

# Aviation Law: A Survey of Recent Trends and Developments

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This aviation law Article focuses on selected developments during a two-year survey period from June 1, 2007 to May 31, 2009. The first part of this Article discusses federal preemption of, and immunity from, state law tort claims. The second part examines recent aviation decisions involving jurisdiction, venue, and choice of law. The third part discusses discovery and evidence issues unique to aviation law. The fourth part reviews recent product liability decisions. The fifth and final part reviews important opinions analyzing aviation insurance.

## I. FEDERAL PREEMPTION AND IMMUNITY

### A. *The Federal Aviation Act of 1958 and the Airline Deregulation Act of 1978*

In *Diana v. NetJets Services*,<sup>1</sup> a Connecticut superior court denied the defendant's motion to dismiss a personal injury negligence claim asserted by an aviation school student who was allegedly struck by the wing of a taxiing aircraft while walking on an airport median.<sup>2</sup> The

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1. No. CV075011701S, 2007 WL 4822585 (Conn. Super. Ct. Dec. 27, 2007).

2. *Id.* at \*6-7.

defendant argued that the Federal Aviation Act of 1958 (Aviation Act)<sup>3</sup> or the Airline Deregulation Act of 1978 (ADA)<sup>4</sup> preempted the negligence claim and that the doctrine of implied field preemption applied because the United States Congress had decided that a single, uniform system of regulation was necessary to promote air safety. The plaintiff argued that the claims were not preempted because there is no express preemption of negligence claims.<sup>5</sup>

The court ultimately adopted the preemption analysis of two other recent decisions:<sup>6</sup> *Aldana v. Air East Airways, Inc.*<sup>7</sup> and *Abdullah v. American Airlines, Inc.*<sup>8</sup> The court explained that federal regulations impliedly preempted the field of aviation safety, so the standard of care is preempted even though the state remedy of a negligence claim is not.<sup>9</sup> Whether the aircraft had been driven in a “careless or reckless” manner, as prohibited by 14 C.F.R. § 91.13(a),<sup>10</sup> was the appropriate standard of care.<sup>11</sup> Although the complaint did not cite to a federal standard, the court denied the motion to dismiss.<sup>12</sup> The court followed United States Supreme Court precedent,<sup>13</sup> holding that Congress did not intend to preempt all tort actions.<sup>14</sup> The savings clause of the Aviation Act<sup>15</sup> expressly preserves state law remedies, including claims for personal injury.<sup>16</sup>

In *Landis v. U.S. Airways, Inc.*,<sup>17</sup> a magistrate judge in the United States District Court for the Western District of Pennsylvania considered both a motion to dismiss and a motion for judgment on the pleadings filed by the defendants.<sup>18</sup> The plaintiff allegedly sustained injuries from a nose gear collapse during pushback from the terminal. The

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3. Pub. L. No. 85-726, 72 Stat. 731 (codified as amended in scattered sections of 49 U.S.C.).

4. Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.).

5. *Diana*, 2007 WL 4822585, at \*2.

6. *Id.* at \*6.

7. 477 F. Supp. 2d 489 (D. Conn. 2007).

8. 181 F.3d 363 (3d Cir. 1999).

9. *Diane*, 2007 WL 4822585, at \*6.

10. 14 C.F.R. § 91.13(a) (2009).

11. *Diana*, 2007 WL 4822585, at \*4 & n.10.

12. *See id.* at \*7.

13. *See id.* at \*2-3 (citing *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 222, 231 n.7 (1995); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383, 390 (1992)).

14. *Id.* at \*6.

15. 49 U.S.C. § 40120(c) (2006).

16. *Diana*, 2007 WL 4822585, at \*2 & n.4, \*6.

17. No. 07-CV-1216, 2008 WL 728369 (W.D. Pa. Mar. 18, 2008).

18. *Id.* at \*1.

plaintiff asserted that the defendant airline did not take necessary steps to prevent the accident, even after a crew member warned that the landing gear wheel was not oriented with the plane's nose during preflight inspection.<sup>19</sup> The defendants successfully argued that the Aviation Act preempted the standard of care imposed by Pennsylvania common law and that the plaintiff failed to allege that the defendants violated a particular federal standard of care.<sup>20</sup> Even though the complaint referred to the Aviation Act and generally alleged facts demonstrating "careless and reckless" operation, the plaintiff failed to identify the specific regulation violated.<sup>21</sup> Accordingly, the court held that in the absence of references in the pleadings to specific regulations, a complaint alleging "careless and reckless" operation fails to state a claim for relief.<sup>22</sup>

In *Glorvigen v. Cirrus Design Corp.*,<sup>23</sup> the United States District Court for the District of Minnesota denied an aircraft manufacturer's motion for summary judgment that claimed the doctrines of "complete preemption" and "conflict preemption" applied.<sup>24</sup> The manufacturer alleged that the Aviation Act completely preempted the field of aviation safety and that conflict preemption barred the plaintiff's claims because it would be impossible "to comply both with FAA [Aviation Act] standards and state negligence standards."<sup>25</sup> For complete preemption to apply, the court explained, the federal statute must provide a remedial provision and clearly indicate that the provision is the exclusive remedy for the alleged harm.<sup>26</sup> The court then noted that the Aviation Act does not provide an express federal remedy for a violation of the standard of care and that Congress had expressed no federal intent for field preemption.<sup>27</sup> Instead, "[the FAA] regulations were intended to prevent accidents and not to 'provide a remedial mechanism for individuals injured by a violation of aviation safety standards,' and . . . 'state tort remedies remain for violation of the federally established standards of care.'"<sup>28</sup> In addition, the court explained that the savings

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19. *Id.*

20. *Id.* at \*2-3.

21. *Id.* at \*3.

22. *Id.*

23. No. 06-CV-2661, 2008 WL 398814 (D. Minn. Feb. 11, 2008).

24. *Id.* at \*2-3.

25. *Id.* at \*2.

26. *See id.* at \*3.

27. *Id.*

28. *Id.* (quoting *Glorvigen v. Cirrus Design Corp.*, No. 05-2137, 05-2138, 2006 WL 399419, at \*4-5 (D. Minn. Feb. 16, 2006)).

clause evidences congressional intent against conflict preemption.<sup>29</sup> Thus, federal law did not preempt plaintiff's state law claims arising out of the crash.<sup>30</sup>

In *Wong v. Precision Airmotive, LLC*,<sup>31</sup> an injured pilot brought a state law product liability suit against an airplane parts manufacturer. The manufacturer moved for judgment on the pleadings, claiming that the Aviation Act impliedly preempted the action.<sup>32</sup> The United States District Court for the District of Connecticut disagreed, holding that state law and federal regulations had long coincided in this field<sup>33</sup> and that in 1990 Congress rejected the creation of national products liability standards for the general aviation industry.<sup>34</sup> The court relied on decisions by the United States Courts of Appeals for the Tenth and Eleventh Circuits that rejected implied field preemption in state products liability cases based on Congress's express preemption of routes, services, and rates in the Aviation Act.<sup>35</sup>

#### B. General Aviation Revitalization Act

The General Aviation Revitalization Act of 1994 (GARA)<sup>36</sup> provides immunity to aircraft manufacturers for accidents involving aircraft more than eighteen years old.<sup>37</sup> In *Blazevska v. Raytheon Aircraft Co.*,<sup>38</sup> the United States Court of Appeals for the Ninth Circuit applied GARA to preclude claims brought in the United States by family members of Macedonian residents who died in a 2004 crash in Bosnia.<sup>39</sup> The aircraft was manufactured and delivered in 1980, so the defendant invoked GARA's eighteen-year statute of repose as an affirmative defense. The defendant moved for summary judgment, and the district court entered judgment for the defendant on claims alleging product liability defects and lack of crashworthiness under Macedonian law.<sup>40</sup> The Ninth Circuit affirmed on appeal.<sup>41</sup> The court rejected the

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29. *Id.*

30. *Id.*

31. No. 05-CV-1604, 2008 WL 160212 (D. Conn. Jan. 10, 2008).

32. *Id.* at \*1.

