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**RECENT DEVELOPMENTS IN REGIONAL AIR CARRIER
LITIGATION AND THE CARRIERS' EXPOSURE TO
PUNITIVE DAMAGES UNDER SUPREME
COURT PRECEDENT**

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DOROTHEA M. CAPONE**

I. INTRODUCTION

SEVEN OF THE last eight crashes involving domestic air carriers that resulted in passenger fatalities involved commuter or regional airlines.¹ Although the Federal Aviation Administration (FAA) called for “a single level of safety across the aviation industry in 1997,”² in reality, the operational differences be-

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¹ Andy Pasztor & Susan Carey, *Commuter Airlines: Questions of Safety*, WALL ST. J., Dec. 1, 2009, at A1.

² *Id.* The Single Level of Safety FAA directive is also known as the “Commuter Rule.” See Operating Requirements: Domestic, Flag, Supplemental, Commuter,

tween the major carriers and those of the regional operators stand in stark contrast to that mandate.³ Safety-related incidents and deadly crashes, including many in which flight crews lost situational awareness, occur significantly more often at regional airlines flying turbo-propeller and smaller jet aircraft than at major air carriers flying larger jets.⁴ One reason for the discrepancy between regional and major air carriers is relatively simple but probably shocking to the uneducated flying public. Some of the most difficult flying is being done by regional airline pilots who often have the least amount of flying experience.⁵ As recently as eight to nine years ago, regional carriers such as Pinnacle Airlines required pilots to have at least 1,500 hours of flight time prior to being hired.⁶ When the major carriers' demand for service grew and competition amongst regional airlines for that business increased, Pinnacle, like many other regional operators, cut its requirements for new hires to 250 hours.⁷ Other carriers sought to fill pilot voids by seeking out new hires from flight schools that are unaccredited or those that had a history of fines and infractions in connection with their training, and/or record-keeping practices.⁸ Another factor contributing to the disparities in safety-related crashes and incidents is the fact that regional air carriers operate shorter routes.⁹ As a result, their pilots may be required to takeoff and land, the most difficult parts of any flight, as many as six or eight times in a twenty-four hour period.¹⁰ Additionally, due to the typically short flight duration, regional pilots are often required to fly through diffi-

and On-Demand Operations: Editorial and Other Changes, 62 Fed. Reg. 13248, 13248 (Mar. 19, 1997) (codified at 14 C.F.R. Part 119). This rule required all 14 C.F.R. Part 135 operators to transition to the safety standards set out in 14 C.F.R. Part 121 by Mar. 20, 1997. *See id.*

³ Pasztor & Carey, *supra* note 1.

⁴ *Id.*; *see also* Press Release, Nat'l Transp. Safety Bd., SV-09-13, Aviation Accident Statistics for 2008, Show 'Mixed Picture' (Apr. 2, 2009), *available at* <http://www.nts.gov/pressrel/2009/090402b.html>.

⁵ Pasztor & Carey, *supra* note 1.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *See* discussion *infra*, Part C.I., regarding the crash of Corporate Airlines Flight 5966. The flight crew operating that aircraft was originally scheduled for eight flights on the day of the crash. *See* NAT'L TRANSP. SAFETY BD., AIRCRAFT ACCIDENT REPORT, NTSB/AAR-06/01, PB2006-9104016 (2004), *available at* <http://www.nts.gov/Publictn/2006/AAR0601.pdf>.

cult weather conditions unlike pilots flying larger jet aircraft who have the luxury of flying above rain, ice, or snow.¹¹

Regional airline scheduling practices also impact the ability of pilots to safely operate their aircraft.¹² Since these carriers typically fly passengers from smaller regional airports¹³ to an airline's hub location, many flights are set to depart in the pre-dawn hours to meet transfer connections and land back at the regional airports late at night after having connected through larger hub airports. Many regional pilots commute to duty bases to report for work by first flying in from their homes, which are typically located hours away.¹⁴ Pilot fatigue leading to a lack of situational awareness has been cited as a contributing factor in many recent commuter airline crashes.¹⁵ Finally, regional airlines compensate their pilots with a shockingly low rate of hourly pay, in some instances paying first officers sitting in the right seat of their planes less than \$25,000 per year.¹⁶ It is painfully obvious that this level of compensation, which is somewhat equivalent to workers employed in the fast-food industry, does not permit pilots to maintain "crash pads" near their bases of operation, which was common practice during the 1970s, '80s, and '90s.¹⁷ While all of these are critical issues that the industry and governmental regulators must address, the real question is what precipitated these issues. The short answer, unfortunately, is economics.¹⁸

The Regional Airline Association—the business interest and lobbying arm of the commuter segment of the aviation industry—reports that the number of passengers flown by regional carriers increased from approximately 82 million in 2000 to 159 million in 2008,¹⁹ comprising more than 50% of all domestic

¹¹ Pasztor & Carey, *supra* note 1.

¹² Dan Weikel, *Are Pilots Flying Beyond Their Limits?*, L.A. TIMES, Jan. 17, 2010, at B1.

¹³ Pasztor & Carey, *supra* note 1.

¹⁴ Weikel, *supra* note 12.

¹⁵ See Stephanie Chen, *Pilot Fatigue is Like 'Having too Much to Drink'*, CNN.COM, May 15, 2009, <http://www.cnn.com/2009/TRAVEL/05/15/pilot.fatigue.buffalo.crash/index.html>.

¹⁶ See Pasztor & Carey, *supra* note 1. See also Joshua Rhett Miller, *Low Pay One of Many Difficulties Facing Regional Pilots*, FOX NEWS, May 13, 2009, <http://foxnews.com/story/0,2933,520097,00.html>.

¹⁷ See generally Steve Dennis, *Crash Pads!*, AIRLINERS.NET, Aug. 28, 2006, <http://www.airliners.net/aviation-articles/read.main?id=97>.

¹⁸ See, e.g., Weikel, *supra* note 12.

¹⁹ Regional Airline Association, 10-Year Industry Statistics, <http://www.raa.org/portals/0/industrystats/trafficstatistics.png> (last visited Apr. 9, 2010).

airline flights.²⁰ As of July 2009, the regional airlines' fleet of aircraft included more than 2,400 turbo propeller and jet aircraft, carrying an average of 54 passengers per flight in 2008.²¹ These carriers service more than 650 U.S. airports, including 476 where only regional air service is available.²² The exceptional growth in regional airlines over the last decade has arisen as the major air carriers sought out new ways of doing business.²³ By outsourcing flights to regional carriers, the major airlines are able to substantially lower their operational costs.²⁴ The major carriers market and sell tickets under their own brand and generally retain the revenue received from ticket sales.²⁵ To provide the actual flights, they enter into contracts with regional operators to service particular airports or routes, paying the regional operators for these services under the terms of contractual agreements.²⁶ While this type of operation may benefit the carriers, it has left the flying public seriously at risk.²⁷

Discussed below are a number of air disasters involving regional carriers that have revealed the many deficiencies and failures inherent under the current regime.²⁸

²⁰ See Regional Airline Association, RAA-Home, www.raa.org (last visited Apr. 9, 2010).

²¹ RAA 2009 ANNUAL REPORT 13, 15, available at <http://www.raa.org/portals/0/pubs/AR2009LR.pdf>.

²² *Id.* at 13.

²³ See, e.g., Julie Johnson, *American to Outsource at O'Hare*, CHI. TRIB., Feb. 21, 2010, at B1; *Safety Risks at Regional Airlines Detailed by PBS*, NPR, Feb. 9, 2010, <http://www.npr.org/templates/story/story.php?storyId=123496427>.

²⁴ See, e.g., Johnson, *supra* note 23.

²⁵ NPR, *supra* note 23.

²⁶ Weikel, *supra* note 12.

²⁷ See NPR, *supra* note 23.

²⁸ For brevity, this article takes an in depth look at only a few of the deadly regional airline air disasters that have taken place in this country over the last twenty or so years. It is important to remember, however, that while only a few are detailed here, many more people have lost their lives as a result of the actions of inexperienced or fatigued pilots, inappropriately matched flight crews, inadequate or deficient training by airline management, lack of appropriate corporate safety cultures, lax hiring practices, and many other factors that contribute to the differences in the operations of regional air carriers and major airlines. There are a number of examples of other air crashes that resulted from the same patterns. Northwest Airlinck Flight 5719, operated by Express Airlines II, crashed trying to land at Hibbing, Minnesota on December 1, 1993, and killed all eighteen persons on board (crash was result of failure in crew coordination and loss of situational awareness with respect to altitude during night instrument landing). See Nat'l Transp. Safety Bd., Accident Brief, DCA94MA022, http://www.ntsb.gov/ntsb/brief.asp?ev_id=20001211X13847&key=1. United Express Flight 6291, operated by Atlantic Coast Airlines, crashed at Columbus, Ohio on January

A. AMERICAN EAGLE FLIGHT 4184

On October 31, 1994, at approximately 4:00 p.m. C.S.T., a Simmons Airlines ATR 72 propeller aircraft being operated as American Eagle Flight 4184 crashed near Roselawn, Indiana, during a rapid descent after an uncommanded roll excursion, killing all sixty-four passengers and four crew members on board.²⁹ With the first officer flying, the plane had departed from Indianapolis, Indiana, headed to O'Hare International Airport in Chicago, Illinois.³⁰ Shortly after take off, the pilots engaged the autopilot and continued to climb until reaching approximately 16,000 feet before leveling off.³¹ During level flight, reports were made by other pilots of freezing rain and icing conditions at approximately 12,000 feet along the route of flight, but there was no acknowledgment of this information by the flight crew.³² The plane descended to approximately 10,000 feet when it was put into an initial holding pattern, and the aircraft's deicing system was activated.³³ While in this holding pattern, the cockpit voice recorder (CVR) noted "sounds of music

7, 1994, and resulted in the deaths of three flight crew and two passengers (crash was attributed to flight crew's failure to monitor airspeed or appropriately respond to stall warning; captain had low time and experience and was paired with first officer with no airline experience in air carrier operations). See Nat'l Transp. Safety Bd., Accident Brief, DCA94MA027, http://www.nts.gov/ntsb/brief.asp?ev_id=20001206X00616&key=1. Northwest Airlin Flight 3701, operated by a two-person Pinnacle Airline flight crew, crashed in a residential area in Jefferson City, Missouri on October 14, 2004 (ferry flight where reckless conduct of the crew who ignored multiple cockpit warnings and pushed the plane past its operating capabilities killing themselves and destroying the aircraft). See Nat'l Transp. Safety Bd., Accident Brief, DCA05MA003, http://www.nts.gov/ntsb/brief.asp?ev_id=20041015X01633&key=1. Delta Connection Flight 6448, operated by Shuttle America, skidded off the runway and crashed through a fence while landing at Cleveland International Airport on February 18, 2007, injuring three passengers (pilot advised federal investigators that the flight was his third of the day, and he was not at the "best of his game" because of a lack of sleep). See Nat'l Transp. Safety Bd., Accident Brief, DCA07MA072, http://www.nts.gov/ntsb/brief.asp?ev_id=20070223X00215bkey=1; Alan Levin, *Concerns Arise Over Regional Airlines*, USA TODAY, Feb. 7, 2008, available at http://www.usatoday.com/news/nation/2008-02-06-regionalsafety_N.htm.

