

## ***Recent Developments in Aviation Law***

Sara Anderson Frey<sup>1</sup>

### **INTRODUCTION**

The past year has brought many important developments in the field of aviation litigation. This article addresses recent developments in the following areas: Preemption, Jurisdiction/Removal, General Aviation Revitalization Act, and the Montreal Convention. This discussion is not intended to be an exhaustive list of new cases but, rather, a sampling of important aviation decisions within the past year.

### **I. FEDERAL PREEMPTION**

The Supremacy Clause of the U.S. Constitution provides “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>2</sup> Accordingly, a state law in sufficient contravention of a federal law will likely be preempted, an issue that often arises in the context of aviation cases.

In *Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Comm’n*, the Second Circuit joined the First, Third, Sixth, and Tenth Circuits in finding that “Congress has established its intent to occupy the entire field of air safety, thereby preempting state regulation of that field.”<sup>3</sup> The plaintiff, a privately owned and operated commercial airport in Connecticut, filed suit against the East Haddam Inland Wetlands and Watercourses Commission (“IWWC”)

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<sup>1</sup> Ms. Frey is a Member at Cozen O’Connor in Philadelphia, Pennsylvania, where she specializes in trial and appellate litigation, with an emphasis in aviation and product liability matters.

<sup>2</sup> U.S. CONST. art. VI, § 2.

<sup>3</sup> 634 F.2d 206, 207 (2d Cir. 2011).

after the IWWC issued a cease and desist order to the plaintiff instructing it to refrain from all regulated activity within 75 feet of inland/wetlands and watercourses.<sup>4</sup> The plaintiff wished to cut down trees in that area, claiming that the trees presented an obstruction to air navigation under federal air regulations. The plaintiff argued that the Federal Aviation Act (“FAA”) preempted the municipal regulations issued by the IWWC. The district court disagreed.

On appeal, the Second Circuit recognized that “Congress intended to occupy the entire field of air safety.”<sup>5</sup> Nonetheless, the Second Circuit affirmed the district court’s holding, finding that the regulations issued by the IWWC did not implicate air safety. The court noted that while Congress intended federal law to govern the field of air safety, it “did not intend to preempt the operation of state statutes and regulations like the ones at issue here, especially when applied to small airports over which the FAA has limited direct oversight.”<sup>6</sup>

Relying on the decision in *Goodspeed*, the United States District Court for the Western District of New York ruled that the FAA preempted the plaintiff’s state law claims in *In re Air Crash Near Clarence Center, New York*,<sup>7</sup> the lawsuit arising out of the crash of Continental Connection Flight 3407 on February 12, 2009 in Clarence Center, New York. Defendants Pinnacle Airlines Corporation and Colgan Air filed a motion for application of a federal standard of care, arguing that the FAA and its associated regulations preempted all state law standards of care relating to air safety.<sup>8</sup> The plaintiffs argued that New York law should govern their claims.

Citing *Goodspeed*, the district court stated that “Congress intended the FAA to entirely preempted state regulation of air safety.”<sup>9</sup> The court noted there was little question that the

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 211.

<sup>6</sup> *Id.* at 212.

<sup>7</sup> No. 09-md-2085, 2011 WL 2848812 (W.D.N.Y. July 18, 2011).

<sup>8</sup> *Id.* at \*1.

<sup>9</sup> *Id.* at \*2 (citing *Goodspeed*, 634 F.2d at 212).

plaintiffs' claims implicated air safety. Thus, based on the Second Circuit's decision in *Goodspeed*, the district court held that "[f]ederal laws and regulations exclusively occupy the field of air safety and therefore apply to Plaintiffs' claims, which directly implicate that field."<sup>10</sup>

In *US Airways, Inc. v. O'Donnell*,<sup>11</sup> the Tenth Circuit examined whether the FAA preempted a New Mexico law regulating the service of alcohol during commercial flights. The case arose out of a citation issued to US Airways by the New Mexico Alcohol and Gaming Division ("AGD"), after an intoxicated US Airways passenger was killed, along with five others, in an automobile accident on his drive home from the Albuquerque Airport. The AGD found that US Airways had served alcohol to an intoxicated person and ordered US Airways to stop serving alcoholic beverages in New Mexico without first complying with various requirements under the New Mexico Liquor Control Act ("NMLCA").<sup>12</sup> US Airways applied for a public service license, in accordance with the NMLCA, however, the AGD denied US Airways a permanent license to serve alcoholic beverages to passengers onboard aircraft in New Mexico, citing US Airways' alleged failure to comply with New Mexico's alcohol server training requirements and the prior incident involving the intoxicated passenger.<sup>13</sup> US Airways subsequently filed suit against the AGD, arguing that New Mexico's regulation of the service of alcoholic beverages on flights was preempted by the FAA and the Airline Deregulation Act of 1978 ("ADA"). The district court disagreed, and awarded summary judgment to the AGD.<sup>14</sup>

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<sup>10</sup> *Id.* at \*3.

<sup>11</sup> 627 F.3d 1318, 1321 (10th Cir. 2010).

<sup>12</sup> *Id.* at 1323. Among other things, the NMLCA requires airlines to secure a public service license and requires all servers to attend an alcohol server training program. *Id.* at 1323 (citing N.M. Stat. §§ 60-6A-9, 60-6E-4).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 1323-24.

On appeal, the Tenth Circuit reversed and held that New Mexico’s regulation of the service of alcoholic beverages on US Airways flights was impliedly preempted by the FAA and ADA, although the court only discussed preemption under the FAA. In so ruling, the Tenth Circuit recognized that its prior decision in *Cleveland v. Piper Aircraft Corp.*, which held that Congress did not intend to occupy the field of airplane safety to the exclusion of state common law, had been “called into question” by subsequent Supreme Court decisions.<sup>15</sup> After reviewing Supreme Court precedent and the language of the FAA, the court held that “the comprehensive regulatory scheme promulgated pursuant to the FAA evidences the intent for federal law to occupy the field of aviation safety exclusively.”<sup>16</sup> The court found that the NMCLA’s regulation of an airline’s alcoholic beverage service implicated the field of aviation safety and thus, was preempted by the FAA.<sup>17</sup>

The Court of Appeals of Texas recently addressed the issue of preemption under the FAA in *Damian v. Bell Helicopter Textron, Inc.*<sup>18</sup> There, the plaintiffs filed products liability claims arising out of the crash of a Bell 407 helicopter following a bird strike. The jury returned a verdict in favor of the plaintiffs. On appeal, Bell argued that the FAA and its related regulations preempted the plaintiff’s design and airworthiness claims, through field preemption or alternatively, through conflict preemption.

The Texas Court of Appeals rejected Bell’s arguments. With respect to field preemption, the court stated that it was adopting the reasoning of the Ninth and Eleventh Circuits and Eastern District of Texas and held that “[a]lthough the FAA regulates many aspects of aviation, [n]either the [FAA] itself, nor its legislative history evidence an intent by Congress to preempt

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<sup>15</sup> *Id.* at 1326 (citing *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir. 1993)).

<sup>16</sup> *Id.* at 1327.

<sup>17</sup> *Id.* at 1329.