33. *Id.* (citing *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 299–300 (1976)).

34. *Id.* at \*2 (citing S. REP. NO. 101-303 (1990)).

35. *Id.* (citing *Pub. Health Trust v. Lake Aircraft, Inc.*, 992 F.2d 291, 295 (11th Cir. 1993); *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1447 (10th Cir. 1993)).

36. Pub. L. No. 103-298, 108 Stat. 1552 (codified at 49 U.S.C. § 40101).

37. *Id.* (defining a limitations period of eighteen years in section 3).

38. 522 F.3d 948 (9th Cir. 2008).

39. *Id.* at 950.

40. *Id.* at 950–51.

41. *Id.* at 955.

plaintiffs' arguments that the presumption against extraterritorial application of federal law applied to GARA.<sup>42</sup> The court held that GARA only regulates the ability of a party to sue in an American court, but it does not regulate conduct that occurs outside the United States.<sup>43</sup> The court noted that GARA "acts not just as an affirmative defense, but instead 'creates an explicit statutory right not to stand trial.'"<sup>44</sup>

In *Johnson v. Precision Airmotive, LLC*,<sup>45</sup> the United States District Court for the Eastern District of Missouri held that, although GARA might apply, it did not support a stay of discovery.<sup>46</sup> The plaintiffs sued various companies involved in the manufacture, maintenance, and repair of an aircraft<sup>47</sup> that was more than eighteen years old at the time of the crash.<sup>48</sup> The defendants moved to stay discovery pending resolution of their summary judgment motion on the GARA issue, or in the alternative, to limit discovery to GARA-related issues. The plaintiffs argued that it was impossible without further discovery to ascertain the age of each replacement part, regardless of the original aircraft's age.<sup>49</sup>

The court held that there was no basis to support the claim that the defendants "should not have to submit to discovery if, under GARA, they cannot be held liable for plaintiffs' claims."<sup>50</sup> Instead, the court explained that "GARA merely sets forth a defense to liability in cases where the relevant airplane parts are more than eighteen years old."<sup>51</sup> The court concluded that it would be impossible to narrow discovery to GARA issues.<sup>52</sup> "There [was] not merely one 'GARA issue' to resolve in this case, but rather a separate GARA issue for every part of the plane that [was] added since the plane was new."<sup>53</sup> Therefore, summary judgment was not appropriate because discovery was needed to determine facts about replacement parts less than eighteen years old.<sup>54</sup>

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42. *Id.* at 953.

43. *Id.*

44. *Id.* at 951 (quoting *Estate of Kennedy v. Bell Helicopter Textron, Inc.*, 283 F.3d 1107, 1110 (9th Cir. 2002)).

45. No. 4:07-CV-1695, 2008 WL 2570825 (E.D. Mo. June 26, 2008).

46. *Id.* at \*1.

47. *Id.*

48. *Id.* at \*3.

49. *Id.* at \*2-3.

50. *Id.* at \*2.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at \*3.

C. *The Federal Tort Claims Act*

Generally, actions for damages against the government raise the question of sovereign immunity. The Federal Tort Claims Act (FTCA)<sup>55</sup> was passed in 1946<sup>56</sup> and waives, with certain exceptions, federal government immunity from tort liability for the acts of its officers, employees, and representatives.<sup>57</sup>

In *United States Aviation Underwriters Inc. v. United States*,<sup>58</sup> the United States District Court for the Middle District of Georgia granted the Government summary judgment in an action alleging that the United States was negligent for failing to monitor turbulence advisories issued by meteorologists and failing to warn a flight crew of the possible turbulence.<sup>59</sup> The court explained that “forecasting turbulence is a discretionary function, and the FTCA exempts the Government from liability for discretionary acts.”<sup>60</sup> The court noted, however, that if the Government had forecasted turbulence and issued warnings, then it had no discretion to fail to provide that information to the crew.<sup>61</sup> The plaintiff asserted that the exception did not apply because there was an actual occurrence of clear air turbulence sufficient to warrant the issuance of warnings, thus depriving the forecasters of discretion.<sup>62</sup> The court disagreed, however, and unequivocally held that weather diagnostics and forecasting are within the types of discretionary activities shielded under the exception.<sup>63</sup> Even if the Government was grossly negligent in failing to issue an advisory, the Government could not be held liable.<sup>64</sup> Because the Government never decided that significant air turbulence was occurring, the Government was not required to warn flight crews.<sup>65</sup>

In *Supinski v. United States*,<sup>66</sup> the representative of a deceased parent’s estate brought an FTCA suit alleging that the flight instructor and designated pilot examiner who certified the plane’s pilot were government employees and were negligent in: (1) issuing the airplane

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55. 28 U.S.C. §§ 1346, 2671–80 (2006).

56. Pub. L. No. 79-601, §§ 401–24, 60 Stat. 812, 842–47.

57. See 28 U.S.C. §§ 1346, 2674, 2680.

58. 567 F. Supp. 2d 1407 (M.D. Ga. 2008).

59. *Id.* at 1409–10.

60. *Id.* at 1408.

61. *Id.*

62. *Id.*

63. *Id.* at 1410.

64. *Id.*

65. *Id.*

66. No. 4:07-CV-963, 2008 WL 199546 (E.D. Mo. Jan. 22, 2008).

pilot's certificate, (2) certifying the pilot's flight school, and (3) hiring, training, and supervising the examiner and pilot. As such, the complaint contended that the Government was responsible for the injuries.<sup>67</sup> The United States District Court for the Eastern District of Missouri dismissed the complaint for lack of subject matter jurisdiction.<sup>68</sup> The court considered both what constitutes a government employee for purposes of the FTCA and whether the discretionary function exception applied to the case.<sup>69</sup>

The court found that neither the trainer nor the examiner were federal employees because the Government did not exercise sufficient control over their performance.<sup>70</sup> The trainer was employed by a private flight school that set training schedules and fees, assigned students, and supervised performance. The pilot examiner was self-employed and did not have a Federal Aviation Administration (FAA) contract.<sup>71</sup> Although both the trainer and examiner applied standards prescribed by federal regulations in assessing the pilot's fitness, this did not render them government employees.<sup>72</sup>

The discretionary function exception precluded the claim that the Government was negligent in regulating the flight school.<sup>73</sup> The plaintiff argued that the FAA's negligence in certifying the flight school and failing to decertify the school rendered the Government liable.<sup>74</sup> The court rejected this argument, noting that "[a]ll of the applicable regulations speak in the permissive and they do not set forth a fixed . . . standard which the FAA must apply in certifying a flight school."<sup>75</sup> Further, the FTCA did not waive the Government's sovereign immunity for claims concerning hiring, training, and supervision because the decisions fell under the exception.<sup>76</sup>

In *In re Air Crash at Lexington, Kentucky, August 27, 2006 (Lexington III)*,<sup>77</sup> the United States District Court for the Eastern District of Kentucky dismissed the plaintiff's FTCA claims because the FTCA did not waive the Government's sovereign immunity when state law did not

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67. *Id.* at \*1.

