

2002

Recent Developments in Aviation Law

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David T. Norton, *Recent Developments in Aviation Law*, 67 J. AIR L. & COM. 1107 (2002)
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RECENT DEVELOPMENTS IN AVIATION LAW

DAVID T. NORTON*

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INTRODUCTION

I AM HONORED and privileged to present the “Recent Developments in Aviation Law” paper for the 2002 SMU Air Law Symposium. The year 2001 brought immense tragedy and sorrow for the aviation industry specifically and for our country as a whole. We will not fully know nor understand for many years

the extent of the changes wrought by the events of September 11, 2001.

In light of these events, I will attempt to provide a reasonably comprehensive review of the significant legislation and regulations that arose out of the terrorist attacks, the “normal” annual review of significant case law and a few final comments on the new proposed aircraft fractional ownership regulations. This review will cover December 2000 through the end of December 2001. With respect to my report on case law, I will cover all of the major reported federal circuit, district and state court cases, as well as unreported decisions that appeared to add points of interest. Note that I present some cases in only one section of the paper, even though they may cover a range of issues discussed in other sections. The task was enormous, and it is inevitable that I missed, or misread, some cases, which should not be interpreted as any type of reflection on the importance of that particular matter.

Finally, as this was a “solo” flight on my part, any errors or omissions in this paper rest solely upon my own shoulders. For those I offer my humble apologies.

—DAVID T. NORTON

I. RECENT AVIATION LEGISLATIVE AND REGULATORY ACTIVITY RELATED TO THE TERRORIST ATTACKS OF SEPTEMBER 11, 2001

A. INTRODUCTION

On the morning of September 11, 2001, a group of terrorists hijacked four commercial airliners. The terrorists crashed two of the aircraft into Towers I and II of the World Trade Center in New York City, both of which subsequently collapsed. The terrorists crashed a third aircraft into the Pentagon. The fourth crashed into a field in Pennsylvania, apparently as the passengers attempted to gain control of the aircraft.

These terrorist acts have caused a sea change in aviation and aviation security, both in the United States and around the world. The immediate affect was a total ground stop order, bringing all aviation activity in the United States (other than military and law enforcement flights) to a complete halt. Shortly thereafter, Congress enacted two major pieces of aviation legislation—the Air Transportation Safety and System Stabi-

lization Act¹ and the Aviation Transportation Security Act.² It will arguably take many years to determine what long-term affects these terrorist acts will have on aviation specifically and our society in general.

B. COMMERCIAL AVIATION COMPENSATION AND STABILIZATION

1. *The Stabilization Act*

On September 22, 2001, President Bush signed the Air Transportation Safety and System Stabilization Act (the "Stabilization Act").³ The Stabilization Act contains five substantive sections, titled and dealing with: (1) airline stabilization, i.e., monetary assistance to commercial air carriers, (2) aviation insurance, (3) tax provisions, (4) victim compensation, and (5) air transportation safety.

a. Title I: Airline Stabilization

Title I provides several forms of substantive relief, as well as obligations and limitations, to air carriers.⁴ It also creates a new Stabilization Board, and addresses rules with respect to essential air services. Specifically, Section 101, titled "Aviation Disaster Relief," creates two forms of relief to commercial air carriers: federal credit instruments and direct compensation.⁵ With respect to the credit instruments, Congress granted the President the authority to issue Federal credit instruments to air carriers, not to exceed \$10 billion in the aggregate. With respect to direct compensation, Congress gave the President the authority to issue direct compensation not to exceed, in the aggregate, \$5 billion to air carriers for (1) losses incurred as a result of the

¹ Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 *et seq.* (2001) (codified as amended in scattered sections of 49 U.S.C.).

² Aviation Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified as amended in scattered sections of 49 U.S.C.).

³ Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 *et seq.* (2001) (codified as amended in scattered sections of 49 U.S.C.).

⁴ Section 402(1) of the Stabilization Act, applicable to the September 11th Victim Compensation Fund of 2001 created by Title IV of the act, defines "air carrier" as "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation and includes employees and agents of such citizen." The term "air carrier" is not otherwise defined in the Stabilization Act, which has lead to some confusion with respect to who may qualify for its compensation, credit and liability-limitation provisions.

⁵ Stabilization Act, 115 Stat. 230, §§ 101(a)(1) and (a)(2), respectively.

ground stop order and (2) incremental losses incurred between September 11 and December 11, 2001, as a result of the attacks.⁶

Sections 103 and 104 of the Stabilization Act provide further guidance and limitations on the relief granted by Section 101. Under Section 103, any direct-compensation payments authorized by Section 101(a)(2), and made to an air carrier, cannot exceed that air carrier's actual losses, with such losses determined through reports in the form required by the administration. Under Section 104, the recipients of the credit-instruments aid authorized under Section 101(a)(1) must agree that between September 11, 2001 and September 11, 2003, any employee or officer who earned over \$300,000 in 2000 will not exceed in earnings what they earned in 2000, nor will they receive severance or other such benefits more than twice what they earned in 2000.

The Stabilization Act creates a new Air Transportation Stabilization Board (ATSB), composed of (1) the Chairman of the Board of Governors of the Federal Reserve System (or his or her designee), who is also designated as the chair of the ATSB; (2) the Secretary of the Department of Transportation (DOT) (or his or her designee); (3) the Secretary of the Treasury (or his or her designee); and (4) the Comptroller General of the United States (or his or her designee) as a non-voting member of the ATSB.⁷

The role of the new ATSB is to administer the issuance of the credit instruments authorized by Section 101;⁸ manage the risk assumed by the government with respect to these credit instruments;⁹ and see that the government participates in any gains under this program.¹⁰ Moreover, Section 102(c) places additional limitations on the credit-instrument grants authorized under Section 101(a)(1) to situations in which:

(A) the obligor is an air carrier for which credit is not reasonably available at the time of the transaction; (B) the intended obligation by the obligor is prudently incurred; and (C) such agree-

⁶ According to the Department of Transportation, as of December 10, 2002, \$4,602,157,931.90 had been awarded to 410 air carriers under this direction compensation program. See <http://www.dot.gov/affairs/carrierpayments.htm> (last visited Jan. 15, 2003).

⁷ Stabilization Act, 115 Stat. 230, § 102(b).

⁸ *Id.* § 102(c).

⁹ *Id.* § 102(d)(1).

¹⁰ *Id.* § 102(d)(2).

ment is a necessary part of maintaining a safe, efficient, and viable commercial aviation system in the United States.¹¹

Finally, Section 105 of the Stabilization Act requires any recipients of compensation under the act to maintain the air service they had in place on September 11, 2001.

b. Title II: Aviation Insurance

Section 201 of the Stabilization Act modifies 49 U.S.C. § 44302, the provision previously granting the Secretary of Transportation authority to provide insurance or reinsurance for aircraft in foreign commerce or any two points outside the United States, by deleting the geographic restriction and adding additional authority such that the Secretary may now reimburse air carriers for the cost of insurance premiums resulting from September 11. This section also provides that those air carriers that the Secretary certifies as victim of an act of terrorism:

shall not be responsible for losses suffered by third parties . . . that exceed \$100,000,000, in the aggregate, for all claims by such parties arising out of such act, and the Government shall be responsible for any liability above such amount. No punitive damages may be awarded against any air carrier (or the Government taking responsibility for and air carrier under this paragraph) under a cause of action arising out of such act.¹²

Section 202 authorizes the Secretary to extend the provisions described above, as well as those found in 49 U.S.C. § 443, to “vendors, agents and subcontractors of air carriers.”

c. Title III: Tax Provisions

Section 301 of the Act modifies the Internal Revenue Code by extending certain tax due dates for air carriers. The section also notes that “[n]othing in any provision of law shall be construed to exclude from gross income under the Internal Revenue Code of 1986 any compensation received under section 101(a)(2) of this Act [granting authority to provide direct compensation to air carriers for losses suffered from the terrorist attacks].”¹³

¹¹ *Id.* § 102(c).

¹² *Id.* § 201(b)(2).

¹³ *Id.* §301(b).

d. Title IV: Victim Compensation

Title IV of the Stabilization Act may be cited as the “September 11th Victim Compensation Fund of 2001” (the “Fund”).¹⁴ The purpose of the Fund is “to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001.”¹⁵

The Attorney General shall appoint a Special Master to administer the Fund.¹⁶ The Special Master must follow a detailed set of rules with respect to the Fund.¹⁷ Among other things, an individual seeking compensation (a “Claimant”) must file his or her claim with the Special Master within two years after the Attorney General, acting in consultation with Special Master, promulgates the procedures for filing. Also, the Act requires the Special Master and Attorney General to promulgate filing procedures within 90 days after enactment of the Act.¹⁸ The Fund further provides guidelines for eligibility, factors to consider in awarding a claim (which, with respect to a Claimant specifically cannot include negligence or any other theory of liability), and a 120 day deadline for responding to each claim.¹⁹

Other significant aspects of the Fund limit a Claimant’s remedies. A Claimant may not receive punitive damages; the Claimant’s award shall be reduced by the amount of “Collateral Source”—life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to the terrorist acts—already received by the Claimant; and by submitting a claim, the Claimant waives the right to file or be a part of a civil action for damages sustained due to the terrorist attacks.²⁰ Along these lines, the Fund also provides that “[n]otwithstanding any other provision of law, liability for all claims, whether for compensatory or punitive damages, arising from the [terrorist attacks] against any air carrier shall not be in an amount greater than the limits of the liability coverage maintained by the air carrier.”²¹ Moreover, the Act also creates an exclusive federal cause of action for damages arising out of the

¹⁴ *Id.* § 401.

¹⁵ *Id.* § 403.

¹⁶ *Id.* § 404.

¹⁷ *Id.* § 405.

¹⁸ *Id.* § 407.

¹⁹ *Id.* § 405(a).

²⁰ *Id.* § 405(b), (c)(3)(B).

²¹ *Id.* § 408(a).

crashes of the four aircraft, provides that the substantive law to be applied shall be the law of the state where the crash occurred (except where preempted by federal law), and sets the original and exclusive jurisdiction for all such actions in the United States District Court for the Southern District of New York.²²

e. Title V: Air Transportation Safety

Finally, Title V serves as a precursor to later action by the Congress, affirming the President's decision to spend \$3,000,000,000 on airline safety and security and stating its commitment to pass further legislation on air travel security.²³

2. *Order and Regulations*

Since the enactment of the Stabilization Act, the DOT and the Office of Management and Budget (OMB) have issued at least two orders and two sets of regulations specifically related to the Act.

The DOT issued its Airline Industry Conditions Order on September 28, 2001, under the authority of the new Stabilization Act, in order to "monitor industry developments and to use our authority as appropriate to alleviate recent industry problems, to provide advice and analysis to Congress, and to implement legislation enacted by Congress."²⁴ The original Order required reporting to begin within two days after its issuance, required "real-time" reporting, and was open ended as to its duration. Attachment A to the Order listed the specific airlines that were required to respond, and Attachment B listed the data to be reported. This included financial data and analysis (including changes in compensation for airline executives), operations data and analysis (including potential employee furloughs), traffic and fare data and analysis, and bookings and cancellations data and analysis.

Due to significant industry outcry, the DOT modified the Order on October 12, 2001.²⁵ The modified Order ended the re-

²² *Id.* § 408(b).

²³ The Act also has one last non-substantive title: Title VI—Separability. *Id.* § 601.

²⁴ DOT Order 2001-9-18, Airline Industry Conditions, DOT Dkt. No. OST-2001-10709-1 (Sept. 28, 2001), *as amended*, DOT Dkt. No. OST-2001-10709-2 (Oct. 12, 2001); DOT Dkt. No. OST-2001-10709-1 ¶ 1.

²⁵ DOT Dkt. No. 10709-2 ¶ 2; *see also* Brian F. Havel and Michael G. Whitaker, *The Approach of Re-Regulation: The Airline Industry After September 11, 2001*, in CCH ISSUES IN AVIATION LAW & POLICY 7-12 (November 2001).

porting time on December 31, 2001 and required noticeably less onerous data from carriers (including the deletion of the requirement to provide executive compensation information).

DOT Order 2001-9-18²⁶ responds to Section 105 of the Stabilization Act, although it appears to rest most of its regulatory authority on the scope of the small community service program created by 49 U.S.C. §§ 41731-42. Among other things, it requires the airlines to provide advance notice of any plans to substantially reduce or end a community's domestic scheduled passenger service, and expires on its own terms as of December 31, 2001.

On October 5, 2001, the OMB issued in final-rule form its Regulations For Air Carrier Guarantee Loan Program under Section 101(a)(1) of the Air Transportation Safety and System Stabilization Act.²⁷ The regulations spell out in detail how the new Air Transportation Stabilization Board will implement the three conditions of eligibility for federal credit assistance prescribed in Section 102(c)(2)(B) and for the credit assistance authorized by Section 101(a)(1) of the Act.

On October 29, 2001, the DOT published its final rules and request for comments in its Procedures for Compensation of Air Carriers.²⁸ In response to comments received, DOT amended the new regulations effective December 26, 2001.²⁹ The regulations provide detailed guidelines for awarding direct compensation to air carriers authorized under Section 101(a)(2) of the Act.

C. AVIATION AND TRANSPORTATION SECURITY

1. *The Transportation Security Act*

After considerable disagreement between the two houses, on November 17, 2001, Congress passed, and on November 19, President Bush signed, the Aviation Transportation Security Act

²⁶ DOT Order 2001-9-18, Reports on Significant Airline Service Reductions, DOT Dkt. No. OST-2001-10711 (Sept. 27, 2001).

²⁷ Aviation Disaster Relief—Air Carrier Guarantee Loan Program, 14 C.F.R. Part 1300 (2002).

²⁸ Procedures for Compensation of Air Carriers, 66 F.R. 54616 (Oct. 29, 2001).

²⁹ 14 C.F.R. Part 330 (Oct. 29, 2001), published at 67 F.R. 18468; *see* DOT, Air Carrier Compensation at <http://www.dot.gov/accomp.html> (last visited Jan. 15, 2003) (noting that Part 330 was amended in the Federal Register on Apr. 16, 2002, and providing a copy of the proposed amendments).

(the "Security Act").³⁰ The Security Act is largely based on the Senate's version of the proposed bill, S.B. 1447.

a. New Transportation Security Administration

Significantly, the Security Act creates a new federal agency within the DOT, the Transportation Security Administration (TSA), to be headed by the new Under Secretary of Transportation for Security.³¹ On December 10, 2001, DOT Secretary Mineta announced his intended nomination of John Magaw, a former director of the Bureau of Alcohol, Tobacco and Firearms as well as the U.S. Secret Service, as the new Under Secretary.³² Although the new TSA is largely focused on aviation issues, the new Under Secretary will be responsible for a multi-modal agency that could well eclipse the FAA in size and scope.³³

The new Under Secretary was given three months after the enactment of the Security Act to "assume civil aviation security functions and responsibilities under chapter 49 of title 49, United States Code, as amended by this Act," in accordance with a schedule to be developed by the Secretary of Transportation.³⁴ The Security Act also sets other specific deadlines, such as requiring the new Under Secretary to (1) report to Congress on immediate safety steps by December 19, 2001;³⁵ (2) begin the collection of passenger and air carrier security fees by January 18, 2002;³⁶ (3) provide certification to Congress that the federalization of screening process has been completed by November

³⁰ Aviation Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 *et seq.* (2001) (codified throughout 49 U.S.C. § 40101 *et seq.*). The Joint Explanatory Statement of the Committee of Conference from the House of Representatives Conference Report provides a good overview of the significant portions of the new Security Act. H.R. REP. NO. 107-296, at 54-81 (2001). For an excellent article that also provides a detailed overview of the Security Act, *see* Frank J. Costello and Robert A. DeHaan, *The New Face of Aviation Security: An Overview of the Aviation Transportation Security Act*, CCH ISSUES IN AVIATION LAW & POLICY (Nov. 2001).

³¹ Security Act, 49 U.S.C. § 114 (2002).

³² *See, e.g.*, Press Release, DOT, U.S. Transportation Secretary Mineta Announces Intended Nomination of Magaw as Under Secretary of Transportation for Security (Dec. 10, 2001), *at* <http://www.dot.gov/affairs/dot12301.htm>.

³³ *See* 49 U.S.C. § 114(d).

³⁴ 49 U.S.C. § 114(g).

³⁵ 49 U.S.C. § 44903.

³⁶ 49 U.S.C. § 44940.

19, 2002;³⁷ and (4) commence the private screening opt-out program at the by November 19, 2004.³⁸

b. Functions of the New Under Secretary of Transportation for Security—Emergency Orders and Federalized Screening

The Under Secretary has broad emergency rulemaking authority. Should he or she determine that a “regulation or security directive must be issued immediately in order to protect transportation security,” the TSA may do so without following any of the normal promulgatory or review processes.³⁹ The Security Act also provided a mechanism for review of such emergency orders in the form of a new Transportation Security Oversight Board (the “TSOB”), but the TSOB’s role is limited to either ratifying or disapproving the emergency action within thirty days of its issuance.⁴⁰

Arguably the most immediate, visual and controversial provision of the new Security Act is the federalization of all passenger, baggage and cargo screening services.⁴¹ The details in the Security Act are long, complex, and comprehensive. They range, for example, from (1) the minimum hiring standards for new screeners (including the requirements of U.S. citizenship, have a certain minimum education, and a background security check),⁴² to (2) the time frame for the transition from air-carrier-controlled screening to federalized screening (beginning three months after enactment and being completed no later than one year after enactment),⁴³ to (3) an increase in penalties, making assault of any person with aviation security duties in the performance of those duties a federal felony.⁴⁴

That being said, the Security Act does create two options for the use of private screening companies, drafted as a compromise between House and Senate versions of the original bill.⁴⁵ The first option allows the Under Secretary to start a pilot pro-

³⁷ 49 U.S.C. § 44901.

³⁸ 49 U.S.C. § 44919.

³⁹ 49 U.S.C. § 114(l)(s)(A).

⁴⁰ 49 U.S.C. §§ 114(1)(2)(B), 115.

⁴¹ *See, e.g.*, 49 U.S.C. §§ 114(g); H.R. REP. NO. 107-296, Sect. 21, at 63-64 (2001) (joint conference comments on federalization provisions).

⁴² *See* 49 U.S.C. § 44935.

⁴³ 49 U.S.C. §§ 114(g), 44901(a).

⁴⁴ 49 U.S.C. § 46503.

⁴⁵ H.R. REP. NO. 107-296, Sect. 21.

gram at no more than five airports in which private screening companies would perform to all of the standards required of the federal workers. The second is an opt-out program, with essentially the same requirements as the pilot program, but beginning two years after the Under Secretary certifies that the federalization process has been completed at the airport in question.⁴⁶

The Security Act also directs the TSA to develop programs for the increased screening of checked-baggage. Two of its more controversial deadlines require the TSA to have a system in place to screen all checked baggage no later than January 11, 2002, as well as explosive detection systems. Where such systems are not available, alternative systems such as bag-matching, manual search or explosives detecting dogs—no later than December 31, 2002.⁴⁷

The new TSA must develop a screening program for air cargo as soon as practicable, without facing a hard deadline.⁴⁸ Finally, the Under Secretary may at his or her discretion, require airports to maximize their use of technology to detect or neutralize chemical or biological weapons.⁴⁹

The Security Act also transfers to the TSA essentially all of the security functions performed by the DOT and the Federal Aviation Administration (FAA), such as, (1) research and development funding and responsibilities;⁵⁰ (2) functions relating to the testing of airport screeners;⁵¹ and (3) functions related to drug and alcohol testing.⁵²

c. Funding

The Security Act authorizes the TSA to impose user fees on both passengers and air carriers to help pay for the new security efforts.⁵³ It also authorizes (but does not appropriate) some \$1.5 billion in federal funding to airports,⁵⁴ as well as an addi-

⁴⁶ 49 U.S.C. § 44919.

⁴⁷ 49 U.S.C. § 44901(c).

⁴⁸ 49 U.S.C. § 44901(f).

⁴⁹ 49 U.S.C. § 44903(c)(2)(C).

⁵⁰ 49 U.S.C. § 44912.

⁵¹ 49 U.S.C. § 45107.

⁵² 49 U.S.C. § 45102.

⁵³ 49 U.S.C. § 44940.

⁵⁴ 49 U.S.C. § 44903.

tional \$500 million to air carriers for specific safety measures such as fortified cockpit doors.⁵⁵

d. Coordination with Other Federal Agencies

The Security Act does not apply only to the TSA, nor does it allow the TSA to operate in complete isolation. For example, when issuing emergency regulations or directives, the TSA may not take a security action if the FAA notifies the Under Secretary that the proposed action “could adversely affect the airworthiness of an aircraft.” However, the Secretary of Transportation can overrule the FAA on the point.⁵⁶ Likewise, the TSA must “give great weight to the timely views” of the National Transportation Safety Board (although what this actually means is unclear).⁵⁷

e. Airport Security

The Security Act also extensively improves airport perimeter access security.⁵⁸ For example, the Under Secretary may “order the deployment of [airport and law enforcement] personnel at any secure area of the airport as necessary to counter the risk of criminal violence.” Also, the Under Secretary may enter into a memorandum with the Attorney General to deploy federal law enforcement personnel to meet airport security concerns.⁵⁹ Among other things, the Under Secretary must create a perimeter screening program, develop a plan to provide assistance to small and medium airports, continually test for compliance with access control requirements and establish pilot programs at no fewer than 20 airports to evaluate emerging access technology such as biometrics.⁶⁰

The Security Act also addresses airport security with respect to those who work at the airport. The Security Act significantly expands background check requirements, requiring not only those with unescorted access but also those with escorted access to be checked (possibly meaning the checking of hundreds of thousands of additional individuals). Moreover, the checks

⁵⁵ 49 U.S.C. § 41309 note.

⁵⁶ 49 U.S.C. § 114(1)(4).

⁵⁷ 49 U.S.C. § 114(i).

⁵⁸ See 49 U.S.C. § 44903.

⁵⁹ 49 U.S.C. § 44903(h).

⁶⁰ *Id.*

must be conducted in greater depth and coordination with other federal agencies.⁶¹

f. Other Commercial-Aviation-Specific Security Issues

The Security Act also addresses an extremely broad range of other issues. For example, it directs the FAA (in one of the few security tasks it retains) to take specific steps with regard to cockpit security.⁶² It calls for an increase in the number of federal air marshals;⁶³ a waiting period for aliens who wish to take certain flight training in the United States, as well as changes to the airman registry databases;⁶⁴ specific additional training for aircrew members on how to address attempted hijackings;⁶⁵ limited liability provisions for airline employees who report suspicious circumstances as well as for “self-help” actors and “good Samaritans” who assist in thwarting hijacking attempts;⁶⁶ the arming of pilots in certain circumstances;⁶⁷ as well as studies into using “stun guns” to subdue hijackers;⁶⁸ and mandatory use of the Customs Service’s Advanced Passenger Information System with respect to passenger manifests for flights in-bound to the United States.⁶⁹

g. General Aviation Security and General Airspace Restrictions

The Security Act also puts into statutory form the temporary flights restrictions and general aviation security rules previously issued by the FAA for charter operators and all “large” aircraft.⁷⁰ It also addressed a great sore point for general aviation operators, automatically terminating the remaining flight restrictions in Enhanced Class B airspace around Boston, New York and Washington, D.C.⁷¹

⁶¹ 49 U.S.C. § 4496.

⁶² See 49 U.S.C. § 44903.

⁶³ 49 U.S.C. § 44917.

⁶⁴ 49 U.S.C. §§ 44939, 44703(g).

⁶⁵ 49 U.S.C. § 44918.

⁶⁶ 49 U.S.C. §§ 44944, 44903.

⁶⁷ 49 U.S.C. § 44903.

⁶⁸ 49 U.S.C. § 44941.

⁶⁹ 49 U.S.C. § 44903.

⁷⁰ 49 U.S.C. § 44903. See Aircraft Security Under General Operating and Flight Rules, SFAR No. 91, 66 F.R. 50,531 (Oct. 4, 2001).

⁷¹ 49 U.S.C. § 40101 note.

h. Other Miscellaneous Issues

Finally, the Security Act touches on a range of other issues, such as DOT's immunization authority on antitrust issues,⁷² the FAA's promulgation of foreign carrier overflight fees,⁷³ and a range of technical and conforming provisions, including all of Title II of the Security Act, which addresses nothing by modifying and extending various provisions of the Stabilization Act.

2. *Related Regulatory Activity*

The DOT, FAA and new TSA have also been active on the regulatory front. After many years of effort, the FAA issued its final rules substantially rewriting Parts 107 and 139 (Airport Security) and 108 (Aircraft Operator Security) in July, 2001,⁷⁴ as well as a final rule on "Temporary Flight Restrictions."⁷⁵ After all the effort, much of the FAA's work has been potentially negated by the Security Act in the aftermath of September 11.

The activity in direct response to the acts of September 11 included final rules on "Aircraft Security Under General Operating and Flight Rules"⁷⁶ and "Flightcrew Compartment Access and Door Designs."⁷⁷ This activity also included a proposed rule from the FAA titled "Procedures for Reimbursement of Airports, On-Airport Parking Lots and Vendors of On-Airfield Direct Services to Air Carriers for Security,"⁷⁸ a request for comment from DOT titled "Firearms, Less-Than-Lethal Weapons, and Emergency Services on Commercial Air Flights,"⁷⁹ and—what I believe is the new TSA's first published rule—an interim final rule titled "Imposition and Collection of Passenger Civil Aviation Security Fees."⁸⁰

⁷² 49 U.S.C. § 44940.

⁷³ 49 U.S.C. §§ 47102, 47110.

⁷⁴ See, e.g. 14 C.F.R. Parts 107 and 139 Airport Security, Final Rule, 66 F.R. 37,274 (July 17, 2001).

⁷⁵ 66 F.R. 47,373 (Sept. 11, 2001).

⁷⁶ 66 F.R. 50,531 (Oct. 4, 2001).

⁷⁷ 66 F.R. 51,546 (Oct. 9, 2001).

⁷⁸ 66 F.R. 66,238 (Dec. 21, 2001).

⁷⁹ 66 F.R. 67,620 (Dec. 31, 2001).

⁸⁰ 66 F.R. 67,798 (Dec. 31, 2001).

II. REVIEW OF CASE LAW

A. LIABILITY OF AIR CARRIERS IN WARSAW CONVENTION CARRIAGE

1. *Scope of the Convention and the "Tseng Preemptive Effect"*

During 2001, a number of courts addressed personal injury actions arising under or affected by the Warsaw Convention.⁸¹ Issues going to the scope of the Convention with respect to personal injury claims included further interpretations of the terms "accident," "bodily injury," and "embarking or disembarking" from Article 17 of the Convention,⁸² the application of the Convention to non-ticketed passengers, its application to claims of delayed transportation and racial discrimination, and the application of the Convention with respect to airline security check point agents.

