water pooling in the fuselage. The action was bifurcated for trial, and, at the close of the liability phase, the jury returned a verdict for defendant. In response to special interrogatories, the jury found that plaintiff had failed to prove that the aircraft design was defective or that the SAS had continued to create nose-down pressure after the crew had switched off the system. The jury also responded negatively to a special interrogatory asking whether defendant had proved that plaintiff had been contributorily negligent.

625 1994 WL 396479 at *2-*3.
624 21 F.3d 721 (6th Cir. 1994).
Plaintiff appealed, alleging insufficiency of the evidence supporting the defense verdict. The Sixth Circuit affirmed, finding that there was evidence to support the lower court finding that the amount of water that had accumulated in the fuselage was unforeseeably great and that the SAS had, in fact, stopped creating nose-down pressure when it was switched off.

Plaintiff also appealed from the district court's denial of his motion for a new trial. Plaintiff argued that the court had erred by admitting into evidence two reports by defendant's accident reconstruction experts after the jury instructions had been read. Plaintiff further objected to the reports as being hearsay and as being irrelevant, insofar as they reported test results that, plaintiff argued, were not conducted under sufficiently similar circumstances to those involved in the landing incident. The Sixth Circuit rejected all three of plaintiff's arguments, ruling that the reports were admissible because plaintiff himself had referred to them in cross-examining the experts, the hearsay exception was inapplicable because the information was of the type relied upon by experts in the field, and that the tests were conducted under sufficiently similar circumstances to be probative.

In Sherer v. Hartzell Propeller, Inc., the decedent, plaintiff's husband, was the pilot-in-command of a twin-engine commuter plane that crashed while attempting to land. Plaintiff filed suit against the manufacturer of the airframe and of the propellers. In this decision, the United States District Court for the Northern District of Ohio denied the propeller manufacturer summary judgment, ruling that the factual issues regarding its liability created jury questions.

The motion considered the following undisputed facts: (1) that the accident resulted from the pilot, either deliberately or inadvertently, placing the power levers into a reverse-thrust position while still airborne; and (2) that the propeller manufacturer had placed incorrect feathering springs in both propellers during overhaul.

The propeller manufacturer also argued that no dispute existed with respect to the fact that the pilot would have been unable to regain control of the aircraft even if the correct springs had been installed. In support, the propeller manufacturer argued that plaintiff lacked any evidence—such as quantitative data that the correct springing would have moved the propeller

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blades out of reverse thrust more quickly or that any delay contributed to the accident—to support a contrary finding. The court, however, found that this issue was properly in dispute, proclaiming that it was faced with both “dueling experts” and “dueling tests.”

The court also relied on information from the NTSB report showing that the decedent pilot’s selection of reverse thrust did not necessarily make the accident inevitable. The court noted that the case had been pending for more than four years, including interlocutory appeals, and that the propeller manufacturer had admitted to putting the wrong springs in the propellers. Under these circumstances, the court declared that it was “not inclined to hold, on summary judgment, that [defendant/propeller manufacturer] cannot be liable.”

In *Glenn v. Cessna Aircraft Co.*, plaintiffs unsuccessfully appealed from a jury verdict for defendants in this negligence and products liability action and from the trial court’s denial of plaintiffs’ motion for a new trial. Plaintiffs contended that the trial court erred in limiting the time for opening and closing arguments and also erred in several evidentiary rulings. The Tenth Circuit upheld the verdict in all respects.

The Tenth Circuit dismissed plaintiffs’ contention that the ten minute and twenty-two minute limitations on opening and closing arguments deprived them of a fair trial on the basis of waiver, as plaintiffs had not lodged any contemporaneous objection to the limitations, and the lack of any plain error. With respect to the court’s evidentiary rulings, which included the admission of certain engineering drawings, the court of appeals noted that plaintiffs, again, had failed to lodge any contemporaneous objection. Plaintiffs’ appeal from the denial of their new trial motion was similarly unsuccessful, as the Tenth Circuit ruled that they had failed to show that the verdict was insupportable based on the evidence.

In *Pegasus Helicopters, Inc. v. United Technologies Corp.*, defendant United Technologies Corp. appealed to the Tenth Circuit from the jury verdict and the district court’s previous denial of its motion for judgment as a matter of law in an action

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626 *Id.* at 20789-90
627 *Id.* at 20791.
628 *Id.*
629 32 F.3d 1462 (10th Cir. 1994).
630 35 F.3d 507 (10th Cir. 1994).
brought by Pegasus Helicopters, Inc., the third-hand purchaser of a Bell 214B helicopter. Pegasus had prevailed at trial on claims of breach of express warranty and breach of the implied warranty of fitness for a particular purpose arising out of United Technologies' manufacture and refurbishment of the helicopter engine fuel control unit.

Pegasus, which provided high-altitude, heavy-lift helicopter services, had operated the subject helicopter for four years when it removed the fuel control unit for a scheduled overhaul. After installing the refurbished fuel control unit, however, the helicopter could no longer deliver the reliability and performance Pegasus required. Pegasus then filed the present action against United Technologies.

At the close of Pegasus’s case, United Technologies moved for judgment as a matter of law, arguing there was no evidence to support the breach of warranty claims. The district court denied the motion, and identified, as supporting evidence, several tags that were attached to the fuel control unit reciting that it had been inspected and accepted in accordance with the original equipment manufacturer’s specifications. Although United Technologies argued that Pegasus was never advised of the nature of those specifications, it was uncontested that the helicopter could not attain altitudes of more than approximately 10,000 feet with the refurbished fuel control unit, whereas United Technologies’ internal specifications provided for a much higher maximum operating altitude.

United Technologies renewed its motion for judgment as a matter of law at the close of the case, which the court again denied. The jury returned a verdict in favor of Pegasus in the amount of $412,000 plus prejudgment interest. Following the jury verdict, United Technologies once again moved for judgment as a matter of law, or, alternatively, for a new trial. The district court denied both motions and the appeal ensued. The Tenth Circuit affirmed, agreeing with the district court that there was sufficient evidence from which the jury could reasonably find for Pegasus.631 The court of appeals, however, remanded the matter to the district court for a recalculation of the prejudgment interest awarded, holding that interest was only authorized beginning from the date each element of consequential damages was incurred.632

631 Id.
632 Id.
The negligence action of *JetCraft Corp. v. Flight Safety International*\(^6\) arose from an accident involving a Cessna CE 650 Citation owned by Jetcraft and being operated on a training flight by Flight Safety International (FSI) under supervision of an FSI flight instructor. The four trainee pilots on board were all employed by JetCraft. The accident occurred during a touch-and-go landing when the left landing gear retracted, causing the aircraft to veer off the runway after the left wingtip struck the ground. The instructor pilot was handling the gear and flap controls at the time. Plaintiff brought this unsuccessful appeal from the jury’s verdict in FSI’s favor.

Plaintiff claimed that the district court had erred in failing to submit their bailment theory of negligence to the jury. Under applicable Kansas law, FSI, as bailee of the aircraft, owed plaintiff a duty of ordinary care. Additionally, under a particular application of the *res ipsa loquitur* doctrine, plaintiff argued it was entitled to a rebuttable presumption of negligence based on its argument that the aircraft was under the instructor pilot’s exclusive possession and control when the accident occurred.

The Tenth Circuit rejected both charges of error. With respect to the bailment theory, the court of appeals ruled that, at most, the instructor pilot was in exclusive control of the gear and flap controls, not the entire aircraft, and that bailment only applied when an entire item of property is entrusted to the bailee.\(^6\)\(^3\)\(^4\) The court also held *res ipsa loquitur* inapplicable, ruling that plaintiff had not established the “exclusive control” element due to the presence of the JetCraft pilots on board the airplane.\(^6\)\(^5\) Although, as the technical pilot-in-command, the instructor exercised ultimate authority as to the operation, the Tenth Circuit refused to equate this with having exclusive possession and control of the aircraft.

The court also determined that evidence of a FAA certificate action against the instructor pilot was not admissible due to lack of relevancy. The certificate action arose from the instructor pilot’s failure to have an authorized Flight Safety pilot on board when he had fulfilled his flight currency requirements. The court ruled that the certificate action involved a collateral matter “far too remote to the controlling question of [the instructor

\(^6\)\(^3\)\(^3\) 16 F.3d 362 (10th Cir. 1993).
\(^6\)\(^3\)\(^4\) Id. at 364.
\(^6\)\(^5\) Id.
pilot’s negligence at the time of the accident to warrant submission to the jury.”

Lastly, the Tenth Circuit ruled that the district court had properly excluded statements by plaintiff’s human factors expert that the instructor pilot had caused the accident by inadvertently retracting the landing gear. The court of appeals found that the expert’s opinion was speculative, in view of the lack of foundational evidence.

