

RECENT DEVELOPMENTS IN AVIATION AND SPACE LAW

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This paper provides an overview of important developments in aviation and space law from October 1, 2014, to September 30, 2015. We selected some of the most significant cases in the areas of federal preemption, the Foreign Sovereign Immunities Act, unmanned aircraft systems, *forum non*

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conveniens, international conventions, federal jurisdiction, and the Federal Tort Claims Act.

I. FEDERAL PREEMPTION

It is well established that when federal law conflicts with state law, federal law preempts state law.¹ Aviation is heavily regulated by the Federal Aviation Administration (FAA) so whether federal laws and regulations preempt state laws is a commonly litigated issue. Although preemption issues are often litigated in aviation cases, no uniform approach has developed.²

A. *Sikkelee v. Precision Airmotive Corp.*

In *Sikkelee v. Precision Airmotive Corp.*, the plaintiff claimed that an aircraft piloted by her husband lost power due to a defective carburetor, causing him to lose control of the aircraft shortly after takeoff and resulting in his fatal injuries.³ After various stipulations and motions, the only claims that remained were against Lycoming, the engine manufacturer, for negligence and strict products liability relating to a rebuilt carburetor installed in the aircraft in accordance with Lycoming instructions.⁴

The district court had previously held that federal standards of care preempted state law standards, citing *Abdullah v. American Airlines*.⁵ The court dismissed the plaintiff's claims and granted the plaintiff leave to amend her complaint to plead federal standards of care.⁶

In October 2013, a few months before the trial date, the plaintiff proposed jury instructions citing eighteen federal regulations as the applicable federal standards of care.⁷ The court found the plaintiff's proposed instructions were "completely unable to assist the Court in . . . 'formulating an intelligible statement of applicable law.'"⁸ Based on the failures of the plaintiff's proposed instructions, the court ordered additional summary judgment briefing, noting the case "would profit from examination" of these issues.⁹

Ultimately, the court determined that the plaintiff's claims for negligent design and strict products liability under a design defect theory were entirely preempted.¹⁰ The court concluded that since all the design

1. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

2. *See Lewis v. Lycoming*, 957 F. Supp. 2d 552, 555–58 (E.D. Pa. 2013).

3. 45 F. Supp. 3d 431, 434–35 (M.D. Pa. 2014) (*Sikkelee III*).

4. *Id.* at 435–36, 440.

5. *Id.* at 435 (citing *Sikkelee v. Precision Airmotive Corp.*, 731 F. Supp. 2d 429, 438–39 (M.D. Pa. 2010) (*Sikkelee I*) (citing *Abdullah v. Am. Airlines*, 181 F.3d 363 (3d Cir. 1999))).

6. *Id.* (citing *Sikkelee I*, 731 F. Supp. 2d at 439).

7. *Id.* at 437.

8. *Id.*

9. *Id.* at 438.

10. *Id.* at 451–53.

regulations the plaintiff claimed Lycoming violated were prerequisites to obtaining a type certificate, Lycoming's type certificate for that model engine was conclusive evidence of compliance with those requirements and granted summary judgment.¹¹

The plaintiff argued that the court should find an implied general standard of care in the FAA's design regulations.¹² The court rejected that argument, reasoning that the general standard of care found in *Abdullah* came directly from 14 C.F.R. § 91.13(a) and there was no corresponding design regulation setting forth a general standard of care.¹³ The court said it had no authority to read into the existing regulations an "overall concept of careful conduct" or create federal common law, and as a result, "once the engine or component-maker has complied with the specific regulations [by obtaining a type certificate], he has met any standard of care the federal regulations can be said to constitute."¹⁴

The court also rejected the plaintiff's argument that the lack of a regulation directly addressing the defects and failures she alleged were present in the carburetor was evidence that the field of aviation safety was not pervasively regulated and preempted.¹⁵ The court reasoned that "Congress's decision to leave an area unregulated by both the federal and state governments preempts the field as effectively as its decision to have federal law regulate so comprehensively that state law supplementation is undesirable."¹⁶ Unlike other courts that found that "opening the courthouse door" would have a "salutary effect" on federal regulation of aviation safety, in *Sikkelee III*, the district court reasoned that allowing juries to determine the meaning of vaguely worded aviation design standards would undercut the FAA's own interpretations of those regulations and destabilize rather than aid in federal regulation of aviation safety.¹⁷

The court, however, permitted to go forward the plaintiff's claims that Lycoming failed to report engine defects that result, or could result, in a loss of engine power, pursuant to 14 C.F.R. § 21.3.¹⁸ In contrast to 14 C.F.R. § 21.99(b), which is permissive and provides that type certificate holders "may submit appropriate design changes for approval" based on their service experience, 14 C.F.R. § 21.3 *requires* the type certificate holder to report "any failure, malfunction, or defect in any

11. *Id.*

12. *Id.* at 451.

13. *Id.* at 447 (citing *Abdullah*, 181 F.3d at 365; *Elassaad v. Indep. Air, Inc.*, 613 F.3d 119, 129–30 (3d Cir. 2010)).

14. *Id.* at 449.

15. *Id.* at 450.

16. *Id.*

17. *Id.* at 454–56.

18. *Id.* at 459.

product” it manufactured.¹⁹ Even though Lycoming did not make the carburetor at issue, the plaintiff set forth sufficient evidence to create a genuine issue of material fact as to whether Lycoming had properly:

complied with its § 21.3 reporting responsibilities in relation to the O-320-D2C engines (incorporating [the model carburetors at issue]) that *were* manufactured by Lycoming or *did* go through its quality control system, [such that] a type design change would have been mandated by the Administrator, which would have changed the design of even those carburetors that were not manufactured by Lycoming.²⁰

The court also noted that the plaintiff’s claim would be a very difficult one to prove because not only would she have to establish a failure to abide by § 21.3, but also that, if Lycoming complied with § 21.3, the FAA would have ordered design changes that would have prevented this accident.²¹

The plaintiff appealed to the Third Circuit, and briefing is complete. The issues before the Third Circuit on appeal are: (1) whether preemption of state court standards of care by federal standards of care set forth in federal regulations as found in *Abdullah* applies to claims alleging design defect; and (2) if federal standards of care do preempt state products liability standards, whether the issuance of a type certificate immunizes a manufacturer from liability even if the plaintiff can show that the design of the product at issue violates federal regulations.²² Oral argument before the Third Circuit was held June 24, 2015, and the matter is presently *sub judice*. Regardless of the decision by the Third Circuit, an application for certiorari to the Supreme Court is expected.

B. *Baugh v. Delta Air Lines, Inc.*

In *Baugh v. Delta Air Lines, Inc.*, the plaintiff, a blind woman, was injured when she fell on a sloping ramp while attempting to board an aircraft operated by Delta.²³ The plaintiff had notified Delta employees of her need for assistance and alleged that she was told to proceed down the ramp immediately without assistance.²⁴ The plaintiff brought only a state law negligence claim in state court, but the defendant filed a notice of removal to federal court, claiming federal question jurisdiction due to the fact that

19. *Id.*

20. *Id.*

21. *Id.* at 460.

