

RECENT DEVELOPMENTS IN AVIATION AND SPACE LAW

Jane Cherry, Paula K. Knippa, and Steven L. Osit

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Jane Cherry is a trial associate in the Dallas office of Thompson & Knight LLP. Paula K. Knippa is an attorney at Slack & Davis LLP in Austin, where she focuses her practice on aviation-related matters. Steven L. Osit is an attorney in the Office of the General Counsel at the U.S. Department of Transportation in Washington, D.C. The views expressed here are those of the authors and do not necessarily represent the views of their firms or the position of the United States.

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This paper addresses recent developments in aviation and space law for the period October 1, 2013, through September 30, 2014. Although not an exhaustive survey, the authors have sought to include cases that illustrate some of the more significant trends of interest to practitioners in this area.

I. JURISDICTIONAL MATTERS

A. *Walden v. Fiore*

In *Walden v. Fiore*, the Supreme Court reversed the Ninth Circuit’s holding that a federal agent who had questioned travelers and conducted a search of their luggage at the airport in Atlanta purposefully availed himself of the jurisdiction of the travelers’ home state, Nevada.¹ *Fiore* and *Gipson*, two professional gamblers, were returning to Las Vegas from Puerto Rico.² Their return trip began in San Juan and included a connecting flight departing from Atlanta.³ A Transportation Security Administration (TSA) screening in San Juan revealed that they were carrying about \$97,000 in cash.⁴ After Drug Enforcement Agency (DEA) officials in San Juan questioned them about their residency and the purpose and destination of the funds, they were permitted to travel to Atlanta.⁵ In Atlanta, DEA agents questioned them again, and they presented documents showing where they had been as well as how much money they had won at each casino they had visited.⁶ Despite this, the DEA brought in a drug dog, whose “reaction sufficiently signaled contraband to indicate that their money was involved in drug transactions.”⁷ The DEA seized the funds, telling *Fiore* and *Gipson* that they would be returned once they produced additional documentation.⁸ The funds were returned, but not until several

1. 134 S. Ct. 1115, 1118 (2014).

2. *Fiore v. Walden*, 657 F.3d 838, 842 (9th Cir. 2011), *withdrawn and superseded on denial of reh’g en banc*, 688 F.3d 558 (9th Cir. 2012), *rev’d*, 134 S. Ct. 1115 (U.S. 2014).

3. *Id.*

4. *Id.* at 842–43.

5. *Id.* at 843.

6. *Id.*

7. *Id.*

8. *Id.*

months later.⁹ During that time, the agents submitted a probable cause affidavit to the U.S. Attorney's office in Georgia,¹⁰ which concluded that the affidavit "omitted information," the affidavit was "misleading," and there had been no probable cause for seizure of the funds.¹¹

The travelers filed suit against the DEA agents in the District of Nevada alleging that the agents "had violated their Fourth Amendment rights."¹² Agent Walden moved to dismiss for lack of personal jurisdiction and improper venue.¹³ The district court dismissed, concluding that Agent Walden's actions were aimed at Georgia rather than Nevada and, therefore, that the court did not have personal jurisdiction over him.¹⁴ On appeal, the Ninth Circuit disagreed, concluding that the federal court in Nevada had jurisdiction over Agent Walden because he had acted intentionally, subjecting himself to the jurisdiction of the Nevada court.¹⁵

The Supreme Court reversed, holding that the Ninth Circuit incorrectly focused on the defendant's contact with the plaintiffs instead of the forum.¹⁶ The Court reasoned that the "'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there."¹⁷ Thus, "the plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him."¹⁸ Here, the defendant "never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada."¹⁹ Therefore, this defendant's actions did not sufficiently connect him with the forum state.²⁰

B. *Martinez v. Aero Caribbean*

In *Martinez v. Aero Caribbean*, an airplane crashed in Cuba and everyone on board was killed.²¹ Heirs of one of the passengers sued the owners (the Cuban defendants) and the manufacturer of the plane, Avions de Transport Régional (ATR), for wrongful death and negligence.²² Before the

9. *Id.* at 844.

10. *Id.*

11. *Id.* at 844–45.

12. *Id.*

13. *Id.* at 845.

14. *Id.*

15. *Id.* at 857, 860.

16. *Walden v. Fiore*, 134 S. Ct. 1115, 1122–25 (2014).

17. *Id.* at 1122.

18. *Id.*

19. *Id.* at 1124.

20. *Id.*

21. 577 F. App'x 682 (9th Cir. 2014).

22. *Id.*

Cuban defendants were properly served, ATR moved to dismiss.²³ The Northern District of California granted the motion to dismiss and entered a judgment with respect to ATR, but not with respect to the unserved Cuban defendants.²⁴ The plaintiffs appealed.²⁵ “Therefore, at the time plaintiffs filed their notice of appeal with [the Ninth Circuit], their claims against the Cuban defendants remained pending before the district court.”²⁶ The Ninth Circuit looked to 28 U.S.C. § 1291, under which federal appellate courts have jurisdiction only over “appeals from ‘final judgment[s] that dispose[] of all claims with respect to all parties.’”²⁷ The court noted that there is an exception to this rule and a federal appellate court does have jurisdiction where “an action is dismissed as to all of the defendants who have been served and only unserved defendants remain.”²⁸ The Ninth Circuit qualified this exception, however, noting it does not apply “where no final judgment is entered and it is clear from the course of proceedings that further adjudication is contemplated.”²⁹ Here, the trial court’s docket indicated that the plaintiffs were continuing their suit against the Cuban defendants.³⁰ Therefore, in this case, the Ninth Circuit determined that the exception did not apply, judgment was not final, and it did not have jurisdiction.³¹ The Ninth Circuit ordered a limited remand to determine whether the district court intended to certify the judgment against ATR under Federal Rule of Civil Procedure 54(b).³²

II. PREEMPTION

A. *Airline Deregulation Act*

1. *Northwest, Inc. v. Ginsberg*

In *Northwest, Inc. v. Ginsberg*,³³ the Supreme Court broadly applied the preemption provision of the Airline Deregulation Act (ADA), which preempts state laws “related to a price, route or service of an air carrier.”³⁴ In *Ginsberg*, a customer whose membership in Northwest Airlines’ frequent flyer program was revoked brought a class action suit to recover for

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 683.

27. *Id.* (quoting *Dream Games of Ariz., Inc. v. PC Onsite*, 561 F.3d 983, 987 (9th Cir. 2009)).

28. *Id.* (quoting *Patchick v. Kensington Publ’g Corp.*, 743 F.2d 675 (9th Cir. 1984)).

29. *Id.* (quoting *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 872 (9th Cir. 2004)).

30. *Id.*

31. *Id.* at 683–84.

32. *Id.* at 684.

33. 134 S. Ct. 1422 (2014).

34. 49 U.S.C. § 41713 (2012).

common law breach of contract, breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, and intentional misrepresentation.³⁵ The customer flew extensively on the airline and achieved “platinum elite” status.³⁶ Northwest revoked his status after he contacted the airline over twenty-four times with complaints about travel problems and “continually asked for compensation over and above [the airline’s] guidelines.”³⁷ The district court dismissed the breach-of-contract claim for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and held that the other claims were preempted by the ADA.³⁸ The Ninth Circuit reversed, holding that (1) the ADA did not expressly preempt common law breach of contract claims under the implied covenant of good faith and fair dealing, and (2) this claim was not sufficiently related to prices and services to be preempted.³⁹

The Supreme Court reversed the Ninth Circuit, holding that (1) the ADA preemption provision applies not only to state laws but also to common law rules;⁴⁰ and (2) the common law breach-of-contract claim was sufficiently related to rates, routes, or services to be preempted by the ADA.⁴¹ The Court examined whether the claims “related to” prices, routes, or services. “A claim satisfies this requirement if it has ‘a connection with, or reference to, airline’ prices, routes, or services . . . and the claim at issue here clearly has such a connection.”⁴² The Court reasoned that the frequent flyer “program is connected to the airline’s ‘rates’ because the program awards mileage credits that can be redeemed for tickets and upgrades” that can impact the amount that a customer pays.⁴³ The program was also connected to “services” because higher levels of access and service were available through the program.⁴⁴

2. *Brown v. United Airlines, Inc.*

In *Brown v. United Airlines, Inc.*, the plaintiffs brought two class actions against U.S. Airways and United Airlines on behalf of skycaps asserting unjust enrichment, tortious interference, and other state law claims.⁴⁵ Specifically, the skycaps alleged that they were losing tips as a result of the airlines’ imposition of fees for curbside service.⁴⁶ The trial court

35. *Ginsberg*, 134 S. Ct. at 1427.

36. *Id.* at 1426.

37. *Id.* at 1427.

38. *Id.*

39. *Ginsberg v. Northwest, Inc.*, 695 F.3d 873, 881–82 (9th Cir. 2012).

40. *Ginsberg*, 134 S. Ct. at 1429–30.

41. *Id.* at 1430–31.

42. *Id.* at 1430 (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)).

43. *Id.* at 1431.