68. *Id.*

69. *See id.* at \*3–6.

70. *Id.* at \*3.

71. *Id.*

72. *Id.*

73. *Id.* at \*5–6.

74. *Id.* at \*5.

75. *Id.*

76. *Id.* at \*6.

77. No. 5:06-CV-316, 2008 WL 2397708 (E.D. Ky. June 11, 2008).

provide for private liability under similar circumstances.<sup>78</sup> The plaintiff's claims arose when a Comair flight attempted to take off from the wrong runway, hitting multiple non-frangible objects and killing all forty-seven passengers and two of the three crew members.<sup>79</sup> Before addressing the discretionary function exception, the court decided it was necessary to ascertain whether state law would attach a duty of care in a purely private setting, which is the "first hurdle to establishing jurisdiction under the FTCA."<sup>80</sup> The plaintiff argued that, under Kentucky's "Good Samaritan" law,<sup>81</sup> the United States had a duty to use due care.<sup>82</sup> The court rejected the argument because the plaintiff could not "show that the FAA undertook to render any 'services'" to the plaintiff, and thus, no actions gave rise to a duty owed to the plaintiff.<sup>83</sup> As such, the plaintiff could not prove proximate cause, and the claims were dismissed for lack of jurisdiction.<sup>84</sup> Additionally, the court noted that claims regarding the air traffic controller's schedule might fall within the discretionary function exception, but reserved the consideration of the exception for trial.<sup>85</sup>

In *Farag v. United States*,<sup>86</sup> the United States District Court for the Eastern District of New York denied the Government's motion for summary judgment on FTCA claims.<sup>87</sup> The plaintiffs were two friends of Arab ethnicity on a domestic flight to New York. Two U.S. agents, who were also on the flight, believed the plaintiffs were acting suspicious because they spoke in a mixture of Arabic and English, looked at their watches repeatedly as if "timing" events, and moved seats to sit by one another. Upon arrival, officers in SWAT gear with shotguns and police dogs were waiting for the plaintiffs. The plaintiffs were frisked, handcuffed, jailed, interrogated, and released about four hours later.<sup>88</sup>

After complying with the administrative prerequisites of 28 U.S.C. § 2401(b),<sup>89</sup> the plaintiffs filed suit.<sup>90</sup> The plaintiffs alleged that the

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78. *Id.* at \*8.

79. Defendant/Third-Party Plaintiff's Third-Party Complaint at 2, *In re Air Crash at Lexington, Kentucky*, August 27, 2006, No. 5:06-CV-316-KSF, 2006 WL 5100433 (E.D. Ky. 2006).

80. *Lexington III*, 2008 WL 2397708, at \*2.

81. RESTATEMENT (SECOND) OF TORTS § 324A (1965), *quoted in* Ostendorf v. Clark Equip. Co., 122 S.W.3d 530, 530 (Ky. 2003).

82. *Lexington III*, 2008 WL 2397708, at \*1.

83. *Id.* at \*7.

84. *Id.* at \*8.

85. *Id.* at \*9.

86. 587 F. Supp. 2d 436 (E.D.N.Y. 2008).

87. *Id.* at 471.

88. *Id.* at 443-48.

89. 28 U.S.C. § 2401(b) (2006).

agents committed the torts of false arrest and false imprisonment.<sup>91</sup> The court applied the substantive law of New York—the law of the jurisdiction where the events occurred.<sup>92</sup> In determining whether an arrest was actually made, the court held that the officers' use of force and restraint, along with the transportation, incarceration, and interrogation of the plaintiffs, qualified this as an arrest.<sup>93</sup> Further, the court explained that the Government lacked the necessary probable cause to arrest the plaintiffs, and the agents could not merely rely on Arab ethnicity to create probable cause.<sup>94</sup>

In *Cahill v. United States*,<sup>95</sup> the United States District Court for the Middle District of Florida determined that it had jurisdiction over the plaintiff's FTCA claims.<sup>96</sup> The plaintiff alleged that the air traffic controllers' negligent failure to provide required separation distance between two planes exposed the second plane to the first plane's wake turbulence, causing the second plane to crash.<sup>97</sup> Separation standards exist to avoid these types of accidents.<sup>98</sup> The Government alleged that the accident was caused by pilot error.<sup>99</sup> The court found that the controllers breached their duty by failing to maintain the required separation of four nautical miles between the planes.<sup>100</sup> However, the court determined that "the cause of [the] accident was not a wake turbulence encounter."<sup>101</sup> Therefore, the failure to maintain the required separation "did not cause the accident, nor was it a substantial factor in causing the accident."<sup>102</sup>

## II. JURISDICTION, VENUE, AND CHOICE OF LAW

### A. Personal Jurisdiction

In *Vibratech, Inc. v. Frost*,<sup>103</sup> the Georgia Court of Appeals affirmed the trial court's denial of Vibratech's motion to dismiss for lack of

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90. *Farag*, 587 F. Supp. 2d at 448.

91. *Id.* at 451.

92. *Id.*

93. *Id.* at 452–53.

94. *Id.* at 469.

95. No. 8:05-CV-2379-T-24MSS, 2008 WL 1711519 (M.D. Fla. Apr. 10, 2008).

96. *Id.* at \*8.

97. *Id.* at \*1.

98. *See id.* at \*2–3; *see also* FAA Order JO 7110.65S § 5-5-4(f) (Feb. 14, 2008).

99. *Cahill*, 2008 WL 1711519, at \*1.

100. *Id.* at \*9.

101. *Id.* at \*11.

102. *Id.*

103. 291 Ga. App. 133, 661 S.E.2d 185 (2008).

personal jurisdiction and, in doing so, affirmed that subsection (1) of the Georgia long arm statute<sup>104</sup> reaches to the maximum extent of due process.<sup>105</sup> The case arose from a 2004 crash in Tennessee of an aircraft owned by the Georgia Cumberland Conference of Seventh-Day Adventists, resulting in five deaths. Among the parties sued was Vibratex, a defunct Delaware corporation whose principal place of business was in New York. Vibratex manufactured a viscous damper used in the plane and sold the part to manufacturer Teledyne Continental Motors, Inc. (TCM),<sup>106</sup> which supplied engines across the country.<sup>107</sup> Vibratex had shipped the part to TCM in Mobile, Alabama.<sup>108</sup>

Vibratex claimed that the trial court lacked personal jurisdiction because the company had no offices or agents in Georgia and never marketed its products for use specifically in Georgia.<sup>109</sup> The court of appeals ruled, however, that jurisdiction was proper under subsection (1) of Georgia's long arm statute, which provides for jurisdiction over a defendant transacting any business within Georgia.<sup>110</sup> The court acknowledged it had not previously considered the application of subsection (1) when "the manufacturer of an aviation component ship[ped] to an intermediary like TCM, who install[ed] the part into an aviation engine and then ship[ped] the engine into Georgia."<sup>111</sup> The court noted that it would consider Vibratex's "intangible contacts" when determining personal jurisdiction under subsection (1).<sup>112</sup> Jurisdiction exists if: "(1) the nonresident defendant has purposefully done some act or consummated some transaction in this state, (2) . . . the cause of action arises from or is connected with such act or transaction, and (3) . . . the exercise of jurisdiction . . . does not offend traditional fairness and substantial justice."<sup>113</sup>

This test was met because Vibratex sold the damper to an Alabama manufacturer for resale in United States locations, including Geor-

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104. O.C.G.A. § 9-10-91(1) (2007).

