Recent Cases and Developments in Aviation Law - Part II

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Recommended Citation
George S. Petkoff, Recent Cases and Developments in Aviation Law - Part II, 56 J. Air L. & Com. 491 (1990)
https://scholar.smu.edu/jalc/vol56/iss2/4
RECENT CASES AND DEVELOPMENTS IN AVIATION LAW

PART II*

GEORGE S. PETKOFF

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* This is the second half of the Recent Developments article. Part I can be found in Volume 56:1.
### V. Federal Tort Claims Act

#### A. Discretionary Function Exception

The Federal Tort Claims Act (FTCA)\(^1\) authorizes actions against the United States for damages resulting from injury to or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any federal government employee acting within the scope of her employment under circumstances "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."\(^2\) The FTCA does not apply, however, to any claims based upon an act or omission of a governmental employee exercising due care in performing or failing to perform a discretionary function or duty authorized under a federal statute or regulation, whether

\(^2\) 28 U.S.C. § 2674 (1988). The statute, however, specifically precludes liability "for interest prior to judgement or for punitive damages." *Id.*
or not the discretion has been abused.\(^3\)

In *Leone v. United States*,\(^4\) the plaintiffs brought an action against the United States under the FTCA, alleging that aviation medical examiners, acting as government employees, were negligent in examining a pilot for evidence of heart disease prior to the pilot obtaining his FAA certification. The plaintiffs' decedents died in an aircraft crash when the pilot apparently suffered a heart attack and lost control of the craft. According to the plaintiffs, the physicians failed to adequately question the pilot about his medical history and failed to sufficiently examine him for clinical evidence of angina or coronary heart disease. As a result, the pilot received certification in violation of federal regulations specifying that no applicant with an established medical history or clinical diagnosis of myocardial infarction, angina pectoris, or coronary heart disease could receive a satisfactory medical certificate.\(^5\)

The government's primary argument for dismissal of the action was based on its interpretation of a recent United States Supreme Court case.\(^6\) The government contended that the Supreme Court had made it clear that the discretionary function exception to the FTCA extended to all activities undertaken pursuant to regulatory authority. The *Leone* court determined, however, that the Supreme Court decision involved federal regulations empowering government employees to make policy judgments when conducting airline inspection compliance reviews and that such power was discretionary. The court did not believe that the Supreme Court decision could be construed so broadly as to bring all regulatory activities

\(^3\) 28 U.S.C. § 2680(a) (1988). The provisions of the FTCA do not apply to "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).


under the discretionary powers exception. The court concluded that the discretionary function exception was inapplicable to the government’s alleged failure to apply clearly articulated, undeviating medical standards in the context of a physical examination. Therefore, the plaintiffs were entitled to maintain an action against the United States under the FTCA.

On the basis of the discretionary function exception, the federal district court in Pepper v. United States dismissed an action brought under the FTCA for lack of subject matter jurisdiction. The plaintiffs represented the estates of a pilot and a co-pilot, who were killed when their aircraft lost power during take-off and struck trees located near the departure end of an airport runway. The plaintiffs claimed that the trees were an "obstruction" to air navigation in violation of federal regulations. They alleged that the defendant, acting through the Federal Aviation Administration (FAA), breached its duty to "eliminate" the obstruction and that the breach proximately caused the decedents’ death.

The court examined the applicable statutes and regulations and held that the regulations pertaining to objects affecting navigable airspace did not require the FAA to remove obstructions. The court noted that the statutory language suggested discretionary rather than mandatory requirements, and general policy standards rather than specific discretion. The court, therefore, concluded that the FAA had discretion in the manner in which it dealt with obstructions at the airport. Assuming the FAA took no steps to exercise the discretion, the court reasoned that it had no power to hear the plaintiffs’ claim. The court did find that the FAA could be held liable for negli-

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7 Leone, 690 F. Supp. at 1187.
8 Id. at 1188.
9 21 Av. Cas. (CCH) 17,775 (W.D. Mich. 1988).
11 Pepper, 21 Av. Cas. (CCH) at 17,776.
12 Id.
gently attempting to remedy an obstruction of the runway's approach slope by creating a displaced threshold, constructively moving the physical end of the runway to a point further away from the trees. However, the court found no evidence to suggest that the FAA negligently created, maintained, publicized, or operated the runway's displaced threshold.

In *Fleming v. United States*, a pilot and copilot brought an action seeking damages from the federal government under the FTCA, for injuries sustained when their aircraft crashed while attempting to land with the aid of a Non-Directional Beacon (NDB), a government-operated navigational aid. The plaintiffs alleged that the NDB had been improperly placed for use as a separate navigational device. They further contended that their use of the NDB was necessary because the airport's Instrument Landing System (ILS) facility was not operating at the time of the crash. The government argued that its previous acquisition of the existing NDB as a federal navigational facility was a discretionary act protected by the discretionary function exception to the FTCA.

The court relying on *Berkovitz v. United States*, concluded that governmental conduct which engendered reliance did not in and of itself create an actionable claim under the FTCA. Rather, the claimant was required to show that the challenged conduct did not involve an element of judgment or choice, or that the judgment or choice did not concern an area intended to be protected from liability. The *Fleming* court determined that the government's conduct arguably involved settled policy matters, including the cost of moving the NDB to a location consistent with its use as a separate navigational facility, the temporary nature of such a move, the cost

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15 *Id.*
16 21 Av. Cas. (CCH) 18,335 (W.D. Pa. 1989).
17 *Id.* at 18,336.
19 *Fleming*, 21 Av. Cas. (CCH) at 18,338.
incurred in returning the NDB to its original location once the airport's ILS facility was returned to service, and the availability of manpower and property upon which the NDB could be temporarily located. Since the airport would have been closed to all instrument landings without the NDB or ILS facilities, air safety also was a consideration.

The court held that the discretionary function exception did not apply if the FAA was required to operate the NDB when the airport's ILS was out of service in accordance with a federal statute, regulation, or policy specifically prescribing such a course of action. Since it was unknown whether the government had a choice in operating the NDB at the time of the crash, the government's motion for summary judgment was denied on the issue of the applicability of the discretionary function exception.\(^\text{18}\) The court, however, did grant partial summary judgment in favor of the government with regard to the plaintiffs' assertion that a cause of action existed under the FTCA merely because the government's conduct engendered reliance and actually subjected them to a more dangerous condition.\(^\text{19}\)

In Charlima, Inc. v. United States,\(^\text{20}\) the plaintiff filed suit against the FAA alleging negligence when a designated representative, authorized to make airworthiness inspections under federal regulation,\(^\text{21}\) failed to discover an aircraft's damaged wing spars. The airworthiness inspector approved the craft, and the FAA issued a certificate of airworthiness. The certificate was revoked when the plaintiff discovered the damaged wing spars.

The plaintiff alleged that the inspector was a federal employee and was negligent in failing to discover the damaged wing spar. The district court granted the defendant's motion for summary judgment, holding that the

\(^{18}\) Id. at 18,339.

\(^{19}\) Id.

\(^{20}\) 873 F.2d 1078 (8th Cir. 1989).

United States was immune from tort liability under the discretionary function exception to the FTCA.\(^{22}\) The plaintiff appealed, contending that the government was liable under the FTCA, that the discretionary function exception was inapplicable, and that the airworthiness inspector was a federal employee.

Under the FTCA the conduct of a representative can subject the federal government to liability only if the representative is classified as a federal employee. The crucial element in determining whether an individual may be considered a federal employee is the amount of control the federal government has over the individual's performance.\(^{23}\) The court of appeals in \textit{Charlima} concluded that the designated airworthiness inspector was not an employee of the FAA since the FAA did not control his day-to-day activities.\(^{24}\) Although the FAA acted generally as an overseer, it did not manage the details of the inspector's work or supervise him in his daily investigative duties. In addition, the FAA had no customary contractual relationship with the inspector, nor was he on the FAA payroll or otherwise compensated by the FAA. Instead, the inspector was paid by the airworthiness certificate applicant, who elected to use him to inspect its aircraft at its own cost instead of allowing FAA personnel to conduct the inspection.

The court also held that the mere promulgation of FAA regulations governing the inspection process did not bring a designated aircraft inspector under the scope of federal employment.\(^{25}\) The court noted that if the United States were liable for the acts of designated representatives, every governmental attempt to enhance the safety of the workplace or a transportation system could lead to

\(^{22}\) \textit{Charlima}, 873 F.2d at 1080. "A Designated Airworthiness Representative (DAR) may . . . (2)(a) Perform examination, inspection, and testing services necessary to the issuance of certificates . . . in the area of maintenance, or . . . in the area of manufacturing and engineering." \textit{Id.}


\(^{24}\) \textit{Charlima}, 873 F.2d at 1081-82.

\(^{25}\) \textit{Id.} at 1081.
governmental tort liability, and the effect "would be to make the Government a joint insurer of all activity subject to safety inspection." Since the designated representative was not a federal employee, the court found it unnecessary to address the issue of whether the federal government was immune from liability under the discretionary function exception.

B. Federal Pre-emption

In *In re Air Crash Disaster at Stapleton International Airport, Denver, Colorado, November 15, 1987*, Continental Airlines (Continental) moved for summary judgment or dismissal of the plaintiffs' punitive damage claims on the grounds that: (1) federal regulation of interstate air traffic and commercial air carriers pre-empted state regulation of aircraft safety through tort claims for punitive damages; and (2) compliance with federal regulations prevented a finding of liability under state punitive damage statutes as a matter of law.

The district court concluded that federal law did not pre-empt the state law claims for punitive damages. Relying on the holding of *Silkwood v. Kerr-McGee Corp.*, the court found that even when federal statutes, regulations, and agencies closely regulate conduct in interstate commerce, "punitive damages have long been a part of traditional state tort law," preserved by a savings clause included in the federal statute. Here, the savings clause of the Federal Aviation Act stated, that "nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

The court further held that the presumption against

26 Id. at 1082 (quoting Garbarino v. United States, 666 F. 2d 1061, 1066 (6th Cir. 1981)).
28 Id. at 1186.
30 *Air Crash at Denver*, 721 F. Supp. at 1187 (quoting *Silkwood*, 464 U.S. at 255).
pre-emption, which normally attached to traditional state regulation of health and safety, could only be defeated by clear indications in the statute or legislative history that Congress specifically intended to limit state tort liability to actions for compensatory damages. The court concluded that various provisions of the Federal Aviation Act did not overcome that presumption and, consequently, federal law did not pre-empt state law claims for punitive damages. 32

C. Constitutional Challenges

Lake v. Lake County, Montana 33 was an eminent domain proceeding brought by the City of Ronan (Ronan) to condemn the plaintiffs' property for an airport expansion project. The plaintiffs responded by seeking a preliminary injunction to halt the city's sanction, a summary judgment motion, and a delay of the proceedings. The plaintiffs also sought a preliminary injunction against Lake County to prohibit funding of the city's activities. The District Court of Lake County denied the plaintiffs' motion and quashed the motion for preliminary injunction against the county. 34 The plaintiffs appealed to the Montana Supreme Court.

The Montana Supreme Court held that a joint agreement, entered into pursuant to state statute, by a city and others, for the purpose of developing a regional airport, did not prohibit the city from independently exercising its power of eminent domain. Even though the statute required joint action when an eminent domain proceeding was brought under the authority of the joint airport board, the statute did not, on its face, preclude action separate and apart from that taken by the joint airport board. In addition, the Montana Constitution endowed cities with a broad grant of powers. The court concluded that to limit the statutory scheme to a narrow interpretation

32 Air Crash at Denver, 721 F. Supp. at 1188.
34 Id., 759 P.2d at 162.
restricting the city's power of eminent domain would contravene both constitutional and legislative requirements. The court further held that the constitutional right to due process guaranteed that no person would be deprived of property in an eminent domain proceeding without adequate notice, hearing, and just compensation. The plaintiffs argued that it was unfair to allow the city to bring an independent eminent domain proceeding and thereby manipulate the geographical area subject to public necessity determination. The court concluded, however, that the plaintiffs were unable to cite authority supporting their contention, and that the city's compliance with the state statutory eminent domain procedures clearly satisfied the due process requirements.