22. Brief of Appellant Jill Sikkelee at 3–4, *Sikkelee v. Precision Airmotive Corp.*, No. 14-4193 (3d Cir. Jan. 5, 2015), ECF No. 003111838446; Brief for Appellee Avco Corp. at 1–2, *Sikkelee v. Precision Airmotive Corp.*, No. 14-4193 (3d Cir. Mar. 11, 2015), ECF No. 003111901522.

23. No. 1:14-cv-2551 (WSD), 2015 WL 761932, at *1 (N.D. Ga. Feb. 23, 2015).

24. *Id.*

the plaintiff's claims were preempted by federal law, specifically the Air Carrier Access Act of 1986 (ACAA).²⁵ In Delta's view, the ACAA provided the plaintiff's only remedy and the ACAA provides no explicit private cause of action.²⁶ The plaintiff filed a motion to remand, arguing that Delta was trying to manufacture federal question jurisdiction where it did not exist because she did not bring a claim for discrimination under ACAA but only a state law negligence claim.²⁷ The defendant responded by filing a motion to dismiss the plaintiff's complaint for failure to state a claim.²⁸

The court noted that "[e]ven when a plaintiff has pleaded only state-law causes of action, however, he may not avoid federal jurisdiction if either '(1) his state-law claims raise substantial questions of federal law or (2) federal law completely preempts his state-law claims.'" ²⁹ Thus, the issue before the court was whether the ACAA provided "complete preemption" such that it could exercise federal question jurisdiction.³⁰

Since the Eleventh Circuit had yet to examine this precise issue, the court considered decisions from other circuits.³¹ Those cases concluded that the ACAA did not preempt state law negligence claims and, at most, held that the ACAA preempted state law standards of care, replacing them with the requirements of the ACAA and related federal regulations.³² The court then predicted that the Eleventh Circuit would adopt the same approach and held that the ACAA did not preempt the plaintiff's state law negligence claims, but did preempt state law standards of care.³³ The court further determined that federal preemption of the standard of care did not raise a "substantial" federal question and remanded the case, citing Eleventh Circuit precedent establishing that congressional intent in not providing a private damages remedy is "tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction."³⁴

25. *Id.*

26. *Id.* at *2.

27. *Id.* at *1.

28. *Id.* at *2.

29. *Id.* (quoting *Dunlap v. G & L Holding Grp., Inc.*, 381 F.3d 1285, 1290 (11th Cir. 2004) (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 13 (1983))).

30. *See id.* at *3-4.

31. *See id.* at *6.

32. *Id.* at *6-11 (examining *Gill v. JetBlue Airways Corp.*, 836 F. Supp. 2d 33, 45-46 (D. Mass. 2011); *Summers v. Delta Airlines, Inc.*, 805 F. Supp. 2d 874, 876-77 (N.D. Cal. 2011); *Elassaad*, 613 F.3d at 132-34; *Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995, 998 (9th Cir. 2013)).

33. *Id.* at *12-13.

34. *Id.* at *14 (quoting *Jairath v. Dyer*, 154 F.3d 1280, 1284 (11th Cir. 1998); *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 814 (1986)).

II. UNMANNED AIRCRAFT SYSTEMS

The FAA issued an order of assessment against Raphael Pirker requiring him to pay a civil penalty of \$10,000 for violating 14 C.F.R. § 91.13(a) stemming from his careless or reckless operation of a Ritewing Zephyr unmanned aircraft around the University of Virginia (UVA).³⁵ Pirker was alleged to have flown his Zephyr at extremely low altitudes and dangerously close to vehicles and pedestrians as part of a paid assignment to obtain video footage of the UVA campus.³⁶ This order of assessment against Pirker was the first instance where the FAA fined a pilot of an unmanned aircraft system.³⁷

Pirker appealed the order to an administrative law judge at the National Transportation Safety Board and brought a motion to dismiss the FAA's complaint against him, arguing that the Federal Aviation Regulations (FARs), including § 91.13(a), applied only to "aircraft" and his Zephyr was a "model aircraft" exempt from those regulations.³⁸ The ALJ agreed and dismissed the order of assessment.³⁹ The ALJ found that there was a reasonable inference that the FAA intended to exclude "model aircraft" from the regulatory provisions for "aircraft" based on the fact that it had issued Advisory Circular 91-57, which introduced "model aircraft" as a term separate from "aircraft."⁴⁰ The FAA administrator then appealed the case to the full NTSB, claiming that the ALJ erred in determining that the Zephyr was not an "aircraft" and not subject to 14 C.F.R. § 91.13(a).⁴¹

The NTSB first addressed whether the Zephyr fell within the definition of aircraft by examining 49 U.S.C. § 40102(a)(6), which defines an "aircraft" as "any contrivance invented, used, or designed to navigate, or fly in, the air," and 14 C.F.R. § 1.1, which defines "aircraft" as used in the FARs as "a device that is used or intended to be used for flight in the air."⁴² The NTSB noted that nothing in either definition excludes either "model aircraft" or unmanned aerial vehicles.⁴³ The NTSB also pointed out that Advisory Circular 91-57 "outlines, and encourages voluntary compliance with, safety standards for model aircraft operators,"

35. Raphael Pirker, NTSB Order No. EA-5730, 2014 WL 8095629, at *1 (Nov. 18, 2014).

36. *Id.*

37. Mariella Moon, *First Drone Operator Fined by the FAA Settles for \$1,100*, ENGADGET (Jan. 23, 2015, 12:31 PM), <http://www.engadget.com/2015101/231faa-drone-pirker-case>.

38. *Pirker*, 2014 WL 8095629, at *1.

39. *Id.* at *2.

40. *Id.* at *1-2 (citing Raphael Pirker, Docket CP-217, 2014 WL 3388631 (N.T.S.B. Mar. 6, 2014) (citing AC 91-57, June 9, 1981)).

41. *Id.* at *2.

42. *Id.* (quoting 49 U.S.C. § 40102(a)(6); 14 C.F.R. § 1.1).

43. *Id.*

which is only a permissive system, and does not on its face exclude “model aircraft” from application of the FARs.⁴⁴ Although drones did not exist and were not contemplated when the FARs were adopted, the NTSB pointed out that the FARs do set forth rules relating to other unmanned devices, including balloons, kites, and rockets.⁴⁵ However, the FARs never indicated that the FAA “considers those devices to be something other than ‘aircraft.’”⁴⁶ As a result, the NTSB found that § 91.13(a) applied to Pirker, reversed the ALJ’s decision, and remanded the case to the ALJ for further proceedings.⁴⁷

Upon remand, the FAA settled with Pirker, reducing his fine from \$10,000 to \$1,100.⁴⁸

III. FORUM NON CONVENIENS

Forum non conveniens is an equitable doctrine that allows a court, in its discretion, to decline jurisdiction that would otherwise be proper when it deems that the action could be more appropriately tried in another forum.⁴⁹ Courts first determine whether the alternative forum is adequate and available and then weigh the private interest of the litigants and the public interest of the respective fora in order to determine which is more appropriate for the litigation.⁵⁰

A. *Lumenta v. Bell Helicopter Textron, Inc. et al.*

In *Lumenta v. Bell Helicopter Textron, Inc.*, the Court of Appeals of Texas affirmed the Harris County trial court’s order granting defendant Bell Helicopter Textron’s motion to dismiss based upon the doctrine of *forum non conveniens*.⁵¹

The case arose out of the August 3, 2011, crash of a Bell 412 helicopter into the side of the Dua Saudera Mountain in Bitung, North Sulawesi,

44. *Id.* at *3.