The case of McGilvra v. National Transportation Safety Board, a Freedom of Information Act (FOIA) enforcement action, arose from the NTSB’s denial of a FOIA request for a copy of the cockpit voice recorder (CVR) tape recovered from the March 31, 1991, United Airlines Flight 585 crash in Colorado Springs. Plaintiff, a relative of a crash victim, sought the tape for use in a wrongful death action. The United States District Court for the District of Colorado held that the NTSB could not be compelled, in response to a FOIA request, to produce CVR tapes, which are barred from public disclosure under 49 U.S.C. appendix section 1905(c). That statute limits the NTSB’s authority to disclosing transcripts of the pertinent portions of the tapes, not the tapes themselves. Consequently, FOIA Exemption 3, which authorizes the withholding of information specifically exempted by statute, was found applicable.

In issuing its ruling, the court rejected the argument that the NTSB’s discretionary authority to disclose CVR tapes to “parties to the field investigation” constituted a “public” disclosure. The court also noted that a party involved in litigation arising from an accident, as opposed to a FOIA enforcement plaintiff, could possibly gain access to CVR tapes under a protective order preventing public disclosure.

In the state court appeal of Broin v. Philip Morris Companies, Inc., a group of thirty non-smoking flight attendants successfully challenged the trial court’s dismissal of their class action allegations against various tobacco manufacturers and distributors for injuries allegedly caused by exposure to second-hand

636 Id. at 365.
637 Id. at 366.
639 Id. at 102.
640 Id. at 101-02.
641 Id. at 102.
642 Id. at 103.
smoke in airplane cabins. The trial court granted defendants’ motion to dismiss the class action allegations on the grounds that, while the potential class size of 60,000 flight attendants was large, the class representatives had raised issues that might not be shared by the entire class. The trial court had also found that the plaintiffs could not adequately safeguard the interests of the entire class, many of whom were from foreign countries.

In rejecting the trial court’s concerns, the Florida District Court of Appeals found that all of the elements necessary to certify the class existed.644 The class described was both distinct and numerous. Further, the claims of the class members were sufficiently common in that they were all passive inhalers of second-hand smoke and all were allegedly treated in the same manner by the cigarette manufacturers.

The appellate court rejected defendants’ argument that differing statutes of limitations broke the thread of commonality between the class claims, stating that the trial court could address this concern by dividing the class into sub-classes.645 The court similarly dismissed the trial court’s concern of inadequate class representation and lack of typicality as speculative.646 The court opined that the common issues shared by the class were not affected by such concerns as the residences of the class members and that the potential differences between the injury claims of individual claimants should foreclose class action status.647

In the memorandum decision of Lear v. Upali (USA), Inc.,648 Gates Learjet Corp., defendant in this case arising from the unexplained inflight disappearance of one of its business jets, unsuccessfully appealed from the New York trial court’s denial of its motion for summary judgment. The motion was based, in part, on the argument that the doctrine of res ipsa loquitur, which would have created a rebuttable inference of negligence by defendant, was inapplicable, based on the fact that the manufacturer lacked “exclusive control” over the instrumentality of the accident, one of three essential elements of the doctrine.

In holding that this condition was satisfied, the court noted that defendant had manufactured the airplane and had pro-

644 Id. at 889.
645 Id. at 891.
646 Id. at 892.
647 Id.
vided training for the pilot and that either defendant or its distributor had maintained the airplane. On these facts, the appellate division summarily concluded that the defendant was in control of all relevant instrumentalities.

The case of Jaffe Aircraft Corp. v. Carr arose from the death of respondents' decedent, who died as a passenger in a prototype aircraft. Immediately before the crash, the airplane was traveling straight and level, at less than maximum speed, when the right wing separated due to fatigue. The only issue in dispute was the cause of the fatigue. After the trial court entered judgment on the jury's verdict for defendants, the plaintiffs appealed.

The Texas Court of Appeals reversed on the grounds that the jury's failure to attribute at least partial causation to the pilot was against the great weight and preponderance of the evidence. On review, the Texas Supreme Court reversed the court of appeals and remanded the case for consideration under the correct standard of review—whether the evidence supporting the jury's verdict was sufficient to prevent a manifestly unjust result. On remand, the court of appeals held that the defense verdict was proper under the evidence submitted.

D. Sanctions

In Johnson v. Pratt & Whitney Canada, Inc., defendants unsuccessfully appealed from a $4.9 million judgment in a wrongful death action brought by the heirs of two Marine pilots who were killed in an air crash. On appeal, defendants contended that the trial court abused its discretion in enforcing discovery sanctions that precluded them from contesting liability or proving-comparative fault. Defendants also contended that plaintiffs were not entitled to damages exceeding $25,000, as their complaint had only stated that damages were in excess of the trial court's jurisdictional minimum of that amount.

The core of plaintiffs' product liability claim alleged that the aircraft's engine fuel nozzles were defective. During pretrial discovery, plaintiffs had been forced to involve the court no less
than fifteen times to obtain orders compelling the production of information from defendants. The trial judge found that defendants' conduct amounted to "obfuscation, confusion, denial and total stonewalling," and, at one point, the judge became so exasperated that he warned defendants' counsel as follows: "Let me tell you at a particular time I'm going to issue sanctions." Once issue sanctions are awarded in this case, you'll wish you had to do it over." In return to counsel's response of "No. Not really. Not until you've seen what issue sanctions land on you."

Plaintiffs subsequently moved for issue and evidentiary sanctions, which the court granted after noting that defendants had failed to produce documents despite the issuance of fifty court orders and that documents that defendants had claimed were destroyed had later been found to exist. On its own motion, the court also struck defendants' answers "in light of all the concerted activities to deter discovery."

Defendants then dismissed their counsel and substituted another, who filed a motion for reconsideration of the sanctions on the basis of the former counsel's affidavit that the offensive acts were attributable to his office, not to defendants. Although the court denied the motion, it modified its order striking the answer to allow defendants to contest damages. Defendants then sought a writ of prohibition to prevent the trial from proceeding on this basis, which the court of appeals denied.

On appeal, defendants argued that the discovery sanctions were inappropriate, insofar as the objectionable conduct had been due to their counsel, not defendants themselves. The court of appeals rejected this position, noting that the trial judge had wide discretion in imposing discovery sanctions, and finding that the evidence of client misconduct was "substantial." Defendants also contended that, because the trial court struck their liability defenses, it should have entered a judgment by default and only allowed plaintiffs to prove their damages up to the $25,000 stated in the complaint, resulting in a remittitur of the $4.9 million judgment. The court of appeals rejected this

655 Id. at 29-30.
656 Id. at 29.
657 Id.
658 Id.
659 34 Cal. Rptr. 2d at 29.
660 Id. at 31-32.
RECENT DEVELOPMENTS

argument, too, noting that plaintiffs had merely alleged that their damages exceeded the trial court's jurisdictional minimum.\textsuperscript{661} The court of appeals also affirmed the striking of comparative fault defenses, ruling that, "[h]ad the court allowed Pratt to point the finger of liability at others, Pratt would have been unprepared to defend against a shifting of responsibility and Pratt would have been rewarded 'for its bad faith discovery tactics.'"\textsuperscript{662}

E. JURY TRIAL

In the wrongful death action of \textit{Craig v. Atlantic-Richfield Co.},\textsuperscript{663} plaintiff unsuccessfully appealed the district court's ruling for the defendant, challenging the court's denial of her jury trial demand and its rulings on various agency and negligence issues. The Ninth Circuit held that the district court had correctly determined that plaintiff had waived her right to a jury, and it affirmed the court's other rulings.\textsuperscript{664}

Plaintiff's decedent was killed in an airplane crash in Indonesia in an airplane operated by Airfast. Decedent was employed by Brinkerhoff, a wholly-owned subsidiary of Crowley, and worked on an off-shore oil drilling platform that Brinkerhoff and Crowley operated. Brinkerhoff had contracted with Atlantic-Richfield Indonesia (not a defendant in the case), a wholly-owned subsidiary of Atlantic-Richfield Co. (ARCO), to operate the platform at a lease concession operated by Hudbay Oil. Hudbay then contracted with Airfast to transport Brinkenhoff employees, including plaintiff's decedent, from their former work site in Singapore to Indonesia, and thence by helicopter to the platform. Decedent was killed in the crash of one of the chartered flights from Singapore to Indonesia when the pilot attempted to land in severe fog.

