Schnader ATTORNEYS AT LAW
Aviation Group

# AVIATION HAPPENINGS

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## In this issue



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### Court Holds that Seating a Passenger Behind an IFE Box Does Not Constitute Montreal Convention "Accident"

*Stephen J. Shapiro, Philadelphia*

The United States District Court for the Eastern District of Pennsylvania recently held that seating a passenger behind a seat to which an in-flight entertainment ("IFE") box is attached does not qualify as a Montreal Convention "accident." That finding led the Court to enter summary judgment in favor of an air carrier on a passenger's claim that his leg was injured by an IFE box.

In commercial aircraft that carry seat-back entertainment systems, wiring for the systems is housed in hard plastic boxes, often referred to as IFE boxes, that are attached to the frame beneath many seats. In *Plonka v. US Airways*, the plaintiff alleged that he injured himself when his leg impacted an IFE box during a flight from Philadelphia, Pennsylvania to Frankfurt, Germany. The plaintiff did not allege that the IFE box was damaged or defective, instead claiming only that US Airways was liable for assigning him to a seat where he would be exposed to an IFE box.

US Airways, represented by Schnader, moved for summary judgment on the ground that seating a passenger near an IFE box is not an "accident" within the meaning of the Montreal Convention, as it is not an unusual or unexpected event. In support of its motion, US Airways submitted the declaration of one of its engineers, who testified that: (a) the manufacturer of the aircraft at issue (an Airbus A330 -200) installed the IFE boxes in compliance with an FAA-approved design; (b) US Airways did not alter the design or placement of the IFE boxes after delivery of the aircraft; and (c) Airbus installed IFE boxes underneath ninety seats in the economy cabin of the aircraft – one box for each of the ninety groups of contiguous seats.

The Court granted US Airways' motion, holding that "[s]eating Plaintiff in a seat where an IFE box was affixed was not an 'unexpected or unusual event or happening' since the IFE box was part of the Suspect Aircraft's approved design and up to eighty-nine other passengers were similarly seated." The Court analogized the matter before it to other cases in which courts have held that airlines are not liable under the Montreal Convention for injuries allegedly caused by the normal arrangement and operation of aircraft seats. ***Plonka v. US Airways*, 2015 U.S. Dist. LEXIS 145270 (E.D. Pa. Oct. 27, 2015).**

## EU 261 Not Enforceable In United States Courts

*Allison A. Snyder, New York*

EU Regulation 261/2004 (EU 261), adopted on February 17, 2004, established rules on compensation and assistance to passengers in the event of denied boarding onto, and cancellation or long delays of, flights. It applies to all flights by "Community carriers" (*i.e.*, carriers with a valid operating license granted by an EU state) between airports in the European Union ("EU") and airports outside of the EU. A contracting carrier operating under a codeshare agreement is not liable.

EU 261 provides a favorable liability scheme for passengers, so it was not surprising when class action lawsuits were commenced against a number of airlines in federal court in the Northern District of Illinois; the suits sought to enforce EU 261 in the United States. Each of the complaints initially asserted breach of contract claims, and the airlines filed motions to dismiss those claims. The breach of contract claims were dismissed against those airlines that did not explicitly incorporate EU 261 into their conditions of carriage, with the Court finding that those claims were preempted by the Airline Deregulation Act ("ADA"). In contrast, the claims were allowed against those carriers which did incorporate EU 261 into their conditions of carriage, with the Court finding that these claims were contract claims, and the ADA does not preempt breach of contract claims.

In response to these rulings, the plaintiffs amended Their complaints to assert direct causes of action under EU 261, and each of the airlines filed motions to dismiss on the ground that EU 261 is not enforceable outside the legal systems of EU member states. Each of the district courts that considered this this issue held that EU 261 does not provide a private cause of action outside the EU. One of these decisions was appealed to the Seventh Circuit Court of Appeals, which affirmed the district court's decision, holding that that EU 261 is not judicially enforceable outside the courts of EU Member States, and therefore that EU 261 does not provide the basis for a private right of action enforceable in U.S. courts. The Seventh Circuit chose not to address whether EU 261 claims were preempted by the ADA, as the district court (and other courts in the Northern District of Illinois and Eastern District of New York) had found. ***Volodarskiy v. Delta Airlines, Inc.*, 784 F.3d 349 (7th Cir. 2015).**

Also of interest to carriers who fly to/from the EU (and their insurers) is the European Court of Justice's decision in *Van der Lans v. Koninklijke Luchtvaart Maatschappij NV (KLM)*, in which the court denied a challenge by KLM to an air carrier's obligation to pay delay damages to passengers on flights that are canceled or delayed due to technical problems with the aircraft that arose spontaneously, were not attributable to poor maintenance and were not detected during routine maintenance checks.