44. *Id.*

45. 720 F.3d 60, 62 (1st Cir. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

46. *Id.*

dismissed the claims as preempted by the ADA.⁴⁷ In dismissing the claims, the trial court rejected the plaintiffs' argument "that the ADA does not preempt common law claims, regardless of the relationship between those claims and an air carrier's prices, routes, or services."⁴⁸

The First Circuit affirmed, holding that these tortious interference and unjust enrichment claims were preempted by the ADA.⁴⁹ To come to this conclusion, the court considered two questions: (1) "whether the arguably preempted claim is based on a state 'law, regulation, or other provision having the force and effect of law'" and (2) "whether the claim is sufficiently 'related to a price, route, or service of an air carrier.'"⁵⁰ The court saw the second question as "an open-and-shut matter," so it focused its analysis on the first question.⁵¹ In response to the first question, the court concluded that even though the plaintiffs' claims were not based on a statute, the common law has the force and effect of law just as statutory law does.⁵²

In coming to this conclusion, the court relied on the Supreme Court's opinion in *American Airlines, Inc. v. Wolens*.⁵³ "There, the Supreme Court stated, albeit in dictum, that the words 'having the force and effect of law' are 'most naturally read to refer to binding standards of conduct that operate irrespective of any private agreement.'"⁵⁴ Based on this, the court reasoned that common law suits are "backed by the weight of the state judiciary enforcing state law."⁵⁵ Therefore, both common law and statutory law equally possess "the force and effect of law."⁵⁶ Acknowledging that "[b]oth the Supreme Court and this court have consistently given a wide interpretive sweep to ADA preemption," the court rejected the plaintiffs' specific arguments against applying a broad preemptive stroke in this case as "pockets of turbulence . . . mostly hot air, and none of it disrupts our flight path."⁵⁷ The court held that "the district court appropriately prescribed" what the court called the "strong medicine" of preemption, in keeping with its and the Supreme Court's previous decisions.⁵⁸

47. *Id.*

48. *Id.* at 62–63.

49. *Id.* at 71.

50. *Id.* at 63 (quoting 49 U.S.C. § 41713 (2012)).

51. *Id.* at 64.

52. *Id.* at 65.

53. *Id.* (citing *Am. Airlines v. Wolens*, 513 U.S. 219 (1995)).

54. *Wolens*, 513 U.S. 229 n.5.

55. *Brown*, 720 F.3d at 65.

56. *Id.*

57. *Id.* at 65, 67.

58. *Id.* at 71.

3. *Bower v. EgyptAir Airlines Co.*

In *Bower v. EgyptAir Airlines Co.*, the First Circuit broadly applied the ADA preemption provision as it did in *Brown*.⁵⁹ In this case, the plaintiff's ex-wife took the plaintiff's and her two children and boarded a flight to Egypt, her country of origin.⁶⁰ The defendant airline failed to "recognize that the children's passports had no entry visas reflecting the children's arrival in the United States[,] . . . comment on the fact that [the ex-wife] and her children had different last names[,] . . . [and] check for their I-94 forms."⁶¹ The plaintiff sued both his ex-wife and the airline based on intentional interference with custodial relations and negligence.⁶² The airline argued that the plaintiff's claims were preempted by the ADA.⁶³ The trial court disagreed but granted summary judgment to the airline on other grounds.⁶⁴

On appeal, the First Circuit affirmed but concluded that the common law tort claims were preempted by the ADA.⁶⁵ Citing the *Brown* decision, the court applied the same analysis but focused more on the second question, "the linkage question"⁶⁶ or "whether the claim is sufficiently 'related to a price, route, or service of an air carrier.'"⁶⁷ The First Circuit continued to follow its broad definition of "services" rather than adopt the narrower one employed by the Ninth Circuit: "The broader view of 'service,' which pre-dates *Rowe* in our sister circuits, includes items such as the handling of luggage, in-flight food and beverage provisions, ticketing, and boarding procedures."⁶⁸ Thus, because the "plaintiff's complaint [was] essentially that EgyptAir allowed [the plaintiff's ex-wife] to board the aircraft without adequately investigating her pre-flight documentation and status," it was akin to a claim involving denied boarding, and the ADA preempted his claims.⁶⁹

B. *Federal Aviation Act*

1. *Ventress v. Japan Airlines*

In contrast to the ADA, the Federal Aviation Act (FAA) "does not expressly preempt state regulation of air safety or prohibit states from imposing tort liability for unlawful retaliation or constructive termination,"

59. 731 F.3d 85 (1st Cir. 2013), *cert. denied*, 134 S. Ct. 1788 (2014).

60. *Id.* at 88.

61. *Id.*

62. *Id.* at 89.

63. *Id.*

64. *Id.*

65. *Id.* at 92.

66. *Id.* at 93.

67. *Id.* (quoting *Brown v. United Airlines, Inc.*, 720 F.3d 60, 62 (1st Cir. 2013) (quoting 49 U.S.C. § 41713 (2012)), *cert. denied*, 134 S. Ct. 1787 (2014)).

68. *Id.* at 94; see *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008).

69. *Bower*, 731 F.3d at 95.

and, therefore, “FAA ‘preemption, if any, must be implied.’”⁷⁰ In *Ventress*, a flight engineer employed by a company that supplied flight crews to Japan Airlines sued the airline and his employer for statutory and common law retaliation and constructive termination.⁷¹ The flight engineer had been medically disqualified from flying by the defendants, which he alleged was retaliation for raising safety concerns about a fellow pilot.⁷² The trial court granted judgment on the pleadings to the defendants because the plaintiff’s claims were preempted by the FAA.⁷³ The Ninth Circuit affirmed, holding that the claims were “preempted because they would require the fact finder to intrude upon the federally occupied field of aviation safety.”⁷⁴ The court began by noting that “pilot qualifications and medical standards for airmen . . . are pervasively regulated.”⁷⁵ Because the claims asserted here would require “the finder of fact to determine whether [the airline] had a legitimate, nonretaliatory explanation for its acts or its explanation is merely a pretext for retaliation,” this would essentially be an “inquiry into the medical fitness of” two pilots.⁷⁶ As such, the case “intrudes upon the federally occupied field of pilot safety and qualifications that Congress has reserved for the agency and impermissibly subjects federal law to supplementation by, [and] variation among, state laws,” and therefore the plaintiff’s claims were preempted.⁷⁷

2. *Lewis v. Lycoming*

Unlike in *Ventress*, the court in *Lewis v. Lycoming* refused to apply FAA preemption based on intrusion into the field of aviation safety.⁷⁸ In *Lewis*, a British flight instructor and his student died in a helicopter crash.⁷⁹ Representatives of their estates brought several state products liability claims against the companies that designed, manufactured, assembled, and sold the helicopter and its component parts.⁸⁰ The defendants argued that the claims were preempted by the FAA.⁸¹ Specifically, they argued field preemption because Congress intended to preempt the entire aviation field.⁸² The court disagreed, holding that, despite the “expansive language”

70. *Ventress v. Japan Airlines*, 747 F.3d 716, 720 (9th Cir. 2014) (quoting *Montalvo v. Spirit Airlines*, 508 F.3d 464, 470 (9th Cir. 2007)).

71. *Id.* at 719.

72. *Id.* at 719–20.

73. *Id.* at 720.

74. *Id.* at 719.

75. *Id.* at 721.

76. *Id.* at 722 (citation omitted) (internal quotation marks omitted).

77. *Id.*

78. 957 F. Supp. 2d 552 (E.D. Pa. 2013); see *Ventress*, 747 F.3d at 720.

79. *Lewis*, 957 F. Supp. 2d at 553–54.

80. *Id.*

81. *Id.* at 554.

82. *Id.*

in the Third Circuit's opinion in *Abdullah v. American Airlines*, that case "applies only to 'careless or reckless operation of an aircraft.'"⁸³ The court reasoned that state products liability law is not an obstacle to congressional goals of safety in air transportation and commerce such that the entire field is subject to preemption.⁸⁴ Further, state products liability claims are not subject to field preemption by the FAA as "state products liability law is not inconsistent with the scheme of aviation regulation under the circumstances posited here."⁸⁵ Instead, "[s]tate products liability, negligence and breach-of-warranty claims for aircraft design or manufacture will only help, not harm, Congress in obtaining its goal of maximum safety."⁸⁶

III. MONTREAL CONVENTION

The Montreal Convention, or the Convention for the Unification of Certain Rules of International Carriage by Air, is a multilateral treaty that was adopted in 1999 by members of the International Civil Aviation Organization and intended to supplant some of the more antiquated provisions of the Warsaw Convention, which previously governed airline liability to passengers and shippers on international flights.⁸⁷ Although the Montreal Convention was intended to unify and replace the system of liability created under its predecessor's framework, the Convention still retains a great many of its original provisions and terms.⁸⁸ As a result, courts continue to rely on precedent analyzing the Warsaw Convention when deciding cases arising under or implicating the Montreal Convention.⁸⁹

A. *Jurisdictional Preemption*

1. *DeJoseph v. Continental Airlines, Inc.*

Michael DeJoseph brought a negligence claim for injuries suffered while on a flight operated by Continental Airlines during which a hot liquid being served by a flight attendant was spilled in his lap.⁹⁰ DeJoseph originally brought suit in New Jersey state court, but Continental removed the case on federal question jurisdiction grounds pursuant to 28 U.S.C. § 1331.⁹¹ Continental argued that, because DeJoseph's claims arose during "the

83. *Id.* at 557–58; see also *Abdullah v. Am. Airlines*, 181 F.3d 363 (3d Cir. 1999).

84. *Lewis*, 957 F. Supp. 2d at 558.

85. *Id.* at 559.

86. *Id.*

87. *DeJoseph v. Cont'l Airlines, Inc.*, 18 F. Supp. 3d 595, 600 (D.N.J. 2014).

88. *Dogbe v. Delta Air Lines, Inc.*, 969 F. Supp. 2d 261, 269 (E.D.N.Y. 2013).

89. *Id.*

90. *DeJoseph*, 18 F. Supp. 3d at 596.