45. *Id.* at *4.

46. *Id.*

47. *Id.* at *5–6.

48. Moon, *supra* note 37.

49. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504–05 (1947).

50. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981). The private interest factors that are considered are the relative ease of access to proof, the availability of compulsory process for the attendance of unwilling witnesses, the cost of obtaining willing witnesses, the possibility of viewing the premises, and other practical problems that make a trial easy, expeditious, and inexpensive. *Id.* Public interest factors include administrative difficulties related to court congestion, burdening the people of a community with jury duty when they have no relation to the litigation, local interest in having localized controversies decided at home, and the appropriateness of trying a case in the forum that is at home with the law that governs the case. *Id.*

51. No. 01-14-207-CV, 2015 WL 5076299, at *1 (Tex. App. Aug. 27, 2015). Adler Murphy & McQuillen LLP represented a party in this matter.

Indonesia, minutes after takeoff.⁵² The Indonesian National Transportation Safety Committee (INTSC), which recovered the wreckage and investigated the accident, classified the collision as a “Controlled Flight into Terrain” (CFIT), meaning an “airworthy aircraft, under [the] control of the pilot, unintentionally collided with terrain.”⁵³ In its investigation report, the INTSC found that the pilot was fasting on the day of the accident and the flight was conducted under visual flight rules while in instrument conditions.⁵⁴ The INTSC further noted that there was no report of any system malfunction during the flight and the wreckage evidence indicated that the engine as well as the main and tail rotors was functioning properly at the time of impact.⁵⁵ The crash resulted in the deaths of the plaintiff’s decedent, Roy Meyers Revelino Nawawi, who was a passenger on board the chartered flight, along with the pilot, engineer, and seven other passengers.⁵⁶

Nawawi was an Indonesian citizen, as was his mother, who was the plaintiff, individually and as the personal representative of his estate.⁵⁷ Of the seven other passengers, three were Indonesian, two were Australian, and two were South African.⁵⁸ The pilot and engineer of the helicopter were also Indonesian, and the flight was operated and chartered by companies both based in Indonesia.⁵⁹ The wrongful death complaint, sounding in products liability against Bell and various component part manufacturers, generally alleged that the helicopter’s avionics, power train, and instrumentation and navigational systems were defective and proximately caused the crash.⁶⁰

In granting Bell’s motion to dismiss based upon *forum non conveniens*, the trial court found that: (1) Indonesia was an available and adequate alternative forum; (2) the private interest factors weighed heavily in favor of Indonesia because the majority of evidence and witnesses were centralized there; and (3) the public interest of Indonesia outweighed those of Texas given the amount of connections Indonesia had with the accident and the people involved.⁶¹

The Court of Appeals of Texas affirmed, holding that Indonesia is an available and adequate alternate forum and acknowledging that Indonesian

52. *Id.* at *2.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at *1–2.

57. *Id.* at *2.

58. *Id.* at *3–4.

59. *Id.* at *2.

60. *Id.* at *1.

61. *Id.* at *6.

law provides a remedy for the plaintiff's claims.⁶² The court found that this conclusion was supported by Bell's Indonesian law expert as well as several other U.S. district court decisions that have previously concluded the same.⁶³ The plaintiff argued that Indonesian courts would reject jurisdiction over wrongful death claims against foreign product defendants, attaching supporting excerpts from Central Jakarta District Court's judgments.⁶⁴ The court, however, rejected the plaintiff's argument (and supporting excerpts) for failing to "expressly" state the basis by which jurisdiction would be rejected there, and no expert testimony in support of that contention was submitted.⁶⁵

The court then analyzed the private and public interest factors.⁶⁶ The court noted that it was undisputed that Indonesia was the location of the crash, wreckage, accident investigators, and maintenance/operator personnel and records.⁶⁷ Although the plaintiff asserted that Bell witnesses and documents located in Texas constituted "crucial" liability evidence concerning product design and manufacture necessary to prosecute the case, the appellate court found the majority of evidence and witnesses was still centered in Indonesia and favored that forum, noting that the location of Bell's headquarters in Texas was an "an insufficient basis for keeping a non-resident's suit in Texas when, as here, all of the other factors favor another forum."⁶⁸ The court further reasoned that Bell's agreement to produce these witnesses and evidence in Indonesia obviated the plaintiff's concern for compelling production of Bell's evidence there.⁶⁹

The *Lumenta* court also found that the public interest factors weighed in favor of the Indonesian forum: the crash occurred in Indonesia; the helicopter was owned and operated by Indonesian companies, subject to Indonesian flight regulations, and carrying predominantly Indonesian citizens; an Indonesian governmental entity recovered the wreckage and investigated the crash; and the plaintiff was a citizen of Indonesia.⁷⁰ While the plaintiff argued that Texas citizens have a local interest in a lawsuit concerning an allegedly defective product manufactured by a Texas defendant, the court rejected this argument, finding that the fact that an allegedly defective product is produced and available in Texas "does not create a stake in the resolution of this controversy" in favor

62. *Id.*

63. *Id.* at *5–6.

64. *Id.* at *6.

65. *Id.*

66. *Id.* at *7.

67. *Id.*

68. *Id.* at *10 (citing *In re Omega Protein, Inc.*, 288 S.W.3d 17, 23 (Tex. App. 2009)).

69. *Id.* at *8 (citing *In re Air Crash Disaster Over Makassar Strait, Sulawesi*, No. 09-cv-3805, 2011 WL 91037 (N.D. Ill. Jan. 11, 2011)).