105. *Vibratex*, 291 Ga. App. at 135, 140, 661 S.E.2d at 188, 191.

106. *Id.* at 134, 661 S.E.2d at 187.

107. *See id.* at 139, 661 S.E.2d at 190.

108. *Id.* at 134, 661 S.E.2d at 187.

109. *Id.* at 135, 661 S.E.2d at 188.

110. *Id.* at 139–40, 661 S.E.2d at 190–91; *see also* O.C.G.A. § 9-10-91(1) (providing for personal jurisdiction over a nonresident who "[t]ransacts any business within this state").

111. *Vibratex*, 291 Ga. App. at 136, 661 S.E.2d at 189.

112. *Id.* at 137, 661 S.E.2d at 189.

113. *Id.* (quoting *Aero Toy Store, LLC v. Grieves*, 279 Ga. App. 515, 517–18, 631 S.E.2d 734, 737 (2006)).

gia.<sup>114</sup> In fact, the manufacturer's website even identified the Georgia maintenance facility that had installed the engine.<sup>115</sup> Vibrattech should have "reasonably anticipate[d] being haled into court" in Georgia because it placed the part in the stream of commerce knowing it would be purchased by consumers throughout the United States, including in Georgia.<sup>116</sup> The court held that fairness required that the plaintiffs be able to seek redress in Georgia rather than New York or Delaware.<sup>117</sup>

#### B. Removal Subject Matter Jurisdiction

In *Ray v. American Airlines, Inc.*,<sup>118</sup> a passenger claimed intentional infliction of emotional distress, false imprisonment, negligence, and breach of contract, alleging that she was subjected to deplorable conditions while her plane was grounded for eleven hours.<sup>119</sup> After the defendant airline removed the case to federal court,<sup>120</sup> the district court denied the plaintiff's motion to remand because the claims were properly removed.<sup>121</sup> The court had diversity jurisdiction because the complaint contained sufficient allegations to support a potential award exceeding the \$75,000 required for an individual case or the \$5 million in the aggregate required for a class action.<sup>122</sup> Although the complaint did not specify an amount of damages sought, the court relied in part on a settlement letter sent by the plaintiff.<sup>123</sup> Federal Rule of Evidence 408<sup>124</sup> did not prohibit the use of the settlement letter for the limited purpose of establishing the amount in controversy.<sup>125</sup>

In *Goonewardena v. AMR Corp.*,<sup>126</sup> the United States District Court for the Eastern District of New York held that it lacked original jurisdiction—and it declined to exercise supplemental jurisdiction—over a suit filed by a passenger alleging discrimination.<sup>127</sup> The plaintiff passenger alleged that after his flight was canceled, his request for overnight

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114. *Id.* at 139, 661 S.E.2d at 190–91.

115. Brief of Appellees at 7–8, *Vibrattech, Inc. v. Frost*, 291 Ga. App. 133, 661 S.E.2d 185 (2008) (No. A07A2078).

116. *Vibrattech*, 291 Ga. App. at 139, 661 S.E.2d at 190–91.

117. *Id.* at 140, 661 S.E.2d at 191.

118. No. 08-5025, 2008 WL 3992644 (W.D. Ark. Aug. 22, 2008).

119. *Id.* at \*1.

120. *Id.* at \*3.

121. *Id.* at \*6.

122. *Id.*

123. *Id.* at \*5–6.

124. FED. R. EVID. 408.

125. *Ray*, 2008 WL 3992644, at \*4.

126. No. 08-CV-4141, 2008 WL 5049904 (E.D.N.Y. Nov. 25, 2008).

127. *Id.* at \*4.

accommodation was denied, and he was removed from his flight the next day on the erroneous assumption that he was ill. The defendants removed from state court to federal court.<sup>128</sup> The plaintiff amended his complaint to withdraw his claim under the Civil Rights Act of 1964<sup>129</sup> and to limit the damages on his state law claims to less than \$75,000. He sought to have the case remanded to state court, claiming lack of jurisdiction.<sup>130</sup>

The court held that remand was appropriate because the court lacked jurisdiction.<sup>131</sup> The court explained that “[u]nder the complete-preemption doctrine, certain federal statutes are construed to have such extraordinary preemptive force that state-law claims coming with[in] the scope of the federal statute are transformed, for jurisdictional purposes, into federal claims—*i.e.*, completely preempted.”<sup>132</sup> The court dismissed the defendants’ argument that the suit arose under federal law merely because ordinary preemption under the Aviation Act or ADA might be raised as a defense.<sup>133</sup> For complete preemption, the defendant must establish that the plaintiff’s claims were “in actuality nothing more than claims brought under the FAA [Aviation Act] and the ADA, clothed as claims under” state law.<sup>134</sup> Neither federal law provision gave a private right of action, so the plaintiff could not bring claims under the federal statutes.<sup>135</sup> Therefore, the court lacked jurisdiction over the state law claims.<sup>136</sup> The court declined to exercise supplemental jurisdiction over the state claims because the plaintiff had withdrawn his sole federal claim early in the litigation.<sup>137</sup>

In *Swanstrom v. Teledyne Continental Motors, Inc.*,<sup>138</sup> the United States District Court for the Southern District of Alabama remanded to Alabama state court a wrongful death suit arising out of an aircraft crash.<sup>139</sup> The defendants had removed the case to federal court under 28 U.S.C. § 1442(a)(1),<sup>140</sup> the federal officer removal statute.<sup>141</sup> The

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128. *Id.* at \*1.

129. 42 U.S.C. §§ 2000a–2000h (2006).

130. *Goonewardena*, 2008 WL 5049904, at \*1.

131. *Id.* at \*4.

132. *Id.* at \*2 (quoting *Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 272 (2d Cir. 2005)).

133. *Id.* at \*2–3.

134. *Id.* at \*2.

135. *Id.* at \*3.

136. *Id.*

137. *Id.*

138. 531 F. Supp. 2d 1325 (S.D. Ala. 2008).

139. *Id.* at 1334.

140. 28 U.S.C. § 1442(a)(1) (2006).

141. *Swanstrom*, 531 F. Supp. 2d at 1331. Under the federal officer removal statute, “[t]he United States or any agency thereof or any officer (or any person acting under that

defendants claimed that the FAA had Designated Engineering Representatives (DERs) employed by one of the defendants to represent the agency in examining, testing, and certifying aircraft crashworthiness.<sup>142</sup> The district court noted that neither of the DERs were named as defendants, and the allegations did not identify a specific FAA representative.<sup>143</sup> Officer removal was not appropriate because there was “no evidence or argument that they [were] designated in any manner as a representative of the FAA.”<sup>144</sup> The court held that mere participation in a regulated industry is not enough,<sup>145</sup> and “removal is appropriate only where the FAA representative has been specifically named and the allegations relate to conduct of the FAA representative while acting in the capacity of an FAA representative.”<sup>146</sup>

### C. *Forum Non Conveniens*

In *In re Air Crash Near Peixoto de Azeveda, Brazil, on September 29, 2006*,<sup>147</sup> the United States District Court for the Eastern District of New York dismissed a suit arising from a midair collision of an executive jet and a Brazilian airliner under the doctrine of forum non conveniens.<sup>148</sup> Under this doctrine, federal courts have discretion to dismiss a properly filed action if it is more convenient for the litigation to proceed in an alternative forum.<sup>149</sup>

The defendants argued that New York was an inappropriate forum and that the plaintiffs filed there only because of the generosity of juries in the United States.<sup>150</sup> Further, the defendants contended that Brazil was an adequate and available alternative<sup>151</sup> and that most of the evidence, documents, and witnesses were located in Brazil.<sup>152</sup> Moreover, all of the plaintiffs were Brazilian residents.<sup>153</sup>

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officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office” may remove an action from state to federal court. 28 U.S.C. § 1442(a)(1).