91. *Id.* at 597. Continental also claimed original jurisdiction based on diversity of the parties until DeJoseph stipulated that he was not seeking an amount in controversy exceeding \$75,000. *Id.*

course of an international flight,” they were subject to the Montreal Convention, which provided the exclusive cause of action and remedy for his claims.⁹² DeJoseph’s lawsuit, therefore, arose under the “Constitution, laws, or treaties of the United States,” making the exercise of federal jurisdiction over the case proper under the complete preemption doctrine.⁹³

The complete preemption doctrine is deemed to apply when the preemptive force of a federal statutory provision is so powerful that it entirely displaces any state cause of action and the claims that would otherwise be authorized by state law become exclusively federal in nature.⁹⁴ In addressing the question of whether jurisdiction of the case under the complete preemption doctrine existed, the trial court observed that neither the Supreme Court nor the Third Circuit had addressed whether the Montreal Convention completely preempted state law.⁹⁵ The court also noted that there appeared to be a split among federal courts as to the preemptive reach of the Montreal Convention and traced that split to divergent interpretations of the Supreme Court’s holding in *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, in which the Court held that a plaintiff could not recover under local law “when her claim does not satisfy the conditions for liability under the [Warsaw] Convention.”⁹⁶

Some courts, the *DeJoseph* court noted, had interpreted this holding to announce a rule of complete preemption such that all state law claims within the scope of a claim falling under the aegis of the Convention were completely preempted, while others had read *Tseng* more narrowly to find *conflict* preemption as opposed to *complete* preemption.⁹⁷ Conflict preemption, the court pointed out, recognizes the survival of state law claims, although such claims will continue to be subject to the limitations imposed by the terms of the federal treaty or law concerned.⁹⁸ When conflict preemption is implicated, the defendant is required to identify a specific conflict between a treaty provision and the state law cause of action pursued and assert preemption as a defense—not a complete displacement of state law in its entirety.⁹⁹ The court further noted that the Supreme Court had *not* expressly found complete preemption in the *Tseng* case and that, historically, when the Court intended complete preemption, it did so in clear, unequivocal terms absent in the *Tseng* opinion.¹⁰⁰

92. *Id.* at 599.

93. *Id.* at 600.

94. *Id.* at 599 (citing *Dukes v. U.S. Healthcare*, 57 F.3d 350, 353 (3d Cir. 1995)).

95. *Id.* at 600.

96. *Id.* at 602 (quoting *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999)).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 603.

In addition, the *DeJoseph* court examined the language of Article 29 of the Montreal Convention, which sets forth the conditions and limits of liability under which a claim falling within the Convention may be brought, observing that Article 29 appeared to expressly contemplate claims, subject to the limits and conditions stated therein, being brought “under this Convention or in contract or in tort or otherwise.”¹⁰¹

Persuaded by the language of the Convention itself, the more precise interpretation of the Supreme Court’s opinion in *Tseng*, and the Third Circuit’s admonition to narrowly construe the removal statute against removal, the court declined to exercise federal question jurisdiction over the *DeJoseph* suit and remanded the case to state court.¹⁰²

2. *Fadhliab v. Air France*

Three members of the Fadhliab family, Saudi Arabian citizens, were traveling from Los Angeles to Paris and were attempting to take their assigned seats on Air France Flight 73 when they were told that their seats had been changed to accommodate a French family.¹⁰³ An altercation allegedly ensued, whereupon security personnel boarded the aircraft and escorted the Fadhliab family back to the terminal.¹⁰⁴ The Fadhliabs subsequently sued Air France in California state court, alleging state common law claims for assault, battery, negligent hiring and supervision, and intentional infliction of emotional distress.¹⁰⁵ Air France removed the case to federal court on the grounds that the Montreal Convention completely preempted all state law claims.¹⁰⁶

In determining the propriety of exercising federal jurisdiction based on complete preemption, the *Fadhliab* court, like the *DeJoseph* court, observed the “striking divide among federal courts over the Montreal Convention’s preemptive effect.”¹⁰⁷ Unlike the *DeJoseph* court, however, the *Fadhliab* court concluded that “the preemptive force of the Montreal Convention is so strong that it transmutes Plaintiffs’ facially state law claims into federal ones under the complete preemption doctrine.”¹⁰⁸

In reaching its conclusion, the *Fadhliab* court clarified that it was not writing on a blank slate.¹⁰⁹ The Supreme Court had “previously considered the preemptive effect of the Warsaw Convention’s exclusivity

101. *Id.*

102. *Id.* at 604.

103. *Fadhliab v. Air France*, 987 F. Supp. 2d 1057 (C.D. Cal. 2013).

104. *Id.* at 1059.

105. *Id.* at 1060.

106. *Id.*

107. *Id.* at 1062.

108. *Id.*

109. *Id.*

provision” in *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*,¹¹⁰ “albeit not in the context of the jurisdictional doctrine of complete preemption.”¹¹¹ In *Tseng*, the *Fadbliah* court noted that the Supreme Court had concluded that Article 24 precluded all other bases for liability other than those established in the Convention’s personal injury provisions as consistent with the Convention’s “comprehensive scheme of liability rules and textual emphasis on uniformity.”¹¹²

The court then quickly dismissed the significance of the revised language in Article 29 of the Montreal Convention referencing all claims “whether under this Convention or in contract or in tort or otherwise” as merely clarifying—not altering—the Convention’s rule on exclusivity.¹¹³ The court went on to announce, without explanation, that “the additional ‘in contract or in tort or otherwise’ language simply bolsters—not dilutes—the Convention’s preemptive effect once one establishes that an agreement relates to ‘international carriage’ under Article 1.”¹¹⁴

Finally, the *Fadbliah* court referred to a statement by the then Deputy Secretary of State for Transportation Affairs, discussing the Convention’s “exclusivity in the area of claims for damages arising in the international transportation of passengers, baggage and cargo” and several opinions from British courts stating that “there are no exceptions to the exclusivity of the Convention” as further historical evidence confirming its conclusion that the Montreal Convention so completely preempted state law claims as to render such claims exclusively within the jurisdiction of the federal courts.¹¹⁵ Unlike the *DeJoseph* court, however, the *Fadbliah* court did not address the principle of conflict preemption as a means of conceptually retaining the exclusivity of the limits on liability imposed by the Convention without resort to the jurisdictional doctrine of complete preemption.

B. *Applicability*

1. *Kruger v. Virgin Atlantic Airways, Ltd.*

The Kruger family bought four round trip tickets on Virgin Atlantic Airways, Ltd. (VAA) from Newark to Delhi. On their return trip, due to delays in Delhi, the flight back to London was running late.¹¹⁶ Concerned about making the connecting flight, the Krugers, who were flying economy class, asked if they could deplane with first class passengers, who

110. 525 U.S. 155 (1999).

111. *Fadbliah*, 987 F. Supp. 2d at 1062.

112. *Id.*

113. *Id.* at 1062–63.

114. *Id.* at 1063.

115. *Id.* at 1064–65.

116. *Kruger v. Virgin Atl. Airways, Ltd.*, 976 F. Supp. 2d 290, 294 (E.D.N.Y. 2013).

had priority in leaving the aircraft.¹¹⁷ The flight attendant charged with ensuring the deplaning of passengers refused.¹¹⁸ The Krugers continued to urge the flight attendant to allow them to deplane, but their requests were refused.¹¹⁹ Finally, when permitted to deplane, Mrs. Kruger's shoulder purportedly came into contact with the flight attendant's chest. Kruger maintained that she tripped.¹²⁰

Upon disembarking, the Krugers made their way toward their connecting flight.¹²¹ In the meantime, the flight attendant asked the aircraft's captain to call the police.¹²² When the Krugers arrived at the gate leading to their connecting flight, the flight attendant and the police were there to meet them.¹²³ After questioning Mrs. Kruger and the flight attendant, the police arrested Mrs. Kruger and transported her in a police van to the police station.¹²⁴ While Mr. Kruger waited at a nearby hotel, Mrs. Kruger was questioned by the police and released five hours later.¹²⁵ No charges were brought against her.¹²⁶

The Krugers subsequently filed a lawsuit against VAA, alleging breach of contract, negligence, loss of consortium, intentional infliction of emotional distress, false arrest, and false imprisonment.¹²⁷ VAA filed a motion for summary judgment on the grounds that the Krugers' state law claims were preempted by the Montreal Convention.¹²⁸ Courts have held that a claimant must have sustained death or bodily injury to recover under the Montreal Convention.¹²⁹ The Convention has been interpreted as precluding recovery for purely psychic injuries.¹³⁰ It is possible to recover for mental injuries, but only in those circumstances in which the mental injuries resulted from an actual physical injury to the claimant.¹³¹ None of the Krugers' claims of emotional distress resulted from an actual physical injury and, thus, would not be recoverable under the Convention, according to VAA.¹³²

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 294–95.

121. *Id.*

122. *Id.* at 294.

123. *Id.* at 295.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 295–96. The Second Amended Complaint added a claim for malicious prosecution. *Id.* at 296.

128. *Id.* at 296.

129. *Id.* at 303.

130. *See, e.g., Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366 (2d Cir. 2004).

131. *Id.*

132. *Kruger*, 976 F. Supp. 2d at 303–04.