Moreover, the Supreme Court's 1999 decision in *El Al Israel Airlines, Ltd. v. Tseng* directly impacted all of these cases.⁸³ In *Tseng*, the Court held that the Warsaw Convention essentially preempts all state law causes of action arising from international flights, even if the claimant cannot meet the various elements of a Convention claim and is thus precluded from any recovery whatsoever.⁸⁴ All of the cases alluded to above deal with, and further interpret, the Court's holdings in *Tseng*.

a. Definitions of "Accident" and "Willful Misconduct" in Article 17, and the Question of Emotional Injuries

In 2001, the Ninth Circuit dealt with *Tseng* in *Carey v. United Airlines, Inc.*⁸⁵ In *Carey*, the appellate court—while reviewing the

⁸¹ Convention for the Unification of Certain Rules Relating to International Transportation by Air, Concluded at Warsaw, Poland, Oct. 12, 1929, adhered to by the United States June 27, 1934, 49 Stat. 3000, 3014, T.S. No. 876, reprinted in note following 49 U.S.C. § 40105 [hereinafter the "Warsaw Convention" or the "Convention"].

⁸² Article 17 of the Convention establishes the conditions under which an airline may be liable for the injuries of passengers:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of embarking or disembarking.

⁸³ *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999).

⁸⁴ *Id.* at 176. For an excellent review of the *Tseng* decision, as well as its early progeny, see Blanca I. Rodriguez, *Recent Developments in Aviation Liability Law*, 66 J. AIR L. & COM. 21, 44-48 (2000).

⁸⁵ *Carey v. United Airlines, Inc.*, 255 F.3d 1044 (9th Cir. 2001).

district court's granting of summary judgment to defendant United Airlines, Inc. (the "airline")—addressed the question of whether plaintiff Gordon T. Carey's ("Carey") allegations of "willful misconduct" were nonetheless "accidents" under Article 17, and, in the wake of *Tseng*, whether the Convention was therefore Carey's exclusive remedy.

Mr. Carey filed suit against the airline for damages arising out of an incident between him and a flight attendant while flying from Costa Rica to Los Angeles.⁸⁶ Carey sat in the first-class cabin, while his daughters sat in the coach class section. During the flight, one of his daughters left her seat in coach and came to Carey, complaining of earaches. The flight attendants warned Carey that his children were not allowed in first class, and Carey responded that his children were ill. When another daughter joined Carey in first class, the same flight attendant warned Carey again, and an argument ensued between the two.⁸⁷

After the flight, Carey brought suit against the airline, asserting state law claims of intentional infliction of emotional and mental distress, negligent infliction of emotional and mental distress, and false imprisonment.⁸⁸ Ruling that Carey's allegations of willful misconduct did not exempt his claims from the Warsaw Convention, that the Convention was his exclusive remedy, and that he failed to satisfy the Convention's requirements, the lower court granted the airline's motion for summary judgment.⁸⁹

On appeal, Carey tried to distinguish his case from the exclusivity ruling in *Tseng* by asserting that since the Warsaw Convention does not apply to claims arising out of intentional or willful misconduct, *Tseng* should not be read to hold that the Warsaw Convention is the exclusive remedy for such claims against an air carrier.⁹⁰ In the alternative, Carey claimed that the physical manifestations of his emotional and mental distress satisfied the "bodily injury" requirement thus qualifying him for recovery under the Warsaw Convention.⁹¹

The Ninth Circuit disagreed. With respect to his first argument, the court felt that Carey's view as to the exclusivity of the

⁸⁶ *Id.* at 1045.

⁸⁷ *Id.*

⁸⁸ *Id.* at 1045-46.

⁸⁹ *Id.* at 1046.

⁹⁰ *Id.* at 1048.

⁹¹ *Id.* at 1051.

Warsaw Convention rested on a faulty view of the Warsaw Convention's liability scheme, noting (from dictum in the *Tseng* opinion) that the definition of an "accident" is an "unusual event . . . external to the passenger and that it should be flexibly applied."⁹² As such, the court concluded that:

Based on the supreme court's interpretation of the term 'accident' in Article 17 and the history of Article 25, including cases interpreting its provisions, we see no basis for concluding that the Warsaw Convention does not apply to claims arising out of intentional misconduct. Because the Warsaw Convention does apply to such claims, Carey has a remedy. Under *Tseng*, it is his only one. Thus, the district court was correct to conclude that Carey was required to satisfy the Warsaw Convention's conditions in order to recover for his alleged injuries.⁹³

The court turned next to Carey's allegations that his emotional injuries satisfied the requirement for a "bodily injury" under the Warsaw Convention. The Ninth Circuit followed the Third Circuit's reasoning in *Terrafranca v. Virgin Atlantic Airways, Ltd.*,⁹⁴ and held that physical manifestations of emotional and mental distress do not satisfy the "bodily injury" requirement in Article 17.⁹⁵ Moreover, the court felt that to rule otherwise would undermine the Supreme Court's reasoning in *Eastern Airlines, Inc. v. Floyd*,⁹⁶ if the court were to conclude that the drafters of the Convention intended to compensate passengers who merely suffered physical manifestations of their emotional and mental distress, "plaintiffs would then be able to skirt *Floyd's* bar on recovery for 'purely emotion injuries' simply by alleging that they suffered some physical manifestations of those injuries, no matter how slight or remote."⁹⁷

Since the court concluded that the Warsaw Convention was Carey's exclusive remedy and that the physical manifestations of his emotional and mental distress did not satisfy the "bodily injury" requirement in Article 17 of the Warsaw Convention, Carey was unable to recover. Accordingly, the lower court appropriately granted summary judgment for the airline.⁹⁸

⁹² *Id.* at 1049.

⁹³ *Id.* at 1051.

⁹⁴ *Terrafranca v. Virgin Atlantic Airways, Ltd.*, 151 F.3d 108 (3d Cir. 1998).

⁹⁵ *Carey*, 255 F.3d at 1052.

⁹⁶ *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991).

⁹⁷ *Carey*, 255 F.3d at 1052.

⁹⁸ *Id.* at 1054.

Another case dealing with the scope of the term “accident” in Article 17, in conjunction with the preemptive effects of *Tseng*, was the opinion of the United States District Court for the Southern District of Texas in *McCaskey v. Continental Airlines, Inc.*⁹⁹ During a trip in September 1998 on board a Continental Airlines aircraft from Tulsa, Oklahoma, to Frankfurt, Germany, with stops in Houston and Newark, Ralph and Mary McCaskey had a disagreement with a gate agent that induced stress on the couple. A delay at the gate in Houston further exacerbated the stress because the aircraft became uncomfortably warm.¹⁰⁰ During the flight from Houston to Newark, Mr. McCaskey then suffered a stroke.¹⁰¹

The crew received assistance from a nurse onboard the aircraft, as well as from MedAire, Inc., a company under contract with Continental to provide medical assistance during flight operations. Based on conversations between the crew, the nurse and a doctor with MedAire, the crew decided to complete the flight to Newark (although there appeared to be some confusion between the parties as to Mr. McCaskey’s condition and the time remaining in the flight). Mr. McCaskey was hospitalized for approximately two weeks after landing at Newark, and died while on a train trip from New Jersey back to Tulsa.¹⁰²

Mrs. McCaskey filed suit against Continental in September 2000, and joined MedAire as a defendant in October 2000. She brought claims under state law for negligence and wrongful death on behalf of her husband, and, in her own behalf, for intentional infliction of emotional distress, for bystander mental distress, and for a violation of the Texas Deceptive Trade Practices Act.¹⁰³ The district court issued its opinion in August 2001 on the parties’ cross-motions for summary judgment, addressing three issues: (1) whether an “accident” occurred during the flight; (2) if an accident did occur, whether the accident caused Mr. McCaskey’s stroke or subsequent death; and (3) with respect to Mrs. McCaskey’s claims for personal injury brought on her own behalf, whether she had suffered a compensable “physical injury.”¹⁰⁴

⁹⁹ *McCaskey v. Continental Airlines, Inc.*, 159 F. Supp. 2d 562 (S.D. Tex. 2001).

¹⁰⁰ *Id.* at 565.

¹⁰¹ *Id.* at 566.

¹⁰² *Id.* at 567-68.

¹⁰³ *Id.* at 568.

¹⁰⁴ *Id.* at 570.

After extensive review of the existing case law, the court concluded that the plaintiff had produced sufficient evidence of at least three potential "accidents" under the Warsaw Convention to withstand a motion for summary judgment. These included evidence of Continental's actions before the flight in Houston, the "overheat" condition that occurred on the ground in Houston, and the lack of response to Mr. McCaskey's stroke during the flight from Houston.¹⁰⁵ The court further concluded that Mrs. McCaskey had introduced some evidence showing that these accidents had caused the stroke, and that she had thus established a *prima facie* showing of causation sufficient to withstand summary judgment.¹⁰⁶

Turning to the question of the physical injury requirement under the Warsaw Convention, the court noted that the position of *Tseng* and its progeny that neither psychic nor psychosomatic injuries are recoverable absent a traditional injury under the Warsaw Convention. The court proceeded to observe that:

[T]he Court need not reach, at this juncture, whether Mrs. McCaskey can recover directly from any solely psychic or psychosomatic injuries, because these injuries are available to Mrs. McCaskey irrespective of the precise nature of her own injuries. This is so because Mr. McCaskey's physical injury, if caused by an accident, satisfies the "gateway bodily injury requirement."¹⁰⁷

The court based this position on *Zicherman v. Korean Airlines Co.*¹⁰⁸ In *Zicherman*, the Supreme Court indicated that the Warsaw Convention permits recovery of "damage sustained" once a compensable accident causing physical injury has been established, and legally cognizable damages are ascertained under the "domestic law" of the forum court.¹⁰⁹ Assuming that Mr. McCaskey's injuries could satisfy all of the basic elements for compensable injury under the Warsaw Convention, the court concluded that Mrs. McCaskey could potentially recover for mental damages arising from the physical harm sustained by her husband under Texas law.¹¹⁰ As such, Continental's motion for summary judgment was denied.¹¹¹

¹⁰⁵ *Id.* at 571-74.

¹⁰⁶ *Id.* at 574-75.

¹⁰⁷ *Id.* at 575-76.

¹⁰⁸ *Zicherman v. Korean Airlines Co.*, 516 U.S. 217 (1996).

¹⁰⁹ *Id.* at 221.

¹¹⁰ *McCaskey*, 159 F. Supp. at 576-77.

¹¹¹ The court also discussed, and dismissed, Mrs. McCaskey's Texas DTPA claims as well as her claims against MedAire and Gordon Bethune, the Chief

Finally, in the recent opinion in *Fulop v. Malev Hungarian Airlines*, the district court begins by observing that: "This case involves the meaning and usage of the common word 'accident' in an uncommon sense. Ordinary as the term is, as defined and applied in the context of the Warsaw Convention, it has engendered extensive debate and varying, sometimes contradictory court decisions."¹¹² After conducting an extensive review on the case law addressing the term "accident" in the Convention, as well as Article 17 in general, the court ruled that the plaintiff's heart attack was not an accident, but the crew's failure to divert the aircraft was an "accident." Moreover, the plaintiff raised a trivial issue of willful misconduct as to whether the crew deviated from normal procedures in failing to divert the aircraft.¹¹³

b. Definition of "Bodily Injury" and "Disembarking" in Article 17

One federal district court case dealing with the Article 17 terms "bodily injury" and "disembarking" under the dictates of *Tseng* was *Turturro v. Continental Airlines*.¹¹⁴ In *Turturro*, defendant Continental Airlines sought summary judgment while plaintiff Joan Turturro sought leave to amend if revisions to her complaint could cure any defect. The matter arose when plaintiff, who had been taking Xanax on a daily basis for panic attacks and to relieve anxiety and nervousness, discovered after boarding the aircraft that her purse, including her medication, had been stolen.¹¹⁵ After several different flight attendants told her that she could not get off the aircraft, the plaintiff panicked and repeatedly called "911" begging for help. The police in turn contacted the pilot, who then decided to return to the gate. A flight attendant escorted her off the aircraft and into a waiting area, where she was met by additional Continental personnel, medical personnel, and the police. After discussions between all of the parties, the police decided to transport the plaintiff

Executive Officer of Continental Airlines (who just happened to be on the flight), the former based on the statute of limitations and the latter on her failure to show any potential liability on Mr. Bethune's part. *Id.* at 578-81.

¹¹² *Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651, 653 (S.D.N.Y. 2001).

¹¹³ *Id.* at 673.

¹¹⁴ *Turturro v. Continental Airlines*, 128 F. Supp. 2d 170 (S.D.N.Y. 2001).

¹¹⁵ *Id.* at 173.

against her will to a psychiatric emergency room, where she remained in custody for several hours.¹¹⁶

Plaintiff filed suit in January 2000 alleging damages for embarrassment, humiliation, loss of liberty, psychological injury, pain, suffering, emotional distress and mental anguish.¹¹⁷ In response to discovery, she also alleged posttraumatic stress, psychological injury and pain. Plaintiff's proposed amended complaint then alleged various causes of action against Continental including false imprisonment of plaintiff "in concert with" the police, common law false imprisonment, defamation, intentional infliction of emotional distress and discrimination on the basis of a medical condition.¹¹⁸

The court first ruled that the plaintiff had not sufficiently alleged "bodily injury," and thus her Warsaw Convention claims failed. Specifically, like the Ninth Circuit's opinion in *Carey*, the district court relied on the Supreme Court's *Floyd* decision to conclude that the definition of "bodily injury" in the Convention excludes psychosomatic illnesses unaccompanied by physical injury or physical manifestation of injury.¹¹⁹ Interestingly, the court also noted that there is some disagreement among the district and circuit courts with respect to the current status of post traumatic stress disorder ("PTSD"). Notwithstanding the possibility of PTSD constituting a physical injury, the court felt that the present case paralleled others in which the plaintiff had not advanced, with the requisite specificity, either a brain lesion theory of PTSD or individualized proof of such lesions.¹²⁰

Citing *Tseng*, the court next ruled—even though the plaintiff could not meet the prerequisites of an Article 17 claim—that the Convention effectively preempted all of her claims with respect to the incidents that occurred on the aircraft or while disembarking.¹²¹ As part of this analysis, the court disagreed with plaintiff's assertion that Congress had excluded the Air Carrier Access Act¹²² from the Convention's preemptive effect.

Therefore, the Court had to deal with the question of when plaintiff's "disembarking" had terminated. Based on prior cases indicating that disembarking has terminated once the airline no

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 174.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 175-76.

¹²⁰ *Id.* at 178-79.

¹²¹ *Id.* at 180.

¹²² Air Carrier Access Act of 1986, formerly 49 U.S.C.S. Appx. § 1374.

longer restricts the passengers movement, the court concluded that the actions allegedly taken by Continental employees resulting in plaintiff's confinement to the psychiatric ward had all occurred after disembarking had terminated. As such, plaintiff's claims related to those activities survived summary judgment and she was allowed leave to amend her complaint accordingly.¹²³

c. Definition of "Embarking" in Article 17

While *Turturro* dealt with the question of what constituted disembarking, the court in *Marotte v. American Airlines, Inc.* dealt with the term "embarking" under Article 17.¹²⁴ Specifically, the Marottes alleged that an American Airlines employee had punched and pushed Mr. Marotte while they were trying to enter a jetway at Miami International Airport for a flight to New York and that he was hospitalized as a result. The Marottes sued, and American in turn moved for summary judgment, arguing that the claims were governed by the Warsaw Convention and were therefore barred due to its two-year statute of limitations.¹²⁵

The sole issue for the court's determination was "whether Mr. Marotte was 'in the course of embarking' the aircraft within the meaning of the Convention at the time of [the American gate attendant's] assault."¹²⁶ Using the same three factors adopted in *Turturro* for defining "disembarking," the court considered (1) the passenger's activity at the time of the accident, (2) the passenger's whereabouts at the time of the accident, and (3) the amount of control exercised by the carrier at the moment of injury.¹²⁷ In light of these three factors, the court concluded that the alleged assault had in fact occurred during the embarking process. Moreover, citing *Tseng*, the court noted that the Convention was plaintiff's sole remedy, and as such, dismissed plaintiff's suit because it was filed more than two years after the causes of action accrued.¹²⁸

¹²³ *Turturro*, 128 F. Supp. 2d at 181-82.

¹²⁴ *Marotte v. American Airlines, Inc.*, 159 F. Supp. 2d 1374 (S.D. Fla. 2001).

¹²⁵ *Id.* at 1376.

¹²⁶ *Id.* at 1378.

¹²⁷ *Id.*

¹²⁸ *Id.* at 1381.

d. Scope with Respect to Non-Ticketed Passengers

Over the past year, the courts have dealt with issues going to the scope of the Convention and arising outside of Article 17 that have been impacted by *Tseng*. For example, *Adjoyi v. Federal Air (PTY) Ltd.* deals with the exclusivity of the Convention in a case involving non-ticketed passengers.¹²⁹ The five wrongful death claims that were the subject of this lawsuit were brought after Federal Air flight 803 crashed in Africa in June of 1998. The five decedents—all United Nations employees—were traveling on a United Nations charter in connection with peacekeeping efforts.

Responding to plaintiffs' argument that the Convention did not apply because there were no written tickets under this aircraft charter, the court observed that the "case law is clear that unticketed, nonfare-paying travelers are still covered by the Convention, as long as there is at some point a 'contract of carriage' consisting of 'a promise, an undertaking, on the part of the carrier to transport or transfer the passenger, and the consent of the passenger.'" The court concluded that these cases applied in the present case.¹³⁰

Recognizing that, under *Tseng*, the Convention provided plaintiff's exclusive remedy, the court then turned to the question of whether it had jurisdiction to hear the plaintiffs' wrongful death claims. The court determined that under the facts of the case the plaintiffs could not establish that the United States was one of the four permissible fora provided in Article 28(1) of the Convention. As such, the court did not have subject matter jurisdiction over the matter and dismissed the complaint accordingly.¹³¹

e. Scope with Respect to Delayed Transportation and Racial Discrimination

In another matter the court analyzed *Tseng's* preemptive effect upon allegations of illegal "bumping" and racial discrimination. In *King v. American Airlines*, the plaintiffs were involuntarily bumped off of their scheduled flight, and they brought suit against the airline claiming that the decision to bump them was based on their race as African Americans.¹³² In analyzing the

¹²⁹ *Adjoyi v. Fed. Air Ltd.*, 137 F. Supp. 2d 498 (S.D.N.Y. 2001).

¹³⁰ *Id.* at 500 (citations omitted).

¹³¹ *Id.* at 501-02.

¹³² *King v. American Airlines*, 146 F. Supp. 2d 159, 160-61 (N.D.N.Y. 2001).

case under *Tseng*, the court determined that plaintiffs' claims fell within Article 19 of the Convention—providing for liability in the case of the delay in transportation by air passengers—and as such the Convention provided plaintiffs' exclusive remedy.

f. Application to Airline Security Checkpoint Agents

In the case of *Dazo v. Globe Airport Security Services*, the Ninth Circuit applied a similar analysis to a matter in which the plaintiff's jewelry was missing from her baggage.¹³³ Finding that the security agent, as the contractor for the airline, fell within the scope of the Warsaw Convention, the Convention was plaintiff's exclusive remedy.¹³⁴

Moreover, the court concluded that defendant's conduct did not rise to the level of willful misconduct and dismissed the plaintiff's argument, based on its earlier decision in *Carey* that allegations of "willful misconduct" do not remove the matter from the purview of the Convention. Accordingly, the appellate court upheld the lower court's ruling that the plaintiff's claims for punitive damages could not stand due to the Convention's liability limiting provisions and that her damages were therefore capped at \$400.¹³⁵

Finally, it is interesting to note that Judge Tashima issued a strong dissent from the "majority's unprecedented expansion of immunity under the Warsaw convention" in finding that the carrier's security agent fell within the scope of the Convention.¹³⁶ However, it is unclear to what extent this issue has been mooted by the enactment of the Security Transportation Act, as discussed at length in Part I of this paper, replete with its federalization of security screeners.

2. Treaty Jurisdiction and Convention Adherents

In *Blake v. American Airlines, Inc.*, the Eleventh Circuit decided that Jamaica is a High Contracting Party to the Warsaw Convention.¹³⁷ This case involved a personal injury action against the air carrier by a passenger who struck his head while being physically removed from an aircraft after smoking on board a flight en route from Jamaica to the United States. The plaintiff filed

¹³³ *Dazo v. Globe Airport Security Services*, 268 F.3d 671 (9th Cir. 2001).

¹³⁴ *Id.* at 676-78.

¹³⁵ *Id.* at 679-81.

¹³⁶ *Id.* at 681.

¹³⁷ *Blake v. American Airlines, Inc.*, 245 F.3d 1213 (11th Cir. 2001).

suit over three years after the accident, and the air carrier in turn filed a motion for summary judgment asserting that the Convention provided the exclusive remedy and plaintiff's suit was barred due to the Convention's two-year statute of limitations. The plaintiff replied that the Convention did not apply, because Jamaica failed to formally ratify the treaty.¹³⁸

In analyzing the situation, the court noted that upon gaining its independence from the United Kingdom, Jamaica had created a presumption that it intended to be bound by the Convention when it expressed the intention to assume all treaty obligations and rights entered on its behalf by the British government. Even though Jamaica had subsequently acceded to 23 of the 26 multilateral treaties Britain had negotiated on its behalf, Jamaica nevertheless had taken no steps to denounce the Convention.

Moreover, the court felt that Jamaica's affirmative conduct had indicated a clear intent to adopt the Convention's privileges and obligations. Specifically, Jamaica had taken an active role in negotiations to amend the Convention and had certified the Guadalajara Convention, which expressly supplements the Warsaw Convention. Furthermore, Air Jamaica had asserted the Warsaw Convention as a defense to a lawsuit in the United States while the carrier was wholly owned by the Jamaican government.

In light of all of these factors, the court concluded that Jamaica was in fact a High-Contracting party to the Convention. As such, the Convention provided the sole remedy for plaintiff, and because plaintiff did not file his lawsuit within the two-year statute of limitations, the air carrier's motion for summary judgment was granted.¹³⁹

3. *Choice of Underlying Law*

In *D'Alessandro v. American Airlines, Inc.*, the court was faced with a choice of law question.¹⁴⁰ The decedent had been a passenger onboard an American Airlines flight from Mexico City to Dallas, Texas. While in Mexico City, he fell from a mobile passenger lounge vehicle operated by the airline's agents. He sustained severe injuries from the fall and died approximately six weeks later.

¹³⁸ *Id.* at 1214.

¹³⁹ *Id.* at 1215-17.

¹⁴⁰ *D'Alessandro v. American Airlines, Inc.*, 139 F. Supp. 2d 305 (E.D.N.Y. 2001).

American Airlines' motion for partial summary judgment raised several choice of law issues. American Airlines argued that there was no evidence that its conduct rose to the level of culpability required under the Convention's Article 25(1) liability-limitation exclusion for "willful misconduct."¹⁴¹ The airline urged that "willful misconduct" requires a finding of intentional conduct with the intent to cause injury based on an international standard, and that the plaintiff was therefore limited to \$75,000 in damages. American acknowledged, however, that the Second Circuit had held that the law of the Forum state determined the meaning of "willful misconduct," rather than American's preferred international standard.¹⁴²

Although the United States' adopted the Montreal Protocol in 1998 and essentially changed the language in Article 25 to that preferred by American Airlines,¹⁴³ the *D'Alessandro* court relied on legislative intent. Arguably, the *D'Alessandro* court's observation that the drafters of the Convention "intended to resolve *whether there is liability*, but to leave to domestic law (the local law identified by the forum under its choice of law rules or approaches) the determination of the compensatory damages available to the suitor" is still on point.¹⁴⁴

Notwithstanding these changes, the court proceeded with a choice-of-law analysis under the forum state, New York, and, ultimately concluding that the law of New York applied, the court denied the carrier's motion for summary judgment because a

¹⁴¹ Article 25(1), as applicable at the time of the incident, provided according to the English translation "that the \$75,000 limitation on damages does not apply 'if the damage is caused by the carrier's willful misconduct or by such default on his part as, in accordance with the laws of the court to which the case is submitted, is considered to be equivalent of willful misconduct.'" *D'Alessandro*, 139 F. Supp. 2d at 307.

¹⁴² *Id.* (citing *Brinks Ltd. v. South African Airways*, 93 F.3d 1022, 1027-29 (2d. Cir. 1996)).

¹⁴³ The specific language now provides that the limitations of liability "shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result," which the courts have read to mean replaces the earlier definition of willful misconduct with the common-law definition of willful misconduct. *See, e.g.*, *Bayer Corp. v. British Airways, PLC*, 210 F.3d 236, 238 (4th Cir. 2000); *Piamba Cortes v. American Airlines, Inc.*, 177 F.3d 1272, 1283-90 (11th Cir. 1999).

¹⁴⁴ *D'Alessandro*, 139 F. Supp. 2d at 308 (quoting *Tseng*, 525 U.S. at 170) (emphasis in original).

reasonable jury could find that willful misconduct had occurred.¹⁴⁵

Another choice of law issue arose in *In re Air Crash Off Point Mugu*.¹⁴⁶ Here, the parties agreed that the Death on the High Seas by Wrongful Act¹⁴⁷ did not apply because the accident did not occur on what is defined as the “high seas,” but that admiralty jurisdiction had to be considered because the crash occurred in navigable waters of the United States.¹⁴⁸ Citing to the Supreme Court’s 1972 decision in *Executive Jet Aviation, Inc. v. Cleveland*,¹⁴⁹ the *Point Mugu* court observed that admiralty jurisdiction exists in aviation accidents only where (1) the alleged wrong occurred on or over navigable waters, and (2) the wrong is significantly related to maritime activity.¹⁵⁰

Finding that the first prong was met the court then relied on later precedent providing that a wrong is significantly related to maritime activity “where the airplane was fulfilling a role that, but for air travel, would have been done by vessel.”¹⁵¹ The court found that the second prong was satisfied as well, and that admiralty jurisdiction therefore applied to the case.¹⁵²

4. Jurisdiction and Venue Under the Convention

a. Subject Matter Jurisdiction

In 2001, several courts addressed subject matter jurisdiction under the Convention. Already noted above was the case of *Adjoyi v. Federal Air (PTY) Ltd.*,¹⁵³ in which the court ultimately decided that the matter was governed exclusively by the Convention and that because the United States was not an appropriate fora for the lawsuit the court lacked subject matter jurisdiction.¹⁵⁴

In *Weiss v. American Airlines, Inc.*, the defendant, American Airlines, had removed the personal injury lawsuit to federal court and then sought dismissal under the preemptive effects of *Tseng*

¹⁴⁵ *Id.* at 309-12.