ARCO originally demanded a jury trial, and plaintiff's counsel subsequently stated in an affidavit that he relied on this demand in not making his own. The district court, however, ruled that ARCO did not have standing to demand a jury trial. The district court also held that ARCO was not the decedent's employer within the meaning of the Jones Act, and, therefore, was

\textsuperscript{661} Id. at 33.
\textsuperscript{662} Id. at 34.
\textsuperscript{663} 19 F.3d 472 (9th Cir.), cert. denied, 115 S. Ct. 203 (1994).
\textsuperscript{664} Id. at 479.
not liable for his death. The court then proceeded to try the case and entered judgment for defendants.

On appeal from the district court’s denial of a jury trial, plaintiff argued that she had relied on ARCO’s jury demand and was entitled to a jury trial under the Jones Act, the district court’s diversity jurisdiction, and the discretion vested in the district court under FRCP 39(b). The Ninth Circuit rejected each of these arguments.65

Plaintiff also argued that defendants were estopped from opposing her jury trial demand by their silence on the issue for more than eight years. The Ninth Circuit acknowledged that “some support” existed in its previous decisions for the “general proposition that a party’s course of conduct may prevent it from relying on procedural protections in Rule 38 and 39.”66 But, the court of appeals held that “under Rule 39(a)(2), the court may, on its own initiative, remove a case from the jury docket if it finds that the right to a jury trial did not exist under a statute or the Constitution.”67 That is what the district court did.

Plaintiff also contended that the Airfast pilot’s negligence should have been imputed to Brinkerhoff and Crowley under agency theory, which the Ninth Circuit rejected after finding that the defendants lacked the requisite control.68 The court of appeals also rejected plaintiff’s challenge to the district court’s finding that neither Brinkerhoff nor Crowley had acted negligently, ruling the neither company had any reason to anticipate Airfast’s negligence, as Airfast was “a reputable and well-established air carrier.”69 The Ninth Circuit also rejected plaintiff’s argument that liability should be imputed to the defendants on the basis that the Airfast airplane was an “appurtenance” of the oil drilling platform.70

The extraordinary decision of the Ohio Supreme Court in Shaffer v. Maier71 arose out of a wrongful death action brought by the estate of a pilot whose Cessna 340 piston twin crashed because of engine failure shortly after taking off from Cincinnati’s Lunken Airport. The engine failure was caused by misfueling with jet fuel by a FBO operating as a fuel dealer for

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65 Id. at 476-77.
66 Id. at 477.
67 Id. (citations omitted).
68 19 F.3d at 478.
69 Id.
70 Id. at 479.
71 627 N.E.2d 986 (Ohio 1994).
Standard Oil of Ohio. At the close of the trial, the jury returned a general verdict in Standard’s favor but also responded affirmatively to a special verdict interrogatory asking whether the fuel dealer was an “apparent agent” of Standard.

After the jury returned its general and special verdicts, the trial court had noted the irreconcilability of the findings concerning Standard but determined that the general verdict should conform to the special interrogatory. Accordingly, the trial court had entered judgment against Standard for the entire amount of plaintiff’s damages. The Ohio Court of Appeals, however, discredited the interrogatory response by relying on the “common knowledge” rule typically invoked in automotive service station cases, in which the courts take judicial notice of the general public knowledge that service stations are independent operations. Extending this rule to the aviation context, the court held that the plaintiff could not have reasonably believed that the FBO was an agent of Standard. The court of appeals, therefore, reinstated the general verdict for Standard.

Before the Ohio Supreme Court, the first issue addressed was whether the appellate court erred in ruling on the “apparent agency” issue as a matter of law. The Ohio Supreme Court rejected the appellate court’s extension of the “common knowledge” rule to cover FBOs, and questioned whether, even in automobile cases, the general public knows that service stations are independent dealers.672

The second issue addressed was whether it was proper for the trial court to conform the general verdict to the special verdict against Standard. The Ohio Supreme Court noted that the jury was likely confused by plaintiff’s direct and vicarious liability theories at trial.673 While acknowledging that the relief was extraordinary, the supreme court remitted the matter under an order giving plaintiff the option of retrying the apparent agency theory against Standard or accepting a fifty percent reduction of the judgment.674

F. Costs

In Holmes v. Cessna Aircraft Co.,675 appellant challenged various aspects of a costs award granted to Cessna Aircraft Co. by the

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672 Id. at 988-89.
673 Id. at 989-90.
674 Id. at 991.
675 11 F.3d 63 (5th Cir. 1994).
United States District Court for the Northern District of Texas. With respect to the trial court's taxation of witness travel costs, the Fifth Circuit reversed based on its view that the costs were necessary.\textsuperscript{676} The court ruled that the expert witness fees and photocopying costs were excessive and remanded for a recalculation.

VIII. PUNITIVE DAMAGES

In \textit{Honda Motor Co., Ltd. v. Oberg},\textsuperscript{677} an important decision safeguarding judicial review of punitive damages awards, the United States Supreme Court held unconstitutional a 1910 amendment to the Oregon constitution barring such review. The Oregon amendment prevented judicial reductions of punitive damages awards by limiting review of jury findings to cases where "the court can affirmatively say there is no evidence to support the verdict."\textsuperscript{678} Therefore, in cases where there was evidence to support a punitive damages award, the courts were powerless to reduce awards inflated by passion or prejudice.

In an opinion written by Justice Stevens, the seven-member majority stressed the importance of the procedural component of the Due Process Clause and the long English and American common law history authorizing judicial review of excessive damages awards.\textsuperscript{679} The Court noted that, among United States jurisdictions, only Oregon flatly prevented review of the size of punitive damages awards, no Oregon court in the past half-century had ever inferred passion or prejudice from the size of an award, and, in the past ten years, no Oregon court had even "hinted" that it might have the power to do so.\textsuperscript{680} Consequently, the Court found that the Oregon amendment unconstitutionally removed one of the "few procedural safeguards which the common law provided"\textsuperscript{681} against the "acute danger of arbitrary deprivation of property"\textsuperscript{682} that the Due Process Clause was intended to prevent. The majority rejected the respondent's arguments that Oregon's existing procedural safeguards (limitation of punitive awards to amounts pleaded; use of the clear-and-convincing evidence standard; a never-used, pre-verdict court proce-

\textsuperscript{676} \textit{Id.} at 64.
\textsuperscript{677} 114 S. Ct. 2331 (1994).
\textsuperscript{678} OR. CONST. art. VII, § 3.
\textsuperscript{679} 114 S. Ct. at 2335-38.
\textsuperscript{680} \textit{Id.} at 2339.
\textsuperscript{681} \textit{Id.} at 2341.
\textsuperscript{682} \textit{Id.} at 2340.
The underlying personal injury action arose from an overturn accident involving an all-terrain vehicle (ATV). The jury awarded $919,390.39 in compensatory damages, reduced by twenty percent for contributory negligence, and $5,000,000 in punitive damages. The Supreme Court remanded the action to the Oregon Supreme Court for further proceedings.

IX. INSURANCE COVERAGE

In *National Union Fire Insurance Co. v. Dawn Aeronautics, Inc.*, the United States District Court for the District of Delaware held that a fatal air crash was covered by a policy of aviation liability insurance (AV Policy) and not covered by an airport comprehensive general liability insurance policy (AP Policy).

The decedent had rented an aircraft from the insured's flight school so that he could continue training for his private pilot's license examination. The airplane crashed, resulting in decedent's death. The decedent's estate gave notice of a claim to the insured and the insurer. The insured filed a declaratory relief action.

The insurer conceded that the AV Policy for bodily injury applied to this claim. The court held that the medical expense coverage of $1000 per person was also applicable. But the court held that the AP Policy did not apply because of the exclusion for bodily injury arising out of the ownership, maintenance, or use of the airplane. The court rejected the insured's argument that "bodily injury" did not include death, which would have rendered the exclusion inapplicable, on the basis that the policy did not specifically define bodily injury as including death. The court called the insured's interpretation "both illogical and contrary to a plain reading of the insurance contract."

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683 *Id.* at 2341.
684 114 S. Ct. at 2341.
686 *Id.* at 19507.
687 *Id.* at 19508.
688 *Id.* at 19510-11.
689 *Id.* at 19511.
In *National Union Fire Insurance v. Care Flight Ambulance*,\(^{690}\) interpreting Texas law, the Fifth Circuit held that there was no insurance coverage pursuant to a breach of warranty endorsement of the insurance policy where the insured had converted the aircraft.\(^{691}\) The subsequent confiscation of the aircraft, which might have been covered under the war risk endorsement had the aircraft not been converted, was irrelevant to coverage.\(^{692}\)

Under a lease agreement for use of an airplane, the lessee was prohibited from subleasing the aircraft and was required to provide insurance. The lessee breached the lease by subleasing the aircraft, which subsequently was seized by the Columbian government for an airspace violation. The lessor's insurer paid for the loss of the aircraft and later filed a subrogation action against the lessee's insurer.