The determination of whether the Convention applied to the Krugers' claims turned on the court's interpretation of the meaning of "accident" and "embarking" under Article 17 of the Convention.¹³³ In order for the Convention to apply, an accident must take place on an aircraft involved in international carriage or in the course of a passenger's embarking or disembarking.¹³⁴

First, the court analyzed whether the incident involving the Krugers qualified as an "accident" for purposes of the Convention.¹³⁵ Noting that the Supreme Court had previously defined "accident" as "an unexpected or unusual event or happening that is external to the passenger,"¹³⁶ the *Kruger* court observed that the incident leading to Mrs. Kruger's arrest at the gate to her connecting flight would certainly constitute an "unexpected and unusual event" sufficient to qualify it as an "accident" falling within the aegis of the Convention.¹³⁷

Next, the court had to determine whether the "accident" occurred while Mrs. Kruger was "embarking" on an international flight.¹³⁸ Relying upon the Second Circuit's "four-prong test to determine whether a passenger is embarking on an aircraft within the meaning of the Montreal Convention," the *Kruger* court examined: (1) the activity of the passenger, (2) restrictions on the passenger's movement, (3) the imminence of actual boarding, and (4) the proximity of the passenger to the gate.¹³⁹ Here, too, the court found that Mrs. Kruger was sufficiently engaged in embarking on her connecting flight to satisfy this condition of Article 17.¹⁴⁰

Having determined that the Montreal Convention applied to the Krugers' claims, the court found that their state law claims were not compensable under the Convention and granted VAA's motion for summary judgment in its entirety.¹⁴¹

2. *Dogbe v. Delta Air Lines, Inc.*

On January 2, 2011, seventy-one year old Samuel Dogbe was scheduled to travel from Norfolk, Virginia, to Accra, Ghana.¹⁴² Dogbe had requested wheelchair assistance for boarding the flight as he was experiencing leg pain.¹⁴³ After boarding, Dogbe continued to experience discomfort and

133. *Id.* at 301.

134. *Id.*

135. *Id.*

136. *Air France v. Saks*, 470 U.S. 392, 405 (1985).

137. *Id.*

138. *Id.*

139. *Id.* at 301–02 (citations omitted).

140. *Id.* at 302–03.

141. *Id.* at 305.

142. *Dogbe v. Delta Air Lines, Inc.*, 969 F. Supp. 2d 261, 264 (E.D.N.Y. 2013).

143. *Id.*

asked a member of the Delta flight crew if seating with more leg room was available.¹⁴⁴ Dogbe was told that no such seating was available. When Dogbe noticed empty seats that appeared to have more leg room, he asked the crewmember if those seats were available and was advised that the seats were “only for the flight crew.”¹⁴⁵ Dogbe then asked if he could “share” the seats with the flight crew but his inquiry was ignored.¹⁴⁶ Shortly after that, another crewmember approached Dogbe and advised him that, if he could not remain in his assigned seat, he might need to disembark from the aircraft.¹⁴⁷ A few minutes after that, yet another crewmember demanded that Dogbe follow him to the front of the aircraft where he was asked to disembark from the aircraft because of his “attitude.”¹⁴⁸

At this point, the Delta crewmember summoned the Port Authority Police to escort Dogbe off the aircraft.¹⁴⁹ In the meantime, Dogbe claimed that one of Delta’s ground crew employees came on board to physically escort him from the aircraft.¹⁵⁰ When the police arrived, Dogbe claimed they treated him with hostility and tackled him to the ground, causing a fractured rib and a neck injury.¹⁵¹ The police then handcuffed and interrogated Dogbe for a “significant” period of time after which he was released.¹⁵² Dogbe was then taken by ambulance to an emergency room in Queens where he was treated for his injuries.¹⁵³ When Dogbe again tried to book a flight to Accra through Royal Dutch Airlines (KLM), he was advised that KLM would not sell him a ticket because of a presumably negative entry by Delta, which was partnered at the time with KLM in an alliance known as “SkyTeam.”¹⁵⁴

Dogbe subsequently brought, among other claims, causes of action against Delta for battery, assault, false imprisonment, intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, and breach of contract.¹⁵⁵ Delta filed a motion to dismiss on the grounds that the Montreal Convention both applied to and served to bar Dogbe’s claims.¹⁵⁶

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 264–65.

148. *Id.* at 265.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 266.

153. *Id.*

154. *Id.*

155. *Id.* at 266–67.

156. *Id.* at 268–69.

In determining the applicability of the Warsaw and Montreal Conventions, the court concluded that either or both applied to Dogbe's claims because Dogbe had himself asserted claims against Delta pursuant to Article 17 of the Warsaw Convention and because any purported questions of fact as to whether Dogbe's travel constituted "ticketed international travel" subject to the Warsaw and/or Montreal Conventions could have been proven or contravened by Dogbe himself.¹⁵⁷

The court then went on to analyze whether Dogbe's claims were, in fact, compensable under the Montreal Convention and determined that they were not.¹⁵⁸ The court's conclusion hinged on whether the injuries Dogbe complained of were caused by an "accident" within the meaning of the Convention.¹⁵⁹ Article 17 of the Montreal Convention provides that a carrier is only liable for damages arising out of the death or bodily injury of a passenger when the accident that caused the death or injury took place on board the aircraft or in the course of the passenger's embarking or disembarking from the aircraft.¹⁶⁰

Citing to the Supreme Court's definition of "accident" in *Air France v. Saks*,¹⁶¹ the *Dogbe* court noted that an "accident" for purposes of the Convention occurs "only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger."¹⁶² The court further noted that the Supreme Court only required that the passenger "be able to prove that some link in the chain [of causes] was an unusual or unexpected event external to the passenger."¹⁶³

Dogbe identified three separate "accidents" that constituted links in the chain that led to his injuries: (1) Delta's refusal to accommodate his medical condition and disability; (2) the provision by Delta of false information to the Port Authority Police, thereby causing them to arrest him; and (3) the use of excessive force by the Port Authority Police.¹⁶⁴

The court addressed and rejected each link in Dogbe's causal chain.¹⁶⁵ First, the court pointed out that Dogbe had failed to allege a disability in his pleadings for which an accommodation by Delta would have even been necessary.¹⁶⁶ Second, the court noted that Dogbe had failed to specifically allege what false statement was given by Delta to the Port Au-

157. *Id.* at 271.

158. *Id.* at 271-72.

159. *Id.*

160. *Id.*

161. 470 U.S. 392, 405 (1985).

162. *Id.* at 271-72 (quoting *Air France v. Saks*, 470 U.S. 392, 405 (1985)).

163. *Id.* at 272.

164. *Id.*

165. *Id.* at 272-73.

166. *Id.*

thority Police and that his complaint lacked any plausible factual allegation that Delta reported false information about him.¹⁶⁷ Third and finally, the court observed that Dogbe had failed to allege facts establishing Delta's control over the Port Authority Police and, therefore, the actions of the police did not fall within the definition of "accident" for purposes of a claim against Delta.¹⁶⁸

C. *Statute of Limitations*

1. *Narayanan v. British Airways*

Panpansam Narayanan, who suffered from advanced stage lung disease, was traveling aboard a British Airways international flight when he was purportedly denied supplemental oxygen by the flight attendants.¹⁶⁹ Six months later, he died.¹⁷⁰ His heirs and estate filed a lawsuit against British Airways under the Montreal Convention, contending that the wrongful denial of oxygen hastened his death.¹⁷¹ While brought within two years of Narayanan's death, the lawsuit was filed more than two years from the date of the flight's arrival.¹⁷² British Airways filed a motion to dismiss on the grounds that the complaint was untimely under Article 35(1) of the Convention.¹⁷³

Article 35(1) of the Montreal Convention states that a claim for damages under the Convention must be filed within two years of the date on which the aircraft arrived—or should have arrived—at its destination.¹⁷⁴ Narayanan's international flight should have arrived on December 26, 2008.¹⁷⁵ According to Article 35(1), any lawsuit complaining about an injury sustained while embarking, disembarking, or traveling aboard the aircraft would necessarily have to have been brought by December 26, 2010.¹⁷⁶ Narayanan's lawsuit was not filed until March 7, 2011.¹⁷⁷

Although the Ninth Circuit considered the analysis to be fairly straightforward and militated toward affirming the lower court's dismissal of Narayanan's claims, it felt compelled to address a nagging "factual wrinkle" that it believed had yet to be addressed by the courts: Does Article 35(1) apply "irrespective of when a claim actually accrues, or whether

167. *Id.* at 272–73.

168. *Id.* at 273.

169. *Narayanan v. British Airways*, 747 F.3d 1125, 1126 (9th Cir. 2014).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 1127–28.

175. *Id.* at 1128.

176. *Id.*

177. *Id.*

local law governs the timeliness of any claims which were not in existence when the aircraft arrived at its destination?”¹⁷⁸

In resolving this question, the Ninth Circuit addressed and disposed of the three arguments raised by the Narayanan plaintiffs in support of their position that the two-year statute could not begin to run until the injury actually accrued.¹⁷⁹

First, the court flatly refuted the plaintiffs’ contention that Article 35(1) did not apply to their claim because the clause states that “[t]he right to damages shall be extinguished if an action is not brought within a period of two years,” which meant that Article 35 can only refer to a right or cause of action already in existence upon reaching the destination.¹⁸⁰ Otherwise, the drafters would have said “any” claim for damages.¹⁸¹ The court disagreed, pointing to Article 29 of the Convention, which confirms that “any action for damages” can only be brought subject to the conditions and limits of liability set forth in the Convention, and such conditions and limitations, the court observed, include the limitations provision of Article 35.¹⁸²

Second, the court rejected the plaintiffs’ argument that the Convention’s language was ambiguous or silent and, therefore, authorized a “pass-through” under *Zicherman v. Korean Air Lines Co.*¹⁸³ to California law because the Convention failed to provide for the situation in which a claimant’s cause of action does not accrue until after the flight reaches its destination.¹⁸⁴ Disagreeing that the Convention’s language was ambiguous or silent or that the “pass-through” language of *Zicherman* applied to anything more than to the question of “who may recover, and what compensatory damages they may receive,” the court concluded that “[t]he more natural interpretation of Article 35 is that it was intended to operate without reference to when a particular claim actually accrued.”¹⁸⁵

Third and finally, the court disputed the plaintiffs’ assertion that applying California law would be consistent with Article 35(2) of the Convention, which provides: “The method of calculating [the two-year] period [set forth in Article 35(1)] shall be determined by the law of the court seized of the case.”¹⁸⁶ In rejecting this assertion, the court cited to long-standing precedent establishing that this provision merely refers to the power of the forum court to determine whether the necessary

178. *Id.*

179. *Id.*

180. *Id.* at 1129.