142. *Swanstrom*, 531 F. Supp. 2d at 1329.

143. *Id.* at 1332.

144. *Id.*

145. *Id.*

146. *Id.* at 1333.

147. 574 F. Supp. 2d 272 (E.D.N.Y. 2008).

148. *Id.* at 275.

149. *Id.* at 278.

150. *Id.* at 279 n.2. The court “put little stock” in this argument. *Id.*

151. *See id.* at 282.

152. *See id.* at 287.

153. *Id.* at 275–76.

Relying on precedent from the United States Court of Appeals for the Second Circuit, the district court applied a three-step analysis for *forum non conveniens*.<sup>154</sup> Under this analysis, a court (1) determines the degree of deference accorded to the plaintiff's forum choice, (2) determines whether the proposed alternative forum is available and adequate, and (3) balances public and private interests implicated in the choice of forum.<sup>155</sup> As to step one, the court explained that a suit in a plaintiff's home forum is due great deference because it is presumed convenient, but it is "much less reasonable to presume that the choice was made for convenience" when it is a foreign plaintiff suing in the United States.<sup>156</sup> The court determined that the plaintiffs' forum choice was only entitled to limited deference.<sup>157</sup> In doing so, the court rejected the argument that the choice was entitled to the same deference that Article XII of the Treaty with Brazil<sup>158</sup> grants U.S. citizens and residents.<sup>159</sup> The court reasoned that the Treaty did not apply to the plaintiffs because it only "requires that the signatories' courts be open to foreign nationals who happen to be located within the territory of the other," and the plaintiffs were not located in, nor had they ever been to, the United States.<sup>160</sup> Because the plaintiffs' choice of forum was given a lesser degree of deference, the action had to be dismissed "if the chosen forum [was] shown to be genuinely inconvenient and the [alternate] forum significantly preferable."<sup>161</sup>

Next, the court held that Brazil was an adequate and available forum.<sup>162</sup> The plaintiffs' argument that their claims would be fragmented in Brazil was rejected because a lack of consolidation does not render a forum inadequate.<sup>163</sup> Further, Brazil was an adequate forum because the potential delay by the Brazilian judicial system was sufficiently minimal relative to delays in the United States.<sup>164</sup> Brazil was also an available forum because the defendants expressly agreed to

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154. *See id.* at 279–89.

155. *Id.* at 278 (citing *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 75 (2d Cir. 2001)).

156. *Id.* at 279 (internal quotation marks omitted) (quoting *Iragorri*, 274 F.3d at 71).

157. *Id.* at 281.

158. Treaty with Brazil, U.S.-Braz., art. XII, Dec. 12, 1828, 8 Stat. 390, 392.

159. *In re Air Crash Near Peixoto de Azevedo*, 574 F. Supp. 2d at 280–81 (citing Treaty with Brazil, *supra* note 157, at 392).

160. *Id.* at 281.

161. *Id.* at 282 (second alteration in original) (internal quotation marks omitted) (quoting *Bigio v. Coca-Cola Co.*, 448 F.3d 176, 179 (2d Cir. 2006)).

162. *Id.* at 284–85.

163. *Id.* at 284.

164. *Id.*

jurisdiction, and there would be personal jurisdiction over all of the defendants in Brazil.<sup>165</sup>

Finally, the court balanced the private and public interest factors, finding that they favored dismissal.<sup>166</sup> Private interest factors include:

“[1] the relative ease of access to sources of proof; [2] the availability of compulsory process for attendance of unwilling witnesses; [3] the cost of obtaining attendance of willing witnesses; [4] [i]ssues concerning the enforceability of a judgment; and [5] all other practical problems that make trial of a case easy, expeditious, and inexpensive—or the opposite.”<sup>167</sup>

Although many involved entities would be subject to personal jurisdiction in the United States, all of the defendants and other important entities would be subject to personal jurisdiction in Brazil.<sup>168</sup> Further, it was possible that parties would be unable to compel testimony or evidence in the United States,<sup>169</sup> unlike in Brazil, where the witnesses, evidence, and the wreckage site would be readily available.<sup>170</sup> Therefore, private factors favored dismissal.<sup>171</sup>

The public interest factors include (1) administrative difficulties from court congestion; (2) local interest in having the case decided at home; (3) the interest in having a forum familiar with the governing law; (4) avoidance of conflict of law issues or difficulties in applying foreign law; and (5) burdening citizens in an unrelated forum with jury duty.<sup>172</sup> The court held that there was no significant congestion of either United States or Brazilian courts, and although it would not be unfair to subject U.S. citizens to jury duty in the case, the other factors favored venue in Brazil.<sup>173</sup> Brazil’s interest was obvious and outweighed the United States’ interest.<sup>174</sup> Therefore, the United States was a “genuinely inconvenient” venue, and Brazil was “significantly preferable.”<sup>175</sup>

In *Clerides v. Boeing Co.*,<sup>176</sup> the United States Court of Appeals for the Seventh Circuit affirmed the forum non conveniens dismissal of a

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165. *Id.* at 283.

166. *Id.* at 289.

167. *Id.* at 285 (alterations in original) (quoting *Murray v. British Broad. Corp.*, 81 F.3d 287, 294 (2d Cir. 1996)).

168. *Id.*

169. *Id.* at 286.

170. *Id.* at 287.

171. *See id.* at 286.

172. *Id.* at 287–88 (citing *Murray*, 81 F.3d at 293).

173. *Id.* at 288–89.

174. *Id.* at 288.

175. *Id.* at 289 (internal quotation marks omitted).

176. 534 F.3d 623 (7th Cir. 2008).

wrongful death claim brought by representatives of a Cypriot passenger, which resulted from a plane crash in Greece.<sup>177</sup> The plaintiffs alleged that the Cypriot airline, Helios Airways, failed to properly pressurize, causing the crew and passengers to lose consciousness and asphyxiate.<sup>178</sup> On appeal, the parties conceded that both Greece and Cyprus were adequate and available fora; therefore, the court's decision hinged on its analysis of the private and public interest factors.<sup>179</sup>

First, addressing the private interest factors, the court held that the ease of access to proof in Greece and Cyprus favored dismissal.<sup>180</sup> The court noted that evidence and witnesses related to the action against Boeing were in the United States, but Boeing had agreed to make witnesses and evidence available in Cyprus and Greece.<sup>181</sup>

The remainder of the relevant proof [was] located primarily in Greece and Cyprus . . . includ[ing] the evidence and witnesses related to Helios and the flight crew, the primary investigations of the crash and the wreckage, the post-mortem examinations of the decedents, and evidence and witnesses related to the families' pain and suffering.<sup>182</sup>

In addition, the compulsory process for obtaining unwilling witnesses favored dismissal because witnesses related to Helios would not be available in the United States, and the parties would need to use the Hague Convention<sup>183</sup> to obtain their testimony, which was not practical.<sup>184</sup>

The public interest factors also favored dismissal.<sup>185</sup> The interests of Greece and Cyprus in "regulating the use of allegedly defective products within their borders" were equal to the United States' interest in regulating the manufacture of products within its borders.<sup>186</sup> Further, none of the 115 decedents were U.S. citizens, only one was possibly a U.S. resident, and 111 decedents were residents of Cyprus or Greece.<sup>187</sup> Finally, Greece and Cyprus demonstrated their interests in the health and safety of their residents by conducting multiple investiga-

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177. *Id.* at 625–26.