²⁹ NAT'L TRANSP. SAFETY BD., AIRCRAFT ACCIDENT REPORT, NTSB/AAR-9601, PB96-910401, DCA95MA001 1, 15 (1996), available at <http://www.nts.gov/Publictn/1996/aar9601.pdf>. Details describing the crash of American Eagle Flight 4184 and the factors that led to it are described at length in the Aircraft Accident Report prepared by the NTSB, adopted July 9, 1996. See generally *id.*

³⁰ *Id.* at 1-2.

³¹ *Id.* at 3.

³² *Id.*

³³ *Id.*

playing in the first officer's headset" and the entry of one of the flight attendants into the cockpit, where she remained for more than fifteen minutes.³⁴ The CVR indicated that throughout this time, the pilots were engaged in non-pertinent conversation with the flight attendant.³⁵ After she left the cockpit, the pilots continued to engage in non-pertinent discussions, some of which involved their encounter with the flight attendant.³⁶ A few minutes later, the captain left the cockpit to use the restroom.³⁷ He returned a short time later but did not inquire as to the status of the icing conditions or the aircraft's deicing system.³⁸ Following instructions received from local-sector air traffic control, the flight crew configured the autopilot to descend to approximately 8,000 feet to enter another hold.³⁹ Descending through 9,130 feet, data retrieved from the plane's flight data recorder (FDR) revealed that the ailerons began slowly deflecting to a right-wing down position and then rapidly deflected to 13.43 degrees right-wing down, almost reaching the maximum design deflection of 14 degrees in either direction from neutral.⁴⁰ The plane stopped rolling at 77 degrees right-wing down and 6,000 feet altitude before appearing to respond to the pilots input made through the control column.⁴¹ As the aircraft began to roll back to the left towards a wings-level position, the ailerons again deflected rapidly to a right-wing down position.⁴² This time the plane rolled to the right in excess of 50 degrees per second, completing a full roll and ultimately crashing violently into a field.⁴³

As part of its investigation, the National Transportation Safety Board (NTSB) concluded that the probable cause of the crash was the pilots' loss of control which was attributed to the sudden aileron hinge moment reversal that occurred after a ridge of ice accreted beyond the plane's deicing boots.⁴⁴ Although investigators were critical of the aircraft manufacturer for failing to provide adequate information to operators or include informa-

³⁴ *Id.* at 3, 6.

³⁵ *Id.* at 4, 6.

³⁶ *Id.* at 6, 7.

³⁷ *Id.* at 7.

³⁸ *Id.*

³⁹ *Id.* at 159.

⁴⁰ *Id.* at 8 & n.16.

⁴¹ *Id.* at 8, 11.

⁴² *Id.* at 8.

⁴³ *Id.* at 8, 12.

⁴⁴ *Id.* at 210.

tion in their manuals as to previously known effects of freezing precipitation on the plane's stability and control characteristics, they also concluded that deficiencies in the airline's flight crew training procedures and the flight crew's sterile cockpit violations, which had distracted them and led to their lack of situational awareness, were contributing factors to the deadly crash.⁴⁵

B. COMAIR FLIGHT 3272

At 3:54 p.m. E.S.T. on January 9, 1997, an Embraer EMB 120 Brasilia aircraft being operated as Comair Flight 3272, traveling from the Cincinnati/Northern Kentucky International Airport to the Detroit Metropolitan/Wayne County Airport, crashed into a field in Monroe, Michigan, approximately nineteen miles from its destination after experiencing an uncommanded in-flight roll.⁴⁶ All twenty-six passengers, two flight-crew members, and a flight attendant were killed in the crash.⁴⁷ The first officer was performing the pilot-flying duties during the flight, which was conducted during light snow and icing conditions.⁴⁸ Although the flight was of a very short duration, after the initial climb out of Cincinnati, the autopilot was engaged, and the captain requested and received approval to depart from their assigned altitude of 19,000 to 21,000 to avoid turbulence they were experiencing at the lower level.⁴⁹ Less than fifteen minutes later, the pilots were instructed by air traffic control to descend to 11,000 feet and enter the approach pattern to the Detroit airport.⁵⁰ Five minutes later, Detroit terminal radar approach control (TRACON) instructed the flight crew to reduce their airspeed to 190 knots and descend to 7,000 feet.⁵¹ During this descent, the flight crew was engaged in non-pertinent conversation unrelated to their flight duties.⁵² At approximately 8,600 feet, the first officer finally called for the descent checklist,

⁴⁵ *Id.* at 205–06, 208–10.

⁴⁶ NAT'L TRANSP. SAFETY BD., AIRCRAFT ACCIDENT REPORT, NTSB/AAR-98/04, PB98-910404, DCA97MA017 1, 15 (1998), available at http://www.nts.gov/Publictn/1998/aar9804_body.pdf. Details describing the crash of Comair Flight 3272 and the factors that contributed to it are described at length in the Aircraft Accident Report prepared by the NTSB, adopted November 4, 1998. See generally *id.*

⁴⁷ *Id.* at 1.

⁴⁸ *Id.* at 1–2.

⁴⁹ *Id.* at 2, 4.

⁵⁰ *Id.* at 2.

⁵¹ *Id.* at 2.

⁵² *Id.*

which, according to Comair policy, was required to be performed before the aircraft had descended below 10,000 feet.⁵³ The descent checklist included an ice-protection prompt that was required to be accomplished before the airplane entered icing conditions.⁵⁴ Two seconds later, the first officer began the approach briefing although neither pilot called for the approach checklist.⁵⁵ An abbreviated briefing stating the airplane's approach reference airspeed, takeoff safety airspeed and final segment airspeeds was made by the captain as part of the approach checklist, although the two final items— notifying the flight attendants and "flaps—15/15/checked"—were not given.⁵⁶

Seconds later, Detroit TRACON instructed the pilots to enter into a right turn and reduce their airspeed to 170 knots, and the captain acknowledged the instruction.⁵⁷ A minute later, the final approach controller instructed them to reduce their airspeed and descend to 6,000 feet.⁵⁸ Two minutes later, they were cleared to descend to 4,000 feet.⁵⁹ During this time, the CVR recorded air traffic controllers' conversations with an Airbus A320 that was vectored ahead of Comair Flight 3272 discussing windshear, tailwinds aloft, and pilot reports of slick runways and low visibilities due to weather conditions at Detroit Airport.⁶⁰ Another minute passed, and the final approach controller instructed the pilots to adjust their heading and reduce their airspeed to 150 knots, and the captain acknowledged these instructions.⁶¹ The flight crew failed to immediately implement these instructions, and fifteen seconds later the controller was required to repeat them before they were acknowledged by the captain.⁶² Over the next several seconds, the pilots engaged in a non-pertinent dialogue, which was interrupted by the final-approach controller amending the heading instruction he gave the flight crew by ninety degrees to adjust the separation be-

⁵³ *Id.* at 3 & n.5.

⁵⁴ *Id.* at 3.

⁵⁵ *Id.*

⁵⁶ *Id.* at 3 & nn. 8–9. Data obtained from the CVR and FDR and physical evidence at the accident site "indicated that the flaps were in the retracted position when the accident occurred." *Id.* at 3 n.9.

⁵⁷ *Id.* at 3.

⁵⁸ *Id.* at 4.

⁵⁹ *Id.*

⁶⁰ *Id.* at 2, 4, 206.

⁶¹ *Id.* at 4.

⁶² *Id.*

tween it and the Airbus A320.⁶³ This change was acknowledged by the captain.⁶⁴

Data from the FDR indicated that the aircraft was at approximately 4,000 feet and began a left turn a few seconds after the captain's acknowledgment.⁶⁵ Five seconds later, at an airspeed of 156 knots, the airplane's roll attitude steepened to approximately 23 degrees of left bank, and the control wheel position began to move back to the right even though the airplane's left roll attitude continued to steepen.⁶⁶ Whirring noises were heard on the CVR, and five seconds later the captain stated, "Looks like your low speed indicator."⁶⁷ Three seconds later he stated: "Power."⁶⁸ FDR data indicated that at this time the airplane was at an airspeed of 146 knots, the left bank angle was steepening beyond 45 degrees, and the autopilot disconnected.⁶⁹ The CVR recorded a sound similar to the stickshaker starting.⁷⁰ Less than two seconds after the autopilot disconnected, the plane's control-wheel position moved from 18 degrees right to 19 degrees left, the roll attitude increased from about 45 degrees left bank to about 140 degrees left bank, and the pitch attitude decreased from nearly 2 degrees nose up to about 17 degrees nose down.⁷¹ They crashed into the ground several seconds later.⁷²

While the NTSB's investigation revealed a number of failures on the part of the FAA, including a "failure to establish adequate aircraft certification standards for flight in icing conditions . . . which led to the loss of control when the airplane accumulated a thin, rough accretion of ice on its lifting surfaces," the actions of the flight crew and Comair's management were determined to be significant factors that contributed to the crash.⁷³ There was no mention on the CVR transcript of a dis-

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 4–5.

