



Aviation Law Section

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Letter from the Chair Annual Meeting Completes a Rewarding Year

Donald J. Nolan, Chicago, Ill.

Dear Aviation Law Section Members:

The 2005 ATLA Annual Convention was a huge success and, in addition, a great time! Congratulations to everyone who made the event possible, and a big thank you to ATLA's convention planners, who, in selecting Toronto, chose such a welcoming venue.

The Aviation Law Section's program, held on Monday, July 25, was informative, entertaining, and well-

attended. I would like to extend my personal thanks to those who gave their valuable time to write convention papers and joined me in presenting during the half-day Aviation Law CLE.

Hon. Dickran Tevrizian, of the U.S. District Court for the Central District of California, graciously shared his valuable insights on the topic of "Alternative Dispute Resolution and Mediation in Aviation Litigation" during the morning's panel. Panel presenters including Stuart Fraenkel, Ken Nolan, Christine Spagnoli, and Victor Diaz also shared their experi-

ences and knowledge on damages in aviation litigation.

Special thanks also to Jerry Skinner of the Nolan Law Group and aviation expert Gunnar Kuepper for their terrorism focus-and-response-oriented presentations. I think everyone who attended came away from the education program with new ideas and strategies to advance the field of aviation litigation.

I would also like to thank our officers and members who attended the

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~Endowed by: John Howie~

Personal Jurisdiction over Foreign Airlines

The Internet Sets a New Course

By Michael R. Sherwin, New York, N.Y.

The activities of Airbus and Boeing sales executives at the recent Paris Air Show are evidence that the future of commercial aviation clearly lies in the Asia Pacific and Middle Eastern markets.

Boeing, for example, says it expects the Asia Pacific to be its largest market, accounting for 36 percent of its expected \$2.1 trillion in aircraft orders over the next 20 years.¹ Similarly, the Indian and Persian Gulf states are viewed as equally promising commercial aircraft markets, quickly eclipsing those of Europe and North America.

PROMISING AVIATION MARKETS IN THE EAST

Due to the location of Qatar and Dubai as convenient hubs between Europe and the Far East, and the increasing integration of this region in the global economy, the Middle East led the world in 2004 with a one-year growth of 24.8 percent in air passenger traffic; Asia Pacific was a close second with a 20.5 percent growth in air passenger traffic in 2004.²

Just recently, India's largest domestic

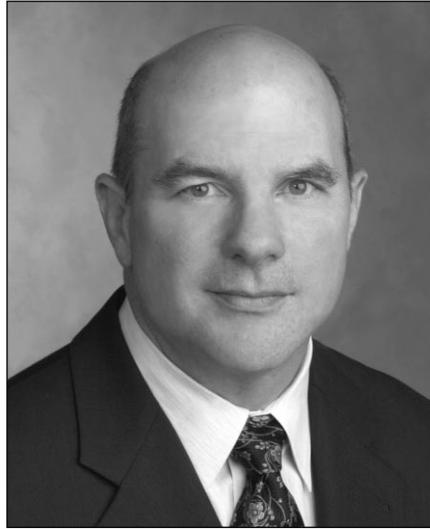
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business meeting, where we continued our dialogue concerning increasing activity on the list server, marketing, and expanding membership in the Section. We also initiated our planning for the 2006 meetings. We continued our lively discussions on these topics at the aviation dinners and receptions.

Finally, I would like to congratulate and welcome the Section's new officers. Brian J. Alexander of New York, N.Y. takes over as chairman; Gary C. Robb of Kansas City, Mo. is our new chair-elect; the vice-chair is Victor M. Diaz of Miami, Fla.; and Justin T. Green of New York, N.Y. begins his term as secretary and treasurer.

As for me, I look forward to remaining involved with our Section as the Aviation Law Section's immediate past chairman. It's been a great year, and I think the Section is continuing to



Donald J. Nolan

grow and increase its value to our membership.