D. Negligence

In Beattie v. United States, the district court found that U.S. Navy air traffic controllers stationed in Antarctica were not negligent in causing or contributing to the crash of a passenger aircraft into a mountain. The court determined that the careless attitude of the airline in changing flight plans without thoroughly briefing the flight crew about the switch and its implications, resulting in the aircraft straying twenty-six miles off course and several thousand feet too low, caused the crash. The crew did not avail itself of several fail-safe systems, any one of which would have enabled it to discover in ample time that the aircraft was not on a proper course and would have permitted the crew to alter the improper course without significant difficulty. Since the air traffic controllers had no reason to suspect that the errors had occurred and that a dangerous condition existed, and since the flight crew was in a better position than the controller to appreciate the danger, the court determined that the controllers had no

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35 Id., 759 P.2d at 165.
36 Id. (relying on Housing Auth. v. Bjork, 109 Mont. 552, 98 P.2d 324 (1940)).
37 Id., 759 P.2d at 166.
basis for suspecting the flight was in danger or peril, or for redirecting the flight or taking extraordinary measures that the flight crew never requested them to take.\textsuperscript{39}

The plaintiffs' principal claim was that the air traffic controllers offered radar guidance to the aircraft but breached a duty to provide such guidance after the crew of the aircraft had accepted it. The court found no formal undertaking, under which the Navy would have owed a duty to the plaintiffs' decedents. The court also found that the Navy had not breached an informal duty to render services, either gratuitously or for a consideration. The court concluded that no legal duty ran from the Navy to the civilian aircraft to furnish air traffic control services on a routine basis.\textsuperscript{40}

If Navy personnel explicitly led the crew of a particular flight to believe that certain services would be forthcoming, such personnel would have a duty to exercise reasonable care in rendering those services. The crew of an aircraft, however, would not be justified in assuming that radar guidance would be available unless and until they were specifically advised by the air traffic controller that radar contact had actually been established. The court held that the evidence revealed that such advice was never explicitly given to this particular flight crew and, further, that establishment of radar contact could not have been implicitly assumed by the crew.\textsuperscript{41}

Finally, the court held that the air traffic controllers were not in a position to challenge or second guess the pilot's representations regarding what he could see and where he was going, particularly when the pilot informed the controller that he could see where he was going. The air traffic controllers could not have assumed that the crew did not have the high terrain in sight. If the flight crew believed that it could not proceed without radar assistance, they had an obligation to go elsewhere, and

\textsuperscript{39} Id. at 1084.
\textsuperscript{40} Id. at 1073.
\textsuperscript{41} Id. at 1078.
the air traffic controllers could not be faulted for failing to anticipate that the crew would proceed anyway and that it would do so at an altitude which would inevitably lead to a crash.\textsuperscript{42}

In \textit{Nicholson Air Services, Inc. v. United States},\textsuperscript{43} the plaintiff brought an action under the FTCA, arising from an aircraft crash on approach to Westmoreland County Airport in Pennsylvania. The plaintiff alleged that the United States was liable because an FAA navigational aid, designed to provide information to aircraft approaching the airport, was faulty.

The United States Fire Insurance Company, which provided hull insurance on the aircraft, filed an administrative claim with the FAA. After the claim was denied, the plaintiff brought suit against the United States in the federal district court. The government moved to dismiss, claiming that since a person other than the person who filed the administrative claim instituted the suit, the court lacked subject matter jurisdiction. The plaintiff contended that the insurance company should be added or substituted as a plaintiff under Federal Rules of Civil Procedure 15(a) and 17(a). The court denied the government’s motion to dismiss, relying upon \textit{Executive Jet Aviation, Inc. v. United States},\textsuperscript{44} in which the Sixth Circuit held that “the filing of an administrative claim by an insured tolled the filing of the statute of limitations with respect to a claim filed by an insurer.” In \textit{Executive Jet Aviation}, the insured was allowed to amend its administrative complaint to show the insurer as a joint claimant and, to join the insurer as a plaintiff in the lawsuit.\textsuperscript{45}

The \textit{Nicholson} court found no substantive difference between the insurer’s assertions in the administrative claim before the FAA and the claim which was asserted in the plaintiff’s suit, since both were for the same amount and

\textsuperscript{42} Id. at 1079.
\textsuperscript{44} 507 F.2d 508 (6th Cir. 1974).
\textsuperscript{45} Id. at 515.
arose out of the same facts. As a result, the court permitted the insurer to be substituted for the owner as a plaintiff in the suit pursuant to the Federal Rules of Civil Procedure.\(^4\)

In *Hayes v. Gates Learjet Corp.*,\(^4^7\) the district court found an FAA examiner negligent for passing a pilot in a flight certification test after the applicant failed to successfully execute an emergency maneuver during takeoff. The examiner was also found negligent in providing instructions between the first and second attempt to execute the maneuver and in allowing the applicant a second chance to perform the maneuver. The first and third acts of negligence were each found to be a proximate cause of the aircraft’s crash. In addition, the court found the safety pilot negligent in failing to fulfill his duty to take control of the aircraft and that such negligence was also a proximate cause of the crash. The United States was liable, under the FTCA, to the safety pilot, who suffered serious and permanent brain injuries, and to his wife, as a result of the FAA examiner’s negligence.\(^4^8\)

In *In re Air Crash at Dallas/Fort Worth Airport, August 2, 1985*,\(^4^9\) the plaintiffs brought a wrongful death action arising out of an air crash in which 137 persons were killed. Delta Airlines was joined as a plaintiff against the United States, the FAA, and the National Weather Service, in order to establish liability and to recoup damages under the FTCA. The court found in favor of the federal government, ruling that the plaintiffs had failed to prove that the government was guilty of any negligence proximately causing the crash. The court held, instead, that the crew’s attempt to land the aircraft in a thunderstorm and its failure to execute a missed approach constituted negligence and were the proximate causes of the crash.\(^5^0\)


\(^{4^7}\) 21 Av. Cas. (CCH) 18,115 (W.D. Tex. 1988).

\(^{4^8}\) *Id.* at 18,121.


\(^{5^0}\) *Id.* at 1280-85.
The court recognized that both through their own observation and from communications received during their descent and approach to the airport, the crew had sufficient information to assess the developing weather situation along the final approach to the runway and to make a proper decision either to continue the approach or to take alternate action. The crew was aware of variable winds and rain showers of sufficient intensity to obscure forward vision. At no time during the final approach did it request additional information on weather conditions from any one of the available sources. The court determined that the crew's failure to solicit additional weather information was evidence of an unreasonable disregard for the risk of landing in unstable weather. The court found the crew undertook an unreasonable risk by continuing the approach in a thunderstorm. The wind shear and the potential for a microburst should have prompted the crew to take immediate action to execute a missed approach.

The court found, however, that the government air traffic controllers breached a duty by failing to inform incoming aircraft of the existence of extreme and hazardous weather north of the airport, and that the controllers were not justified in assuming that the weather was observable by the crew. Nevertheless, the court held that the breach was inconsequential to the fate of the aircraft. There was no evidence that the crew would have acted differently with confirmation of information already known. The court also found that the air traffic controller was not negligent in failing to change runways prior to the crash because the pilot had the responsibility to decide, and was the final authority on, which runway would be used for landing.

In Schuler v. United States, the estates of a pilot and a passenger brought wrongful death actions under the

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51 Id. at 1281-82.
52 Id. at 1289-90.
53 Id. at 1290.
FTCA against the federal government, alleging negligence on the part of the FAA's air traffic controllers. The pilot radioed air traffic control at the airport that he had lost an engine and was returning to the airport. He requested landing on Runway 32, and the controller gave him visual approach clearance to land. An Air Force C-130, however, was obstructing the reciprocal end of Runway 32. The pilot requested runway clearance, and two seconds later the controller told the C-130 to exit the extension of Runway 32. On approach, the pilot banked steeply to the side of the inoperable engine. The aircraft stalled and plunged to the ground. Upon impact, the aircraft burned, killing all passengers.

The district court assigned twenty percent of the responsibility for the crash to the United States. Specifically, the court found that the air traffic controller breached his duty to keep the runway clear and to keep the pilot informed about the C-130.55

On appeal, the Sixth Circuit reversed the district court, holding that there was no duty of constant communication between the radar controller and the pilot during clear weather conditions with regard to visible ground situations after an approach clearance and prior to issuing a final landing clearance.56 Although an air traffic controller must exercise reasonable care, the court found that "under visual flight rules conditions, the primary responsibility for the safe operation of the aircraft rests with the pilot, regardless of traffic clearance."57

The court of appeals further concluded that the district court erred in holding that the conduct of the air traffic controller was a proximate cause of the accident. An air traffic controller, the court noted, is not required to foresee or anticipate unlawful, negligent or grossly negligent acts of pilots. Here, the court found that the controller could not foresee that the pilot would place the aircraft

55 Schuler, 675 F. Supp. at 1099.
56 Shuler v. United States, 868 F.2d 195 (6th Cir. 1989).
57 Id. at 197 (quoting Coatney v. Berkshire, 500 F.2d 290, 292 (8th Cir. 1974)).
too close to the airport, at an excessive rate of speed, as he returned to land. The pilot exercised his own judgment and banked into the dead engine, causing the stall and resulting crash. The appellate court reversed the district court's decision and remanded the case for dismissal of the complaint against the federal government.\(^{58}\)

E. Governmental Contractor Defense

Courts have long recognized a special relationship between a government contractor and the federal government which shields manufacturers supplying products to the government from tort liability for flaws in product design.\(^{59}\) In *Boyle v. United Technologies Corp.*,\(^{60}\) the United States Supreme Court addressed the issue of the broad availability of the government contractor defense, recognizing that in certain areas of "uniquely federal interest," state law would be preempted and, if necessary, replaced by federal common law. Specifically, the Court found that an area of uniquely federal interest was the government's procurement of military hardware.\(^{61}\) The Court propounded the basic elements of the government contractor defense, grounding its contours in the discretionary function exception to the FTCA.

The Court determined that liability for design defects in military equipment cannot be imposed "when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of equipment that were known to the supplier but not to the United States."\(^{62}\) These conditions

\(^{58}\) *Id.* at 198-99.

\(^{59}\) See, e.g., *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940). The government contractor defense derived from the concept of sovereign immunity. "If a contractor's authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will." *Id.* at 20-21.

\(^{60}\) 487 U.S. 500 (1988).

\(^{61}\) *Id.* at 504-06.

\(^{62}\) *Id.* at 512.
are intended to ensure that the manufacturer will be able to rely on the government contractor defense only if the government has participated in the design decision, and the government is aware of a design problem but has made no attempt to correct the defect. If the government was not involved in the design, and defects are later detected, the contractor will not be able to rely on the defense.\footnote{Id. at 513.}

Prior to the Boyle decision, the jury in Harduvel v. General Dynamics Corp.\footnote{878 F.2d 1311 (11th Cir. 1989), cert. denied, 110 S. Ct. 1479 (1990).} had found General Dynamics negligent in its design and manufacture of an F-16 fighter aircraft which had crashed, killing the pilot. The jury also found General Dynamics negligent in its failure to warn of the dangers of the aircraft, strictly liable for the design and manufacturing defects, and strictly liable for failing to provide adequate warnings.\footnote{Id. at 1315.} On appeal to the Eleventh Circuit, General Dynamics relied solely on the government contractor defense even though the recent Boyle decision was specifically aimed at defects in design. Although the plaintiff claimed that the cause of the crash, wire chafing in the electrical system, was a manufacturing defect, General Dynamics contended it was a design defect.\footnote{Id. at 1317.}

The Eleventh Circuit agreed with General Dynamics and concluded that the use of the government contractor defense was appropriate under the circumstances. The court reasoned that in determining whether an alleged defect was one of design or manufacture, the focus should be on the protection of the discretionary activity for which the defense was intended. If the defect was inherent in the government approved product or system, the defense would be available.\footnote{Id.} Specifically, the court found that the United States Air Force had developed the F-16 project,
participated in the design and production process, and continually communicated with General Dynamics about the project. In addition, the court found that General Dynamics had advised the Air Force about the chafing problem and its potentially serious consequences. The court concluded that General Dynamics had satisfied all three elements of the Boyle defense and reversed the judgment of the district court.\(^6\)

In *Nicholson v. United Technologies Corp.*\(^6\) the plaintiff and four other technicians were repairing a helicopter’s landing gear, manufactured by United Technologies Corporation (United Technologies), when the landing gear exploded. The plaintiff filed suit under the Connecticut Products Liability Act\(^7\) and claimed negligence, breach of warranty, strict liability, and failure to warn. The plaintiff alleged that the maintenance manual provided by United Technologies failed to adequately warn technicians of the danger involved in repairing and disassembling the nose landing gear strut. United Technologies moved for summary judgment on various grounds, including the government contractor defense for failure to warn.\(^7\)

In reviewing United Technologies’ reliance on the government contractor defense, the district court applied the three elements of the Boyle decision’s test. Although recognizing that Boyle did not explicitly extend to failure to warn of manufacturing defects, the court concluded that when the government provided the product’s specifications, the contractor could not be liable for safeguards omitted from those specifications. The court extended its reasoning to include the contents of the product’s maintenance manual for those situations in which the government had prepared or dictated the information.\(^7\)

The court required United Technologies to demon-
strate that it acted pursuant to and in conformity with specifications established or provided by the government concerning the contents of the maintenance manual and that those specifications were "reasonably precise." In support of its motion, United Technologies provided evidence that the manual was in conformity with government specifications. Additional evidence showed that the government maintained control over the manual's contents and made revisions without United Technologies' knowledge.