70. *Id.* at *10.

of a Texas forum.⁷¹ Accordingly, the appellate court affirmed the *forum non conveniens* dismissal in favor of Indonesia.⁷²

B. Bjorkstam v. MPC Products Corp.

In *Bjorkstam v. MPC Products Corp.*, the Illinois Appellate Court visited post-dismissal issues following a *forum non conveniens* dismissal to Texas.⁷³ The plaintiffs alleged bystander injuries arising out a plane crash in Mexico City on November 4, 2008.⁷⁴ On November 3, 2009, the plaintiffs filed a lawsuit in the Circuit Court of Cook County, alleging that the plane contained defective component parts, including parts manufactured by a defendant with its principal place of business in Illinois.⁷⁵ On December 10, 2010, the Cook County court granted the defendants' motion to dismiss for *forum non conveniens*, finding that Harris County, Texas, the forum in which the plaintiffs had filed a separate lawsuit against other defendants, was better suited to hear the case.⁷⁶ The dismissal was entered on the conditions in Illinois Supreme Court Rule 187(c)(2), which states: "(i) if the plaintiff elects to file the action in another forum within six months of the dismissal order, the defendant shall accept service of process from that court; and (ii) if the statute of limitations has run in the other forum, the defendant shall waive that defense."⁷⁷

The plaintiffs then amended their Texas complaint on March 11, 2011, to add the Illinois-dismissed defendants.⁷⁸ The plaintiffs mailed the complaint to the defendants' counsel on March 15, 2011, but the cover letter accompanying the complaint had the wrong zip code.⁷⁹ Nearly two years later, on January 31, 2013, the plaintiffs issued a summons to one of the defendants, notifying it of the Texas action.⁸⁰ The Texas court granted the defendant's motion to dismiss the complaint for want of prosecution because the plaintiffs failed to diligently pursue service of process.⁸¹

Subsequently, the plaintiffs filed a new complaint in Cook County, alleging the defendants had violated the *forum non conveniens* order by challenging the plaintiffs' service of process in Texas.⁸² The defendants

71. *Id.* (citing *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 318 (5th Cir. 2008)).

72. *Id.* at *11, 13.

73. 21 N.E.3d 1216 (Ill. App. Ct. 2014). Adler Murphy & McQuillen LLP represented the appellees in this matter.

74. *Id.* at 1219.

75. *Id.*

76. *Id.* at 1219–20.

77. *Id.* at 1220; ILL. SUP. CT. R. 187(c)(2).

78. *Id.* at 1220.

79. *Id.*

80. *Id.* The plaintiffs never issued a summons to the other defendant to this appeal, which the court later addressed in its *res judicata* analysis. *Id.* at 1223.

81. *Id.* at 1220.

82. *Id.* at 1221.

moved to dismiss the Illinois action on the grounds that (1) *res judicata* barred the plaintiffs from re-filing their suit; and (2) the defendants did not violate the *forum non conveniens* order, which prohibited the defendants only from refusing service or asserting the statute of limitations as a defense.⁸³ The Cook County court granted the defendants' motion, finding that the new Illinois complaint constituted a collateral attack on the Texas district court's judgment.⁸⁴

On appeal to the Illinois Appellate Court, the court first found that *res judicata* did not preclude the Illinois circuit court from deciding whether the plaintiffs may reinstate their complaint.⁸⁵ In its review of Texas's *res judicata* principles, which applied to the dismissal order from the Texas forum, the court noted that the defendants were required to prove three elements: "(1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first action."⁸⁶ The court found that, because the plaintiffs could not have sought reinstatement of the Illinois case in the Texas court, the plaintiffs' re-filed Illinois action was not a claim that "could have been raised" there and, thus, *res judicata* did not apply.⁸⁷

The court also found that, because the defendants did not violate the *forum non conveniens* order or Illinois Supreme Court Rule 187(c)(2), the plaintiffs' complaint was properly dismissed.⁸⁸ In reviewing the language and legislative background of Rule 187, the court found that the rule did not, as the plaintiffs argued, require the defendants to waive their challenges to the plaintiffs' service in Texas.⁸⁹ According to the plain language of the rule, while the defendants were required to "accept service of process," they were not required to *wave* any challenges to the plaintiffs' service of process.⁹⁰ The court noted that this distinction was readily apparent by the use of waiver in the context of the statute of limitations defense in the subparagraph immediately following the "accept service of process" condition.⁹¹

As a result, the court held that the rule requiring a defendant to "accept service of process from that court" requires the plaintiff to properly effectuate service of process as defined by law of the forum state.⁹² The court

83. *Id.*

84. *Id.*

85. *Id.* at 1223.

86. *Id.* at 1222 (citing *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996)).

87. *Id.* at 1223.

88. *Id.* at 1223, 1226.

89. *Id.* at 1224.

90. *Id.* at 1224–25 (emphasis added).

91. *Id.* at 1224.

92. *Id.* at 1225.

found that the January 31, 2013, service attempted on the defendant was ineffective because the Texas court found that the plaintiffs did not act diligently under Texas law, the holding of which could not be collaterally attacked in Illinois.⁹³

Although the plaintiffs claimed that the defendants had knowledge of the Texas suit and participated in an out-of-court mediation in connection with the Texas action, the court found that “[d]efendants’ knowledge of the lawsuit did not act as a substitute for service of process.”⁹⁴ Because service was never properly effectuated, the defendants’ obligation to accept proper service was never triggered under Illinois Rule 187 or the Cook County Court’s original *forum non conveniens* order.⁹⁵ Thus, dismissal of the plaintiffs’ complaint was affirmed.⁹⁶

IV. INTERNATIONAL CONVENTIONS

Airline cases demonstrate classic conflict-of-law problems. Put simply, international travel creates international problems. The Convention for the Unification of Certain Rules of International Carriage by Air (Montreal Convention) is intended to establish predictability and consistency when dealing with choice-of-law issues.⁹⁷ It provides exclusive remedies and uniform rules relating to the international carriage of passengers, baggage, and cargo.⁹⁸ Other international regulations may also apply to, or in some cases prohibit, certain claims arising out of international airline travel brought in a United States forum.

A. *Volodarskiy v. Delta Airlines, Inc.—EU 261*

In *Volodarskiy v. Delta Airlines, Inc.*, a class of airline passengers who experienced delays in their flights from European airports to the United States sought to recover for those delays based upon regulations adopted by the European Parliament and European Council, namely, EU Regulation 261/2004, 2004 O.J. (L 46) 1(EC) (EU 261).⁹⁹ EU 261 applies to passengers

departing from an airport located in the territory of a [EU] Member State, and establishes a fixed compensation schedule entitling inconvenienced pas-

93. *Id.* at 1225–26 (citing *Morris B. Chapman & Assocs., Ltd. v. Kitzman*, 739 N.E.2d 1263, 1267 (Ill. App. Ct. 2000)).

94. *Id.* at 1226–27.

95. *Id.* at 1226.

96. *Id.* at 1227.

97. The Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999 (entered into force on Nov. 4, 2003), 2242 U.N.T.S. 309, *reprinted in* S. Treaty Doc. No. 106–45.

98. *Arif Naqvi v. Turkish Airlines, Inc.*, 2015 U.S. Dist. LEXIS 21239, at *5 (D.D.C. Feb. 23, 2015).