181. *Id.*

182. *Id.*

183. 516 U.S. 217 (1996).

184. *Narayanan*, 747 F.3d at 1129.

185. *Id.* at 1129–30.

186. *Id.* at 1130.

measures had been taken by the claimant within the two-year period to invoke the court's jurisdiction over the parties and the action, such as, for example, the computation of time periods for filing a complaint if the last day of limitations fell on a Saturday or Sunday.¹⁸⁷

Having explored and disposed of each of the plaintiffs' arguments, the *Narayanan* court reviewed the drafting history of the Warsaw and Montreal Conventions to further support its conclusion.¹⁸⁸ The court noted that the drafters of Article 29 of the Warsaw Convention—the corollary to Article 35 of the Montreal Convention—intended it to operate “like a jurisdictional prerequisite [that] extinguishes a cause of action after a fixed period of time.”¹⁸⁹

2. *Ireland v. AMR Corp.*

On December 22, 2009, George Ireland was a passenger on American Airlines Flight 331 from Miami to Kingston when the aircraft veered off the runway, crashed through a perimeter fence, crossed a road, and ended up approximately forty feet from the water line.¹⁹⁰ As a result of this alternative “landing,” which broke the aircraft's fuselage apart, Ireland filed an action on December 21, 2012, claiming that he suffered “severe mental anguish, fear of impending death, and . . . severe physical injuries.”¹⁹¹

Because Flight 331 was an international flight, it was undisputed that the Montreal Convention would govern any potential personal injury claims arising out of the crash.¹⁹² Article 35(1) of the Montreal Convention contains a limitation provision, which states that a claimant's right to damages “will be extinguished if the action is not brought within two years of the date of the arrival of the aircraft at destination, or the date on which the aircraft should have arrived at its destination.”¹⁹³ Thus, according to Article 35, Ireland had until December 22, 2011, to bring a claim under the Montreal Convention.¹⁹⁴

In the meantime, American Airlines and its parent company, AMR Corp. (collectively, American Airlines) filed for bankruptcy on November 29, 2011.¹⁹⁵ Section 362(a) of the U.S. Bankruptcy Code provides that a

187. *Id.*

188. *Id.* at 1131.

189. *Id.* (quoting *Albillo-De Leon v. Gonsales*, 410 F.3d 1090, 1097 n.5 (9th Cir. 2005)).

190. *Ireland v. AMR Corp.*, 20 F. Supp. 3d 341, 342 (E.D.N.Y. 2014).

191. *Id.*

192. *Id.* at 343.

193. *Id.* (quoting the Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999 (entered into force Nov. 4, 2003), *reprinted in* S. TREATY Doc. No. 106-45 (2003)).

194. *See id.*

195. *Id.* at 344.

bankruptcy petition operates to automatically stay the commencement or continuation of a judicial action or proceeding against debtors such as American Airlines.¹⁹⁶ Courts have interpreted Section 362(a) to bar the commencement of a lawsuit during the pendency of the automatic stay and render an action filed in contravention of the ban void.¹⁹⁷

Despite the statutory bar imposed by Section 362(a), Ireland ultimately did file a lawsuit against American Airlines, but waited until December 21, 2012, to do so.¹⁹⁸ The automatic stay was not lifted until almost a year later on December 9, 2013.¹⁹⁹ Upon the lifting of the stay, American Airlines moved to dismiss Ireland's claims as barred by the Montreal Convention's two-year limitations of actions provision.²⁰⁰

Ireland, relying on Section 108(c) of the Bankruptcy Code, asserted that Article 35's two-year limitations period had been suspended by the automatic stay imposed by Section 362(a).²⁰¹ Section 108(c) states that if a nonbankruptcy law

fixes a period for commencing or continuing a civil action in a court . . . and such period has not expired before the date of the filing of the [bankruptcy] petition, then such period does not expire until . . . 30 days after notice of the termination or expiration of the stay under section 362 . . . with respect to such claim.²⁰²

Ireland contended that, because American Airlines had filed for bankruptcy before the expiration of the limitations period, he had until thirty days after he received notice of the expiration of the automatic stay to bring his claim and, therefore, his lawsuit was more than timely filed.²⁰³

American Airlines countered that the two-year limitations provision in Article 35 was, in fact, an absolute statute of repose, that is, a "condition precedent" to filing suit, and, thus, not subject to tolling of any kind.²⁰⁴ In support of its position, American Airlines cited to multiple cases, including a Second Circuit opinion, *Fishman v. Delta Air Lines, Inc.*,²⁰⁵ that had addressed the Warsaw Convention's version of Article 35 and concluded that the Convention's limitations of action provision was a "condition precedent to suit" that could not be tolled.²⁰⁶ None of the cases cited by American Airlines discussed the intersection of the automatic stay

196. *Id.*; see also 11 U.S.C. § 362(a)(1).

197. See, e.g., *In re Joe DeLisi Fruit Co.*, 11 B.R. 694, 697 (Bankr. D. Minn. 1981).

198. *Ireland*, 20 F. Supp. 344.

199. *Id.* at 343.

200. *Id.*

201. *Id.* at 344.

202. *Id.* (quoting 11 U.S.C. § 108(c)).

203. *Id.*

204. *Id.* at 344–45.

205. 132 F.3d 138 (2d Cir. 1998).

206. *Ireland*, 20 F. Supp. 3d at 344.

imposed by the Bankruptcy Code and the limitations-of-claims provision in either the Warsaw or Montreal Conventions.²⁰⁷

Ireland, on the other hand, did cite to two cases that specifically addressed the effect of the automatic stay on the limitations provision, *New Pentax Film, Inc. v. Trans World Airlines, Inc.*²⁰⁸ and *Okeke v. Northwest Airlines, Inc.*²⁰⁹ In *New Pentax Film*, the court found that, while Section 108(c) did not toll the Convention's two-year statute, it did serve to extend the deadline for filing the claim until thirty days after notice of the termination of a bankruptcy stay.²¹⁰ Similarly, the *Okeke* court, which relied upon the analysis in *New Pentax Film*, determined that a plaintiff would have until the later of either: (1) thirty days after the termination of the stay or (2) the date that the two-year limitations period would otherwise expire in the absence of Section 108(c).²¹¹ Also discussed were two additional cases analyzing the interaction between Section 108(c) and the limitations provisions of the Montreal and Warsaw Conventions, *Husmann v. Trans World Airlines, Inc.*²¹² and *Linders v. MN Airlines, LLC*,²¹³ that had concluded that the thirty-day extension provided by Section 108(c) applied to Warsaw Convention claims.²¹⁴

The *Ireland* court, however, rejected the *New Pentax Film* opinion as having been superseded by the Second Circuit's holding in *Fishman* and the *Okeke* and *Husmann* opinions as being both unpersuasive and not binding upon a court sitting in New York.²¹⁵ Further, the court found "without merit" Ireland's policy argument that, if Section 108(c) were not applied to extend the two-year limitation period, injured parties would be unfairly prevented from asserting claims under the Montreal Convention.²¹⁶ First, the court pointed out that a plaintiff had options to overcome the obstacle presented by Section 362's automatic stay. A plaintiff, for example, could file his lawsuit within the two-year limitation period—despite the stay imposed by Section 362—whereupon the lawsuit would be abated until the lifting of the stay.²¹⁷ Or a plaintiff could simply apply to the bankruptcy court in which the defendant's petition has been filed to lift the stay for purposes of filing his action.²¹⁸ Second, the court

207. *Id.* at 344–45.

208. 936 F. Supp. 142 (S.D.N.Y. 1996).

209. No. 1:07CV538, 2010 WL 780167 (M.D.N.C. Feb. 26, 2010).

210. *Ireland*, 20 F. Supp. 3d at 345; *New Pentax Film*, 936 F. Supp. at 146–47.

211. *Ireland*, 20 F. Supp. 3d at 346, *Okeke*, 2010 WL 780167, at *6.

212. 169 F.3d 1151 (8th Cir. 1999).

213. 2006 WL 167611, at *4–6 (E.D. Mo. Jan. 23, 2006) (slip op.).

214. *Ireland*, 20 F. Supp. 3d at 347.

215. *Id.*

216. *Id.* at 348.

217. *Id.*

218. *Id.*

observed that Ireland had failed to explain how the potential unfairness imposed by the automatic stay differed from the unfairness attendant to situations where tolling on other statutory or equitable grounds was deemed unavailable to extend the two-year limitations period established under the Montreal Convention.²¹⁹ The court concluded that Section 108(c) did not control the limitations provision of the Montreal Convention and that Ireland's suit should be dismissed for failure to file his complaint within the two-year period following the crash.²²⁰

IV. GENERAL AVIATION REVITALIZATION ACT

It has now been twenty years since Congress passed the General Aviation Revitalization Act (GARA), which created an eighteen-year statute of repose for lawsuits against manufacturers of general aviation aircraft and component parts.²²¹ The statute of repose generally begins to run from

the date of delivery of the aircraft to its first purchaser or lessee, if delivered directly from the manufacturer, . . . [or] the date of first delivery of the aircraft to a person engaged in the business of selling or leasing such aircraft, . . . [or] with respect to any new component, system, subassembly, or other part which replaced another component, system, subassembly, or other part originally in, or which was added to, the aircraft, and which is alleged to have caused such death, injury, or damage, . . . the date of completion of the replacement or addition.²²²

The GARA statute of repose, however, does not completely shield manufacturers of general aviation aircraft and their component parts from liability. There are four exceptions to the statute of repose: (1) if the manufacturer committed a fraud on the Federal Aviation Administration (FAA) in relation to the aircraft or component part at issue, (2) if the person injured or killed was a passenger for purposes of receiving treatment for medical or other emergency, (3) if the person injured or killed was not aboard the aircraft at the time of the accident, and (4) if the action is brought under a written warranty enforceable under law but for the operation of GARA.²²³

On November 24, 2008, Rodney and Rebecca Tillman hired Gregory Secrest to fly them from Hot Springs, Arkansas, to Nashville in his 1979 Beechcraft 95 B55 Baron twin-engine aircraft.²²⁴ During the flight, the

219. *Id.*

220. *Id.*

221. General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552, as amended Pub L. 105-102, § 3(e), 111 Stat. 2216 (1997), *reprinted in* 49 U.S.C. § 40101.