⁶⁸ *Id.* at 5.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at vii. The NTSB noted that Comair's management failed "to establish and adequately disseminate unambiguous minimum airspeed values for flap configurations and for flight in icing conditions," and was critical of its pilot training practices. *Id.*

cussion between the pilots pertaining to the activation of the aircraft's deice system, and it is probable that it was never turned on.⁷⁴ The flight crew was distracted by non-essential conversation during sterile cockpit and was inattentive to the fact that their cockpit instruments indicated that the aircraft was accumulating ice, causing it to slow to a dangerous level.⁷⁵ Furthermore, it is apparent that the flight crew was not aware that the flaps were retracted, and they apparently did not notice that the control wheel was tilting to the right while the aircraft was in a slow left hand turn.⁷⁶ Finally, their conduct, like that of the flight crew operating American Eagle Flight 4184, in relying on the aircraft's autopilot system instead of hand-flying the aircraft while in dangerous icing conditions was a factor in causing both crashes.⁷⁷

C. CORPORATE AIRLINES 5966

On October 19, 2004, at approximately 7:37 p.m. C.S.T., the pilots operating Corporate Airlines Flight 5966 for the American-Connection network of American Airlines attempted to land their sixth flight of the day after more than fourteen hours of duty time. They were joking with one another while under sterile cockpit restrictions about co-workers and what to eat for dinner when the aircraft crashed into trees during final approach and short of its intended arrival runway.⁷⁸ The BAE Jetstream 32 twin-engine turboprop had departed from Lambert-St. Louis International Airport in St. Louis, Missouri, and was bound for Kirksville Regional Airport in Kirksville, Missouri, carrying several physicians from across the country who were scheduled to attend a seminar at a local university.⁷⁹

When the aircraft was approximately twenty-three minutes from the Kirksville Airport and flying at 12,000 feet, the CVR disclosed that the pilots received weather information which indicated four miles visibility in mist with an overcast ceiling at 300

⁷⁴ *Id.* at 3 n.7.

⁷⁵ *Id.* at 176, 178, 191-94.

⁷⁶ *Id.* at vii, 3 n.9, 21, 178-79.

⁷⁷ Compare *id.* at 178-79, with NAT'L TRANSP. SAFETY BD., AIRCRAFT ACCIDENT REPORT, *supra* note 10, at 8.

⁷⁸ NAT'L TRANSP. SAFETY BD., AIRCRAFT ACCIDENT REPORT, *supra* note 10, at 1, 6, 47, 10 n.33. Details describing the crash of Corporate Airlines Flight 5966 and the factors that contributed to it are described at length in the Aircraft Accident Report prepared by the NTSB, adopted Jan. 24, 2006. See generally *id.*

⁷⁹ *Id.* at 1, 12.

feet.⁸⁰ The pilots discussed and acknowledged the dreary conditions and expressed reservations about being able to land without an instrument landing system.⁸¹ Three minutes later, the Kansas City air-route traffic control center cleared them to descend to 8,000 feet at their discretion, which the flight crew acknowledged.⁸² A few minutes later, they again listened to weather information, which downgraded the visibility to three miles, and the captain responded that the conditions were “going down the tubes.”⁸³

At approximately 7:21 p.m., the plane descended through 10,000 feet, triggering sterile cockpit conditions, and the control center cleared them to descend and maintain 3,000 feet.⁸⁴ The pilots acknowledged the clearance and discussed the possibility of shooting a missed approach.⁸⁵ As they descended into the top of the clouds at approximately 7:25 p.m., they joked about the weather conditions, and the CVR recorded a yawn by the first officer.⁸⁶ A few minutes later, they again listened to the weather conditions, which had not changed, and the captain remarked that conditions were “right where you don’t want it.”⁸⁷ By 7:30 p.m., they were advised by the control center to adjust their heading and maintain an altitude of 3,000 feet until they were established on the localizer, and then were cleared for the localizer approach to runway 36 at Kirksville Airport.⁸⁸

Less than a minute later, the captain confirmed with the first officer that they could descend to 2,500 feet in the approach, then asked him to extend the landing gear, select 20 degrees of flap, and perform the landing checklist.⁸⁹ At approximately 7:33 p.m., the first officer keyed the microphone to activate the pilot-controlled runway lights at Kirksville Airport.⁹⁰ When the plane crossed the final approach fix at 7:35 p.m., FDR data showed the aircraft was at 2,500 mean sea level (msl), and the first officer advised the captain that they could descend to 1,320

⁸⁰ *Id.* at 1.

⁸¹ *Id.* at 1–2.

⁸² *Id.* at 2.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 3. This particular yawn was one of five recorded by the CVR by both pilots during the short flight. *Id.* at 3 n.16.

⁸⁷ *Id.* at 3.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 3–4.

feet msl, which is the minimum descent altitude for the approach.⁹¹ Radar and calculated FDR data indicates that from this time until the crash, the aircraft was descending about 1,200 feet per minute.⁹² At 7:36 p.m., as the airplane descended through 1,600 feet msl, the first officer stated, "five hundred, four hundred to go."⁹³ Seventeen seconds later as they descended through approximately 1,450 feet msl (about 500 feet above ground level), the CVR recorded a mechanical announcement of "five hundred" from the plane's ground proximity warning system (GPWS).⁹⁴ The CVR recorded cursing between the pilots who apparently did not know where they were.⁹⁵ Ten seconds later, while apparently searching for the ground, the captain asked "what do you think?," and the first officer responded that he did not see anything.⁹⁶ Two seconds later, the captain stated that he had the approach lights in sight while the GPWS warned them they were at 200 feet above ground level (agl).⁹⁷ During this exchange, the aircraft was descending through about 1,160 feet msl, which is 160 feet below the minimum descent altitude for the airport.⁹⁸ Another ten seconds elapsed, and the CVR recorded the GPWS sounding "sink rate," indicating that based upon the altitude and rate of descent, the airplane had reached about 100 feet agl.⁹⁹ The first sound of the aircraft hitting the trees occurred about a second later.¹⁰⁰

NTSB investigators determined that the probable cause of the crash was "the pilots' failure to follow established procedures or properly conduct a nonprecision [landing] approach at night in instrument meteorological conditions," as well as their improper "descent below the minimum descent altitude before required visual cues were available (which continued unmoderated until the airplane struck the trees)" as well as "their failure to adhere to the established division of duties be-

⁹¹ *Id.* at 4.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* Former NTSB Chair Mark Rosenker remarked that he was "extremely disappointed in what I heard" on the CVR, noting that "from the beginning to the end, it was unprofessional." Sara Kehaulani Goo, *Poor Behavior, Fatigue Led to '04 Plane Crash*, WASH. POST, Jan. 25, 2006, at A02.

⁹⁶ NAT'L TRANSP. SAFETY BD., AIRCRAFT ACCIDENT REPORT, *supra* note 10, at 4.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 4 & n.20.

¹⁰⁰ *Id.* at 4.

tween the flying and non-flying (monitoring) pilot.”¹⁰¹ The Safety Board also cited the pilots’ failure to make standard callouts, their overall lack of professionalism, and their fatigue as factors that contributed to the crash.¹⁰²

D. COMAIR FLIGHT 5191

Shortly before sunrise on August 27, 2006, the flight crew of Delta Connection Flight 5191, which was being operated by the regional airline Comair, Inc. (Comair 5191), violated the clearance they received from the tower controller at Blue Grass Airport in Lexington, Kentucky, to takeoff for Atlanta, Georgia, from the 7,000 foot long runway 22.¹⁰³ Instead, the pilots inexplicably turned their Bombardier CRJ-100 aircraft onto the dark, unlit runway 26, which is only 3,500 feet long and restricted to use by aircraft weighing less than 12,500 pounds operating under daytime visual flight rules.¹⁰⁴ Despite the fact that their view from the cockpit window as they lined the aircraft up on runway 26 was described as a “black hole,”¹⁰⁵ the flight crew seemed to have disregarded the absence of runway lighting, ignored nine heading indications on their cockpit flight displays which provided each of them with their exact heading, and also failed to cross-check and verify that the airplane was on the correct runway.¹⁰⁶ Additionally, the pilots also missed several visual cues outside of the cockpit that should have alerted them they were attempting to takeoff from the wrong runway.¹⁰⁷ These signs included the painted runway numbers on the pavement and various taxiway and runway signs on the airport surface.¹⁰⁸ In particular, the runway 26 hold-short position sign was clearly visible from the cockpit as the crew engaged in non-pertinent

¹⁰¹ *Id.* at 58.

¹⁰² *Id.*

¹⁰³ NAT’L TRANSP. SAFETY BD., AIRCRAFT ACCIDENT REPORT, NTSB/AAR-07-05, PB2007-910406 1, 16, 36 (2007), available at <http://www.nts.gov/Publicatn/2007/AAR0705.pdf>. Details describing the crash of Comair Flight 5191 and the factors that led to it are described at length in the Aircraft Accident Report prepared by the NTSB adopted and released to the public on July 26, 2007. See generally *id.*

¹⁰⁴ *Id.* at 1 & n.2, 16–17.

¹⁰⁵ *Id.* at 26 n.94 (noting that members of NTSB “Operations/Human Performance investigative team” conducting a nighttime taxi demonstration at the Lexington Blue Grass Airport from a similar aircraft described the view from the cockpit window as a “black hole” since the end of runway 26 was not visible).

¹⁰⁶ *Id.* at 60, 62, 67, 79, 105.

¹⁰⁷ *Id.* at 25–26.

¹⁰⁸ *Id.*

conversation while waiting on the taxiway for approximately 50 seconds before they continued their taxi and turned on to runway 26.¹⁰⁹ With the first officer at the controls, the aircraft rolled down the blackened runway and through the extremely well-marked and illuminated intersection of runways 26/22.¹¹⁰ As they passed through and emerged beyond the intersection and continued to roll on the totally dark runway 26, the first officer noted "dat [sic] is weird . . . no lights."¹¹¹ A few seconds later, the captain responded, "Yeah."¹¹² Lacking sufficient pavement to facilitate a safe takeoff, the regional jet ran off the end of the runway, struck an earthen berm, and became temporarily airborne climbing less than 20 feet off the ground.¹¹³ The plane impacted several trees before crashing into a field adjacent to the airport, killing all forty-seven of its passengers, two crew members, and seriously injuring the first officer.¹¹⁴

The NTSB determined that the probable cause of the crash was the flight crew's failure to use available cues and cockpit aids to identify their aircraft's location on the airport surface during taxi, and their failure to cross-check and verify that the airplane was on the correct runway prior to attempting takeoff.¹¹⁵ A contributing factor to the crash according to NTSB investigators was the flight crew's repeated violation of sterile cockpit procedures during taxi, which contributed to their loss of positional awareness.¹¹⁶

Sadly, the grossly negligent actions of the flight crew, which caused the runway incursion and led to the deaths of all of the passengers on board the plane, not only could have easily been prevented, but were the foreseeable consequences of the reckless manner in which Comair management permitted its crews to operate.¹¹⁷ For example, the first officer, who was at the controls as Comair Flight 5191 barreled down the wrong runway, had purchased two beers from a hotel bar within twelve hours of

¹⁰⁹ *Id.* at 3, 25.