99. 784 F.3d 349 (7th Cir. 2015).

sengers to a minimum of €250 and a maximum of €600 (depending on the flight distance) for cancellations that occur on short notice and without an offer of a rerouted flight within a specified time frame.¹⁰⁰

The enforcement mechanism for such claims is set forth in the regulation itself, which requires each EU Member State to designate a national administrative body to handle such claims.¹⁰¹

The plaintiffs did not use the enforcement regimes available to them in the relevant EU Member States, but instead brought a “direct” EU 261 claim against Delta in the Northern District of Illinois.¹⁰² As the Seventh Circuit pointed out, the reason for selecting this forum was “no doubt to access the class-action device available under U.S. law.”¹⁰³ The defendant moved to dismiss the direct EU 261 claim on the grounds that, *inter alia*, such a claim is actionable only in a designated European forum and, therefore, could not be brought in the United States.¹⁰⁴ The district court agreed, holding that “EU 261 does not provide a private right of action that can be enforced in courts outside the EU.”¹⁰⁵

In the Seventh Circuit, the plaintiffs conceded that dismissal of their breach-of-contract claim was proper—because EU 261 was not incorporated into Delta’s contract of carriage—but argued that a direct claim under EU 261 could be properly maintained in a U.S. court.¹⁰⁶ The Seventh Circuit disagreed, noting that “EU 261 does not have an explicit forum-limitation clause” but holding that the plain language of the enforcement provisions of EU 261 did not provide a private cause of action that could be enforced in courts outside the European Union.¹⁰⁷ The court noted that “[a]sking a U.S. court to wade into an area of EU law that is fraught with uncertainty risks offending principles of international comity,” which could generally be avoided by a proper dismissal based upon the doctrine of *forum non conveniens*.¹⁰⁸ The court concluded that

100. *Id.* at 350; *see also id.* at 350–51 (noting that the regulation “also requires air carriers to offer various forms of assistance to their passengers in the event of cancellations and certain long delays”).

101. *Id.* at 351.

102. *Id.* The plaintiffs had previously argued that EU 261 was incorporated into Delta’s contract of carriage and, therefore, the defendant breached the contract by failing to provide EU 261 relief, which was originally dismissed by the district court as preempted by the Airline Deregulation Act. *Id.* at 352 (citing 49 U.S.C. § 41713(b)). After the plaintiffs were given an opportunity to amend their complaint, they alleged only a “direct” claim under EU 261. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 353, 355.

108. *Id.* at 356.

EU 261 is not judicially enforceable outside the designated EU courts and affirmed the dismissal.¹⁰⁹

B. *Jacob v. Korean Air Lines Co.—Montreal Convention*

In *Jacob v. Korean Air Lines Co.*, the plaintiff passenger alleged mental and physical injuries as a result of his travel on defendant airline from Honolulu to India on September 6–7, 2011, with a stopover in Seoul.¹¹⁰ The plaintiff claimed that the airline caused him to suffer from “swollen legs [due to his diabetes], his later need to begin treating his diabetes with insulin, his later chest pains requiring open-heart surgery, and mental anguish.”¹¹¹ The plaintiff also claimed that an employee of the defendant stole \$2,000 in cash from him.¹¹² The district court, however, granted the defendant’s motion for summary judgment on the grounds that the Montreal Convention did not provide the plaintiff with a remedy for his claims because the plaintiff failed to present sufficient evidence of a “bodily injury” caused by an “accident” within the meaning of the Convention.¹¹³ The district court further found that the plaintiff’s \$2,000 conversion claim was preempted under the Montreal Convention, which provides the exclusive remedy for injuries and damages occurring during international airline travel.¹¹⁴

On appeal, the Eleventh Circuit agreed that liability exists under the Convention only if a passenger’s death or injury was caused by an “accident” (i.e., an “unexpected or unusual event or happening that is external to the passenger”).¹¹⁵ The plaintiff argued, however, that several accidents existed in this case: (1) the theft of \$2,000 in cash by an airline employee, (2) the “denial of access to medicine” in Mumbai when his luggage was checked and again on his return flight when he stopped over in Seoul, (3) the failure to call a physician for him at the gate in Mumbai or Seoul, (4) the failure to provide him with diabetic meals on any flight, (5) the failure to allow the plaintiff to “stroll the transit facility” or go through immigration in Seoul, (6) the plaintiff’s “detention” in the holding area in Seoul, (7) the failure to feed or provide “proper hydration” to the plaintiff in the holding facility in Seoul, and (8) the failure to assist the plaintiff when he fell back into his seat because of his swollen legs.¹¹⁶

109. *Id.* at 357.

110. 606 F. App’x 478, 479 (11th Cir. 2015). The plaintiff was briefly detained in Seoul and eventually returned to the United States for failing to carry proper immigration documentation. *Id.*

111. *Id.* at 481.

112. *Id.* at 480.

113. *Id.*

114. *Id.*

115. *Id.* (citing *Air France v. Saks*, 470 U.S. 392, 405 (1985)).

116. *Id.* at 480–81.

Notwithstanding the plaintiff's argument, the Eleventh Circuit held that even if such incidents could be described as "accidents" within the meaning of the Convention, the plaintiff failed to provide sufficient medical evidence, which required competent expert testimony, that any of the alleged "accidents" caused or contributed to his injuries.¹¹⁷ The plaintiff's medical records showed that although he underwent several tests, the results were all negative, and he was discharged the same day without any follow-up treatment.¹¹⁸ While the plaintiff was transported from the aircraft in a wheelchair and taken to the hospital, the court found that "simply because someone asks for a wheelchair and makes vague complaints of injury resulting in the taking of several diagnostic tests does not translate into proof of an injury."¹¹⁹

The Eleventh Circuit also found that the district court did not err in concluding that the Montreal Convention barred the plaintiff's alleged mental injuries.¹²⁰ Despite the plaintiff's "attempts to characterize his physical injuries as manifestations of mental distress," the court held that "the Convention simply does not provide a remedy for *subsequent* physical manifestations of an earlier emotional injury."¹²¹ Finally, because the Convention provides the "exclusive remedy" for a claim of lost or damaged property during international travel, the plaintiff's conversion claim was properly preempted.¹²² Thus, the Eleventh Circuit affirmed summary judgment in favor of the defendant on all counts.¹²³

V. FEDERAL JURISDICTION

An action filed in state court, under certain circumstances, may be removed to a federal forum. The mechanism for doing so arises out of 28 U.S.C. § 1441, which allows for removal of actions (1) involving a federal question or (2) where the amount in controversy exceeds \$75,000 and the suit is between citizens of different states.¹²⁴ A plaintiff may seek to remand the case back to its chosen state forum by showing that federal subject matter jurisdiction does not exist.

117. *Id.* at 481 (citing *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1320 (11th Cir. 1999); *Carroll v. Beto*, 421 F.2d 1065, 1068 (5th Cir. 1970); *Wills v. Amerada Hess Corp.*, 379 F.3d 32, 36-37, 41 (2d Cir. 2004); *Mitchell v. United States*, 141 F.3d 8, 13 (1st Cir. 1998)).

118. *Id.*

119. *Id.*

120. *Id.* 481 (citing *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 534 (1991)).

121. *Id.* at 482 (emphasis added).

122. *Id.*

123. *Id.*

124. 28 U.S.C. § 1441.