<sup>18</sup> No 02-08-00210-CV, 2011 WL 3836464 (Tex. App. Aug. 31, 2011).

the entire field of aviation safety. Instead, the [FAA] and its legislative history demonstrate an acknowledgement by Congress that state law tort claims are viable under the [FAA].”<sup>19</sup> The court was not persuaded by the argument that the FAA certification process was evidence of field preemption, noting that “the certification process ‘does not in and of itself constitute a pervasive regulatory scheme evidencing an intent by Congress to preempt the field of aviation safety.’”<sup>20</sup> The court also rejected Bell’s argument that conflict preemption precluded the plaintiff’s claims, finding that there were no federal statutes or regulations which set forth minimum standards for bird-strike resistance, and, thus, Texas common law design defect claims did not conflict with any federal law.<sup>21</sup>

The plaintiff in *Keum v. Virgin America Inc.*<sup>22</sup> brought suit against Virgin America, claiming that a flight attendant was “very rude and impatient to non-Caucasian passengers,” including the plaintiff who was of Korean descent. The plaintiff alleged causes of action for negligent hiring, training supervision, and/or retention of an unfit employee; assault and battery; negligence; intentional infliction of emotional distress; discrimination under 42 U.S.C. § 1981; violation of Title VI of the Civil Rights Act of 1964; and discrimination under the Unruh Civil Rights Act.<sup>23</sup> Virgin America moved for judgment on the pleadings, contending that the plaintiff’s claims were preempted by the FAA.

The district court noted that the “FAA primarily sets forth federal law in the fields of the economic regulation of airlines and airline safety.”<sup>24</sup> The court went on, however, to state that

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<sup>19</sup> *Id.* at \*7 (citing *Monroe v. Cessna Aircraft Co.*, 417 F. Supp. 2d 824, 833 (E.D. Tex. 2006)).

<sup>20</sup> *Id.* at \*6 (citing *Monroe*, 417 F. Supp. 2d at 833).

<sup>21</sup> *Id.* at \*8.

<sup>22</sup> No. C 10-03285 SI, 2011 WL 835537 (N.D. Cal. Mar. 4, 2011).

<sup>23</sup> *Id.* at \*1.

<sup>24</sup> *Id.* at \*2.

“[f]or claims not involving airline safety, such as personal injury tort claims, the Ninth Circuit has continued to apply California law.”<sup>25</sup> The court found that the plaintiff’s claims relating to the conduct of the flight attendant “do not clearly implicate airline safety,” and thus, state law governed the standard of care.<sup>26</sup>

Express preemption under the ADA<sup>27</sup> was the subject of inquiry before the United States District Court for the Northern District of Illinois in *Giannopoulos v. Iberia Líneas Aéreas de España, S.A.*<sup>28</sup> There, the plaintiffs were scheduled to fly on Iberia from Chicago to Greece, with a layover in Madrid, Spain. Departure from Chicago was delayed more than three hours and as a result, the plaintiffs were rerouted through Vienna, Austria where they had to stay overnight. The plaintiffs finally reached their destination in Greece approximately twenty-four hours after their original scheduled arrival.<sup>29</sup> The plaintiffs subsequently filed a putative class action against Iberia Airlines for breach of contract based on the airline’s alleged failure to pay compensation for a delayed flight as required by Iberia’s conditions of contract and Regulation No. 261/2004 of the European Parliament and European Council (“EU 261”).<sup>30</sup> Iberia moved to dismiss the complaint, on grounds that the plaintiffs’ claims were preempted by the ADA.

The district court noted that “[t]he ADA was enacted to promote ‘maximum reliance on competitive market forces.’”<sup>31</sup> To further that goal, the ADA contains an express preemption provision that prohibits a state from enacting laws “related to a price, route, or service of an air

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*Id.*

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*Id.* at \*4.

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49 U.S.C. § 41713.

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No. 11 C 775, 2011 WL 3166159 (N.D. Ill. July 27, 2011).

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*Id.* at \*1.

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*Id.*

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*Id.* at \*2 (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992)).

carrier.”<sup>32</sup> The district court counseled that the United States Supreme Court had carved out an exception to this express preemption provision where a plaintiff seeks “recovery solely for the airline’s breach of its own, self-imposed undertakings.”<sup>33</sup> Thus, the issue before the court was whether Iberia voluntarily agreed to abide by EU 261 by incorporating it into its conditions of contract. The district court rejected Iberia’s argument that the ADA preempted the plaintiffs’ claims, finding that Iberia voluntarily agreed to pay compensation according to EU 261 when it specifically referred to compliance with EU261 in its conditions of contract.<sup>34</sup>

ADA preemption was also rejected by the court in *Ginsberg v. Northwest, Inc.*<sup>35</sup> There, a member of Northwest Airlines’ frequent flyer program brought suit alleging breach of contract, breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, and intentional misrepresentation, after Northwest revoked his membership.<sup>36</sup> The district court dismissed the plaintiff’s claims for breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, and intentional misrepresentation, finding that the ADA preempted those claims.<sup>37</sup> The plaintiff appealed from the court’s holding that the ADA preempted a claim for breach of the implied covenant of good faith and fair dealing.

On appeal, the Ninth Circuit held that the ADA did not preempt state-based common law contract claims such as the implied covenant of good faith and fair dealing.<sup>38</sup> Citing Supreme

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<sup>32</sup> *Id.* (citing 49 U.S.C. § 41713(b)(1)).<sup>33</sup> *Id.* (citing *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 228 (1995)).

<sup>34</sup> *Id.* at \*3.

<sup>35</sup> No. 09-56986, 2011 WL 3374229 (9th Cir. Aug. 5, 2011).

<sup>36</sup> *Id.* at \*1.

<sup>37</sup> *Id.* The court also dismissed the breach of contract claim, finding that the plaintiff had failed to allege sufficient facts to show a material breach.

<sup>38</sup> *Id.* at \*2.

Court and Ninth Circuit precedent, the court found that a claim for breach of the implied covenant of good faith and fair dealing did not interfere with the deregulatory mandate of the ADA and would not frustrate the purpose of the ADA.<sup>39</sup> The court also concluded the a claim for breach of the covenant of good faith and fair dealing did not relate to prices, routes or services. The court rejected the district court’s broad definition of “prices” and held that Northwest’s frequent flyer program presented “far too tenuous” a link to prices and would essentially subsume all breach of contract actions.<sup>40</sup> The Ninth Circuit likewise rejected the district court’s broad understanding of the “relating to” language in the ADA, noting that such a broad interpretation was not supported by the legislative history.<sup>41</sup> Finally, the court criticized the district court’s broad definition of services, stating that such a broad definition would result in the preemption of virtually everything an airline does.<sup>42</sup>

The United States District Court for the Western District of Washington, however, recently upheld the preemptive effect of the ADA. In *Schultz v. United Airlines, Inc.*,<sup>43</sup> a passenger brought breach of contract claims against United Airlines after delivery of his luggage was delayed for over twenty-four hours. The plaintiff sought a refund of the baggage fee charged by the airline, as well as damages that resulted from the delay in transporting the baggage.<sup>44</sup> United filed a motion to dismiss on grounds the plaintiff’s claims were preempted by the ADA.

The district court agreed with United and granted the motion to dismiss. In doing so, the court noted that the plaintiff’s claims for refund of the baggage fee and damages from the delay

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<sup>39</sup> *Id.* at \*6.

<sup>40</sup> *Id.* at \*7.

<sup>41</sup> *Id.* at \*8.

<sup>42</sup> *Id.*

<sup>43</sup> No. C10-1263 RSM, 2011 WL 2491590 (W.D. Wash. June 22, 2011).

