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## Aviation Law

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Aviation law consists of a complex body of international and domestic laws and regulations. This article will not attempt to address all recent developments, but will instead focus on select 2007 aviation law highlights.<sup>1</sup>

- First, courts this year have issued a number of decisions concerning the extent to which federal law preempts state law in aviation cases. These decisions demonstrate that the law regarding federal preemption in aviation is far from settled. We will discuss several recent decisions on the issue, including one from the U.S. Court of Appeals for the Ninth Circuit. We will also address recent decisions that have rejected the argument that federal preemption in aviation creates federal question jurisdiction.
- Second, we have seen decisions relating to the General Aviation Revitalization Act (GARA),<sup>2</sup> a federal tort reform measure that imposes a statute of repose in general aviation cases. We will address one recent decision where the court held that the GARA exception for a manufacturer's knowing misrepresentation to the Federal Aviation Administration precluded summary judgment.
- Third, there have been a number of decisions relating to the Warsaw and Montreal conventions which largely occupy the field of international aviation law. This year we have seen a number of decisions defining what constitutes an "accident" under the conventions. There have also been decisions relating to court jurisdiction over cases governed by the conventions.
- Fourth, the practice of aviation law has become truly global and many cases arising from foreign accidents have been successfully litigated in the United States. We will discuss the forum non conveniens doctrine, which is the first and perhaps the most important fight in these international cases.
- Finally, we cover two interesting decisions this year addressing aviation products liability claims.

### Preemption

The major battles in 2007 have been fought over the question of whether and to what extent federal law preempts state law in aviation cases. Preemption has been the most litigated aviation law issue since the U.S. Court of Appeals for the Third Circuit's 1999 decision in *Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999).

In *Abdullah*, a passenger from the Virgin Islands sought damages for injuries suffered during a turbulence incident on a commercial flight. The Federal Aviation Regulations (the FARs) and the local law of the Virgin Islands conflicted because the Virgin Islands law did not require the passenger to wear a seat belt while the FARs required passengers to fasten seat belts when the seat belt sign was illuminated. (The seat belt was illuminated when the plaintiff was injured.) At trial, the court charged the jury on the Virgin Islands law and the jury found for the plaintiff. The trial court, however, granted the defendant airline's motion for a new trial on the basis that the local law was preempted by federal law and certified the issue for appeal.

On appeal, the Third Circuit broadly held that there was an "implied federal preemption" of the entire field of aviation safety. The Third Circuit's ruling was a significant departure from prior decisions and the court noted its disagreement with the opinions of the U.S. Court of Appeals for the Second, Tenth and Eleventh circuits. See *id.* at 372.

In *Montalvo v. Spirit Airlines*, F.3d, 2007 WL 2874401 (9th Cir. Oct. 4, 2007), the Ninth Circuit recently held that the Federal Aviation Act, 49 U.S.C. §40103, et seq., and its corresponding regulations impliedly preempt state duty to warn airline passengers about the risks of deep vein thrombosis (DVT), but that fact issues remained whether the plaintiff's claim that the constrained seating configuration caused the DVT were preempted by the Airline Deregulation Act (ADA), 49 U.S.C. §41713(b)(1). *Montalvo* involved negligence claims under California common law. The decision is the latest in a series of aviation law decisions involving DVT.

*Montalvo* followed the U.S. Court of Appeals for the Fifth Circuit's decision in *Witty v. Delta Airlines*, 366 F.3d 380 (5th Cir. 2004), which also addressed state law claims against an airline involving DVT. Unlike the Third Circuit in *Abdullah*, the Fifth Circuit decided the preemption question by "narrowly addressing the precise issues" and refused to decide "whether a state law claim . . . is entirely preempted." *Witty* dismissed the state law claims because they conflicted not only with the ADA, which barred states from imposing laws related to airline prices and services, but also with the FARs, which specified the warnings that an airline must provide to passengers and required that passengers remain seated with their seat belts fastened during a flight. *Id.* at 385.

A U.S. District Court in the Eastern District of Texas recently noted the narrowness of the *Witty* decision by denying an aviation manufacturer's motion that the FARs preempted the plaintiff's state law product liability claims. In *Monroe v. Cessna Aircraft Co.*, 417 F.Supp.2d 824, 835 (E.D. Tex. 2006), a small Cessna aircraft piloted by an instructor and a flight student struck a bird during a training flight. Plaintiffs claimed that the plane was defective and negligently designed because the manufacturer failed to include emergency procedures for responding to in-flight structural damage in the aircraft's flight manual.