¹¹⁰ *Id.* at 4, 26.

¹¹¹ *Id.* at 4, 60, 157.

¹¹² *Id.* at 4, 157.

¹¹³ *Id.* at 4.

¹¹⁴ *Id.* at 1, 4, 7.

¹¹⁵ *Id.* at 105.

¹¹⁶ *Id.* The NTSB also noted that the FAA's failure to mandate that all runway crossings be authorized only by specific air traffic control clearances may have also contributed to the crash. *Id.*

¹¹⁷ *Id.* at 77; see, e.g., *id.* at 1, 38–39, 74 n.186, 124–38.

his scheduled departure on August 27, 2006.¹¹⁸ This purchase, and apparent consumption, not only violated company policy, but also demonstrated a complete lack of concern that the violation would be detected and punished by management.¹¹⁹ Since Comair lacked any routinized process through which its pilots received flight release paperwork, after the pilots checked in for their flight that morning, they boarded the wrong airplane and started its auxiliary power unit before being notified by ground personnel of their error.¹²⁰ Both crew members repeatedly violated sterile cockpit procedures by engaging in inappropriate non-essential conversation discussing their employment with Comair, opportunities to fly for other airlines, and other personal matters, none of which were related to the safe preparation or operation of the flight.¹²¹

Both members of the flight crew delivered what were characterized by Comair's own management-level check airmen as deficient and substandard mandatory briefings, disregarding established procedures since there was little or no possibility that their lax attitudes would be detected or reprimanded by corporate management.¹²² The company's managers and officers recklessly failed to act upon the knowledge they had received pertaining to runway incursions within the industry that had led to serious crashes and loss of life.¹²³ Even more shocking was their failure to take appropriate steps to respond to an incident in Corpus Christi, Texas, on January 2, 2003, in which one of their own flight crews violated the takeoff clearance they had received and recklessly departed from the wrong runway, which, thankfully, was long enough to handle the takeoff so that no lives were lost.¹²⁴ Comair management deliberately chose not to incorporate the specific recommendations that flight crews confirm they are on the correct runway that were contained in an FAA advisory circular published September 26, 2003,¹²⁵ a few years before the crash.¹²⁶ Management personnel

¹¹⁸ *Id.* at 4, 74 n.186.

¹¹⁹ *Compare id.* at 74 n.186, *with id.* at 38–39.

¹²⁰ *Id.* at 1.

¹²¹ *Id.* at 124–38.

¹²² *Id.* at 58.

¹²³ *Id.* at 43, 47.

¹²⁴ Brandon Ortiz, *Judge Rules on Comair Reports*, LEXINGTON HERALD-LEADER, Feb. 21, 2008, available at <http://www.airportbusiness.com/online/article.jsp?siteSection=1&id=17703&pageNum=4>.

¹²⁵ NAT'L TRANSP. SAFETY BD., AIRCRAFT ACCIDENT REPORT, *supra* note 103, at 43. Acknowledging concern over an increase in runway incursions at airports

also received reports and information from their corporate safety department undeniably demonstrating a steady increase in the number of runway incursions committed by their flight crews during the two years preceding the crash, but failed to dedicate the resources or implement actions to determine the cause or stop the escalation.¹²⁷ Finally, in yet another example of Comair management's reckless disregard for the safety of its passengers, it failed to fill critical management positions within the organization with competent, knowledgeable and skilled managers and officers who possessed the background and experience necessary to coordinate the flow of information throughout the organization, and completely failed to fill several positions, including that of manager of flight safety, until the week after the crash of Flight 5191.¹²⁸

E. CONTINENTAL CONNECTION FLIGHT 3407

On February 12, 2009, shortly after 10:15 p.m. E.S.T, a Bombardier Dash 8-Q400 aircraft, being operated by Colgan Air and doing business as Continental Connection Flight 3407, in ice, snow, and fog conditions crashed in Clarence Center, New York, approximately five miles northeast of the Buffalo-Niagara International airport during an instrument approach to Runway 23.¹²⁹ All forty-five passengers, four crew members, and a man in the living room of his home, which was destroyed by the plane's impact, perished.¹³⁰ According to information contained on the plane's digital flight data recorder (DFDR) and the transcript of the CVR released by the NTSB in conjunction

throughout the country, the FAA issued AC 120-74A, which recommended that air carriers add a number of runway verification measures to their standard operating procedures. *Id.* Included in AC 120-74A was a Standard Operating Procedures Template for Group Operations and the Prevention of Runway Incursions, which recommended that flight crews minimize "head's down" activities while the aircraft is moving, as well as a specific recommendation for flight crews to check to ensure "that the compass heading approximately matches the runway heading and taxiway orientation" to confirm proper runway or taxiway selection." *Id.*

¹²⁶ Compare *id.* at 1, with *id.* at 43.

¹²⁷ Ortiz, *supra* note 124.

¹²⁸ NAT'L TRANSP. SAFETY BD., AIRCRAFT ACCIDENT REPORT, *supra* note 103, at 41.

¹²⁹ NAT'L TRANSP. SAFETY BD., OPERATIONS GROUP CHAIRMAN FACTUAL REPORT, Docket No. SA-531, Exhibit No. 2-A, DCA09MA027 2 (2009), available at <http://www.ntsb.gov/Dockets/Aviation/DCA09MA027/417441.pdf>.

¹³⁰ *Id.*

with its preliminary investigation into the cause of the crash,¹³¹ seven minutes before the crash, the captain and first officer noticed and commented on ice building up on the windscreen, which began several minutes of non-pertinent discussion between them in which the first officer commented:

“I really wouldn’t mind going through a winter in the northeast before I have to upgrade to captain.”

“I’ve never seen icing conditions. I’ve never been deiced . . . I don’t want to have to experience that and make those kinds of calls. You [sic] know I’dve freaked out. I’dve have like seen this much ice and thought oh my gosh we were going to crash.”¹³²

Approximately two minutes before the crash, the plane was being flown on autopilot, its airspeed was 172 knots, and the first officer deployed the flaps five degrees to facilitate the final approach.¹³³ Less than a minute later, the flight crew extended the landing gear.¹³⁴ Twenty seconds later, the flaps were moved to ten degrees, and two seconds after that movement, the stick shaker activated causing the autopilot to disconnect.¹³⁵ Instead of allowing the stick pusher to gently bring the nose of the aircraft down to increase the air flow over the wings, the captain improperly pulled back on the control column causing the plane to pitch up and then roll to the left, then to the right.¹³⁶ According to information extracted from the DFDR, the air-

¹³¹ The NTSB’s preliminary hearings into the cause of the crash were held May 12–14, 2009. At the time of the writing of this article, the NTSB had not yet concluded its investigation or released its final report. Details describing the crash of Continental Connection Flight 3407 were obtained from materials within the NTSB’s docket. See NTSB: Docket Management System, <http://www.nts.gov/Dockets/Aviation/DCA09MA027/default.htm> (last visited Apr. 9, 2010).

¹³² NAT’L TRANSP. SAFETY BD., COCKPIT VOICE RECORDER GROUP CHAIRMAN FACTUAL REPORT ADDENDUM, Docket No. SA-531, Exhibit No. 2-B 12–105 (2009), available at <http://www.nts.gov/Dockets/Aviation/DCA09MA027/423395.pdf>. These statements by the first officer took place at 22:11:54.3 and 22:12:05.0, respectively. *Id.*

¹³³ NAT’L TRANSP. SAFETY BD., OPERATIONS GROUP CHAIRMAN FACTUAL REPORT, *supra* note 129. The Buffalo Approach Control issued its last descent clearance to Continental Connection Flight 3407 which was to 2,300 msl, approximately three minutes before the crash. NAT’L TRANSP. SAFETY BD., COCKPIT VOICE RECORDER GROUP CHAIRMAN FACTUAL REPORT ADDENDUM, *supra* note 132, at 12–109.

¹³⁴ NAT’L TRANSP. SAFETY BD., OPERATION GROUP CHAIRMAN FACTUAL REPORT, *supra* note 129, at 3.

¹³⁵ *Id.*

¹³⁶ *Id.*; NTSB Abstract: Aircraft Accident Report, AAR-10/01, PB2010-910401, <http://www.nts.gov/Publictn/2010/AAR1001.htm>.

speed continued to decrease to less than 100 knots.¹³⁷ The aircraft continued to pitch and roll and ultimately entered into “a steep descent from which it did not recover” before impacting a house on a residential street in Clarence Center, New York.¹³⁸

In addition to the flight crew’s failure to hand-fly the plane in known icing conditions, their non-pertinent conversation below 10,000 feet is likely to have contributed to their overall lack of situational awareness, causing them to be inattentive to the various airspeed indicators available to them in the cockpit. The captain’s use of an improper technique to recover from the impending stall, and many other factors are likely to have contributed to this most recent air disaster involving a regional air carrier.¹³⁹ Sadly, many of these very same factors have also been cited by the NTSB as contributing to previous regional airline crashes.¹⁴⁰

It is obvious from the excerpted section of the CVR transcript that the first officer lacked the level of experience that is needed to safely transport fare-paying passengers in Part 121 operations. Although she had accumulated approximately 2,200 total flight hours, she had less than 800 in the Dash-8 Q400 aircraft and she was paired with a captain who possessed roughly 1,000 as a pilot-in-command overall, and only 110 in the Dash-8 Q400 aircraft.¹⁴¹ This combined relative inexperience, coupled with the first officer’s naive understanding of the operation of the aircraft in ice and snow was a recipe for disaster.