Sincerely,

Donald J. Nolan,
chair of the Aviation Law Section

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Editor's Comment

Thanks and Appreciation

Justin T. Green, New York, N.Y.

This edition contains an excellent article by [Michael Sherwin](#) on jurisdiction based on a defendant's contact with the forum via the Internet. It also includes a helpful summary of recent aviation decisions that Dan Barks and I put together.

As my tenure as editor comes to an end, I want to thank all of the authors who contributed articles including Daniel D. Barks, Orla Brady, Paul S. Edelman, Anne Marie Huarte, Steven C. Marks, Leane Capps Medford, Dennis J. Nolan, Jeanne M. O'Grady, Vincent I. Parrett, James E. Rooks, Jr., Michael Sherwin, and William H.

Wimsatt. The articles were thoughtful, well written, and addressed many areas of critical interest to aviation lawyers. They made the newsletter a success.

I also want to thank our chairman, Don Nolan, for his "Notes from the Chair," which provided important information on the Section's activities and promoted member involvement in ATLA and the Aviation Section.

Finally, I want to thank the ATLA staff, especially Christine Hines who provided tremendous support. Her efforts greatly improved our newsletter and working with her was an absolute pleasure.



Justin T. Green

Personal Jurisdiction, cont. from Page 1

airline, Jet Airways, committed to buying at least 20 Boeing planes worth over \$2.8 billion, as well as making a separate deal for 10 Airbus aircrafts worth \$1.5 billion. Similarly, Jet Airways' domestic rival, Kingfisher, recently signed contracts for 15 Airbus aircrafts, including five Super Jumbo A380s, in a \$43 billion deal.³

"India is today one of the most promising [aviation] markets," says John Leahy, the chief commercial officer at Airbus. *Id.*

Additionally, Qatar Airways and China Southern Airlines are expected to ink similar contracts to feed their ambitious plans to add several international routes by 2010.⁴ Qatar Airways is one of the fastest growing airlines in the world, with routes throughout the Middle East and recently added connections to Africa and Europe. The airline plans to double its all-Airbus fleet of 40 planes in the next few years following the \$5.1 billion order of 18 Airbus planes at the Paris Air Show in 2003.

THE "INFANT AIRLINES" THRIVE ON VIRTUAL TICKETING

While the majority of these "infant

airlines" do not currently operate in the United States, the proliferation of virtual ticketing via the Internet has enabled a large number of American travelers to take advantage of these airlines' cheap fares and numerous travel routes throughout the Indian sub-continent and the Far and Middle East.

A review of Web sites operated by many of the most successful "infant airlines" in Asia and the Middle East (e.g. Air Asia, Qatar Airways, Kingfisher) indicates that one of the hallmarks of these carriers is that all flights are booked via the Internet. Some of these airlines, however, operate limited ticketing offices in their home countries. None have offices in either the United States or Europe. This "virtual ticketing" trend is being mirrored by legacy carriers in the United States. In 2004, for example, Northwest Airlines closed all of its 25 ticketing offices in the United States.⁵

In an unexpected fashion, the very convenience of garnering business in the United States via the Internet will possibly enable claimants to subject these remote carriers to the jurisdiction of American courts. While this area of aviation law is relatively uncharted,

an examination of cases indicates that foreign airlines which rely upon Internet commerce to attract American passengers may indeed be subject to personal jurisdiction in the United States.

POSSIBLE PERSONAL JURISDICTION OVER FOREIGN AIRLINES

Although there is scant case law that contemplates the exercise of personal jurisdiction over a foreign airline on the sole basis of Internet-related commerce, a number of related cases are instructive on this issue. For example, in *Breschia v. Paradis Vacation Club, Inc.*, No. 02-3014, 2003 WL 22872128, *5 (N.D. Ill. Dec. 4, 2003), the court explained that the exercise of specific jurisdiction based upon Internet interaction "is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website."