<sup>44</sup> *Id.* at \*1.

in transporting the bag sought “to enlarge the alleged contract by operation of external state law.”<sup>45</sup> The plaintiff was not merely seeking to enforce the terms of the Conditions of Carriage, but rather was seeking to “enhance his agreement by seeking a refund of the baggage fee based on the external laws of the state.”<sup>46</sup> The court concluded that “[t]he purpose of the ADA would be frustrated by permitting the kind of inconsistency that would result from imposing substantive state theories of liability arising from baggage transport.”<sup>47</sup> The court also rejected the plaintiff’s argument that, by charging a baggage fee, United created a “self-imposed undertaking” and was exempt from preemption under the *Wolens* exception. The court stated that the mere fact that the plaintiff paid an additional fee for baggage was insufficient to create an implied contract.<sup>48</sup>

ADA preemption was also upheld by the Ohio Court of Appeals in *Restivo v. Continental Airlines, Inc.*<sup>49</sup> The plaintiffs purchased a \$1,000 Continental Airlines gift card that had a one year expiration date. When the plaintiffs attempted to use the gift card after the expiration date, Continental would not honor it.<sup>50</sup> The plaintiffs filed suit under the Ohio Consumer Sales Practices Act (“OCSPA”) and Ohio’s Gift Card statute. Continental moved to dismiss on grounds the plaintiffs’ claims were preempted by the ADA. The district court agreed and dismissed the complaint.<sup>51</sup>

The Ohio Court of Appeals affirmed, finding that the gift card “related to the provision of airline service in the ‘public utility sense,’ i.e., purchasing a ticket for the provision of air transportation to and from a market at certain times.”<sup>52</sup> The court rejected the plaintiff’s

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<sup>45</sup> *Id.* at \*2.

<sup>46</sup> *Id.* at \*3.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at \*4.

<sup>49</sup> 947 N.E.2d 1287 (Ohio App. 2011).

<sup>50</sup> *Id.* at 1288.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1289.

argument that the purchase of the gift card was a mere financial transaction, noting that the gift card only postponed the eventual purchase of an airline ticket and thus, was related to the provision of air transportation.<sup>53</sup> Consequently, the court held the ADA preempted the plaintiffs' claims.

The applicability of the ADA to foreign air carriers was addressed by the Ninth Circuit in *In re Korean Air Lines Co., Ltd., Anti-Trust*.<sup>54</sup> The plaintiffs, who purchased tickets on Korean Air or Asiana Airlines through travel agents and/or consolidators, brought suit against the airlines alleging various violations of federal antitrust and related California state laws. The airlines moved to dismiss on grounds the plaintiffs' state law claims were preempted by federal law. The district court agreed and the plaintiffs appealed, arguing that the ADA did not apply to foreign air carriers.<sup>55</sup>

The Ninth Circuit found that the term "air carrier" in the ADA was ambiguous and, thus, turned to the legislative history of the ADA. Based on the purpose of the ADA and the legislative history, the court found that "Congress intended to prevent states from regulating foreign air carriers."<sup>56</sup> The court counseled that permitting states to regulate foreign carriers "would create a confusing patchwork of regulations for airline passengers to navigate, as their decision to purchase tickets for international flights would carry different consequences depending on whether they bought tickets from a U.S.-based carrier or an airline headquartered in a foreign country."<sup>57</sup> Such result, the court remarked, "would not be consonant with Congress's express purpose in enacting the statute."<sup>58</sup> The court, therefore, held that "the ADA's

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<sup>53</sup> *Id.* at 1290.

<sup>54</sup> 642 F.3d 685 (9th Cir. 2011).

<sup>55</sup> *Id.* at 691.

<sup>56</sup> *Id.* at 693-94.

<sup>57</sup> *Id.* at 694.

<sup>58</sup> *Id.*

preemption of state regulation covers regulation of all air carriers, whether domestic or foreign.”<sup>59</sup>

Preemption under the Air Carrier Access Act of 1986 (“ACAA”) <sup>60</sup> was examined in *Summers v. Delta Airlines, Inc.*<sup>61</sup> There, a Delta Airlines passenger sued the airline after she was injured while attempting to disembark the airplane. Prior to her trip, the plaintiff, an 84 year-old woman who suffered from various physical limitations, had requested special assistance from Delta including wheelchair assistance in entering and exiting the plane.<sup>62</sup> When the plane landed in San Jose, California, no wheelchair assistance was provided to the plaintiff, as requested, and she was required to disembark by walking through the plane’s door, onto a platform, and down a flight of stairs.<sup>63</sup> The plaintiff fell while disembarking and was seriously injured. The plaintiff brought claims against Delta under California statutes requiring the utmost care and diligence in the carriage of passengers, as well as negligence and negligent infliction of emotional distress. Delta sought dismissal on grounds the ACAA and the FAA preempted the plaintiff’s claims.

With respect to the ACAA, the district court noted that the ACAA “regulates with specificity an airline’s obligations with respect to boarding and deplaning assistance, particularly in instances where the plane does not pull up directly to the gate.”<sup>64</sup> Therefore, the plaintiff’s claims that Delta failed to provide assistance in deplaning were preempted as the ACAA occupied that field.<sup>65</sup> The court was careful, however, to caution that the ACAA “does not preempt all claims related to interactions between airlines and disabled passengers.”<sup>66</sup> “[W]here

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<sup>59</sup> *Id.* at 696.

<sup>60</sup> 49 U.S.C. § 41705.

<sup>61</sup> Case No. 10-CV-05730-LHK, 2011 WL 1299360 (N.D. Cal. Apr. 4, 2011).

<sup>62</sup> *Id.* at \*1.

<sup>63</sup> *Id.*

<sup>64</sup> 2011 WL 1299360, at \*6.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at \*7.

a disabled passenger brings a claim that does not depend on duties pervasively regulated by the ACAA,” those claims will not be preempted.<sup>67</sup> With respect to the FAA, the district court held that the FAA did not preempt the plaintiff’s claims. The court reasoned that aircraft stairs were not pervasively regulated by the FAA and, therefore, the plaintiff’s claims that Delta negligently maintain the stairs or failed to warn her of hazards were not preempted.<sup>68</sup>

## II. GENERAL AVIATION REVITALIZATION ACT OF 1994

One of the most litigated issues in the area of general aviation is application of the General Aviation Revitalization Act of 1994 (“GARA”).<sup>69</sup> GARA created a statute of repose that bars any claims arising from an aviation product or component part thereof more than eighteen years after its date of delivery.

In *United States Aviation Underwriters, Inc. v. Nabtesco Corp.*,<sup>70</sup> the court examined GARA’s triggering provisions. The defendants manufactured an aircraft nose landing gear actuator, serial number 339 (“Accuator 339”), in March 1990.<sup>71</sup> Actuator 339 was installed on a Cessna Aircraft 550-0653 (“Aircraft 550-0653”) in October 1990. At some later date, Actuator 339 was removed from Aircraft 550-653 and was overhauled by Midwest Jet Corporation in December 2006.<sup>72</sup> After overhaul, Actuator 339 was installed on a different Cessna Aircraft (“Aircraft 560-0150”). Aircraft 560-0150 was damaged when its nosegear collapsed during landing in August 2009.

The defendants filed a motion for summary judgment, arguing that the plaintiff’s claims were barred by GARA’s 18 year statute of repose. The defendants argued that the sale of

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<sup>67</sup>

*Id.*

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*Id.* at \*10.

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49 U.S.C. § 40101, note.

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No. C10-821Z, 2011 WL 1655710 (W.D. Wash. Apr. 29, 2011).

<sup>71</sup>

*Id.* at \*1.