Under the third requirement of the government contractor defense, the court required United Technologies to provide evidence that it had warned the United States about the dangers, if any, in the use of the equipment that were known to United Technologies but not to the United States. United Technologies provided evidence that it was aware of no hazard posed by the landing gear strut when the maintenance manual was drafted, nor did it subsequently become aware of any specific knowledge supporting the existence of a hazard. The plaintiff failed to produce any evidence that United Technologies knew or should have known about the defect and thus should have warned the government. The court held that United Technologies satisfied all three requirements for use of the government contractor defense and granted summary judgment as to the plaintiff's failure to warn claims. Although the plaintiff's claims were based on state tort law, the court found that the state-imposed duty of care as a basis for a contractor's liability directly conflicted with the duty imposed by the government contract, thus satisfying the "uniquely federal interest" standard of Boyle.

VI. INDEMNIFICATION

In State of Alaska v. Korean Airlines Co., South Central Air, Inc. (SCA) brought suit against Korean Air Lines

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73 Id. at 604.
74 Id. at 605.
(KAL) for damages incurred when an SCA aircraft collided with a KAL DC-10 cargo jet attempting to take off from the wrong runway at Anchorage International Airport. KAL, in turn, brought a third-party claim against the State of Alaska, alleging, among other claims, negligence in the design and maintenance of the airport's runway. In its defense, the state relied on a provision in its lease with KAL requiring KAL to indemnify, defend, and hold harmless the state from all liability and losses resulting from any act or omission by KAL connected with KAL's use of the airport. The trial court granted summary judgment to KAL on the indemnity issue, concluding that the indemnification clause extended only to losses arising out of the terminal premises, and not to taxiways and runways. The state appealed to the Alaska Supreme Court.

The supreme court held that, although an indemnity agreement generally did not violate public policy by indemnifying the indemnitee for its own negligence, a court would not give effect to a contractual provision indemnifying the indemnitee's own negligence when the clause tended to promote breach of a duty owed to the public at large. The court further held that, although the indemnity agreement did not totally destroy the state's incentive to act with great care in fulfilling its duty to maintain the airport for the public's constant access and use, the public duty exception was applicable due to the general nature of the indemnification provision.

The court also concluded that since the airport provided a public service to both airlines and the traveling public, it would be unfair to allow the airport to impose liability-avoiding agreements on those it was intended to serve, particularly when the airlines had no choice but to accept such an agreement if they were to use the airport. To require airport lessees to indemnify the state for its

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76 Id. at 316.
77 Id. at 317.
78 Id. at 317-19.
own negligence also would violate statutory provisions ensuring the rights of the public to the rightful, equal, and uniform use of the airport.\textsuperscript{79}

VII. NEGLIGENCE

A. Liability of Aircraft Carriers

In \textit{Bidini v. American Trans-Air, Inc.},\textsuperscript{80} an airline passenger was injured when she tripped over debris while walking up the aisle of a grounded aircraft. Alleging that the air carrier possessed either actual or constructive notice of the dangerous condition of the cluttered aisle, the passenger filed suit, claiming that the airline failed to fulfill its duty to make the aisle safe. The defendant moved for summary judgment on the grounds that the plaintiff failed to establish a prima facie case of negligence by not specifically identifying what caused her to trip.

The district court denied the defendant's motion for summary judgment, noting that the airline had constructive knowledge of the general condition of the aisle and that the evidence was sufficient to raise an inference of the existence of a dangerous condition. The court noted that when an owner or operator invites participation of the public in its operation, it must necessarily recognize and be ready to discharge a heightened duty of care arising out of the dangers reasonably anticipated as a result of that participation.\textsuperscript{81} The court concluded that since the accident took place on premises constantly supervised by airline employees, the jury had the right to consider the type of premises and heightened duty of care.\textsuperscript{82}

In \textit{Ricci v. American Airlines},\textsuperscript{83} an airline passenger brought suit against an air carrier for physical and psychological injuries sustained in an in-flight scuffle. A fight broke out between the plaintiff, a smoker seated in the air-

\textsuperscript{79} \textit{Id.} at 318-19.

\textsuperscript{80} 21 Av. Cas. (CCH) 17,784 (E.D.N.Y. 1988).

\textsuperscript{81} \textit{Id.} at 17,786.

\textsuperscript{82} \textit{Id.}

craft's smoking section, and a nonsmoking passenger seated next to the plaintiff. The nonsmoking passenger was assigned to the smoking section as result of the airline's overbooking of the flight. The plaintiff and the nonsmoking passenger began fighting after the plaintiff refused, in response to the nonsmoking passenger's request, to stop smoking. Immediately after the incident, a flight attendant advised the plaintiff to settle down; otherwise, the FBI would be summoned when the aircraft landed. The flight attendant then escorted the plaintiff against his will to the rear of the aircraft where he remained for the duration of the flight. The plaintiff alleged that he was assaulted as a direct result of the negligent acts of the airline and its agents. The airline moved for summary judgment, contending that it could not be held accountable for the unforeseeable actions of the nonsmoking passenger. The trial court granted the airline's motion.\textsuperscript{84}

On appeal, the New Jersey Superior Court reversed the trial court. The court held that although the lower court properly evaluated the airline's conduct by attempting to determine whether it had an obligation to protect passengers from reasonably foreseeable harm by fellow passengers and strangers, it improperly concluded that the airline had no such duty because the harm could not have been anticipated.\textsuperscript{85} The superior court found that reasonable jurors could have concluded that the air carrier should have foreseen a flareup between a militant non-smoker and an intransigent smoker in a situation the airline itself created, and it should have taken appropriate safeguards to prevent the situation.\textsuperscript{86} Additionally, the court found that a reasonable jury could have found the conduct of the flight attendant abusive and insulting.\textsuperscript{87} The court concluded that the issue of the flight attend-

\textsuperscript{84} Id. at 17,844.
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 17,844-45.
\textsuperscript{87} Id. at 17,846.
B. Damages: Pre-Impact Suffering

In Larsen v. Delta Airlines, the surviving spouse of a deceased passenger killed in a Delta aircraft crash sought damages from the air carrier for her past and future pecuniary loss, loss of companionship and society, and mental anguish. Pursuant to stipulations filed in the action, the district court found that the air carrier did not contest liability and that the plaintiff was not required to establish liability, fault, or proximate cause on the part of the defendant in connection with the decedent’s death. Further, the court found that the decedent did not contribute to the cause of his death.

The decedent’s estate sought damages for the conscious pain and suffering the decedent experienced immediately before his death. Although such damages are recoverable under Texas law, the court noted that a damage award for pre-impact mental anguish may not be granted when the evidence is speculative or conjectural. Because of the conflicting and speculative testimony regarding the final minutes of the Delta flight, the court denied an award of damages for any pre-impact suffering the decedent may have experienced.

C. Procedure

In Miller v. Delta Air Lines, the parents of a passenger who died in an aircraft crash filed a wrongful death diversity action against the air carrier under Texas state law. The decedent’s daughter had previously filed a survivor

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88 Id. at 17,845-46.
90 Id. at 718.
91 Id. at 721.
92 Id.
93 861 F.2d 814 (5th Cir. 1988).
and wrongful death diversity action as representative of the decedent’s estate under Florida state law and received a judgment in the amount of $775,000.94

The Fifth Circuit held that the doctrine of res judicata barred the parents’ action because their claim was part of the same cause of action that had been litigated in the wrongful death action brought by the decedent’s daughter in federal district court in Florida.95 The parents argued that their claim was a separate cause of action because the damages sought were fundamentally different in kind from those pursued in the first suit. The court held that this was not enough to prevent the operation of res judicata.96 The parents argued that they were neither parties nor privy to the first suit. The court found that the parents were effectively the same party as, or in privity with, the daughter under Florida’s wrongful death statute. The court affirmed the district court’s summary judgment in favor of the air carrier on the grounds of res judicata.97

In Love v. Port Authority,98 the plaintiff, an employee of United Airlines (United), alleged negligence in the New York and New Jersey Port Authority’s ownership, operation, management, and control of United’s premises at John F. Kennedy International Airport, where the plaintiff fell and incurred physical injuries.

United leased the premises from the Port Authority, and the plaintiff contended that the Port Authority was liable for his injuries because a landlord has a duty to keep its property repaired in accordance with New York City’s administrative regulations. The plaintiff also argued that United should be impleaded as a necessary third party, because under the terms of its lease with the Port Authority, United was responsible for maintaining the premises in a safe condition.

94 Id. at 815.
95 Id. at 817.
96 Id. at 817-18.
97 Id. at 818.
98 21 Av. Cas. (CCH) 18,521 (N.Y. Sup. Ct. 1989).
The New York Supreme Court granted the Port Authority's cross-motion for summary judgment. The court concluded that the Port Authority was a state agency and, therefore, was exempt from local regulation. The court also relied on the fact that United's lease provided that the air carrier would maintain the premises. The fact that a provision of the lease gave the Port Authority the right to re-enter did not mean that it had control of the premises. Finally, the court held that the plaintiff could not bring in United as a necessary party because impleader is only available to a defendant.

In re Air Crash Disaster at Stapleton International Airport, Denver, Colorado, November 15, 1987, addressed the problems of multidistrict litigation. The district court concluded that just and efficient disposition of the plaintiffs' claims would be best served by a plan consolidating all claims arising from the crash in the Colorado district court for trial and resolution of common issues. In reaching its decision, the court considered the overall convenience of the parties, as opposed to individual preferences, and the fact that most of the evidence and witnesses were located in Denver. After determination of the common issues, the cases transferred to the Colorado District court would be returned to their original forums.

The court also ordered a bifurcated test on the issues of common law tort liability and punitive damages. Because the issues were substantially separate and distinct, the court determined that bifurcation would reduce the burden of trial preparation. The court concluded that a separate determination of liability might resolve various issues frustrating settlement and, thus, possibly prevent the need for a separate damages trial.

99 Id. at 18,522.
100 Id.
102 Id. at 1458.
103 Id. at 1458-59.
A. Admissibility of Federal Agency Investigatory Reports

The United States Supreme Court, in *Beech Aircraft Corp. v. Rainey*, held that portions of an investigatory report, otherwise admissible under the Federal Rules of Evidence, were not inadmissible merely because they stated a conclusion or opinion. In *Rainey*, a Navy training aircraft crashed during a training exercise, killing a flight instructor and her student. Because of severe damage to the aircraft and the fact that there were no survivors, the cause of the crash could not be determined with certainty. The surviving spouses brought a products liability suit against Beech Aircraft Corporation, the plane’s manufacturer, and Beech Aerospace Services, Inc., the Navy’s maintenance and servicing contractor. The plaintiffs alleged that loss of engine power, due to a fuel control system defect, had caused the crash. The defendants alleged pilot error, suggesting that the aircraft had stalled during an abrupt maneuver.

The Supreme Court addressed the long-standing conflict among the circuit courts over whether Federal Rule of Evidence 803(8)(C), which provides an exception to the hearsay rule for public investigatory reports containing “factual findings,” extends to allow admission if the reports contain conclusions and opinions.

The primary issue during trial was whether pilot error or equipment malfunction had caused the crash. Both sides relied primarily on expert testimony. The defense presented an investigative report prepared on order of the training squadron’s commanding officer pursuant to authority granted in the manual of the Judge Advocate General (JAG Report). The JAG Report included findings of fact, opinions, and recommendations supported by over sixty attachments. The trial judge initially determined that the JAG Report was sufficiently trustworthy.

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105 *Id.* at 156-57.
and admissible with respect to its "factual findings," but that portions including opinions or conclusions would not be admissible. The day before trial, however, the court reversed its ruling, over the plaintiff's objections, and agreed to admit some of the conclusions concerning the impossibility of determining exactly how the crash occurred and information allegedly concerning pilot error.\textsuperscript{106}

The jury returned a verdict for the defendant, but the Eleventh Circuit reversed and remanded for a new trial. The panel agreed with the plaintiff’s argument that Federal Rule of Evidence 803(8)(C) did not encompass valuable conclusions or opinions. The panel held that conclusions contained in the JAG Report should have been excluded. On rehearing \textit{en banc}, the court of appeals divided evenly on the question of admissibility under Rule 803(8)(C) and reinstated the panel decision.\textsuperscript{107} The Supreme Court granted certiorari.