¹⁴⁶ *In re Air Crash Off Point Mugu*, 145 F. Supp. 2d 1156 (N.D. Cal. 2001).

¹⁴⁷ Death on the High Seas by Wrongful Act, 46 U.S.C. § 761 (2000).

¹⁴⁸ *In re Air Crash Off Point Mugu*, 145 F. Supp. 2d at 1163.

¹⁴⁹ *Exec. Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 268 (1972).

¹⁵⁰ *In re Air Crash Off Point Mugu*, 145 F. Supp. 2d at 1164.

¹⁵¹ *Id.*

¹⁵² *Id.* at 1165.

¹⁵³ *Adjoyi v. Fed. Air Ltd.*, 137 F. Supp. 2d 498 (S.D.N.Y. 2001).

¹⁵⁴ *Id.* at 501-02.

and Articles 17 and 24 of the Convention.¹⁵⁵ In light of the Montreal Protocol's changes to the definition of "willful misconduct," as well as *Tseng's* interpretation of Article 25 of the Convention, the court ruled that the plaintiff's "willful misconduct" claims against American were expressly relegated to state law, and as such that "[took] out of play the federal question on which American has attempted to hang its removal hat." Because the court therefore lacked subject matter jurisdiction it remanded the matter to state court for further proceedings.¹⁵⁶

b. Personal Jurisdiction and Venue

At least one court also dealt extensively with questions of personal jurisdiction and venue under the Convention in 2001. In *Coyle v. P.T. Garuda Indonesia*, plaintiff Joyce Coyle brought a lawsuit against defendant PT Garuda Indonesia (doing business as Garuda Indonesia Airlines) ("Garuda"), a company wholly owned by the government of Indonesia, arising out of the death of her parents, who died in a 1997 crash of a Garuda passenger aircraft.¹⁵⁷ Garuda moved to dismiss the action, or in the alternative for summary judgment, on several grounds, including that the court lacked personal jurisdiction over Garuda and that Oregon was not a permissible venue.

In response to Garuda's argument that it was not subject to personal jurisdiction in Oregon, the court cited Article 28(1) of the Convention, which it construed as a forum selection clause.¹⁵⁸ The court then noted that the clause, created by international treaty rather than by contract, severely restricts the range of permissible forums in light of this restriction, and therefore the airline necessarily consents to personal jurisdiction at those locations specified in Article 28(1).

With respect to the question of venue, the court observed that most courts have considered Article 28(1) to be concerned with jurisdiction only at the national level, and that domestic law

¹⁵⁵ *Weiss v. American Airlines, Inc.*, 147 F. Supp. 2d 950 (N.D. Ill. 2001).

¹⁵⁶ *Id.*

¹⁵⁷ *Coyle v. P.T. Garuda Indonesia*, 180 F. Supp. 2d 1160 (D. Or. 2001).

¹⁵⁸ Article 28(1) provides:

An action for damages must be brought, at the option of the plaintiff, in the territory of one of the high-contracting parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court in the place of destination.

must then be applied to determine the proper forum within a particular country. Then, the court conducted a venue analysis and determined that Oregon was an appropriate venue for the matter since the victims were Oregon residents, the tickets for the trips were purchased in Oregon from an Oregon travel agent, and Oregon was the passengers' place of departure and intended final destination.

5. *Damages Under the Convention*

The court squarely addressed whether the Warsaw Convention allows recovery of punitive damages, as well as damages for pre-impact emotional distress, in *In re Air Crash Off Point Mugu*.¹⁵⁹ Here, the parties agreed that the Convention applied; therefore, the first question in dispute was whether the Convention permits awards of punitive damages.¹⁶⁰ Although the Ninth Circuit had not yet decided the point, the lower court felt that the overwhelming body of law from other circuits clearly mandated that the Convention limit the right to recover from a carrier to compensatory damages and therefore does not include punitive damages.¹⁶¹

Defendant Alaska Airlines further argued that under *Floyd* and *Tseng* the Convention precludes claims for purely emotional distress,¹⁶² so the plaintiffs' claims for pre-impact terror must also be denied.¹⁶³ Plaintiffs responded that the violent maneuvering of the aircraft approximately one-half hour before the crash caused physical injuries that predicated their emotional injury claims. In the context of a motion for summary judgment on the pleadings, the court ruled that the complaint contained sufficient allegations to withstand the defendant's motion at that time.¹⁶⁴

Other 2001 cases already discussed that also touched on emotional injury damages include *Carey v. United Airlines, Inc.*,¹⁶⁵ *Mc-*

¹⁵⁹ *In re Air Crash Off Point Mugu*, 145 F. Supp. 2d 1156 (N.D. Cal. 2001).

¹⁶⁰ *Id.* at 1161.

¹⁶¹ *Id.* at 1161-62.

¹⁶² See the discussion on *Carey* and *McCaskey*, *supra* notes 85-107 and accompanying text.

¹⁶³ *In re Air Crash Off Point Mugu*, 145 F. Supp. 2d at 1162.

¹⁶⁴ *Id.* at 1163.

¹⁶⁵ *Carey v. United Airlines, Inc.*, 255 F.3d 1044, 1051-54 (9th Cir. 2001).

Caskey v. Continental Airlines, Inc.,¹⁶⁶ *Turturro v. Continental Airlines*,¹⁶⁷ and *D'Alessandro v. American Airlines, Inc.*¹⁶⁸

6. *Lost or Damaged Baggage*

In *Cruz v. American Airlines, Inc.*, the court addressed a number of issues—including class certification, contract issues of rescission for mistake and misrepresentation, the availability of injunctive relief, the retroactivity of the Montreal Protocols, and the Convention's subsequent rules with regard to an air carrier's liability for lost luggage. The court ruled on a motion for class certification and cross motions for summary judgment arising out of three separate instances of lost baggage by three different groups of plaintiffs, and addressed the cross motions for summary judgment.¹⁶⁹

Initially, the court looked to a set of plaintiffs whose luggage was lost by American but who had subsequently accepted payments and signed releases from American for that baggage. These plaintiffs asserted that the releases should be set aside, because American obtained them by misrepresentation and mistake. The court conducted a choice-of-law analysis and determined that the laws of Virginia, Maryland and Indiana applied to each of the plaintiffs, respectively.¹⁷⁰ The court extensively reviewed the rules with respect to rescission for mistake and misrepresentation and ultimately concluded that the plaintiffs had not met their burden of proof, thus American Airlines was granted summary judgment as to the plaintiffs who had signed releases.¹⁷¹

The court then moved to the original complaint of the plaintiffs that had not previously signed any type of release with American. These plaintiffs sought injunctive relief against American Airlines with respect to American's rule requiring notice of lost luggage within 30 days of the incident. Deciding that the plaintiffs lacked standing because the potential future dam-

¹⁶⁶ *McCaskey v. Continental Airlines, Inc.*, 159 F. Supp. 2d 562, 575-77 (S.D. Tex. 2001).

¹⁶⁷ *Turturro v. Continental Airlines*, 128 F. Supp. 2d 170, 175-79 (S.D.N.Y. 2001).

¹⁶⁸ *D'Alessandro v. American Airlines, Inc.*, 139 F. Supp. 2d 305, 307-12 (E.D.N.Y. 2001).

¹⁶⁹ *Cruz v. American Airlines, Inc.*, 150 F. Supp. 2d 103, 107-10 (D.D.C. 2001).

¹⁷⁰ *Id.* at 112-13.

¹⁷¹ *Id.* at 114-17.

age was simply too speculative and remote, the court granted American summary judgment on this point as well.¹⁷²

The court then turned to the issue of American Airlines' liability for lost baggage under the Convention. Here the court actually revisited this issue. The court had previously ruled that although American was liable, the Convention limited its liability to approximately half the amount that the plaintiffs were seeking from American.¹⁷³ On appeal, the circuit court for the D.C. circuit disagreed, ruling that the Warsaw Convention offered no such protection to American.

Moreover, the circuit court ruled that the Montreal Protocol No. 4 did not have the retroactive effect as American urged. Nonetheless, American attempted to craft its retroactivity argument in the form of the abatement doctrine. After analyzing the issue under applicable case law, the Montreal protocol for itself, and the comments of the circuit court on the earlier appeal of the same matter, the district court concluded that abatement did not apply to the present circumstances.¹⁷⁴

Finally, the only claim that remained was the first plaintiffs' claims for additional damages for their lost luggage. As such, the question of class certification became moot, and that motion was denied.¹⁷⁵

Another case addressing air carrier liability for lost or damaged baggage under the Convention was *Ijedinma v. Northwest Airlines*.¹⁷⁶ Here the carrier required plaintiff Odinma Ijedinma to check three excess bags on a trip from New Orleans, Louisiana, to Lagos, Nigeria, with several stops in between. Ijedinma filed suit when two of the bags did not arrive at her destination and the carrier tendered an amount that she considered insufficient for the lost items.¹⁷⁷

Because the plaintiff did not dispute that the defendant air carriers had complied with the Warsaw Convention's requirements with respect to the baggage, the only remaining question lay in Ijedinma's assertion that the Convention did not apply because the luggage was lost on the ground and not while the

¹⁷² *Id.* at 118-20.

¹⁷³ *Id.* at 121.

¹⁷⁴ *Id.* at 122.

¹⁷⁵ *Id.* at 123.

¹⁷⁶ *Ijedinma v. Northwest Airlines*, Civ. No. 00-1492 § "K"(5), 2001 WL 803745, 2001 U.S. Dist. LEXIS 10412 (E.D. La. July 12, 2001).

¹⁷⁷ *Ijedinma*, 2001 WL 803745, at *1.

flight was airborne.¹⁷⁸ The court quickly determined that the Convention defines “transportation by air” as that period during which the carrier is in charge of the baggage. Accordingly, the court ruled that the Convention applied, the air carriers could avail themselves of the Convention’s limits on liability (which had already been tendered), and granted summary judgment for the defendants.¹⁷⁹

7. *Lost or Damaged Cargo*

In 2001, the Second Circuit extensively analyzed air carrier liability under the Convention for lost or damaged cargo in *Fujitsu Ltd. v. Federal Express Corp.*¹⁸⁰ The court analyzed the articles in the Convention that limit liability for the carriage of baggage, as well as the potential modification of those articles by the “Hague Protocol.”¹⁸¹

The case began when plaintiff-appellee Fujitsu Limited (“Fujitsu”) shipped a container of silicon wafers from Narita, Japan, to Austin, Texas, using defendant-appellant Federal Express (“FedEx”) as the cargo carrier. An air waybill accompanied the container. After the container arrived in Austin, it was placed in a bonded-cargo cage to await clearance through Customs. Before the package had cleared Customs and been released to the consignee, the consignee faxed a notification to FedEx that it was rejecting the shipment. FedEx then contacted Fujitsu to determine what to do with the cargo. FedEx policy provided that cargo refused by the consignee would not be moved without written instructions and a guarantee of payment.¹⁸²

The evidence at trial indicated that Fujitsu orally instructed FedEx to return the goods to Japan, and that the consignee provided written instructions also directing FedEx to return the merchandise to Fujitsu at the consignee’s expense. FedEx re-labeled the goods and began to send them back to Fujitsu via FedEx’s hub in Memphis. FedEx did not create an air waybill in Austin, but it did do so in Memphis. Although the goods appar-

¹⁷⁸ *Id.* at *2-3.

¹⁷⁹ *Id.*

¹⁸⁰ *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423 (2d Cir. 2001), *cert. denied*, 534 U.S. 891 (2001).

¹⁸¹ Protocol to Amend the Convention for the Unification of Certain Rules Relating to the International Carriage by Air signed at Warsaw on 12, Oct. 1929, Sept. 28, 1955, 478 U.N.T.S. 371 (“Warsaw Convention”).

¹⁸² *Fujitsu*, 247 F.3d at 426-27.

ently left Austin in good condition, they sat in Memphis for a week before being shipped back to Japan. When they arrived in Japan, Fujitsu observed that the outer container was broken and covered with an oily substance which had leaked into some of the interior boxes. Fujitsu immediately reported the damage to FedEx, and FedEx eventually acknowledged that the damage occurred to the container while it was in its possession. Fujitsu subsequently destroyed or disposed of the wafers in the container at the directions of its insurance carrier.¹⁸³

Fujitsu then brought its action against FedEx grounded in breach of contract and negligence. FedEx responded that FedEx had shipped the cargo with a proper air waybill and it was thus entitled to a limitation on liability under the Warsaw Convention of \$9.07 per pound, for a total of \$1,200 for the entire shipment.

The lower court found, however, that the air waybill created in Memphis did not comply with the requirements of the Convention and that the shipment from Austin to Japan could not be covered by the original air waybill. As such, the bench trial awarded damages to Fujitsu in the amount of \$726,640. FedEx appealed, claiming (1) that the trial court erred in finding that the return shipment was not covered by the original air way bill, (2) that the Hague Protocol amendment to the Warsaw Convention was not applicable to the present case, (3) that the court's findings with respect to damages were incorrect, and (4) that the court erred in denying FedEx's request for a finding of spoliation relating to Fujitsu's destruction of the container and wafers.¹⁸⁴

The circuit court began its analysis by reviewing the articles of the Warsaw Convention that govern the shipment of cargo. Specifically, the court focused on Article 9 of the Convention, which provides that if the carrier accepts goods without an air waybill, or if the air waybill does not contain all the particulars set out in Article 8 of the Convention, then the carrier is not entitled to avail itself of the liability limitation provisions in the Convention.¹⁸⁵

FedEx asserted, however, that the shipment from Austin to Japan was simply a return shipment under Article 12 to the Convention rather than a new shipment that would require an

¹⁸³ *Id.* at 427.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 429.

amended or second air waybill for the return. However, the court noted that Article 12 does not address whether the issuance of a second or amended air waybill is required when the cosignor orders the carrier to return the goods to the airport of departure. In light of this difference, the appellate court agreed with the lower court that Article 12 did not apply. Instead, the court characterized the shipment as a new contract of carriage that required a separate air waybill. Because a new air waybill was not created in Austin for the return of the goods to Japan, the appellate court agreed with the lower court that FedEx was not entitled to the Convention's limited liability protection.¹⁸⁶

The court then turned to FedEx's contention that the original Warsaw Convention did not cover the case at hand, but rather by the Warsaw Convention as modified by the Hague Protocol covered the case. Similar to American Airlines' abatement argument as discussed above in the *Cruz* opinion, FedEx here argued that the Hague protocol effectively abated the operation of the provisions of the original Warsaw Convention. Accordingly, FedEx could avail itself of the liability limitations of the Convention under the terms as amended by the Hague Protocol. Fujitsu responded that applying the Hague Protocol to facts that took place almost two years before the agreement's entry into force for the United States would conflict with the circuit court's earlier opinion in *Chubb & Son, Inc. v. Asiana Airlines*,¹⁸⁷ which held that the Hague Protocol should not be given retroactive effect.¹⁸⁸

FedEx was not arguing that the Hague Protocol should be given retroactive effect; rather it was arguing that the original Warsaw Convention could not be prospectively enforced following the Hague Protocol's entry into force. Under the common law doctrine of abatement, a court has no power to enforce inchoate rights or imperfect obligations under statutes that had been repealed or amended but not explicitly saved or preserved at the time of the amendment. Essentially, FedEx was arguing that the Hague Protocol should be given effect as if it had always been in place rather than the original Warsaw Convention.¹⁸⁹

After analyzing FedEx's "enticing argument" at some length, the court decided that it suffered from one crucial flaw—that

¹⁸⁶ *Id.* at 430-31.

¹⁸⁷ *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 306 (2d Cir. 2000), *cert. denied*, 533 U.S.928 (2001).

¹⁸⁸ *Fujitsu*, 247 F.3d at 431.

¹⁸⁹ *Id.* at 431-32.

the issue of whether the provision of a treaty has been abated or following the entry into force of a subsequent treaty is not governed by the common law doctrine of abatement nor the general savings statute codified at 1 U.S.C. § 109. "Rather, when resolving that question, we apply the rules of customary international law enunciated in the Vienna Convention on the Law of Treaties."¹⁹⁰

Moreover, under Article 59 to the Vienna Convention, an international agreement is deemed to have been "terminated" by conclusion of a later treaty only if all of the parties to the first agreement conclude a later agreement relating to the subject matter, and if the parties either intended that the matter should be governed by the later treaty or the provisions of the later treaty are so far incompatible with the earlier one that they are not compatible being applied at the same time.¹⁹¹ In applying this rule to the matter at hand, the court determined that, "[b]y giving effect to the original Warsaw Convention for conduct taking place before entry into force of the Hague protocol and effect to the Hague protocol for conduct taking place after entry into force of that agreement, we easily avoid any possible inconsistency between the two agreements."¹⁹² As such, the court determined that the terms of the original Warsaw Convention applied to the claims asserted against FedEx and that the lower court's ruling on this point was therefore appropriate.¹⁹³

The United States District Court for the Northern District of Illinois considered a similar issue in *Fireman's Fund Insurance v. El Al Israel Airlines, Ltd.*¹⁹⁴ This case arose out of a lost carton of communications equipment. Although the carrier admitted liability, the parties disputed whether the damages were limited under the Convention.¹⁹⁵ The court ultimately found that the air carrier had failed to include a stop in Amsterdam as an "agreed stopping place" within the meaning of the applicable articles of the Convention, and as such the air carrier could not limit its liability to the plaintiff.¹⁹⁶ The court also ruled that it

¹⁹⁰ *Id.* at 433 (citing the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (May 23, 1969) ("Vienna Convention")).

¹⁹¹ *Id.* at 434.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Fireman's Fund Ins. v. El Al Israel Airlines, Ltd.*, No. 99 C 3801, 2001 WL 32847, 2001 U.S. Dist. LEXIS 235 (N.D. Ill. Jan. 12, 2001).

¹⁹⁵ *Fireman's Fund*, 2001 WL 32847, at *3-5.

¹⁹⁶ *Id.* at *6-14.

would not retroactively apply the Montreal Protocols, which had changed the substantive requirements under the Convention that were applicable to the matter at hand.¹⁹⁷

B. NON-WARSAW LIABILITY OF AIR CARRIERS,
OPERATORS AND THIRD PARTIES

1. *Air Carriers and Aircraft Owners or Operators*

The court discussed issues of general negligence regarding aircraft owners and operators in *Craig Test Boring Co., Inc. v. Saudi Arabian Airlines Corp.*¹⁹⁸ This case arose out of a collision between a Saudi Arabian Airlines (“Saudi”) aircraft and a drilling rig leased and operated by plaintiff Craig Test Boring Company (“Craig”) while maintenance person taxied the aircraft on a taxiway at JFK International Airport. A driller working for Craig, who was accompanied by a representative of the airport, had set up a drilling rig next to an active taxiway. Although the airport would normally close a taxiway for such drilling operations, the agent had failed to do so. Moreover, safety cones had not been placed on the taxiway near the drilling rig. Because the taxiway was not closed, the mechanic working for Saudi was cleared to taxi down the taxiway.

As he approached the rig, the mechanic believed that the wing of the aircraft would clear the rig by passing both over and to the left of the rig boom. Although the mechanic observed at least one individual running away from the rig and another person waving at the aircraft shortly before the crash, the mechanic did not stop. The wingtip of the aircraft, a Boeing 747, collided with the rig, causing substantial damage to both the aircraft and the rig. Craig, Saudi, the airport and the applicable insurance parties all sued each other based upon theories of general negligence.¹⁹⁹

Applying the law of New York State, as stipulated by the parties, the court held a non-jury trial to resolve issues of negligence, comparative negligence, and liability with respect to each of the parties. At the end of the day, the court found that Saudi was liable to Craig for 50% of Craig’s damages plus interest, that the airport was liable to Craig for 49% of Craig’s damages plus interest, that the airport was liable to Saudi for 49% of Saudi’s

¹⁹⁷ *Id.* at *14-15.

¹⁹⁸ *Craig Test Boring Co., Inc. v. Saudi Arabian Airlines Corp.*, 138 F. Supp. 2d 553 (S.D.N.Y. 2001).

¹⁹⁹ *Id.* at 555-57.

damages plus interest, and finally that Craig was liable to Saudi for 1% of Saudi's damages plus interest.²⁰⁰

It is also interesting to note that the court, with respect to the liability facing Saudi, adopted the requirements from 14 C.F.R. §§ 91.3, 91.9, and 91.13 in order to set the standard of care as applicable to Saudi's mechanic who was taxied the aircraft. Because the court found that the mechanic did not exercise any of the various options available to him for the safe taxiing of the aircraft, the court ruled that the mechanic, and hence Saudi, had breached the appropriate standard of care.²⁰¹

Note from the Editor: The author recognizes the change in opinion, but thought it appropriate to leave the original paper intact as it was presented at the SMU Air Law Symposium and highlight the change to the reader through an editor's note.

In the case of *Malone v. Capital Correctional Resources, Inc.*, the Supreme Court of Mississippi had to decide whether under that state's laws the owner of an aircraft could be held vicariously liable for the negligence of a non-employee pilot who borrowed the aircraft for the benefit of his personal friends.²⁰² Plaintiffs argued that the applicable state statutes had been interpreted by both the state and federal courts as meaning that the owner of an aircraft is also an operator and is vicariously liable for all acts of the pilot.²⁰³

The lower court ruled, however, that plaintiff's supporting cases were distinguishable from the case at hand, and the Mississippi Supreme Court agreed. The court ruled that prior precedent was distinguishable, that this was a case of first impression from Mississippi courts, and as such that the plaintiffs' arguments were insufficient to call into question the grant of summary judgment by the circuit court.²⁰⁴ It is worth noting that the court went to great ends to distinguish the prior Fifth Circuit case of *Hayes v. Morgan*,²⁰⁵ which had interpreted the Mississippi statutes as meaning that the owner of an aircraft is also an operator and is vicariously liable for all acts of the pilot, noting

²⁰⁰ *Id.* at 557-62.

²⁰¹ *Id.* at 558-59.

²⁰² *Malone v. Capital Corr. Res., Inc.*, No. 1999-CA-1451-SCT, 2001 WL 954157, 2001 Miss. LEXIS 203 (Miss. S.Ct. Aug. 23, 2001), *withdrawn*, 808 So. 2d 963 (2001).

²⁰³ *Malone*, 2001 Miss. LEXIS 203, at *3-6.

²⁰⁴ *Id.* at *7-15.

²⁰⁵ *Hayes v. Morgan*, 221 F.2d 481 (5th Cir. 1955).

that the Fifth Circuit had itself moved away from that ruling, as well as had other federal circuit and district courts.²⁰⁶

In *Jarmuth v. Aldridge*, the Illinois court of appeals addressed negligence claims arising out of the crash of a World War II vintage Vultee BT 13-A training aircraft that was owned by the defendants and piloted by the decedent.²⁰⁷ The aircraft developed a fuel leak, and the owners turned it over to an FAA certificated mechanic for repair. Three days after the airplane was repaired and certified as airworthy, it crashed while the decedent was flying it to Oshkosh, Wisconsin, where it was to be sold.²⁰⁸

The plaintiff asserted that the owner-defendants had a non-delegable duty to ensure that the aircraft was airworthy, that the defendants had breached this duty when they failed to personally inspect the aircraft after it had already been inspected by an FAA-certified mechanic, and that this failure to inspect in turn caused the death of decedent since a defect in the aircraft fuel system caused the aircraft to crash. As framed by the court, the issue was whether the facts and the law create a duty to ensure that an aircraft is airworthy that can not be delegated to another.²⁰⁹

In analyzing this issue, the court compared the maintenance requirements found in 14 C.F.R. Part 121, applicable to commercial air carriers, with the general maintenance requirements found in 14 C.F.R. Part 91. The court noted that 14 C.F.R. § 121.363 imposes upon a certificated air carrier a nondelegable duty to be responsible for all repairs made to the aircraft, while §§ 91.403 and 91.406, which apply to noncommercial aircraft owners, speak only in terms of “primary responsibility.” The court took the use of the term “primary responsibility” to mean that there could also be “secondary responsibility,” in turn negating the implication that the owner’s duty under the general aviation rules is completely nondelegable.²¹⁰ The court concluded that because there was no evidence that the owner-defendants were negligent in relying on properly-certified FAA mechanics to perform the repair work, and because there was no evidence that the owner-defendants had actual or constructive knowledge of any defect in the aircraft, the owners

²⁰⁶ *Malone*, 2001 Miss. LEXIS, at *11-13.

²⁰⁷ *Jarmuth v. Aldridge*, 747 N.E.2d 1014, 1016 (Ill. Ct. App. 2001).

²⁰⁸ *Id.* at 1016-17.

²⁰⁹ *Id.* at 1017.

²¹⁰ *Id.* at 1018.

could not be held liable for the negligence, if any, of the mechanics.²¹¹

2. Airports

Several courts also addressed the liability facing the operators of airports in 2001. For example, in *Walsh v. Avalon Aviation, Inc.*, the federal district court addressed whether a private airport can be liable for a pilot's collision with obstructions beyond the airport boundary during a failed takeoff attempt.²¹² The matter appeared to be one of first impression for the court under Maryland law, so it conducted an extensive analysis of the various Federal Aviation Administration regulatory requirements applicable to airports.

As part of this analysis, the court noted the distinction between regulations addressing obstructions to runway approach paths and the lack of similar requirements with respect to runway departure paths.²¹³ Finding that no regulatory requirement was violated, the court then turned to the question of reasonableness under a basic negligence analysis. Applying the facts at hand, the court determined that the airport did not act unreasonably, thus its motion for summary judgment against the plaintiff was warranted.²¹⁴

The Supreme Court of South Dakota considered the question of whether an airport owed a duty of reasonable care with regard to providing small aircraft tie-down ropes in the case of *Pierce v. City of Belle Fourche*.²¹⁵ Here, the court noted that under South Dakota law the possessor of land owes a business invitee a duty of reasonable care. Moreover, the duty extends to fixtures, attachments and appliances used on land. The court ruled that tie-down ropes are such appliances and that, if such a duty of reasonable care exists, it extends not only to the business invitee's person but also to the business invitee's personal property.²¹⁶

Moreover, the court determined that it would be foreseeable that airplanes would land at the airport, that tie down ropes would eventually wear out from use and exposure to the elements, and that if such worn-out rope broke during high winds,

²¹¹ *Id.* at 1019.