<sup>72</sup>

*Id.*

Aircraft 550-0653 in October 1990 with Actuator 339 installed triggered the repose period.<sup>73</sup> The plaintiff claimed that the repose period was not triggered until Aircraft 560-0150 was sold in December 1991 or when Actuator 339 was first installed on Aircraft 560-150 in April 2007.<sup>74</sup>

The district court initially looked at GARA's first triggering provision which begins "upon the delivery of 'the aircraft.'"<sup>75</sup> The court stated that "when the case involves components that have been removed from one aircraft and installed on another, the relevant aircraft for purposes of GARA's first triggering provision is the aircraft in which the components were originally installed."<sup>76</sup> Thus, under GARA's first triggering provision, the relevant aircraft was Aircraft 550-0653, the aircraft in which Actuator 339 was originally installed.<sup>77</sup> The district court next turned its attention to GARA's second triggering provision, the so-called rolling provision, "which commences on the date work is completed on the installation of a new component, system, subassembly or other part to replace a preexisting part."<sup>78</sup> The court noted that "overhaul of a component does not restart the repose period as to the manufacturer" and thus, the overhaul of Actuator 339 by Midwest Jet did not restart the repose period.<sup>79</sup> As such, the rolling provision did not apply and the plaintiff's claims were barred by GARA because the accident occurred more than 18 years after the date when Aircraft 50-0653 was first delivered.

In *Crouch v. Honeywell Int'l, Inc.*,<sup>80</sup> the plaintiffs sought reconsideration of the court's order granting summary judgment in favor of AVCO Corporation or, alternatively, amendment of their complaint to add allegations of misrepresentation and fraud. The case arose from a 2006

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<sup>73</sup> *Id.* at \*2.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* (citing GARA § 2(a)(1)(A)).

<sup>76</sup> *Id.* at \*3.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Civil Action No. 3:07-CV-638-S, 2011 WL 3627283 (W.D. Ky. Aug. 17, 2011).

plane crash that the plaintiffs claimed was caused by the separation of a magneto from an engine manufactured by Lycoming Engines in 1978. The plaintiffs had argued that AVCO was liable because it produced an overhaul manual within the repose period that had been followed by the mechanic who overhauled the engine in 2005. In November 2010, the district court granted summary judgment in favor of AVCO, holding that while AVCO was acting in its capacity as manufacturer when producing the manual, the manual was not a part of the aircraft under GARA for purposes of resetting the GARA clock.<sup>81</sup>

The district court denied the motion for reconsideration, finding that the plaintiffs failed to point to any portion of the manual that contained the wrong instructions for the overhaul or to any previously existing warning that was negligently deleted.<sup>82</sup> Rather, the plaintiffs' "entire claim vis a vis the manual rests on their claim that the manual, and subsequent service bulletins, failed to provide any warning that the magneto assembly in Crouch's plane might have come loose."<sup>83</sup> The court held that this was "precisely the sort of action that GARA forbids."<sup>84</sup> The district court also denied the plaintiffs request to amend their complaint to add allegations of misrepresentation, finding that the evidence the plaintiffs claimed was "newly discovered" had been in their possession for months.<sup>85</sup>

Claims against an aircraft engine manufacturer and fuel pump manufacturer arising from the 2007 crash of a passenger carrying airplane were barred by GARA in *Agape Flights, Inc. v. Covington Aircraft Engines, Inc.*<sup>86</sup> The aircraft, a Cessna Grand Caravan Model 208B, crashed

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<sup>81</sup> *Id.* at \*1; *see also* Civil Action No. 3:07-CV-638-S, 2010 WL 4449222, at \*2 (W.D. Ky. Nov. 1, 2010).

<sup>82</sup> 2011 WL 3627283, at \*3.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at \*2.

<sup>86</sup> No. CIV-09-492-FHS, 2011 WL 2560281 (E.D. Okla. June 28, 2011).

into the ocean waters near the Bahamas. The plaintiff claimed that the crash was caused by an in-flight power loss resulting from the fuel pump drive shaft splines being severely worn.<sup>87</sup> The defendants filed a motion for summary judgment, asserting that the plaintiff's claims were barred by GARA. It was undisputed that the aircraft engine manufacturer had sold and delivered the engine to Cessna more than 23 years before the accident, that the aircraft on which the fuel pump initially was installed had been sold more than 20 years prior to the accident,<sup>88</sup> and that, at the time of the accident, the aircraft was not being used for scheduled passenger-carrying operations.<sup>89</sup> GARA, therefore, applied and would bar the plaintiff's claims unless an exception applied.

The plaintiff first claimed that GARA's warranty exception, which permits actions brought under a written warranty enforceable by law to go forward, applied.<sup>90</sup> The district court disagreed, finding there was no evidence that any written warranty by either manufacturer had been made to the plaintiff. The plaintiff's reliance upon warranty language in an aircraft rental agreement between it and the plane's owner was inapplicable because the manufacturers were not parties to that agreement.<sup>91</sup> The court also rejected the plaintiff's argument that GARA's rolling provision applied. The court noted that it was the plaintiff, not the manufacturers, who had the burden of proof with regard to the rolling provision.<sup>92</sup> The court found that the plaintiff failed to produce any evidence that the drive gear on the fuel pump had been replaced at any point within 18 years of the crash and that a 2006 revision to the engine manufacturer's service

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<sup>87</sup> *Id.* at \*1.

<sup>88</sup> *Id.* at \*2.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at \*4 (citing GARA § 2(b)(4)).

<sup>91</sup> *Id.* The court further noted that even if the provision did create a right of action against the manufacturers for breach of warranty, any inferred warranty claim against a third party was not a written warranty claim necessary for the application of the GARA warranty exception. *Id.*

<sup>92</sup> *Id.* at \*5.

manual and a 2005 service bulletin did not constitute a “part” for purposes of the “rolling provision.”<sup>93</sup>

The Supreme Court of Washington examined whether a type certificate holder could be considered a manufacturer under GARA in *Burton v. Twin Commander Aircraft LLC*.<sup>94</sup> The lawsuit arose out of the crash of a Twin Commander 690C airplane in Mexico which killed seven people. The plane was originally introduced by Rockwell International in 1971. In 1989, Twin Commander acquired the 690-series type certificates, but did not continue manufacturing the aircraft.<sup>95</sup> In April 2003, Twin Commander issued Alert Service Bulletin 235 advising operators of several aircraft models, including the 690-series, to inspect the rudder cap for unusual wear, which could result in the rudder cap separating from the aircraft. Although the accident aircraft was inspected in accordance with Service Bulletin 235 months before the accident, Mexican government authorities concluded that the rudder came loose during flight and caused the crash.<sup>96</sup> The plaintiff filed suit against Twin Commander, alleging that Service Bulletin 235 was a defective product. The trial court granted Twin Commander’s motion for summary judgment, finding that Twin Commander was a manufacturer for purposes of GARA. The court of appeals, however, reversed, stating that whether Twin Commander was a manufacturer was question of fact.<sup>97</sup>

The Supreme Court of Washington reversed the finding of the court of appeals and held that “a type certificate holder is a ‘manufacturer’ for purposes of GARA’s statute of repose.”<sup>98</sup> In reaching this conclusion, the court relied on the legislative intent of Congress in enacting

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<sup>93</sup> *Id.* at \*5-6.

<sup>94</sup> 254 P.3d 778 (Wash. 2011).

<sup>95</sup> *Id.* at 780.

<sup>96</sup> *Id.* at 781.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 785.