In *Van der Lans*, the plaintiff was ticketed for a flight to Amsterdam (Netherlands) scheduled to depart from Quito (Ecuador) at 9:15 a.m. The flight, however, did not depart until the following day at 7:30 p.m., resulting in an arrival delayed by 29 hours. According to KLM, during push back on the scheduled flight, it was discovered that one of the engines did not start due to a lack of fuel feed, and the component parts had to be flown in from Amsterdam because they were not available at Guayaquil Airport (Ecuador).

KLM challenged Ms. Van der Lans' claim for €600 in delay compensation under EU 261 based on the exception to liability where an event has been caused by "extraordinary circumstances," and which could not have been avoided even if all reasonable measures had been taken. KLM argued that the applicable standard was met because the defective components had not exceeded their average lifetime and the parts were not found to have any problems when they were tested during an "A Check" one month earlier.

The European Court of Justice, rejecting KLM's arguments, held that unexpected technical problems are inherent in the normal course of an air carrier's operations. Moreover, the prevention of such a breakdown or the repairs occasioned by it, including the replacement of a prematurely defective component, is not beyond the actual control of the air carrier, since it is required to ensure the maintenance and proper functioning of the aircraft it operates for the purpose of its business. Thus, the Court of Justice held that a technical problem – which occurs unexpectedly, is not attributable to poor maintenance and was not detected during routine maintenance checks – does not fall within the definition of "extraordinary circumstances."

Given the large number of passengers that may assert claims under EC 261, the imposition of liability even where delays are caused by unexpected technical problems that could not be detected during routine maintenance, and involving parts still operating within the manufacturer's lifetime expectancy, represents a significant financial burden to air carriers. ***Van der Lans v. Koninklijke Luchtvaart Maatschappij NV*, Case C-257/14 [2015].**

**Manufacturer's Warranty Disclaimers and Limitations Bar Claims for Helicopter Crash**
*Aaron J. Fickes, Washington, D.C.*

*City of New York v. Bell Helicopter Textron, Inc.* involved the total loss of a Bell helicopter allegedly caused by the failure of a faulty gear shaft in an engine manufactured by Pratt & Whitney Canada. The City had purchased the helicopter from a former subsidiary of Bell pursuant to a contract that contained a manufacturer warranty from Bell and an engine warranty from Pratt & Whitney. Critically, however, the warranties included disclaimers and limitations.


The manufacturer warranty disclaimed as to Bell all liability for the Pratt & Whitney engine and all express or implied warranties not specified in the contract. The manufacturer warranty also limited the City's remedies to "repair and replacement" of the helicopter's parts, but not any "incidental or consequential damages" to the helicopter. Pratt & Whitney's engine warranty similarly was limited to repairing or replacing the engine, but excluded "incidental or consequential damages," including "expenses incurred external to the engine."

The City brought suit against both Bell and Pratt & Whitney. Bell moved to dismiss the City's claims against it, which were for breach of implied warranty and breach of contract, arguing that the City's claims and requested damages were barred by the contract's warranty disclaimers and limitations. The district court granted Bell's motion, holding first that Bell's warranty disclaimers, which were enforceable under the Uniform Commercial Code, barred the City's claims. The court went on to hold that the limitation of remedies set forth in the warranties barred the City's requested damages, which fell under the category of "special, incidental or consequential damages" arising from a defect in the engine. Finally, the court held that the City's breach of contract claim—premised on what the court described as the contract's "more obscure provisions"—was insufficient to state a claim.

Taken together, the City was left to seek damages only for the repair or replacement of the engine from Pratt & Whitney. The cost of the resultant damage to the $12.5 million helicopter was the City's to bear.