Pilot fatigue has played a role in many air crashes, and, as discussed earlier, is particularly prevalent in regional airline operations.¹⁴² It is probable that it also played a role in the crash of Continental Connection Flight 3407. The first officer made her home in Seattle, Washington, and commuted to her base of

¹³⁷ NAT’L TRANSP. SAFETY BD., OPERATION GROUP CHAIRMAN FACTUAL REPORT, *supra* note 129.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *See, e.g.*, NAT’L TRANSP. SAFETY BD., APPROACH AND LANDING ACCIDENT REDUCTION: STERILE COCKPIT, FATIGUE, FAA SAFO 06004, Docket No. SA-531, Exhibit No. 14-H 1 (2006), *available at* <http://www.nts.gov/Dockets/Aviation/DCA09MA027/417493.pdf>.

¹⁴¹ NAT’L TRANSP. SAFETY BD., HUMAN PERFORMANCE GROUP CHAIRMAN FACTUAL REPORT, Docket No. SA-531, Exhibit No. 14-A at 9 (2009), *available at* <http://www.nts.gov/Dockets/Aviation/DCA09MA027/418082.pdf>.

¹⁴² Chen, *supra* note 15.

operations in Newark, New Jersey.¹⁴³ She awoke in Seattle on the morning of February 11, 2009, and traveled from there to Memphis, Tennessee, in a jumpseat on a Federal Express flight that departed Seattle at approximately 8:00 p.m., arriving in Memphis at 11:30 p.m.¹⁴⁴ She remained in the Federal Express crew lounge for a few hours until she departed on another Federal Express flight that left Memphis at 4:18 a.m., arriving in Newark at 6:23 a.m. on February 12, 2009, almost twenty-four hours since she had last slept at home in Seattle.¹⁴⁵ She apparently advised members of the Federal Express flight crew that she intended to get some sleep in the crew lounge in Newark, despite the fact that this was specifically prohibited by Colgan's policies.¹⁴⁶ NTSB investigators were unable to determine her activities while in Newark, but did interview several pilots who reported seeing her in the Colgan crew room watching television and conversing with other pilots.¹⁴⁷ Records obtained from her cell phone revealed exchanges of text messages almost every hour through late afternoon, as well as telephone calls with her husband.¹⁴⁸

Other factors have been raised as possibly contributing to the crash of Continental Connection Flight 3407.¹⁴⁹ These include Colgan's training policies and practices, its hiring practices, and the penuriously low hourly rate-based compensation it pays its pilots, particularly first officers just beginning their careers, which is akin to fast-food workers, who do not have the safety of dozens of people resting on their shoulders.¹⁵⁰ Additionally, Colgan's sick- and personal-leave policies may have prevented

¹⁴³ NAT'L TRANSP. SAFETY BD., HUMAN PERFORMANCE GROUP CHAIRMAN FACTUAL REPORT, *supra* note 141.

¹⁴⁴ *Id.* at 10–11.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 12.

¹⁴⁷ *Id.*

¹⁴⁸ *See id.*

¹⁴⁹ NTSB Abstract: Aircraft Accident Report, *supra* note 136.

¹⁵⁰ Nancy Cordes, *Poor Training Cause of Buffalo Crash?*, CBS EVENING NEWS, Feb. 2, 2010, <http://www.cbsnews.com/stories/2010/02/02/eveningnews/main/6167556.shtml>; Jerry Zremski & Michael Beebe, *Low Pay, Fatigue 'Recipe' for Crash; Flight 3407 Families Outraged*, BUFFALO NEWS, May 14, 2009, <http://www.buffalo-news.com/2009/05/14/670974/low-pay-fatigue-recipe-for-crash.html>. The NTSB also noted that the first officer had moonlighted by working in a coffee shop while employed by Colgan. *See* NAT'L TRANSP. SAFETY BD., HUMAN PERFORMANCE GROUP CHAIRMAN FACTUAL REPORT, *supra* note 141, at 9.

the first officer, who was feeling ill, from being able to ask for a day off.¹⁵¹

Many lawsuits arising out of the crash were originally filed in the United States District Court for the Western District of New York, which is located in Buffalo, New York, the flight's destination and home to many of its victims. These suits named Colgan Air, Inc., Pinnacle Airlines Corp., Colgan's parent, and Continental Airlines, Inc. as defendants. In some instances, Bombardier Aerospace Corporation was also named as a defendant. Several other cases were originally filed in the Southern and Eastern Districts of New York, the Eastern District of Pennsylvania, the District of Connecticut and the District of New Jersey. These cases were thereafter transferred to the Western District of New York by the Judicial Panel of Multidistrict Litigation pursuant to 28 U.S.C. § 1407 for consolidated and coordinated pre-trial proceedings.¹⁵² All of the cases raise issues as to the negligence, gross negligence, or reckless conduct of the flight crew at the controls of Continental Connection Flight 3407 in their operation of the aircraft, as well as to the corporate defendants' supervision, training, and personnel practices. The cases have been assigned to the Honorable William M. Skretny, and the parties anticipate that discovery will begin over the next several months.

Like the perfect storm, the crash of Continental Connection Flight 3407 seems to include many of the failures in the regional airline industry that have occurred over the last twenty years and may have finally awoken the FAA from a decade of slumber. Since the crash on February 12, 2009, there has been a loud public cry for changes in the manner in which regional air carriers operate, stimulated in large measure by the herculean efforts of the families of the victims to draw attention to the facts associated with the crash and push legislative leaders for safety changes. Almost immediately after the crash, the NTSB reiterated calls it had previously made for changes to industry practices that the FAA failed to implement.¹⁵³ Members of Congress

¹⁵¹ Michael Beebe, *Feeder Airline Growth Breeds Corner-Cutting*, BUFFALO NEWS, June 9, 2009, <http://www.buffalonews.com/2009/06/697390/feeder-airline-growth-breeds-corner.html>; Cordes, *supra* note 150.

¹⁵² Transfer Order, *In re Air Crash Near Clarence Center, New York*, on February 12, 2009, MDL No. 2085 (J.P.M.L. Oct. 6, 2009).

¹⁵³ See, e.g., NTSB Safety Recommendations A-07-04; A-07-08; A-07-09; A-07-10; and A-07-11, dated Jan. 23, 2007; A-07-13 and A-07-14, dated Feb. 27, 2007; A-06-48; A-06-51, dated July 10, 2006; A-03-53; A-03-54, dated Dec. 2, 2003; A-98-90; A-

convened hearings in both the House and the Senate to draft legislation to address the failures.¹⁵⁴ On June 15, 2009, FAA Administrator Randy Babbitt launched what he termed an industry-wide “Call to Action” designed to finally implement the single level of safety mandated by the agency more than a dozen years ago, bringing together representatives from regional and major air carriers to establish voluntary safety initiatives.¹⁵⁵ In October 2009, the House passed the Airline Safety and Pilot Training Improvement Act of 2009, which was designed to improve pilot

98-91; A-98-95; A-98-96; A-98-97; A-98-101; A-98-102; and A-98-103, dated Nov. 30, 1998; A-94-184 dated Nov. 7, 1994; NTSB Safety Alert, SA-014 Dec. 2008.

¹⁵⁴ Following the NTSB hearings in May 2009, the U.S. House Committee on Transportation and Infrastructure Aviation Subcommittee held a hearing on June 11, 2009, to address “regional air carriers and pilot workforce issues” and another on September 23, 2009, to examine the FAA’s Call to Action program. *Regional Air Carriers and Pilot Workforce Issues: Hearing Before the Subcomm. on Aviation of the H. Comm. on Transportation and Infrastructure*, 111th Cong. vii (2009); *The Federal Aviation Administration’s Call to Action on Airline Safety and Pilot Training: Hearing Before the Subcomm. on Aviation of the H. Comm. on Transportation and Infrastructure*, 111th Cong. vi (2009). The U.S. Senate Committee on Commerce, Science, and Transportation’s Subcommittee on Aviation, Operations, Safety and Security held a hearing on June 10, 2009 to look at the FAA’s role in the oversight of commercial air carriers. *Aviation Safety: FAA’s Role in the Oversight of Commercial Air Carriers: Hearing Before the Subcomm. on Aviation Operations, Safety and Security of the S. Comm. on Commerce, Science, and Transportation*, 111th Cong. 1 (2009) (statement of the Honorable Mark V. Rosenker, Acting Chairman, National Transportation Safety Board). On June 17, 2009, it reconvened to focus on the role and responsibility of commercial air carriers. *Aviation Safety: The Role and Responsibilities of Commercial Air Carriers and Employees: Hearing Before the Subcomm. on Aviation Operations, Safety and Security of the S. Comm. on Commerce, Science, and Transportation*, 111th Cong. 1 (2009) (statement of James C. May, President and CEO, Air Transport Association of America, Inc. (ATA)). The Subcommittee also heard from witnesses on August 6, 2009, to hear discussion on the relationship between the regional and major air carriers, and its last Subcommittee hearing was held on December 1, 2009, to hear testimony in connection with pilot fatigue. See *Aviation Safety: The Relationship Between Network Airlines and Regional Airlines: Hearing Before the Subcomm. on Aviation Operations, Safety and Security of the S. Comm. on Commerce, Science, and Transportation*, 111th Cong. (2009); *Aviation Safety: Pilot Fatigue: Hearing Before the Subcomm. on Aviation Operations, Safety and Security of the S. Comm. on Commerce, Science, and Transportation*, 111th Cong. (2009).

¹⁵⁵ Frances Fiorino, *Industry Debate Focuses on Flightcrew Training*, AVIATION WK. & SPACE TECH., Nov. 27, 2009, available at http://www.aviationweek.com/aw/jsp_includes/articlePrint.jsp?storyID=news/aw113009p1.xml&headline=NULL. After the initial meeting with representatives from all corners of the airline industry, the FAA announced an expedited review of flight and rest rules and a program to expand access to pilots’ flying records by modifying the Pilot Records Improvement Act. In addition, the FAA has instructed those carriers who do not have Flight Operations Quality Assurance and Aviation Safety Action Programs in place to institute them as soon as possible. *Id.*

training practices, examine the serious issue of pilot fatigue, raise the minimum number of flight hours required for first officers by requiring an ATP license for the position, and establish an electronic pilot-records data base.¹⁵⁶ The Senate passed its version entitled the FAA Air Transportation Modernization and Safety Improvement Act on March 22, 2010, and both bills are currently being reconciled.¹⁵⁷ The families of the victims of Continental Connection Flight 3407 have made more than twenty-five trips to Washington, DC since the crash to advocate for mandated safety changes so that other families do not find themselves in the same position.¹⁵⁸

While the FAA's "Call to Action" and Congress' promises to bring changes to the regional airline industry¹⁵⁹ are important steps, they are mired down by numerous political agendas. While legislators meet and garner photo opportunities, the dangerous conditions that have resulted in the deaths of hundreds of airline passengers remain the same. Unfortunately, real change is unlikely to occur at individual airlines until there are punitive consequences for their decisions to continue to conduct their operations in a "business as usual" manner. While it is true that significant change will cost the industry money, its failure to institute the desperately needed safety changes that have resulted in deadly air disasters leaves them susceptible to punitive damage claims in the lawsuits that arise out of these crashes.