The manufacturer moved for summary judgment, arguing that *Abdullah* and *Witty* supported dismissal. The court found, however, that the Tenth Circuit's decision in *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir. 1993), which addressed a products liability claim and recognized that the Federal Aviation Regulations only provided minimal safety standards, was better reasoned than *Abdullah*, and that *Witty* was narrowly limited in scope and did not apply to a situation where there was no specific requirement in the FARs in conflict with plaintiff's state law claims. *Monroe* found that the FARs regarding the content of aircraft flight manuals were broadly drafted and left discretion to the manufacturer. This demonstrated the "lack of [a] pervasive and precise regulatory scheme" necessary to support the defendant's argument. *Monroe*, 417 F.Supp.2d at 833.

*Monroe* also cited GARA as a basis for rejecting defendant's broad preemption argument. The court found that GARA was an acknowledgment by Congress of the continuing viability of state law tort claims against manufacturers for aircraft and parts in service for less than 18 years.

Another recent decision held that Tennessee could not impose aviation safety rules for emergency medical service (EMS) aviation because the field of aviation safety is preempted by federal law and regulations.

The excessive accident rate in emergency medical services (EMS) aviation has received much attention over the past several years. The National Transportation Safety Board (NTSB) attributes many EMS crashes to pilot error. But a pilot is only as good as the aircraft that he or she flies. Tennessee recently attempted to address the safety problem by enacting regulations designed to improve EMS safety.

In *Air Evac EMS, Inc. v. Robinson*, 2007 WL 1484473 (M.D.Tenn., May 18, 2007), the court issued a declaratory judgment that federal law preempted the Tennessee law, which imposed safety rules and required emergency medical services helicopters to have improved avionics equipment. The court found that Tennessee had no authority to regulate in the area of aviation safety.

Other courts have issued recent decisions finding federal preemption in certain circumstances. In *Adana v. Air East Airways, Inc.*, 477 F.Supp.2d 489 (D.Conn. 2007), the court found that the FAA preempts state commission law standards of care, but does not preempt state law remedies. The Court followed the Third Circuit's *Abdullah* approach and found that the Federal Aviation Act and corresponding regulations provide the standard of care. The court found that plaintiff's negligence claim may go forward, but only applying federal standards. In *Levy v. Continental Airlines, Inc.*, 2007 WL 2844592 (E.D.Pa. Oct. 1, 2007), the court similarly dismissed all state personal injury claims finding that they were preempted by federal law.

### Preemption, U.S. Jurisdiction

Defendants have recently attempted to use preemption arguments to strip state courts of jurisdiction in aviation cases. These efforts have been rejected by a series of recent court decisions. The courts held that federal preemption is not a legitimate ground of removing cases from state court.

In *In re Air Crash at Lexington, Kentucky, August 27, 2006*, 486 F.Supp.2d 640 (E.D.Ky., 2007), the families of victims from the Comair Flight 5191 crash in Lexington, Ky., brought claims in state court. The defendants moved to dismiss the actions to federal court pursuant to 28 U.S.C. §§1331 and 1337, arguing that plaintiffs' claims were governed by federal law and that federal law preempts the state law claims presented. The court remanded the action finding that there was no complete preemption of plaintiffs' state law claims and that the fact that the defendants may rely on federal law as the defense does not create a federal question sufficient to allow for federal jurisdiction.

In *Bennett v. Southwest Airlines Co.*, 493 F.3d 762 (7th Cir. 2007), passengers and bystanders brought state law claims against Southwest Airlines after an aircraft overran its intended runway, broke through the airport fence and crashed onto a city street. The Seventh Circuit held that the defendant's affirmative defense that the Federal Aviation Act preempted the plaintiff's state law tort claims was not sufficient to support federal jurisdiction because the "arising under jurisdiction" depends on the claim for relief rather than potential defenses. In *Zahora v. Precision Airmotive Corp.*, 2007 WL 765024 (E.D.Pa., March 9, 2007), the court similarly found that federal regulation of aviation safety did not create a federal question in aviation tort cases and remanded the case to state court because it found that it did not have jurisdiction.

In *Buck v. American Airlines, Inc.*, 476 F.3d 29 (1st Cir. 2007), the First Circuit held that while the Airline Deregulation Act (ADA) preempted the state law claims at issue, the ADA did not create a private right of action in favor of purchasers of nonrefundable airline tickets who sought to recover fees and taxes collected by the airline during ticketing.