Passive Web sites in which there is "no exchange of information . . . is not grounds for the exercise of personal jurisdiction." *Id.* In accordance with this doctrine, the court in *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295, 399-400 (S.D.N.Y. 1996), refused to

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Personal Jurisdiction, cont. from Page 3

exercise jurisdiction based upon Internet contacts alone where a defendant jazz club's Web site only consisted of a calendar of upcoming events and ticketing information.

In contrast, defendants that enter into contractual relations with individuals in a particular state over the Internet may be subject to personal jurisdiction in that forum. The court in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1122-23 (W.D. Pa. 1997) did just that when it articulated a "sliding scale of internet activity" in determining that an online computer news service purposefully availed itself to doing business in Pennsylvania. Thus, the news service subjected itself to personal jurisdiction there, by operating an Internet site to advertise and solicit customers for its services and by entering contracts with approximately 3,000 Pennsylvania residents.

Although courts consistently recognize that personal jurisdiction cannot rest on the sole basis of maintaining a "passive" Web site since these sites do "little more than make information available to those who are interested in it," *Zippo*, 952 F. Supp. at 1124, there is little agreement about the requisite level of cyber activity needed to confer personal jurisdiction.

Some courts have held that sufficient minimum contacts are established, and the defendant is "doing business" over the Internet where the defendant's Web site is capable of accepting and does accept purchase orders from residents of the forum state.⁶

Other courts have rejected the idea that a company operating a Web site is subject to the jurisdiction of any forum whose citizens have purchased the company's goods via the Internet. See *Millennium Enters., Inc., v. Millennium Music, LP*, 33 F. Supp.2d 907, 921 (D. Or. 1999) (concluding that "[t]he fact that someone who accesses defendants' Web site can purchase [one of defendant's products] does not render defendants' actions 'purposefully directed' at this forum").

The court opined that in the Internet age "the likelihood that personal jurisdiction can be constitutionally exer-



Michael R. Sherwin

cised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the internet." *Id.* at 1124; see also *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1264-65 (6th Cir. 1996) (holding that specific jurisdiction is proper if the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the internet).

Accordingly, the following checklist provides questions that should be scrutinized when determining the relative success of securing personal jurisdiction over defendants based upon cyber-contacts:⁷

(a) What is the qualitative nature of the cyber activities? Is the defendant's Web site "interactive" (e.g. communication and contractual relations can be exercised by parties electronically) or "passive" (e.g. information publishing Web site)? In addition to business transactions, does the defendant also conduct cyber banking with financial institutions in the subject forum?

(b) What is the quantitative nature of the cyber activities? What percentage of defendant's business is generated in the subject forum? What percentage of defendant's business is conducted via the Internet? What is the frequency of the defendant's "e-sales" activity with the resident of the subject forum?⁸

(c) Where is the cyber presence headquartered? Is the defendant's Web site maintained by an Internet Service

Provider (ISP) located in the subject forum?

In sum, pertinent case law indicates that a defendant's Internet activities within a forum state can support the exercise of personal jurisdiction if the quantitative and qualitative nature of the e-contacts shows an active, continuous and systematic relationship with forum residents.

"Infant airlines" of the world beware—although you may not have any air routes or offices in the United States, your cyber-contacts may very well provide a key ingredient in an American court's jurisdictional analysis.