A. *Thornton v. M7 Aerospace LP*

In *Thornton v. M7 Aerospace LP*, the plaintiffs challenged federal subject matter jurisdiction on the grounds of fraudulent joinder of a foreign sovereign third-party defendant.¹²⁵ The case arose out of the crash of a Fairchild SA227-DC Metro 23 commuter aircraft in May 2005 while on approach to the Lockhart River airfield in Queensland, Australia.¹²⁶ As recognized by the Seventh Circuit, it was “[o]ne of the worst aviation accidents in Australian history; all fifteen people on board died when the descending plane crashed into terrain.”¹²⁷ The plaintiffs focused their liability claims on the aircraft’s ground proximity warning system.¹²⁸

The case was originally filed in Illinois state court in May 2007 but later removed to the Northern District of Illinois in July 2011 after the defendants filed third-party contribution and indemnity claims against Airservices Australia (ASA), an entity owned by the Australian government, which designed the approach procedure into Lockhart River airfield.¹²⁹ In turn, ASA removed the case to federal court under the Foreign Sovereign Immunities Act (FSIA) and moved to dismiss the claims against it based upon the two-year statute of limitations for contribution claims in Illinois.¹³⁰ The plaintiffs moved to remand the case based upon an alleged “fraudulent joinder” of ASA in order to invoke a federal forum.¹³¹ The district court denied both motions.¹³² Two years after removal, the plaintiffs again sought to remand the case alleging “fraudulent joinder, asserting that the third-party claims against ASA were barred by the statute of limitations and therefore had no chance of success.”¹³³ The district court denied this motion as well, and the plaintiffs appealed after the defendants prevailed on summary judgment.¹³⁴

On appeal to the Seventh Circuit, the plaintiffs argued that “ASA was fraudulently joined because it was joined four years after the original

125. 796 F.3d 757 (7th Cir. 2015). Adler Murphy & McQuillen LLP represented a party in this matter.

126. *Id.* at 760.

127. *Id.*

128. *Id.* at 761.

129. *Id.* at 764.

130. *Id.* (citing 28 U.S.C. § 1441(d)).

131. *Id.* Generally, the “fraudulent joinder” doctrine applies when a plaintiff improperly includes a forum defendant for which no viable claim exists in order to defeat diversity jurisdiction and remain in a state forum. *See Morris v. Nuzzo*, 718 F.3d 660, 666 (7th Cir. 2013) (“Under the fraudulent joinder doctrine . . . an out-of-state defendant’s right of removal premised on diversity cannot be defeated by joinder of a nondiverse defendant against whom the plaintiff’s claim has ‘no chance of success.’” (citing *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 73 (7th Cir. 1992)).

132. *Thornton*, 796 F.3d at 764.

133. *Id.*

134. *Id.*

action was filed, so Illinois's two-year statute of limitations [for contribution] had run."¹³⁵ The plaintiffs contended that the defendants knew or should have known of ASA's involvement in the alleged accident by the date they filed their complaint since "ASA provided the source material for the navigation charts" used by one of the defendants to prepare approach charts.¹³⁶ The defendants, on the other hand, argued "they did not know they had a claim against ASA until 2009, when ASA redesigned the flight path, indicating that a safer approach path was possible," and, therefore, Illinois's discovery rule tolled the applicable statute of limitations against ASA.¹³⁷

Although the *Thornton* court noted that ASA had a strong statute of limitations defense, the court found that this "is not the standard we must use to determine whether or not *jurisdiction* exists."¹³⁸ Instead, "[t]he defendants need[ed] to have 'no chance of success' in their claims against ASA."¹³⁹ Because the defendants had "some chance of success," the plaintiffs failed to carry their burden on the fraudulent joinder issue.¹⁴⁰ Having found jurisdiction proper, the court went on to affirm summary judgment in favor of the defendants on the grounds that the plaintiffs did not properly present any evidence from which a reasonable jury could infer the defendants' products contributed to the crash.¹⁴¹

B. Junhong v. Boeing Co.

The Seventh Circuit again dealt with remand and jurisdictional issues in a case that arose out of the July 6, 2013, crash of Asiana Airlines Flight 214 into the seawall that separates the ocean from the end of the runway at San Francisco International Airport (SFO).¹⁴²

In *Junhong v. Boeing Co.*, the plaintiff "passengers filed suit against Boeing in state courts of Illinois, contending that the plane's autothrottle, autopilot, and low-air-speed-warning systems contributed to the pilots' error"¹⁴³ in approaching SFO "too low and too slow."¹⁴⁴ Other suits were also filed in the California district courts, which were consolidated before the Panel on Multidistrict Litigation (MDL) in the Northern

135. *Id.*

136. *Id.* at 765.

137. *Id.* (citing *Knox Coll. v. Celotex Corp.*, 430 N.E.2d 976, 980 (Ill. 1981)).

138. *Id.*

139. *Id.* (citing *Morris*, 718 F.3d at 666).

140. *Id.*

141. *Id.* at 771. The court specifically found that the ground proximity warning system's manufacturer had no duty to alert the customer that an improved system should be installed.

142. 792 F.3d 805, 807 (7th Cir. 2015). Kreindler & Kreindler LLP represented a party in this matter.

143. *Id.* at 808.

144. *Id.* at 807.

District of California.¹⁴⁵ In order to seek transfer of the Illinois claims to the consolidated MDL proceedings, Boeing attempted to remove the Illinois state cases to federal court, asserting two bases for the federal forum: admiralty jurisdiction and federal officer jurisdiction.¹⁴⁶ The district court remanded the action for lack of subject matter jurisdiction because (1) “Boeing did not act as a federal officer for the purpose of § 1442”; and (2) “the tort occurred on land, when the plane hit the sea-wall, rather than over navigable water.”¹⁴⁷ Although most remand orders are non-reviewable, Boeing appealed as a matter of right through its § 1442 (federal officer) basis of removal.¹⁴⁸

The Seventh Circuit first found that Boeing was not entitled to remove under federal officer jurisdiction.¹⁴⁹ The court rejected Boeing’s argument that it was “acting under” the authority of the FAA because “the FAA has granted Boeing authority to use FAA-approved procedures to conduct analysis and testing required for the issuance of type, production, and airworthiness certifications for aircraft under Federal Aviation Regulations.”¹⁵⁰ The court found that a person merely subject to federal requirements is not “acting under” governmental authority for purposes of § 1442.¹⁵¹ The court said “rule making” rather than “rule compliance” is the “key ingredient,” noting that simply complying with rules would cloak countless categories of individuals (e.g., lawyers, taxpayers, etc.) as federal officers “acting under” the authority of the federal government.¹⁵²

Instead of terminating the appeal after agreeing with the plaintiffs that § 1442 did not support removal, the court analyzed whether it had the discretion to review the remaining grounds of removal, admiralty jurisdiction.¹⁵³ Boeing contended that the district court’s *whole* order, and not

145. *Id.* (citing 28 U.S.C. § 1407(a)).