II. THE LEGAL STANDARD FOR PUNITIVE DAMAGES

Like many other plaintiffs who have filed wrongful death suits following the deaths of their loved ones in many of the regional air disasters discussed in this article, the families of those killed on board Continental Connection Flight 3407 have alleged pu-

¹⁵⁶ See Airline Safety and Pilot Training Improvement Act of 2009, H.R. 3371, 111th Cong. (2009). One provision of the bill would require the FAA to ensure that Part 121 carriers train pilots to recognize and recover from stalls and upsets. *Id.* § 4(a).

¹⁵⁷ See FAA Air Transportation Modernization and Safety Improvement Act, S. 1451, 111th Cong. (2009) (authorizing the FAA's financial appropriations for fiscal years 2010 and 2011).

¹⁵⁸ Jerry Zremski, *Flight 3407 Families Aim Lobbying at All Senators*, BUFFALO NEWS, Mar. 7, 2010, <http://www.buffalonews.com/2010/03/03/975142/flight-3407-families-aim-lobbying.html>.

¹⁵⁹ Ramon Lopez, *FAA Boss Promises Action on Pilot Fatigue; More News*, AVIATION TODAY, Aug. 11, 2009, http://www.aviationtoday.com/regions/usa/FAA-Boss-Promises-Action-on-pilot-Fatigue-More-News_34334.html.

nitive damage claims in their complaints based upon the facts and circumstances that permitted the crash to occur. As will be discussed below, under the current state of the law, it is clear that each plaintiff is entitled to have his or her compensatory and punitive damage claims heard by the same jury.¹⁶⁰

Several Supreme Court decisions over the last twenty years have addressed constitutional due process concerns and the sizes of jury punitive damage awards arising out of different legal claims.¹⁶¹ In *Pacific Mutual Life Insurance Co. v. Haslip*, which made its way to the Court in 1991, the Justices considered the effect of the Due Process Clause on the size of a punitive damage award made in a fraud action brought by a woman who learned she was uninsured as a result of the actions of an agent and her health insurer, which caused her to be personally liable for medical treatment she had received.¹⁶² After a jury trial in an Alabama state court, the plaintiff was awarded \$200,000 in compensatory and \$840,000 in punitive damages, which was affirmed thereafter by the Alabama Supreme Court.¹⁶³ After determining that the defendants had received the constitutional protections provided by Alabama law, the U.S. Supreme Court endorsed the Alabama Supreme Court's standards for assessing a punitive award, including the need to analyze whether there was a "reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred" before ultimately upholding the trial court's 4-to-1 punitive to compensatory ratio.¹⁶⁴

Two years later, in *TXO Production Corp. v. Alliance Resources Corp.*, which arose out of an action to quiet title based upon a quitclaim deed, the Supreme Court upheld a West Virginia jury's award of \$19,000 in compensatory damages to the defendant on its counterclaim for slander, which reflected the cost of defending the quiet title action and a \$10 million dollar punitive damage award.¹⁶⁵ In so doing, the Supreme Court reiter-

¹⁶⁰ See *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001).

¹⁶¹ See, e.g., *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1998); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *BMW of N. Am., Inc., v. Gore*, 517 U.S. 559 (1996).

¹⁶² 499 U.S. at 5–6, 17.

¹⁶³ *Id.* at 5–7.

¹⁶⁴ *Id.* at 19, 21–24.

¹⁶⁵ 509 U.S. at 447, 451.

ated its reasoning in *Haslip*, and looked with favor at a decision out of the West Virginia Supreme Court, which stated that as “a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.”¹⁶⁶ The Court acknowledged the large amount of the punitive damage award in the case, but noted that it was not “so ‘grossly excessive’ as to be beyond the power of the State to allow” it in light of the significant amount of royalty payments disputed in the underlying case and the bad faith and scheme of “fraud, trickery and deceit” involved.¹⁶⁷

In 1996, the Supreme Court looked at the size of a punitive damage award in *BMW of North America, Inc. v. Gore*.¹⁶⁸ In *Gore*, an Alabama jury awarded the plaintiff \$4,000 in compensatory damages for BMW’s conduct in representing that the car it sold to him was new when in fact it had been repainted after being damaged prior to delivery, and \$4 million dollars in punitive damages based upon a determination that the company had in place a non-disclosure policy which constituted “gross, oppressive or malicious” conduct under Alabama law.¹⁶⁹ During trial, the plaintiff produced evidence that BMW had a policy of not telling purchasers about pre-sale repairs that cost less than 3% of the value of the vehicle, and he also produced evidence that the repair to his vehicle reduced its value by \$4,000, which was 10% of its cost as new.¹⁷⁰ The plaintiff calculated his request for punitive damages at \$4 million dollars by multiplying his \$4,000 actual damages by the 1,000 cars BMW had sold to other customers as new without disclosing that they had been repainted.¹⁷¹ On appeal, the Alabama Supreme Court applied the U.S. Supreme Court’s *Haslip* criteria and rejected the defendant’s claim that the award was constitutionally impermissible, although it nevertheless ordered a remittitur of the punitive award to \$2 million dollars, since it believed the jury had improperly included BMW’s conduct in other jurisdictions when calculating its punitive damage award.¹⁷²

¹⁶⁶ *Id.* at 459 (citing *Games v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 909 (1991)).

¹⁶⁷ *Id.* at 462.

¹⁶⁸ 517 U.S. 559, 562–63 (1996).

¹⁶⁹ *Id.* at 564–65.

¹⁷⁰ *Id.* at 563–64.

¹⁷¹ *Id.* at 564.

¹⁷² 646 So. 2d 619, 629 (1994).

While it agreed with the reasoning of the Alabama Supreme Court as it pertains to the state's lack of authority to penalize a defendant for conduct in other jurisdictions,¹⁷³ the U.S. Supreme Court concluded that the \$2 million dollar punitive damage award, which was still 500 times the amount of the actual damages, was constitutionally excessive in light of the facts and circumstances surrounding the claim.¹⁷⁴ To provide courts with guidance when analyzing the amount of punitive damage awards, the Court established three guideposts for review: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the plaintiff's harm and the punitive damage award; and (3) the difference between that remedy and civil penalties imposed in comparative cases.¹⁷⁵ After applying these guideposts to the facts in the case, the Court concluded that the punitive damage award was excessive since the first guidepost, i.e. degree of reprehensibility of the defendant's conduct, was mitigated by the fact that the harm to the plaintiff was one that was purely economic,¹⁷⁶ and there was no evidence in the record of intentional false statements, affirmative misconduct, or concealment of evidence of the defendant's improper motive, which were at issue in *Haslip* and *TXO*.¹⁷⁷ With respect to the second guidepost, the Court cited a long history of courts throughout the country adhering to the principle that punitive damages "must bear a 'reasonable relationship' to compensatory damages,"¹⁷⁸ and it reiterated its decisions in both *Haslip*

¹⁷³ The Supreme Court did recognize, however, that evidence of out-of-state conduct may be relevant for determining the reprehensibility of a defendant's conduct. *Gore*, 517 U.S. at 574 n.21.

¹⁷⁴ *Id.* at 574.

¹⁷⁵ *Id.* at 574–75. According to the Court, the reprehensibility of a defendant's conduct is the most important indicator as to the reasonableness of a punitive damage award. *Id.* at 575–76.

¹⁷⁶ *Id.* at 576.

¹⁷⁷ *Id.* at 579.

¹⁷⁸ *Id.* at 580 & n.32 (citing *Saunders v. Mullen*, 24 N.W. 529 (Iowa 1885) ("When the actual damages are so small, the amount allowed as exemplary damages should not be so large."); *Flannery v. Baltimore & Ohio R.R. Co.*, 15 D.C. (4 Mackey) 111, 125 (D.C. 1885) ("[W]hen punitive damages award 'is out of all proportion to the injuries received, we feel it our duty to interfere.'"); *Houston & Tex. Cent. R.R. Co. v. Nichols*, 9 Am. & Eng. R.R. Cas. 361, 365 (Tex. 1882) ("Exemplary damages, when allowed, should bear proportion to the actual damages sustained."); *McCarthy v. Niskern*, 22 Minn. 90, 91–92 (1875) ("punitive damages 'enormously in excess of what may justly be regarded as compensation' for the injury must be set aside 'to prevent injustice'"); *Grant v. McDonogh*, 7 La. Ann. 447, 448 (La. 1852) ("[E]xemplary damages allowed should bear some proportion to the real damage sustained.")).

and *TXO*, which supported the proposition that a comparison between the compensatory award and the punitive award is a significant factor.¹⁷⁹ The Court did, however, soundly reject the idea that the constitutional line could be marked by a “simple mathematical formula” and made a point of observing that “low awards of compensatory damages” might “support a higher ratio than high compensatory awards,” particularly when an egregious act resulted in relatively low economic damages, when the injury was “hard to detect,” or “the monetary value of noneconomic harm [was] difficult to determine.”¹⁸⁰

In 2003, the Supreme Court again examined the excessiveness of a punitive damage award, this time in connection with a bad faith claim made against an automobile insurer who refused to proffer its \$50,000 policy limits in an automobile accident which resulted in the death of a driver and serious permanent disability of another driver who were involved in a collision due to the negligence of its insured.¹⁸¹ *State Farm Mutual Auto Insurance Co. v. Campbell* made its way to the Supreme Court after a jury returned a verdict against the Campbells in connection with the crash, and their insurance company, State Farm, responded by instructing them to put their house up for sale to satisfy the judgment.¹⁸² The Campbells appealed and State Farm paid the judgment after it was affirmed by the Utah appellate court.¹⁸³ After reaching an agreement with the injured parties not to seek satisfaction of their claims from them personally, the Campbells instituted a bad faith action against the insurer.¹⁸⁴ Following a bifurcated trial on the bad faith claim,¹⁸⁵ the jury held that State Farm’s refusal to settle the wrongful death and personal injury claims was unreasonable in light of the substantial likelihood of a verdict in excess of the policy limits.¹⁸⁶ The jury responded with an award of \$2.6 million dollars in emotional distress com-

¹⁷⁹ *Id.* at 581.