GARA, as well as decisions of courts from Illinois, Iowa, and Pennsylvania reaching the same conclusion. Having determined that Twin Commander was entitled to GARA protection, the court next considered whether there was a material question of fact as to whether Twin Commander misled the FAA about the rudder problem, so as to invoke the fraud exception to GARA.

Examining the language of the fraud exception, the court held that the exception applied “only if the misrepresentation, concealment, or withholding is knowing”<sup>99</sup> and where the information allegedly misrepresented, concealed, or withheld was both “material and relevant.”<sup>100</sup> The court found that the plaintiff, who had the burden of proving the fraud exception, failed to present any evidence of a knowing misrepresentation, concealment or withholding.<sup>101</sup> The court rejected the plaintiff’s reliance on expert opinion to prove the exception, noting that the experts failed to present actual evidence, but rather simply opined that Twin Commander had a responsibility to do more than it did.<sup>102</sup> This, the court held, was insufficient to satisfy the fraud exception.

GARA was found not to bar claims in *Scott v. MD Helicopters, Inc.*<sup>103</sup> That case arose out of a May 2007 crash of a military surplus helicopter in Alabama. The main rotor blades, transmission, and main rotor hub separated completely from the helicopter, causing the crash.<sup>104</sup> The plaintiff filed suit against MD Helicopter, Inc. (“MDHI”), the type certificate holder for the model 369A helicopter, alleging that MDHI had a duty as the type certificate holder to provide

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*Id.*

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*Id.* at 786.

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*Id.* at 789, 790.

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*Id.* at 790.

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No. 8:09-cv-986-T-33TBM, 2011 WL 2693669 (M.D. Fla. July 12, 2011).

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*Id.* at \*1.

instructions for continued airworthiness.<sup>105</sup> MDHI argued that the plaintiff's claims were barred by GARA.

The district court rejected MDHI's argument, noting that the plaintiff's claims related to a maintenance manual, which was not a part of the aircraft as it "need not be sold with, kept onboard or used to maintain the aircraft."<sup>106</sup> Since a manual is not a "part," the court concluded that "GARA does not bar claims involving maintenance manual defects."<sup>107</sup> The court also rejected MDHI's argument that the plaintiff's claims did not involve a defective maintenance manual, but rather the failure to issue one. The court stated that the plaintiff's claim focused on FAA regulations and that it "does not follow that the FAA would require manufacturers to make available chances to maintenance manuals if failure to do so were protected by the statute of repose."<sup>108</sup>

### III. JURISDICTION AND REMOVAL

Jurisdiction in federal court may be based on diversity jurisdiction or federal question jurisdiction. Where diversity does not exist, defendants will often remove cases on grounds that the plaintiff's claims are preempted by federal law. Courts have differed in determining whether preemption provides a ground for federal jurisdiction in aviation cases.

In *S.M.N. v. Hageland Aviation Services, Inc.*,<sup>109</sup> the plaintiff, the parent of an 18 month-old child, filed suit seeking recovery for injuries the child received after falling from a parked Hageland airplane on the tarmac in Bethel, Alaska. Hageland removed the case to federal court, arguing that the plaintiff's anticipated reliance on the Federal Aviation Regulations ("FARs")

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<sup>105</sup> *Id.* at \*2.

<sup>106</sup> *Id.* at \*5 (citing *Colgan Air, Inc. v. Raytheon Aircraft Co.*, 507 F.3d 270, 277 (4th Cir. 2007)).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> No. 4:10-cv-0031-RRB, 2011 WL 87366 (D. Alaska Jan. 11, 2011).

and the preemption of state law claims conferred subject matter jurisdiction.<sup>110</sup> The district court disagreed and granted the plaintiff's motion to remand.

In ruling, the court found that the plaintiff's potential use of FARs did not require the resolution of a substantial question of federal law.<sup>111</sup> Although acknowledging that FARs may well impact the litigation, the court stated that "the case will not be primarily decided based upon the resolution of the standard of care issue."<sup>112</sup> The court remarked that "Congress never intended that all aviation safety claims be removed to federal court," as evidenced by the fact that the FARs do not create a private cause of action.<sup>113</sup> Because the case did not "turn" on the resolution of a substantial question of federal law, the court did not have jurisdiction. The court also rejected Hageland's preemption argument, stating that "[t]he Ninth Circuit has made it clear that where a defendant argues preemption over a state claim as a defense to a motion to remand, there must be some federal remedy available to the plaintiff in order for the district court to have jurisdiction over such claim."<sup>114</sup> Since the FARs did not provide any specific remedy to the plaintiff, the preemption defense failed to establish subject matter jurisdiction.

In *Rosen v. Continental Airlines, Inc.*,<sup>115</sup> the plaintiff filed suit in state court against Continental Airlines after he was unable to purchase a head seat or any alcoholic beverages while on a Continental flight from Newark, New Jersey to Honolulu, Hawaii because Continental only accepted debit or credit cards for such purchases. The defendant removed the case to federal court, on grounds that the plaintiff's claims arose under federal law because such claims were preempted by the ADA, the claims directly related to the Federal Coinage Action of

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<sup>110</sup> *Id.* at \*1, \*3.

<sup>111</sup> *Id.* at \*2.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at \*3.

<sup>114</sup> *Id.* at \*4.

<sup>115</sup> Civ. No. 10-5859, 2011 WL 1467209 (D.N.J. Apr. 18, 2011).

1965, and the claims related to the FAA which implicitly preempts state law.<sup>116</sup> The district court, *sua sponte*, examined whether it had jurisdiction over the matter and determined that it did not.

The district court rejected Continental’s argument that preemption of claims under the ADA and/or FAA provided a basis for federal jurisdiction, noting that “[g]enerally, a defense implicating federal law is not sufficient to create federal question jurisdiction” unless Congress “so completely pre-empt[s] a particular area that any civil complaint raising this select group of claims is necessarily federal in character.”<sup>117</sup> The court concluded that “neither the ADA nor the FAA completely preempts Plaintiff’s state law claims to the point where they become federal claims” reasoning that neither statute provides a private cause of action.<sup>118</sup> The court also held that the Federal Coinage Act did not provide a basis for federal jurisdiction, as the act only defines legal tender and does not create a private cause of action.<sup>119</sup> As a result, the action was remanded to state court.

Jurisdiction under the ACAA was addressed by the court in *Brown v. Alaska Air Group, Inc.*<sup>120</sup> There, the plaintiff, a passenger on Horizon Airlines, sought wheelchair assistance prior to her flight from Lewiston, Idaho to Seattle, Washington. Upon arrival in Seattle, the plaintiff was taken by motorized cart from the plane to a location approximately 20-30 feet from an elevator reserved for persons unable to ascend the airport’s entry stairs.<sup>121</sup> No wheelchair assistance was provided and the plaintiff proceeded to the elevator using her walker. She fell on

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<sup>116</sup> *Id.* at \*1.

<sup>117</sup> *Id.* at \*3 (citing *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 634-64 (1987)).

<sup>118</sup> *Id.* at \*4.

<sup>119</sup> *Id.* at \*5.

<sup>120</sup> No. CV-11-0091-WFN, 2011 WL 2746251 (E.D. Wash. July 14, 2011).

<sup>121</sup> *Id.* at \*1.

the tarmac and fractured her right distal femur.<sup>122</sup> The plaintiff subsequently brought suit against the airline for breach of contract, negligence, failure to follow the requirements of the ACAA, and violation of Washington’s law against discrimination. Following removal to federal court by the airline, the plaintiff filed a motion to remand.