Because the Federal Rules of Evidence are legislative enactments, the Supreme Court looked at the traditional tools of statutory construction in order to construe the rule’s provisions. The Court examined the rule’s language, its legislative history, and its framers’ intent. The Court took a broad approach to admissibility under Rule 803(8)(C), looking to the rule’s plain language permitting admission of reports propounding factual findings. The Court felt the rule’s limitations and safeguards lay elsewhere. First, the requirement that reports contain factual findings barred the admission of statements not based on factual investigation. Second, the trustworthiness provision required the trial court to determine whether the report, or any portion thereof, was sufficiently trustworthy to be admitted. The Court found no reason to strain an interpretation of Rule 803(8)(C) that was contrary to the liberal thrust of the federal rules.\textsuperscript{108}

\textsuperscript{106} Id. at 159.
\textsuperscript{107} 827 F.2d 1498 (11th Cir. 1987).
\textsuperscript{108} Rainey, 488 U.S. at 169.
The Supreme Court held that portions of investigatory reports are admissible despite the fact that they state a conclusion or opinion. As long as the conclusion is based on a factual investigation and satisfies the rule's trustworthiness requirement it should be admissible, along with other admissible portions of the report. The Court agreed with the trial judge's determination that certain of the JAG Report's conclusions were trustworthy and, therefore, were correctly admitted into evidence. The Supreme Court reversed the Court of Appeals with respect to the Rule 803(8)(C) issue, but remanded the case on other grounds.109

In In re Aircrash in Bali, Indonesia,110 the Ninth Circuit Court of Appeals affirmed a district court decision involving a fatal aircrash, finding no reversible error in the admission of a Federal Aviation Administrative (FAA) report concerning Pan American World Airways' (Pan Am) safety record and procedures, and the admission of the airline's report of its own safety record and problems.111 The case involved the crash of a Pan Am flight in Bali in which all the crew and passengers were killed.

Pan Am contended that admission of the FAA and Pan Am reports constituted reversible error. The court of appeals concluded that the trial court had broad discretion to admit or exclude evidence and reviewed the trial court's decision only for an abuse of its discretion. Even if an error were found, reversal would be appropriate only if the court could determine that the error affected the substantial rights of the parties.112

The court found that the FAA report was properly admitted, pursuant to Federal Rule of Evidence 803(8)(C), which creates a hearsay exception for public documents. The court, relying on the Supreme Court decision in

109 Id. at 175.
111 Id. at 816.
112 Id.
Rainey, found that the report was not inadmissible simply because it included valuative or normative findings. Further, Pan Am failed to demonstrate that the FAA report was untrustworthy or unduly prejudicial.113

Pan Am further argued that the district court erred in admitting Pan Am’s report, pursuant to Rule 801(c)(2)(D) and that the report was unduly prejudicial. The rule provides that a statement is not hearsay if it is offered against a party opponent and is a statement made by the party’s employee concerning a matter within the scope of the employment made during the existence of the employment relationship. The court held that the report was admissible as an admission of Pan Am employees concerning matters within the scope of their employment, since all but eight of the authors of the report were experienced Pan Am crew members.114

Finally, Pan Am argued that both the reports, in effect, were subsequent remedial measures and were thus inadmissible under Federal Rule of Evidence 407.115 Since Pan Am’s report took many months to prepare and was dated only one day after the crash, it was apparent to the court that the report was not a response to the crash. The court found no basis for treating it as a subsequent remedial measure.

Furthermore, the court concluded that the FAA report was not a subsequent remedial measure within the meaning of Rule 407. The FAA investigation began five days after the crash and the report was dated fourteen months after the crash. The FAA report did not qualify as a subsequent remedial measure because it was prepared by the FAA without the voluntary participation of Pan Am. Pan Am’s management was legally obligated to cooperate with the FAA’s investigation, thus admission of the FAA report

113 Id.
114 Id.
115 FED. R. EVID. 407 states that evidence of measures taken after an event which would have made the event less likely to occur is not admissible to prove culpable conduct. FED. R. EVID. 407.
did not penalize Pan Am for its voluntary participation in safety measures.\textsuperscript{116}

In \textit{In re Air Crash Disaster at Stapleton International Airport, Denver, Colorado, November 15, 1987},\textsuperscript{117} the court admitted an accident investigation report of the National Transportation Safety Board (NTSB) into evidence, since the report was tendered in support of the passengers' claims for negligence, punitive damages, and false advertising of pilot qualifications and safety under the Texas Deceptive Trade Practices Act. After the aircraft crash, the NTSB, in accordance with federal regulations, began an investigation. The report found in part that pilot error and improper de-icing procedures caused the crash. The report included an appendix which covered "Human Factors" contributing to the crash. The plaintiffs tendered portions of the report, including the appendix, in support of their claims. The defendants objected generally to admission of the report and specifically to the admission of the appendix which suggested that the cockpit crew, and especially the copilot in control of the aircraft, lacked the qualifications necessary to fly the DC-9 in the weather conditions confronted on the day of the crash. The court ruled formally on the objections and admitted the edited report into evidence.\textsuperscript{118}

The district court reaffirmed admission of the edited NTSB report but noted a federal statutory limitation on the admissibility of NTSB reports. The statute excluded from evidence any NTSB reports relating to an accident or investigation and precluded a report's use in any suit or action for damages arising out of the materials contained in the report.\textsuperscript{119}

\textsuperscript{116} \textit{Aircrash at Bali}, 871 F.2d at 817.
\textsuperscript{117} 720 F. Supp. 1493 (D. Colo. 1988).
\textsuperscript{118} Id. at 1495.
\textsuperscript{119} 49 U.S.C. app. § 1441(e) (1988). "No part of any report or reports of the National Transportation Safety Board relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports." 49 U.S.C. app. § 1441(e).
Because many of the plaintiffs' claims had originally been filed in Idaho, the defendants urged the district court to apply a Ninth Circuit Court of Appeals ruling that the statute acted as a complete bar to the admission of any portion of the final NTSB report. The district court determined, however, that the Tenth Circuit's contrary holding on the issue should apply because it was the controlling precedent for federal courts sitting in Colorado, the forum to which all the plaintiffs' claims had been transferred for pre-trial and trial purposes.\textsuperscript{120}

The Tenth Circuit had held that the federal statute did not totally prohibit admission of all evaluation, opinion, and conclusion evidence. The primary emphasis of the provision was to exclude reports which expressed the NTSB's views as to the probable cause of the accident. Further, the legislative history of the statute demonstrated that its purpose was to prevent usurpation of the jury's role by evidentiary use of the NTSB's conclusion about the probable cause of the accident. The district court found that these persuasive evidentiary principles controlled the admissibility of the NTSB report and denied the defendants' motion to exclude the entire NTSB.\textsuperscript{121}

The court determined, however, that its ruling did not resolve the issue of the appendix's admissibility. To resolve this question, the court relied on the Supreme Court's decision in \textit{Rainey}. The court concluded that the appendix would be admissible under Federal Rule of Evidence 803(3)(C) even though it contained conclusions, as long as those conclusions were based on factual investigation and were trustworthy under evidentiary rules. Because the appendix had been prepared following the NTSB's pretrial investigation of the crash, its admissibility depended on a determination that the report was trustworthy. The court applied four factors articulated by the

\textsuperscript{120} \textit{Air Crash at Denver}, 720 F. Supp. at 1496.

\textsuperscript{121} \textit{Id.} (relying on \textit{Keen v. Detroit Diesel Allison}, 569 F.2d 547, 549-51 (10th Cir. 1978)).
Tenth Circuit for determining the trustworthiness of government reports: (1) the timeliness of the investigation, (2) the special skills or experience of the investigator, (3) whether a hearing was held and the level at which it was conducted, and (4) any possible motivation or bias problems in preparing the report. The fact that the agency preparing the report had an interest in its conclusions went to the weight accorded the evidence, not to its admissibility, absent a specific showing of bias. Since the appendix had been adopted in the NTSB's final report, the report, taken as a whole, satisfied the trustworthiness requirement of Rainey. The court concluded that the report was not based principally on hearsay and was not so filled with inadmissible conclusions that the entire report should have been excluded.

IX. INSURANCE

A. Coverage

In Monarch Insurance Co. v. Castellano, the plaintiff insured the defendant's single-engine plane. The insurance policy specifically limited coverage to occurrences and losses on flights within the continental United States, Canada and Mexico, and provided no coverage on flights more than ten miles off shore. The engine on the defendant's single-engine aircraft failed in mid-flight on a trip from Florida to the Bahamas. The defendant was forced to "ditch" the aircraft in the Atlantic Ocean approximately ten miles off the Florida coast.

The defendant filed a claim with Monarch for the loss of his aircraft. Monarch denied liability because of the specific policy provisions. Monarch then filed a declaratory judgment action to determine its liability to the defendant under the insurance policy. The trial court found that the

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122 Id. at 1498 (citing Perrin v. Anderson, 784 F.2d 1040, 1047 (10th Cir. 1986)).
123 Id. at 1499.
policy provisions did not cover the loss.125

On appeal, the defendant argued that the trial court’s grant of summary judgment in favor of Monarch should be reversed because the territorial coverage provision of the policy was ambiguous. The Illinois appellate court affirmed the trial court’s judgment and held that the language of the insurance policy was not ambiguous and should be read as providing coverage only for flights within the continental United States, Canada, or Mexico. For aviation insurance coverage purposes, the court held that when a policy provided coverage for a loss within the United States, the geographical limit included only the continental landspace of the United States, three nautical miles from the shore, and “the outside boundaries of an area within which flights, on reasonable routes, [were] covered.”126

In General Electric Credit Corp. v. Kelly & Dearing Aviation,127 Kelly & Dearing (K&D) had purchased an aircraft with funding provided by General Electric Credit Corporation (GECC). K&D subsequently leased the aircraft to a pilot who obtained insurance coverage for both himself and K&D. The pilot also obtained a lienholder’s endorsement to the policy protecting GECC’s interest. The endorsement excluded coverage in the event of “conversion, embezzlement or secretion of the aircraft.”128

The pilot flew the aircraft to Santa Marie, Colombia, where it was seized by the Colombian government. GECC filed a claim against the insurance policy but was denied recovery when the insurance company discovered that the loss occurred outside the continental United States, the pilot himself was not covered because he did not meet the minimum pilot qualifications required under

125 Id., 531 N.E.2d at 909.
126 Id. (quoting Vargas v. Insurance Co. of N. America, 651 F.2d 838, 840 (2d Cir. 1981)).
128 Id. at 751.
the policy, and the aircraft had been seized by a foreign
government. The insurance company claimed that these
policy violations amounted to a conversion of the aircraft.
GECC filed suit for recovery under the lienholder’s en-
dorsement. The trial court entered judgment in favor of
GECC, concluding that although the pilot may have vio-
lated the policy, thereby precluding any claim the pilot
and K&D might have, GECC had an independent right of
recovery under the lienholder’s endorsement. On ap-
peal, the Tennessee Court of Appeals determined that
although the lienholder’s endorsement protected GECC
regardless of any acts of the pilot, the pilot’s actions had
effectively deprived GECC of its property for an indefinite
period of time. The court held that an effective conver-
sion of the aircraft had occurred and GECC could not re-
cover on its claim.

B. Exclusions

In Monarch Insurance Co. v. Polytech Industries, Inc., the
plaintiff, Monarch Insurance Company (Monarch), filed
suit seeking a declaratory judgment to determine its liabil-
ity under the insured’s insurance policy. The claim arose
from the crash of a Cessna aircraft owned by Polytech In-
dustries, Inc. (Polytech). The crash occurred when a pro-
spective purchaser of the aircraft took it on a flight for
demonstration purposes, accompanied by Polytech’s ex-
ecutive vice president. Although both men were pilots,
neither was properly certified for the aircraft at the time of
the flight. In addition, the insured failed to have the air-
craft inspected as required by FAA regulations, preclud-
ing recovery for loss of the aircraft under Georgia state
law.

The district court held that Polytech’s failure to per-
form the annual FAA inspection constituted a violation of
the aircraft’s airworthiness certificate, thus suspending

129 Id. at 752.
130 Id. at 754.
coverage under the terms of the insurance policy. Recovery under the policy was also precluded because neither pilot was properly certified in accordance with FAA regulations. Therefore, the plaintiff's motion for summary judgment was granted.\footnote{655 F. Supp. at 1065.}

In \textit{Gardner Trucking, Inc. v. South Carolina Insurance Guaranty Association},\footnote{297 S.C. 235, 376 S.E.2d 260 (1989).} Gardner Trucking, Inc. (Gardner), brought an action against the South Carolina Guaranty Association (Guaranty Association) to recover insurance proceeds for damages to a Piper Comanche aircraft. The owner hired a pilot to fly the aircraft to South Carolina from Indiana. While the pilot was attempting to land, the aircraft's landing gear malfunctioned, and the underside of the plane was severely damaged. Several days after the crash, the owner reported to the sheriff's department that the aircraft had been stolen. Evidence revealed that the pilot had little experience with retractable gear aircraft and only ten hours experience in the Comanche model. In addition, the aircraft did not have an airworthiness certificate.