²¹² *Walsh v. Avalon Aviation, Inc.*, 125 F. Supp. 2d 726 (D. Md. 2001).

²¹³ *Id.* at 728.

²¹⁴ *Id.* at 729-30.

²¹⁵ *Pierce v. City of Belle Fourche*, 624 N.W.2d 353 (S.D. 2001).

²¹⁶ *Id.* at 355.

an airplane could be damaged or even blow away. Consequently, the defendant city had a duty to use reasonable care in selecting the ropes, fabricating the tie-downs and detecting and replacing the worn tie-downs. The supreme court therefore ruled the trial court erred in determining that the city did not owe the plaintiff a duty of reasonable care and reversed and remanded the case for trial on the merits.²¹⁷

3. *Non-Aviation-Industry Third Party Liabilities*

In *Craig Test Boring Co., Inc. v. Saudi Arabian Airlines Corp.*, discussed at length above, the trial court ruled that non-aviation-industry third parties could be held liable under the theory of negligence with respect an aircraft accident.²¹⁸ Several other courts also investigated such third-party negligence liability in 2001. For example, in *Rachel v. Petroleum Helicopters, Inc.*, the district court ruled that in a passenger's personal injury action against an air taxi operator arising from the crash of one of its helicopters, the aircraft operator could not file a third party complaint against the manufacturer of an allegedly defective prosthetic implant used in the treatment of one of the passenger's injuries.²¹⁹ This was because under the state's comparative negligence statute, the proper method for the operator to be indemnified was through operation of that statute rather than a separate third-party action directly against the manufacturer.

On the other hand, the Missouri Court of Appeals ruled in *Hosto v. Union Electric Co.* that an electric utility company could be held liable for an accident in which a helicopter crashed into one of its unmarked power lines, killing the pilot and passenger.²²⁰ This was so, even though the power lines were not required to be marked under the applicable federal aviation regulations, because they spanned 1,300 feet across a river and had oxidized to a point where they were virtually impossible for a pilot to see. Moreover, the lines in question were in close proximity to two airports, over 40 airports were located in the general area, and the particular river was a "natural flyway" with heavy boat traffic.²²¹

²¹⁷ *Id.* at 356-57.

²¹⁸ *Craig Test Boring Co., Inc. v. Saudi Arabian Airlines Corp.*, 138 F. Supp. 2d 553 (S.D.N.Y. 2001). See *supra* notes 198-201 for the discussion of the case.

²¹⁹ *Rachel v. Petroleum Helicopters, Inc.*, Civ. Act. No. 99-3205 § "N," 2001 WL 699415, 2001 U.S. Dist. LEXIS 8576 (E.D. La. June 19, 2001).

²²⁰ *Hosto v. Union Elec. Co.*, 51 S.W.3d 133 (Mo. App. 2001).

²²¹ *Id.* at 139-41.

C. LIABILITY OF MANUFACTURERS AND SUPPLIERS

1. *No Manufacturer's Liability Regarding Inaccurate Fuel Gage*

In *McLennan v. American Eurocopter Corp.*, the United States Court of Appeals for the Fifth Circuit heard the appeal from final judgment against an aircraft-manufacturer defendant finding that it was partially liable, based on a faulty fuel gage, for the crash of a helicopter being used in "slinging" operations.²²²

Slinging involves the suspension of a heavy load from a helicopter using equipment attached to the helicopter for that purpose. The helicopter then transports the load to a different location while flying at low altitudes. Moreover, given the limited weight-carrying capacity of the helicopters used for slinging operations, helicopter pilots slinging loads are often required to fly with lower quantities of fuel than helicopters engaged in other operations. During this particular series of slinging operations, the plaintiff, Peter McLennan, crashed an American Eurocopter Corporation Model AS-350-B helicopter near the Haig Glacier in Western Alberta, Canada.²²³

The plaintiff contended that the aircraft manufacturer was responsible for his injuries and resulting damages under the Texas law theories of strict products liability negligence. Both theories focused upon alleged marketing defects in the helicopter. Specifically, the plaintiff claimed that the manufacturer affirmatively marketed the helicopter as suitable for slinging operations when in fact the helicopter was unreasonably dangerous for that use. These allegations were based in part upon plaintiff's assertion that the resistor-type fuel measurement system in the aircraft tended to wear when consistently flown in the low-fuel stage required for slinging, which led to inaccurate fuel gauge readings. In essence, the plaintiff claimed that any helicopter equipped with such a resistor-type fuel measurement system is unreasonably dangerous and should not be used for slinging operations.²²⁴

The manufacturer responded that: (1) the helicopter was not unreasonably dangerous; (2) it owed no duty to warn users of any risk under the circumstances of the plaintiff's flight; (3) even if there was such a duty, it was completely satisfied by the issuance of service letters and bulletins before the crash address-

²²² *McLennan v. American Eurocopter Corp.*, 245 F.3d 403 (5th Cir. 2001).

²²³ *Id.* at 409-14.

²²⁴ *Id.* at 422-23, 427.

ing issues with respect to the fuel measurement system; (4) the alleged marketing defects were neither the producing nor proximate causes of the crash; and (5) the crash was caused instead by the improper maintenance or pilot error or both.²²⁵

Based on these allegations, the circuit court conducted an extensive review of the facts introduced at trial. The circuit court disagreed with essentially all of the trial court's conclusions. The court found that the plaintiff had ignored the documentary warnings provided by the manufacturer in flight documentation and service letters and bulletins regarding the fuel measurement system. Further, the court found that he ignored the warnings given to him by instructor pilots on the aircraft and ignored warnings provided by the aircraft itself. The court also found that he continued to fly the aircraft with the low fuel warning light on in violation of the flight manual and company policy, and he commenced at least two additional sling loads with knowledge that he was within 20 minutes of his fuel reserve. In short, the court concluded that there were no additional warnings that the manufacturer could have given that would have dissuaded the plaintiff from continuing his flight on the day of the crash.

In the end, the circuit court ruled that the district court had "committed clear error, and that the record does not support the conclusion that [manufacturer's] conduct was either a producing or proximate cause of this crash. To the contrary, this crash was caused solely by [plaintiff's] own pilot error."²²⁶ The court reversed and remanded in favor of the manufacturer and ruled that plaintiff's cross-appeal with respect to the percentage of liability was moot.

2. *The General Aviation Revitalization Act of 1994*

The contours of the General Aviation Revitalization Act of 1994 ("GARA")²²⁷ were further defined by two cases in 2001. *Lyon v. Agusta S.P.A.* settled several open issues about GARA.²²⁸ In *Lyon*, three individuals were killed in the crash of a Marchetti model F-260 aircraft on November 26, 1993. The aircraft had been sold originally by Marchetti in December of 1970 to SA

²²⁵ *Id.* at 427-34.

²²⁶ *Id.* at 434.

²²⁷ The General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552 (1994), *reprinted at* 49 U.S.C. § 40101, notes.

²²⁸ *Lyon v. Agusta S.P.A.*, 252 F.3d 1078 (9th Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002).

Sabena, NV in Belgium and had, after intervening transfers, become the property of the owner of the craft at the time of the crash. The decedent's survivors brought a lawsuit against Marchetti and its parent corporations on November 15, 1994. The effective date of GARA was August 17, 1994. The defendant manufacturers moved to dismiss the lawsuits on the basis that it was barred by the provisions of GARA. The district court granted the motion, and the Ninth Circuit affirmed.²²⁹

On appeal, the decedent's survivors argued that GARA did not properly cover their cause of action because the accident in question occurred before GARA was enacted. They added that if GARA did cover their cause of action, then it is unconstitutional. The Ninth Circuit analyzed both the retroactivity and constitutionality claims.

The Ninth Circuit began its analysis of the retroactivity question by noting that the Supreme Court has made it clear that, with some notable exceptions, retroactive legislation is permissible. The normal presumption is that statutes are not meant to be retroactive. Moreover, if Congress has expressly prescribed the statute's proper reach, then there is no need to resort to judicial default rules. But if Congress does not clearly set the statute's reach, the Court must go on to ask whether the new statute would have a retroactive effect.²³⁰

The Court then turned to the text of GARA. Noting that the Act states that it was to take effect on the date of its enactment, August 17, 1994, and that this statement does not speak to retroactivity, the Court then observed that preceding the declaration is the phrase "except as provided in subsection (b)," This subsection in turn reads, "this Act shall not apply with respect to civil actions commenced before the date of enactment of this Act."²³¹ In discussing this choice of language, the Court found that Congress had clearly expressed its intention that GARA be applied to all actions that had not already been commenced on its effective date. Because the Court had ruled that GARA should be applied retroactively, the Court then turned to plaintiff's claims that the Act is unconstitutional.

Plaintiffs urged that if GARA barred their action, then it is unconstitutional both substantively and procedurally.²³² The

²²⁹ *Id.* at 1081.

²³⁰ *Id.* at 1084-85.

²³¹ *Id.* at 1085 (citing GARA § 4(b)).

²³² *Id.* at 1085-86.

plaintiffs' substantive argument rested on the theory that GARA deprived them of a vested property right in their cause of action. The Ninth Circuit quickly dismissed this argument, noting that it had previously held that although a cause of action is a species of property, that party's property right in any cause of action does not vest until the party obtains a final, reviewable judgment.²³³

Plaintiffs also claimed that GARA violated a procedural due process right, because the statute of limitations cannot be shortened in a way that eliminates the plaintiff's ability to file an action. Still, the Court held that GARA is not a statute of limitations, and it does not shorten any statute of limitations. Rather, GARA is "a classic statute of repose."²³⁴ As the Court explained, a statute of repose does not run from the dates on which the injury occurs. Rather, it runs from what amounts to the date of the first transfer from the manufacturer.

With this in mind, the Court analyzed of the legislative history of this statute, with a special focus on whether Congress acted irrationally or arbitrarily in passing the statute. The Court eventually concluded that "Congress rationally can, and did, offer special protection to those who had already filed their actions. That is not irrational. GARA is constitutional in this respect."²³⁵ Therefore, the Court concluded that because Marchetti first delivered the aircraft in question approximately twenty-three years before its crash in California, GARA constitutionally barred an action based upon that accident even though GARA itself was not passed until after the accident occurred.²³⁶

In *Bain v. Honeywell Int'l, Inc.*, the court decided whether Bell Helicopter Textron, Inc. ("Bell"), the manufacturer of the helicopter that gave rise to the lawsuit, could be liable to plaintiffs due to GARA.²³⁷ Finding that Bell had delivered the helicopter more than twenty-eight years before the crash, that it did not replace or work on the parts of the aircraft relevant to the crash since the original delivery, and that it had no reason to monitor or issue warnings concerning the aircraft parts in question, the court held that GARA barred all of the state law causes of action plaintiffs had asserted against Bell and dismissed Bell from the

²³³ *Id.* at 1086.

²³⁴ *Id.* at 1084, 1086.

²³⁵ *Id.* at 1086-88.

²³⁶ *Id.* at 1089.

²³⁷ *Bain v. Honeywell Int'l, Inc.*, 167 F. Supp. 2d 932 (E.D. Tex. 2001).

suit.²³⁸ Moreover, the court found that because there was no possibility of recovery against Bell under GARA, plaintiffs had fraudulently joined Bell in order to defeat diversity jurisdiction and therefore denied plaintiffs' motion to remand.²³⁹

3. *The Economic Loss or East River Doctrine*

In *Brown v. Eurocopter, S.A.*, a federal district court in the Fifth Circuit addressed defendants Eurocopter, S.A.'s and American Eurocopter Corp.'s (together "Eurocopter") Rule 12(b)(6) motion to dismiss the counter-plaintiffs' suit for failure to state a claim.²⁴⁰ The case arose out of the crash of a Eurocopter helicopter in which the aircraft lost tail-rotor control and struck an off-shore oil platform, killing its pilot.

The decedent's survivors filed suit against Eurocopter, which in turn filed a third-party suit against the air taxi operator that owned and operated the aircraft. The air taxi operator filed counter-claims against Eurocopter, based on Eurocopter's alleged post-sale negligent acts, for the damage to the aircraft caused by the crash. Hence Eurocopter's motion to dismiss asserting that the economic loss or *East River* doctrine—the doctrine under maritime law that no cause of action sounding in strict liability or negligence is allowed for damages that a product causes to itself—effectively barred any recovery by the air taxi operator against Eurocopter.²⁴¹

In response, the air taxi operator agreed that the *East River* doctrine did not apply to cases involving post-sale negligence, as opposed to negligence occurring prior to or at the time of sale. The court then noted that the circuits are split on the issue, with the Eleventh Circuit holding that a claim for post-sale negligence is not barred by the doctrine, the Third Circuit holding that such a claim is barred by the doctrine, and the Fifth Circuit not yet weighing in on the issue. In light of the lack of guidance from its own circuit, the district court followed the Eleventh Circuit and ruled that the *East River* doctrine did not bar the air taxi operator's claims. Therefore, the court denied Eurocopter's motion to dismiss.²⁴²

²³⁸ *Id.* at 934-36, 940.

²³⁹ *Id.* at 936-38, 940.

²⁴⁰ *Brown v. Eurocopter, S.A.*, 143 F. Supp. 2d 781 (S.D. Tex. 2001).

²⁴¹ *Id.* at 782.

²⁴² *Id.* at 783.

Finally, in *Voohries-Larson v. Cessna Aircraft Co.*, the administrators of three airplane crash decedents filed liability and wrongful death claims against Cessna Aircraft Co.²⁴³ Ruling on the appeal of the trial court's judgment on a jury verdict, the circuit court held the administrators have failed to preserve for review objections to certain jury instructions and that the evidence supported the verdict, thus affirming the lower courts decision.²⁴⁴

D. LIABILITY OF THE UNITED STATES: THE FEDERAL TORT CLAIMS ACT

During 2001, two courts addressed the scope of the Federal Tort Claims Act ("FTCA"). First, the Second Circuit extended subject matter jurisdiction to federal district courts where 49 U.S.C. § 46110 could have arguably denied jurisdiction. Second, a federal district court held that the FTCA does not waive sovereign immunity in claims by federal contractors.

The case of *Merritt v. Shuttle, Inc.* is part of a tortured history surrounding the crash of a Shuttle, Inc. aircraft in June 1996 and the FAA's emergency revocation of the aircraft captain's—Richard Merritt's—pilot certificate as a result of that crash.²⁴⁵ Merritt appealed the FAA's emergency revocation to the National Transportation Safety Board ("NTSB") Administrative Law Judge ("ALJ"), who after a four day hearing modified the revocation to a nine month suspension. This modification was based in large part on the ALJ's finding that the FAA had failed to provide Merritt with all of the weather information the FAA controllers were aware of that contributed to the crash.²⁴⁶

Merritt initially appealed the ALJ's order to the NTSB, but he soon abandoned the appeal and filed an action in federal district court. Merritt filed numerous federal and state claims against several defendants, including a Fifth Amendment due process *Bivens* claim against three FAA officials, and an FTCA negligence claim against the United States based on the FAA's failure to warn Merritt of the approaching storm. The defendants originally moved to dismiss on various grounds. The district court granted a number of these motions, and denied the balance. Among the motions denied was the United States' motion to dismiss for lack of subject matter jurisdiction under 49

²⁴³ *Voohries-Larson v. Cessna Aircraft Co.*, 241 F.3d 707 (9th Cir. 2001).

²⁴⁴ *Id.* at 710-19.

²⁴⁵ *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 184-86 (2d Cir. 2001).

²⁴⁶ *Id.* at 185.

U.S.C. § 46110 and the FAA officials' motion to dismiss the *Bivins* claims on qualified immunity grounds.²⁴⁷

Although the FAA officials raised an interlocutory appeal of the district court's rejection of their qualified immunity defense, the circuit court instead reviewed *sua sponte* the district court's denial of the United States' motion to dismiss for lack of subject matter jurisdiction under § 46110. "Finding that Merritt's *Bivens* claim was 'inescapably intertwined' with review of the suspension order, and that permitting that claim to proceed to trial in the District Court "would result in new adjudication over the evidence and testimony adduced in the prior administrative . . . hearing, the creditability determinations made by the ALJ, and, ultimately, the findings made by the ALJ during the course of the proceedings under § 46110," the circuit court concluded that "§ 46110 deprived the district court of jurisdiction over the *Bivins* claim."²⁴⁸ The court then remanded the action to the district court for proceedings consistent with its opinion.

On remand, the district court dismissed the Fifth Amendment due process claims against the three FAA officials. Furthermore, finding that Merritt's common law tort actions against the United States were "inescapably intertwined" with the NTSB ALJ's original review of the revocation order, the district court also *sua sponte* dismissed Merritt's FTCA claim against the United States. Therefore, the present case is Merritt's timely appeal of the district court's decision.²⁴⁹

To begin its analysis of whether § 46110 deprived the District Court of jurisdiction over Merritt's FTC claims, the circuit court looked at the text of the statute itself. Section 496110 gives to the Courts of Appeal for the United States the exclusive jurisdiction to affirm, amend, modify or set aside FAA orders with respect to pilot certificates.²⁵⁰ Thus, the section precludes a federal district court from affirming, amending, modifying or setting aside any part of such an order.

The Court then noted that under the Supreme Court's decision in *City of Tacoma v. Taxpayers of Tacoma*, statutes such as § 46110 that vest judicial review of administrative orders exclusively in a court of appeals also preclude district courts from hearing claims that are "inescapably intertwined" with review of

²⁴⁷ *Id.* at 185-86.

²⁴⁸ *Id.* at 186.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 186-87.

such orders.²⁵¹ In reviewing the *City of Tacoma* decision at length, the circuit court understood it to mean that such statutes preclude: (1) *de novo* litigation of issues hearing in a controversy over an administrative order where one party alleges that it was aggrieved by the order, and (2) all other modes of judicial review of the order. The court explained:

[T]his means that the mere overlap of evidence and testimony introduced in the two proceedings, or the mere overlap of findings made by an ALJ and by a district court judge, are insufficient to preclude the district court from hearing a given claim. Such overlap is relevant only if the claim attacks the matters decided by the administrative order.²⁵²

Applied to the present case, the circuit court determined that Merritt's FTCA claim did not allege that he was injured or aggrieved by the ALJ's suspension order. Instead, Merritt claimed that he was injured by the failure of the FAA employees to provide him with accurate information prior to his takeoff in June of 1996. Moreover, the Court noted that the substance of Merritt's claims went to issues that ALJ could not have decided, because such a venue is not appropriate for deciding, or providing relief to Merritt for, any negligence of the FAA employees.²⁵³

Finally, the circuit court also considered several issues that weighed against depriving the district court of jurisdiction over Merritt's FTCA claims. First, under the district court's reading, although every passenger on board the crashed aircraft could have brought an FTCA claim against the government, Merritt could not. Moreover, even if the ALJ had found that Merritt bore no responsibility for the crash, Merritt would nonetheless unjustly be barred from ever bringing an FTCA claim in the district court. While this interpretation would preclude Merritt from bringing an FTCA claim for injuries he suffered, it would ironically permit Merritt's estate to bring an FTCA claim if Merritt actually died as a result of the crash.²⁵⁴

Thus, the circuit court determined that § 46110 did not deprive the district court of subject matter jurisdiction, and remanded the case for further proceedings consistent with its opinion.²⁵⁵

²⁵¹ *Id.* at 187 (citing *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958)).

²⁵² *Id.* at 187-89.

²⁵³ *Id.* at 189-90.

²⁵⁴ *Id.* at 191.

²⁵⁵ *Id.* at 192.

In *Alinsky v. United States*, a federal district court also addressed issues surrounding the FTCA.²⁵⁶ The case arose from the crash of two aircraft over Chicago's Merrill C. Meigs Field in July of 1997. At the time of the crash, the Air Traffic Control Tower was operated by a private company acting as an independent contractor for the FAA. The plaintiff's filed suit against the FAA in part under the FTCA, seeking to hold the FAA vicariously liable for the independent contractor's alleged negligence. The district court quickly granted the government's motion to dismiss this claim, because the waiver of sovereign immunity granted by the FTCA only extends to actions initiated by government employees and not to those by independent contractors.²⁵⁷

E. LIABILITY OF FOREIGN NATIONS: THE FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act²⁵⁸ (FSIA) is the exclusive source of the United States courts' subject matter jurisdiction over claims against foreign states and their agencies or instrumentalities. Generally, the Act presumes that a foreign state or instrumentality is immune from suit in federal court unless, among other things, the particular claim is based upon a commercial activity carried on in the United States by that state or instrumentality. Several courts that addressed these issues in 2001 found that there was insufficient U.S. commercial activity to establish jurisdiction under FSIA.

1. *Insufficient U.S. Commercial Activity to Establish Jurisdiction*

For example, in *Ryba v. Lot Polish Airlines*, the two plaintiffs—a husband and wife—sued Lot Polish Airlines—a company which was majority owned by the Republic of Poland—for injuries the wife sustained after she fell in an entranceway of a facility owned by the defendant.²⁵⁹ Upon finding no significant nexus between the airline's commercial activity in the United States and the plaintiffs' cause of action, the court dismissed the claims for lack of subject matter jurisdiction.²⁶⁰

²⁵⁶ *Alinsky v. United States*, 156 F. Supp. 2d 908 (N.D. Ill. 2001).

²⁵⁷ *Id.* at 911.

²⁵⁸ Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602 *et seq.*

²⁵⁹ *Ryba v. Lot Polish Airlines*, No. 00 CIV. 5976, 2001 WL 286731, 2001 U.S. Dist. LEXIS 2908 (S.D.N.Y. Mar. 22, 2001).

²⁶⁰ *Ryba*, 2001 WL 286731, at *1-3.

Likewise, in *Fondo v. Delta Airlines, Inc.*, plaintiff Edwin Fondo, M.D., filed suit against defendants Delta Airlines, Inc. and Air France, Inc., for their failure to transport him to Brazzaville, Africa, and for various tortious acts.²⁶¹ Defendant Air France moved for summary judgment on the grounds that the court lacked subject matter jurisdiction under FSIA because there was no identifiable nexus between the plaintiff's claims and defendant's commercial activity in the United States. The court dismissed the claim finding that the only nexus between the plaintiff's tort claims and Air France's commercial activity in the U.S. was that the plaintiff had purchased his ticket here.²⁶²

2. *Sufficient U.S. Commercial Activity to Establish Jurisdiction*

On the other hand, at least one court found sufficient U.S. commercial activity in order to establish jurisdiction against a foreign instrumentality. In *Lyon v. Augusta S.P.A.*, discussed at length above with regard to GARA, the court first addressed the question of whether the district court had jurisdiction under FSIA over the foreign manufacturer.²⁶³ Marchetti, and the Augusta entities that owned it, were instrumentalities of the Republic of Italy.²⁶⁴ All parties agreed that Marchetti's acts of designing, manufacturing and selling the aircraft were "in connection with the commercial activity" and that the activity was "outside the territory of the United States," but the parties disagreed as to whether that activity caused "a direct effect in the United States."²⁶⁵ Calling the concept of "a direct effect in the United States" a rather "enigmatic proposition" to construe, the circuit court then turned to previous Supreme Court precedent to unravel this enigma.²⁶⁶

In looking to this case law, the court decided that the plaintiff's harm need not necessarily be a substantial, foreseeable or immediate cause or result of an act of the defendant's acts outside the United States; rather it only must be an immediate consequence of defendant's activity. In turn, the court determined that of the phrase "immediate consequence" means that the focus should be on whether some intervening act broke the

²⁶¹ *Fondo v. Delta Airlines, Inc.*, No. 00 Civ. 2445 (JSM), 2001 WL 604039, 2001 U.S. Dist. LEXIS 7098 (S.D.N.Y. May 30, 2001).

²⁶² *Fondo*, 2001 U.S. Dist. LEXIS 7098, at *13-16.

²⁶³ *Lyon v. Augusta S.P.A.*, 252 F.3d 1078 (9th Cir. 2001).

²⁶⁴ *Id.* at 1081.

²⁶⁵ *Id.* at 1082.

²⁶⁶ *Id.*

chain of causation leading from the asserted wrongful act to its impact in the United States.²⁶⁷ In light of this analysis, the circuit court determined under the facts of the case that the court did have jurisdiction over Marchetti under the commercial activity exception to FSIA.²⁶⁸

3. Waiver of FSIA Immunity

In *Coyle v. P.T. Garuda Indonesia*, another case discussed above, the court ruled that the defendant air carrier had waived its FSIA immunity when it obtained a permit from the DOT to conduct operations between Indonesia and the United States because that permit included a specific limited waiver of sovereign immunity.²⁶⁹

F. SELECTED MULTI-DISTRICT LITIGATION ISSUES

1. "Tseng Preemption" Blocks Causes of Action

Courts issued several opinions dealing with pending multi-district litigation ("MDL") in 2001. In two cases the courts dealt with exclusivity issues under the *Tseng* decision. In *In re American Airlines, Inc., Flight 869*, the court indicated that the Warsaw Convention does not apply in instances where a plaintiff pleads "willful misconduct,"—a statement that directly conflicts with the other cases discussed above on this point.²⁷⁰ The *Flight 869* court also very briefly addressed several choice of substantive law issues as part of its opinion.²⁷¹

In *In re Air Crash Off Point Mugu*, the court also briefly touched upon exclusivity issues with respect to the Convention and in light of the *Tseng* decision. Then the court moved to the discussion of damages available under the Convention as noted above.²⁷²

²⁶⁷ *Id.* at 1083.

²⁶⁸ *Id.* at 1083-84.

²⁶⁹ *Coyle v. P.T. Garuda Indonesia*, Civ. No. 99-1348-JE, 2001 U.S. Dist. LEXIS 9483 (D.Or. Apr. 30, 2001).

²⁷⁰ *In re American Airlines, Inc., Flight 869*, 128 F. Supp. 2d 1367, 1369 (S.D. Fla. 2001).

²⁷¹ *Id.* at 1370.

²⁷² *In re Air Crash Off Point Mugu*, 145 F. Supp. 2d 1156, 1161 (N.D. Cal. 2001).

2. Removal and Choice of Law Issues

In another pending MDL matter, *In re Air Crash at Little Rock*, a parent and natural guardian of a minor sued American Airlines for loss of consortium with respect to the minor's father.²⁷³ The court addressed a motion to remand the case. The father was injured during the crash of American Airlines Flight 1420 at Little Rock, and his case was pending with the Eastern District of Arkansas, the court conducting the multi-district litigation for this matter.²⁷⁴

The guardian originally filed suit in Dallas County, Texas then the suit was conditionally transferred to the Arkansas court in July of 2001. The plaintiff filed a motion to remand the case to Dallas County, because it had been improvidently removed. Although American Airlines is based in Texas, the court ultimately determined that the only proper venue for the child's consortium claim was the Eastern District of Arkansas because the claim for loss of consortium must be filed in conjunction with the parents' pending action. Moreover, because there was no other connection to Texas (all the parties were Colorado residents), and Colorado does not recognize the right of a child to sue for loss of consortium as a result of injury to the parent, the court also granted defendant's motion for summary judgment on the loss of consortium claim.²⁷⁵

G. PREEMPTION

A number of courts addressed a broad range of preemption issues in 2001, including several cases applying the Airline Deregulation Act of 1978, preemption under various constitutional provisions and the Pilot Record Improvements Act of 1996.