This opinion demonstrates that warranty disclaimers and limitations, far from being mere boilerplate worthy of little attention, continue to provide manufacturers with powerful defenses. ***City of New York v. Bell Helicopter Textron, Inc.*, No. 13 CV 6848 (E.D.N.Y. June 16, 2015)**

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**Speculative Startle Theory of Causation of Crash Deemed Insufficient**
*David C. Dziengowski, Philadelphia*

The Third Circuit recently affirmed the grant of summary judgment in favor of the FAA and Agusta Aerospace Corporation in *Turturro v. United States*, on the basis that the plaintiffs—the estates of a deceased student-pilot and instructor—could not prove proximate causation. A Grumman AA-1C crashed in Northeast Philadelphia after its student-pilot banked right at low altitude, causing an unrecoverable stall. The maneuver followed an ATC communication to "make right traffic," which was an attempt to separate the Grumman from a converging Agusta 139 helicopter.

The plaintiffs argued that the ATC's instruction, followed by the student-pilot's observation of the nearby Agusta 139, triggered a startle reaction in the student-pilot, which, in turn, resulted in a reflexive pullback of the yoke and subsequent stall.

The plaintiffs offered expert testimony to support their startle theory, but the Third Circuit found it insufficient to survive summary judgment. The court contrasted other cases where one of the injured parties survived the accident and therefore could testify to a startle response. "Unlike the plaintiffs in those cases," the court observed, "plaintiffs here did not provide reliable evidence that there actually was a startle reaction." *Turturro*, 2015 U.S. App. LEXIS, at *28. As a result, the "plaintiffs only can surmise that [the student-pilot] had an involuntary startle response," (*Id.* at *29) amounting to nothing more than speculation, which is not a reliable basis upon which to build expert testimony and get to a jury. ***Turturro v. United States*, 2015 U.S. App. LEXIS 17679 (3d Cir. Oct. 6, 2015).**

## Federal Aviation Administration Considering New UAS Registration Requirements

*Bill Janicki, San Francisco*

The FAA has long been concerned about the safety of operating unmanned aircraft systems (or drones) and how these systems can be integrated into the national airspace. That concern is now growing.

Reports from pilots and air traffic controllers about UAS operations near airplanes and airports have surged in recent months. In addition, UAS flying near wild fires have interfered with firefighting operations, and a number of reports have spotted UAS operating near sporting events.

In response to the threat posed by these unsafe operations, the FAA also recently kicked off an educational campaign called "Know Before You Fly," which provides UAS operators with information and guidance needed to fly safely and responsibly. Earlier this year, the FAA released a beta test version of an application called B4UFLY, which is used to determine if operating UAS in different locations is safe and legal. The FAA also has implemented "no drone zones," including one over the Washington, D.C. area, and has been issuing fines for unsafe operations. In fact, the FAA recently proposed a $1.9 million fine against a commercial UAS operator for unauthorized operations over populated cities and for endangering airspace safety.

While UAS manufacturers are also trying to promote safety—for example, some manufacturers plan to offer a safety system that will keep UAS from flying in restricted areas—reports of unsafe UAS operations continue to rise.

In response to its growing concerns, the FAA is considering sweeping changes to UAS registration requirements. Although commercial UAS operators already must register their aircraft with the FAA, a recent proposal would require that all UAS operators, including hobbyists and recreational users, register with the FAA.

In October of this year, the FAA announced the formation of a task force to develop a process for owners of small UAS to register their aircraft. The goal is to be able to connect UAS with their operators. Under the current system, hobbyists and recreational uses can operate without any registration requirements and without specific authorization from the FAA. Only commercial UAS operators must registered their aircraft and obtain specific approval to operate from the FAA.

This new task force met for three days in November and delivered its recommendations to the FAA on November 21, 2015. The task force proposed a free, owner-based registration system, so each registrant will be given a single registration number to cover all UAS the registrant owns. A person must be at least 13 years old to register and will be required to provide their name and street address. U.S. citizenship or residence status is not required. The proposal goes on to make registration mandatory before operating any UAS weighing between 250 grams (about ½ pound) and 55 pounds. The registration number must be affixed to the UAS.

The FAA is expected to have a small UAS registration system in place by the end of the year. This new registration system is further evidence of the difficulty the FAA is having in determining how to regulate UAS in a manner that balances the commercial and non-commercial benefits of UAS with the risks they pose.