First, the Fifth Circuit affirmed the district court's conclusion that the unauthorized sublease, resulting in confiscation of the aircraft, was a conversion as a matter of law.\(^{693}\) Next, the court held that the breach of warranty endorsement, which excluded losses resulting from conversion, among other things, barred coverage for the loss in this case.\(^{694}\) The court rejected the appellant's argument that the war risk endorsement of the policy, which covered losses resulting from confiscation and other risks, superseded the exclusion for loss resulting from conversion.\(^{695}\) Coverage terminated upon the conversion of the aircraft and was not resurrected following the confiscation.\(^{696}\)

In *Smith v. Hughes Aircraft Co.*,\(^ {697}\) a long-running insurance coverage dispute over Hughes Aircraft's claims for indemnification for its settlement of thousands of personal injury claims by Tucson residents arising from alleged groundwater contamination from Hughes Aircraft's activities near the Tucson airport, the Ninth Circuit reversed the district court's grant of summary judgment in certain insurers' favor. The coverage dispute focused on the applicability of the pollution exclusions contained in the insurance policies issued to Hughes from 1956 through

\(^{690}\) 18 F.3d 323 (5th Cir.), cert. denied, 115 S. Ct. 293 (1994).

\(^{691}\) Id. at 329.

\(^{692}\) Id.

\(^{693}\) Id. at 325-28.

\(^{694}\) Id. at 329.

\(^{695}\) 18 F.3d at 329.

\(^{696}\) Id.

\(^{697}\) 22 F.3d 1432 (9th Cir. 1993).
1985 to injury claims arising from Hughes’ improper disposal of the solvent trichloroethylene (TCE) into unlined ponds. Hughes had settled the personal injury claims in 1991.

The 1971-1985 insurance policies contained the standard aviation form AVN 46A pollution exclusion which Hughes argued applied only to “aviation” risks and not to hazardous waste disposal. The Ninth Circuit, finding the exclusion ambiguous, reversed the summary judgment against Hughes.\(^6\)\(^9\)\(^8\) The pollution exclusion in the 1974-1985 policies also was limited to “sudden and accidental” discharges. The Ninth Circuit held that, under both Arizona and California law, “sudden” connotes temporal brevity, and, therefore, pollution caused by long-term hazardous waste disposal practices was not subject to the exclusion.\(^6\)\(^9\)\(^9\)

Hughes also argued that the pollution exclusion should not apply because TCE was not a known contaminant at the time of discharge. The Ninth Circuit, however, held that the policy language did not require contemporary knowledge that a discharged substance was a contaminant or pollutant, but only that the discharge be of “toxic chemicals, liquids . . . or other irritants.”\(^7\)\(^0\)\(^0\)

The district court had granted summary judgment to the insurers who issued policies from 1956 through 1971 on the basis that the harm caused by the pollution was “expected” by Hughes. The Ninth Circuit ruled that, for Hughes to have “expected” the harm to occur, it must actually have known or believed that the harm was “substantially certain” or “highly likely” to result.\(^7\)\(^0\)\(^1\) As Hughes’ subjective knowledge was a question of fact, summary judgment was reversed.\(^7\)\(^0\)\(^2\) The court also reversed summary judgment for these insurers on the basis that a question of fact existed as to whether any of the claimants were injured prior to 1971.\(^7\)\(^0\)\(^3\)

In *Coleman v. Charlesworth,*\(^7\)\(^0\)\(^4\) the Illinois Supreme Court affirmed judgment in favor of an insurer in a declaratory relief action to establish that there was no coverage for injuries and deaths resulting from a hot air balloon accident.

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\(^{698}\) *Id.* at 1436.

\(^{699}\) *Id.* at 1437.

\(^{700}\) *Id.* at 1438.

\(^{701}\) *Id.* at 1439.

\(^{702}\) 22 F.3d at 1440.

\(^{703}\) *Id.*

\(^{704}\) 623 N.E.2d 1366 (Ill. 1993).
The insured offered commercial sightseeing flights in hot air balloons. The insured purchased a policy providing aviation premises and products liability insurance; however, the policy was never received because the insured failed to obtain a countersignature. A cover note issued by the brokers identified the type of insurance, which allowed the court to refer to the insurance policy to determine coverage.

The aviation premises provision of the policy provided coverage for bodily injury or property damage "in or about the premises." The court found that there was no coverage because the injuries occurred fifteen minutes after the hot air balloon had left the balloon port when it struck electrical power lines. The policy also covered bodily injury or property damage "elsewhere" in the course of any work or the performance of any duties carried out by the insured, but it excluded injuries or damage caused by aircraft owned, used, or operated by the insured. The court held that the exclusion applied. The court also held that the products liability provision of the policy did not apply because it covered only bodily injury or property damage arising from a good or product, whereas the offering of a balloon ride was a service.

X. FAA ENFORCEMENT/LOCAL REGULATION

A. Certificate Actions

1. Pilot Certificates

In the appeal of Robinson v. NTSB, the petitioner helicopter pilot obtained a reversal of the NTSB's order affirming the FAA's emergency revocation of his airline transport pilot certificate (ATP), which occurred after the pilot allegedly executed a takeoff in a twin-engine helicopter while only one engine was operating. The District of Columbia Circuit remanded the matter to the NTSB, holding that the emergency revocation could not rest solely on circumstantial evidence in the face of contrary direct evidence.

The FAA's revocation order was based on the testimony of a senior airport operations agent that the pilot had advised that
he was having trouble with one engine. Subsequently, the agent observed the helicopter "skid" around the heliport, which he characterized as an attempt to make a single-engine takeoff.

One of the pilot’s passengers, however, testified that both engines were operating. Another witness, the director of maintenance where the pilot landed after the alleged single-engine flight, testified that the pilot, after landing, described having trouble with one engine, which the maintenance director found was too warm to handle. The maintenance director also testified that a non-operating engine does not generate heat and that firewalls prevent heat transfer between the engines. The District of Columbia Circuit ruled that the NTSB’s affirmance was arbitrary and capricious, as the Board failed to adequately explain why it discounted this evidence, given the lack of contradictory evidence, and remanded the matter for a further explanation.711

In Booher v. United States Department of Transportation,712 petitioner sought review of an NTSB order suspending his pilot’s license. The Fourth Circuit affirmed the suspension.

On July 10, 1989, petitioner, a commercial pilot, made a non-incident emergency landing on South Carolina Highway 11 and parked his plane on the side of the road. Later, he and the airplane were discovered by a Highway Patrol trooper, who saw petitioner pouring gasoline in the airplane fuel tanks. Petitioner explained he had been forced to land on Highway 11 because he had received contaminated fuel and had purchased the new gas from a nearby Texaco station. Petitioner then took off and completed his flight to Asheville, North Carolina.

After the incident, petitioner filed a report of his emergency landing with the National Aeronautics and Space Administration (NASA) under the Aviation Safety Reporting Program (ASRP). The FAA doubted that the landing was necessitated by contaminated fuel and held an evidentiary hearing before an administrative law judge (ALJ).

The ALJ found that fuel starvation caused the emergency landing, petitioner initiated his flight with insufficient fuel,713 and fueled his airplane with automobile gasoline.714 Both violations warranted suspension, the former violation was waived be-

711 Id.
712 28 F.3d 1208 (4th Cir. 1994).
713 See 14 C.F.R. § 91.22(a) (1992).
714 See 14 C.F.R. § 91.31(a) (1992).
cause it was not deliberate. Petitioner finally argued that both violations should be waived because he voluntarily filed the ASRP report. FAA Advisory Circular No. 00-46C limits the FAA in two respects if it seeks disciplinary action against a pilot who voluntarily files an ASRP report. First, the report cannot be used as evidence in the hearing. Second, violations that are “inadvertent and not deliberate” must be waived. Here, the report was not used at the evidentiary hearing and petitioner’s fuel violation was found to be deliberate. Thus, the ALJ’s suspension of petitioner’s license was affirmed.

In *Henderson v. FAA*, petitioner, a helicopter pilot, challenged a sixty-day certificate suspension imposed for his allegedly unsafe operation of a helicopter carrying television journalists on a photography flight over Corvallis, Oregon. The suspension resulted from the FAA’s findings that petitioner had operated the helicopter at altitudes and airspeeds too low to allow a safe emergency landing in the event of mechanical failure and had violated the 300-foot minimum altitude for helicopter flights over congested areas. After the suspension was upheld by an ALJ and the full NTSB, petitioner appealed to the Ninth Circuit.