Guaranty Association denied the owner coverage for the damage to the aircraft on the basis of three policy exclusions. First, the insurer determined that the aircraft was converted while in the possession of the pilot, who the insurer contended was a bailee. Second, the FAA had not issued an airworthiness certificate. Third, the owner had entrusted the airplane to a pilot who lacked the required hours and experience on the particular type of aircraft. The trial court granted a summary judgment in favor of Guaranty Association, on the basis of all three policy exclusions.\footnote{\textit{Id.}, 376 S.E. 2d at 262.}

The owner appealed only the issue of the applicability of the policy's conversion provision. The owner conceded that he abandoned his exception with respect to the two other insurance exclusions. Because any of the three...
insurance provisions would independently exclude coverage, the South Carolina Supreme Court considered only whether either of the abandoned exclusions was causally connected to the loss. The court concluded that the pilot flew without the experience required under the insurance policy, and the owner did not dispute that the pilot’s lack of experience was causally connected to the crash. Thus, the court held that the trial court properly granted a declaratory judgment in favor of Guaranty Association.\textsuperscript{135}

X. AIRPORTS

A. Negligence

In \textit{Hill Air of Gadsen, Inc. v. Marshall},\textsuperscript{136} the owner of an aircraft brought suit for breach of contract and negligence against a mooring company after the aircraft was damaged at a tie-down facility during a severe thunderstorm. At trial, the jury returned a verdict in favor of the owner, and the mooring company appealed to the Alabama Supreme Court after its motion for judgment notwithstanding the verdict was denied.\textsuperscript{137}

The court concluded that there was substantial evidence to sustain the jury’s verdict, and the jury was warranted in finding that the damage to the aircraft could have been prevented had the mooring company used adequate means to anchor it. The court reasoned that since the storm was not such a bizarre occurrence that it could not have been reasonably anticipated, and since it appeared that the damages would not have occurred but for the negligence of the tie-down facility’s owner, the trial court did not err in refusing to direct a verdict in favor of the mooring company.\textsuperscript{138}

In \textit{Blum v. Airport Terminal Services, Inc.},\textsuperscript{139} a wrongful death action was filed against several defendants after a

\begin{footnotesize}
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\item \textsuperscript{135} \textit{Id.}
\item \textsuperscript{136} 526 So.2d 15 (Ala. 1988).
\item \textsuperscript{137} \textit{Id.} at 16.
\item \textsuperscript{138} \textit{Id.} at 17.
\item \textsuperscript{139} 762 S.W.2d 67 (Mo. Ct. App. 1988).
\end{itemize}
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fatal crash resulting from the misfueling of an aircraft. The jury returned verdicts against two of the defendants. The City of St. Louis was found negligent for failing to regulate refueling services at the airport, and Airport Terminal Services (ATS) was found negligent in conducting its refueling services of the aircraft.

ATS appealed the jury verdict to the Missouri Court of Appeals on the grounds that the damages awarded were excessive and that the trial court had improperly instructed the jury on the issue of damage assessment. The court found that evidence introduced at trial established that in a high risk operation, such as the refueling of aircraft, which involved the possibility of catastrophic consequences to human life and health, ATS, presumably an expert in the field, denied its employees the training and protection necessary to avert tragedy. The court determined that this conduct reflected a want of care indicative of an indifference to the consequences. The court held that the aggravated circumstances language of the trial court's jury instruction was properly included, and the trial court did not err in failing to define aggravated circumstances.\(^\text{140}\)

The jury had found that the City of St. Louis, which had granted a lease to ATS, breached its continuing, non-delegable, legal duty to comply with federal regulations. The regulations required that the city ensure that its tenants had a sufficient number of trained personnel and procedures for safely storing, dispensing, and otherwise handling fuel, including marking and labeling storage tanks and identifying specific types of fuel.\(^\text{141}\)

On appeal, the court had no difficulty in finding evidence sufficient to establish the city's breach of its continuing nondelegable duty. Because of the potential for disaster to both crew personnel and the general public, the federal regulations imposing an affirmative supervisory duty on the city, and the city's failure in any way to

\(^{140}\) Id. at 74.

\(^{141}\) 14 C.F.R. § 139.321(a), (d) (1990).
comply with its duty, the court held that the trial court's submission of a jury instruction on aggravating circumstances was not erroneous. The court concluded that the city had a duty under federal regulations to ensure that operations at its airports were conducted safely by both the city and its tenants. Failure of the city's key employee to be aware of the existence of that duty and to investigate or discuss safety with ATS evidenced a complete indifference to and a conscious disregard for the safety of others. Therefore, the court determined that damages were properly awarded against the city.\textsuperscript{142}

B. Searches and Airport Security

In United States v. $124,570,\textsuperscript{143} a flight terminal security (FTS) officer operating a security scanner at Seattle International Airport picked up a dark mass inside the defendant's briefcase on the X-ray screen. After asking the defendant to open the briefcase, the FTS security officer found a large quantity of currency. In accordance with airport policy, the FTS officer returned the briefcase to the defendant and notified the United States Customs Service and airport police. Drug Enforcement Administration (DEA) agents met the defendant's flight in Los Angeles and had narcotic-sniffing dogs check it for signs of illicit drugs. Based upon the dogs' reactions, the DEA agents determined that the currency had come in contact with at least one illegal substance.

The United States filed a civil forfeiture action pursuant to federal statute.\textsuperscript{144} The defendant moved to suppress the evidence found in his briefcase, but the trial court

\begin{footnotesize}
\textsuperscript{142} Blum, 762 S.W.2d at 77.

\textsuperscript{143} 873 F.2d 1240 (9th Cir. 1989).

\end{footnotesize}
ruled that the currency was subject to forfeiture.\textsuperscript{145}

On appeal, the Ninth Circuit held that the use of airport security screening systems to achieve ends unrelated to air safety violated the constitutional rights of commercial air travelers. The court found that airport security checks were administrative searches, and, like all other governmental searches, subject to the Fourth Amendment’s reasonableness requirement. To the extent that administrative searches were used for purposes other than those contemplated by the regulatory scheme, they fell outside the scope of their approved purpose. The court noted that administrative searches were not searches authorized for use as part of a criminal investigation to secure evidence of a crime.

In an earlier case, \textit{Davis v. United States},\textsuperscript{146} the Ninth Circuit had approved airport security searches based on the understanding that they would be limited to searches for guns or explosives and that they would be no more burdensome than necessary to achieve that objective. In \textit{Davis}, the court relied on a United States Supreme Court decision in which the Court held that administrative searches were generally reasonable because they were "neither personal in nature nor aimed at discovery of evidence of a crime [and involved a] relatively limited invasion of privacy."\textsuperscript{147} The \textit{United States v. $124,570} court held that a limited administrative search cannot also serve unrelated law enforcement purposes. To the extent the defendant was identified by FTS officials and reported to the Customs agents, the search by the Customs agents could not be justified as an administrative search on the basis of governmental interest in ensuring air traffic safety.\textsuperscript{148}

The court also considered whether the search would be justified under any exception to the warrant requirement.

\textsuperscript{145} United States v. $124,570, 873 F.2d at 1242.
\textsuperscript{146} 482 F.2d 893 (9th Cir. 1973).
\textsuperscript{147} \textit{Camara v. Municipal Ct.}, 387 U.S. 523, 537 (1967).
\textsuperscript{148} United States v. $124,570, 873 F.2d at 1247.
The court was reluctant to hold that the consent given for airport security searches exceeded the rationale of those searches. The court concluded that the exceptions to the warrant requirement established for exigent circumstances, inventory searches, or border searches were not applicable. Accordingly, the trial court’s order denying a motion to suppress the evidence uncovered by the search of the briefcase was reversed.\footnote{Id. at 1248.}

XI. FAA Regulations

A. FAA Suspension of Certificates

In ConnAire, Inc. v. Secretary, United States Department of Transportation,\footnote{887 F.2d 723 (6th Cir. 1989).} ConnAire appealed a National Transportation Safety Board (NTSB) order suspending ConnAire’s air carrier operating certificate. Prior to the NTSB order, the Federal Aviation Administration (FAA) had issued an emergency order revoking ConnAire’s certificate, alleging that ConnAire was guilty of violating Federal Aviation Regulations resulting in a serious threat to public safety. The alleged violations included aircraft operation without appropriate pilot ratings certification and failure to keep accurate flight time and maintenance records. In a hearing before an NTSB Administrative Law Judge (ALJ), the ALJ found substantial evidence supporting many of the FAA’s allegations of ConnAire’s violations of federal regulations. The ALJ concluded, however, that ConnAire’s violations, while serious, did not merit the penalty of revocation. The ALJ ordered ConnAire’s certificate suspended for one hundred twenty days, ending the emergency revocation. Both the FAA and ConnAire appealed to the NTSB, and the suspension was stayed pending the appeal.\footnote{Id. at 724.} The NTSB unanimously held that there was sufficient evidence to support the ALJ’s findings with regard to ConnAire’s violations. ConnAire appealed to
the United States Court of Appeals for the Sixth Circuit. While the appeal was pending, ConnAire completed its suspension.\footnote{152 Id. at 725.}

The FAA contended that ConnAire’s appeal was moot because it had served its suspension and there was nothing to appeal. The court of appeals, however, concluded that the case was not moot because it was reasonably foreseeable that the FAA might have future dealings with ConnAire and that a suspension on ConnAire’s record would likely affect that relationship. The court determined that the suspension was a situation “capable of repetition, yet evading review” and constituted an exception to the mootness doctrine.\footnote{153 Id. at 726.}

The court considered, but ultimately rejected, ConnAire’s contention that the FAA abused its discretion by originally revoking ConnAire’s certificate in violation of its own guidelines. The court viewed ConnAire’s interpretation of the guidelines as too narrow. Neither the court nor the NTSB could hold the FAA to its internal guidelines if those guidelines were inconsistent with the agency’s statutory mandate. If the FAA had statutory authority for its actions and the guidelines conflicted with that authority, then the statute had to be given preference over the guidelines. The pertinent statute, stated, in part: “If [the Secretary of Transportation] determines that safety in air commerce or transportation and the public interest requires, the Secretary of Transportation may issue an order . . . suspending, or revoking, in whole or in part, any type certificate . . . .”\footnote{49 U.S.C. app. § 1429(a) (1988).} In determining whether such a suspension or revocation should be ordered, “the findings of fact by the Board or the Secretary of Transportation, if supported by substantial evidence, shall be conclusive.”\footnote{49 U.S.C. app. § 1486(e) (1988).}

As to the FAA’s use of its discretion, the Sixth Circuit
found that there was more than enough evidence to show that the agency reasonably could have concluded that ConnAire showed "'a lack of capability'; an 'unwillingness to comply with the principles of air safety'; or 'abuses that were detrimental to the public interest.'" The evidence, as the ALJ found, revealed serious violations, worthy of serious action under a fair interpretation of the FAA's guidelines. Accordingly, the FAA properly revoked ConnAire's certificate, based upon its findings that it was guilty of violating several Federal Aviation Regulations resulting in a serious threat to public safety.

Finally, ConnAire argued that the NTSB erred when it refused to determine if the FAA's actions were taken in accordance with its guidelines. The NTSB stated that "'we agree with the administrator that the NTSB's role is not to evaluate the administrator's enforcement program in terms of the FAA enforcement manual and that the administrator's exercise of discretion in selection of the type of penalty . . . is unreviewable.'"

ConnAire contended that the NTSB had the authority, under its general power, to hear an appeal on the issue of whether the FAA has followed its internal guidelines. The court of appeals rejected ConnAire's contentions. The court concluded that while the NTSB did have "'power to review the agency's compliance with its policies in cases where the policies interpreted were relatively specific and of a type that would be relied upon by private parties, this was not the case here.'" The court affirmed the NTSB decision.

B. Judicial Review of FAA Decisions

In Chritton v. National Transportation Safety Board, an emergency medical evacuation pilot sought review of an

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156 ConnAire, 887 F.2d at 727.
157 Id. at 728.
158 Id.
159 Id.
160 888 F.2d 854 (D.C.Cir. 1989).
NTSB order suspending his commercial pilot’s license because of a helicopter crash. In considering the pilot’s appeal, the District of Columbia Court of Appeals concluded that it was required to review the NTSB decision in accordance with the provisions of the Administrative Procedures Act, which provided that the applicable standard of review was the substantial evidence test. The court found that the test required it to uphold an administrative agency’s order if, on review, it determined that there was substantial evidence, defined as relevant evidence that a reasonable mind would accept as adequate to support the agency’s conclusion, even though a plausible alternative interpretation of the evidence would support a contrary view.