## Aviation Group News

- The group was recognized in the 2016 edition of *Benchmark Litigation*, with partners **Denny Shupe** and **Ralph Wellington** garnering individual recognitions.
- Vice chair **Barry Alexander**, **Denny Shupe**, and **Jonathan Stern** were all noted in *The International Who's Who Legal* in the area of *Transport– Aviation Contentious*.
- **Denny Shupe** was recognized by *Best Lawyers in America* for Aviation Law.
- Aviation Group Chair **Bob Williams** was named a Fellow of the Litigation Counsel of America.
- Associate **Lee Schmeer** discussed "Niche Practices" for the Delaware Valley Law Firm Marketing Group on October 1, 2015.
- Partner **Bill Janicki,** located in the San Francisco office, and associate **David Dziengowski**, resident in Philadelphia, joined the firm.

## Seventh Circuit Holds Asiana 214 Case Removable under Admiralty Jurisdiction

*Lee C. Schmeer, Philadelphia*

The tragic crash of Asiana 214, a Boeing 777 en route to San Francisco from Seoul, South Korea, presented a novel question for the Seventh Circuit in *Lu Junhong v. The Boeing Company*: Does an aviation accident that becomes inevitable over water but occurs on land trigger federal maritime jurisdiction? Boeing removed these cases initially to the Northern District of Illinois, which remanded them back to state court on the grounds that (1) Boeing did not qualify as a federal officer, and (2) there was no admiralty jurisdiction because the crash occurred on land.

On appeal to the Seventh Circuit, Boeing argued first that because the FAA delegated the analysis and testing of the 777 auto-throttle system (the system alleged to be the primary non-pilot culprit in the accident), it effectively made Boeing a federal officer. The Court rejected this argument, noting the difference between a federal entity that has the power to dictate the law, and an entity such as Boeing that may be able to *certify* compliance with the law, but has no direct ability to create it. Boeing next argued that removal was proper under federal maritime jurisdiction based on the United States Supreme Court's decision in *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249 (1972), which held that the key inquiry in determining whether a plane crash falls under maritime law is whether the events leading to the accident have sufficient contact with maritime activity. Boeing argued that since the Asiana accident became inevitable while the aircraft was still over the San Francisco Bay, maritime law applied. While the district court rejected Boeing's claim that the accident became inevitable over water, it found no functional difference between an aircraft crossing the ocean and a ship doing the same, and that an injury suffered on land that is caused by a vessel on navigable water is properly brought under maritime law. The court therefore found maritime jurisdiction to be present, and reversed the remand to state court. ***Lu Junhong v. The Boeing Company*, No. 14-1825 (7th Cir. July 8, 2015).**

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## Courts Finds Ticket Sale Insufficient to Establish Personal Jurisdiction

*Julie E. Randolph, Philadelphia*

In *Cordice v. LIAT Airlines*, the district court found that the plaintiff's purchase of an airline ticket from the defendant in New York (the *pro se* plaintiff alleged only that the ticket was purchased in the United States, but the court assumed it was purchased in New York for purposes of the motion) was insufficient to establish personal jurisdiction over the defendant where the injury occurred outside of New York and the defendant lacked other contacts with the state. In reaching its decision, the court reinforced that a personal jurisdiction defense may succeed in Montreal Convention cases.

The plaintiff brought a $10,000 claim in New York federal court against LIAT Airlines arising from a burn she allegedly incurred on a LIAT flight from Trinidad and Tobago to St. Vincent. LIAT argued that the court lacked personal jurisdiction because LIAT's principal place of business is in Antigua, it does not operate flights to or from any United States state, and it has no offices or employees in New York (or any other state).

The district court, noting that the Montreal Convention requires the plaintiff to establish personal jurisdiction even where treaty (subject matter) jurisdiction is present, examined whether LIAT's contracts with New York satisfied New York's general or specific jurisdiction statutes. The court found that LIAT did not have sufficient business activity in New York to confer general jurisdiction. The court also held that specific jurisdiction was not appropriate bases upon the plaintiff's online purchase of an airline ticket from her home in New York ("The mere purchase of a ticket in New York is insufficient to establish personal jurisdiction based upon an injury that occurred elsewhere while travelling on that ticket"). Because the court lacked personal jurisdiction over LIAT, it dismissed the case. ***Cordice v. LIAT Airlines*, 2015 U.S. Dist. LEXIS 126704 (E.D.N.Y. Sept. 22, 2015).**

**Personal Jurisdiction Issues Continue to be an Early Focus In Aviation Litigation in the U.S.**
*Denny Shupe, Philadelphia*

In our last newsletter, we reported on developments since the Supreme Court's decision in *Daimler AG v Bauman*, 134 S. Ct 746 (2014) and subsequent decisions of federal and state courts. Recall that those decisions, as a practical matter, uniformly have followed the teachings of *Daimler* and held that a corporation no longer is subject to general personal jurisdiction in a state unless it is incorporated in that state or has its principal place of business in that state. Breaking from the decisions of many courts in the past, general jurisdiction over a defendant cannot be established merely because a corporation does a lot of business, even millions of dollars of business, in that state.