1. The Airline Deregulation Act of 1978

The Airline Deregulation Act of 1978²⁷⁶ ("ADA") sets at a federal regulatory scheme for the airline industry. In many instances, the ADA preempts state law. In 2001, courts settled several issues surrounding the ADA's preemptive effects.

²⁷³ *In re Air Crash at Little Rock*, 170 F. Supp. 2d 861 (E.D. Ark. 2001).

²⁷⁴ *Id.* at 862.

²⁷⁵ *Id.* at 863.

²⁷⁶ Airline Deregulation Act of 1978, Pub. L. 95-504, 92 Stat. 1705 (1970), Pub. L. 96-192, 94 Stat. 48 (1980), and Pub. L. 103-429, 108 Stat. 4390 (1994) (reprinted at various sections throughout 49 U.S.C. §§ 40101 *et seq.*).

a. Justice O'Connor's Call to Settle Split Between the Circuits

Interestingly, Justice O'Connor's dissented from the Supreme Court's denial of certiorari in *Northwest Airlines, Inc. v. Duncan*.²⁷⁷ Justice O'Connor dissented because she felt that the case "presents an important issue that has divided the Courts of Appeals: the meaning of the term 'service' and the portion of the Airline Deregulation Act of 1978 (ADA) that preempts any state law 'related to any price, route, or service of an air carrier.'"²⁷⁸ Justice O'Connor began her comments by noting that although the Court has addressed the scope of the ADA's preemption provision on two occasions, it has never directly addressed the definition of "service" within the meaning of 49 U.S.C. § 41713(b)(1).

The courts of appeals that have taken on this definition have arrived at directly conflicting positions. For example, the Ninth and Third Circuits have held that the term "service" encompasses the prices, schedules, origins and destinations of the point to point transportation of passengers, cargo or mail, but does not encompass the provision of in flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities.²⁷⁹ On the other hand, the courts of appeals for the Fourth, Fifth and Seventh Circuits have adopted a much broader definition, holding that "service" does include actions such as ticketing, boarding procedures, provisioning of food and drink, and baggage handling.²⁸⁰ In light of these directly conflicting interpretations, Justice O'Connor would have accepted certiorari on the case so that the Supreme Court could settle the conflict.²⁸¹

b. Municipal Authority Not Preempted and Can Enforce Non-Discrimination Rules

The Ninth Circuit addressed ADA preemption of municipal ordinances in *Air Transportation Association of America v. City & County of San Francisco*.²⁸² The City of San Francisco, through its

²⁷⁷ *Northwest Airlines, Inc. v. Duncan*, 531 U.S. 1058 (2000).

²⁷⁸ *Id.* at 571 (citations omitted).

²⁷⁹ *Id.* (citations omitted).

²⁸⁰ *Id.* at 571-72 (citations omitted).

²⁸¹ *Id.* at 572.

²⁸² *Air Transp. Ass'n of Am. v. City & County of San Francisco*, 266 F.3d 1064 (9th Cir. 2001).

Airport Commission, owns and operates the San Francisco International Airport. Since 1966, the city has refused as a matter of public policy to do business with contractors that discriminate on the basis of race and other identifying factors. In 1972, the city amended its ordinances to add gender and sexual orientation as additional prohibited bases for discrimination. In 1997, the city extended these prohibitions to contracting agencies of the city, including the San Francisco International Airport. Thus, in order to execute new airport property contracts or to amend existing airport property contracts, airlines with a presence at the airport would have to provide benefits on an equal basis to married employees and employees with registered domestic partners.²⁸³

Organizations representing the various airlines and affected parties (together the “airlines”) filed suit against the city alleging that the ADA preempted ordinances, among other things.²⁸⁴ The lower court held that ADA preemption rules required the airlines to provide proof that “they or the members they represent are seriously considering not flying in or out of San Francisco, or limiting or rejecting future business or expansion, as a result of the burdens of complying with the ordinance.”²⁸⁵ The airlines failed to provide this proof. The Ninth Circuit considered this ruling on appeal.

On appeal, the airlines offered two arguments as to why the district court’s summary judgment in favor of the city regarding preemption was in error. First, they argued that the ordinances’ requirement that contractors not discriminate in providing “travel benefits” and “employee discounts” related to prices and services. Second, they argued that the ordinances’ method of imposing the nondiscrimination requirements—conditioning future airport property leases on compliance with the ordinance—related to service and routes.²⁸⁶

Looking to prior ADA precedent, the circuit court concluded that the ordinances’ requirements did not relate to prices or services because the ordinance simply required the airlines not to discriminate in providing benefits. It did not bind the airlines to provide free or discounted tickets to anyone; rather it stated that the if the airlines did provide tickets to employees’ spouses,

²⁸³ *Id.* at 1069.

²⁸⁴ This group also alleged preemption under the Railway Labor Act, the Employee Retirement Income Security Act of 1974 and California law.

²⁸⁵ *Air Transp. Ass’n.*, 266 F.3d at 1070.

²⁸⁶ *Id.* at 1072-73.

then they would also have to provide them to their registered domestic partners. As such, the airlines were free to set whatever terms, conditions and prices they wanted on the travel benefits and discounts that they chose to provide, as long as they did not discriminate. Therefore, the ADA did not preempt these provisions.²⁸⁷

With respect to the airlines' second argument, the circuit court felt that the method of imposing the ordinances did not relate to routes and services. Rather, the city could impose the ordinances through its role as landlord of the city airport under either its sovereign power or its contractual power to impose those restrictions. The court felt it was inconsequential that the ordinance had the effect of inuring bargaining leverage to the city because the ordinance only bound the airlines to nondiscrimination, not to actually make changes in their prices, routes or services.²⁸⁸ In summary, the circuit court concluded that the ADA did not preempt the ordinance and affirmed the lower court's decision on this point.

c. State Whistleblower Statute is Preempted by ADA

In *Botz v. Omni Air Int'l*, the United States District Court for the District of Minnesota considered whether Minnesota's whistleblower statute is both expressly preempted under the ADA or impliedly preempted under the Wendell H. Ford Aviation Investment and Reform Act.²⁸⁹ Specifically, the court considered whether the whistleblower statute, as applied to plaintiff's claim alleging that she had been improperly fired for reporting suspected violations of the Federal Aviation Regulations ("FARs"), amounted to enforcement of the law related an air carrier's service.

Omni Air asserted that the plaintiff's claim was related to a service, because the plaintiff's refusal to perform relied on her understanding of the applicable FARs. Also, if an employee could use their own interpretation of the FARs to force a carrier to modify their operations through a whistleblower statute, that statute would have an effect on the air carrier's "services."

The court agreed, finding that the ADA preempted the claim. The court went further to rule that both the plain language of

²⁸⁷ *Id.* at 1072.

²⁸⁸ *Id.* at 1073-74.

²⁸⁹ *Botz v. Omni Air Int'l*, 134 F. Supp. 2d 1042, 1044 (D. Minn. 2001) (citing Wendell H. Ford Aviation Investment and Reform Act, 49 U.S.C. § 42121).

the ADA, as well as the underlying regulatory scheme of the ADA, support a finding that Congress intended to expressly preempt state whistleblower claims when the underlying violation is based on the FARs.²⁹⁰ Moreover, the court noted that Congress recently enacted whistleblower protection through the Ford Act, which further expressed the Congress' intent to preempt claims like the plaintiff's in the state court. Based on these findings, the court granted Omni's motion to dismiss the plaintiff's state law claims on the basis of preemption.²⁹¹

d. General Personal Injury Causes of Action Not Preempted

Snyder-Stulginkis v. United Air Lines, Inc. arose from an August 1999 crash of a Boeing 737-200 aircraft in Argentina operated by Lineas Aereas Privadas Argentina ("LAPA").²⁹² The decedents' survivors alleged that defendant United Airlines had negligently trained the LAPA pilots and that this negligent training was the proximate cause of the fatal accident. The defendant then removed the action to the Northern District of Illinois. The court ruled on the plaintiff's motion to remand for lack of jurisdiction.²⁹³

In order to decide whether the removal was appropriate, the court had to decide whether the ADA completely preempted the plaintiffs' claims, thus creating federal question jurisdiction. Because the plaintiffs had pleaded only state law causes of action, this analysis arose in the context of an exception to the well pleaded complaint rule: the doctrine of complete preemption. After conducting an extensive review of the underlying case law, the court decided that the ADA does not expressly preempt the plaintiffs' claims and that the Savings Clause of the ADA has in fact been found to preserve such claims. As such, the court ruled that the plaintiff's claims were not preempted.²⁹⁴

e. Conflict between FAA and State Aeronautics Commission

In *Big Stone Broadcasting, Inc. v. Lindbloom*, the district court was faced with the interesting question of whether the ADA preempted certain state laws promulgated by the South Dakota Aer-

²⁹⁰ *Id.* at 1046-47.

²⁹¹ *Id.* at 1047-49.

²⁹² *Snyder-Stulginkis v. United Air Lines, Inc.*, No. 01 C 185, 2001 WL 1105128, 2001 U.S. Dist. LEXIS 11665 (N.D. Ill. Aug. 7, 2001, as amended Sept. 20, 2001).

²⁹³ *Snyder-Stulginkis*, 2001 WL 1105128, at *1-2.

²⁹⁴ *Id.* at *2-7.

onautics Commission ("SDAC") regarding the construction of structures over a certain height.²⁹⁵ Plaintiff Big Stone Broadcasting, Inc. had planned the construction of a tower near South Shore, South Dakota, and had filed appropriate applications with the Federal Communications Commission and the FAA. In October of 1999, the FAA completed its aeronautical study concerning the proposed tower under its guidelines found in 49 U.S.C. § 40103 and 14 C.F.R. Part 77. The FAA concluded that the proposed construction would not be a hazard to air navigation and issued a "no hazard" determination.²⁹⁶

Based on the FAA's determination, the Federal Communications Commission granted Big Stone a construction permit in February of 2000. At the same time, Big Stone had applied for permission to construct the tower from SDAC. Even though the SDAC was aware of the FAA's final determination, it denied permission under the applicable state laws. Soon after the SDAC denied its application, Big Stone filed suit against the SDAC primarily arguing that the ADA preempted its decision.²⁹⁷

The court reviewed the general rules applying to ADA preemption, and the various regulations dealing with the FAA's control of airspace in the United States. Finally, the court determined that Congress had granted the FAA sole sovereignty over U.S. airspace and mandated that the FAA and other federal agencies work together to determine proper placement of broadcast hours. The court also determined that the FAA and those agencies had in fact promulgated specific regulations in response to Congress' mandate. Thus, the court felt that allowing states to interfere with the federal agencies cooperation would frustrate Congress' intent and erode the agency's effectiveness. Therefore, the court ruled that the ADA preempted the SDAC's decision, so the decision had no legal effect.²⁹⁸

2. *Constitutional Rights—Due Process and Equal Protection*

In *SeaAir NY, Inc. v. City of New York*, the Second Circuit considered the City of New York's decision to ban a seaplane touring operation.²⁹⁹ The plaintiff, SeaAir NY, Inc., wished to provide site seeing tours out of its leased city-owned waterfront

²⁹⁵ *Big Stone Broadcasting, Inc. v. Lindbloom*, 161 F. Supp. 2d 1009 (D.S.D. 2001).

²⁹⁶ *Id.* at 1010-11.

²⁹⁷ *Id.* at 1012-13.

²⁹⁸ *Id.* at 1014-21.

²⁹⁹ *SeaAir NY, Inc. v. City of New York*, 250 F.3d 183 (2d Cir. 2001).

property. The city issued a permit under its rules for the seaplane base, but disallowed operations including any commercial air tours in order to minimize the noise impact on the general public.³⁰⁰ In response to the restriction, the plaintiff sued the city, alleging that the restriction violated the Supremacy, Due Process, and Equal Protection clauses of the Constitution as well as the preemption provisions of the ADA.³⁰¹

The plaintiff's preemption argument under the Supremacy Clause relied entirely on its assertion that it was engaged in "interstate air transportation" as defined in 49 U.S.C. § 40102(a)(25). The plaintiff claimed that his operations fell under the ADA's provisions shielding air carriers that provide air transportation from state or local regulations affecting service. Section 40102(a)(25) defines interstate air transportation, in part, as transportation *between a place* in one state and another.³⁰²

The plaintiff argued that because its planes would fly from New York airspace into New Jersey airspace and back during the course of their site-seeing travels, they would travel between two states in the meaning of this definition. The district and circuit courts disagreed. "Despite SeaAir's urgings to the contrary, we do not live in a world in which a piece of air can serve as a place for the purposes of creating a 'between.'"³⁰³ Having decided that "the 'places' to which the statute refers are on the ground," the circuit court affirmed the lower court's decision that the plaintiff was not providing air transportation as defined under the federal statute, thus its Supremacy Clause preemption argument failed.³⁰⁴

The court then turned to the plaintiff's Due Process and Equal Protection claims. In order for the plaintiff to prevail on this claim, it must have shown that the city's regulation was an exercise of power without any reasonable justification or governmental objective.³⁰⁵ The circuit court felt, however, that the state reasonably assumed that the reduction in flights would, in fact, result in a reduction of noise. Accordingly, the court ruled that the city's restrictions did not violate SeaAir's Due Process rights. Making even shorter work of plaintiff's Equal Protection

³⁰⁰ *Id.* at 185.

³⁰¹ *Id.*

³⁰² *Id.* at 186.

³⁰³ *Id.*

³⁰⁴ *Id.* at 186-87.

³⁰⁵ *Id.* at 187.

argument, the circuit court concluded that the lower court appropriately dismissed the plaintiff's complaints and affirmed the ruling.³⁰⁶

3. *Constitutional Rights—Supremacy and Commerce Clauses*

The United States Court for the Middle District of Florida considered preemption arguments under the Constitution's Supremacy and Commerce Clauses in *National Bus. Av. Assoc. v. City of Naples Airport Auth.*³⁰⁷ This case centered on attempts made over several years by the Naples Aviation Authority (the "Authority") to reduce aircraft noise levels at the Naples Municipal Airport. As part of these efforts, the Authority banned Stage 2 aircraft, i.e., those aircraft under 7,500 pounds maximum gross take-off weight, from operating at the Naples Municipal Airport as of August 30, 2001. The National Business Aviation Association and the General Aviation Manufacturer's Association, representing aircraft operators affected by the Stage 2 ban, filed suit against the Authority, alleging that the Stage 2 ban violated both the Supremacy Clause and Commerce Clause of the United States Constitution.³⁰⁸

Careful to proceed with caution to avoid unintended Federal encroachment on state authority, the court followed the general rule that when a statute operates in an area traditionally governed by state law, preemption will not lie unless it is "the clear manifest purpose of Congress."³⁰⁹ First, the court looked to Dormant Commerce Clause issues, noting that negative or dormant invocations of the Commerce Clause prohibit state regulation that discriminates against or unduly burden interstate commerce, while state laws that impose the same burden on both in-state and out-of-state interests usually do not violate the Commerce Clause.³¹⁰

Turning to the parties' cross motions for summary judgment, the court determined that the ADA did not preempt that the power exercised by the Authority. The court felt that the Authority's ban on operations was neither unreasonable nor discriminatory, because the study the Authority had performed to justify the ban had conformed with the procedural require-

³⁰⁶ *Id.* at 188.

³⁰⁷ *Nat'l Bus. Av. Assoc. v. City of Naples Airport Auth.*, 162 F. Supp. 2d 1343 (M.D. Fla. 2001).

³⁰⁸ *Id.* at 1346.

³⁰⁹ *Id.* at 1348.

³¹⁰ *Id.* at 1349.

ments of the applicable aviation noise statutes and regulations. Moreover, because Congress had approved the process by which the Authority had actually banned the aircraft, in conjunction with its earlier reasonableness finding, the Court ruled that there was no violation of the Commerce Clause. As such, the Authority was entitled to summary judgment dismissing the plaintiff's lawsuit.³¹¹

4. *Pilot Records Improvement Act of 1996*

The Colorado Supreme Court considered whether the liability-limiting provisions of the Pilot Records Improvement Act of 1996³¹² preempted a defamation suit brought by a pilot against his employer. In *Sky Fun 1 v. Schuttloffel*, John Schuttloffel had been employed by Sky Fun 1 as a corporate pilot.³¹³ During one flight with Sky Fun 1's owner, Bill Kitchen, on board, lighting struck the aircraft. Several days later, Kitchen informed Schuttloffel that his services were no longer required.³¹⁴

Schuttloffel sought employment with Mountain Air Express shortly thereafter. Under 49 U.S.C. § 44936(f), Mountain Air sought the written records maintained by Sky Fun 1 pertaining to Schuttloffel's proficiency, and he sent a consent and release form allowing the prospective employer to obtain the records. Kitchen filled out the standard checklist-type form used to convey the records, writing on the report in large letters "CALL ME!" next to entries concerning Schuttloffel proficiency and safety. Kitchen, however, provided no documentation at that time.

In response to Kitchen's "call me" notation, Mountain Air's training coordinator spoke with Kitchen. Kitchen stated that Schuttloffel was very good in flight simulators but not a good pilot and that Mountain Air should not hire him. The training coordinator requested written records supporting this statement, but Kitchen replied that he did not keep such records. Thereafter, Kitchen initiated several calls to the training coordinator urging Mountain Air not to hire Schuttloffel. This reached the point that the training coordinator would simply put Kitchen on hold in order to avoid his calls. Eventually, Kitchen faxed to the training coordinator a document labeled

³¹¹ *Id.* at 352-54.

³¹² Pilot Records Improvement Act of 1996, 49 U.S.C. § 44936(g) (1996).

³¹³ *Sky Fun 1 v. Schuttloffel*, 27 P.3d 361 (Colo. 2001).

³¹⁴ *Id.* at 363-64.

“Termination Report.” It detailed three incidents where Schuttloffel allegedly acted dangerously in his capacity as a pilot. Kitchen did not supplement this report with Schuttloffel’s log books or any of their supporting information. Moreover, during trial Schuttloffel indicated that while he was employed by Sky Fun 1, Kitchen had never supplied him with such a report. Mountain Air eventually determined that Kitchen likely fabricated the document to effect its decision in hiring Schuttloffel.³¹⁵

In August of 1997, Sky Fun 1 filed suit against Schuttloffel asserting negligence and seeking damages for costs of the repair from the lightning strike incident. Schuttloffel denied negligence and counterclaimed for withheld wages, vacation pay, tortious interference with prospective contracts and defamation. At a bench trial, the court found for Schuttloffel on the negligence, wages, vacation pay and defamation claims. It ruled against him on the remaining issues. The court of appeals affirmed. On further appeal, the Supreme Court of Colorado considered whether the limited liability provisions of § 44936(g) preempt a defamation suit under state law by a pilot applicant against his former employer, when the defamatory verbal statements are not based on records supplied by the previous employer pursuant to § 44936(f)(1).³¹⁶

The court began by looking to the statutory text. Section 44936 requires (among other things) that before hiring a pilot, an air carrier shall request and receive records from any carriers that have previously employed the individual pilot during the five proceeding years. The statute also alleviates the air carrier’s concern for potential lawsuits by requiring the air carriers seeking the written records to obtain a written consent and release from liability from a pilot applicant. Moreover, the section limits a record provider’s liability from suits brought by the pilot applicant.³¹⁷

After reviewing these provisions, the supreme court concluded that the liability-limiting provision of the statute prevents suits based on pilot records provided to a potential employer, including oral statements made to explain the circumstances and contents of such records. However, the court also felt that Congress did not broadly immunize all oral statements. Rather,

³¹⁵ *Id.* at 363-65.

³¹⁶ *Id.* at 365.

³¹⁷ *Id.* at 366.

it chose to utilize the term “record” as the operative though undefined term in the limitation of liability provision. “We conclude that the preemptive term of the Act do not affect Colorado common law defamation actions involving verbal assertions that the speaker knew to be false or the speaker made in reckless disregard of the truth, when the verbal statements are not based upon previous employer’s records.”³¹⁸

Finding that Kitchen’s statements were false or made in reckless disregard of the truth (seemingly because, according to Schuttloffel’s testimony, Kitchen had called him at home after he had been fired and stated that Schuttloffel had ruined Kitchen’s marriage and that Kitchen was going to destroy him), the court agreed with the trial and appellate courts and ruled that the Pilot Records Improvement Act did not preempt Schuttloffel’s defamation claims.³¹⁹

H. INSURANCE

A number of opinions addressed a range of insurance coverage and other issues in 2001.

1. Coverage Issues

a. Only “Non-Commercial” Operations Covered

In *Avemco Ins. Co. v. Auburn Flying Services*, the Eighth Circuit affirmed the district court’s decision in which it had granted Avemco’s motion for summary judgment, finding that a non-commercial aviation policy that Avemco had issued to Auburn Flying Services, Inc., did not cover an accident.³²⁰ In October 1997, several organizations conducted a “fly-in” at the Auburn Airport near Auburn, Nebraska. During the event, attendees could pay \$10.00 for a ten to fifteen minute airplane ride around the local area in a plane piloted by Fred Farrington. This money was collected at a table near the runway that had a sign advertising the plane rides. While attempting to land during one of these flights, the aircraft struck a passing semitractor trailer and crashed. The three passengers died in the crash, and Farrington died four months later. Avemco had issued a non-commercial aviation insurance policy to Auburn Flying Services, Inc. (“AFS”), covering the aircraft in question. Farrington, the

³¹⁸ *Id.* at 368.

³¹⁹ *Id.* at 370.

³²⁰ *Avemco Ins. Co. v. Auburn Flying Serv.*, 242 F.3d 819 (8th Cir. 2001).

president of AFS, was the named insured under the policy while piloting the aircraft.³²¹

The policy contained the following exclusion: "This policy does not cover bodily injury, property damage, or loss . . . when your insured aircraft is . . . used for a commercial purpose." The policy defined "commercial purpose" as meaning "any use of your insured aircraft for which an insured person receives, or intends to receive, money or other benefits. It does not include: (a) the equal sharing among occupants of the operating cost of the flight."³²² The parties to the action had stipulated that the money collected by Farrington was not sufficient to cover the operating expenses of the flight. After the crash, representatives of the decedents filed suit against AFS. Avemco, in turn, filed a declaratory action seeking to determine if coverage existed under the policy.³²³

In reviewing the lower court's opinion, the Eighth Circuit interpreted the insurance policy under Nebraska law. Appellants argued that the "commercial purpose" exclusion in the policy was ambiguous, and cited several cases from other jurisdictions that held "for a charge" and "for a fee" exclusions in similar noncommercial airplane policies are ambiguous. Appellants urged this point, because Nebraska courts construe ambiguous insurance contracts in favor of the insured.³²⁴

The circuit court disagreed that the particular provision was ambiguous, and the provision's interpretation was therefore a matter of law for the court. That question boiled down to the difference between a receipt of money for use of the aircraft and an equal sharing of operating costs.³²⁵

In making this analysis, the court considered the general purpose of the exclusionary clause. It deemed that the difference in risks between these two types of flights (for charge versus shared expenses) lies in the frequency of the flights:

[T]he purpose of the exclusionary clause is to reduce that risk by limiting the total number of flights. . . . The receipt of money, or some other benefit, for the use of an airplane provides additional impetus or motivation for making the flight, and is thus likely to increase the number of flights an insured will make. . . . On the other hand, a shared expense flight suggests a common interest

³²¹ *Id.* at 821.

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.* at 822.

³²⁵ *Id.* at 823.

in the flight other than the interest in making the particular flight.”³²⁶

Further, the court held that in interpreting an insurance exclusion clause, the relevant inquiry is whether a reasonable person, viewing the totality of the circumstances surrounding the arrangement, would conclude this arrangement was one of “shared expenses” or a flight made for the receipt of money.³²⁷

Applying this philosophy, the court decided that because none of Farrington’s passengers thought there was any agreement to share expenses (or even that the set amount of \$10.00 was actually for expenses), Farrington and his passengers possessed no community of interest other than taking the flight in and of itself. Moreover, by providing these flights in conjunction with a fly-in, Farrington held himself out to provide flights to the general public. As such, the \$10 fee did not qualify as a shared expense under the insurance policy—it was a commercial operation. Therefore, the circuit court affirmed the decision of the district court and denied coverage.³²⁸

b. No Coverage Due to Misrepresentations of Medical Status

The Eastern District of Virginia considered a petition for declaratory judgment on an insurance coverage issue in *United States Specialty Ins. Co. v. Skymaster of Virginia*.³²⁹ The insurance company asserted that there was no coverage, because the pilot had fraudulently misrepresented and concealed medical information pertinent to the issuance of the insurance policy.³³⁰ The pilot had a history of diabetes, which he did not disclose to his FAA medical examiner. Thus, at the time of the crash the pi-

³²⁶ *Id.* (citing *Thompson v. Ezzell*, 379 P.2d 983, 987 (Wash. 1963)).

³²⁷ *Id.* at 824.

³²⁸ *Id.* at 825-26. Judge Lay issued a rather scathing dissent, indicating that he felt that “whether the policy is analyzed in terms of ambiguity or in terms of unreasonable results it imposes,” he would come to the inescapable conclusion that summary judgment was inappropriate in the case. *Id.* at 830. Although the judge’s impassioned dissent is understandable in light of the loss of coverage going to the decedent’s representatives, it seems misguided since it is focused more on the numbers reflected by the discussion on shared expenses—whether the shared expenses are less or more than the cost of operating the flight—than the simple concept of receiving some amount of benefit rather than having a common purpose for the flight in which expenses are shared almost after the fact. *Id.* at 827-30.

³²⁹ *United States Specialty Ins. Co. v. Skymaster*, 123 F. Supp. 2d 995 (E.D. Va. 2000).