The court concluded that there was substantial evidence to uphold the NTSB’s finding of pilot negligence. The pilot had apparently run into some power lines in adverse weather. Based on earlier weather reports conveyed to the pilot, the court found that the adverse weather conditions were foreseeable. Additionally, the power lines also were a foreseeable condition, since they were clearly marked on the pilot’s flight chart, and the pilot had flown the route before. Based on the evidence presented, the court agreed with the NTSB’s finding that the pilot was negligent in failing to avoid known or foreseeable circumstances.

The court then examined the NTSB’s rejection of the pilot’s emergency defense. In interpreting the defense, the court found that the emergency doctrine applied only under sudden and unexpected situations. Only unforeseeable adverse weather would constitute an emergency

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161 See 49 U.S.C. app. § 1903(d) (1988). The court defined substantial evidence as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Chritton, 888 F.2d at 856 (quoting Refrigerated Transport Co. v. I.C.C., 616 F.2d 748 (5th Cir. 1980).

162 Chritton, 888 F.2d at 860.

163 See 14 C.F.R. § 91.3(b) (1990). This regulation provides that “[i]n an emergency requiring immediate action, the pilot in command may deviate from any rule . . . to the extent required to meet that emergency.” 14 C.F.R. § 91.3(b).
triggering the defense. The court found the NTSB had acted reasonably in rejecting the emergency defense, since the plaintiff should have reasonably foreseen the bad weather conditions. Accordingly, the court affirmed the NTSB's opinion.\textsuperscript{164}

In \textit{Hill v. National Transportation Safety Board},\textsuperscript{165} the plaintiff, a helicopter pilot, sought review of an NTSB order upholding the FAA's suspension of his flight certificate for failing to maintain a safe minimum altitude and for operating an aircraft in a careless or reckless manner so as to endanger the life or property of another. The pilot contended that the alleged violations occurred in air space outside FAA jurisdiction. The Tenth Circuit noted that, under federal statute,\textsuperscript{166} the Secretary of Transportation was authorized to regulate the use of navigable air space under such terms, conditions, and limitations as he deemed necessary to insure the safety of aircraft and the efficient utilization of such air space. The court also found that the FAA had the power to revoke, suspend or modify a pilot's aviation certificate if the Secretary determined it necessary in the interest of safety in air commerce.\textsuperscript{167}

The court did determine that the incidents for which the pilot was sanctioned involved intrastate flights only and occurred outside navigable air space as defined in the applicable federal statutes.\textsuperscript{168} Nevertheless, the court concluded that the FAA still had the authority to suspend the pilot's aviation certificate. The fact that the pilot's conduct in a particular incident did not actually endanger interstate, overseas, or foreign air commerce did not exempt such conduct from FAA jurisdiction. The court further concluded that by holding an FAA issued aviation certificate, the pilot submitted to the FAA's jurisdiction

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\textsuperscript{164} Chritton, 888 F.2d at 860.
\textsuperscript{165} 886 F.2d 1275 (10th Cir. 1989).
\textsuperscript{166} 49 U.S.C. app. § 1348(a) (1988).
\textsuperscript{167} 49 U.S.C. app. § 1429(a) (1988).
\textsuperscript{168} \textit{Hill}, 886 F.2d at 1281.
\end{flushright}
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regarding any operation of aircraft that may affect safety and air commerce.\textsuperscript{169}

C. Drug Related Suspensions of Certificates

In \textit{French v. Pan Am Express, Inc.},\textsuperscript{170} the plaintiff, who had been fired by Pan Am for refusing to submit to drug testing, filed suit in Rhode Island Superior Court, seeking damages, reinstatement, and an order enjoining Pan Am from requiring him to submit to drug tests. The plaintiff claimed that Pan Am's drug testing program violated state statutes regulating the circumstances under which an employer could require its employees to submit to testing. The sole issue on appeal was whether the state statute was pre-empted by the drug testing provision of the Federal Aviation Act, as applied to airline pilots employed by interstate air carriers.\textsuperscript{171}

The First Circuit Court of Appeals held that the federal statute pre-empted state law for the purposes of providing criteria for testing aviation employees for drugs. The court concluded that federal law assigned overall responsibility for prescribing rules governing pilot qualifications to the Secretary of Transportation. The intricate web of statutory provisions afforded no room for the imposition of state law criteria concerning pilot suitability. The court inferred from the Federal Aviation Act an unmistakably clear intent to occupy the field of pilot regulation related to air safety, to the exclusion of state law. Such an intent was implicit in the pervasiveness of relevant federal regulations, the dominance of federal interest, and the legislative goal of establishing a single, uniform system of control over air safety.\textsuperscript{172}

In \textit{Mines v. National Transportation Safety Board},\textsuperscript{173} the plaintiff petitioned for review of an NTSB order affirming

\begin{itemize}
\item \textsuperscript{169} Id. at 1282.
\item \textsuperscript{170} 869 F.2d 1 (1st Cir. 1989).
\item \textsuperscript{172} French, 869 F.2d at 6-7.
\item \textsuperscript{173} 862 F.2d 617 (6th Cir. 1988).
\end{itemize}
an FAA ruling revoking the plaintiff’s transport pilot certificate for illegal drug offenses in violation of federal regulations.\textsuperscript{174} The plaintiff had been convicted of conspiracy to possess marijuana, with intent to distribute, but the trial judge suspended the plaintiff’s sentence pursuant to the Youth Corrections Act (YCA)\textsuperscript{175} and placed him on probation with supervision for five years. The court later issued a Certificate of Vacation of Conviction pursuant the YCA. Prior to the trial court’s setting aside the plaintiff’s conviction, the FAA revoked his airline transport pilot’s certificate. The NTSB upheld the FAA’s action on the ground that the YCA did not preclude an agency from considering a youth offender’s conviction in determining his qualification to hold a federal license or certificate. The Sixth Circuit reversed the NTSB’s revocation order, holding that once the pilot’s conviction was set aside pursuant to the YCA, the NTSB was not permitted to consider it as the predicate conviction in its finding of a violation of a federal regulation. The court rejected the NTSB’s argument that the YCA was a sentence statute and not an expungement statute. Relying on its previous decision in \textit{United State v. Fryer},\textsuperscript{176} the court held that a conviction set aside under the YCA could not constitute a conviction for purposes of revoking a certificate issued under federal law, stating that the YCA by legislative design was intended to give the offender a second chance, free from any record of conviction.\textsuperscript{177}

The NTSB contended that despite the expungement and rehabilitative purposes of the YCA, the public’s interest in aviation safety demanded that the plaintiff’s conviction be taken into account in considering his qualifications

\textsuperscript{174} 14 C.F.R. § 61.15(a) (1990).
\textsuperscript{176} 545 F.2d 11 (6th Cir. 1976) (holding that a conviction set aside under the federal Youth Corrections Act, 18 U.S.C. §§ 5005-5026 (1982) (repealed 1984), did not constitute a conviction for the purpose of violation of federal law for illegal possession of firearms and for making false statements to federally licensed firearms sellers).
\textsuperscript{177} Mines, 862 F.2d at 621-22.
to be a pilot. The court recognized the problems that drugs pose to society, particularly in terms of air safety and transportation but found that the YCA did not limit the setting aside of a drug-related conviction regardless of other policy issues.\textsuperscript{178}.

D. FAA Negligence

\textit{Fischer v. United States Department of Transportation,}\textsuperscript{179} arose from the crash of a Cessna 441 in which a passenger was injured and the pilot killed. The plaintiff claimed that the FAA was negligent: 1) in failing to maintain minimum altitude and position guidance for the aircraft, 2) in failing to notify the pilot that the aircraft was below the minimum descent altitude, 3) in failing to notify the pilot of the level of terrain in the area; and 4) in providing adequate information regarding weather conditions. The plaintiff alleged that these acts of negligence were the proximate cause of his injuries. The FAA, one of the defendants, argued that the controller's actions in directing the aircraft were discretionary functions, and the controller in fact had followed established operational procedures. Moreover, the district court had no jurisdiction to review functions and procedures established by federal government agencies. The FAA also claimed that the pilot's negligence was the proximate cause of the accident.

The district court found that the air traffic controller's actions were not discretionary and were subject to review. Relying on \textit{Stork v. United States,}\textsuperscript{180} the court found that a controller's failure to warn the pilot of dangerous conditions at an airport, even when the pilot knew of the dangers, was a breach of the controller's duty. The fact that the pilot may have known that he was flying the plane below minimum levels, or that the weather was bad, did not remove the air traffic controller's duty to warn the pilot of

\footnotesize{\textsuperscript{178} Id. at 622.}
\footnotesize{\textsuperscript{179} 22 Av. Cas. (CCH) 17,175 (N.D. Ohio 1989).}
\footnotesize{\textsuperscript{180} 430 F.2d 1104 (9th Cir. 1976).}
the conditions.\textsuperscript{181}

The court concluded that the government was under a duty to warn the pilot about flight conditions. The plaintiff, however, failed to provide any evidence that the FAA knew that the aircraft was below minimum levels. The plaintiff also failed to provide any legal basis or evidence that the controller had a duty to inform the pilot of the level of the terrain or that the terrain posed a hazard. The court granted the FAA's summary judgment motion on these issues.\textsuperscript{182}

The plaintiff did provide evidence about the weather conditions which revealed that two miles from the airport where the crash occurred visibility was practically zero. The controller had provided weather information for airport visibility only. The FAA argued that the failure, if any, to provide weather information was not the proximate cause of the crash. The court agreed with the FAA, finding that the pilot's disregard of his altitude, his copilot's warning, and an altitude alert warning device were the proximate causes of the crash. The court found that the plaintiff did not offer evidence that would convince a reasonable trier of fact that the FAA's alleged negligence was the proximate cause of the accident. The court concluded that the accident occurred because the pilot deliberately and intentionally flew below the weather hazard after receiving warning. The court granted the FAA's motion for summary judgment as to the plaintiff's claim that the FAA had breached its duty to provide accurate weather information.\textsuperscript{183}

E. Perfection of a Security Interest

In \textit{South Shore Bank v. International Jet Interiors, Inc.},\textsuperscript{184} South Shore Bank extended a loan to LTD Industries, Inc. (LTD) and obtained a security interest in a 1982 Gulf-

\textsuperscript{181} \textit{Fischer}, 22 Av. Cas. at 17,179.
\textsuperscript{182} \textit{Id.}
\textsuperscript{183} \textit{Id.}
\textsuperscript{184} 721 F. Supp. 29 (E.D.N.Y. 1989).
stream American airplane. South Shore filed notice of its security agreement with the FAA on June 19, 1988. On June 20, 1988, LTD contracted with International Jet Interiors, Inc. (IJI) to refurbish the interior of the aircraft. LTD subsequently defaulted on the loan from South Shore, and South Shore repossessed the aircraft in New Jersey. LTD also failed to pay IJI for its work and, in September, 1988, IJI attempted to file a mechanics’ lien against the aircraft. The FAA refused to record IJI’s notice, however, because the lien was not filed in New York, the state where the work was stated to have been performed. On November 18, 1988, IJI filed a second notice of lien, stating that the work had been performed in New Jersey and the FAA recorded the second lien notice on December 8, 1988. Because the lien included the aircraft’s title, making sale to a third part impossible, South Shore commenced an action for declaratory judgment to determine the validity of IJI’s lien.

The district court concluded that federal law pre-empted IJI’s mechanic’s lien claim. It relied on Philko Aviation, Inc. v. Schaket, 1 in which the United States Supreme Court construed section 503(c) of the Federal Aviation Act, 2 which provides that no instrument affecting the title to any aircraft is valid against innocent third parties until the instrument is filed for recordation with the FAA. The Supreme Court further concluded that section 503(c) pre-empted state laws that validated undocumented or unrecorded transfers of aircraft. 3

IJI attempted to escape the Philko holding by claiming, first, that South Shore had actual notice of IJI’s lien. With respect to IJI’s first argument, the court held that Philko had overruled any previous decisions regarding the effect of state law on the validity of an unrecorded lien. The court further held that as to IJI’s second argument, South Shore’s Security interest attached to the aircraft at the

3 Philko, 462 U.S. at 411-12.
time notice of the interest was filed. Since IJI had not filed its lien prior to that time, South Shore could not be held to have had actual notice of IJI’s claim. The court found that a lien affecting an interest in an aircraft became valid only when the lien was filed for recording with the FAA. When more than one recorded lien has been filed, the priority of those liens then should be determined by reference to applicable state law. The court ordered a further hearing on South Shore’s motion for summary judgment to determine the order of priority of recorded liens under New Jersey law.