222. *Id.*

223. *Id.*

224. *Tillman v. Raytheon Co.*, 430 S.W.3d 698, 701 (Ark. 2013).

left engine of the Beech Baron lost power and the aircraft went into a flat spin from which the pilot was unable to recover, crashing in the woods and killing all aboard.²²⁵ Because the aircraft had been delivered to its first purchaser on December 21, 1978, GARA's statute of repose ran on December 21, 1996, or twelve years before the fatal crash.²²⁶

The special administrator of the Tillmans' estates, Davis Tillman, subsequently brought a wrongful death action against, among others, the manufacturer of the 1978 aircraft (collectively, the Raytheon defendants).²²⁷ In the lawsuit, he alleged that the Raytheon defendants had: (1) negligently designed the aircraft resulting in its propensity to engage in an unrecoverable flat spin; (2) misrepresented, concealed, or withheld material information from the FAA about the flat-spin characteristic of the Beech Baron; and (3) negligently failed to include the most current instructions on spin avoidance and control in the aircraft's revised flight manual.²²⁸ The trial court granted summary judgment in favor of the Raytheon defendants on all of the claims against them.²²⁹ Tillman appealed.²³⁰

In his first point of error, Tillman contended that summary judgment with respect to the fraud exception to GARA should be reversed because a genuine issue of material fact existed as to whether the Raytheon defendants withheld or concealed material information from the FAA or misled or misinformed the FAA about the Beech Baron's propensity to enter into an uncontrollable flat spin.²³¹ In reviewing the evidence submitted by Tillman in support of his fraud claim, the Arkansas Supreme Court concluded that, instead of constituting evidence of fraud or concealment, the evidence actually reflected "open and candid communications with the FAA about the safety of the flat-spin characteristic" of the aircraft.²³² In other words, the evidence submitted by Tillman established the opposite of a material fact necessary to his fraud claim.

In his second point of error, Tillman argued that a genuine issue of material fact existed as to whether GARA's statute of repose had been tolled by the Raytheon defendants' publication of an allegedly defective flight manual.²³³ Tillman alleged that the 2002 supplement to the aircraft's Pilot Operating Handbook (POH) failed to incorporate safety information on the subject of spin avoidance and spin recovery characteristics that the

225. *Id.*

226. *Id.* at 704.

227. *Id.* at 701-02.

228. *Id.* at 702.

229. *Id.*

230. *Id.*

231. *Id.* at 704.

232. *Id.* at 707.

233. *Id.*

Raytheon defendants had been publishing in a series of “safety communi-ques.”²³⁴ The Arkansas high court again rejected Tillman’s argument, observing that failing to update a POH was not analogous to revising the POH defectively, which would implicate the rolling provision in GARA.²³⁵ The court also observed that Tillman’s complaint was in effect a “failure-to-warn” claim and that the failure to warn of a newly perceived problem did not correlate to the replacement of a part for purposes of triggering the rolling provision of GARA.²³⁶

Finally, Tillman argued that GARA was unconstitutional in that it “places an unreasonable and arbitrary restraint on a person’s ability and right to be compensated for a loss that was proximately caused by a third party.”²³⁷ The Arkansas Supreme Court held, however, that it was precluded from considering Tillman’s unconstitutionality argument as he had failed to preserve it at the trial court level.²³⁸ Having resolved all issues before it, the Arkansas high court affirmed the grant of summary judgment against Tillman.²³⁹

V. AVIATION AND TRANSPORTATION SECURITY ACT

The Aviation and Transportation Security Act (ATSA) immunizes the “voluntary disclosure of any suspicious transaction relevant to a possible violation of law or regulation, relating to air piracy, a threat to aircraft or passenger safety, or terrorism” from civil liability, provided the disclosure was not made “with actual knowledge that the disclosure was false, inaccurate, or misleading; or . . . with reckless disregard as to [its] truth or falsity. . . .”²⁴⁰

In *Air Wisconsin Airlines Corp. v. Hoepfer*, the U.S. Supreme Court held that ATSA immunity may not be denied without finding that the disclosure was also materially false.²⁴¹

William Hoepfer had been a pilot with Air Wisconsin for approximately six years when the company required him to transition to a new aircraft.²⁴² In December 2004, Hoepfer flew to Virginia for what was his last opportunity to complete a proficiency check after failing three

234. *Id.*

235. *Id.* at 708.

236. *Id.*

237. *Id.* at 709.

238. *Id.*

239. *Id.*

240. 49 U.S.C. § 44941.

241. 134 S. Ct. 852, 858 (2014).

242. *Id.*

prior attempts.²⁴³ Both Hoyer and the airline understood that he would lose his job if he failed a fourth time.²⁴⁴ After failing this fourth test, Hoyer “responded angrily,” threatened to contact the union, and accused the instructor pilot of “railroading the situation.”²⁴⁵ His instructor reported the incident to his supervisor, and Hoyer left to catch his return flight to his home in Denver.²⁴⁶

Several hours later, Air Wisconsin management discussed the situation and became “concern[ed] about what Hoyer might do next.”²⁴⁷ As a federal flight deck officer (FFDO), Hoyer was licensed to carry a firearm while piloting an aircraft.²⁴⁸ While Air Wisconsin had no reason to suspect he was carrying one at the time, they did not believe they could rule it out.²⁴⁹ The executives also recalled two prior events where disgruntled employees “lashed out violently.”²⁵⁰ Due to “Hoyer’s anger, his impending termination, the chance that he might be armed, and the history of assaults by disgruntled airline employees,” Air Wisconsin elected to call authorities at the TSA.²⁵¹ As determined by the jury, Air Wisconsin “made two statements [to the TSA]: first, that Hoyer ‘was an FFDO who may be armed’ and that the airline ‘was concerned about his mental stability and the whereabouts of his firearm;’” and second, “within the subject of an email, that an [u]nstable pilot in [the] FFDO program was terminated today.”²⁵² TSA ordered Hoyer’s plane back to the gate, whereupon he was removed and searched; he was not carrying a firearm.²⁵³ Hoyer returned to Denver later in the day and Air Wisconsin fired him the following day.²⁵⁴

Hoyer brought several claims against Air Wisconsin in Colorado state court, including defamation, and Air Wisconsin moved for summary judgment on the basis of ATSA immunity.²⁵⁵ The trial court denied summary judgment, however, holding that the jury must determine whether “Air Wisconsin ‘made the disclosure [to the TSA] with actual knowledge that the disclosure was false, inaccurate, or misleading’ or ‘with reckless

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 859.

249. *Id.*

250. *Id.* (citing *United States v. Calloway*, 116 F.3d 1129, 1131 (6th Cir. 1997); Eric Malnic, *Report Confirms That Gunman Caused 1987 Crash of PSA Jet*, L.A. TIMES, Jan. 6, 1989, at 29).

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

disregard as to its truth or falsity.’”²⁵⁶ The case was tried, and the jury returned a verdict in favor of Hoepfer.²⁵⁷

Affirmed by the Colorado Court of Appeals, the case was then brought to the Colorado Supreme Court.²⁵⁸ While it also affirmed, the Colorado Supreme Court held the trial judge erred in submitting the issue of ATSA immunity to the jury.²⁵⁹ Instead, “immunity under the ATSA is a question of law to be determined by the trial court before trial.”²⁶⁰ The court held this error to be harmless, however, because, in its analysis, Air Wisconsin’s statements were made with reckless disregard as to their truth or falsity.²⁶¹

The U.S. Supreme Court granted certiorari to determine whether the trial court was also required to find that the Air Wisconsin’s statements were materially false.²⁶² Holding that it was, the Court explained that when “Congress patterned the exception to ATSA immunity after the actual malice standard of [*New York Times v. Sullivan*] . . . [it] meant to incorporate the settled meaning of actual malice.”²⁶³ Accordingly, ATSA did not mean to impose liability for “materially true statements made recklessly.”²⁶⁴

In the context of the statements made to the TSA, the Court held that a disclosure is materially false if a reasonable TSA official would consider the omission or misrepresentation important in determining how to respond to a situation.²⁶⁵ Applying this standard to the facts of *Air Wisconsin*, the Court found the airline entitled to ATSA immunity.²⁶⁶ With respect to the report that Hoepfer may have been armed, the Court considered that a reasonable TSA officer under the circumstances would want to have investigated the whereabouts of Hoepfer’s weapon even if he had been told that Hoepfer was an FFDO.²⁶⁷ Likewise, the fact that Hoepfer was not yet terminated at the time of Air Wisconsin’s report was inconsequential: “No reasonable TSA officer would care whether an angry, potentially armed airline employee had just been fired or merely knew he was about to meet that fate.”²⁶⁸ Over three dissenting justices, the majority also concluded that Air Wisconsin’s

256. *Id.* at 860.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* (quoting *Air Wis. Airlines Corp. v. Hoepfer*, 320 P.3d 830, 836–37 (Colo. 2012)).