³³⁰ *Id.* at 996.

lot's medical certificate was invalid due to the misrepresentations made to the medical examiner. In turn, the pilot failed the policy's condition for coverage that he possess a current and valid certificate.³³¹

The court felt that Virginia law permitted this insurance exclusion in light of the FARs addressing pilot certification.³³² Moreover, the court rejected the pilot's argument that a causal connection must exist between the lack of proper medical certification and the crash in order to nullify the coverage.³³³ In summary, the court enforced the policy as written and granted the insurance company's motion on denial of coverage because the requirement that the pilot have a current and a proper medical certificate was clear, unambiguous, and not unreasonable or contrary to public policy.³³⁴

c. No Coverage for "In-Flight" Incident with "Low-Time" Pilot

In *Aviation Charters, Inc. v. Avemco Ins.*, a divided New Jersey appellate court addressed whether New Jersey law requires an insurer to prove a causal connection between circumstances that trigger an exclusion in the insurance coverage and the loss itself.³³⁵ The policy in question excluded coverage for "in-flight" operations (which included tax operations) conducted by an unapproved pilot. An "approved" pilot was one who had logged at least 5000 total flight hours.³³⁶

The accident happened while a 2000-hour pilot taxied the aircraft. The accident, however, was not related to an action of the pilot, *per se*. The insurer moved for a denial of coverage based on the exclusion in the policy for unapproved pilots. The owner argued that the insurer must prove a causal connection between the "low-time" pilot and the accident in order to enforce the exclusion. The lower court agreed and entered judgment against the insurer.³³⁷

The appellate court reviewed state cases that could be construed to require a causal connection between an exclusionary

³³¹ *Id.* at 997-99.

³³² *Id.* at 1000-01.

³³³ *Id.* at 1002-03.

³³⁴ *Id.* at 1003.

³³⁵ *Aviation Charters, Inc. v. Avemco Ins.*, 763 A.2d 312 (N.J. Super. Ct. 2000), *aff'd as modified*, 784 A.2d 712 (N.J. 2001).

³³⁶ 763 A.2d at 313.

³³⁷ *Id.*

clause and the accident in question. Although the appellate court did not necessarily agree with the aircraft owner's reading of the cases, it did acknowledge that the point is not crystal clear.³³⁸ The court noted, however, that a majority of those cases reject the proposition that a causal nexus between the loss and a coverage-excluding event is required before the aviation insurer can deny coverage.³³⁹ At the end of the day, the court determined that the State of New Jersey has consistently enforced exclusionary clauses that are clear and unambiguous without imposition of a causal nexus where the exclusionary clause does not officially so require. Thus, the court reversed and remanded the lower court's decision.³⁴⁰

The New Jersey Supreme Court "affirmed the judgment of the Appellate Division substantially for the reasons expressed in the court's majority opinion." The court noted, however, that they were not adopting "a *per se* rule holding that the absence of causality never be the basis for disregarding an unambiguous exclusionary clause in an insurance policy."³⁴¹ Recognizing that the plaintiff, Aviation Charters, could have paid more to Avemco Insurance to receive a policy that would cover a "lower-time" pilot (which plaintiff was in fact doing on some of its other aircraft insured by defendant), the court felt that requiring a causal connection would "constitute an unbargained-for expansion of coverage, *gratis*, resulting in the insurance company's exposure to a risk substantially broader than that expressly insured against in the policy."³⁴²

2. Federal Common Law and the "Released Value Doctrine"

In *Kemper Ins. Co. v. Federal Express Corp.*, the First Circuit dealt with the application of the "released value doctrine" to an aviation insurance policy.³⁴³ In this case, eight packages of jewelry shipped via defendant-appellee Federal Express ("Fed Ex") either never reached their destination or arrived empty. Each of these packages was sent under the Fed Ex Master Power Ship Agreement, which limits Fed Ex's liability in a manner described in its service guide. The service guide, explained that liability

³³⁸ *Id.* at 314-16.

³³⁹ *Id.* at 316-17 (citations omitted).

³⁴⁰ *Id.* at 318.

³⁴¹ *Aviation Charters, Inc. v. Avemco Ins. Co.*, 784 A.2d 712, 713 (N.J. 2001).

³⁴² *Id.* at 714 (internal citations omitted).

³⁴³ *Kemper Ins. Co. v. Federal Express Corp.*, 252 F.3d 509 (1st Cir. 2001), *cert. denied*, 534 U.S. 1020 (2001).

with regard to any packages was limited to \$100.00, unless a higher value was specifically declared on the applicable air waybill. For most items, Fed Ex would allow the shipper to declare a value up to \$50,000, but for items of "extraordinary value," including jewelry, the maximum declared value was limited to \$500.00. At the time of the shipment, the shipper—Homes Protection Group, Inc.—had purchased third party insurance from plaintiff-appellant Kemper Insurance Companies ("Kemper"). Kemper, as the subrogee, sought to invalidate the \$100.00 limitation of liability. The district court concluded that the limitation of liability was valid, and the circuit court affirmed.³⁴⁴

As an initial matter, Kemper had brought claims against Fed Ex in tort and in contract. Fed Ex then moved to dismiss the tort claims as preempted by the ADA. Although the lower court held that the savings clause of the ADA preserved federal common law remedies in tort for lost shipments, it also concluded that the air waybill limited Fed Ex's liability to \$100.00 per shipment and that Kemper could not avoid this limitation by recasting its claims as a tort action. The court therefore granted the motion to dismiss with respect to the tort claim.³⁴⁵

With respect to Kemper's contract claims, the district court determined that under the applicable federal common law, specifically the "released of value doctrine," Fed Ex's limitation on liability was valid, because it allowed the shipper to increase Fed Ex's exposure to \$50,000, with a correspondingly higher shipping fee. Accordingly, the district court dismissed Kemper's claim to void the limitation on contract liability based on public policy and granted Fed Ex partial summary judgment on the breach of contract claim based on the \$100.00 limitation of liability.³⁴⁶

Initially, the circuit court turned to federal common law and the released value doctrine. Although traditional common law forbids a carrier from disclaiming liability for its own negligence, "the released value doctrine allows an air carrier to 'limit its liability for injury, loss or destruction of baggage on a 'released valuation.'"³⁴⁷

The basis for this doctrine is that in exchange for a lower shipping rate, the shipper is deemed to have released the carrier

³⁴⁴ *Id.* at 510-11.

³⁴⁵ *Id.* at 511.

³⁴⁶ *Id.* at 511.

³⁴⁷ *Id.* at 512 (citations omitted).

from liability beyond a stated amount. The shipper, however, is bound by this agreement only if (1) it has reasonable notice of the higher rate for improved coverage and (2) it is given a fair opportunity to pay a higher rate in order to obtain greater protection.³⁴⁸ While Kemper conceded that the shipper had reasonable notice of the limitation of liability, it contended that Fed Ex's rate structure did not give the shipper "a fair opportunity to pay a higher rate in order to obtain greater protection."³⁴⁹ In essence, Kemper argued that because the shipper did not have the opportunity to ensure its property to its full value, the shipper did not have the opportunity to obtain greater protection.

The circuit court was unsympathetic to this argument, especially in light of the fact that the very existence of such a limitation allows Kemper to market their third-party insurance to shippers. This consideration was even stronger in light of the fact that it was Kemper, the third party subrogee, who was bringing suit. As such, the circuit court affirmed the lower court's ruling with respect to the released value doctrine.³⁵⁰

I. JUDICIAL REVIEW OF ADMINISTRATION ACTIONS

1. Review of FAA Final Orders

In *Arapahoe County Public Airport Authority v. FAA*, the Tenth Circuit reviewed the FAA's decision to suspend the Arapahoe County Public Airport Authority's (the "Authority") eligibility for discretionary federal grants, based on violations of federal statutes and existing grant provisions.³⁵¹ The Authority urged the circuit court to set aside the FAA's decision for various reasons. One notable reason was that the decision was incompatible with an opinion recently issued by the Colorado Supreme Court.³⁵²

³⁴⁸ *Id.* at 512.

³⁴⁹ *Id.* at 512-13.

³⁵⁰ *Id.* at 513-14. The circuit court also addressed Kemper's claims under the Carmack Amendment and its claims of willful and wanton misconduct. Analyzing both issues at length, the court agreed with the lower court that Kemper's proposed amendments to its complaint seeking to add such causes would have indeed been futile and as such affirmed the lower court on this point as well. *Id.* at 514-16.

³⁵¹ *Arapahoe County Pub. Airport Auth. v. FAA*, 242 F.3d 1213 (10th Cir. 2001).

³⁵² *Id.* at 1216.

The Authority owns and operates Centennial Airport, located south of Denver, Colorado. Over the course of several years, the Authority had accepted millions of dollars in discretionary grants from the FAA. In return for the grants, the Authority made assurances that: 1) the airport would be available for public use on reasonable terms and without unjust discrimination to any person, firm or corporation, and 2) to conduct or engage in any aeronautical activity to furnish services to the public. The grant assurances did recognize, however, that the Authority could prohibit operations or classes of aeronautical use if those actions were necessary for the safe operation of the airport.

Centennial Express Airlines (the "Airline") was interested in providing scheduled passenger service at the airport and filed an official application to that end in May 1993. The Authority refused to consider such service and sought guidance from the FAA. The Authority ultimately decided to ban the Airline's request without waiting to hear from the FAA. In contravention of the ban, the Airline initiated scheduled service between Centennial Airport and Dalhart, Texas in December 1994. The Authority immediately sought and obtained a temporary injunction in state district court to prevent the Airline from operating the scheduled service. The Colorado Supreme Court eventually issued an opinion reinstating the permanent injunction (which had been granted by the trial court but reversed on intermediate appeal), despite concurrent complaints on file with the FAA. Also, the court held that federal law did not preempt the Authority's ban on scheduled service or violate the terms of the nondiscrimination grant assurances.³⁵³

While litigation progressed in state court, three complaints had been filed with the FAA. Shortly after the Colorado Supreme Court issued its decision, the FAA issued its final determination that the Authority's ban of scheduled operations violated the grant assurances and federal law. In light of the FAA's final decision, the Authority filed its petition for review with the circuit court.³⁵⁴

The Authority asked the Tenth Circuit to set aside the final FAA order for three errors of law. The Authority first argued that the Colorado Supreme Court's decision was final, preclusive and dispositive of the issues resolved in the FAA's final or-

³⁵³ *Id.* at 1216-17.

³⁵⁴ *Id.* at 1217.

der pursuant to the Full Faith and Credit Act.³⁵⁵ The FAA responded that the Full Faith and Credit Act was not technically implicated, because it was an agency rather than a court. However, the FAA recognized that it would be governed by common law preclusion similar to the concepts embodied in the Act.

The circuit court agreed that the preclusive effect of the Colorado Supreme Court decision, if any, would derive from the common law doctrines of *res judicata* and issue preclusion rather than the Act. Moreover the court observed that the Supremacy Clause trumps the full faith and credit determinations if the state court judgment or decree restrained the exercise of the United States' sovereign power. Therefore, the court determined that it would have to balance the common law justification for full faith and credit with the competing policy supporting the Supremacy Clause.³⁵⁶

The court began this analysis on the full faith and credit side of the equation. In reviewing the Colorado Supreme Court's decision, as well as the final decision and order from the FAA, the circuit court determined that full faith and credit to be afforded to the supreme court's decision was mitigated by several factors. First, the supreme court's preemption analysis was not as fully developed and as well defined as that conducted by the FAA. Second, the supreme court decision was a badly fractured plurality opinion. Finally, the FAA was not a party to, nor in privity with a party to, the state court proceedings. Without the FAA as a party, the Court's decision could not satisfy a fundamental requirement of issue preclusion under federal or Colorado law.

Turning to the Supremacy Clause, the court first observed that the issue before the FAA was whether the Authority complied with conditions imposed on it by federal law in an agreement with a federal administrative agency in return for the Authority's receipt of federal funds. With this issue in mind, the circuit court conducted a preemption analysis, noting that it is "difficult to visualize a more comprehensive scheme of combined regulation, subsidization, and operational participation than that which Congress has provided in the field of aviation."³⁵⁷ Moreover, if rulings similar to the Colorado Supreme Court's opinions were deemed preclusive, it would frustrate the

³⁵⁵ Full Faith and Credit Act, 28 U.S.C. § 1738 (2002).

³⁵⁶ *Arapaho*, 242 F.3d at 1218-19.

³⁵⁷ *Id.* at 1220-21 (citations omitted).

FAA's ability to discharge its statutory duty to interpret and implement federal aviation statutes governing the enforcement of grant assurances. Therefore, the court ruled that the strong federal supremacy policy in the field of aviation prevailed over full faith and credit principles, and the Colorado Supreme Court's decision would have no bearing on the FAA's decision being reviewed by the court.³⁵⁸

The circuit court then turned to the Authority's second argument—that the Authority, rather than the FAA, should be responsible for local and regional aviation planning and safety. Once again, the circuit court conducted a preemption review relying on the ADA, holding that a local political subdivision of a state may not enact or enforce a law, regulation or other provision having the force and effect of law related to a price, route or service of an air carrier.³⁵⁹ The circuit court quickly determined that the Authority's ban of scheduled service was connected with and related to both services and routes. The court also discussed in detail whether or not the ban was otherwise permissible because it constituted an exercise of the Authority's proprietary power. Agreeing with the FAA on this point, the court determined that the ban was not an appropriate exercise of the Airport owner's proprietary powers, so the Authority's ban was preempted under the ADA and the Supremacy Clause.³⁶⁰

Finally, with respect to the Authority's third argument, the circuit court agreed with the FAA that the present facts did not warrant prospective consideration of how 1996 legislative amendments requiring airports to have a 14 C.F.R. Part 139 certificate for scheduled passenger service might apply to the case at hand. As such, the circuit court denied the Authority's petition in full and affirmed the final FAA's order.³⁶¹

The Tenth Circuit issued an opinion in another petition for review of a final decision in *Custer County Action Ass'n v. Garvey*.³⁶² Here the petitioners asked the circuit court to reverse the FAA's and Air National Guard's (the "ANG") orders approving the Colorado Airspace Initiative ("the Initiative") and finding the final environmental impact statement on the initiative to be

³⁵⁸ *Id.* at 1221.

³⁵⁹ *Id.* at 1221 (citing to 49 U.S.C. § 41713(b)(1)).

³⁶⁰ *Id.* at 1222-24.

³⁶¹ *Id.* at 1224.

³⁶² *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024 (10th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002).

adequate. Petitioners also claimed that implementation of the Initiative would violate their property rights under the Third and Fifth Amendments to the United States Constitution.³⁶³

The controversy was triggered by the Initiative—proposed special use airspace changes to the National Airspace System designed to (1) provide the necessary airspace for the Colorado ANG 140th Tactical Fighter Wing to be able to train under realistic conditions, and (2) to respond to changes in commercial aircraft arrival and departure corridors required for operation of the Denver International Airport. The Initiative involved rather extensive changes to several military operating areas, military training routes and restricted areas.³⁶⁴

As part of this process the ANG issued a final environmental impact statement in October 1997. In October 1999, the FAA issued a final order adopting the final environmental impact statement and directing that the required special use airspace changes to the National Airspace System be implemented. The petitioners then filed their petition for review of the ANG and FAA orders in November 1999.³⁶⁵

The petitioners raised three challenges to the ANG's and FAA's approval of the Initiative. First, they argued that the FAA had violated Section 40103 of the Federal Aviation Act, the applicable federal aviation regulations, and the Administrative Procedures Act. Second, they claimed that the ANG and the FAA had violated the National Environmental Policy Act and its implementing regulations. Finally, they argued that the ANG and FAA violated the Fifth Amendment to the United States Constitution by taking petitioners' property interests without due process of law, and violated the Third Amendment by appropriating petitioners' property interests and invading petitioners' privacy for military purposes during peacetime without their consent. The circuit court addressed each of these arguments in turn.³⁶⁶

The circuit court first noted that the FAA had violated its own statute and regulations and that it was precluded from second guessing the administration under the political question doctrine, although the circuit court was free to review whether the FAA had acted within the scope of its powers or had followed its

³⁶³ *Id.* at 1027-28.

³⁶⁴ *Id.* at 1028-29.

³⁶⁵ *Id.* at 1029.

³⁶⁶ *Id.* at 1030.

own regulations or the Constitution.³⁶⁷ Within this framework, the court reviewed whether the FAA had made the proper finding of necessity under the applicable statute, had properly limited military airspace under the applicable regulation, and had followed the appropriate regulations with respect to minimum flight altitudes. Addressing each point in turn, the circuit court determined that the FAA had not violated the Federal Aviation Act, the applicable regulations, or the Administrative Procedures Act by approving the Initiative.³⁶⁸

The court also extensively reviewed petitioners' claims with respect to the National Environmental Policy Act. In the end, the court determined that the ANG and the FAA had not acted in contravention of that act.³⁶⁹

Finally, the court turned to the petitioners' constitutional claims. In response to the assertion that the Initiative violated the Fifth Amendment the court observed that injunctive relief is not available under the Fifth Amendment absent an allegation that the purported taking is unauthorized by law. Because the court had already determined that the Initiative was in fact authorized, it denied petitioners' request for injunctive relief on Fifth Amendment grounds.³⁷⁰

Petitioners also insisted that they had a Third Amendment right to "refuse military aircraft training in airspace within the immediate reaches of their property," and that the military flights to be conducted under the initiative would be *per se* unconstitutional.³⁷¹ The crux of petitioners' argument seemed to be that because a private party has a right to the airspace above his or her property, the United States military may not appropriate such property interests during peacetime without a property owner's consent. The circuit court responded that this argument "borders on the frivolous." In short, the circuit court overruled this claim noting that "it is not reasonable to expect privacy from the lawful operation of military aircraft in public navigable airspace."³⁷²

In *Friends of Richards-Gebaur Airport v. FAA*, the Eighth Circuit reviewed the FAA's order closing the Richards-Gebaur Airport

³⁶⁷ *Id.* at 1031.

³⁶⁸ *Id.* at 1032-34.

³⁶⁹ *Id.* at 1034-41.

³⁷⁰ *Id.* at 1042.

³⁷¹ *Id.* at 1042-43.

³⁷² *Id.* at 1043-44.

in Kansas City, Missouri.³⁷³ This order was rather controversial in the general aviation community and triggered several petitions for review, one from a group of local pilots calling themselves the Friends of Richards-Gebaur Airport (“Friends”), and the second from the Aircraft Owners and Pilots Association (“AOPA”). The Eighth Circuit consolidated the petitions for purposes of briefing and argument.³⁷⁴

The Richards-Gebaur Airport was built in 1941 on land owned by the City of Kansas City, Missouri. From the 1950s through the mid-1970s, the airport was used as an air force base. In 1985, the United States conveyed the property back to Kansas City pursuant to the Surplus Property Act. The conveyance required the city to use the property as a public use airport, which it did between 1984 and 1994. Over that time, the city accepted approximately \$12.2 million in federal airport improvement program funds for airport development.

For several years, the airport had consistently lost money. Between 1984 and 1997, losses exceeded \$18 million and were subsidized by the city’s other two commercial airports. In light of these losses, in 1998 the FAA and Kansas City negotiated a memorandum agreement in which the FAA concluded that the city could be released from its grant assurances under the Surplus Property Act and the Airport Improvement Program. In early 1999, the Kansas City council approved an ordinance enabling the Kansas City Railroad Company to developed property. In late 1999, the FAA released the city from its federal obligations to maintain the property as an airport, allowing the city to close the airport and maintain it for non-aeronautical uses consistent with the memorandum of agreement entered into between the FAA and Kansas City. The FAA prepared no formal environmental analysis of this proposed action, but it did consider several pertinent environmental factors before concluding that the closure was categorically excluded from requirement of preparing an environmental assessment.³⁷⁵

After the FAA issued its letter releasing Kansas City from its federal obligations with respect to the airport, Friends filed a petition for judicial review of the FAA’s actions. Friends challenged the FAA’s decision to categorically exclude the closure of the airport from the requirement of preparing an environmen-

³⁷³ Friends of Richards-Gebaur Airport v. FAA, 251 F.3d 1178 (8th Cir. 2001).

³⁷⁴ *Id.* at 1182-83.

³⁷⁵ *Id.* at 1183-84.

tal assessment. AOPA petitioned the court as well, asserting that the FAA had failed to satisfy the standards of the Surplus Property Act and that it lacked authority to release Kansas City from its federal obligations.³⁷⁶

The crux of petitioners' argument challenging the FAA's decision was that the FAA failed to adequately consider all of the relevant extraordinary circumstances that would prevent the use of the categorical exclusions.³⁷⁷ The FAA had reviewed a number of environmental impacts under the proposed action and had concluded that no extraordinary circumstances existed to preclude a categorical exclusion. Nonetheless, the Friends contended that the FAA had acted arbitrarily and capriciously by failing to consider seven different extraordinary circumstances: (1) the release of the airport property was environmentally controversial; (2) the FAA had ignored or improperly discounted evidence indicating that a substantial community disruption was likely and that the action would cause a significant increase in surface traffic congestion; (3) closing the airport would result in increased and impermissible noise pollution; (4) under the FAA's own regulations, an extraordinary circumstance exists where a government action has a significant impact on air quality; (5) the new railroad facility would adversely effect historical property; (6) under the FAA's airport environmental handbook, an extraordinary circumstance exists if the action is "likely to be highly controversial with respect to the availability of adequate relocation housing;" and (7) although the FAA could properly categorically exclude the release of airport property, it could not categorically exclude the construction of a railroad track.³⁷⁸ In each case, the circuit court reviewed the petitioners' contentions and determined that none demonstrated an extraordinary circumstance. Thus, the court held that the FAA had not acted in an arbitrary or capricious manner.

The court then turned to the petitioners' second major argument, that the FAA had acted arbitrarily and capriciously when it released Kansas City from its federal obligations with respect to aeronautical use at the airport. The contention focused on the specific language within the statute allowing the Secretary of Transportation to waive a property owner's grant assurances and

³⁷⁶ *Id.* at 1184.

³⁷⁷ *Id.* at 1185-86 (discussing National Environmental Policy Act, 42 U.S.C. §§ 4321-70).

³⁷⁸ *Id.* at 1186-93.

obligations. Specifically, the statute requires the secretary to determine that a waiver will not frustrate the purpose for which the gift was made and is "necessary to advance the civil aviation interests of the United States."³⁷⁹ The gist of the petitioners' argument was that the FAA had acted arbitrarily and capriciously because the release issued by the FAA did not specifically find that the release of Richards-Gebaur's airport property was "necessary to advance the civil aviation interests of the United States," as worded in the statute. The circuit court decided that although the FAA's release did not specifically use this language, the substance of the release taken as a whole did embody the concept. As such, the court concluded that the FAA's decision was not arbitrary, capricious or contrary to law.³⁸⁰

In *Yetman v. Garvey*, the Seventh Circuit faced yet another challenge to the FAA's age 60 rule.³⁸¹ The opinion represented the latest in a long string of petitions challenging the FAA's refusal to allow pilots over the age of 60 to serve as pilots on board commercial air carriers. The petitioners made three main arguments in a petition for review: (1) the FAA had made inconsistent policy determinations with respect to the age 60 rule, (2) the petitioners had each passed an appropriate age 60 exemption protocol, and (3) accident studies had demonstrated that pilots over the age of 60 were just as safe, if not safer, than younger pilots.³⁸²

Under their inconsistent determination argument, the petitioners made three specific assertions. First, the petitioners argued that while the FAA does not permit U.S. air carriers to employ pilots over the age of 60, the U.S. does allow foreign air carriers flying within the United States to use pilots over the age of 60. The FAA responded, and the court agreed, that the FAA is required to do so under the Convention on International Civil Aviation. The petitioners' second assertion was that other persons under the age of 60 could obtain medical exemptions and the FAA surely could monitor the health of healthy pilots who had reached the age of 60. In response the FAA asserted, and the circuit court agreed, that the FAA was better able to monitor discreet physical problems in the younger pilots and it could not do so with pilots over the age of 60. As such, the FAA had not

³⁷⁹ *Id.* at 1194 (citing 49 U.S.C. § 47153(a)(1)).

³⁸⁰ For a recently reported decision from the First Circuit that addresses similar issues, see *Save Our Heritage, Inc. v. FAA*, 259 F.3d 49 (1st Cir. 2001).

³⁸¹ *Yetman v. Garvey*, 261 F.3d 664 (7th Cir. 2001).

³⁸² *Id.* at 669-70.

acted arbitrarily or capriciously. The final assertion was that there had been a change in world standards with respect to the age limitations on pilots. However, the court noted that, "such evidence is of little significance in our view for the petition for exemptions." In short, just because other countries allow their pilots to fly longer does not mean that the FAA has acted arbitrarily if it chooses not to do so.³⁸³

Under the petitioners' second argument that they had complied with an appropriate age 60 protocol, the FAA argued that the protocol used has not been sufficiently developed to allow for adequate monitoring of the cognitive abilities of pilots over the age of 60. As such the court held that the FAA did not act arbitrarily in deciding not to use the protocol proposed by the pilots.³⁸⁴

Finally, the petitioners' argued that certain accident risk studies had demonstrated the safety of pilots over the age of 60. The circuit court held that the FAA's rejection of the studies was proper, because they did not contain evidence that experience gained after the age of 60 neutralized the dangers of sudden incapacitation and deterioration of piloting skills.³⁸⁵ Accordingly, the circuit court determined that the FAA appropriately denied the exemptions, and the court therefore affirmed the FAA's order.

One final case addressing the review of FAA orders was the First Circuit's recent opinion in *Save Our Heritage, Inc. v. FAA*.³⁸⁶ A group of preservation organizations, towns, and stewards of several historic sites filed a petition for review of the FAA's decision to allow Shuttle America Airlines to commence scheduled passenger service between LaGuardia Airport outside of New York City and Hanscom Field, a general aviation airport 15 miles outside of Boston. The court determined that while the plaintiffs did have standing to challenge the FAA's order, they could not overcome the FAA's assessment that the increase in flights would have a *de minimus* environmental impact.

2. Review of DOT Orders

In *City of New York v. Mineta*, the City of New York petitioned the Second Circuit for review of four orders of the Secretary of

³⁸³ *Id.* at 669-73.

³⁸⁴ *Id.* at 673-76.

³⁸⁵ *Id.* at 676-79.

³⁸⁶ *Save Our Heritage, Inc. v. FAA*, 269 F.3d 49 (1st Cir. 2001).

Transportation granting takeoff and landing slots to airlines that service New York's LaGuardia and Kennedy Airports.³⁸⁷ The DOT's implementation of the Wyndell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21") triggered this action.³⁸⁸ Congress enacted AIR21 because of its growing impatience with the amount of time it took the Secretary of Transportation to grant exemptions from slot requirements under authority that Congress had given to the Secretary in 1994.³⁸⁹ AIR21 accelerated the phase-out of the high density rule (the "HDR") at the four airports where it still remained (LaGuardia, Kennedy, Chicago O'Hare and Washington, D.C.'s Reagan National), with the HDR to be phased out at LaGuardia and Kennedy as of January 1, 2007. Moreover AIR21 provided interim slot rules so that new entrants could offer services to the airports until that date.³⁹⁰ These interim rules were rather complex and provided for very fast time lines granting slot exemptions.