## GARA

Congress enacted GARA in 1994 to "revitalize" the general aviation industry. GARA imposes a statute of repose protecting general aviation manufacturers from liability for claims arising more than 18 years after the manufacture of the aircraft, or any components, systems, subassemblies, or other parts involved in an accident. See 49 U.S.C. §40101 note, §§2(a), 3(3). GARA has a number of exceptions, however, including one that makes it inapplicable where the manufacturer knowingly misrepresented or concealed safety information to or from the FAA.

*Robinson v. Hartzell Propeller Inc.*, 2007 WL 2007969 (E.D.Pa. July 5, 2007), involved the crash landing of a Mooney M20E aircraft near Plattsburg, N.Y. The plaintiffs alleged that a blade of the aluminum propeller on their aircraft fractured during the flight, causing the crash. The defendant moved for summary judgment, arguing that plaintiffs' claims were barred by GARA's 18-year statute of repose. Plaintiffs argued that the "knowing misrepresentation, concealment or withholding" exception of the statute of repose applied. The court denied the defendant's motion holding that there were genuine issues of material fact as to whether defendant Hartzell "knowingly misrepresented, concealed or withheld" information from the FAA.

## Warsaw/Montreal Convention

Since 1929, the Warsaw Convention has governed the liability of airlines to passengers traveling on international tickets between nations that have signed onto the convention. The United States declared its adherence to the treaty in 1934 and since that time U.S. courts have grappled with the meaning of the convention's provisions. In 1999, the Montreal Convention, a new international agreement that replaced the Warsaw Convention, was enacted. Perhaps the most significant change in the Montreal Convention is the addition of a "fifth jurisdiction" that allows courts in the plaintiff's domicile the ability to take jurisdiction. The Warsaw Convention continues in force in circumstances where the nation whose law governs the action is signatory to the Warsaw Convention, but not the Montreal Convention. This year we have seen a number of decisions regarding what constitutes an "accident" under the conventions, which is a prerequisite to liability.

In *Watts v. American Airlines, Inc.*, 2007 WL 3019344 (S.D.Ind., Oct. 10, 2007), a passenger suffered a heart attack while in the lavatory on an international flight. He was left by the crew in the lavatory and he was later found by cleaning personnel and was subsequently pronounced dead. Plaintiff, representing the decedent's estate, brought a claim alleging that American Airlines violated industry standards and its own policies by failing to respond to decedent's medical emergency. American Airlines argued that the Montreal Convention governed and that the decedent's heart attack was not an "accident" under the convention. An "accident," as the term is used in the Warsaw and Montreal conventions, has been defined by the Supreme Court as "an unexpected or unusual event or happening that is external to the passenger." *Air France v. Saks*, 470 U.S. 392, 405 (1985). The *Watts* court found that while the heart attack was not an accident, the airline's alleged failure to respond to the emergency and follow industry standards could constitute an accident and accordingly denied defendant's motion.

In *In re Deep Vein Thrombosis Litigation*, 2007 WL 3027351 (N.D.Cal. Oct. 12, 2007), the U.S. District Court for the Northern District Court of California decided five individual claims arising from passengers developing DVT during international flights. The Court followed *Husain v. Olympic Airways*, 316 F.3d 829 (9th Cir. 2002), in holding that the airline's refusal to reseat a passenger who had complained about cramped seating could constitute an accident pursuant to the Montreal Convention. The court also declined to rule out the claim of another plaintiff who developed DVT after being stuck in his seat during a two-hour delay. The court held that the circumstances surrounding the two-hour delay could constitute an accident. The court further found that a third plaintiff's evidence of an airline's failure to provide medical attention could constitute an "accident." The court, however, granted summary judgment against the claims of one plaintiff based on lack of evidence.

Courts have issued decisions in 2007 concerning where actions governed by the Warsaw and Montreal conventions may be brought. In *Bunis v. Israil Airlines & Tourism, Ltd.*, F.Supp.2d, 2007 WL 2500298 (E.D.N.Y. July 30, 2007), the court denied a plaintiff's motion to remand the action to state court, holding that the Warsaw Convention provided federal question jurisdiction over claims arising on an international flight.<sup>3</sup> In *Baah v. Virgin Atlantic Airways Ltd.*, 473 F.Supp.2d 591 (S.D.N.Y. 2007), the court held that it lacked subject matter jurisdiction over the claims which was governed by the Montreal Convention. The court found that because the passenger's ticket provided for round-trip transportation with the final destination London, that the U.S. court did not have jurisdiction, pursuant to Article 33.<sup>4</sup>

Finally, courts have reaffirmed that the conventions, where applicable, completely preempt state law claims against airlines.