¹⁸⁰ *Id.* at 582–83.

¹⁸¹ 538 U.S. 408, 412–13 (2003).

¹⁸² *Id.* at 413.

¹⁸³ *Id.* at 414.

¹⁸⁴ *Id.* at 413. Evidence was produced during trial demonstrating State Farm had instituted a nationwide program to meet corporate fiscal goals by capping claim payments. *Id.* at 420.

¹⁸⁵ The first phase of the trial was held to determine whether State Farm’s decision not to settle was unreasonable in light of the “substantial likelihood of an excess verdict.” The second phase was conducted to determine State Farm’s liability for both compensatory and punitive damages. *Id.* at 414.

¹⁸⁶ *Id.* at 414.

pensatory damages and a punitive damage award of \$145 million dollars.¹⁸⁷ The trial court reduced the awards to \$1 million dollars in compensatory and \$25 million in punitive damages.¹⁸⁸ On appeal, the Utah Supreme Court applied the *Gore* guideposts and reinstated the original award after concluding that the insurer's conduct was reprehensible.¹⁸⁹

Finding that it was error for the appellate court to reinstate the jury's original punitive damage award based upon a desire to expose and punish deficiencies in State Farm's national operations, rather than for reprehensible conduct directed toward the Campbells,¹⁹⁰ the Court reemphasized that a state generally does not have a legitimate interest in punishing unlawful acts committed outside of its jurisdiction.¹⁹¹ When looking at the second of the *Gore* guideposts, the Court again declined to identify concrete constitutional limits on the ratio between compensatory and punitive damages.¹⁹² While noting that the Court had never imposed "rigid benchmarks" beyond which punitive damage awards may not pass, it did restate its position in *Gore*, which suggested that ratios greater than those it had previously upheld "may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'" ¹⁹³ Significantly, the Court again stressed the requirement that "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered."¹⁹⁴ After observing that the emotional harm suffered by the

¹⁸⁷ *Campbell v. State Farm Mut. Auto Ins. Co.*, 65 P.3d 1134, 1143 (2001), *reversed by* *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 403 (2003).

¹⁸⁸ *Campbell*, 538 U.S. at 414.

¹⁸⁹ *Id.* at 415–16. The Court found, among other things, that State Farm employees had altered company records to make it appear as if the Campbells were less culpable in the underlying crash, and it held this conduct sufficient to support a punitive award. *Id.* at 419–20.

¹⁹⁰ *Id.* at 418, 420.

¹⁹¹ *Id.* at 421–22. The Court did, however, express the need to continue to preserve the relevance of out-of-state conduct to "demonstrate[] the deliberateness and culpability of the defendant's action in the State where it is tortious [provided the] conduct [has] a nexus to the specific harm suffered by the plaintiff." *Id.* at 422.

¹⁹² *Id.* at 424–25. The Court did note, however, that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* at 425.

¹⁹³ *Id.* at 425 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 581–83 (1996)).

¹⁹⁴ *Id.* at 426.

Campbells arose not from a physical assault or trauma, but from an economic transaction that resulted in a \$1 million dollar award for a year and a half of emotional distress, the Court concluded that a ratio of 145-to-1 was neither reasonable nor proportionate to the harm they suffered.¹⁹⁵ The case was remanded back to the Utah state court to determine the appropriate amount of the punitive damage award.¹⁹⁶ Upon remand, the Utah Supreme Court held that \$9,018,780.75, or approximately nine times the compensatory award, was appropriate, and the Supreme Court denied certiorari.¹⁹⁷

Several years passed until the Supreme Court again delivered a decision dealing with the size of a punitive damage award. *Exxon Shipping Co. v. Baker* began its long legal odyssey shortly after the oil supertanker ran aground on Bligh Reef in the Prince William Sound in Alaska on March 24, 1989.¹⁹⁸ Shortly before its grounding, its grossly intoxicated captain walked out of the tanker's bridge.¹⁹⁹ The ship's hull split open and caused an unprecedented and catastrophic spill of millions of gallons of crude oil into Prince William Sound.²⁰⁰ By the time the case made its way to the U.S. Supreme Court, the punitive damage award made in the initial trial had been remanded three times.²⁰¹ The trial judge entered a \$4.5 billion dollar punitive

¹⁹⁵ *Id.* at 426–29. The Court gave only a cursive review of the third *Gore* guidepost, which instructs a court to look at the disparity between a punitive damage award and potential civil penalties since the most relevant civil sanction under Utah state law for the harm done to the Campbells was a \$10,000 fraud statute, which paled in comparison to the \$145 million dollar punitive damage verdict. *Id.* at 428.

¹⁹⁶ *Id.* at 428–29.

¹⁹⁷ *Campbell v. State Farm Mut. Auto Ins. Co.*, 98 F.3d 409, 420 (2004), *cert. denied*, 543 U.S. 874 (2004).

¹⁹⁸ *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2611 (2008).

¹⁹⁹ *Id.* at 2612.

²⁰⁰ *Id.* at 2612–13.

²⁰¹ Prior to this decision, Exxon had paid more than \$1 billion dollars to settle state and federal claims for environmental damage, after spending approximately \$2.1 billion in cleanup efforts and paying several hundred million dollars in fines and restitution. *Id.* at 2613. The action, which resulted in the Supreme Court decision in 2008, was a class action filed by approximately 32,000 commercial fisherman and native Alaskans to recover economic losses to individuals who depended on Prince William Sound for their livelihoods. *Id.* at 2611–13. Interesting, although not discussed in the Supreme Court's decision, is the fact that Exxon itself stood to share in the punitive damages award pursuant to a deal it entered into with seafood processors, which came to be known as the "Seattle Seven" years earlier. See *In re The Exxon Valdez*, 229 F.3d 790, 792 (9th Cir. 2000). The Seattle Seven settled their claims with Exxon for \$64 million dollars prior to the liability trial, agreed not to execute on any compensatory damages

damage award against the oil company in 2004.²⁰² The Ninth Circuit twice vacated and remanded for adjustments to the size of the punitive award in light of the Supreme Court's punitive damage decisions dealing with due process constitutional protections before ultimately remitting the award to \$2.5 billion dollars.²⁰³

Exxon filed a legal challenge as to the size of the remaining \$2.5 billion dollar punitive damage award.²⁰⁴ In a detailed analysis of the history and dual goals behind punitive damage awards discussing the need to deter a defendant's reckless or harmful conduct and also provide retribution to an injured plaintiff,²⁰⁵ Justice Souter noted that, in a tort context, punitive damages are generally limited to circumstances "where a defendant's conduct is 'outrageous,' owing to 'gross negligence,' [or] 'willful, wanton, and reckless indifference for the rights of others.'"²⁰⁶ He described reckless conduct as neither intentional, malicious, nor "necessarily callous toward the risk of harming others, as opposed to unheeding of it,"²⁰⁷ and stated that larger punitive-damage awards may be justifiable when a defendant's wrongdoing is hard to detect so as to increase its chance of escaping responsibility or "when the value of injury and the corresponding compensatory" damages are small.²⁰⁸ While acknowledging

award, and also agreed to cede back to Exxon any punitive damages they might recover as a result of the litigation. *Id.* Under the terms of this cede-back provision, Exxon would receive almost 15% of the punitive damages award, a fact it chose not to disclose to the court and the jury making the assessment. *See id.* at 794–95. Upon learning this, the trial judge struck the cede-back provision since he was angered that Exxon had failed to tell the jury "the whole story." *Id.* Both Exxon and the Seattle Seven appealed, and the Ninth Circuit vacated and reversed the trial court, holding that cede-back agreements are lawful and enforceable, and generally not disclosable to a jury. *See id.* at 790, 800.

²⁰² *In re The Exxon Valdez*, 296 F. Supp. 2d 1071, 1110 (D. Alaska 2004), *opinion after remand*, 296 F. Supp. 2d 1071 (D. Alaska 2004), *vacated*, 472 F.3d 600 (9th Cir. 2006), *amended by*, 490 F.3d 1066 (9th Cir. 2007), *vacated*, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008).

²⁰³ *In re The Exxon Valdez*, 472 F.3d 600, 601, 625 (9th Cir. 2006), *amended by* 490 F.3d 1066 (9th Cir. 2007), *vacated*, Exxon, 128 S. Ct. 2605 (2008); *In re The Exxon Valdez*, 490 F.3d 1066, 1068 (9th Cir. 2007); *In re The Exxon Valdez*, 270 F.3d 1215, 1246–47 (9th Cir. 2001).

²⁰⁴ *Exxon*, 128 S. Ct. at 2614.

²⁰⁵ *Id.* at 2621 n.9 (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003)).

²⁰⁶ *Id.* at 2621 (quoting 4 RESTATEMENT (SECOND) OF TORTS § 908(2) (1977)); 1 L. SCHLEUTER, PUNITIVE DAMAGES § 9.3(A) (5th ed. 2005)).

²⁰⁷ *Id.* at 2621–22 (citing 2 RESTATEMENT (SECOND) OF TORTS § 500, cmt. a (1964)).