146. *Id.* at 808 (citing 28 U.S.C. §§ 1333, 1442). Admiralty jurisdiction gives rise to jurisdiction of the district courts in “[a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.” 28 U.S.C. § 1333(1). Generally, this includes claims arising under the Death on the High Seas Act, 46 U.S.C. § 30302, which brings within the admiralty jurisdiction any death that is “caused by wrongful act, neglect, or default occurring on the high seas” more than three nautical miles from shore. *Junhong*, 792 F.3d at 815 (citing *Exec. Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 263–64 (1972)). Likewise, federal officer jurisdiction offers a federal forum to “[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office.” 28 U.S.C. § 1442(a)(1).

147. *Junhong*, 792 F.3d at 808.

148. *Id.*

149. *Id.* at 810.

150. *Id.* at 808.

151. *Id.* at 809.

152. *Id.* at 810 (citing *Watson v. Philip Morris Cos.*, 551 U.S. 142, 157 (2007)).

153. *Id.* at 811.

just the reasons concerning § 1442, was reviewable.¹⁵⁴ The Seventh Circuit agreed, finding that “once an appeal of a remand ‘order’ has been authorized by statute, the court of appeals may consider *all* of the legal issues entailed in the decision to remand.”¹⁵⁵ The court noted that § 1447(d) was enacted to prevent appellate delay in determining where litigation will occur, “[s]ince the suit must be litigated somewhere, it is usually best to get on with the main event.”¹⁵⁶ The court found that the fee-shifting mechanism in the remand statute adequately prevents litigants from using a § 1442 “hook” simply to appeal an otherwise non-reviewable basis, noting that “after today it would be frivolous for Boeing or a similarly situated defendant to invoke § 1442 as a basis of removal.”¹⁵⁷ Thus, Boeing was able to use its alleged federal officer jurisdiction this time, and only this time, in order to review its other ground for federal jurisdiction.¹⁵⁸

Turning to the admiralty jurisdiction issue, the plaintiffs argued that (1) “aviation accidents are outside the admiralty jurisdiction”; and (2) even if aviation accidents can be within admiralty jurisdiction, it is unavailable when the injuries occurred on land as they did here.¹⁵⁹ Boeing, in turn, argued that admiralty jurisdiction is available when the cause of the accident “occurred while the plane was over navigable waters.”¹⁶⁰

The Seventh Circuit found that it was not the location of the crash itself that determined whether admiralty jurisdiction applied but rather where the events leading up to the accident occurred and reversed the district court.¹⁶¹ Noting the peculiar interplay between admiralty law and aviation matters, the court found that “Asiana 214 was a trans-ocean flight, a substitute for an ocean-going vessel . . . and thus within the scope of [the Supreme Court’s] observation that this situation ‘might be thought to bear a significant relationship with traditional maritime activity.’”¹⁶² As a result, airplanes over navigable waters can be treated

154. *Id.*

155. *Id.* (citing *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 451–52 (7th Cir. 2005)).

156. *Id.* at 813 (citing *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 640 (2006); *United States v. Rice*, 327 U.S. 742, 751 (1946); *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988)).

157. *Id.* (citing 28 U.S.C. § 1447(c); *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005); *FED. R. APP. PROC.* 38).

158. *See Junbong*, 792 F.3d at 811.

159. *Id.* at 814.

160. *Id.*

161. *Id.* at 815–16 (citing *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986)).

162. *Id.* at 816 (citing *Exec. Jet*, 409 U.S. at 271); *see also id.* (“The Supreme Court’s holding in *Offshore Logistics* that an accident caused by problems in airplanes *above* water should be treated, for the purpose of § 30302, the same as an accident caused *on* the water carries the implication that the general admiralty jurisdiction of 28 U.S.C. § 1333(1) also includes ac-

the same as vessels, and admiralty jurisdiction was available, making removal to federal court proper in this case.¹⁶³

The appeals court specifically rejected the district court's determination that the correct standard to determine whether an accident occurred over navigable waters as whether the accident became "inevitable" while the aircraft was over water.¹⁶⁴ However, the court noted that even if location was determinative, the correct standard was whether Boeing could show that the possible, not inevitable, cause of the accident occurred while the aircraft was over water.¹⁶⁵ The court noted that the plaintiffs assigned liability to Boeing based on the fact that 4.5 nautical miles from the seawall the autothrottle disengaged without the pilots noticing it.¹⁶⁶ Given that the accident was allegedly caused by problems while the flight was "above water," which the court equated to occurring "on water," admiralty jurisdiction existed and removal was therefore proper.¹⁶⁷

C. TRE Aviation Corp. v. FAA

In *TRE Aviation Corp. v. FAA*, the plaintiffs filed a petition for review in the U.S. District Court for the District of Arizona arising from a National Transportation Safety Board (NTSB) final order upholding the FAA's revocation of the airworthiness certificate of a Bell 206B helicopter owned by TRE Aviation Corp. and Robert Mace.¹⁶⁸ The plaintiffs requested a full evidentiary hearing and *de novo* review of the NTSB's order.¹⁶⁹

The FAA moved to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and made a "facial" attack limited to the pleadings.¹⁷⁰ In response, the plaintiffs argued the court had jurisdiction under section 2(d) of the Pilot's Bill of Rights (PBR), which provides:

Upon a decision by the National Transportation Safety Board upholding an order or a final decision by the Administrator denying an airman certificate under section 44703(d) of title 49, United States Code, or imposing a punitive civil action or an emergency order of revocation under subsec-

cidents caused by problems that occur in trans-ocean commerce. Admiralty then supplies a uniform law for a case that otherwise might cause choice-of-law headaches.").

163. *Id.*

164. *Id.* at 814.

165. *Id.* at 815.

166. *Id.* at 814.

167. *Id.* at 815 (citing *Offshore Logistics*, 477 U.S. 207). The court also instructed the district court to rescind the remand orders and transfer the Illinois cases to the Northern District of California for consolidated pretrial MDL proceedings. *Id.* at 818.

168. No. 2:14-CV-1852-HRH, 2015 WL 1538075 (D. Ariz. Apr. 7, 2015).

169. *Id.* at *1.

170. *Id.*

tions (d) and (e) of section 44709 of such title, an individual substantially affected by an order of the Board may, at the individual's election, file an appeal in the United States district court in which the individual resides or in which the action in question occurred, or in the United States District Court for the District of Columbia. If the individual substantially affected by an order of the Board elects not to file an appeal in a United States district court, the individual may file an appeal in an appropriate United States court of appeals.¹⁷¹

The FAA responded that section 2(d) applies only to airman certificates and does not, therefore, provide jurisdiction over an appeal regarding an aircraft's airworthiness certificate.¹⁷² The plaintiffs argued that section 2(d) was not limited to airman certificates; that the plaintiff, Robert Mace, was an airman and was "substantially affected" by the order; and/or that revocation amounted to a civil action or emergency order of revocation.¹⁷³

The district court framed the issue as one of statutory construction.¹⁷⁴ The court acknowledged that, although section 2(d) might appear ambiguous, "when the purpose of the PBR and the structure of the statute is considered as a whole, there is no ambiguity."¹⁷⁵ The court noted that "limiting [s]ection 2(d) to appeals involving airman certificates is in keeping with the purpose of the PBR, which was enacted 'to provide rights for pilots, and for other purposes.'"¹⁷⁶ Because the purported appeal did not concern an airman certificate, it found that section 2(d) did not provide subject matter jurisdiction.¹⁷⁷

As for the plaintiffs' remaining arguments, the court rejected their claim that the case could be brought under section 2(d) based upon Mace's status as an airman since his airman certificate was not at issue.¹⁷⁸ In dicta, the court remarked that, even if section 2(d) was not limited to airman certificates, the other enumerated provisions therein (such as punitive actions or emergency orders of revocation) did not apply to revocation of an airworthiness certificate.¹⁷⁹

Lastly, the court addressed the plaintiffs' alternative request to transfer to the Ninth Circuit, which the FAA did not oppose.¹⁸⁰ The court

171. *Id.* at *2 (citing Pub. L. No. 112-153, 126 Stat. 1159 (Aug. 3, 2012)).