178. *Id.* at 626.

179. *Id.* at 629.

180. *Id.*

181. *Id.*

182. *Id.*

183. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Convention), *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555.

184. *Clerides*, 534 F.3d at 629–30.

185. *Id.* at 630.

186. *Id.*

187. *Id.*

tions into the crash.<sup>188</sup> Therefore, the court's analysis of the public and private interest factors was reasonable and not an abuse of discretion.<sup>189</sup>

In *Van Schijndel v. Boeing Co.*,<sup>190</sup> the United States Court of Appeals for the Ninth Circuit affirmed dismissal of a products liability suit by citizens of the Netherlands against U.S. manufacturers regarding the crash of a Singaporean-owned airplane in Taiwan.<sup>191</sup> The trial court dismissed the action, concluding that Singapore was an available and alternative forum and that private and public interest factors favored dismissal.<sup>192</sup> Because Singapore courts had access to critical evidence the district court could not control, dismissal was appropriate.<sup>193</sup> The appellate court considered the fact that evidence and many important witnesses were located in Singapore.<sup>194</sup> Further, the district court properly considered the United States' interest as a whole, not just California's interest, before concluding that Singapore's interest was greater.<sup>195</sup>

In *In re Cessna 208 Series Aircraft Products Liability Litigation*,<sup>196</sup> the United States District Court for the District of Kansas held that the forum non conveniens doctrine would not operate to allow a dismissal in favor of a Canadian forum even though the case concerned a Canadian pilot who was killed in a plane crash in Canada.<sup>197</sup> The pilot's family sued Cessna Aircraft Corporation and Goodrich Corporation claiming that faulty design and manufacturing of certain aircraft parts had caused the crash.<sup>198</sup> The court held, however, that the balance of private and public interest factors did not dictate dismissal.<sup>199</sup>

As to the private interest factors, the court noted that most of the liability evidence was in Kansas, where Cessna was incorporated and where it designed, tested, and built the aircraft.<sup>200</sup> Although some evidence was in Canada, it was not in a central location.<sup>201</sup> Therefore,

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188. *Id.*

189. *Id.*

190. 263 F. App'x 555 (9th Cir. 2008).

191. *Id.* at 557.

192. *Id.*

193. *See id.*

194. *Id.*

195. *Id.*

196. 546 F. Supp. 2d 1191 (D. Kan. 2008).

197. *Id.* at 1197.

198. *Id.*

199. *Id.*

200. *Id.* at 1194–96.

201. *Id.* at 1196.

the ease of access to evidence “weigh[ed] strongly in favor of [the] plaintiffs.”<sup>202</sup> Further, the availability of compulsory process for unwilling witnesses slightly favored Cessna, but “the record [did] not reflect that a significant number of witnesses [would] be unwilling to cooperate or that cost to obtain compliance [would] be substantial.”<sup>203</sup>

Turning to the public interest factors, the court explained that although Canada had an interest in the litigation because the decedent was a Canadian citizen, the United States had an interest in “regulating the conduct of resident aircraft manufacturers even [when] a particular aircraft accident occurs in a foreign country.”<sup>204</sup> Although Canadian law likely would apply, Cessna had not proven that it would be difficult for the court to apply Canadian law.<sup>205</sup> As a result, factors that slightly favored Canada were “outweighed by the ease of access to sources of proof as part of this consolidated proceeding and the interest of the United States in regulating the conduct of a resident aircraft manufacturer.”<sup>206</sup>

#### D. Choice of Law

In *In re Air Crash at Lexington, Kentucky, August 27, 2006 (Lexington II)*,<sup>207</sup> the United States District Court for the Eastern District of Kentucky evaluated competing state damages laws in a suit brought by the families of three passengers who died in a Comair runway crash. At the time of the crash, one victim was a New York resident, one was a Kentucky citizen, and one was a citizen of New Mexico.<sup>208</sup> The court rejected the plaintiffs’ claims that state law other than Kentucky law should apply.<sup>209</sup>

The New York resident had originally filed suit in a New York federal court based on diversity jurisdiction, so the court applied New York choice of law rules to this plaintiff.<sup>210</sup> The court performed an “interest analysis” under standards established in *Neumeier v. Kuehner*<sup>211</sup> and its progeny.<sup>212</sup> Under the second *Neumeier* rule, the law of the state in which the accident occurred generally applies if one of the parties is

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202. *Id.*

203. *Id.*

204. *Id.* at 1196–97.

205. *Id.* at 1197.

206. *Id.*

207. No. 5:06-CV-316, 2008 WL 631238 (E.D. Ky. Mar. 5, 2008).

208. *Id.* at \*1–2.

209. *Id.* at \*6–8.

210. *Id.* at \*2.

211. 286 N.E.2d 454 (N.Y. 1972).

212. *Lexington II*, 2008 WL 631238, at \*3.

domiciled in the state.<sup>213</sup> The plaintiff argued, however, that because not all of the defendants were domiciled in Kentucky and because there were substantial contacts with New York, the third *Neumeier* rule applied, which would allow the situs of the tort to be displaced as the governing law if it would “advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.”<sup>214</sup> The court held that the domicile of the Comair defendants in Kentucky mandated application of the second rule, and Kentucky law applied.<sup>215</sup> Further, because all claims against Delta were related to Delta’s relationship with Comair, there was no basis for disregarding the Comair defendants’ domiciles.<sup>216</sup>

The court applied Kentucky choice of law rules in the cases of the other two victims, who originally filed suit in Kentucky.<sup>217</sup> Kentucky choice of law applies when “Kentucky has enough contacts to justify applying Kentucky law”<sup>218</sup> even though they are “not necessarily the most significant contacts.”<sup>219</sup> There were sufficient contacts in this case because the accident occurred in Kentucky, Comair was a citizen of Kentucky, and the forum court sat in Kentucky.<sup>220</sup> Even the New Mexico resident, who owned a horse farm and breeding business in Kentucky, had significant contacts such that the application of Kentucky law was appropriate.<sup>221</sup>

### III. UNIQUE DISCOVERY AND EVIDENCE ISSUES

In *In re Air Crash at Lexington, Kentucky, August 27, 2006 (Lexington I)*,<sup>222</sup> a federal district court held that voluntary safety reports from pilots and airline personnel (ASAP reports) were discoverable and not privileged.<sup>223</sup> In *In re Air Crash at Lexington, Kentucky, August 27, 2006 (Lexington IV)*,<sup>224</sup> the court also held that cockpit voice recorder

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213. *Id.* at \*5.

214. *Id.* at \*4 (quoting *Neumeier*, 286 N.E.2d at 458).

215. *Id.* at \*6.

216. *Id.*

217. *Id.* at \*6–7.

218. *Id.* at \*2 (quoting *Adam v. J.B. Hunt Trans., Inc.*, 130 F.3d 219, 230–31 (6th Cir. 1997)).

219. *Id.* (quoting *Foster v. Leggett*, 484 S.W.2d 827, 829 (Ky. 1972)).

220. *Id.* at \*7.

221. *Id.* at \*8.

222. 545 F. Supp. 2d 618 (E.D. Ky. 2008).

223. *Id.* at 619–20, 624.