The court denied the motion for remand, finding that federal jurisdiction existed because the plaintiff’s claims were preempted by the ACAA. The court cited to pervasive regulations found in the ACAA on the subject of failure to provide transport services between planes.<sup>123</sup> The court rejected the plaintiff’s argument that federal question jurisdiction did not exist because there was no federal remedy under the ACAA, remarking that the ACAA offered an administrative remedy.<sup>124</sup>

#### IV. MONTREAL CONVENTION

The Convention for the Unification of Certain Rules for International Carriage by Air,<sup>125</sup> more commonly known as the Montreal Convention (“Montreal” or “Montreal Convention”), became effective on November 4, 2003 and governs air carrier liability for international transportation. The Montreal Convention succeeded the Warsaw Convention and “applies to all international carriage of persons, baggage or cargo performed by aircraft for reward.”<sup>126</sup>

##### A. PREEMPTION UNDER THE MONTREAL CONVENTION

One issue that frequently arises in cases involving international transportation is the preemptive effect of the Montreal Convention found in Article 29, which provides:

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<sup>122</sup>

*Id.*

<sup>123</sup>

*Id.* at \*5 (citing 14 C.F.R. § 382.95(a); 14 C.F.R. § 382.91).

<sup>124</sup>

*Id.*

<sup>125</sup>

Convention for the Unification of Certain Rules for International Carriage by Air (“Montreal Convention”), May 28, 1999, ICAS Doc. 9740, *reprinted in* S. Treaty Doc. No. 106-45.

<sup>126</sup>

Montreal Convention, art. 1(1).

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability as are set forth in this Convention.<sup>127</sup>

In *Souza v. American Airlines, Inc.*,<sup>128</sup> the United States District Court for the Southern District of New York examined whether the Montreal Convention preempted the plaintiff's claim for lost baggage and negligent infliction of emotional distress. The plaintiff was a passenger on an American Airlines flight, scheduled for travel between New York, New York and Rio de Janeiro, Brazil.<sup>129</sup> The plaintiff checked two pieces of luggage, one of which weighed more than seventy pounds and was subject to a \$100 overweight baggage fee. Upon arrival in Brazil, the plaintiff received only the bag which did not trigger the overweight baggage fee. The other bag never materialized and the plaintiff filed suit three days after returning to New York.<sup>130</sup>

American Airlines filed a motion for summary judgment, seeking a declaration that its liability, if any, could not exceed the limits set forth in the Montreal Convention. The district court began its analysis by examining the language of Article 29 and noted that where Montreal applies, "its terms provide the 'exclusive mechanism for remedying injuries suffered' by a plaintiff."<sup>131</sup> Because the plaintiff was traveling on an international flight and both the United States and Brazil were signatories to the Montreal Convention, the court found that the Montreal Convention provided "her exclusive remedy against American and preempt[ed] any state-law cause of action," including the claim for negligent infliction of emotional distress.<sup>132</sup> Thus,

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<sup>127</sup> *Id.* at art. 29.

<sup>128</sup> No. 10 Civ. 5938, 2011 WL 2749086 (S.D.N.Y. July 7, 2011).

<sup>129</sup> *Id.* at \*1.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at \*2 (citing *King v. Am. Airlines, Inc.*, 284 F.3d 352, 356-57 (2d Cir 2002)).

<sup>132</sup> *Id.* at \*3.

American's liability, if any, was subject to the limits of liability for lost baggage set forth in the Montreal Convention.

The United States District Court for the Southern District of Texas recently addressed the preemptive effect of the Montreal Convention in *Tewes v. Gulf Air*.<sup>133</sup> There, the plaintiffs purchased business class tickets for a Gulf Air flight from Bahrain, Kingdom of Bahrain to Dubai, United Arab Emirates. The flight was cancelled and the plaintiffs were rebooked on another flight, but were seated in coach. The plaintiffs alleged that a Gulf Air supervisor told them they could use their business class tickets at a later date; however, when they attempted to use the tickets, Gulf Air refused to honor them.<sup>134</sup> The plaintiffs filed suit in state court, asserting breach of contract claims. Gulf Air removed the action to federal court and moved to dismiss the claim on grounds the Montreal Convention preempted the plaintiffs' claims.<sup>135</sup>

The district court disagreed and held that the Montreal Convention did not bar the plaintiffs' breach of contract claim.<sup>136</sup> Citing to case law from other jurisdictions, including district courts in Kentucky, California and New York, the court drew a distinction between claims for delay and claims for non-performance.<sup>137</sup> The court held that claims involving a complete refusal to transport fell outside the provisions of the Montreal Convention and

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<sup>133</sup> Civil Action No. H-10-1685, 2011 WL 649532 (S.D. Tex. Feb. 10, 2011).

<sup>134</sup> *Id.* at \*1.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at \*3.

<sup>137</sup> *Id.* (citing *Atia v. Delta Airlines, Inc.*, 692 F. Supp. 2d 693 (E.D. Ky. 2010); *Nankin v. Continental Airlines, Inc.*, 2010 WL 342632 (C.D. Cal. Jan. 29, 2010); *Mullaney v. Delta Air Lines, Inc.*, 2009 WL 1584899 (S.D.N.Y. June 3, 2009); *In re Nigeria Charter Flights Contract Litig.*, 520 F. Supp. 2d 447 (E.D.N.Y. 2007); *Weiss v. El Al Israel Airlines, Ltd.*, 433 F. Supp. 2d 361 (S.D.N.Y. 2006)).

therefore, were not preempted. Since the plaintiffs were seeking claims for a failure to honor tickets more than a month after the cancelled flight, the court denied the motion to dismiss.<sup>138</sup>

*Garrisi v. Northwest Airlines, Inc.*<sup>139</sup> addressed whether the Montreal Convention preempted a state law claim for negligence. The plaintiff was injured while onboard a Northwest Airlines flight from Detroit, Michigan to Amsterdam Netherlands when a flight attendant knocked over a hot cup of coffee onto the plaintiff's lap prior to take-off.<sup>140</sup> The plaintiff filed a negligence claim against Northwest in Michigan state court. Northwest removed the action to federal court on grounds of diversity and federal question jurisdiction, the latter based on complete preemption under the Montreal Convention.<sup>141</sup> Subsequently, Northwest filed a motion to dismiss, arguing that the plaintiff's negligence claim was barred by the statute of limitations under the Montreal Convention.

The district court rejected the plaintiff's argument that the Montreal Convention did not apply because she was injured prior to take-off. The court examined Article 17 of the Montreal Convention which provides that a carrier is liable for damages which take place "on board the aircraft."<sup>142</sup> Since the plaintiff's injury occurred onboard an aircraft bound for an international destination, her claims fell within the ambit of the Montreal Convention. Having determined the applicability of Montreal, the court turned to whether the plaintiff's claims were preempted. The court recognized that courts are split on the issue of whether the Montreal Convention completely preempts state law causes of action, such as to invoke federal question jurisdiction. The court was persuaded by the reasoning of those courts finding in favor of complete

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<sup>138</sup> *Id.* Because federal jurisdiction was based on the Montreal Convention, the district court also remanded the case to state court. *Id.*

<sup>139</sup> No. 10-12298, 2010 WL 3702374 (S.D.N.Y. Sept. 16, 2010).