172. *Id.*

173. *Id.* at *3.

174. *Id.* at *2.

175. *Id.*

176. *Id.*

177. *Id.* at *3.

178. *Id.*

179. *Id.*

180. *Id.* at *3-4 (citing 49 U.S.C. § 1631; *Munns v. Kerry*, 782 F.3d 402 (9th Cir. 2015) (when a district court lacks jurisdiction, it may transfer the case under 28 U.S.C. § 1631

determined that the Ninth Circuit would have had jurisdiction under 49 U.S.C. § 1153(a) or 49 U.S.C. § 46110(a) at the time of filing and that it was in “the interest of justice” to transfer.¹⁸¹ Thus, it transferred the case to the Ninth Circuit.¹⁸²

VI. DISCRETIONARY FUNCTION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT

The Federal Tort Claims Act (FTCA) is the exclusive remedy for tort claims against the United States arising out of alleged negligence of a federal employee.¹⁸³ The FTCA, however, is a limited waiver of sovereign immunity and contains a number of exceptions, including claims “based upon the exercise of performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not the discretion involved be abused.”¹⁸⁴ A two-part test is employed when analyzing whether conduct is subject to the discretionary function exception.¹⁸⁵ First, the conduct must involve an element of choice or judgment.¹⁸⁶ Thus, the exception is inapplicable where a federal statute, regulation, or policy specifically prescribes the employee’s conduct.¹⁸⁷ Second, the court must determine whether “the action challenged in the case involves the permissible exercise of policy judgment.”¹⁸⁸

Finer v. United States arose out of the nighttime crash of a Cessna M337B twin-engine aircraft flown by civilian government contractors in support of an Air Force training exercise at Avon Park, Florida.¹⁸⁹ The civilian crew did not have weather radar onboard.¹⁹⁰ The plaintiffs alleged the aircraft encountered adverse weather conditions, causing the right wing to separate and the plane to crash.¹⁹¹ All three crewmembers perished.¹⁹² The plaintiffs’ wrongful death claims alleged that a non-

where: (1) the potential transferee court “would have had jurisdiction ‘at the time [the action] was filed,’ and (2) ‘it is in the interest of justice’ to transfer” (alteration in original).

181. *Id.* at *4.

182. *Id.*

183. 28 U.S.C. §§ 1346(b)(1), 2679.

184. 28 U.S.C. § 2680(a).

185. *United States v. Gaubert*, 499 U.S. 315 (1991); *Berkowitz v. United States*, 486 U.S. 531, 536 (1988).

186. *Berkowitz*, 486 U.S. at 537.

187. *Dalehite v. United States*, 346 U.S. 15 (1953).

188. *Id.*

189. Order of Dismissal, *Finer v. United States*, No. 13-14206-civ (S.D. Fla. May 14, 2015), ECF No. 110, at 2 (*Finer Order*). Kreindler & Kreindler LLP represented the plaintiff and the Department of Justice represented the United States in this case.

190. *Id.* at 2.

191. *Id.* at 3.

192. *Id.* at 2.

commissioned officer in the U.S. Air Force (Weather NCO) did not forecast the possibility of certain adverse weather conditions and that Air Force personnel failed to transmit a necessary recall to the crew, resulting in the aircraft's encounter with adverse weather conditions that contributed to the accident.¹⁹³

The United States moved to dismiss on the grounds that forecasting and transmitting weather warnings were protected by the discretionary function exception since there were no fixed standards directing how and when weather information should be transmitted to aircraft during the exercise.¹⁹⁴ In response, the plaintiffs argued that the Rule 12(b)(1) standard was inappropriate, that Air Force manuals and instructions deprived the forecaster of discretion, and that reasonable reliance imposed an independent duty on the United States.¹⁹⁵

The district court first determined the motion presented a "factual" (as opposed to a "facial" attack), which meant it could consider evidence outside of the complaint, rather than view only the pleadings in the light most favorable to the non-moving party.¹⁹⁶ Next, the court found the jurisdictional issues were not intertwined with the merits and proceeded to resolve the motion under Rule 12(b)(1) rather than Rule 56.¹⁹⁷

Turning to the first prong of the discretionary function test, the court found that all of the plaintiffs' claims hinged upon the allegedly incorrect forecast by the Air Force's Weather NCO, the only meteorologist assigned to the exercise.¹⁹⁸ The plaintiffs submitted various procedures and instructions as evidence of non-discretionary requirements, but the court found those requirements were general in nature and left the employee with discretion as to how to carry out the requirements.¹⁹⁹ Relying upon *United States Aviation Underwriters, Inc. v. United States*,²⁰⁰ the *Finer* court found that developing a weather forecast and determining when to issue warnings involve a judgment call that is discretionary in nature.²⁰¹

Regarding the second part of the test, the court found that weather forecasts and warnings are the type of policy decisions the discretionary function exception was designed to protect.²⁰² The plaintiffs' complaint was dismissed with prejudice for lack of subject matter jurisdiction on

193. *Id.*

194. *Id.* at 3.

195. *Id.* at 5, 11–12.

196. *Id.* at 4 (citing *Morrison v. Amway Corp.*, 323 F.3d 920, 924 n.5 (11th Cir. 2003)).

197. *Id.* at 4–5.

198. *Id.* at 11.

199. *Id.* at 12–13.

200. 562 F.3d 1297 (11th Cir. 2009) (per curiam).

201. *Finer Order* at 11.

202. *Id.* at 13.

May 14, 2015.²⁰³ On June 11, 2015, the plaintiffs filed a motion for reconsideration, which was pending as of the date of this writing.

VII. CONCLUSION

The above cases are an overview of some significant developments that occurred between October 1, 2014, and September 30, 2015, in the area of aviation law. Looking forward to 2016, after a review of the decisions summarized above, it appears that preemption is likely to remain in the spotlight as the legal community awaits the Third Circuit's decision in *Sikkelee v. Precision Airmotive Corp.*, which may eventually reach the U.S. Supreme Court. In addition, while the Seventh Circuit's decision in *Junhong v. Boeing Co.* was not appealed, it has had a significant effect on the ongoing litigation relating to Asiana Flight 214 and will likely have an impact in 2016.

203. *Id.* at 14.