In anticipation of AIR21 becoming law, DOT had been moving forward with granting four slot exemptions. The Department granted those exemptions shortly before AIR21 became law in April of 2000.³⁹¹ These slot exemptions were the focus of the city's petition for review.

The city claimed that DOT had failed to perform a required environmental review, that it did not consider certain statutory factors, and that it did not evaluate each airline's application individually prior to issuing the orders.³⁹² In response, DOT asserted that the circuit court did not have jurisdiction to review the matter. Alternatively, the Secretary argued that because AIR21 left him with no discretion in granting slot exemptions at the New York airports and imposed such short and mandatory deadlines, the governing statutes did not require an environmental analysis.³⁹³

In order to answer the petitioners' claims, the circuit court extensively reviewed and analyzed AIR21. The court found that

³⁸⁷ *City of New York v. Mineta*, 262 F.3d 169 (2d Cir. 2001).

³⁸⁸ Wyndell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), Pub. L. No. 106-181, 114 Stat. 61 (2000) (codified in scattered sections of 49 U.S.C.).

³⁸⁹ *Id.* at 172-73.

³⁹⁰ *Id.* at 173.

³⁹¹ *Id.* at 175.

³⁹² *Id.*

³⁹³ *Id.* at 176.

(1) the imposition on the Department of nondiscretionary mandates and short deadlines for granting the slot exemptions relieved the agency of the requirements to conduct an environmental review; (2) AIR21 provided no exceptions to the mandate that the slot exemptions be granted, and gave DOT no exercise of discretion over the grants; (3) although a provision in the act granted DOT discretion to assess economic benefits in the context of considering an exemption for a carrier using foreign aircraft for which there were competing U.S.-made aircraft, the city had waived or forfeited its argument that such discretion required the preparation of environmental review; (4) a provision in AIR21 expressly excluding the grant of slot exemptions at the Washington Reagan National Airport from environmental review requirements supported the court's conclusion that DOT lacked discretion when granting exemptions at LaGuardia and Kennedy; (5) a provision in the act allowing DOT to suspend the short deadline to allow carrier applicants to supplement incomplete applications did not empower the agency to toll the deadline in order to prepare an environmental impact statement; and finally (6) DOT's issuance of blanket orders granting exemptions did not violate AIR21 because DOT's role in the grants was mandatory and the use of blanket orders was within its discretion. Accordingly, the city's petition for review was denied.³⁹⁴

3. *Review of Rulemaking*

In *Air Transport Ass'n of Canada v. FAA*, the United States Court of Appeals for the District of Columbia reviewed an interim final rule of the Federal Aviation Administration regarding the payment of overflight fees by foreign air carriers.³⁹⁵ The FAA had initially promulgated a fee structure in response to the Federal Aviation Authorization Act of 1996 (the "Act").³⁹⁶ These fees cover air traffic control and related services provided to the foreign carrier overflights, and the Act requires that they be directly related to the FAA's cost of providing such services.³⁹⁷

In 1997, the FAA issued an interim final rule establishing the first fee schedule for overflights. Airlines affected by the 1997

³⁹⁴ *Id.* at 176-184.

³⁹⁵ *Air Transport Ass'n of Canada v. FAA*, 254 F.3d 271 (D.D.C. 2001).

³⁹⁶ Federal Aviation Authorization Act of 1996, 49 U.S.C. § 45301 (the "Act").

³⁹⁷ *Id.* § 274-75.

fee schedule challenged that rule, contending that the FAA exceeded its statutory authority by computing fees, at least in part, on the value of the services to the recipient rather than on the cost. The circuit court agreed with the petitioners, vacated the 1997 rule, and remanded it to the FAA for further proceedings.³⁹⁸ In June 2000, the FAA published its second interim final rule establishing a new schedule of overflight fees. This opinion dealt with a challenge to the second rule.³⁹⁹

The petitioners' first argument was that in promulgating the rule the FAA was required (but failed) to comply with the appropriate notice and comment procedures of the Administrative Procedures Act. The circuit court ruled that because it had vacated the previous rule, the new interim rule could be treated as if it was a first interim rule and could be made without notice and comment.⁴⁰⁰

Second, the petitioners challenged the new interim rule, asserting that the FAA's adoption of that rule was arbitrary, capricious and an abuse of discretion. The petitioners contended that the FAA erroneously concluded that costs for providing services to non-overflights are the same as costs for providing services to overflights. In response, the court held that the FAA had failed to articulate the basis for its conclusion that the unit cost of providing air traffic control services to overflights within each environment was identical to the unit cost of providing such services to all traffic within each environment. Accordingly, the circuit court vacated the 2000 rule and remanded once again to the FAA for further proceedings consistent with its opinion.⁴⁰¹

Note, however, that the Security Act moots this string of disputes between the air carriers and the FAA on overflight fees. The Act provides that the FAA shall impose such fees using a "reasonably related" rather than "directly related" standard for determining such costs, and that this imposition would not be subject to judicial review, *i.e.* while the FAA lost the battles on this point, with the help of Congress it won the war.⁴⁰²

³⁹⁸ *Id.* § 275.

³⁹⁹ *Id.* § 276.

⁴⁰⁰ *Id.* § 277-78.

⁴⁰¹ *Id.* § 279.

⁴⁰² Security Act, 49 U.S.C.A. § 45301(b)(1)(B).

J. GENERAL LEGAL ISSUES

1. *Personal Jurisdiction*

In *Patrick v. Massachusetts Port Authority*, Defendants Massachusetts Port Authority (“Massport”) and AMR Corporation moved to dismiss the claims against them for lack of personal jurisdiction.⁴⁰³ The plaintiff, Dorothy Patrick, fell while walking through a restricted area at Logan Airport with a tour group when the group was transferring between aircraft. Patrick filed negligence claims against, among others, Massport and AMR Corp.⁴⁰⁴

The court noted that because Patrick asserted general rather than specific jurisdiction, the degree of contact with the forum necessary to support her jurisdiction claim was high. Specifically, Patrick had to show that the defendant had continuous and systematic contacts with or linkage to the forum state.⁴⁰⁵ Massport showed that it maintained no place of business or facilities in the forum state and that it owned no property there. Furthermore, Massport was not registered to do business in New Hampshire, did not transact business there and had no employees working there. Although the plaintiff asserted that Massport promoted its airport in New Hampshire, encouraged the use of a local airport there, and served a significant number of forum state residents, the court ruled such contacts were insufficient to permit the exercise of general personal jurisdiction. Accordingly, the court granted the Airport Authority’s motion to dismiss.⁴⁰⁶

AMR contended that the court lacked personal jurisdiction because AMR is a holding company, without employees, located in Texas, and it does not transact business in New Hampshire. In essence, AMR demonstrated that it owned the company that owned the airline in question. In response, the plaintiff argued that AMR was subject to personal jurisdiction based on its status as a successor to Business Express, a named defendant that was merged into a subsidiary of AMR in December 2001. However, because the court found that the plaintiff could offer no evidence showing that AMR was Business Express’ successor under

⁴⁰³ *Patrick v. Mass. Port Auth.*, 141 F. Supp. 2d 180 (D.N.H. 2001).

⁴⁰⁴ *Id.* at 182.

⁴⁰⁵ *Id.* at 184.

⁴⁰⁶ *Id.* at 184-85.

any of the applicable state statutes, the court granted AMR's motion to dismiss for lack of personal jurisdiction.⁴⁰⁷

2. Subject Matter Jurisdiction

a. No SMJ under Discretionary Function Exception to the FTCA

The issue in *GATX/Airlog Co. v. United States* was whether the district court had subject matter jurisdiction under the discretionary function exception to the FTCA in the plaintiff's lawsuit against the FAA.⁴⁰⁸ This controversy began when the GATX/Airlog Company ("Airlog"), a company in the business of converting passenger aircraft into cargo freighters, hired Hayes International Corporation ("Hayes"), an aeronautical engineering company, to design cargo conversions for the Boeing 747 passenger airplanes and to obtain appropriate supplemental type certificates ("STCs") from the FAA. Part of the process in obtaining the STCs was the selection of an engineering methodology that could generate the necessary compliance data.

Airlog claimed that in 1986 the FAA determined that one particular method was acceptable to assure regulatory compliance. The FAA reaffirmed this conclusion in 1987 and 1988. In 1988, based on that conclusion, the FAA issued Hayes and Airlog two STCs, thereby approving its conversion design. Hayes, with the FAA's authorization, assigned the STCs to Airlog. Airlog converted ten Boeing 747 aircraft to cargo freighters under these STCs between 1988 and 1994. After the conversions, the aircraft experienced significant structural problems. As a result, in 1996 the FAA issued an airworthiness directive which reduced the allowable payload by approximately 100,000 pounds. As part of the airworthiness directive, the FAA concluded that the original design methodology used was insufficient. Moreover, in order to reinstate the full load capacity of the aircraft, the FAA ruled that additional data would have to be generated under a different engineering methodology. The effect of this chain of events was that the cargo capacity of the converted aircraft were significantly reduced.⁴⁰⁹

As a result of the reduction in payload, the owners of the converted airplanes sued Airlog. Airlog then sued the United States under the FTCA, claiming that the FAA had been negligent in

⁴⁰⁷ *Id.* at 185.

⁴⁰⁸ *GATX/Airlog Co. v. United States*, 234 F.3d 1089 (9th Cir. 2000).

⁴⁰⁹ *Id.* at 1092-93.

approving the original design methodology and negligently issued STCs based on that method. The government moved to dismiss Airlog's complaint, arguing that the district court lacked subject matter jurisdiction because the FAA's alleged conduct was protected by the discretionary function exception to the FTCA. The district court granted the government's motion, and Airlog appealed.⁴¹⁰

The Ninth Circuit first noted that while the FTCA grants federal courts jurisdiction over damages claims against the United States for the negligent acts of Federal employee, the act has not waived its immunity for claims based upon the exercise or performance of a discretionary function or duty on the part of the federal agency or employee.⁴¹¹ In order to determine whether a particular action falls under this discretionary function exception, the courts follow a two part test laid out by the Supreme Court in *Berkowitz v. United States*.⁴¹²

Applying the facts to the law, the circuit court ruled that the government had met its burden on the first prong of the *Berkowitz* test because, although the FAA must examine "pertinent technical data" before issuing an STC, the FAA has discretion to determine what constitutes such pertinent technical data and whether to issue an STC.⁴¹³ Likewise, the Circuit Court also ruled that the government had met its burden under the second prong of the *Berkowitz* test, because the FAA's conduct in the present case was susceptible to policy analysis.⁴¹⁴ With both prongs *Berkowitz* met, the circuit court affirmed the district court's dismissal for lack of subject matter jurisdiction under the discretionary function exception to the FTCA.⁴¹⁵

b. Exhaustion of Administrative Remedies

In *Zephyr Aviation L.L.C. v. Dailey*, plaintiff-appellant Zephyr Aviation LLC ("Zephyr") appealed the dismissal of its constitutional tort action against Robert Allen Daily and Kenneth Wayne Clary (the defendants).⁴¹⁶ Zephyr contended that the FAA's administrative remedies do not contemplate constitutional tort actions against FAA inspectors in an individual capacity; therefore,

⁴¹⁰ *Id.* at 1093.

⁴¹¹ *Id.* at 1093-94.

⁴¹² *Berkowitz v. United States*, 486 U.S. 531, 536 (1988).

⁴¹³ *Id.* at 1095-96.

⁴¹⁴ *Id.* at 1096-98.

⁴¹⁵ *Id.* at 1098.

⁴¹⁶ *Zephyr Aviation L.L.C. v. Dailey*, 247 F.3d 565 (5th Cir. 2001).

the district court erred in dismissing its claims for lack of subject matter jurisdiction after concluding that Zephyr had failed to exhaust its administrative remedies.⁴¹⁷

The case arose when the FAA received a hotline complaint alleging that one of Zephyr's aircraft was being used for illegal charter flights. Specifically, the complaint alleged that some flight hours accumulated by the aircraft were not being properly recorded in its logs. Defendants were aviation safety inspectors who investigated the matter. At one point during the investigation, the defendants placed a condition notice on the aircraft, as well as a "notice of proposed certificate action" stating that the aircraft's airworthiness certificate had been "revoked." The FAA later issued an amended aircraft condition notice noting that the airworthiness certificate was "invalid" because of unrecorded flight time. Zephyr's attorneys spoke with the FAA, who told the attorney that the airworthiness certificate had never been revoked, but that the aircraft was not airworthy because of unrecorded flight hours. After reviewing steps taken to correct the maintenance reports, the FAA retracted the condition notice in a letter to Zephyr.⁴¹⁸

Less than a year later, Zephyr sold the aircraft at a considerable loss. Shortly thereafter, Zephyr sued the defendants claiming that when they purported to "revoke" the aircraft's airworthiness certificate, the defendants were acting *ultra vires* and with malice. Zephyr argued that it was damaged in the amount of the lost value of the aircraft due to the action of "revocation" of the airworthiness certificate, without due process of law and in violation of the Fifth Amendment of the United States and the Texas Constitution.⁴¹⁹ The defendants then removed the action to federal court and moved to dismiss on the grounds that the court did not have subject matter jurisdiction because Zephyr failed to exhaust administrative remedies. The district court granted their motion.⁴²⁰

Zephyr's suit against the defendants alleged a commonly known "*Bivens* action."⁴²¹ Initially, the circuit court noted that in determining the role of the doctrine of exhaustion in the *Biv-*

⁴¹⁷ *Id.* at 568.

⁴¹⁸ *Id.* at 569-70.

⁴¹⁹ *Id.* at 569.

⁴²⁰ *Id.* at 570.

⁴²¹ See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (lawsuit alleging Constitutional tort violations against government officials).

ens context, the initial focus is on Congressional intent.⁴²² Moreover, where Congress has not clearly required exhaustion, some judicial discretion governs. In exercising that discretion, federal courts are to balance the interests of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion.⁴²³

Although Congress has developed an administrative appeal structure for reviewing FAA orders, the circuit court found that the review structure does not provide a forum for redressing constitutional violations against individual FAA inspectors with monetary damages. As such, the circuit court conducted a balancing test described above in its sound discretion.⁴²⁴

While agreeing with the other circuit courts that had already addressed the issue by ruling that parties may not avoid an administrative review simply by fashioning their attacks on an FAA decision as a constitutional or tort claim against individual FAA officers, Zephyr's particular claims did not implicate that concern. This was because Zephyr's claims did not relate to an FAA order currently pending against it. In fact, there had never been an order of revocation to appeal. Moreover, Zephyr was seeking monetary relief for alleged extra procedural and unconstitutional actions by FAA inspectors. The administrative appeal procedures provide no such relief. For all of these reasons, the circuit court declined to impose a traditional exhaustion requirement on *Bivens* actions against FAA officials when the *Bivens* suit does not implicate existing FAA enforcement actions. As such, the circuit court ruled that the district court erred in concluding that it did not have subject matter jurisdiction over Zephyr's *Bivens* action.⁴²⁵

c. No Implied Private Cause of Action under 49 U.S.C. § 44711

In *Spinner v. Verbridge*, the plaintiff sued the defendant for injuries caused as a result of an aircraft takeoff accident in which the defendant was the pilot in command.⁴²⁶ After the crash, the plaintiff discovered that the defendant was not properly certi-

⁴²² *Id.* at 571.

⁴²³ *Id.* at 570-71.

⁴²⁴ *Id.* at 571.

⁴²⁵ *Id.* at 573. That being said, the Court nevertheless affirmed the lower court's order and dismissed Zephyr's lawsuit, finding under Rule 12(b)(6) that Zephyr had not alleged claims for which relief could be granted. *Id.* at 573-74.

⁴²⁶ *Spinner v. Verbridge*, 125 F. Supp. 2d 45, 45-46 (E.D.N.Y. 2000).

fied as a pilot and had not been for some time. Plaintiff brought the suit in federal district court alleging as its sole basis for jurisdiction two provisions of the Federal Aviation Act of 1958, specifically 49 U.S.C. §§ 4471(A)(1) and (A)(2).⁴²⁷ The defendant filed a motion to dismiss for lack of subject matter jurisdiction, contending that the sections of the Federal Aviation Act relied upon by the plaintiff did not provide for either an express or an implied private cause of action.

The court noted that it was clear that no express private cause of action existed, but not so clear that no implied cause of action existed. Moreover, although courts within the circuit had found no private right of action within a number of other sections of the Federal Aviation Act, courts had not yet addressed this particular section. The court therefore conducted its own analysis of whether an implied private right of action could be read into the statute under the four part test established by the Supreme Court in *Court v. Ashe*. The court determined that Congress had not created an implied private cause of action under the particular section and dismissed the case accordingly.⁴²⁸

d. No Antitrust SMJ under FTAIA

In 1999, the International Air Transport Association (“IATA”) decided to lower the commissions paid to IATA accredited travel agents in Central America and Panama to a flat rate of seven percent. Prior to this time, the commission rates paid to travel agents in Latin American and Caribbean varied depending on the country, and in the case of Peru, Panama, Bolivia and Nicaragua, the commission rate was as high as ten to eleven percent. In response, a group of IATA accredited travel agents in Latin America sued several major American air carriers and IATA in *Turicentro, S.A. v. American Airlines, Inc.* The agents alleged that the defendants acted in concert to lower the commission rates in violation of the United States antitrust laws with devastating effects on the plaintiffs’ businesses and the business members of the proposed class.⁴²⁹

The defendants moved to dismiss the plaintiffs’ complaint on several grounds, including the ground that the court lacked sub-

⁴²⁷ *Id.* at 46.

⁴²⁸ *Id.* at 47-48, 52 (citing *Court v. Ashe*, 422 U.S. 66 (1975)).

⁴²⁹ *Turicentro, S.A. v. American Airlines, Inc.*, 152 F. Supp. 2d 829, 829-39 (E.D. Pa. 2001).

ject matter jurisdiction over the plaintiffs' claims because U.S. antitrust laws do not regulate competitive conditions in foreign countries. In addressing defendants' motions, the Court recognized that American antitrust laws generally do not regulate the competitive conditions of other nations' economies. Moreover, in 1982, Congress enacted the Foreign Trade Antitrust Improvement Act ("FTAIA")⁴³⁰ to facilitate the export of domestic goods by exempting from the Sherman Act export transactions that did not injure the U.S. economy. Thereby, Congress relieved exporters from a competitive disadvantage in foreign trade.⁴³¹

Under FTAIA:

[A]ntitrust conduct involving United States export commerce with foreign nations is actionable only if that conduct has a direct substantial and reasonably foreseeable effect on one of the following: (1) on United States domestic commerce; (2) on United States import commerce; or (3) on export commerce only to the extent that such conduct injures export business in the United States.⁴³²

Thus, the situs of the defendants' conduct does not control, rather the location where the effect of that conduct is felt controls. Also, FTAIA precludes subject matter jurisdiction over claims by foreign plaintiffs against defendants where the situs of the injury is overseas and that injury arises from effects in a nondomestic market. As such, the court granted defendants' motion for dismissal due to lack of subject matter jurisdiction over the matter because plaintiffs could allege no harm within the United States.⁴³³

3. *Forum Non Conveniens*

a. Dismissal Warranted Where Foreign Countries Provided Adequate Forum

In *Lueck v. Sundstrand Corp.*, Sundstrand appealed to the Ninth Circuit concerning the district court's dismissal of its suit on the basis of *forum non conveniens*.⁴³⁴ This case arose out of the crash of a de Havilland DHC-8 aircraft on June 5, 1995 in New Zealand operated by Ansett New Zealand ("Ansett"). As the crew was preparing to land, the landing gear failed to lower hy-

⁴³⁰ Foreign Trade Antitrust Improvement Act, 15 U.S.C. § 6(a) (2002).

⁴³¹ *Turicentro*, 152 F. Supp. 2d at 832.

⁴³² *Id.* at 833.

⁴³³ *Id.* at 834.

⁴³⁴ *Lueck v. Sundstrand Corp.*, 236 F.3d 1137 (9th Cir. 2001).

draulically. The crew apparently became distracted while attempting to lower the gear manually, and flew the aircraft towards hilly terrain in the area. Although the aircraft's ground proximity warning system ("GPWS") sounded an alarm, it was only four seconds before the aircraft crashed. The crash killed one member of the flight crew and three passengers, and it injured the remaining fifteen passengers.⁴³⁵

The plaintiffs filed suit in the United States District Court for the District of Arizona against the Canadian manufacturer of the aircraft and the American manufacturers of the GPWS and the radio altimeter. The district court granted the defendants' motion for dismissal on the grounds of *forum non conveniens*.⁴³⁶

Because *forum non conveniens* dismissal first requires that an adequate alternative forum be available to the plaintiff, the plaintiffs urged on appeal that New Zealand offers no remedy for their losses because it has "legislated tort law out of existence."⁴³⁷ This was based on a 1972 act passed by the New Zealand legislature which provides no-fault coverage for those who suffer personal injuries arising from accidents. This act generally covered medical costs, limited compensation for lost earnings to 80% of the claimant's former salary with an additional cap in place, and eliminated lump sum payments for noneconomic losses.⁴³⁸

The circuit court ruled, however, that the proper question is not whether the plaintiffs could bring a personal injury lawsuit of the type they wanted to bring in the United States, rather it is whether New Zealand offers a remedy for their losses at all. Moreover, it is not an appropriate basis to hold that a *forum non conveniens* dismissal is inappropriate where the foreign forum has less favorable law. The question simply is whether or not the foreign forum offers an adequate remedy.⁴³⁹

The circuit court also reviewed the lower court's balancing of the private interest and public interest factors required in a *forum non conveniens* analysis. The lower court felt that private interests favored trial in the foreign country, primarily because the court recognized that while important evidence existed in both fora, the district court could not compel production of much of

⁴³⁵ *Id.* at 1140-41.

⁴³⁶ *Id.* at 1140.

⁴³⁷ *Id.* at 1143.

⁴³⁸ *Id.* at 1141-42.

⁴³⁹ *Id.* at 1144-45.

the New Zealand evidence, whereas the parties controlled, and therefore could bring, all of the United States evidence to New Zealand.⁴⁴⁰ The court found three public interest factors: (1) local interest in the lawsuit, (2) the burden on local courts, and (3) the cost of resolving the dispute in an unrelated forum. Nonetheless the court ruled that New Zealand had a much higher level of public interest in addressing the litigation. Therefore, because New Zealand did provide an adequate forum, and the public and private interests all weighed in favor of New Zealand, the circuit court affirmed the lower court's decision to dismiss the action on the basis of *forum non conveniens*.⁴⁴¹

The Eleventh Circuit addressed a *forum non conveniens* dismissal in *Satz v. McDonnell Douglas Corp.*⁴⁴² This case arose from the crash of a McDonnell Douglas DC-9 aircraft being operated by Austral Airlines between two points in Argentina in October of 1997. Several decedents' representatives brought the case in the United States against McDonnell Douglas alleging products liability and negligence claims. The district court dismissed the action based on *forum non conveniens*.⁴⁴³

On appeal, the plaintiffs asserted that Argentina did not provide an adequate forum for the dispute because the manufacturer was not amenable to process in Argentina even if the manufacturer consented to jurisdiction in Argentina's courts. As evidence on this point both parties introduced conflicting affidavits from two Argentinean law professors. The district court found that the defendants had introduced some evidence that Argentina was an appropriate forum. So the court conditioned its order of dismissal on the manufacturer consenting to any Argentine judgment against it, agreeing to conduct all discovery in accordance with the Federal Rules of Civil Procedure, and voluntarily producing documents and witnesses within the United States. The circuit court ruled that the district court's actions were not an abuse of discretion.⁴⁴⁴

The circuit court also reviewed the district court's balancing of public and private factors and found that the district court did not abuse its discretion in finding that the private and public factors weighed in favor of dismissal. Therefore, the Circuit

⁴⁴⁰ *Id.* at 1146-47.

⁴⁴¹ *Id.* at 1148.

⁴⁴² *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279 (11th Cir. 2001).

⁴⁴³ *Id.* at 1281.

⁴⁴⁴ *Id.* at 1283.

Court affirmed the lower court's dismissal on the basis of *forum non conveniens*.⁴⁴⁵

b. Defendant Failed to Meet Burden of Proof

In *McLennan v. American Eurocopter Corp., Inc.*, 245 F.3d 403 (5th Cir. 2001), discussed at length above in the portion of this paper addressing manufacturer liabilities, the court also briefly addressed the manufacturer's motion to dismiss on the basis of *forum non conveniens*. As in the *Satz* case, the parties had set up a battle of dueling affidavits between legal experts in the forum jurisdiction, each alleging that that jurisdiction either was or was not an adequate alternative forum to jurisdiction in the United States. In this case, however, the district court felt that the defendant did not meet its burden in showing that Alberta, Canada was an adequate alternative forum and that the public and private factors weighed in favor of dismissal. As such, the Circuit Court affirmed the district court's decision to not dismiss on the basis of *forum non conveniens*.⁴⁴⁶

c. Plaintiff Waived Foreign Forum in Underlying Agreement

In *AAR International, Inc. v. Nimelias Enterprises S.A.*, the Seventh Circuit reviewed an appeal of a *forum non conveniens* motion in the context of a lawsuit over an alleged breach of the lease of a Boeing 737 aircraft.⁴⁴⁷ Here, the underlying lease contained a non-mandatory, or permissive, forum selection clause, as well as a representation that the parties would not object to jurisdiction in an Illinois court on the basis of inconvenience.

In light of this posture, the court determined that rather than using the traditional analysis, the standard for reviewing this freely negotiated forum selection clause was that it would be presumptively valid and enforceable unless (1) its incorporation into the underlying contract was the result of fraud, undue influence or overwhelming bargaining power; (2) it was so gravely difficult and inconvenient that the complaining party would for all practical purposes be deprived of its day in court; or (3) its enforcement would contravene a strong public policy in the forum in which the suit was brought as declared by statute or judicial decision.⁴⁴⁸

⁴⁴⁵ *Id.* at 1283-84.

⁴⁴⁶ *Id.* at 422-25.

⁴⁴⁷ *AAR Int'l, Inc. v. Nimelias Enterprises S.A.*, 250 F.3d 510 (7th Cir. 2001).

⁴⁴⁸ *Id.* at 523-24.