Notes

1. <http://in.news.yahoo.com/050616/137/5yz5x.html> (June 19, 2005).
2. See <http://www.airsider.net/files/2005/0205/008/airlineforecast5.htm> (Feb. 27, 2005).
3. http://www.usatoday.com/travel/flights/2005-06-15-india-middle-east-orders_x.htm (Jun. 15, 2005).
4. <http://news.airwise.com/story/view/1118357122.html> (Jun. 9, 2005).
5. See <http://www.bizjournals.com/seattle/stories/2004/02/16/daily23.html> (Feb. 19, 2004). United announced similar measures in 2003 and 2004.
6. See *Euromarket Designs, Inc. v. Crate & Barrel Ltd.*, 96 F. Supp.2d 824, 838 (N.D. Ill. 2000) (stating that the defendant "clearly is doing business over the website" because it purposefully designed "a Web site with a high level of interactivity, enabling customers to browse through an online catalog and place orders via the Internet"; see also *Stomp v. Neato, LLC*, 61 F. Supp.2d 1074, 1078 (C.D. Cal. 1999) (holding that the defendant's two online sales "constitutes conducting business over the Internet, and therefore under the test enumerated in *Zippo* ... asserting personal jurisdiction is proper").
7. A court will obviously balance these factors against its obligation to exercise jurisdiction in a (reasonable) manner. This decision will often turn on the following issues: (a) burden of defendant in defending in the forum; (b) extent of conflict with the sovereignty of defendant's state; (c) judicial economy; (d) plaintiff's interest in seeking effective relief; and (e) the existence of an alternative forum (e.g. "forum non conveniens"). See generally *Rodriguez v. Dixie Southern Industries, Inc.*, 113 F. Supp.2d 242, 253-54 (D.P.R. 2000) ("Gestalt Factors").
8. Note that in the context of Warsaw Convention cases, the potential exists that a federal court, under Fed. R. Civ. P. 4(k)(2), may exercise personal jurisdiction over Warsaw defendants on the aggregate basis of "contacts with the United States as a whole." *Coyle v. PT Garuda Indonesia*, 180 F. Supp.2d 1160, 1170 (D. Or. 2001), *rev'd on other grounds*, 363 F.3d 979 (9th Cir. 2004).

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2005 Notable Aviation Decisions

By Daniel D. Barks, Washington, D.C. and [Justin T. Green](#), New York, N.Y.

WARSAW CONVENTION

Robertson v. American Airlines, Inc., 401 F.3d 499 (D.C. Cir. 2005).

The D.C. Court of Appeals held that the Denver to Chicago leg of a passenger's trip from London to Denver to Chicago to Washington, D.C. was "international transportation" within the meaning of the Warsaw Convention, and thus the Convention's two-year limit, rather than the District of Columbia's three-year statute of limitations, applied to the passenger's claim arising from burns she sustained on the Denver to Chicago leg.

The passenger regarded the Denver to Chicago leg as part of the unified journey to London to Washington D.C. In addition, the airline, through the travel agency which made the reservations, knew that the domestic leg was part of the international travel.

Orova v. Northwest Airlines, Inc., No. 03-4296, 2005 WL 281197 (E.D. Pa. Feb. 2, 2005).

Plaintiffs sued Northwest Airlines alleging breach of contract and intentional infliction of emotional distress after they were humiliated and barred from a flight from Europe to the United States. The court granted Northwest Airlines' motion for summary judgment on the ground that Northwest was an improper party because the flights in question were operated by KLM and the Warsaw Convention limitations actions to the actual carrier.

Boxley v. Delta Airlines 30 Avi 16, 299 (N.D. Ohio, April 29, 2005)

The failure to warn of a risk of DVT during a long flight is not an "accident" within the meaning of the Warsaw Convention's Article 17.

FORUM NON CONVENIENS

Gambra v. International Lease Finance Corp., No. CV 04-10129CASAJWX, 2005 WL 1529612 (C.D. Cal. June 28, 2005).

This case arises out of the crash of Flash Airlines Flight 604 in the Red Sea

off the coast of Egypt while en route from Egypt to France on Jan. 3, 2004. The Court granted defendants' motion to dismiss on the grounds of forum non conveniens, noting, inter alia, that all but two, i.e. 120 out of 122, of the decedents were citizens or residents of France.

FEDERAL PREEMPTION

O'Callaghan v. ARM Corp., No. 04 C 4005, 2005 WL 1498870 (N.D. Ill. June 8, 2005).