261. *Id.*

262. *Id.* at 861.

263. *Id.* at 861; see also *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

264. *Id.* at 862.

265. *Id.* at 864.

266. *Id.*

267. *Id.* at 864–65.

268. *Id.* at 865.

statements as to Hoepfer's mental stability did not convey a greater sense of concern than if they had simply reported he "[blew] up" following a training session.²⁶⁹ "It would be inconsistent with the ATSA's text and purpose," the Court held, "to expose Air Wisconsin to liability because its employee could have chosen a slightly better phrase than 'mental stability' to articulate its concern."²⁷⁰

VI. GOVERNMENTAL LIABILITY

Most aviation-related claims against the United States are brought pursuant to the Federal Tort Claims Act (FTCA), which waives sovereign immunity

for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.²⁷¹

A. *Conflict of Laws*

Actions under the FTCA are subject to the "whole law" of the place where the alleged negligent act or omission occurred, including that jurisdiction's choice-of-law rules.²⁷² Venue is proper only in the judicial district in which the plaintiff resides or the act or omissions occurred.²⁷³

Metro Aviation, Inc. v. United States involved particularly challenging questions concerning the choice and interpretation of applicable law in the context of an indemnity and contribution action against the United States.²⁷⁴ On February 6, 2007, a plane owned by Metro and piloted by its employee, Vince Kirol, crashed on approach to Gallatin Field Airport (BZN) near Bozeman, Montana.²⁷⁵ Metro alleged that a controller at Salt Lake Air Route Traffic Control Center (ARTCC) cleared the pilot for a visual approach to BZN, but failed to advise him of a minimum safe altitude alert.²⁷⁶ As determined by the NTSB, the aircraft descended toward the airport and collided with terrain approximately eighty feet below a

269. *Id.* at 865–66.

270. *Id.* at 866.

271. 28 U.S.C. § 1346(b).

272. *See id.*; *Richards v. United States*, 369 U.S. 1, 11 (1962).

273. 28 U.S.C. § 1402(b).

274. 2014 WL 2708630 (D. Utah June 16, 2014).

275. *Id.* at *1.

276. *Metro Aviation, Inc. v. United States*, 2010 WL 1881875, at *1 (D. Mont. May 7, 2010).

ridge line obscured by the darkness.²⁷⁷ The pilot and his two passengers, Paul Erickson and Darcy Dengel, died and the aircraft was destroyed.²⁷⁸

Following the crash, Metro received claims from the estates of passengers Erickson and Dengel.²⁷⁹ Metro and its insurers settled them both, Erickson out-of-court, and Dengel after a lawsuit was brought in the Montana state court.²⁸⁰ The United States did not participate in these settlement discussions, nor was it involved in the state court action.²⁸¹ Subsequently, Metro and its insurers (collectively, Metro) filed a claim against the United States in the U.S. District Court for the District of Montana for indemnity or, in the alternative, contribution, alleging that that the negligence of air traffic controllers in the Salt Lake ARTCC caused the accident.²⁸²

The United States moved to transfer the case to Utah, arguing that venue was improper in Montana under the FTCA because “the act or omission complained of occurred” in Utah, the state where the Salt Lake ARTCC is located.²⁸³ Metro, relying heavily on *Forest v. United States*,²⁸⁴ maintained that “the act or omission occurred in Montana when the pilot failed to receive warnings that allegedly would have prevented the crash.”²⁸⁵ In *Forest*, a controller in Utah had provided inaccurate information to an aircraft transiting to Montana, which the plaintiffs claimed contributed to the crash. Construing the FTCA, the *Forest* court held that the controller’s actions did not become tortious until the information was received by the aircraft and therefore applied Montana law.²⁸⁶ The *Metro* court found the *Forest* case distinguishable, however, because here the failure to issue a safety alert was allegedly negligent, and the failure or omission occurred entirely in Utah.²⁸⁷ Accordingly, the court granted the United States’ motion to transfer the case.²⁸⁸

Once in Utah, the United States moved for partial summary judgment on the basis that Metro’s contribution and indemnity claims were barred under both Utah and Montana law, and alternatively that Utah law applied in the event that the laws conflict.²⁸⁹ Metro agreed that Utah law barred

277. *Metro Aviation, Inc.*, 2014 WL 2708630, at *1.

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.* The plaintiffs also asserted claims for negligence and subrogation, which remain pending. *See id.*

283. *Id.* *See also Metro Aviation*, 2010 WL 1881875, at *1.

284. 539 F. Supp. 171 (D. Mont. 1982).

285. *Metro Aviation*, 2010 WL 1881875, at *2–3.

286. *See Forest*, 539 F. Supp. at 175–76.

287. *Metro Aviation*, 2010 WL 1881875, at *3.

288. *Id.* at *3–4.

289. *Metro Aviation*, 2014 WL 2708630, at *2.

claims for contribution and indemnity, but argued that Montana law both governed and allowed such claims.²⁹⁰ Applying Utah's approach to choice-of-law questions, the court determined that Montana had the "most significant relationship" to the litigation under the factors articulated by the Restatement (Second) of Conflict of Laws.²⁹¹ While the controller's alleged negligence took place in Utah, the intrastate nature of the flight from one point in Montana to another weighed heavily in Metro's favor.²⁹²

Finding Montana law unsettled as to whether claims for indemnity or contribution were permitted under the circumstances of this case, however, the court certified three questions to the Montana Supreme Court: (1) whether a person who has settled a claim with a victim may bring an action for contribution against a joint tortfeasor if the victim never filed a tort action, i.e., the Erickson claim; (2) whether a defendant who settles with the plaintiff before trial may bring a subsequent action for contribution against a person that was not a party to the original action, i.e., the Dengel claim; and (3) whether Montana recognizes a common law right to indemnity in favor of a party whose negligence was "remote, passive, or secondary."²⁹³ After briefing and oral argument, the Montana Supreme Court answered "no" to each question.²⁹⁴

On the United States' renewed motion for summary judgment, the court found in favor of the government on both the indemnity and contribution claims.²⁹⁵ Rather than engage in an analysis of Kirol's negligence, the court held that Metro was not entitled to indemnity under any circumstances: either Metro was negligent and therefore not entitled to indemnity, or it was not negligent and therefore had no liability to the passengers for the settlement it sought in indemnity.²⁹⁶ Similarly, the court found the Montana Supreme Court's interpretation of the Montana contribution statute required judgment in favor of the United States as to Metro's claims for contribution.²⁹⁷ Erickson had never filed an action against Metro, so it was never made a "party to an action" as the statute required.²⁹⁸ The statute also required contribution claims to be brought as third party claims in the original action, which Metro did not attempt in the case brought by Dengel.²⁹⁹

290. *Id.*

291. *Metro Aviation, Inc. v. United States*, 2012 WL 2914521, at *1-3 (D. Utah July 16, 2012), citing Restatement (Second) of Conflict of Laws § 145(2) (1971).

292. *Id.* at *2.

293. *See Metro Aviation*, 2014 WL 2708630, at *2.

294. *Id.*; *see Metro Aviation, Inc. v. United States*, 305 P.3d 832, 833 (Mont. 2013).

295. *Metro Aviation*, 2014 WL 2708630, at *3.

296. *Id.*

297. *Id.* at *4.

298. *Id.*

299. *Id.*

Finally, the court rejected Metro's cross-motion for summary judgment, which argued that the Montana contribution statute, as interpreted, violated Metro's right to equal protection under the Montana and U.S. Constitutions as it denied the right to contribution to persons who, for procedural reasons such as venue and jurisdiction, were otherwise unable to join a joint tortfeasor.³⁰⁰ First, the court found that Metro lacked standing reasoning that "Metro [had] not established that it [was] a member of the class it define[d] in its briefs," because Metro did not attempt to join the United States in the original action, such as by removing the matter to federal court.³⁰¹ Second, the court rejected the plaintiffs' argument as a collateral attack on the Montana Supreme Court's interpretation of its state's statute.³⁰² To the extent that Metro based its arguments on the Montana Supreme Court's interpretation of the statute, the court added, "'a mere error of state law' is not a denial of . . . equal protection."³⁰³

B. *Intentional Torts*

The FTCA excludes from its waiver of sovereign immunity those claims "arising out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution," among other enumerated intentional torts, unless due to the acts or omissions of a "law enforcement officer."³⁰⁴

Two recent federal district court cases affirm the prevailing view³⁰⁵ that TSA airport security screeners are not "law enforcement officers" under the FTCA.

In *Hernandez v. United States*, Hernandez claimed that he was subjected to "unlawful detention, harass[ment], interrogation, embarrassment, and other torts" on several occasions passing through TSA airport security.³⁰⁶ Hernandez sued the United States and the TSA under the FTCA for negligence, false arrest, assault, battery, false imprisonment, invasions of privacy, and the intentional and negligent infliction of emotional distress.³⁰⁷ Pursuant to the Westfall Act, the court readily granted the United States'

300. *Id.* at *5–6.

301. *Id.*

302. *Id.* at *6.

303. *Id.* (quoting *Gryger v. Burke*, 334 U.S. 728, 731 (1948)).

304. 28 U.S.C. § 2680(h).

305. *See, e.g.* *Walcott v. United States*, 2013 WL 5708044, at *2–3 (E.D.N.Y. Oct. 18, 2013); *Weinraub v. United States*, 927 F. Supp. 2d 258, 262–63 (E.D.N.C. 2012); *Corbett v. Transp. Security Admin.*, 968 F. Supp. 2d 1171 (S.D. Fla. 2012); *Coulter v. U.S. Dep't of Homeland Security*, 2008 WL 4416454, at *7–9 (D.N.J. Sept. 24, 2008); *Welch v. Huntleigh USA Corp.*, 2005 WL 1864296, at *5 (D. Or. Aug. 4, 2005).