The Ninth Circuit affirmed the suspension based on the finding that petitioner had flown the helicopter at too low an altitude and airspeed to allow a safe emergency landing, but reversed the finding that petitioner had violated the 300-foot rule on the basis that the rule exemption for photography flights clearly applied. The Ninth Circuit also rejected petitioner’s argument that his due process rights had been violated by the ALJ, who, petitioner alleged, had “stifled,” “interrupted,” and “intimidated” him.

In *Howard v. FAA*, the FAA suspended a commercial pilot’s license for forty days after he landed a VFR flight at an airport that was operating under IFR. The FAA, and later the NTSB, found that ground visibility was less than three miles and that the ceiling was under 1000 feet when the pilot landed. The Ninth Circuit rejected the pilot’s defense that the poor visibility was not “reported” because it had not been communicated to him and ruled that the fact that the report had been available to

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715 7 F.3d 875 (9th Cir. 1993).
716 Id. at 878-79.
717 Id. at 879.
718 17 F.3d 1213 (9th Cir. 1994).
the pilot was sufficient.\textsuperscript{719} The court of appeals affirmed the suspension on the basis that substantial evidence supported the agency’s factual findings.

In \textit{Meili v. NTSB},\textsuperscript{720} petitioner appealed the NTSB’s affirmation of his thirty day license suspension, which arose from his alleged unauthorized flight into the San Diego, California, TCA. The ALJ cut in half petitioner’s original sixty day suspension. On appeal, the Ninth Circuit affirmed the finding that petitioner had violated the TCA as being supported by substantial evidence.\textsuperscript{721} The court of appeals rejected petitioner’s argument that he had been prejudiced by the FAA’s failure to retain a copy of the air traffic control tape, finding the evidence “overwhelming” that petitioner’s version of events was “incredible.”\textsuperscript{722}

In \textit{Nehez v. NTSB},\textsuperscript{723} petitioner, a commercial airline pilot, sought review of the NTSB’s affirmation of the FAA’s finding that he had operated an aircraft carelessly or recklessly. The Ninth Circuit affirmed the decision and rejected petitioner’s contention that the NTSB, in reviewing the FAA’s decision, had applied an incorrect legal standard in evaluating the sufficiency of the evidence.

The certificate action arose from a takeoff from Des Moines, Iowa, in which petitioner performed as second-in-command of a commercial flight. Petitioner allegedly took off with a runway visual range of only 800 feet, half the 1600 feet required minimum. On appeal from the FAA certificate action, petitioner argued that the NTSB was required to show either that the likelihood of potential harm from his acts was unacceptably high or that his judgment was clearly deficient. The court rejected these contentions, noting that the standard urged by petitioner applied to helicopters but not fixed-wing aircraft.\textsuperscript{724} Instead, the court noted that the appropriate standard was whether petitioner’s actions could have endangered life or property.\textsuperscript{725} Accordingly, the court rejected petitioner’s contention that the NTSB decision was unsupported by the evidence.

\textsuperscript{719} Id. at 1216-17.
\textsuperscript{720} 8 F.3d 28 (9th Cir. 1993) (unpublished opinion available at 1993 WL 384573 at *1 (Sept. 28, 1993)).
\textsuperscript{721} Id. at *3.
\textsuperscript{722} Id. at *4.
\textsuperscript{723} 30 F.3d 1165 (9th Cir. 1994).
\textsuperscript{724} Id. at 1167.
\textsuperscript{725} Id.
as petitioner had executed a takeoff with only half of the required visibility.\textsuperscript{726}

In \textit{Sue v. NTSB},\textsuperscript{727} the Ninth Circuit reviewed and affirmed an order of the NTSB revoking petitioner's commercial pilot and medical certificates.

On December 22, 1989, the FAA revoked petitioner's license and medical certificate based on two offenses: (1) Sue made false statements on his 1987, 1988, and 1989 medical certificate applications; and (2) petitioner operated a seaplane below the required altitude and without possession of the required pilot, medical, and registration certificates.

Petitioner appealed the revocation before an ALJ who modified the penalty to an eleven month suspension. Both parties appealed to the NTSB, which reinstated the revocation.

On his 1987, 1988, and 1989 medical certificate applications, petitioner answered "no" to questions concerning past traffic violations, even though he had three convictions for driving under the influence. The court found the alcohol related convictions to be material because they were relevant to the FAA's decision to grant a license.\textsuperscript{728} It was also clear from the record that petitioner had actual knowledge of the falsity of the statements.\textsuperscript{729}

Petitioner also contended that the medical application form was confusing and ambiguous and to penalize him for his false statements, therefore, would violate due process. Previous courts had accepted this argument in the context of criminal prosecutions due to the additional due process protections and higher burdens of proof applicable in criminal cases. But, this court declined to apply the greater protections associated with a criminal proceeding to a civil administrative proceeding.

Petitioner was also charged with failing to adhere to altitude restrictions when he flew under a bridge. Petitioner admitted flying under the bridge but stated it was necessary because the surrounding terrain was rough and wooded. The court did not disturb the ALJ's factual finding that the under-bridge flight was unnecessary and posed an unnecessarily high risk of danger to petitioner's passenger and to the bridge itself.\textsuperscript{730}

\textsuperscript{726} \textit{Id.}
\textsuperscript{727} 8 F.3d 30 (9th Cir. 1993) (unpublished opinion available at 1993 WL 366559, at *1 (Sept. 20, 1993)).
\textsuperscript{728} \textit{Id.} at *2.
\textsuperscript{729} \textit{Id.}
\textsuperscript{730} \textit{Id.} at *3.
Finally, petitioner admitted he was not in possession of his medical and pilot certificates on the day of the flight. The court also upheld the ALJ’s finding that the airplane’s registration certificate was not on board during the flight in question.\textsuperscript{731}

In \textit{Tur v. FAA},\textsuperscript{732} the Ninth Circuit denied petitioner’s request for review of an FAA order revoking his commercial pilot certificate, which found that petitioner lacked the qualifications required of a helicopter pilot. Petitioner appealed the administrator’s emergency order and an expedited hearing was set before an ALJ. Petitioner had the option of proceeding with the expedited hearing or waiving the emergency procedure to allow him more time to prepare his defense. Petitioner chose to proceed with the expedited hearing, which was held twenty days after he was sent notice.

The FAA alleged that, on May 27, 1988, petitioner operated his helicopter within 100 feet of a fire on a Redondo Beach, California, pier, causing smoke and heat to blow on fire fighters, temporarily blinding them. Noise from the helicopter also interfered with the fire fighters’ communications.

The FAA also alleged that on another occasion, petitioner illegally flew in formation with a Los Angeles Fire Department helicopter rescue flight that was transporting a gunshot victim to Cedar-Sinai Medical Center. This unauthorized formation flight forced the fire department helicopter to alter its course and bypass the landing site in order to avoid a collision with his aircraft.

The ALJ found these incidents were established by the preponderance of the evidence and indicated that petitioner lacked the qualifications necessary to hold an airman’s certificate. The ALJ sustained the revocation order. Petitioner then appealed to the NTSB, which sustained the revocation.

In his appeal to the Ninth Circuit, petitioner complained of procedural defects in the prior hearing. First, he complained that his offenses were more than six months old and did not warrant the emergency procedures followed by the Administrator. The “Stale Complaint Rule” disallows introduction of evidence of offenses that are more than six months old, unless the offenses address the airman’s qualification.\textsuperscript{733} The ALJ made it clear that the old allegations were not barred because the Ad-

\begin{footnotes}
\item[731] \textit{Id.} at *4.
\item[732] 4 F.3d 766 (9th Cir. 1993).
\item[733] \textit{Id.} at 768-69.
\end{footnotes}
ministrator's order and the evidence presented directly related to the issue of lack of qualification.

Petitioner also claimed that he was denied due process by being forced to respond to the charges within the expedited time frame of the emergency proceedings. Since petitioner himself possessed the power to expand the time frame, the court held this argument had no merit.734

Petitioner further argued that the NTSB did not serve the final ruling within the sixty day period mandated by 49 U.S.C. appendix section 1429(a). The Administrator's order to revoke was effective October 1, 1991. The Administrator notified the NTSB by letter dated October 17, 1991, and received on October 22, 1991. Notice of the final NTSB ruling was served on December 16, 1991. The court held that the sixty day limit ran from the date the NTSB was advised of the order. Therefore, notice of the final disposition was timely.735

In Hernandez v. NTSB,736 the Tenth Circuit affirmed a reinstatement of a full board of the NTSB of the FAA's revocation of a commercial pilot's certificate for several convictions for drug-related offenses, none of which were involved with the pilot's use of his certificate privileges. In the initial appeal from the FAA's certificate order, the ALJ had overturned the revocation and ordered a twelve month suspension. The FAA then appealed to the full Board, which reinstated the revocation. The Tenth Circuit affirmed the revocation order after finding that the board had not supplanted the ALJ's factual findings and that the policy of ordering revocation for non-certificate-related drug offenses was not a new policy, thereby negating any ex post facto concerns.737

2. Medical Certificates

The matter of Woznick v. Richards738 came before the Sixth Circuit on a petition for review of the NTSB's order affirming suspension of the petitioner's airman's medical certificate for failure to produce requested medical records.