A practical result of these decisions, and other recent decisions limiting the exercise of specific jurisdiction, is that the merits of litigation often are not addressed for many months, sometimes in excess of a year, while a court hears jurisdictional challenges from one or more defendants in multi-party aviation litigation, and permits jurisdictional discovery related to one or more of the defendant's challenges to personal jurisdiction. The aviation plaintiff's bar is responding to this "new normal" of initial jurisdiction challenges with creative legal arguments that seek to limit the effect of the *Daimler* decision.

One such response occurred in Pennsylvania, where a plaintiff filed an application for exercise of "King's Bench Power" by the Supreme Court of Pennsylvania to address two issues as formulated by the plaintiff: (1) whether the state's general jurisdiction statute, which authorizes a state court to exercise general jurisdiction over a foreign corporation if it carries on a continuous and systematic part of its general business within Pennsylvania, has been rendered unconstitutional by *Daimler*; and (2) whether the minimum contacts provision of the state's long–arm statute, which permits a court to exercise specific jurisdiction over a defendant "to the fullest extent allowed under the Constitution of the United States…based on the most minimum contacts with [Pennsylvania] allowed under the Constitution of the United States," has been rendered unconstitutional by *Daimler.*

Among the arguments raised by the plaintiff in this lengthy application were: (1) the *Daimler* decision, which plaintiff contends is being misinterpreted by the courts, would unnecessarily disrupt long-established legal decisions and overrule decades of Pennsylvania court opinions; (2) the *Daimler* decision is being misapplied by these courts and producing "deep injustices," with *dicta* in the Supreme Court's opinion being misused to disrupt long-established law of personal jurisdiction; (3) a defendant who registers to do business in the state and conducts substantial business in the state should be subject to jurisdiction in that state for acts that result in harm in that state; (4) injured parties are being denied the opportunity to bring suit in their own state for wrongs directed to that state and for harm felt in that state; and (5) as a result, a plaintiff may have no choice but bring a multiplicity of law suits in different states arising from a single accident.

The Supreme Court of Pennsylvania recently denied the petition. Nevertheless, this undoubtedly will not be the last challenge to the *Daimler* decision and its progeny.

## FAA Preempts Claims for Injuries Caused by Fall of Carry-On Bag

*Barry S. Alexander, New York*

In *Ahmadi v. United Cont. Holdings, Inc. dba United Airline*, the plaintiff commenced litigation to recover for injuries allegedly sustained during boarding of a domestic flight from Bakersfield, California to Boston, Massachusetts, when she was struck by a piece of baggage that fell while another passenger was trying to place it into an overhead bin. The complaint asserted causes of action for (1) negligence, (2) *res ipsa loquitur*, (3) negligence *per se*, (4) breach of contract, and (5) breach of implied covenant of good faith and fair dealing.

The breach of contract and breach of implied covenant of good faith and fair dealing claims having already been dismissed, United filed a motion for summary judgment dismissing the remaining tort claims as preempted by the Federal Aviation Act ("FAA"). The court granted the motion and dismissed the claims against United.

The Court began its analysis with the general standard for FAA preemption enunciated by the Ninth Circuit (which includes California), which provides that "[i]n areas of law involving aviation safety and commerce, field preemption exists where there are pervasive federal regulations."

The Court then applied that analysis to the claims against United, which it interpreted to allege that United (1) failed to train or supervise their employees, (2) failed to assist passengers in loading their carry-on luggage in overhead bins, (3) failed to provide a safe storage space for carry-on bags, and (4) failed to warn Plaintiff about a dangerous condition.