306. 2014 WL 803774, at *1 (D. Colo. Feb. 28, 2014).

307. *Id.* Both Hernandez and Pelligrino, discussed *infra*, additionally brought claims against individual TSA screeners alleging violations of their First and Fourth Amendment rights; these claims are outside the scope of this article.

motion to dismiss the tort claims against the TSA for lack of subject-matter jurisdiction.³⁰⁸ The court also dismissed Hernandez's tort claims against the United States, finding itself without jurisdiction due to the "intentional torts" exception and inapplicability of the "law enforcement officer" proviso.³⁰⁹

The FTCA defines law enforcement officers as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."³¹⁰ First, the court noted that screeners are not empowered to "seize evidence" or "make arrests," but are instead required to call law enforcement officers to respond to their discovery of an illegal item.³¹¹ Second, the court, as most other courts before it, held that the phrase "to execute searches" was not meant to encompass the sort of limited purpose, consensual administrative searches that TSA screeners perform.³¹² The court also recognized, with respect to any "uncertainty about whether Congress intended to encompass TSA screeners within the 'law enforcement' proviso, the uncertainty must be resolved against the waiver of sovereign immunity."³¹³ Hernandez's claims for false arrest, assault, battery, and false imprisonment were dismissed as falling within the "intentional torts" exception.³¹⁴

The court also dismissed Hernandez's remaining tort claims under the exception, even though they were not specifically enumerated. As to Hernandez's claims for negligence and the negligent infliction of emotional distress, the court found they were an attempt to "simply recast an intentional tort claim as one for simple negligence to circumvent [the "intentional torts" exception]."³¹⁵ Such claims "[arose] out of" Hernandez's previously barred intentional tort claims.³¹⁶ Similarly, the court held that Hernandez's "unlawful search, invasion of privacy, and intentional infliction of emotional distress claims [were] derivative of his assault and battery claims [and were] therefore also precluded."³¹⁷

In *Pelligrino v. United States*, Pelligrino also proceeded against the United States under the FTCA on claims arising from an altercation she had with TSA screeners at the Philadelphia International Airport.³¹⁸ For reasons substantially equivalent to those in *Hernandez*, the court

308. *Id.* at *4; see also 28 U.S.C. § 2679(a).

309. *Id.* at *8–9.

310. 28 U.S.C. § 2680(h).

311. *Id.* at *5.

312. *Id.* at *6 (citing 49 U.S.C. §§ 44901–44902).

313. *Id.* at *8 (citing *Trentadue v. United States*, 397 F.3d 840, 852 (10th Cir. 2005)).

314. *Id.* at *8.

315. *Id.* at *8–9.

316. *Id.* at *9 (quoting *Guccione v. United States*, 847 F.2d 1031, 1034 (2d Cir. 1988)).

317. *Id.* at *9.

318. 2014 WL 1489939, at *1–3 (E.D. Pa. Apr. 16, 2014).

dismissed Pelligrino's claims for false arrest, false imprisonment, malicious prosecution, and civil conspiracy.³¹⁹ With respect to Pelligrino's claim for damage to her personal property, however, the court rejected the United States' argument that it, too, was barred under the "intentional torts" exception.³²⁰ Rather, the court found that it "ha[d] not been framed in relation to the false arrest and false imprisonment that ha[d] also been alleged . . . [and] stem[med] from different, separate activity."³²¹ Accordingly, the court denied summary judgment to the United States on Pelligrino's property damage claim.³²²

C. *Duty and Causation*

Aviation-related claims against the United States pursuant to the FTCA typically proceed on a theory of common law negligence. In *Turturro v. United States*, the court explored the elements of duty and causation under Pennsylvania law.³²³ On May 22, 2008, Charles Angelina was conducting pattern work at Northeast Philadelphia Airport (PNE) with flight instructor Adam Braddock on what was purported to be his last training flight on board a Grumman AA-1C (N9555U) before the private pilot check ride.³²⁴ While the aircraft was on final approach to its second touch and go on Runway 33, an Agusta helicopter operated by co-defendant Agusta Aerospace, hovering east of Runway 33, requested permission to depart the airport toward the west.³²⁵ After the helicopter advised that it had the Grumman in sight, the local controller cleared the helicopter on course, noting that the Grumman would be in a "left downwind departure."³²⁶ During its climb-out from Runway 33, the controller instructed the Grumman to "make right traffic."³²⁷ The Grumman did not acknowledge the instruction but, rather, banked into what eyewitnesses described as an uncoordinated right turn at an altitude of approximately 200 feet above ground level.³²⁸ The helicopter pilots, surprised by the turn, immediately arrested forward movement and came to a stop about one-half mile from the Grumman.³²⁹ They then watched as the Grumman stalled and crashed, killing both occupants.³³⁰

319. *See id.* at *4–8.

320. *Id.* at *8.

321. *Id.*

322. *Id.*

323. 2014 WL 4188076 (E.D. Pa. Aug. 22, 2014).

324. *Id.* at *1–2.

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.* at *3–4.

329. *Id.* at *4.

330. *Id.*

Several lawsuits were filed, but eventually the claims brought by the estates of Braddock and Angelina against Agusta and the United States were consolidated in the Eastern District of Pennsylvania.³³¹ As to the United States, the plaintiffs argued that the controller should have instructed the Grumman to make right traffic “speed and altitude permitting.”³³² In the absence of such a qualification, the aircraft executed an immediate turn at a stage of flight, according to the plaintiffs’ expert, “when it is most difficult for pilots to take instructions and an aircraft is most prone to danger.”³³³ The court found no prohibition, however, on communicating with a pilot during his departure climb and rejected the implication that a communication so timed necessarily conveys a sense of urgency.³³⁴ Accordingly, the court found the controller did not breach her duty.

More significant to the court, however, was the plaintiffs’ inability to establish that any action of the controller proximately caused the Grumman to stall and crash. Although the plaintiffs initially advanced a theory that the Grumman encountered wake turbulence from the helicopter, an earlier departed business jet, or downwash from the hovering helicopter’s rotors, their position at oral argument zeroed in on the “startle reaction theory.”³³⁵ Specifically, the plaintiffs claimed that the Grumman pilots immediately turned right in response to the controller’s instruction and were “startled by the presence of a large Agusta helicopter in forward flight and accelerating towards them as a potential collision hazard.”³³⁶ In response to the encounter, the student pilot allegedly yanked back on the controls, causing the aircraft to stall and crash.³³⁷

While countenancing a “startle” theory of proximate cause in general, the court found it unsupported by the facts of this case because the plaintiffs could not establish that either of the Grumman pilots saw the Agusta.³³⁸ And, even if they had, there was no evidence that they were startled by the helicopter’s presence.³³⁹ The testimony of the helicopter pilots, who saw the Grumman and did not consider it a collision hazard, led the court to question whether the Grumman pilots actually perceived a threat that startled them.³⁴⁰ Most importantly, the plaintiffs were unable

331. For an account of the case’s complex procedural history, see *Turturro v. Agusta Aerospace Corp.*, 2010 WL 3239199 (E.D. Pa. Aug. 13, 2010); see also *Turturro*, 2014 WL 4188076, at *1 n.1.

332. *Turturro*, 2014 WL 4188076, at *13–14.

333. *Id.* at *13.

334. *Id.* at *14.

335. See *id.* at *15–18.

336. *Id.* at *17.

337. *Id.* at *14.

338. *Id.* at *18.

339. *Id.*

340. *Id.*

to establish that the controller's instructions created an actual collision hazard.³⁴¹ As a result, the plaintiffs were forced to argue that the presence of the helicopter one-half mile away created a "perceived" collision hazard in the minds of the Grumman pilots. Characterizing the plaintiffs' theory of causation as "sheer speculation," the court granted summary judgment in favor of the United States.³⁴² The court also granted summary judgment in favor of Agusta, holding that the pilots followed the controller's instructions of ATC, kept the Grumman in sight as instructed, maintained appropriate separation, and complied with all pertinent Federal Aviation Regulations.³⁴³

Collaterally, the *Turturro* case also addresses the FAA's duty to preserve radar data in the context of the plaintiffs' claim for the spoliation of evidence.³⁴⁴ As a non-radar facility, the PNE Tower had no radar data to produce.³⁴⁵ However, the plaintiffs' expert expected that Philadelphia International Terminal Radar Approach Control (TRACON) would have coverage of PNE and requested its radar data pursuant to the Freedom of Information Act.³⁴⁶ By the time the request was submitted, 105 days after the accident, the data had been overwritten subject to the facility's standard forty-five day retention policy.³⁴⁷

The plaintiffs alleged that the FAA was aware of its culpability immediately after the accident, but nevertheless destroyed radar evidence that would enable the plaintiffs to prove their claims.³⁴⁸ In response, the United States referred the court to the FAA's document retention policy which, inter alia, provides that "an air traffic facility that 'provided no direct or indirect air traffic services to the aircraft in question' must retain documentation such as radar data only '[w]hen requested by specific persons."³⁴⁹ Because Philadelphia TRACON provided no services to the aircraft and because a request was not submitted within the forty-five day period, the court rejected the plaintiffs' motion for a spoliation sanction.³⁵⁰

341. *Id.*

342. *Id.* at *18–19.

343. *Id.* at *13.

344. *Id.* at *20.

345. *Id.* at *21.

346. *Id.*

347. *Id.*

348. *Id.* at *20.

349. *Id.* at *21.

350. *Id.*