224. No. 5:06-CV-316, 2008 WL 2782827 (E.D. Ky. July 8, 2008).

(CVR) audio tape recordings were admissible at trial.<sup>225</sup> However, in *In re Air Crash at Lexington, Kentucky, August 27, 2006 (Lexington V)*,<sup>226</sup> the court excluded the National Transportation Safety Board (NTSB) safety recommendations from evidence.<sup>227</sup>

First, the court found that ASAP reports were admissible and not protected by any common law or self-critical analysis privileges.<sup>228</sup> Second, the court rejected Comair's arguments that the CVR recordings were irrelevant and highly prejudicial.<sup>229</sup> Comair argued that (1) the recordings, which contained crew shouts and exclamations, would "play on the jury's sympathies and impair their ability to use reason," (2) there was "no evidence that these sounds were recorded from anywhere but the cockpit and, therefore, [were] not relevant," and (3) the jury could "reference the CVR transcript without the prejudicial effect of [playing] the recording."<sup>230</sup> The court held that "the tone of voice, pitch, and inflection of the pilots statements [sic] are highly relevant to their state of mind and to [the] [p]laintiffs' claims of negligence and gross negligence. These aspects of their statements are completely absent from a printed page."<sup>231</sup>

Finally, under 49 U.S.C. § 1154(b),<sup>232</sup> the court held that the NTSB safety recommendations were inadmissible.<sup>233</sup> In doing so, the court analyzed the relationship between § 1154(b) and 49 C.F.R. § 835.2,<sup>234</sup> the NTSB's own regulations.<sup>235</sup> Pursuant to its own regulation, the NTSB does not oppose the use of factual reports in evidence, but it opposes the use of reports containing NTSB conclusions and determinations.<sup>236</sup> The court found that although Congress had not explicitly granted the NTSB rule-making authority in this area, its determination was "entitled to some deference and is persuasive."<sup>237</sup> The court cited prior decisions in which safety recommendations were identified as conclusions and determinations of the NTSB, and also relied on an opinion letter from NTSB general counsel outlining the agency's position

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225. *Id.* at \*3.

226. No. 5:06-CV-316, 2008 WL 2796875 (E.D. Ky. July 18, 2008).

227. *Id.* at \*5.

228. *Lexington I*, 545 F. Supp. 2d at 623–24.

229. *Lexington IV*, 2008 WL 2782827, at \*1–2.

230. *Id.* at \*1.

231. *Id.* at \*2.

232. 49 U.S.C. § 1154(b) (2006).

233. *Lexington V*, 2008 WL 2796875, at \*5.

234. 49 C.F.R. § 835.2 (2009).

235. *Lexington V*, 2008 WL 2796875, at \*2–4.

236. *See* 49 C.F.R. § 835.2.

237. *Lexington V*, 2008 WL 2796875, at \*4.

that such recommendations were statutorily barred from admission.<sup>238</sup> The court noted that it was important to keep the NTSB “free of the entanglement of such suits.”<sup>239</sup>

#### IV. PRODUCT LIABILITY DECISIONS

In *Glorvigen v. Cirrus Design Corp.*,<sup>240</sup> the United States District Court for the District of Minnesota considered whether Cirrus could be held liable for negligence in failing to provide adequate training to an aircraft purchaser.<sup>241</sup> The court held that by voluntarily providing “transition training,” including autopilot training, a duty arose to provide training to the aircraft purchaser.<sup>242</sup> For purposes of summary judgment, the court assumed that the purchaser did not receive autopilot training<sup>243</sup> and held that the issue of liability would be decided based upon the ordinary prudent designer and manufacturer standard.<sup>244</sup>

[B]y manufacturing an aircraft with an autopilot mechanism and including ‘transition training’ as part of the aircraft’s purchase price, Cirrus could have foreseen the injury as alleged in this case. The connection between Cirrus’ allegedly negligent training and the Plaintiffs’ claimed damage [was] not so remote that the [c]ourt [could] conclude that public policy require[d] awarding summary judgment in favor of Cirrus at this stage.<sup>245</sup>

Additionally, the court denied summary judgment on the manufacturer’s defense that it had contracted out training to an independent third-party.<sup>246</sup> Finally, the court granted summary judgment to the manufacturers on the strict liability and warranty claims, noting that there was no evidence submitted to support the claim that the aircraft was unsafe or defective.<sup>247</sup>

In *Dalrymple v. Fairchild Aircraft Inc.*,<sup>248</sup> the United States District Court for the Southern District of Texas granted summary judgment to the defendant, Fairchild Aircraft, Inc.,<sup>249</sup> which acquired Swearingen

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238. *Id.* at \*2–4.

239. *Id.* at \*5 (quoting 49 C.F.R. § 835.3 (2009)).

240. No. 06-2661, 2008 WL 398814 (D. Minn. Feb. 11, 2008).

241. *See id.* at \*3.

242. *Id.* at \*4.

243. *Id.* at \*3.

244. *Id.* at \*4.

245. *Id.*

246. *Id.* at \*5.

247. *Id.* at \*5–6.

248. 575 F. Supp. 2d 790 (S.D. Tex. 2008).

249. *Id.* at 799.

Aircraft Corporation, the company that designed and manufactured a Merlin IV airplane that crashed off the coast of Spain, allegedly as a result of electrical failure caused by a lightning strike.<sup>250</sup> The aircraft was operated by Flightline, S.L.<sup>251</sup> The plaintiff sued under the Death on the High Seas Act,<sup>252</sup> alleging a failure to warn of the vulnerability of the plane's power systems if struck by lightning.<sup>253</sup> After a predecessor Swearingen/Flightline airplane was struck by lightning, lost power, and crashed in Germany, the predecessor issued a service bulletin recommending "removal of a particular battery diode in order [t]o preclude de-energizing Battery Bus Relay if [the] diode shorts."<sup>254</sup> Fairchild had delivered a complete set of aircraft manuals to Flightline approximately nine months before the accident, including the service bulletin at issue.<sup>255</sup>

Fairchild had no duty to warn of alleged deficiencies based on a federal aviation regulation, which imposes a duty on Type Certificate holders to inform the FAA of malfunctions or defects.<sup>256</sup> The court explained that Fairchild held the Type Certificate, and the language clearly states that the duty to report only applies to aircraft that the Type Certificate holder manufactured and not to the successor.<sup>257</sup>

Further, the court dismissed the plaintiff's negligence claims brought under the Death on the High Seas Act.<sup>258</sup> Even if Fairchild had a post-sale duty to warn of potential product defects, it satisfied that duty by providing the charter company a copy of the service bulletin and a set of aircraft manuals that warned of a risk of a short circuit to the diode in the event of a lightning strike.<sup>259</sup> Fairchild did not breach a duty of reasonable care by failing to advise the charter company of unarticulated potential defects.<sup>260</sup> There was no evidence identifying defects that rendered the airplane "vulnerable to electrical failure in the event of a lightning strike, or any changes that could or should have been made to alleviate that risk."<sup>261</sup> There was no evidence that the defendant was aware of vulnerabilities in the plane other than those

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250. *Id.* at 793.

251. *Id.*

252. 46 U.S.C. §§ 30301–08 (2006).

253. *Dalrymple*, 575 F. Supp. 2d at 795–96.

254. *Id.* at 793 (alteration in original) (internal quotation marks omitted).

255. *Id.*

256. *Id.* at 796–97 (citing 14 C.F.R. § 21.3 (2009)).

257. *Id.* at 797.

258. *Id.* at 799.

259. *Id.* at 797.

260. *Id.* at 798.