In *In re Air Crash at Lexington, KY, August 27, 2006*, 501 F.Supp.2d 902 (E.D.Ky. 2007), the court held that the Montreal Convention completely preempted state law causes of action. The court held that "the Warsaw and Montreal Conventions provide the exclusive remedy for claims within the scope of the treaties . . . and that [t]his construction is much broader than mere conflict preemption." *Id.* at 913. In short, the court ruled that if the Montreal Convention applied, the case belonged in federal court. In *In re Nigeria Charter Flights Contract Litigation*, F.Supp.2d, 2007 WL 3124527 (E.D.N.Y. Oct. 25, 2007), the court held that claims for nonperformance of a contract for carriage were not preempted by the Warsaw and Montreal conventions, but that claims for delay were preempted. The court denied motions to dismiss plaintiffs' state law contract and tort claims.

## Forum Non Conveniens

Under the doctrine of forum non conveniens, a court may dismiss a case over which it has jurisdiction if dismissal best serves the convenience of the parties and the ends of justice.

In *In re Air Crash Near Athens, Greece on August 14, 2005*, 479 F.Supp.2d 792 (N.D.Ill., 2007), the court dismissed the claims of 92 crew and passengers who were killed in the crash of Helios flight 522, a Cypriot airliner on a flight from Cyprus to Prague. The court held that Cyprus and Greece were adequate alternative fora for the actions and that the relevant public and private interest factors favored dismissal. The court also noted that the pendency of litigation in Greece between the airline's owner and the aircraft's manufacturer favored dismissal.

## Products Liability

The law is not perfectly uniform when it comes to whether the owner of a defective product may recover economic loss in a products liability action. The majority of courts, however, have held that a corporation may not bring a products liability action to recover for economic losses. This is the rule followed in a recent decision.

In *Hasler Aviation, L.L.C. v. Aircenter, Inc.*, 2007 WL 2263171 (E.D.Tenn. Aug. 3, 2007), the court granted the defendant's motion that the economic loss doctrine barred the plaintiff's products liability claims. The plaintiff had purchased a 1962 Aero Commander model 500A aircraft which turned out to be defective and not airworthy. The court held that because there was no allegation of personal injury or property damage, the plaintiff's tort claims were barred.

The question of whether a maintenance manual is part of the airplane or whether it is a separate product was addressed in *Colgan Air, Inc. v. Raytheon Aircraft Co.*, F.3d, 2007 WL 3025840 (4th Cir. Oct. 18, 2007). In *Colgan*, an aircraft lessee sued the aircraft's manufacturer for negligence, strict liability and breach of express and implied warranty after an airplane crash resulting in the death of a pilot and copilot. The district court had granted summary judgment for the manufacturer. The Fourth Circuit reversed, in part, because factual issues precluded summary judgment based on the manufacturer's warranty disclaimer and factual issues also precluded summary judgment on the express warranty clause.

Immediately prior to the accident, Colgan's mechanics performed a maintenance procedure installing a new elevator trim tab cable using Raytheon's maintenance manual. Colgan's mechanics, relying on Raytheon's instructions, installed the trim tab cable such that the trim tabs operated in reverse, which caused the accident.

The court found that "the district court erred in concluding that the maintenance manual was part of the Aircraft as a matter of law" and that "a genuine issue of material fact exists as to whether the maintenance manual was a separate product apart from the Aircraft." Consequently, the court found that issues of fact existed for the jury regarding whether the aircraft's warranty, which barred claims outside a 90-day window for "each part of the Aircraft," also applied to bar Colgan's claims for defects in the maintenance manual. Additionally, the court found a genuine issue of material fact as to whether a statement in the maintenance manual created an express warranty.

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## Endnotes:

1. Kreindler, *Aviation Accident Law* (Matthew Bender 2007) provides an up-to-date comprehensive treatment of the complex body of laws governing aviation tort litigation.
2. Pub. L. No. 103-298, 108 Stat. 1552 (1994), amended by Act of Pub. L. No. 105-102, §3(e), 111 Stat. 2204, 2216 (1997)
3. While the Montreal Convention is in effect, Israel is not a signatory to the Montreal Convention.
4. "A plaintiff may bring an action in the United States for damages pursuant to the Montreal Convention only when the United States is: (1) 'the domicile of the carrier'; (2) 'the principal place of business' of the carrier; (3) 'the place where the carrier has a 'place of business through which the contract has been made'; (4) 'the place of destination'; or (5) 'the principal and permanent residence of the passenger.'"