734 Id. at 770.
735 Id. at 771.
736 15 F.3d 157 (10th Cir. 1994).
737 Id. at 158-59.
In September 1990, petitioner received his airman's medical certificate. On the application form, he answered affirmatively to questions concerning whether he had ever been hospitalized or had traffic or criminal convictions. Concerning hospitalizations, petitioner stated that in 1990 he had undergone penile implant surgery. Petitioner also revealed that he had one DUI conviction and one other experience involving driving while under the influence of alcohol. Subsequently, the FAA Aeromedical Certification Division notified petitioner that his medical certification was under review and requested submission of records relating to the implant surgery and the DUI incidents. After petitioner failed to respond, the FAA notified petitioner that he was no longer deemed qualified to hold a medical certificate and requested voluntary relinquishment of the certificate.

Eventually, petitioner produced a letter from his doctor, which gave a brief account of petitioner's dysfunction leading to the implant surgery. The letter stated that the doctor and a psychological consultant believed that petitioner's problem was organic, not psychological. The FAA sent two more letters to petitioner demanding that he submit the requested records and surrender his medical certificate. Petitioner responded with an affidavit stating that he could not relinquish the certificate because he had lost it. The FAA then issued an emergency order suspending petitioner's medical certificate. Thereafter, the petitioner sought and obtained a hearing before an ALJ.

Petitioner testified before the ALJ that he used alcohol infrequently and had never been treated for alcohol or drug abuse. In addition, he testified that he had been convicted in 1981 for setting false alarms, in 1988 for disorderly conduct, and, in 1972 for assault and battery. The ALJ ruled that petitioner had failed to comply with the FAA’s request for medical records regarding the implant surgery, held that the FAA had been justified in requesting those records, and upheld the emergency order of suspension.

Petitioner next appealed to the NTSB, which concluded that the FAA had reasonable grounds for seeking information regarding the penile implant surgery and that the petitioner's history of arrests suggested that a review of his medical and psychological records was appropriate.

The Sixth Circuit noted that the NTSB findings would be upheld, unless they were “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or that the Board’s factual findings were not supported by substantial evi-
In addition, the court ruled that the FAA was authorized to suspend an airman’s medical certificate for failure to comply with reasonable information requests. After reviewing the record, the court of appeals found that substantial evidence supported the NTSB decision and upheld the suspension.

*Bullwinkel v. FAA* concerned a petition for review of an NTSB order affirming the FAA’s refusal to renew appellant’s third-class airman’s medical certificate under the FAA’s “no lithium” rule. The airman had been taking lithium to control his manic depressive mood disorder. The FAA, relying on 16 C.F.R. sections 60.17(d)(1)(II) and (f)(2), had held that appellant’s history of mood swings, attention deficit disorder, and use of medications justified disqualifying the pilot for medical reasons.

Bullwinkel challenged the NTSB’s adoption of the “no lithium” rule as being in excess of its jurisdiction and as an unreasonable interpretation of the federal regulations. Appellant also argued that the denial of his medical certificate was discriminatory based on his handicap and, therefore, violated the Rehabilitation Act.

The Seventh Circuit rejected the first challenge, holding that an agency adjudication provides an appropriate forum for determining the scope of regulations and articulating agency policy. The court, however, rejected the “no lithium” rule as being an unreasonable interpretation of 14 C.F.R. section 67.17(f), governing eligibility for medical certificates, ruling that “even a cursory glance at section 67.17 makes it clear that this regulation is aimed at underlying medical conditions, not medications” and that lithium did not fall within any of the prohibited categories included in the regulations. The court of appeals also rejected the Rehabilitation Act claim.

Based on its ruling that the “no lithium” rule could not reasonably be derived from the regulations at issue, the Seventh Circuit vacated the NTSB’s affirmance of the FAA order denying...
appellant’s medical certificate renewal and remanded the matter for consistent proceedings.\textsuperscript{747}

\textit{Hinson v. Hoover}\textsuperscript{748} involved R.A. (Bob) Hoover, one of the best-known pilots of the modern era. This year, the FAA revoked Hoover’s medical certificate under an emergency order because Mr. Hoover allegedly suffers from a “cognitive deficit.” In this NTSB order on the FAA’s appeal from an ALJ’s ruling restoring Mr. Hoover’s medical certificate, the NTSB ruled that Mr. Hoover had failed to rebut the evidence of cognitive deficit and reinstated the revocation of his medical certificate.

In June 1992, two FAA inspectors questioned Mr. Hoover’s fitness based on their observation of his performance at an air show in Oklahoma City. Based on the FAA inspectors’ reports, the Federal Air Surgeon asked Mr. Hoover to submit to neurological, psychological, and psychiatric evaluations. After the first tests results were unfavorable, Mr. Hoover requested and received retesting.

The FAA’s initial examiner, a psychiatrist, found that Mr. Hoover suffered from a few abnormalities relating to short-term memory and ability to recite numbers in declining order (\textit{e.g.}, counting backwards by seven units at a time). The psychiatrist referred Mr. Hoover to a neuropsychologist for testing, based on his opinion that the aggregate testing showed some form of nonspecific aging pathology. A referral was then made to a neurologist, whose examination was normal except for a SPECT scan of the brain (a test in which blood-born radiation tracer is imaged) showing a borderline possibility of areas of low blood flow in Mr. Hoover’s brain.

When Mr. Hoover was reexamined, a neuropsychologist found that his range of cognitive responses ran from Impaired to High Average. Another SPECT scan showed low blood flow and an initial report explained the findings as suggestive of multiple strokes or degenerative changes. This reference was later changed to read “normal variance?” because the neuropsychologist opined that Mr. Hoover’s examination revealed some selected risk signs that could be viewed as accelerated aging or subclinical disease. At the hearing before the ALJ, FAA witnesses testified that the retesting in 1993 actually showed a progressive deficit when compared to the 1992 test findings.

\textsuperscript{747} 23 F.3d at 174.
\textsuperscript{748} 1994 WL 57006, at *1 (Feb. 18, 1994) (NTSB Order No. EA-4094).
Mr. Hoover’s defense was first that the two reporting FAA investigators conspired to have him grounded. The board glossed over this argument in its opinion. The board seemed to believe it unnecessary to consider any Fourth Amendment problems in the FAA’s acts that caused Mr. Hoover to be examined, although Mr. Hoover argued that he was told that the original neuropsychological testing would not affect his medical certification, that the testing conditions were unexpected, and that the tests were conducted in a hostile environment.

Mr. Hoover also introduced testimony from an examining flight surgeon that he was fit to fly and that his neurological examination was average for a seventy-one year old male. He also had another neuropsychologist testify that Hoover had only a mild impairment when the results were corrected for age.

Finally, Mr. Hoover introduced testimony from Dr. Antoinette Appel, the first degree neuropsychologist in the United States, who testified that his performance at flying was the best indication of his cognitive abilities and who criticized several of the tests as inappropriate and raising false alarms.

The board, however, found that Mr. Hoover had failed to rebut the results of his examinations showing evidence of cognitive deficit and had merely suggested other explanations for the poor test results. The NTSB held that the initial testing by the first neuropsychologist, which showed cognitive defect, was never refuted. The NTSB seemed to find that the SPECT scan, specifically the analysis that perhaps showed a worsening from 1992 to 1993, was particularly persuasive in reversing the ALJ and revoking Mr. Hoover’s medical certificate. The NTSB also criticized the ALJ’s evaluation of medical expert testimony, finding that, in excluding evidence proffered by the FAA, the ALJ did not follow the Administrative Procedures Act (APA) and, instead, apparently applied the Federal Rules of Evidence.

3. Other Certificates

In Greenwood v. FAA, petitioner claimed many violations in the FAA’s suspension and non-renewal of his designation as a pilot examiner. The Ninth Circuit only entertained the due process arguments, found no violation, and affirmed the FAA order.