Under this test, the court ruled that the party seeking to negate the selection clause had not met its burden in overcoming the clause's presumptive validity. Moreover, the court noted that although the forum selection clause in issue was a permissive clause, because the parties had also agreed to not challenge venue on the basis of inconvenience it would be incongruous for the court to not enforce the parties' clear and express agreement to accept jurisdiction in the courts of Illinois. As such, the court ruled that the forum selection clause was fully enforceable.⁴⁴⁹

4. Venue

In *TM Claims Serv. v. KLM Royal Dutch Airlines*, plaintiff TM Claims Service, Inc., filed an action as subrogee for its insured Fuji Foto Film, Inc. against defendant KLM Royal Dutch Airlines in New York state court.⁴⁵⁰ The defendant removed the action to the United States District Court for the Southern District of New York. Several months later the defendant filed a motion to transfer the action to the United States District Court for the Northern District of Georgia pursuant to 28 U.S.C. § 1404A on the grounds that the litigation had no connection with the State of New York and transfer would be for the convenience of the parties and witnesses and in the interest of justice.⁴⁵¹

In reviewing the defendant's motion, the court noted that while the plaintiff's choice of forum is to be given strong consideration, the factors in this particular matter weighed in favor of transferring the matter to Georgia. Specifically, the plaintiff could have properly brought the action in the Northern District of Georgia because substantial events or omissions giving rise to the claim occurred there and the defendant conducted business and was subject to personal jurisdiction there. Moreover, the court found (1) there was no evidence that the goods entered or passed through New York, and the handling of the claim by the subrogee's employees of New York did not necessarily mean that they had personal knowledge of the events that allegedly caused the damage; (2) the alleged damage occurred in the northern

⁴⁴⁹ *Id.* at 525-26. The Court also addressed in the bulk of its opinion interesting and complex issues regarding abstention and parallel proceedings under the *Colorado River Doctrine* with respect to the proceedings involving the same dispute occurring in Greek courts.

⁴⁵⁰ *TM Claims Serv. v. KLM Royal Dutch Airlines*, 143 F. Supp. 2d 402 (S.D.N.Y. 2001).

⁴⁵¹ *Id.* at 402-03.

district of Georgia; (3) most of the material witnesses were located in Georgia; (4) several nonparty witnesses were located in Georgia, where a Georgia court would be in a better position to compel their testimony; and finally (5) the interests of justice based on the totality of the circumstances favored transfer to the Georgia court.⁴⁵² As such, the Court granted defendant's motion to transfer.

5. Evidence

In *McLennan v. American Eurocopter Corp., Inc.*, discussed at length above, the court primarily ruled that the plaintiffs had failed to produce sufficient evidence to sustain their negligence and products liability allegations.⁴⁵³

In *Fujitsu Ltd. v. Federal Express Corp.*, also discussed above, Federal Express alleged a claim for spoliation of evidence against Fujitsu.⁴⁵⁴ The court determined that plaintiff was not guilty of spoliation, because Federal Express was on notice that plaintiff had in its possession the damaged goods that were the subject of the suit, yet Federal Express never requested to inspect those goods before the plaintiff received written instructions from its insurance carrier to dispose of the goods. Although the plaintiff should not have disposed of the material, its act in doing so did not rise to the level necessary to support a claim for spoliation of evidence.⁴⁵⁵

In *Friesen-Hall v. Colle*, the Kansas Supreme Court addressed the question of how much and what type of evidence was sufficient to establish who was acting as pilot in command of an aircraft that crashed.⁴⁵⁶ The aircraft was a Piper PA38 Tomahawk, which crashed in March 1994. On board was a private pilot and a certified flight instructor. The purpose of the flight was the private pilot's biennial flight review. A dispute arose as to which of the two pilots was actually flying the aircraft at the time of the crash. The pilot's surviving spouse filed a lawsuit alleging that the flight instructor was flying the aircraft and that the aircraft crashed due to his negligence. The trial court determined that the plaintiff was unable to produce any admissible evidence that the flight instructor was actually flying the airplane at the time

⁴⁵² *Id.* at 403-07.

⁴⁵³ *McLennan v. American Eurocopter Corp., Inc.*, 245 F.3d 403 (5th Cir. 2001).

⁴⁵⁴ *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423 (2d Cir. 2001).

⁴⁵⁵ *Id.* at 435-36.

⁴⁵⁶ *Friesen-Hall v. Colle*, 17 P.3d 349 (Kan. 2001).

of the crash. Thus, the court granted summary judgment in favor of the defendant.⁴⁵⁷

On appeal, the plaintiff alleged that the trial court erred by finding that there was no admissible evidence to support her claim that the flight instructor was flying the aircraft at the time of the crash. The court determined that the dispositive question for the entire dispute was whether the identity and alleged negligence of the pilot could be proven by circumstantial evidence.⁴⁵⁸

In analyzing this question, the court looked to its own prior precedent in *In re Estate of Hayden*⁴⁵⁹ and *In re Estate of Rivers*,⁴⁶⁰ which together set the standard in Kansas that a finding that a pilot is at the controls of an aircraft at the moment of its crash must not be predicated upon speculation, surmise or conjecture.⁴⁶¹ Moreover, other jurisdictions had considered these cases, leading one court to surmise that there are two extremes of thought with respect to using circumstantial evidence to establish pilot identity and negligence in a plane crash. At one end—represented by the Kansas Supreme Court's *Hayden* and *Rivers* decisions—courts will not submit the question to a jury based solely on circumstantial evidence. On the other end was the “pilot-in-command” doctrine, based on that term's definition in the FARs. These courts hold that the designated pilot-in-command is responsible for the negligent act, irrespective of whether he or she was in actual control of the aircraft at the time of the crash.⁴⁶²

On appeal, the plaintiff argued that the standard announced in *Hayden* and *Rivers* too heavily burdened a plaintiff in a negligence case because it was contrary to the burden of proof in civil cases generally, and that the court should instead adopt the pilot-in-command doctrine. The court declined to adopt this doctrine, because neither *Hayden* nor *Rivers*, nor the cases cited to by plaintiff in support of the doctrine, contemplated what the court referred to as an “examination” situation (i.e., a flight being conducted for the purposes of a biennial flight review of an already-rated pilot).⁴⁶³ At the end of the day, the court decided

⁴⁵⁷ *Id.* at 351.

⁴⁵⁸ *Id.* at 352.

⁴⁵⁹ *In re Estate of Hayden*, 254 P.2d 813 (Kan. 1953).

⁴⁶⁰ *In re Estate of Rivers*, 267 P.2d 506 (Kan. 1954).

⁴⁶¹ *Friesen-Hall*, 17 P.3d at 352-54.

⁴⁶² *Id.* at 354.

⁴⁶³ *Id.* at 354-55.

to maintain its prior standard, ruling that the trial court did not err because, even resolving all facts and inferences in favor of the plaintiff, the question as to who was piloting the aircraft when the airplane crashed was still left to speculation, surmise and conjecture.⁴⁶⁴

K. MISCELLANEOUS TOPICS

1. Labor and Employment Issues

In *Abdu-Brisson v. Delta Air Lines, Inc.*, the Second Circuit heard the plaintiff's appeal from an order and accompanying judgment of the United States District Court for the Southern District of New York granting defendant Delta Airlines, Inc.'s motion for summary judgment.⁴⁶⁵ The lawsuit arose from Delta's efforts to integrate the pilot seniority lists of Delta and Pan Am Airlines when Delta absorbed Pan Am after its 1991 bankruptcy.⁴⁶⁶

In 1994, a group of former Pan Am pilots and flight engineers who Delta had hired filed suit in New York state court alleging age discrimination under the New York State human rights statute. The discrimination was based on three policies adopted in the Pan Am asset purchase agreement. Specifically, the policies included: the seniority lists integration methodology, a ten-year service requirement for full post medical retirement benefits, and a three year period of pay disparity.⁴⁶⁷

The district court eventually granted Delta's motion for summary judgment and dismissed all of the plaintiffs' claims because the plaintiffs had failed to established a prima facie case of age discrimination.⁴⁶⁸ On appeal, the Second Circuit ruled that while the district court had erroneously concluded that plaintiffs had not met their prima facie burden, the plaintiffs had adduced no evidence that Delta's legitimate and nondiscriminatory explanations for each of the challenged employment terms were false. On that basis, the Second Circuit affirmed the judgment of the district court.⁴⁶⁹

In *Bertulli v. Independent Association of Continental Pilots*, the Fifth Circuit addressed an appeal arising out a controversy over

⁴⁶⁴ *Id.* at 355.

⁴⁶⁵ *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456 (2d Cir. 2001).

⁴⁶⁶ *Id.* at 461-62.

⁴⁶⁷ *Id.* at 463-65.

⁴⁶⁸ *Id.* at 465.

⁴⁶⁹ *Id.* at 466-70.

a pilot's seniority list.⁴⁷⁰ The pilots originally filed a class action against their pilot's association and their employer claiming they suffered injury as a result of their lost seniority when the pilot's association and airline changed the seniority rankings of their pilots. On the defendants' appeal from the district court certification order under Rule 23(f), the defendants argued that the plaintiffs lacked standing and that the certification of the class was an abuse of discretion.⁴⁷¹

In response to the standing argument, the circuit court ruled that the plaintiffs did have standing, because the pilot's association had deprived them of seniority without a vote and without fair representation from the pilot's association. With respect to the class certification issue, the circuit court ruled that the district court did not abuse its discretion in finding certification to be appropriate for the claims due to the economies of class treatment and the numerous common issues that weighed in favor of class treatment.⁴⁷²

In *United Airlines, Inc. v. International Association of Machinists & Aerospace Workers*, plaintiff United Airlines appealed from the denial of a preliminary injunction against defendant International Association of Machinists and Aerospace Workers ("IAM"). The plaintiff sought the injunction to compel IAM to assert every reasonable effort to discourage its member mechanics from engaging in a concerted work slowdown at United.⁴⁷³

The controversy arose out of difficult labor negotiations between the plaintiff and defendant, during which the plaintiff asserted that the defendant was encouraging or facilitating deliberate slowdowns as part of its bargaining tactics. A district court originally issued a temporary restraining order against IAM,⁴⁷⁴ but later declined to enter a preliminary injunction, ruling that it would be more appropriate for the airlines to target specific individuals who were still conducting slowdown activities rather than issue a broad order for all members of the union.⁴⁷⁵

On appeal, the circuit court ruled that the district court's failure to issue the injunction effectively denied United of a judicial

⁴⁷⁰ Bertulli v. Independent Ass'n of Continental Pilots, 242 F.3d 290 (5th Cir. 2001).

⁴⁷¹ *Id.* at 293-94.

⁴⁷² *Id.* at 295-99.

⁴⁷³ *United Airlines, Inc. v. Int'l Ass'n of Machinists & Aerospace Workers*, 243 F.3d 349, 353 (7th Cir. 2001).

⁴⁷⁴ *Id.* at 356-58.

⁴⁷⁵ *Id.* at 358-60.

remedy to which it was untitled under the Railway Labor Act. The district court had erred as a matter of law when it rejected injunction on the basis that United could address the slowdown by disciplining or firing the individual workers responsible. The court held that requiring the carrier to do so was tantamount to making it assume the union's own enforceable duty to end the slowdown. Moreover, an injunction was the sole effective means of enforcing the union's duties under its duty to maintain the status quo during contract negotiations, especially given the district court's own conclusion that a number of mechanics were engaging in a deliberate and unlawful slowdown.⁴⁷⁶

In *Fairbairn v. United Airlines, Inc.*, the Fourth Circuit Court of Appeals decided whether an employment dispute between David Fairbairn, a former airline reservation agent, and his former employer, United Airlines, Inc., was subject to compulsory arbitration before an appropriate adjustment board under the Railway Labor Act when Fairbairn was not covered by any collective bargaining agreement nor represented by any union.⁴⁷⁷ The district court originally entered summary judgment in favor of United. Later, the court modified its judgment and ordered the parties to pursue arbitration pursuant to that Act. United appealed, contending that the district court improperly assumed that the "minor dispute" provisions of the Railway Labor Act applied to Fairbairn, even though he was not covered by a collective bargaining agreement nor represented by a labor union.⁴⁷⁸

On appeal, the circuit court determined that binding precedent limits the Railway Labor Act's scope to agreements reached after collective bargaining. Although the Act permits an employee to reject union assistance and pursue a grievance independently, the employee must still be subject to a collective bargaining agreement and therefore be represented generally by the union. Moreover, contrary to Fairbairn's claims, the notices that United placed in its workplaces indicating that disputes were to be handled according to the Railway Labor Act did not extend the Act's coverage to disputes not required to be covered under the Act. Finally, the benefits received by Fairbairn as a result of the collective bargaining agreements did not automatically confer standing upon him to enforce the

⁴⁷⁶ *Id.* at 361-69.

⁴⁷⁷ *Fairbairn v. United Airlines, Inc.*, 250 F.3d 237 (4th Cir. 2001).

⁴⁷⁸ *Id.* at 238-40.

terms of those agreements. As such, because Fairbairn's relationship with United was governed only by an individual contract and he was not a member of the union nor subject to its collective bargaining agreements, the circuit court ruled that the district court's order compelling arbitration was improper.⁴⁷⁹

In *Adames v. Executive Airlines, Inc.*, a group of ninety-four flight attendants sued the defendant for violations of various Puerto Rico labor laws, arguing that they were entitled to compensation dealing with issues such as wages, overtime pay, maternity pay, and so forth.⁴⁸⁰ The district court ruled that the Railway Labor Act preempted the suit, depriving it of subject matter jurisdiction.⁴⁸¹ The circuit court affirmed, ruling that because the issues raised by the plaintiffs required interpretation of the applicable collective bargaining agreement they involved "minor disputes" within the meaning of the Act. Thus, the lower court's dismissal for lack of jurisdiction was appropriate.⁴⁸²

2. Antitrust Issues

Virgin Atlantic Airways Ltd. v. British Airways PLC arose out of intense competition between Virgin Atlantic Airways Limited ("Virgin") and British Airways PLC ("British Airways") over slot allocations at London's Heathrow Airport.⁴⁸³ As a consequence of that competition, Virgin filed a complaint against British Airways alleging restraint of trade under Section 1 of the Sherman Antitrust Act and attempted monopolization under Section 2 of the Sherman Antitrust Act.⁴⁸⁴

The restraint of trade claim focused on certain incentive agreements British Airways had with travel agencies and corporate customers. The attempted monopolization claim focused on Virgin's assertions that British Airways included customers to shift to British Airways flights priced below cost. The district court granted summary judgment to British Airways primarily because Virgin had failed to support its experts' theories of an-

⁴⁷⁹ *Id.* at 240-44.

⁴⁸⁰ *Adames v. Exec. Airlines, Inc.*, 258 F.3d 7 (1st Cir. 2001).

⁴⁸¹ *Id.* at 10.

⁴⁸² *Id.* at 12-16.

⁴⁸³ *Virgin Atlantic Airways Ltd. v. British Airways PLC*, 257 F.3d 256 (2d Cir. 2001).

⁴⁸⁴ *Id.* at 259-62.

ticompetitive practices with factual evidence pertaining to the various routes for which Virgin claimed it had suffered injury.⁴⁸⁵

On appeal, the circuit court found that British Airways' incentive agreements did not constitute an illegal restraint of trade, because Virgin had failed to allege that the travel agencies and corporate customers who benefited under the incentive agreements agreed to do anything in exchange for the benefits they received. In response to the second claim, the circuit court found that British Airways did not violate Section 2 of the Sherman Act by adding flights to accommodate increased traffic that resulted from its incentive agreements. Virgin argued that the agreements resulted in incremental passengers being charged below cost fares, but the court noted that Virgin failed to establish that British Airways recouped its losses by overpricing tickets on its monopoly routes. Moreover, Virgin had failed to offer evidence that the carrier possessed monopoly power in one market and then used it to gain competitive advantage in a different one.⁴⁸⁶ As such, the circuit court affirmed the lower court's summary judgment in favor of British Airways.

Note from the Editor: The author recognizes the change in opinion, but thought it appropriate to leave the original paper intact as it was presented at the SMU Air Law Symposium and highlight the change to the reader through an editor's note.

The companion cases of *Continental Airlines, Inc. v. United Airlines, Inc.*⁴⁸⁷ ("Continental I") and *Continental Airlines, Inc. v. United Airlines, Inc.*⁴⁸⁸ ("Continental II") arose out of defendants United Airlines, Inc.'s ("United") and the Dulles Airport Management Council's ("AMC") decision to place carry-on bag sizing templates at all security checkpoints at the Washington Dulles International Airport. In April 2000, the defendants agreed, over Continental's objections, to install the sizing templates at the Dulles Airport's passenger security checkpoints, forcing all of Continental's customers to comply with United Airlines' carry-on baggage sizing restrictions. Shortly after the templates were put into place, Continental brought suit against the defendants alleging violations of Section 1 of the Sherman Antitrust Act. Continental's claim was that the sizing templates

⁴⁸⁵ *Id.* at 263.

⁴⁸⁶ *Id.* at 265-73.

⁴⁸⁷ *Continental Airlines, Inc. v. United Airlines, Inc.*, 126 F. Supp. 2d 962 (E.D. Va. 2001), *vacated*, 277 F.3d 499 (4th Cir. 2002).

⁴⁸⁸ *Continental Airlines, Inc. v. United Airlines, Inc.*, 136 F. Supp. 2d 542 (E.D. Va. 2001), *vacated*, 277 F.3d 499 (4th Cir. 2002).

eliminated the competitive advantage Continental enjoyed from its expanded aircraft baggage storage bins and its flexible, passenger-friendly carry-on baggage policies and practices.⁴⁸⁹

In *Continental I*, the district court found that the defendant's actions constituted an unreasonable restraint of trade under Section 1 of the Sherman Act.⁴⁹⁰ In *Continental II*, the district court determined the amount of damages Continental was entitled to as well as the form of injunctive relief appropriate to the defendant's antitrust violation.⁴⁹¹

In *Continental II*, the court noted that two types of monetary relief are available for such a violation: lost profits or the cost of mitigation. Because Continental offered no proof of lost profits, the analysis focused on the cost of mitigation. On that point, the court decided that no genuine issue of material fact existed, because Continental's mitigation cost totaled approximately \$84,000, which under Section 4 of the Clayton Act was trebled to approximately \$254,000.⁴⁹²

With respect to Continental's requested injunctive relief, the court rejected the defendants' proposed scheme which allowed Continental passengers to use a "medallion" in order to bypass the security templates. The court determined that the only appropriate injunctive relief was an order enjoining the defendants from employing any type of baggage sizing template at the security checkpoints at Dulles.⁴⁹³

In *United States v. AMR Corp.*,⁴⁹⁴ the United States District Court for the District of Kansas issued an extensive opinion addressing the United States' allegations that defendants AMR Corporation, American Airlines, Inc., and AMR Eagle Holding Company participated in a predatory scheme pricing against low cost carriers in violation of Section 2 of the Sherman Act. The claims arose out of competition between American Airlines and several smaller low cost carriers on various airline routes centered on the Dallas-Fort Worth International Airport from 1995 to 1997.

American Airlines moved for summary judgment, arguing that it competed against the low cost carriers on the merits and that its conduct was not unlawful under the Antitrust Acts. At

⁴⁸⁹ *Continental II*, 136 F. Supp. 2d at 544-45.

⁴⁹⁰ *Continental I*, 126 F. Supp. 2d at 978-82.

⁴⁹¹ *Continental II*, 136 F. Supp. 2d at 545.

⁴⁹² *Continental II*, 136 F. Supp. 2d at 545-48.

⁴⁹³ *Continental II*, 136 F. Supp. 2d at 548-52.

⁴⁹⁴ *United States v. AMR Corp.*, 140 F. Supp. 2d 1141 (D. Kan. 2001).

the end of a 76-page opinion, the court concluded that the government's claims in the case failed. In short, the court found that: (1) American did not price below an appropriate measure of costs, (2) evidence showed that American priced its fares consistently above its variable costs, (3) the government's claims with respect to question of recruitment failed from a pervasive failure of proof, and (4) the government's allegations with respect to reputation liability were inappropriate. Accordingly, the court granted defendant American's Motion for Summary Judgment.⁴⁹⁵

3. Criminal Actions

In *United States v. Mendoza*, the Ninth Circuit Court of Appeals reviewed a case in which a man attempted to assist his girlfriend in making a connecting flight by calling in a bomb threat to the airline.⁴⁹⁶ On the evening of December 29, 1999, Flavio David Mendoza ("Mendoza") took his girlfriend to the St. Louis airport where she was to board a TransWorld Airlines flight to San Francisco that would connect to a Korean Airlines flight ("KAL") to Seoul, Korea. Because the girlfriend missed her original flight, she was told that she might not make her connecting flight in San Francisco.

Once the girlfriend was en route to San Francisco, Mendoza placed a number of calls to KAL, inquiring whether his girlfriend would be able to make the flight. Fearing that she would not make the connection, Mendoza made an anonymous phone call from a pay phone near his home to the San Francisco airport, in which he stated that he had heard that there might be a bomb on board the KAL flight.

The call obviously raised a great deal of alarm among the airport security and KAL officials. KAL compared the threat with recordings of the previous calls from Mendoza, and determined that Mendoza had made the bomb-threat. Mendoza's girlfriend confirmed KAL's conclusion when KAL played the tape for her. As a result of the call, the aircraft, which had already launched, started to return to San Francisco. Once KAL had identified Mendoza, however, the crew was informed that the call had been a hoax, and they elected to return to their original heading to Seoul and completed the flight uneventfully.⁴⁹⁷

⁴⁹⁵ *Id.* at 1218-19.

⁴⁹⁶ *United States v. Mendoza*, 244 F.3d 1037 (9th Cir. 2001).

⁴⁹⁷ *Id.* at 1040-41.

The government indicted Mendoza on one count of violating 18 U.S.C. § 844(e) and one count of violating 18 U.S.C. § 32(a)(6). The second count charged that Mendoza willfully communicated information knowing the information to be false and under circumstances in which such information could be reasonably believed, thereby endangering the safety of an aircraft in flight. The jury was unable to reach a verdict on the § 844 charge and it was eventually dismissed. However, the jury did return a guilty verdict on the § 32(a)(6) charge, which Mendoza appealed.

On appeal, Mendoza argued that there was insufficient evidence that he had actually endangered the flight. The court concluded that the danger to the flight created by Mendoza's call was above and beyond the danger inherent in routine flying:

The stress to the pilots, coupled with the increased flying time caused by the bomb scare, made for a situation seldom experienced on an aircraft and created a level of danger not normally present. The government produced sufficient evidence for rational trier of fact to find beyond a reasonable doubt that Flight 24 was endangered while in flight.⁴⁹⁸

Mendoza also argued that he was prejudiced by the government's use of a dictionary definition of "endangerment" during its closing argument. Also Mendoza argued that if the flight was endangered, Mendoza was not responsible because intervening actors broke the chain of causation. The court of appeals dismissed each argument in turn.⁴⁹⁹ Finally, the court also dismissed Mendoza's complaints concerning certain testimony that admitted jury instructions with respect to the Section 32 charge. Thus, the Ninth Circuit affirmed the decision of the lower court, and the United States Supreme Court denied certiorari.⁵⁰⁰

In *United States v. Abozid*, the Second Circuit affirmed the conviction in the United States District Court for the Southern District of New York against one of the defendants for conspiracy to traffic in unauthorized access devices with the intent to defraud.⁵⁰¹ The unauthorized access devices were ticket stock bearing account numbers that defendants had received as travel agents. The defendants would sell the tickets at pure profits without reimbursing the airlines for the stock. Finding that the

⁴⁹⁸ *Id.* at 1043.

⁴⁹⁹ *Id.* at 1043-46.

⁵⁰⁰ *Id.*

⁵⁰¹ *United States v. Abozid*, 257 F.3d 191 (2d Cir. 2001).

district court committed no reversible error, the Second Circuit confirmed the convictions.

In *United States v. Teubner*, defendant Richard Teubner moved to dismiss certain counts of the indictment charging him with violation of 18 U.S.C. § 32(a)(6).⁵⁰² The indictment charged Teubner with knowingly selling 49 separate aircraft engine parts that were both flight-critical and life-limited using falsified FAA Forms 8130-3 airworthiness approval tags, and falsifying aircraft engine log book entries.⁵⁰³ Teubners argued that under Section 32(a)(6) the government must show that the aircraft was in flight when its safety is endangered. Essentially, the section does not criminalize a communication about an aircraft part at a remote place that is made without knowledge that the part will ever be installed on any particular aircraft.⁵⁰⁴

In response, the court found that a plain reading of the statute “teaches that it is enough that [the defendant] willfully communicated information knowing it was false and under circumstances in which the information could reasonably be believed, as a result of his intentional conduct, an aircraft was endangered while in flight.”⁵⁰⁵ Dismissing Teubner’s other arguments as well, the court denied his motion to dismiss the various counts in the indictment against him.⁵⁰⁶

III. MISCELLANEOUS REGULATORY ISSUE: PROMULGATION OF THE NEW SUBPART K ON AIRCRAFT FRACTIONAL OWNERSHIP

The final topic of this paper is the FAA’s promulgation of new regulations regarding the ownership and operation of aircraft fractional ownership shares in the United States. Without delving into the topic in detail,⁵⁰⁷ it is worth noting that the long-

⁵⁰² *United States v. Teubner*, Crim. No. 3:00-CR-214-D, 2001 U.S. Dist. LEXIS 14855 (N.D. Tex. Aug. 8, 2001).

⁵⁰³ *Teubner*, 2001 U.S. Dist. LEXIS 14855, at *2-3.

⁵⁰⁴ *Id.* at *3-5.

⁵⁰⁵ *Id.* at *5-6.

⁵⁰⁶ *Id.* at *7-11.

⁵⁰⁷ For an excellent article that explains in detail the history of fractional ownership in the United States and the efforts to reach an industry consensus with respect to regulating this fast-growing segment of the business aviation community, see Eileen M. Gleimer, *When Less Can Be More: Fractional Ownership of Aircraft—The Wings of the Future*, 64 J. AIR L. & COM. 979 (1999).

awaited Notice of Proposed Rulemaking was issued by the FAA on July 18, 2001.⁵⁰⁸

In short, the proposal would create a new Subpart K of Part 91 of the FARs and eliminate some operational and regulatory disparities between fractional and charter providers, while allowing the fractional providers to continue operating much as they have been since their inception.⁵⁰⁹

⁵⁰⁸ 66 F.R. 37520 (Jul. 18, 2001). The comment period was subsequently extended several times due to the events of September 11, 2001.

⁵⁰⁹ See, e.g., Summary to NPRM, Regulation of Fractional Aircraft Ownership Programs and On-Demand Operations, 66 F.R. 37520, at 37520 (Jul. 18, 2001).