<sup>140</sup> *Id.* at \*1.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at \*3 (citing Montreal Convention, art. 17).

preemption and held that the plaintiff's state law claim was completely preempted.<sup>143</sup> Because the plaintiff failed to file suit within the two year statute of limitations set forth in Article 35 of the Montreal Convention, her claim was time-barred and the court granted judgment in favor of Northwest.<sup>144</sup>

In *Eli Lilly and Co. v. Air Express Int'l USA, Inc.*, the Eleventh Circuit addressed whether the Montreal Convention preempted claims for breach of a long-term service agreement and two air waybill contracts.<sup>145</sup> Eli Lilly filed suit against Air Express International USA, Inc. ("DHL"), seeking recovery for the spoliation of temperature-sensitive insulin products, which were shipped by DHL from France to Indiana and were exposed to sub-freezing temperatures en route.<sup>146</sup> The district court dismissed the claim for breach of the service agreement, finding that such claim was preempted by the Montreal Convention. The district court granted summary judgment in favor of Eli Lilly with respect to breach of the air waybill contracts and held that DHL waived the liability limits of the Montreal Convention under provisions in the long-term service agreement.<sup>147</sup> DHL appealed, claiming, in part, that its liability was limited pursuant to the Montreal Convention.

The Eleventh Circuit agreed with DHL and held that the Montreal Convention limited DHL's liability for damage to cargo.<sup>148</sup> In ruling, the court noted that the limits on liability set forth in the Montreal Convention can be increased under Article 22(3) if the shipper makes a "special declaration of interest" at the time the package is handed over to the carrier or under

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<sup>143</sup> *Id.* at \*5.

<sup>144</sup> *Id.* at \*6.

<sup>145</sup> 615 F.3d 1305, 1306 (11th Cir. 2010).

<sup>146</sup> *Id.* at 1307.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 1313.

Article 24 if the carrier stipulates that higher limits of liability should apply.<sup>149</sup> Because it was undisputed that Eli Lilly did not declare a value for the cargo, the issue before the Eleventh Circuit was whether DHL stipulated to a higher limit of liability in the long-term service agreement.

The court examined the liability provision in the long-term service agreement and noted that at the time it was drafted, the Warsaw Convention was in effect and did not contain a provision parallel to Article 25 of the Montreal Convention permitting a carrier to stipulate to increased limits on liability.<sup>150</sup> Thus, the liability provision would not have been valid under the Warsaw Convention, which suggested that the parties did not intend such a result.<sup>151</sup> The Eleventh Circuit also remarked that since the agreement made no mention of either the Warsaw Convention or the Montreal Convention, there was “no indication that the parties intended to opt out of the Montreal Convention liability regime.”<sup>152</sup>

### **B. Meaning of “Embarking” and “Disembarking”**

Liability for carriers under the Montreal Convention extends to accidents that take place “on board the aircraft or in the course of any of the operations of embarking or disembarking.”<sup>153</sup> While the term “on board the aircraft” is self-explanatory, much litigation has revolved around when a passenger is in the “operations of embarking or disembarking.”

In *Matveychuk v. Deutsche Lufthansa, AG*,<sup>154</sup> the plaintiff alleged that one of Lufthansa’s gate agents attacked her in a bathroom during a layover at the Frankfurt Airport on her journey from Newark, New Jersey to Minsk. The plaintiff claimed that when she arrived in Frankfurt,

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<sup>149</sup>

*Id.*

<sup>150</sup>

*Id.* at 1315.

<sup>151</sup>

*Id.*

<sup>152</sup>

*Id.* at 1315-16.

<sup>153</sup>

Montreal Convention, art. 17(1).

<sup>154</sup>

No. 08-CV-3108, 2010 WL 3540921 (E.D.N.Y. Sept. 7, 2010).

the gate agent on duty told her she was too late for her connecting flight to Minsk and directed her to the rebooking desk. An argument ensued and the plaintiff claimed that the agent followed her into the restroom and assaulted her. The plaintiff filed a motion for partial summary judgment, seeking a ruling that her claim was covered by the Montreal Convention.<sup>155</sup> Lufthansa took the position that the plaintiff's claims arose under German law, arguing that the plaintiff was not injured during the operation of embarking.<sup>156</sup>

The district court agreed with the plaintiff and held that her claims were governed by the Montreal Convention. The district court identified the following factors to be considered in determining whether a passenger is injured during the operation of embarking: (1) the passenger's activity at the time of the accident, (2) any restrictions on her movements, (3) the imminence of actual boarding, and (4) the passenger's physical proximity to the gate.<sup>157</sup> Applying these factors to the case at hand, the court found that the plaintiff had just narrowly missed her connecting flight to Minsk and had gone to the restroom to compose herself before proceeding to the rebooking desk.<sup>158</sup> At all times, the plaintiff had remained in the secure transit area limited to ticketed international passengers. While the plaintiff missed her connecting flight and was rebooked on a flight for the following day, she spent the night in the terminal. Under these facts, the court held that the plaintiff was injured in the operations of embarking, stating that "the mere fact that a passenger was denied permission to board does not preclude a finding that the passenger was nevertheless in the process of embarking."<sup>159</sup>

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<sup>155</sup> *Id.* at \*1.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at \*2 (citing *King v. American Airlines, Inc.*, 284 F.3d 352, 359 (2d Cir. 2002)).

<sup>158</sup> *Id.* at \*3.

<sup>159</sup> *Id.* (citing *King*, 284 F.3d at 359-60).

In *Fedelich v. American Airlines*,<sup>160</sup> the court focused on the meaning of “disembarking” as it applied to a plaintiff who fell at an international baggage carousel in the San Juan International Airport after a flight from the Dominican Republic. After the flight landed in San Juan, the plaintiff proceeded to the baggage claim area to gather her luggage and then proceed through customs. The plaintiff tripped over an emergency stop box attached to the carousel and fractured her wrists.<sup>161</sup> American Airlines moved for summary judgment, arguing that the Montreal Convention governed the plaintiff’s claims and that she was not entitled to relief under the Montreal Convention because she was not injured during the operations of embarking or disembarking.

The district court recognized that Montreal would apply “only if Plaintiff was injured in the process of embarking or disembarking.”<sup>162</sup> The court remarked that courts have narrowly construed the act of embarking and disembarking, “normally strongly relating the accident with the physical act of entering the plane.”<sup>163</sup> Turning its attention to the facts of the case before it, the court found that the plaintiff was injured at a location “far removed from where passengers descend from the aircraft, the commonly understood meaning of disembarkation.”<sup>164</sup> In addition, the court noted that the plaintiff’s act of baggage retrieval was not an action necessary to become separated from the plane. While American Airlines maintained the baggage carousel, the court found that the plaintiff was not under the control of American as she was while entering or leaving the airplane because she was free to roam around and choose her path. Under these

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<sup>160</sup> 724 F. Supp. 2d 274 (D.P.R. 2010).

<sup>161</sup> *Id.* at 276.

<sup>162</sup> *Id.* at 283.

<sup>163</sup> *Id.* at 284 (citing *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 316-17 (1st Cir. 1995)).

<sup>164</sup> *Id.*

circumstances, the court concluded that the plaintiff was not disembarking within the meaning of the Montreal Convention.<sup>165</sup>

### C. Meaning of “Accident”

Another area of frequent litigation concerning the Montreal Convention involves what constitutes an “accident.” Article 17 governs liability for death or bodily injury where “the accident which caused the death or injury took place on board the aircraft or in the course of the operations of embarking or disembarking.”<sup>166</sup> The term “accident” is not defined in the Montreal Convention.