749 Id. at *9.
750 Id. at *9-*10.
751 28 F.3d 971 (9th Cir. 1994).
For fourteen years, petitioner had been an FAA designated pilot examiner (PED) with authority to test pilots and issue pilot certificates. The PED is a one-year designation terminable or non-renewable under internal guidelines established by and under the discretion of the FAA.\textsuperscript{5}

During a test, petitioner had required a student to perform an optional maneuver, which resulted in a hard landing. This incident caused a temporary suspension of his PED, which was lifted upon recommendation of a FAA inspector, less than a week after it was imposed. However, the inspector recommended that petitioner’s PED not be renewed upon expiration.

Despite the inspector’s adverse recommendation, petitioner submitted his application for renewal only four days prior to the expiration date of his PED, instead of the required sixty days. Nonetheless, he was given a flight check for renewal and failed. After communicating with the FAA, petitioner was offered the opportunity to reapply and to be retested for reinstatement. He declined to accept and, instead, appealed to the Ninth Circuit.

On appeal, petitioner argued that the FAA’s decision to suspend and not renew his PED was arbitrary and capricious. The court held it lacked jurisdiction to consider this question because there is no judicially manageable standard by which it could review the administrator’s decision.\textsuperscript{55} Petitioner next argued that his procedural due process rights were violated when the FAA suspended and non-renewed his PED. The suspension of petitioner’s PED was temporary and taken after an incident which resulted in concern for safety. Petitioner was given an opportunity to respond, which he did, and the suspension was lifted. Petitioner, therefore, received adequate due process regarding the suspension.\textsuperscript{54}

Regarding the non-renewal of petitioner’s PED, the court held that he did not have a liberty or property interest in the renewal because the decision to renew was within the FAA’s discretion. Because he had no legitimate claim of entitlement to renewal, petitioner was not entitled to procedural due process.\textsuperscript{55}

Petitioner also attacked the constitutionality of section 314 of the Federal Aviation Act. However, the court held that he

\textsuperscript{5} See FAA Order 8700.1, § 9 (1989).
\textsuperscript{55} 28 F.3d at 974-75.
\textsuperscript{54} Id. at 975.
\textsuperscript{55} Id. at 977.
waived this challenge for failure to present a specific, cogent argument for consideration.\textsuperscript{756} Petitioner further asserted that the FAA's internal procedure governing suspensions and renewals of PEDs was in violation of the APA, which should govern his license, but the court rejected the claim due to his failure to raise the issue below.\textsuperscript{757}

Finally, petitioner argued that the agency's decision violated his Fifth Amendment equal protection rights because in that the decision not to renew was based on his age. The jurisdiction of the court to review agency orders "depends on the adequacy of the administrative record."\textsuperscript{758} The record before the Ninth circuit was inadequate to address this issue in that "the only information in the record [was petitioner's] own assertions in letters to the FAA that he believes the agency's motivation was his age."\textsuperscript{759}

In \textit{Mace v. Skinner},\textsuperscript{760} a certified aircraft mechanic appealed the dismissal with prejudice of his constitutional challenge to the FAA's certificate revocation procedures. The dismissal was based on a lack of subject matter jurisdiction.

The action arose from the FAA's issuance of an emergency order revoking the mechanic's certificate on the basis of alleged violations of safety regulations stemming from his improper inspection and repair work. The mechanic challenged the revocation, which an NTSB ALJ affirmed. His appeal to the full board was dismissed because he failed to file his appellate brief on time. The mechanic then appealed to the Ninth Circuit.

While this appeal was pending, the mechanic filed a separate action in the United States District Court for the District of Arizona, challenging, on numerous constitutional grounds, the FAA's procedures for issuing emergency orders. The district court dismissed the complaint with prejudice for lack of subject matter jurisdiction, ruling that jurisdiction to review NTSB decisions was exclusively vested in the circuit courts of appeal. The mechanic prevailed in his appeal from this dismissal on the basis that the statute vesting exclusive subject matter jurisdiction in the appellate courts did not apply to actions challenging the FAA's revocations procedures in general, as opposed to the mer-

\textsuperscript{756} Id. at 975.

\textsuperscript{757} Id.

\textsuperscript{758} 28 F.3d at 978 (citing Southern Cal. Aerial Advertisers Ass'n v. FAA, 881 F.2d 672, 676 (9th Cir. 1989)).

\textsuperscript{759} 28 F.3d at 978.

\textsuperscript{760} 34 F.3d 854 (9th Cir. 1994).
its of a particular revocation order. The court also noted that the mechanic sought money damages in the district court action, a remedy that was not available in the review from the certificate dismissal.

*Olsen v. NTSB* involved a review of the NTSB's affirmance of the FAA's revocation of an airframe and powerplant mechanic's certificate for intentionally falsifying an aircraft logbook entry. The Ninth Circuit affirmed the NTSB ruling on the basis that substantial evidence supported the charge against the mechanic. The falsification involved false entries of aircraft engine time at the point of sale to a third party, which were caused by the mechanic's knowing failure to update entries in the logbook for the aircraft, which he owned, and for misrepresenting the date he last conducted an annual inspection.

The mechanic last performed an annual inspection of the airplane in November, 1990, at which time he entered a tachometer reading of 2402:00 in the aircraft logbook. After this entry was made, the mechanic knew the airplane had made two flights of approximately thirty to thirty-five minutes each. In August 1991, the mechanic sold the airplane, representing to the buyer that he had conducted the annual inspection one week before. The mechanic then entered the tachometer reading "2402" in the logbook and dated the annual inspection sign-off as August 9, 1991. After 2.83 operating hours, the purchaser took the airplane to his own mechanic, who determined that there were several discrepancies in the aircraft that rendered it unairworthy. The buyer then notified the FAA, which commenced an investigation uncovering the mechanic's wrongdoing.

**XI. DEBTOR-CREDITOR**

*Northwest Airlines, Inc. v. United States Department of Transportation* focused on a federal law under which an air route may not be transferred between air carriers without the transferring carrier's initial consent. At issue in this case was whether the Department of Transportation (DOT) was authorized to transfer a route over the bankrupt's formal withdrawal of its transfer application prior to final approval.

761 *Id.* at 859-60.

762 *Id.* at 858.

763 14 F.3d 471 (9th Cir. 1994).

764 15 F.3d 1112 (D.C. Cir. 1994).

Finding that the DOT's actions, in effect, protected the efficient operation of the marketplace by ensuring that the route was transferred to a carrier able to use it, the court approved the action as within the DOT's discretion.\textsuperscript{766} The court further held that to allow withdrawal of a transfer application in the final stages would hamper the public interest and administrative efficiency.\textsuperscript{767} Given that the transfer ultimately would be subject to the bankruptcy court's approval, the court held that the bankrupt's contractual rights were adequately protected.\textsuperscript{768}

In \textit{In re Midway Airlines, Inc.},\textsuperscript{769} in response to efforts by a creditor, an engine service facility, to enforce statutory artisan's liens on an engine in debtor Midway Airlines' possession, the bankruptcy trustee moved for summary judgment contending that the creditor lacked a secured interest in the parts. The court denied the motion, holding that undetermined factual issues existed that would determine the creditor's lien rights, which would be enforceable despite the bankruptcy stay if it were shown that Midway had no remaining equity in the parts.

The creditor had performed repair and testing services on the debtor's engine parts beginning in the mid-1980s on an unwritten credit basis. In 1990, after the debtor established a pattern of delinquency, the creditor advised that it would no longer extend credit and that the debtor's parts would not be released until the debtor's balances were paid, plus a $100,000 advance against future fees. The debtor made no payments and sent no parts to the creditor for servicing.

The debtor had originally filed for bankruptcy under Chapter 11. After that proceeding was voluntarily converted to Chapter 7, the creditor moved to have the automatic stay modified to allow enforcement of its liens. The creditor claimed it had enforceable liens under New York, Texas, and Florida law, where the engine parts were stored. The creditor also claimed a lien interest on the parts for sums the debtor owed for services to parts that had been returned to the debtor, by arguing that its extensions of credit for future services had been calculated with reference both to the anticipated fees for those services and to

\textsuperscript{766} 15 F.3d at 1119.
\textsuperscript{767} \textit{Id.} at 1119-20.
\textsuperscript{768} \textit{Id.} at 1118.
\textsuperscript{769} 167 B.R. 880 (Bankr. N.D. Ill. 1994).
the debtor's outstanding balance for services rendered. The court accepted this argument and held that the creditor had a colorable claim against the parts held for repair, which would be determined by the resolution of the factual issues concerning the parties' business relationship. Noting that under 11 U.S.C. section 362(d)(2) the court may lift the automatic stay as to collateral in which a debtor has no equity, the court denied the summary judgment motion.

XII. PENAL ACTIONS AGAINST PILOTS AND PASSENGERS

In United States v. Compton, the Ninth Circuit affirmed defendant's conviction for attempted air piracy but vacated entry of judgment and sentence on his conviction for interference with a flight crew member on the basis that the interference charge was a lesser included offense of the attempted air piracy conviction.