261. *Id.*

addressed in the service bulletin.<sup>262</sup> Last, the plaintiff could not demonstrate the detrimental reliance element of a negligent undertaking claim and, in the absence of such evidence, the claim failed.<sup>263</sup> The court concluded that providing the service bulletin actually made the aircraft safer.<sup>264</sup>

In *In re Cessna 208 Series Aircraft Products Liability Litigation*,<sup>265</sup> the United States District Court for the District of Kansas addressed the defendant FlightSafety's motion for summary judgment relating to claims arising from an aircraft accident.<sup>266</sup> The plaintiffs filed wrongful death claims on behalf of family members, alleging that the school: (1) negligently failed to properly instruct the pilots on how to avoid ice accumulation, (2) fraudulently failed to disclose information about icing conditions with the Cessna Caravan, and (3) breached express and implied warranties to the family concerning the school's training and safety instructions and the aircraft itself.<sup>267</sup>

First, applying Texas law, the court denied FlightSafety's motion for summary judgment on educational malpractice claims because a nearly identical motion had been denied in state court before removal.<sup>268</sup> The district court observed that it would be improper to second-guess the reasoning of the state court's interpretation of state law and that the state trial court judge's ruling was a reasonable application of Texas law.<sup>269</sup>

Second, the court denied FlightSafety's motion for summary judgment based on federal preemption<sup>270</sup> because FlightSafety failed to establish

“(1) that plaintiffs' state law tort claims regarding its curriculum and flight simulators stand as an obstacle to . . . execution of the full [FAA regulation objectives] or (2) that it [was] impossible for FlightSafety to comply with both federal and state law pertaining to its curriculum and flight simulators . . . . In particular, FlightSafety offer[ed] no evidence that if it had proposed additional instruction or simulations on icing conditions, the FAA would have rejected them.”<sup>271</sup>

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262. *Id.*

263. *Id.* at 798–99.

264. *Id.* at 799.

265. 546 F. Supp. 2d 1153 (D. Kan. 2008).

266. *See id.* at 1155.

267. *Id.* at 1157.

268. *See id.* at 1157–59.

269. *See id.* at 1159.

270. *Id.* at 1161.

271. *Id.* at 1160–61 (internal citations omitted).

Finally, the district court granted the motion for summary judgment on the breach of implied warranty claims because providing flight training materials is not a tangible good or property that can be the subject of such claims.<sup>272</sup> However, the court denied summary judgment on the express warranty claims because there is no federal preemption of such claims.<sup>273</sup>

#### V. INSURANCE POLICY COVERAGE

In *Sugar Financial Group, Inc. v. Insurance Co. of the State of Pennsylvania*,<sup>274</sup> the United States District Court for the Western District of Washington held that exclusions in an aviation insurance policy were not ambiguous, and the pilot's failure to meet the pilot endorsement requirements precluded coverage for aircraft damage.<sup>275</sup> The endorsement required that the pilot hold a "current and valid FAA Private, Commercial, or ATP pilot certificate rating and endorsements applicable to [the] aircraft, including an instrument rating" and have at least "1000 total logged hours as pilot-in command of aircraft, of which includes . . . 50 hours same make and model as [the] aircraft [and] 500 hours multi-engine powered fixed wing aircraft."<sup>276</sup> The pilot did not have an instrument rating and had only approximately 400 hours of total logged time.<sup>277</sup> The policy also included a number of exclusions:

This insurance does not apply:

1. under any coverage

. . . .

c) when the aircraft is in flight:

i) with your knowledge and consent for either an unlawful purpose or for other than the Approved Use;

ii) when a special permit or waiver is required by the FAA;

iii) if piloted by anyone other than:

(1) a pilot specified in [the pilot endorsement];

(2) a pilot employed by an FAA approved repair station while the aircraft is in their care, custody or control for the purpose of maintenance, repair or test flight.<sup>278</sup>

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272. *Id.* at 1162.

273. *Id.* at 1162-63.

274. No. C07-5398, 2008 WL 859929 (W.D. Wash. Mar. 28, 2008).

275. *Id.* at \*4.

276. *Id.* at \*1.

277. *Id.* at \*2.

278. *Id.*

The insured argued that coverage was not excluded because the failure to include the word *or* or the word *and* in exclusion 1(c) rendered it ambiguous, and that it should be construed in favor of the insured.<sup>279</sup> The court rejected this argument, explaining that it must examine “the exclusion in question, the public policy considerations involved and the transaction as a whole.”<sup>280</sup> Notwithstanding the absence of the word *or*, the correct interpretation of the exclusion was that it applied to any one of the conditions.<sup>281</sup> Because the pilot clearly did not meet the requirements of the pilot endorsement, no coverage applied.<sup>282</sup>

In *Abdel v. North American Specialty Insurance Co.*,<sup>283</sup> the United States District Court for the Middle District of Tennessee denied both parties’ summary judgment motions regarding hull and liability coverage because there was a genuine issue of material fact.<sup>284</sup> The issue of fact dealt with statements made by the insurer’s representative to the insured student pilot about the qualifications of the flight instructor required to provide the student instructions in the insured aircraft.<sup>285</sup> Previously, the instructor pilot was referred to in a quote and in the application as a “Certified Flight Instructor” (CFI), meeting the “Open Pilot Warranty.”<sup>286</sup> The court explained that the terms defined in the policy would ultimately control in the event of conflict with prior representations,<sup>287</sup> but the term *open pilot warranty* was not defined in the policy or elsewhere; instead, the quote, application, and policy also referred to requirements for “additional pilots” to be approved to operate the aircraft.<sup>288</sup> Because both terms were used in the same documents, as a matter of law, the court could not conclude that the term *open pilot warranty* was the equivalent of the term *additional pilots*.<sup>289</sup>

The instructor operating the aircraft during the accident did not meet the additional pilot requirements because he was not twenty-five years old, had not logged one thousand hours of pilot-in-command time, and had not flown the accident aircraft before.<sup>290</sup> Although the instructor

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279. *Id.* at \*3.

280. *Id.* at \*3–4 (quoting *Ohio Cas. Ins. Co. v. Henderson*, 939 P.2d 1337, 1339 (Ariz. 1997)).

281. *Id.* at \*4.

282. *Id.*

283. No. 3:06-1192, 2008 WL 249681 (M.D. Tenn. Jan. 28, 2008).

284. *Id.* at \*7–8.

285. *Id.*

286. *Id.* at \*3.

287. *See id.* at \*5.

288. *Id.* at \*6.

289. *Id.* at \*6–7.

290. *Id.* at \*6.

had occasionally flown a similar aircraft,<sup>291</sup> this was not sufficient to meet the required twenty-five hours in the same make and model as the accident aircraft.<sup>292</sup> In affidavit testimony, the insured student pilot claimed that when he asked the insurance representative about the qualifications of the CFI, the representative told him that most flight instructors would meet the "Open Pilot Warranty."<sup>293</sup> The representative also allegedly told the insured that he should not name a specific flight instructor as an approved pilot because it would be necessary to do more paperwork if he changed instructors.<sup>294</sup> Summary judgment was not appropriate because what the insurance representative said or did not say presented factual questions that could only be resolved by a credibility determination.<sup>295</sup>

Likewise, the court denied the plaintiff's motion for summary judgment because there was a question of fact about whether the flight was a training flight on which the instructor was acting as the student's CFI.<sup>296</sup> On the one hand, the student testified that he had done preflight planning and preparation; on the other hand, he was in the back seat asleep during the accident.<sup>297</sup>

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291. *Id.* at \*4.

292. *Id.* at \*6.

293. *Id.* at \*7.

294. *Id.*

295. *Id.* at \*7-8.

296. *Id.* at \*8.

297. *Id.*