In *Goodwin v. British Airways PLC*,<sup>167</sup> the plaintiff was injured while exiting a British Airways flight, after her left foot slid into the narrow opening between the jet way and the aircraft door. According to the plaintiff, she was struck by another passenger while exiting and as a result, lost her footing.<sup>168</sup> The plaintiff brought suit against British Airways. Both parties agreed that the plaintiff’s claims were governed by the Montreal Convention. British Airways filed a motion for summary judgment on grounds the incident complained of did not constitute an “accident” under Montreal.<sup>169</sup>

The district court applied a two-prong test to determine whether an “accident” had occurred: (1) the occurrence of an unusual or unexpected event that was external to the plaintiff and (2) a malfunction or abnormality in the aircraft’s operation.<sup>170</sup> The court concluded that the plaintiff satisfied the first prong, finding that a hard bump from a passenger was an unusual or unexpected event. With respect to the second prong, the court remarked that an event is related

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<sup>165</sup> *Id.* at 285.

<sup>166</sup> Montreal Convention, art. 17(1).

<sup>167</sup> Civil Action No. 09-10463-MBB, 2011 WL 3475420 (D. Mass. Aug. 8, 2011).

<sup>168</sup> *Id.* at \*2.

<sup>169</sup> *Id.* at \*3.

<sup>170</sup> *Id.* at \*4 (citing *Air France v. Saks*, 470 U.S. 392, 399 (1985)).

to an aircraft's operation "where there is direct crew involvement," such as where the flight crew refuses to assist or assists in a negligent manner.<sup>171</sup> Where there is "no direct involvement by the flight crew, the event cannot be related to the aircraft's operation."<sup>172</sup> Based on the plaintiff's description of the events, the court determined that there was "no evidence that the incident was in the airline's purview or control."<sup>173</sup> The incident did not constitute an "accident" under the Montreal Convention and the court granted the airline's motion for summary judgment.

The interplay between the FAA and the Montreal Convention was discussed by the Ninth Circuit in *Phifer v. Icelandair*.<sup>174</sup> There, the plaintiff sought recovery for injuries received when she struck her head on an overhead television monitor onboard an Icelandair flight. The district court granted summary judgment in favor of the airline, finding that the plaintiff failed to provide evidence of violation of the FAA, which the district court held was a prerequisite to recovery under the Montreal Convention.<sup>175</sup> The Ninth Circuit reversed, stating that "[a]lthough FAA requirements may be relevant to the district court's 'accident' analysis, they are not dispositive of it."<sup>176</sup> The court remanded the action so that the district court could determine under the proper standard whether an Article 17 accident had occurred.

In *Heinemann v. United Continental Airlines*,<sup>177</sup> the plaintiff was a passenger on a United Airlines flight from Amsterdam to Seattle. The plaintiff claimed he had an epileptic seizure just before the plane landed and that one of the flight attendants mistook the seizure for an act of hostility.<sup>178</sup> The plaintiff was arrested as he disembarked from the plane and thereafter brought

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<sup>171</sup> *Id.* at \*5.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at\*6.

<sup>174</sup> No. 09-56858, 2011 WL 3850951 (9th Cir. Sept. 1, 2011).

<sup>175</sup> *Id.* at \*1.

<sup>176</sup> *Id.* at \*3.

<sup>177</sup> No. 2:11-CV-00002-NJP, 2011 WL 2144603 (W.D. Wash. May 31, 2011).

<sup>178</sup> *Id.* at \*5.

suit against United for false arrest, false imprisonment, false diagnosis of an epileptic seizure, and falsifying police reports. United sought dismissal on grounds the plaintiff’s state law claims were preempted by the Montreal Convention and that the plaintiff was not entitled to relief under Montreal.

The district court agreed that the plaintiff’s claims were governed by Montreal and dismissed all state law causes of action.<sup>179</sup> The court went on to examine whether the plaintiff was entitled to relief under Article 17 of the Montreal Convention. The court noted that the term “accident” as used in the Montreal Convention did not have an “ordinary, everyday meaning.”<sup>180</sup> Rather, citing United States Supreme Court precedent, the court stated that the term “accident” is “any ‘unexpected or unusual event or happening that is external to the passenger.’”<sup>181</sup> Acknowledging that the term “accident” should be “flexibly applied,” the court held that the incident complained of by the plaintiff did constitute an accident.<sup>182</sup> Nonetheless, the court granted summary judgment in favor of United, finding that the plaintiff had no evidence of a bodily injury.

In *Sewer v. Liat (1974) Ltd.*,<sup>183</sup> the plaintiff purchased a ticket on Liat Airlines traveling from Tortola, British Virgin Islands to Antigua. On the day of his flight, he and several other passengers were bumped from the flight and told they would have to take a later flight.<sup>184</sup> When the plane arrived, the waiting passengers pushed past the gate agents and boarded the plane. The plaintiff became angry when he discovered another passenger sitting in his assigned seat and

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<sup>179</sup> *Id.* at \*4.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* (citing *Air France v. Saks*, 470 U.S. 392, 405 (1985)).

<sup>182</sup> *Id.* (citing *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 172 (1999)).

<sup>183</sup> Civil Action No. 04-76, 2011 WL 635292 (D.V.I. Feb. 16, 2011).

<sup>184</sup> *Id.* at \*1.

eventually was asked to leave the airplane.<sup>185</sup> He refused to leave and had to be escorted off the plane by a police officer. He attempted to re-enter the plane and was handcuffed and detained for ten to fifteen minutes before being released without any charges.<sup>186</sup> The plaintiff filed suit against Liat, asserting claims of discrimination, defamation, and intentional or negligent infliction of emotional distress.<sup>187</sup>

Liat filed a motion for summary judgment on grounds the Montreal Convention preempted the plaintiff's discrimination claims. The district court agreed, noting that "[e]very court which has considered whether discrimination claims are preempted by the Warsaw Convention, has held in the affirmative."<sup>188</sup> Having determined that Montreal governed the plaintiff's claims, the court turned its attention to determining whether the incident complained of constituted an accident. The court found that having one's airline seat occupied by another passenger or being bumped from a flight did not qualify as accidents, as "over seating is neither unexpected or unusual."<sup>189</sup> Moreover, even if bumping was considered an accident, the plaintiff did not suffer a death, physical injury, or physical manifestation of injury and therefore, could not recover.

*Ginsberg v. American Airlines*<sup>190</sup> involved interpretation of the word "accident" as it related to an altercation between plaintiff and a flight attendant during a flight from New York to Turks and Caicos. The altercation began as the result of the flight attendant instructing plaintiff, who was returning to his seat, to wait until she moved the beverage cart out of the aisle. The

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<sup>185</sup>

*Id.*

<sup>186</sup>

*Id.*

<sup>187</sup>

*Id.* at \*2.

<sup>188</sup>

*Id.* at \*3.

<sup>189</sup>

*Id.* (citing *Grimes v. Northwest Airlines, Inc.*, No. 98-4794, 1999 U.S. Dist. LEXIS 11754, at \*9 (E.D. Pa. 1999)).

<sup>190</sup>

No. 09 Civ. 3226 (LTS) (KNF), 2010 WL 3958843 (S.D.N.Y. Sept. 27, 2010).

plaintiff, however, began moving the cart himself after the flight attendant left it unattended, which led to a physical exchange.<sup>191</sup> American Airlines later denied the plaintiff's return ticket, which led the plaintiff to file suit. The court accepted American's argument that the Montreal Convention preempted plaintiff's claims, ruling that no "accident" had occurred because the altercation was not "unexpected" nor "external" to the plaintiff's volition.<sup>192</sup>

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<sup>191</sup> *Id.* at \*1.

<sup>192</sup> *Id.* at \*4.