F. Statutory Construction

In United States v. Rocky Mountain Helicopters, Inc., the federal government brought an action against Rocky Mountain Helicopters, Inc. (RMH) to recover civil penalties for alleged violations of FAA regulations, requiring RMH to provide crew members with eight hours rest every twenty-four hour work period. The court found that the defendant did not violate the applicable FAA regulation and denied the recovery of civil penalties. At issue was the interpretation of two federal regulations governing flight and duty time in effect at the time of the alleged violations. The first regulation provided that no certificate holder may designate a flight crew member, and no flight crew member may accept an assignment, unless that assignment provided for at least ten consecutive hours of rest during the twenty-four hour period preceding the planned assignment completion. RMH had been operating under an exemption to this regulation, which permitted RHM to make an assignment providing flight crew members with only eight consecutive hours of rest. This exemption formed the basis of a new regula-

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188 South Shore Bank, 721 F. Supp. at 34.
190 Id. at 1051.
tion, which was designed to replace the existing regulation and its exception and was effective on October 1, 1985.

The government claimed that the new regulation was merely a codification of the old regulation, as modified by the exemption, and that RMH's flight records indicated a violation of both regulations. RMH argued that its conduct during the time prior covered by the government's complaint was governed by the old regulation, under which certificate holders were only required to provide a rest plan while the new regulation provided that flight crew members must be relieved unless the crew member would receive eight consecutive hours of rest. Under RMH's interpretation of the regulation, flight records showed that the pilots, not RMH, had violated the regulation.

The court found that the new regulation was not enforceable against RMH until its compliance date, one year after the regulation's effective date. Therefore, RMH's conduct during the time of the alleged violation was governed by the old regulation. The court then addressed the issue of the standard of conduct required by RMH under the old regulation. The court found that the operative term "provide" did not impose strict liability upon RMH for any violation of the eight hour rest requirement. The court construed the word "provide" to mean "furnish or supply," rather than "require." The court noted that the new regulation strengthened the language of the rest requirement to read that flight crew members must be relieved if they had not received their requisite rest.195

In determining whether the defendant had violated the standard of conduct under the old regulation, the court examined the defendant's operations manual. The court found that the defendant met the requirements of the regulation by making flight assignments providing for the required amount of rest. Any violation was contrary to the

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195 Rocky Mountain, 704 F. Supp. at 1050.
defendant's operations manual and would, therefore, be an independent act by the pilot, rather than a violation by RMH.\textsuperscript{194}

XII. Passenger Actions Against Air Carriers

A. Terrorist Attack

The case of Shinn v. El Al Israel Airlines\textsuperscript{195} arose under Article 17 of the Warsaw Convention which subjects an airline carrier to absolute liability for damages sustained in the event of a death, wounding, or any other bodily injuries suffered by a passenger while aboard or in the course of embarking or disembarking an aircraft. The plaintiffs sued the air carrier for injuries they sustained during a terrorist attack while waiting to board an aircraft.

To determine whether the provisions of Article 17 applied to the plaintiffs' claims, the court analyzed whether they were in the process of embarking or disembarking at the time of the attack. In its determination, the court considered four factors: 1) the passengers' activities; 2) the passengers' control; (3) the air carrier's control over the passengers; and 4) the passengers' location. The court found that the plaintiffs had obtained their boarding passes and checked their baggage but were still free to roam the airport at will. Noting that the aircraft had not even arrived and that the plaintiffs were not in a sterile area subject to the air carrier's control, the court granted the air carrier's motion to dismiss.\textsuperscript{196}

B. Flights Delays and Missed Connections

In Padua v. Eastern Airlines, Inc.,\textsuperscript{197} the court held that the defendant, Eastern Airlines, Inc. (Eastern), was not liable under breach of contract for damages resulting from a delay in the departure of the plaintiff's flight and subse-

\textsuperscript{194} Id. at 1050-51.
\textsuperscript{195} 21 Av. Cas. (CCH) 18,331 (D. Colo. 1989).
\textsuperscript{196} Id. at 18,334.
\textsuperscript{197} 21 Av. Cas. (CCH) 17,716 (P.R. Super. Ct. 1988).
quent missed connection.\textsuperscript{198} The court concluded that the primary duty of an air carrier was to exercise the highest degree of care for the safety of its passengers. To impose liability for a flight delay which may have been caused by any number of factors related to safety, such as mechanical problems or adverse weather conditions, would be contrary to the air carrier's duty to the public. The court found that the contractual provisions contained in the tickets relating to the air carrier's liability under such circumstances were valid and obligatory and not in contravention of law, morals, or public order. As a matter of law, the air carrier was not liable for contractual damages such as those claimed by the plaintiff.\textsuperscript{199}

In \textit{Cenci v. Mall Airways, Inc.},\textsuperscript{200} the plaintiff sued to recover damages after the air carrier issuing her original ticket rerouted her to Delta Airlines, whose flight was delayed due to adverse weather conditions, causing her to miss her connecting flight. Instead of returning to the Delta counter to obtain a new ticket on a later connecting flight, the plaintiff purchased a ticket to her destination on United Airlines. The plaintiff sought damages against the original air carrier, Mall Airways, for cancellation of its flight. The City Court of Albany held that, under its contract for carriage, Mall was not liable for damages caused by the cancellation.\textsuperscript{201} Mall's contract for carriage provided that it reserved the right to cancel any flights and assumed no responsibility for the effects of such action.

Mall was also not liable for damages under the Warsaw Convention. Since Mall informed the plaintiff of its flight's mechanical problems and provided her with an alternative means of reaching her destination, Mall took "all necessary measures to avoid the damage" to the plaintiff.\textsuperscript{202} In addition, the court found no evidence that

\textsuperscript{198} \textit{Id.} at 17,717.
\textsuperscript{199} \textit{Id.} at 17,717-18.
\textsuperscript{200} 140 Misc. 2d 907, 531 N.Y.S.2d 743 (Albany City Ct. 1988).
\textsuperscript{201} \textit{Id.;} 531 N.Y.S.2d at 744.
\textsuperscript{202} \textit{Id.;} 531 N.Y.S.2d at 745.
Mall had an explicit arrangement with Delta, by which it would assume any liability for Delta’s share of the plaintiff’s circumstances. Mall was relieved from any liability caused by Delta’s delay under the provisions of Article 30 of the Warsaw Convention. The court, however, awarded the plaintiff reimbursement for the unused portion of her Mall Airways ticket.

C. Miscellaneous

The case of In Re: Passenger Computer Reservations Systems Antitrust Litigation arose out of the defendants’ ownership of computerized reservation systems (CRS). A CRS is composed of computer terminals and printers in travel agencies which are telephonically linked to the owner’s computer. The equipment allows the travel agent to send and receive air transportation booking information, book flights, and print out tickets. The subject CRS were owned by various airlines, and each CRS contained flight information for airlines other than the owner airline. The CRS owner charged the travel agents for the use of the system, and charged other airlines fees for booking air transportation through the CRS.

Defendant American Airlines owned the world’s largest CRS, the SABRE system, which over 11,000 travel agencies used to handle airline, hotel, and car reservations. At the time of this litigation, SABRE was processing over ten million reservations per month.

Defendant United Airlines was the first company to announce plans to market a CRS. Their CRS, APPOLLO, was the second largest in the world, with an estimated market share of 23%, although United claimed to have a 39% market share at the time of this litigation. American’s market share was approximately 30%, down from 40% in 1980. Eastern Airlines, TWA, and Delta shared the rest of the market. A claim was brought against the

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203 Id.
204 Id.; 531 N.Y.S.2d at 746.
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airlines for their refusal to provide competitors with reasonable access to their respective CRS, allegedly in an attempt to monopolize the market for air transportation.

The district court held that United’s refusal to accommodate its competitors did not constitute an attempted monopolization of the air transportation market.206 The court found that the airlines’ supercompetitive booking fees and contract provisions, which made it difficult for travel agents to switch systems, did not establish significant entry barriers into the market. The court also found that there were alternative systems available to the competitors. Claims that a 12% to 14% market share conferred monopoly power were unfounded due to the number of competitors.207

Due to the inability to determine relevant market and monopoly power issues, the court did not dismiss the monopolization claims on summary judgment motions. Factual questions remained as to whether the relevant market comprised the nationwide market for access to the airlines’ respective CRS by travel agents or the nationwide market for access to all CRS automated travel agents. It was not possible to assess monopoly power without a finding of a relative market.

In JM Partners/Omni Aviation v. Group Investments, Inc.208 the plaintiffs negotiated to lease two aircraft to the defendant. Following execution of the leases, the plaintiffs purchased the aircraft and had them inspected, at which time both were found to be airworthy and in good repair. Subsequently, the defendant’s employees inspected both aircraft. The defendant then informed the plaintiffs that it was dissatisfied with both aircraft and considered the leases null and void pursuant to the satisfaction clauses.

The trial court found that the defendant acted unreasonably and arbitrarily and, therefore, was in breach of the leases. The defendant’s dissatisfaction “resulted from

206 Id. at 1454.
207 Id.
208 21 Av. Cas. (CCH) 18,044 (Tenn. Ct. App. 1988).
some factors other than the proper mechanical condition or airworthiness of the planes." The court determined that the defendant did not have an "unfettered right" to determine whether it was satisfied with the aircraft, even though the satisfaction clauses provided that the leases' terms would not commence until the defendant was completely satisfied with the equipment's condition.

On appeal, the Tennessee Court of Appeals found that the evidence supported the trial court's finding that "it was the intention of the parties that both airplanes be airworthy and be delivered to the defendant in proper mechanical condition." The court also held that even under an objective standard, the clauses did not allow the defendant to act arbitrarily or capriciously. The court found that the facts showed that both aircraft were airworthy. The court concluded that any rejection had to be reasonable and based on the mechanical condition of the aircraft.

XIII. Contractual Claims

A. Breach of Contract

In United States Gold Corp. v. Federal Express Corp., Federal Express' contract of carriage and service guides limited its liability to $100.00 for loss of and failure to deliver a package containing gold grain valued at $102,042.41. The Federal Express Manifest contained an agreement between Federal Express and U.S. Gold, regarding the shipment. The Manifest included, by reference, the then current Federal Express Service Guide. The front of the Manifest contained the following provision: "By signing, shipper acknowledges and accepts the terms and conditions of shipment and agrees to be bound thereby." An
agent prepared and signed the Manifest on behalf of U.S. Gold.

The Manifest further provided a liability limitation of $100.00 per shipment unless the shipper declared a higher value in a space provided on the Manifest. Plaintiff declared no value in addition to the $100.00 per shipment. The shipper's copy of the Manifest contained a restatement of the liability limitation and the declared value.

U.S. Gold contended that the Manifest was a mere "receipt," and that it did not embody the contract of carriage. The district court found no basis for U.S. Gold's argument and held that the limitation of liability was valid and enforceable as a matter of law because it resulted from a "fair, open, just, and reasonable agreement between the carrier and shipper, [and the shipper was given] the option of higher recovery upon paying a higher rate." Federal Express' motion for partial summary judgment was granted, and its liability, if any, was limited to $100.00.

In Dopf v. United Airlines, Inc., United cancelled the plaintiff's flight after the aircraft experienced a fueling problem. The plaintiff alleged that he received multiple assurances from the codefendant Lundell, a United customer service supervisor, that he would personally guarantee that the plaintiff's baggage would be put on the plaintiff's alternate flight. When the plaintiff arrived in Denver, he was unable to locate his luggage, which contained his overcoat and prescription medicine. Plaintiff also alleged that he missed his connecting flight, requiring him to spend the night in Denver.

Although United made accommodations for his overnight stay, the plaintiff alleged that the hotel van stopped outside the terminal building, and he had to stand in subfreezing temperatures in the snow. Furthermore, upon arrival at his hotel room, the temperature was forty-five
degrees. The plaintiff claimed these conditions aggravated his illness. The plaintiff further alleged that the next morning he was unable to locate his luggage, following conversations with United and his connecting airline. Subsequently, the plaintiff decided to abandon his trip and return home. Later, United found the plaintiff’s luggage in Goodland, Kansas and returned it to him undamaged.