With regard to Plaintiff's negligence claim, the Court found:

1. **Failure to Train—**"[T]he FAA has pervasively regulated the field of training, certifying, and supervising common carrier employees," the standard of care in Plaintiff's negligence claim was therefore preempted, and the plaintiff failed to point to any evidence that United failed to train its employees in accordance with federal regulations.
2. **Failure to Assist—**Flight attendant duties are closely regulated by the FAA, which "require carriers to assist disabled passengers with stowing carry-on luggage, but only when they 'self-identify as being an individual with a disability needing assistance.'" The Court then held that there was no evidence that the passenger who dropped the bag self-identified as needing assistance, or that the flight crew should otherwise have been aware of such a need, and therefore, that there was no evidence that the flight crew breached any duty under the FAA. The Court rejected the plaintiff's argument that a heightened standard should be applied because United (1) voluntarily assumed one through a manual provision stating that "flight attendants 'must proactively assist and direct customers with stowage of baggage,'" and (2) failed to enforce industry weight standards for carry-on baggage.
3. **Failure to Provide Safe Storage Space—**Overhead compartment design is regulated by the federal government, and the plaintiff failed to provide any evidence showing that the design or operation of the overhead compartments failed to comply with federal standards.
4. **Failure to Warn—**The Ninth Circuit "has specifically found that airlines cannot be liable for failure to warn about conditions, unless those warnings are mandated by federal law," and the plaintiff provided no evidence showing that United failed to comply with federal safety warning regulations.

Based on the foregoing, the Court held that United was entitled to summary judgment dismissing the plaintiff's negligence claims. The Court then granted summary judgment dismissing the *res ipsa* claim on the basis that United did not have exclusive control of the baggage that fell on the plaintiff, and the negligence *per se* claim on the basis that "the areas of Aviation safety at issue in this lawsuit are preempted by federal regulations." ***Ahmadi v. United Cont. Holdings, Inc. dba United Airline*, 2015 U.S. Dist. LEXIS 104748 (E.D. Cal. Aug. 10, 2015)**.

**Fifth Circuit Enforces Forum Selection Clause Applicable to One of Multiple Defendants**

*Aaron J. Fickes, Washington, D.C.*

In *In re Rolls Royce Corp.*, the Fifth Circuit Court of Appeals was tasked with deciding what to do when Some, but not all, parties are subject to a forum selection clause, and one of the parties to the forum selection clause files a motion to sever and transfer the claims against it to the agreed-upon jurisdiction. The Fifth Circuit's review came on the heels of the United States Supreme Court's decision in *Atlantic Marine Constr. Co. v. U.S. Dist. Ct.*, 134 S. Ct. 568 (2013), in which the Court held that a forum selection clause entered into by all parties should govern except in unusual cases. The Fifth Circuit reversed the district court's refusal to enforce the forum selection clause, but applied a different standard from that applied in *Atlantic Marine;* one that placed substantially less weight in favor of enforcing the forum selection provision.

*In re Rolls Royce Corp.* involved a helicopter crash in the Gulf of Mexico. The plaintiff alleged that its helicopter's number two engine bearing failed, forcing the pilot to make an emergency water landing. The pilot inflated the helicopter's emergency pontoon floats, but one of the pontoons failed after the passengers were safely evacuated, rendering the helicopter a total loss.

Although the contract between the plaintiff and Rolls Royce contained a forum-selection clause requiring suit to be brought in certain Indiana state or federal courts, the plaintiff commenced the action in Louisiana state court (the action was removed to federal court). The action named two other defendants, neither of whom was subject to a forum -selection clause. Rolls Royce moved to sever the claims against it and to transfer those claims to Indiana in accordance with the forum-selection clause, but the district court denied the motion.

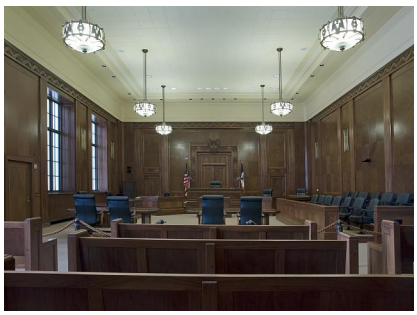
In a divided opinion, the Fifth Circuit reversed and remanded. In so doing, the majority established a three-part standard, which places significantly less weight on the forum-selection clause than that provided in *Atlantic Marine*.

The Fifth Circuit acknowledged that its analysis turned on the application of private interest (the interests of the litigants) and public interest (the interests of the public and judicial system at-large) factors, like any analysis of a motion to transfer (as with a *forum non conveniens* analysis), but held that the factors should be applied as follows where only some of the parties have agreed to a forum selection clause:

1. The private interest factors of the parties who agreed to the forum selection clause must weigh in favor of severance and transfer;
2. The private interest factors of the parties who have not agreed to the forum selection clause must be analyzed as they would in a case without any such clause; and
3. A determination must be made whether the weight of the private interest factors is outweighed by the judicial economy considerations of having all claims determined in a single lawsuit.