Plaintiffs allege that they bought tickets from Chicago to Rome after hearing that American Airlines offered more legroom than other airlines, which the plaintiffs allege was false. The court held that the ADA preempted two counts of the plaintiffs' Amended Complaint because allowing the plaintiffs to use consumer fraud laws to obtain damages from the defendants' advertising has the effect of regulating the defendants' rates.

The court concluded, however, that a reasonable fact finder could conclude that the defendant accepted the plaintiffs' offer to purchase tickets on the terms stated in the advertisement and, therefore, the court did not dismiss plaintiffs' contract claim.

Miezin v. Midwest Express Airlines, Inc., No. 2004AP868, 2005 WL 1208507 (Wis. App. May 17, 2005).

The issue is whether a plaintiff can pursue a state common-law negligent failure-to-warn claim regarding the deep vein thrombosis (DVT) dangers, or whether federal law preempts DVT claims. The court concluded that the claim, based solely on a state common-law negligence theory, is impliedly preempted by the Federal Aviation Act of 1958.

In re: Deep Vein Thrombosis Litigation, MDL No. 04-1606, 2005 WL 591241 (N.D. Cal. March 11, 2005).

The court granted airline defendants' motion to dismiss all of non-Warsaw plaintiffs' DVT claims as preempted by federal law.

Greene v. B.F. Goodrich Avionics Systems, Inc., 409 F.3d 784 (6th Cir. 2005).

The wife of a helicopter pilot killed in a helicopter crash brought a products liability suit against a gyroscope-manufacturer alleging that the manufacturer defectively designed or manufactured the vertical gyroscope portion of the helicopter's navigation system and that the manufacturer was negligent in failing to warn of its defective product. The Sixth Circuit held that:

(1) The pilot's statement recorded on a cockpit voice recorder prior to the fatal helicopter crash was admissible under the present sense impression and excited utterance exceptions to the hearsay rule.

(2) The evidence presented by the wife failed to establish a manufacturing defect in the vertical gyroscope.

(3) The federal law preempted the state-law failure-to-warn claim.

Power v. Federal Express Corp., 127 Cal.App. 4th 1039, 26 Cal.Rptr.3d 202 (App. Ct. 2005)

A customer, whose property was damaged during transit, sued an air freight carrier for breach of contract and breach of implied covenant of good faith and fair dealing. The California Court of Appeals held that:

(1) The customer's action was preempted by the federal Airline Deregulation Act of 1978 (ADA) to the extent it sought relief beyond repair costs.

(2) The customer's recovery was similarly limited by federal common law.

Gary v. The Air Group, Inc., 397 F.3d 183 (3d Cir. 2005).

A copilot was fired after he reported the pilot's lack of qualifications and FAA violations. He brought a state court action against the employer alleging retaliatory discharge in violation of New Jersey's Conscientious Employee Protection Act. The Third Circuit held that:

(1) The copilot's claim for retaliatory discharge was not "related to" the

“service of an air carrier” within the meaning of the ADA’s express preemption clause.

(2) The addition of the Whistleblower Protection Program did not expand the scope of the ADA preemption provision to encompass state law whistleblower claims.

McBride v. Gemini Air Cargo, Inc., 2005 WL 1522723 (Fla. App. 3 Dist. June 29, 2005)

Former employees brought an action for retaliatory termination under the Florida Whistleblower Act, alleging that they were terminated because they reported regulatory violations to the FAA. The District Court of Appeal held that:

(1) The federal Airline Deregulation Act did not preempt action.

(2) The action was not preempted by the federal Whistleblower Protection Program.

In re American Airlines, Inc., Privacy Litigation, 370 F. Supp.2d 552 (N.D. Tx. May 25, 2005)

Plaintiffs filed putative nationwide class actions alleging injuries arising out of the airline’s agent’s unauthorized disclosure of its passengers’ personally identifiable travel information to private research companies. After the cases were consolidated and transferred by the Judicial Panel on Multidistrict Litigation, the airline and the companies moved to dismiss. The District Court held that:

(1) The disclosure did not violate Electronic Communications Privacy Act-Stored Communications.