On February 10, 1991, defendant boarded a Houston-bound Southwest Airlines flight in Oakland, California. Approximately forty-five minutes after departure, he handed the senior flight attendant a note stating he had nitro glycerin on his person and a bomb in his luggage. This note demanded that the flight divert to New York and that defendant be given $13 million in ransom money before proceeding to Cuba.

The captain notified air traffic control of the problem and descended from 26,000 feet to 10,000 feet to avert the loss of cabin pressure in the event of an explosion. Defendant was then informed that the flight did not have enough fuel to fly to New York and would have to stop in San Diego. At that point, defendant announced, "I'm not serious."

The plane landed in San Diego and defendant was arrested. Defendant confessed he had attempted to hijack the flight because he needed money, but "after I got into it I decided it wasn't going to work." Defendant was indicted, convicted, and sentenced to thirty years for piracy and twenty years on the interference charge, the sentences to run concurrently.

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770 Id. at 885. The court noted that ordinarily an artisan's lien is relinquished when the property is returned to the debtor, as it can no longer be said the artisan was relying on the property to satisfy his fee. Id.
771 Id.
772 Id.
773 5 F.3d 358 (9th Cir. 1993).
The Ninth Circuit affirmed the piracy conviction on the basis that delivery of the note alone was more than sufficient to comprise attempted air piracy, as it constituted “the use of a threat to seize the aircraft.” However, the court vacated judgment on the interference charge, which was based on defendant’s interference with the captain’s and flight attendants’ duties, because it was a lesser included offense necessarily committed in the act of attempted air piracy.

In United States v. Oesterblad, defendants appealed the denial of their motions to dismiss their indictments for fraudulent conspiracy and for mail and wire fraud. The indictment arose from defendant’s alleged fraud in a scheme of bonus mile acquisitions that defendants redeemed for travel credits.

Defendants contended on appeal that their conduct did not comprise a “scheme” or “artifice” designed to defraud the carrier of its “property.” The Ninth Circuit rejected this argument, holding that “dishonest methods or schemes designed ‘to wrong[ ] one in his property rights’ or ‘the deprivation of something of value by trick, deceit, chicane or overreaching’ will fulfill the scheme to defraud element,” and that the bonus mile credits that defendants obtained satisfied the “property” element of the fraud offense. The Ninth Circuit also affirmed the trial court’s finding that the bonus miles were “things of value,” and, hence, were “property” for purposes of the federal mail and wire fraud statutes.

In United States v. Ross, the United States appealed the district court’s suppression of two packages of cocaine that were discovered in defendant’s carry-on luggage by security employees of an air carrier on which defendant had been ticketed. The incident occurred at the beginning of defendant’s one-way flight from Los Angeles to Chicago and on to Washington D.C., for which defendant paid cash, stating that she was not carrying any personal identification. Because of these facts, the air carrier required that her luggage be X-rayed at the ticket counter, although defendant was not so advised.

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774 5 F.3d at 360.
775 Id.
776 12 F.3d 1110 (9th Cir. 1993) (unpublished opinion available at 1993 WL 478420, at *1 (Mar. 9, 1993)).
777 Id. at *1.
778 Id.
779 Id.
780 32 F.3d 1411 (9th Cir. 1994).
The X-ray of defendant’s luggage revealed the presence of two unidentifiable items. An air carrier employee removed and opened the first such item, a Rolex watch box that contained cocaine. The employee advised the Los Angeles International Interagency Narcotics Task Force, which dispatched an officer who told defendant to open the second unidentifiable item, which also turned out to be a container of cocaine. It was undisputed that the baggage searches were conducted in conformity with FAA regulations which are directed at preventing sabotage, hijackings, or terrorist acts.

The trial court suppressed the evidence of both packages on the basis that the searches constituted state conduct and were conducted without search warrants. With respect to the second package, the court ruled that the air carrier’s employee had opened the package directly at the request of the narcotics officer, and, therefore, was acting as the government’s agent in conducting a warrantless search. The Ninth Circuit agreed that the first search fell squarely within the state action rule, notwithstanding the fact that it was conducted by the air carrier’s employees, because “the search was part of the overall, nationwide anti-hijacking effort.”

In the Tenth Circuit case of United States v. Jenny, defendant appealed his convictions on two counts arising from his intimidation of flight crew members and one count arising from abusive sexual contact, arguing that the district court had erred in enhancing his sentence under federal sentencing guidelines on the basis that he had recklessly endangered the safety of the aircraft and passengers. Defendant had been sentenced to fifty-one months imprisonment for each of the intimidation counts and six months for the abusive sexual contact count, the sentences to be served concurrently.

The convictions were based on the following facts: on July 29, 1992, the defendant boarded United Airlines Flight 475 from Denver, Colorado, to Ontario, California, in order to serve his sentence for a drunk driving offense. Upon boarding the aircraft, the defendant was abusive to a flight attendant, and, during the flight, repeatedly used vulgar expletives when addressing the cabin crew, sexually molested a cabin attendant, and generally harassed the passengers. The flight was ultimately required

781 Id. at 1413-14.
782 7 F.3d 953 (10th Cir. 1993).
to make an unscheduled landing in Grand Junction, Colorado, where defendant was arrested and removed from the airplane.

In defense to premeditation charges at trial, defendant had relied on expert witness testimony that he had a fear of flying and suffered from severe alcohol dependency and that his actions were spontaneously caused by these factors, as aggravated by dread induced by his forthcoming incarceration and from leaving his girlfriend. On appeal, he argued that the district court’s application of the guidelines enhancing his sentence was in error, basing his challenge on the argument that there was insufficient evidence to support the finding that he had the requisite “foreknowledge” to support a determination of recklessness, an argument the Court of Appeals swiftly rejected.\textsuperscript{785}

In \textit{State v. Omar},\textsuperscript{784} the Ohio Court of Appeals affirmed defendant’s conviction for forgery of merchandise receipts he submitted to an air carrier for the purpose of avoiding Warsaw Convention liability limitations for lost baggage.

Upon arriving in Istanbul, Turkey, on a flight from Cleveland, Ohio, defendant discovered that his luggage had been torn open and its contents stolen. Defendant claimed to have lost $4450 in property. The air carrier agreed to pay defendant the $640 mandated by the Warsaw Convention and promised to reimburse him completely if he could supply receipts for the missing items. Defendant then submitted altered receipts, and the air carrier contacted the police.

Defendant appealed his conviction for forgery on the basis that he did not have the requisite intent to defraud because he was only attempting to regained the value of his lost property. The appellate court rejected this argument and affirmed defendant’s conviction, ruling that, as the air carrier was only obligated to pay defendant $640, his forgery was an attempt to fraudulently obtain the $3800 difference.\textsuperscript{785}

The appeal of \textit{State v. Wagar}\textsuperscript{786} arose from appellant’s conviction for “misconduct at an emergency,” in violation of section 2917.13(A) of the Ohio Revised Code.

In attempting to land his “light weight fabric” airplane at Freedom Field in Medina County, appellant crashed and the airplane came to rest upside down on the runway. Officers of the

\textsuperscript{783} Id. at 957.
\textsuperscript{785} Id.
\textsuperscript{786} 632 N.E.2d 546 (Ohio Ct. App. 1993).
Ohio State Highway Patrol assisted at the scene, including one who instructed the appellant not to move the airplane from the runway. Despite these instructions, appellant tied a rope to the airplane and was again instructed not to move it. In response to appellant's statement that he was going to move the airplane anyway, the officer repeated her instruction, whereupon appellant finally ceased his efforts. The officer then continued her investigation and allegedly touched or pointed at the airplane with her clipboard. The appellant requested that the officer not touch the airplane because she might damage the fabric, whereupon she arrested appellant for misconduct at an emergency.

Appellant argued to the Ohio Court of Appeals that the trial court incorrectly overruled his motion for acquittal, that his conviction was against the manifest weight of the evidence, and that the trial court incorrectly ruled that the Ohio statute was not preempted by federal regulations requiring preservation of wreckage at the scene of the accident. Appellant's first two assignments of error were overruled by the court of appeals on the basis that the evidence supporting his conviction was sufficient.787

The court rejected appellant's preemption argument ruling that preemption was inapplicable where, as here, the court perceived no conflict between the federal regulation and the Ohio statute, as both were directed at preserving evidence at accident scenes.788 The court commented that its ruling was based on the fact that the Ohio statute buttressed the federal provision and stated that, in its view, appellant had violated the federal regulation by attempting to remove the airplane from the runway.789

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787 Id. at 547-48.
788 Id. at 548-49.
789 Id. at 549.