The Fifth Circuit noted that the weighing of these factors is a fact-sensitive analysis, and that the Supreme Court's decision in *Atlantic Marine*, while relevant, is not in any way decisive. Applying the factors to this case, the court held that the district court had failed to give proper weight to the forum selection clause, and that the other factors did not weigh sufficiently against severance and transfer to support denial.

The majority's approach and the Supreme Court's denial of certiorari thus inject uncertainty into the analysis and serve as a possible way for a party to avoid enforcement of a forum-selection clause in multiparty suits. It remains to be seen whether other Circuits will follow the Fifth Circuit's lead. ***In re Rolls Royce Corp.*, 775 F.3d 671 (5th Cir. 2014), *cert. denied sub nom.*, *PHI Inc. v. Rolls Royce Corp.*, 2015. U.S. LEXIS 5375 (Oct. 5, 2015).**



## Third Circuit Considers Boundaries of Preemption under Federal Aviation Act

*David C. Dziengowski, Philadelphia*

Sixteen years ago, the Third Circuit issued its seminal ruling on federal preemption in *Abdullah v. American Airlines*, 181 F.3d 363 (3d Cir. 1999). There, the Third Circuit held that the Federal Aviation Act of 1958 impliedly preempts the "entire field" of aviation safety, while preserving state and territorial damages for remedies. Because *Abdullah* arose from an airline's operation of an aircraft in turbulent conditions, courts have struggled to apply its holding in the context of aircraft product liability claims. *Sikkelee*, currently before the Third Circuit, is expected to clarify this issue.

*Sikkelee* stems from the crash of a 1976 Cessna 172N aircraft, which the plaintiff alleged was caused by a defective carburetor. The court found itself bound by *Abdullah*, and held that state common-law standards of care were preempted. Plaintiffs disagreed, and appealed to the Third Circuit.

On appeal, the plaintiffs are arguing that *Abdullah* does not control design defect claims against aircraft engine manufacturers, and that FAA Type Certification does not foreclose a design defect claim. In response, the defendants contend that preemption applies, and that the issuance of a Type Certificate necessarily reflects the FAA's determination that the engine satisfied the relevant federal standards. In the defendants' view, allowing a jury to second guess that FAA decision would undermine the regulatory scheme.

At the request of the Third Circuit, the Federal Aviation Administration filed a brief *amicus curiae* providing their position on these important issues. In its letter brief, the FAA argued in favor of a broad approach to preemption. Essentially, the FAA contends that preemption of aviation safety standards extends from operation to design and certification. As of the date of this newsletter, the Third Circuit has not issued its opinion on the dispute. We expect a decision soon, and anticipate that there will be an attempt to bring these issues before the Supreme Court of the United States. ***Sikkelee v. Precision Airmotive Corp.*, No. 4:07-cv-00886, 2014 U.S. Dist. LEXIS 126204 (M.D. Pa. Sept.10, 2014), appeal pending *Sikkelee v. Precision Airmotive Corp.*, No. 14-4193 (3d Cir.).**

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## Federal Appeals Court Affirms Non-Reviewability of National Transportation Safety Board Reports

*Robert J. Williams, Pittsburgh*

A federal appeals court recently rejected an operator's request to compel the NTSB to revise its factual accident report in *Helicopters, Inc. v. NTSB*. The case arose out of the March 18, 2014 crash of an Airbus AS350-B2 news helicopter in Seattle, Washington. The aircraft reportedly lifted approximately 15 feet off the ground and rotated counter-clockwise between 360 and 540 degrees, before crashing into an automobile parked near the helipad.

The AS350-B2 has a history of accidents caused by unintended takeoff during hydraulic systems checks. Those checks, which are performed with the engine running and the aircraft on the ground, originally required the fuel flow control lever to be set to "Flight," resulting in 100% engine power and main rotor speed. If the collective is not properly locked during the test, the aircraft may lift off the ground and rotate counterclockwise. Because those checks temporarily deplete the hydraulic accumulators, pilots may not be able to regain control of the aircraft once it leaves the ground. In 2010, the manufacturer revised the test procedure to require a lower power setting and improved the collective lock.