(2) The Airline Deregulation Act preempted passengers’ state law tort claims against the airline.

(3) The passengers failed to plead an actionable breach of contract claim.

MANUFACTURER DUTY

Paramount Aviation Corp. v. Gruppo Agusta, 124 Fed.Appx. 85 (3d. Cir. 2005) (not precedential).

A company which provided management services for a helicopter involved in a crash brought a state court action against the manufacturer, the related corporate entities in the helicopter’s distribution chain, and the repair firm that serviced helicopter, asserting claims for,

inter alia, negligence and strict tort liability. The Third Circuit held that the defendants did not owe a duty of care to the company supporting its recovery in negligence or strict tort liability.

FEDERAL REMOVAL

Britton v. Rolls Royce Engine Services, No. C 05-01057 SI, 2005 WL 1562855 (N.D. Cal. June 30, 2005)

The defendant contended that even if the plaintiffs had not based their claims on any federal law violation, “removal [was] appropriate because federal statutes and regulations, including the Transportation Laws of the United States and the regulations promulgated by the FAA pursuant to those laws, preempt state law in these areas.”

The court rejected the preemption argument noting that the only evidence of congressional intent to preempt offered by the defendant is the statement in a 1958 Senate Report that “the federal government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest.”

“This vague language does not establish Congress’ intent to preempt state tort claims, and indeed, the courts have repeatedly rejected preemption in the aviation safety field.” (Citing *American Airlines, Inc. v. Wolens*, 513 U.S. 219 115 S.Ct. 817, 130 L.Ed.2d 715 (1995); *Duncan v. Northwest Airlines, Inc.*, 208 F.3d 1112 (9th Cir.2000); *Vinnick v. Delta Airlines, Inc.*, 93 Cal.App.4th 859, 113 Cal.Rptr.2d 471 (2001)).

The court found that the defendant failed to demonstrate that Congress intended the various “Transportation Laws” and the FAA regulations to preempt the plaintiffs’ state-law claims for negligence, products liability, and breach of warranty and rejected defendant’s argument for an independent basis for removal under 28 U.S.C. § 1442(a), the Federal Officer Removal Statute.

EXPERT WITNESSES

Indemnity Insurance Company of North America v. American Eurocopter LLC, 227 F.R.D. 421 (M.D. N.C. 2005).

In a dispute between an insurer and a helicopter manufacturer arising from a helicopter accident, the insurer sought

to preclude potential expert testimony from the manufacturer’s employees, whom the manufacturer maintained were lay witnesses but had identified as expert witnesses as a precautionary measure. In the alternative, the insurer sought an order compelling the witnesses to submit to depositions. The district court held that:

(1) The employee witnesses did not have to produce written reports absent showing either that they were retained experts or that they regularly provided expert testimony, but

(2) The employee witnesses were subject to deposition to determine their expert status and nature of opinions to be offered, if any.

BANKRUPTCY

United Airlines, Inc. V. U.S. Bank, N.A. 30 Avi 16, 342 (7th Cir. May 27, 2005).

The circuit court held in a previous opinion that 11 U.S.C. §1110 entitles aircraft lessors to immediate possession of an aircraft leased to UAL unless UAL paid full rental, or lessors agreed to take less than what was called for under the lease agreement. The district court and Bankruptcy Referee were slow to lift the injunction against repossession without further delay.

AIRLINE SECURITY

U.S. v. Marquez, 30 Avi 16,347 (9th Cir. June 7, 2005)

The trial court’s denial of a motion to suppress evidence under the 4th Amendment was affirmed in a case involving the discovery of bricks of cocaine on a passenger who was selected for additional screening by airport security. This is because the search was reasonable under the circumstances and made with good intent; i.e., to detect the existence of weapons or explosives.

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