The New York Supreme Court granted a summary judgment motion in favor of United. The Court held that the airline’s tariff contained exculpatory clauses for certain classes of freight and limitations of liability for loss or damage to specified property, and the clauses were valid regardless of fault.\(^{217}\) The applicable tariff excused the airline from liability for failure to operate any flight according to schedule or for changing the schedule. The court determined that United had complied with its tariff provisions, since it offered to transport the plaintiff on the next flight on which space was available at no additional cost. The court found no merit in the plaintiff’s contention that the tariff provisions were inapplicable because the plaintiff did not receive the requisite notice of their terms. The court held instead, that a passenger on an interstate flight was conclusively deemed to have had notice of the contents of the transportation documents.\(^{218}\)

In addition, the court found no special contract between the plaintiff and United’s customer service supervisor, since the airline’s tariff provided that no employee of the airline had the authority to alter, modify, or waive any of the tariff’s provisions unless authorized by a corporate officer.\(^{219}\) The customer service supervisor was not personally liable to the plaintiff for any damages suffered as a result of the delay in the delivery of his baggage, since he was performing his employer’s work.

\(^{217}\) Id. at 17,837.
\(^{218}\) Id. at 17,837-38.
\(^{219}\) Id. at 17,838.
B. Lack of Privity

The action in *Fourquin v. People Express Airlines, Inc.* \(^{220}\) involved the loss of three pieces of artwork. The plaintiffs sued to recover the value of the artwork appraised at $150,000.00, plus lost profit, estimated at $100,000.00. At the People's Express luggage check-in counter, one of the plaintiffs (Fourquin) allegedly advised an agent that one of his three bags contained the artwork, and he demanded that the bag receive special treatment. The agent agreed and all three bags were checked.

Upon Fourquin's arrival in England, he discovered that of the three bags he checked, the bag containing the artwork was missing. He reported the loss, and People Express subsequently paid him $910,000.00.\(^{221}\) No stipulations or releases were exchanged and/or executed. People Express never recovered Fourquin's luggage.

An individual, who had not purchased a ticket from People Express filed a joinder motion as a party plaintiff, claiming a one-half interest in one of the artworks. The individual contended that, since commencing the action, Fourquin had disappeared. The individual maintained that denial of the motion would prejudice his interest.

The New York Supreme Court held that an individual who did not purchase a ticket from an airline was not entitled to be added as a party plaintiff, even if he claimed an interest in the plaintiffs' loss. The court followed the well-settled principle that the purchase of an airline ticket creates a contract only between the purchaser and the provider of the service. Since no privity was found between the individual and the airline, the court found no basis for his joinder.\(^{222}\)

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\(^{220}\) 21 Av. Cas. (CCH) 17,942 (N.Y. Sup. Ct. 1989).

\(^{221}\) *Id.* The court did not explain why the plaintiffs recoverd $660,000.00 more than their estimated losses.

\(^{222}\) *Id.* at 17,943.
XIV. Handicapped Passengers

A. Duty of Care Required by the Carrier

In *Ax v. Delta Airlines, Inc.*, a handicapped passenger, suffering from a severe form of arthritis and osteoporosis, sued Delta Airlines, seeking damages for personal injuries when a flight attendant lifted her from her seat. The plaintiff had given the flight attendant a letter from her doctor which described her disease and stated that she would require a bulkhead seat during the flight. She was assigned a bulkhead seat to her destination, but on her return flight, a bulkhead seat was not available. Delta placed the plaintiff in a priority position in case an assigned bulkhead seat became available and also tried to have persons sitting in the bulkhead seats change places with the plaintiff. Unable to acquire a bulkhead seat, the plaintiff sat in the seat assigned to her. When the flight arrived at its destination, the flight attendant told the plaintiff to remain seated until all of the passengers deplaned. The attendant then lifted the plaintiff from her seat. At that time, the plaintiff claimed she felt a snap in her back and knocked her ankle against the bar of the seat in front.

The plaintiff’s doctor testified that bumping or touching the plaintiff could result in injury. Although the flight attendant knew that the plaintiff needed bulkhead seating, she was never aware of the plaintiff’s predilection for injuries which could result from lifting her from her seat.

The district court held that Delta’s employees did not know or have reason to know of the plaintiff’s disability. The court further stated that although airlines must try to accommodate handicapped passengers, if they cannot satisfy a demand on a particular flight, the traveller would have to choose whether to remain on the scheduled flight or wait for one on which the passenger’s medical disability could be accommodated. The court held that the plaintiff failed to carry her burden of proof in establishing the air-

223 21 Av. Cas. (CCH) 18,474 (S.D.N.Y. 1989).
line's liability for breach of duty to exercise such care and to render such aid for her safety and welfare as would be reasonably required by her disability. Consequently, the plaintiff’s complaint was dismissed.224

B. Refusal to Board

In Tallarico v. Trans World Airlines, Inc.225 a thirteen year old child with cerebral palsy who could not walk or talk but had normal intelligence and could communicate with trained persons was entitled to maintain an action against Trans World Airlines (TWA) for its refusal to allow her to fly unaccompanied. The plaintiff, the child’s father, made reservations on TWA’s flight for his daughter to fly home from her school for the Thanksgiving holiday. The child arrived at Houston’s Hobby Airport in a wheelchair with a hired limousine driver who informed the TWA ticket agent that she would be flying alone. The agent and his manager decided that the child could not travel unaccompanied and refused to allow her to board the flight.

The plaintiff was required to travel to Houston to accompany his daughter to St. Louis. At the end of the Thanksgiving weekend, the plaintiff traveled back to Houston with his daughter and then returned to St. Louis. The plaintiff alleged expenditures of $1,350.00 in out-of-pocket expenses for two round-trip flights from St. Louis to Houston, plus incidental costs. He alleged, among other things, that TWA violated the Air Carrier Access Act of 1986 in its refusal to allow the child to travel alone.226 The trial court held that the plaintiff did not have an implied, private cause of action under the Air Carrier Access Act.

On appeal, the Eighth Circuit concluded that although the Air Carrier Act did not expressly grant private citizens

224 Id. at 18,475.
225 881 F.2d 566 (8th Cir. 1989).
a cause of action to remedy perceived air carrier violations, an implied, private cause of action existed under the Act because the child was one for whose special benefit the statute was enacted. In reaching its conclusion, the court looked to the United States Supreme Court decision *Cort v. Ash*, which provided an analytical framework for determining whether the child did, in fact, have such an implied private cause of action. In *Cort*, the Supreme Court examined four factors it considered relevant in analyzing a statute for an implied right of action. First, the Court looked at whether the plaintiff was one of the class for whose especial benefit the statute was enacted. Second, the Court considered whether there was any congressional intent, explicit or implicit, either to create or deny such a remedy. Third, the Court asked whether the remedy was consistent with the underlying purpose of the legislative scheme to create an implied private right. Finally, the Court considered whether the cause of action was one traditionally delegated to state law such that it would be inappropriate to infer a cause of action based solely on federal law.

In applying the *Cort* factors to the facts in *Tallarico*, the Eighth Circuit determined that the minor, as a handicapped individual, was a member of the class of persons for whose special benefit Congress enacted the Air Carrier Access Act. The court believed that the circumstances surrounding the enactment of the Act provided an implicit indication that Congress did intend to create a private cause of action for handicapped individuals who were injured when air carriers discriminated against them. In implying a remedy to handicapped persons for apparent violations of the Act, the court did not perceive any inconsistency with the underlying purposes of the legislative scheme. Finally, the court found that air carrier discrimination against handicapped persons was not an area of law which was basically the states' concern. The court

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228 *Id.* at 78.
concluded that the minor stated a claim under the Air Carrier Access Act because she had an implied private cause of action under the Act.\textsuperscript{229}

In \textit{Andrews v. Piedmont Airlines},\textsuperscript{230} an action for intentional infliction of emotional distress, false imprisonment, and negligence, based on an airline's refusal to permit a passenger to board its aircraft and travel unaccompanied due to his physical incapacity was not sustainable. The trial court granted the airline's motion for summary judgment, and the plaintiff appealed. The South Carolina Court of Appeals affirmed the trial court's decision.

The plaintiff's daughter in Florida agreed to let him live in her home, and the hospital at which he had been a patient arranged the trip. Piedmont informed the hospital's social worker when she made the arrangements that the airline had guidelines governing handicapped passengers traveling unaccompanied. The hospital transported the plaintiff to the airport where he was placed in an airport wheelchair and taken to the Piedmont ticket counter. He purchased a ticket and was wheeled to the gate area. The Piedmont station manager subsequently questioned the plaintiff about his physical condition and concluded that he did not meet the airline's disabled passenger guidelines.

The plaintiff claimed that Piedmont's negligent conduct caused him to suffer damages in the form of expenditures for lodging at the hospital and emotional discomfort to him and his family. The court rejected these arguments. The court found that the costs for lodging were not proximately caused by Piedmont's conduct.\textsuperscript{231} As to the claim for emotional damages, the court concluded that "[m]ere emotional discomfort [was] not an actionable damage, even if it [resulted] from the defendant's lack of due care."\textsuperscript{232}

\textsuperscript{229} \textit{Tallarico}, 881 F.2d at 570.
\textsuperscript{231} \textit{Id.} at 369, 377 S.E.2d at 129.
\textsuperscript{232} \textit{Id.}
In addition, the court held that the airline’s actions were not so extreme and outrageous as to support a cause of action for intentional infliction of emotional distress, nor did the airline’s actions support a cause of action for false imprisonment since there was no evidence that the restraint was unlawful.\textsuperscript{233} The court reasoned that it was well established that common carriers had a higher duty toward noticeably handicapped passengers, and, in light of the plaintiff’s condition, the alleged restraint was reasonable. The court concluded that it may have been a breach of the airline’s duty if it had not detained the plaintiff until the hospital’s social worker arrived.\textsuperscript{234}

\section*{XV. Miscellaneous}

\subsection*{A. Constitutional Challenge}

In \textit{International Society for Krishna Consciousness, Inc. v. Lee},\textsuperscript{235} the plaintiffs commenced an action challenging the policy of the Port Authority of New York and New Jersey prohibiting the continuous distribution of literature to, and solicitation of contributions from, individuals in the public areas of the passenger terminals at Port Authority controlled airports. The plaintiffs contended that the prohibition of these activities within the public areas of the airports violated their constitutional rights under the First and Fourteenth Amendments of the United States Constitution.

In challenging the airport regulations prohibiting the distribution of literature and solicitation of contributions, the district court held that only access to the interior of airport terminals was relevant because the plaintiffs had consistently limited their demand for access to the interior of the buildings and had never sought access to the airport’s exterior sidewalks. In reaching its decision, the court relied on \textit{Cornelius v. NAACP Legal Defense and Educa-}

\footnotesize{\textsuperscript{233} Id.}

\footnotesize{\textsuperscript{234} Id. at 370, 377 S.E.2d at 130.}

\footnotesize{\textsuperscript{235} 721 F. Supp. 572 (S.D.N.Y. 1989).}
tion Fund,\textsuperscript{236} in which the United States Supreme Court stated that when defining the relevant forum, a court should focus on the access sought by the speaker.

The district court held that the airport terminals were traditional public forums and, therefore, the government could not impose content-based restrictions on First Amendment activity unless those restrictions were narrowly tailored to further a compelling state interest. The government could impose, in those forums, content-neutral time, place, and manner restrictions, provided such restrictions served significant governmental interest and left adequate alternative channels of communication. The court concluded that airports were comparable to city streets, which made them fit well within the notion of traditional public forums.\textsuperscript{237} Since the Port Authority's blanket prohibition on leafletting and solicitation was not narrowly tailored to further a compelling state interest the court granted the plaintiffs' motion for summary judgment.\textsuperscript{238}

B. Hazardous Materials Aboard Aircraft

In \textit{United States v. Moskowitz},\textsuperscript{239} the defendant appealed a conviction for knowingly and recklessly causing the transportation in air commerce of hazardous materials\textsuperscript{240} and of willfully violating federal regulations by transporting hazardous materials in air commerce.\textsuperscript{241}

The evidence showed that the defendant and four companions possessed cocaine and various drug parapherna-
lia, including several canisters of butane and nitrous oxide, while on board an Eastern Airline flight.

The defendant argued that the government had failed to prove beyond a reasonable doubt that he either knew or was aware of the FAA regulations prohibiting the transportation of hazardous materials, or was aware of recklessly or willfully violating such regulations. The court concluded that the defendant had sufficient notice that the types of hazardous materials brought on board the aircraft were prohibited. Testimony at trial indicated that notices advising passengers of federal law prohibiting transportation of hazardous materials were posted at the entrance to the Eastern Airlines terminal at John F. Kennedy International Airport, at the ticket counter, and at the defendant's gate. The notices indicated that "hazardous materials" included explosives, compressed gases, flammable liquids, and flammable solids. The court held that a reasonable jury could conclude that the defendant's behavior revealed an awareness that the canisters of butane were prohibited and needed to be concealed from the airport authorities. 242

242 Moskowitz, 888 F.2d at 228.
Comments