In the matter before the appellate court, the NTSB had not yet issued its probable cause determination. However, its factual report indicated that the pilot of the accident aircraft had only 8.3 hours' experience in the AS350-B2, and the operator had not replaced the original hydraulic systems checklist with the revised one, thereby insinuating that the accident was caused by improper performance of the tests.

The operator sought to compel the NTSB to include in its factual report the additional facts that the manufacturer's testing of a similarly equipped aircraft in similar conditions failed to produce inadvertent takeoff, and surveillance video of the accident flight was inconsistent with inadvertent takeoff. The operator's request was based upon 49 U.S.C. § 1153, which authorizes federal appeals courts to review final orders of the NTSB. However, the court ruled that the NTSB factual accident report is not a "final order," particularly because it does not fix liability or affect the operator's rights. Although the report may cause "commercial and reputational harm" to the operator, that is neither legally cognizable, nor does it transform the report into a final reviewable order within the meaning of the statute. Accordingly, the court denied the operator's petition. This decision's unfortunate result is that affected parties are not able to appeal the findings in the NTSB's factual report despite the acknowledged harm that an inaccurate statement can have. ***Helicopters, Inc. v. NTSB,* No. 15-3028 (7th Cir. Oct 13, 2015).**

## EU PNR Directive Coming Soon; Burdens on Carriers No Doubt to Follow

*Barry S. Alexander, New York*

On February 11, 2015, in the wake of terrorist attacks in Paris and Copenhagen early in 2015, the European Parliament issued a joint resolution on anti-terrorism measures, in which it discussed measures to combat terrorism, and committed itself to finalize an EU Passenger Name Record (PNR) directive by the end of 2015. The proposed directive would require more systematic collection, use and retention of PNR data from carriers and non-carriers (such as travel agencies and tour operators) for passengers entering or leaving the EU from a non-member country.

PNR data, of course, includes personal information about passengers provided in the course of ticket reservations, which is held by air carriers. It includes 19 fields of information, including travel dates, travel itinerary, ticket information, contact details, travel agency details, the method of payment, seat number and baggage information.

The renewed efforts for a PNR directive come despite the rejection by members of the Parliament's Committee on Civil Liberties, Justice and Home Affairs of a prior PDR directive in 2013 based on concerns about the potential impact of such a directive on fundamental rights and data protection. The efforts for a new directive are focused on balancing the fact that "security is one of the rights guaranteed by the EU Charter of Fundamental Rights," with an understanding that "fundamental rights, civil liberties and proportionality are essential elements in successful counter-terrorism policies."

The European Parliament issued a proposed directive on September 7, 2015, which was debated in the Council of the EU—Justice and Home Affairs on October 8, 2015. The proposed rules approved by the Civil Liberties Committee provide for the following:

- The data must be processed only to prevent, detect, investigate and prosecute terrorist offenses, and certain types of serious transnational crime, such as human trafficking, sexual exploitation of children, drug trafficking, weapons trafficking, money laundering and cybercrime;
- Member States Passenger Information Units (PIUs) would have to appoint a data protection officer to monitor data processing and safeguards and act as a single contact point for passengers with PNR data concerns;
- All processing of PNR data would have to be logged or documented;
- Passengers would have to be clearly and precisely informed about the collection of PNR data and their rights;
- Stricter conditions would govern any transfer of data to third countries; and
- The transfer of PNR data to private parties would be prohibited.

PNR data would be retained in the national PIU for an initial period of 30 days, after which those elements that could serve to identify a passenger would be "masked out." The "masked out" data would be accessible only to a limited number of PIU staff for up to four years in serious transnational crime cases, and five years for terrorism ones. After the five years, PNR data would have to be permanently deleted, unless the competent authorities are using it for specific criminal investigations or prosecutions (in which case the retention of data would be regulated by the national law of the member state concerned).

Finally, provisions requiring member states to share PNR data with each other and with Europol, and stipulating conditions for doing so, also were inserted.

The PNR directive raises several potential concerns for carriers:

- The PNR directive will be implemented through national laws, the content of which is left to some extent to the discretion of Member States. Thus, there is a possibility, if not likelihood, that national laws will differ, requiring carriers to closely monitor a number of different regimes; and
- The increased collection, retention and/or dissemination of PNR data increases the risk of a cyber attack.

It will be interesting to see both how the PNR directive reads once it is finalized, and whether it will withstand the legal challenges that are likely to follow. In light of the burdens that will be created by the directive, as well as the increased potential for cyber liability, carriers and their insurers will almost certainly be waiting with trepidation.

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