²⁰⁸ *Id.* at 2622 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996)).

the difficulties juries may face in the absence of express guidelines for making punitive damage awards, the Court specifically rejected the option of establishing a hard-dollar punitive cap, noting that there is simply no standard tort "making it difficult to settle upon a particular dollar figure" that would be appropriate in all cases under all circumstances.²⁰⁹ Instead, the Court elected to follow its earlier precedent that had established principles and guidelines as to the outer limits of constitutionality, and it held that it was appropriate to peg punitive damages to compensatory damages in civil cases to a multiplier or ratio.²¹⁰

Applying the facts of the *Exxon Valdez* case to a federal maritime law context in his analysis, Justice Souter noted that the case did not involve intentional or malicious conduct and was one in which the behavior at issue was not driven primarily by the desire for gain.²¹¹ He was also careful to note that the plaintiffs' losses in the suit were commercial in nature.²¹² This is an important observation, since it meant that the Court was not required to do a detailed analysis of two of the relative reprehensibility factors it had previously established to be "[t]he most important indicium of the reasonableness of a punitive damages award."²¹³ The Court ultimately determined that the maximum punitive damage award allowable in a maritime law context was

²⁰⁹ *Id.* at 2629.

²¹⁰ *Id.* (citing 2 ALI ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: REPORTERS' STUDY 258 (1991) ("[T]he compensatory award in a successful case should be the starting point in calculating the punitive award"); ABA, REPORT OF SPECIAL COMM. ON PUNITIVE DAMAGES, SECTION OF LITIGATION, PUNITIVE DAMAGES: A CONSTRUCTIVE EXAMINATION 64-66 (1986) ("recommending a presumptive punitive-to-compensatory damages ratio"). In reaching this conclusion, the Court found support in the fact that a ratio or multiplier model had been adopted by many states. *See, e.g.*, ALA. CODE §§ 6-11-21(a), (d) (2005) (greater of 3:1 or \$1.5 million in most personal injury suits, and 3:1 or \$500,000 in most other actions); COLO. REV. STAT. § 13-21-102(1)(a) (2007) (1:1); MO. REV. STAT. § 510.265(1) (2008) (greater of 5:1 or \$500,000 in most cases); N.D. CENT. CODE § 32-03.2-11(4) (2007) (greater of 2:1 or \$250,000). The Court also found support in analogous legislation enacted by Congress, which has provided for treble damages in antitrust, racketeering, patent and trademark actions. *See* 15 U.S.C. §§ 15, 1117 (2006); 18 U.S.C. § 1964(c) (2006); 35 U.S.C. § 284 (2006).

²¹¹ 128 S. Ct. at 2633.

²¹² *Id.*

²¹³ *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)). The Court discussed the need to weigh five specific considerations when evaluating a punitive damage award's reasonableness including (1) whether "the harm caused was physical as opposed to economic," and (2) whether the conduct causing the plaintiff's harm showed "indifference to or a reckless disregard of the health or safety of others." *Id.*

one that was equal to the jury's \$507.5 million dollar compensatory damage award.²¹⁴

III. COMPENSATORY AND PUNITIVE DAMAGES MUST BE AWARDED AT THE SAME TIME BY THE SAME JURY

As is the case in the Continental Connection Flight 3407 litigation that is being litigated in the Western District of New York, cases arising out of the crash of a commercial airliner are typically transferred to a single jurisdiction by the Judicial Panel on Multidistrict Litigation so that pre-trial proceedings may be conducted in a single forum. Counsel representing defendants in similar aviation disaster cases have argued to judges managing the cases that judicial efficiency is best served by conducting a single liability trial in the same jurisdiction so they can avoid being subjected to multiple trials in the various jurisdictions in which the plaintiffs originally filed their lawsuits.

The significance of *Exxon Valdez* and its predecessors does not rest on the Supreme Court's reasoning as to the size of individual punitive damage awards but, rather, on language in the cases that plainly calls for compensatory and punitive damages to be awarded by the same fact-finder at the same time.²¹⁵ Moreover, these decisions mandate that there has to be a reasonable relationship between compensatory and punitive damage awards, which can only be achieved through the use of an arithmetic multiplier or ratio.²¹⁶ To achieve this constitutional mandate, it is necessary for a jury to assess a defendant's liability for the crash, and that same jury must also determine whether the conduct of the defendant, evidence of which they have received during the liability phase of a trial, gives rise to a punitive damage award. Finally, to insure that the awards adhere to the Supreme Court's reasonable relationship criteria, that same jury must hear *all* of the damage evidence on behalf of every one of

²¹⁴ 128 S. Ct. at 2633–34. See also *In re Exxon Valdez*, 236 F. Supp. 2d 1043, 1060, 1063 (D. Alaska 2002), *opinion after remand*, 296 F. Supp. 2d 1071 (D. Alaska 2004), *vacated*, 472 F.3d 600 (9th Cir. 2006), *amended by* 490 F.3d 1066 (9th Cir. 2007), *vacated*, *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008).

²¹⁵ See *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001).

²¹⁶ *Gore*, 517 U.S. at 581 (“[a] comparison between the compensatory award and the punitive award is significant.”); *State Farm*, 538 U.S. at 426 (“[c]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.”).

the plaintiffs who has filed wrongful death suits, thereby imposing a heavy burden on the jurors. Any attempt to try fault for punitive damages before a jury that has heard evidence of a defendant's liability and the actual amount of punitive damages before a different jury could potentially violate Seventh Amendment protections since two separate juries would be adjudicating interwoven claims.²¹⁷

No appellate court has wrestled with the practical implications that are presented as a result of the Supreme Court's punitive damage mandates in the context of an aviation disaster. Prior to the *Gore* and *State Farm* decisions, trial courts managing these types of cases tended to bifurcate issues related to liability and punitive and compensatory damages at a trial.²¹⁸ The only federal trial court to grapple with this problem in a case arising out of the crash of a commercial airliner is that of the Honorable Karl S. Forester from the Eastern District of Kentucky in connection with the crash of Comair Flight 5191.²¹⁹ All of the passengers' wrongful death cases were transferred to Judge Forester pursuant to 28 U.S.C. § 1404(a), so there was never a need for him to consider the possibility that some cases would be required to be transferred back to their original jurisdictions at the conclusion of consolidated pre-trial proceedings.²²⁰

As the trial date in the case approached in the summer of 2008, Judge Forester recognized that because there were viable punitive damage claims in the case, it would be necessary to establish a construct under which the case could proceed to trial and still adhere to the Supreme Court's requirement that there be a reasonable relationship between the punitive and compensatory damages each family was entitled to receive. He was aware that the evidence of the defendants' negligence

²¹⁷ The Seventh Amendment states: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

²¹⁸ See, e.g., Andrew C. Jayne, *The Impact of Recent U.S. Supreme Court Punitive Damages Jurisprudence on Oklahoma's Punitive Damages Statute and Jury Instructions*, 57 OKLA. L. REV. 873, 892-93 (2004).

²¹⁹ All of the wrongful death suits filed by the families of the passengers who were killed on board Comair Flight 5191 have been resolved with the exception of a single case. Judge Forester continues to preside over that case. The authors served as leading counsel for the Plaintiff's Executive Committee for the case.

²²⁰ E.g., *Fahey v. Comair, Inc.*, No. 07-2002-KVH, 2007 U.S. Dist. LEXIS 32954, at *4-5, 7 (D. Kan. May 3, 2007).

presented by the plaintiffs during a trial would, by necessity, include the degree of negligence that could support liability for punitive damages under Kentucky law. He was also aware that if he attempted to carve out the issue of the defendants' gross negligence from a jury's consideration of the appropriate amount of compensatory damages a family was entitled to receive, it would require a plaintiff to present all of the liability evidence twice, to two juries, which created potential Seventh Amendment issues. He was also mindful of the enormous burden that could be imposed upon a single jury being asked to sit in service until all of the liability, punitive, and compensatory damage claims for each of the 49 decedents' families were resolved.

Faced with the reality that under Supreme Court precedent, each family was entitled to have its own trial as to the defendants' liability and the amount of their compensatory and punitive damages, Judge Forester sought to establish a procedure to facilitate settlement discussions between the parties while remaining in line with the Supreme Court's directives in the event the cases could not be resolved. In an unreported opinion, he ordered the parties to try three exemplar cases on all issues and stated that he anticipated that good faith settlement negotiations would take place once there was a determination in the exemplar cases.²²¹

In addition to trying to bring the parties to a resolution by settlement and hopefully avoid the need for multiple trials on liability and punitive and compensatory damages, Judge Forester offered the parties two possible solutions. First, in the event the exemplar cases produced a punitive damage finding and formula, he suggested that the parties could, if they desired, agree to adopt its use in future cases.²²² Second, he recommended that, in the event that there was no punitive finding during the exemplar trials, the parties could agree that this finding would be binding on future trials.²²³ The problem with this approach, obviously, is the fact that it is voluntary in nature and requires plaintiffs to give up their right to their own trial as to the defendants' liability and their responsibility for both punitive and compensatory damages, which is really not a solution to the problem. Following the Court's decision, all but one of the

²²¹ See *In re Air Crash at Lexington at Kentucky*, August 27, 2006, No. 5:06-cv-315-KSF D.E. 2196 (E.D. Ky. May 15, 2008) (unreported).

²²² *Id.*

²²³ *Id.*

wrongful death passenger cases were resolved by settlements, which eliminated the need to determine the manner as to how the cases could be tried.

It is important to note again that all of the cases arising out of the crash of Comair Flight 5191 were either originally filed in the Eastern District of Kentucky or transferred to that jurisdiction subject to 28 U.S.C. § 1404(a).²²⁴ The Judicial Panel on Multidistrict Litigation declined to grant a transfer pursuant to 28 U.S.C. § 1407 to the few cases originally filed outside of the Eastern District of Kentucky.²²⁵ What is generally more commonplace, and is the case in the litigation arising out of the crash of Continental Connection Flight 3407, is that cases filed following an air disaster are subject to a transfer order from the Judicial Panel under 28 U.S.C. § 1407, which transfers the cases to a single jurisdiction for the purpose of conducting the pre-trial proceedings.²²⁶ As a result, the plaintiffs affected by the Order of the Judicial Panel in the Continental Connection Flight 3407 case are entitled, under the unambiguous terms of the statute itself and the Supreme Court's instruction in *Lexecon*, to a remand order returning them to their original jurisdictions when the pre-trial proceedings are concluded.²²⁷ Regardless of where the cases are tried, based upon the current state of the law, the complex issue as to how the families' claims will be tried remains to be determined.

²²⁴ E.g., *Fahey*, 2007 U.S. Dist. LEXIS 32954, at *7.

²²⁵ *Id.* at *2.

²²⁶ *Id.* at *4-5.

²²⁷ See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28 (1998).