

THE AVIATION LAW  
REVIEW

SEVENTH EDITION

Editor  
Sean Gates

THE LAWREVIEWS

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THE LAWREVIEWS

# UNITED STATES

*Garrett J Fitzpatrick, James W Hunt and Mark R Irvine*<sup>1</sup>

## I INTRODUCTION

Civil aviation in the United States is regulated almost entirely by the federal (national) government – as opposed to the separate governments of the 50 states. The federal government agencies that primarily regulate aviation are the Federal Aviation Administration (FAA) and the Department of Transportation (DOT).

The FAA regulates US air commerce with the interest of promoting safety and efficiency. FAA rules are published annually in the Code of Federal Regulations and address virtually all aspects of both commercial and general aviation, including aircraft design and certification, design of airspace, air traffic control procedures, operating rules for carriers, certification of pilots, mechanics and carriers, and enforcement of rules in administrative proceedings.

The DOT regulates international air services and coordinates with other countries and international organisations in developing and managing international air routes. It also regulates international aviation pricing and intercarrier agreements between foreign and US airlines.

Remaining aspects of aviation law not falling within the broad federal control are reserved to the states, including the power to tax<sup>2</sup> and to regulate state law liability claims.

## II LEGAL FRAMEWORK FOR LIABILITY

The US government structure is divided between the national and state governments. These two systems share power under a doctrine known as federalism as prescribed in the US Constitution.<sup>3</sup> The national government regulates aviation based on the need for uniformity in aviation law and certain constitutional powers granted to the federal government.<sup>4</sup>

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2 US courts have held that foreign-based and registered aircraft flying exclusively in foreign commerce are not subject to local property taxation. *Scandinavian Airlines Sys Inc v. LA Cty*, 363 P.2d 25 (Cal. 1961).

3 'Ours is "a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it".' *J. McIntyre Mach Ltd v. Nicaastro*, 564 U.S. 873, 884 (2011).

4 U.S. Const. Article I, Section 8, cl. 3 ('To regulate Commerce with foreign Nations, and among the several States ...'); Stuart Banner, *Who Owns the Sky? The Struggle To Control Airspace from the Wright Brothers On* (2008) (detailing a history of the development of US aviation law).

The federal government consists of three separate branches:<sup>5</sup> legislative, executive and judicial. Each branch plays a role in the development of aviation law. The legislative branch, or the Congress, enacts the laws. The executive branch, which includes the US President and many agencies, executes and enforces the laws. The judicial branch applies and interprets the laws.

The agencies responsible for most aviation regulation are the DOT and FAA, which are part of the federal government's executive branch and established by acts of Congress.<sup>6</sup> Most legal disputes concerning agency actions are adjudicated in administrative law courts, which are part of the federal executive branch of government.<sup>7</sup>

Civil lawsuits are heard in either the state or federal courts. The federal courts are of limited jurisdiction and entertain only certain cases as authorised by Congress or the US Constitution. State courts, by contrast, are of general jurisdiction. Aviation cases are heard in either state or federal courts, depending on the case circumstances.<sup>8</sup>

Defendants are subject to a court's jurisdiction in a civil lawsuit only where the court has 'personal jurisdiction' over the defendant, which is a constitutional doctrine limiting the court's authority over out-of-state or foreign defendants.<sup>9</sup> To be within a court's personal jurisdiction, the defendant must have a sufficient connection to the court's forum.

Litigants have a right to a jury trial in most cases.<sup>10</sup> Juries consist of randomly selected US citizens. The judge instructs the jury on the law to apply. The jury renders a decision based on its determination of facts after all the evidence has been presented. There is generally a right to appeal from the trial court level. Most cases are resolved before the case reaches the jury trial, either by motion or by settlement.

## **i International carriage**

The United States is party to several multilateral agreements and conventions relating to international carriage,<sup>11</sup> including the following main conventions, which US courts are often called upon to interpret.

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5 State governments have similar structures.

6 Department of Transportation Act of 1966, Pub. L. No. 89-670, 80 Stat. 931; Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731.

7 Certain agency actions may be challenged directly in a federal district court, including, for example, if a challenged FAA penalty meets certain thresholds. 49 U.S.C.A. Section 46301(d)(4) (West, Westlaw through P.L. 116-19).

8 The two most common bases for federal court jurisdiction are cases arising under federal law; and cases between citizens from different states, or between a US citizen and a foreign country citizen. U.S. Const. Article III, Section 2, cl. 1. A foreign carrier that qualifies as a 'foreign state' under the Foreign Sovereign Immunities Act may remove a state-court lawsuit to federal court. 28 U.S.C.A. Section 1441(d) (West, Westlaw through P.L. 116-19).

9 See, for example, *Goodyear Dunlop Tires Operations SA v. Brown*, 564 U.S. 915 (2011) (North Carolina court lacked personal jurisdiction over a European tyre manufacturer arising from an accident in France, where only a small percentage of tyres were distributed in North Carolina).

10 A foreign carrier that qualifies as a 'foreign state' under the Foreign Sovereign Immunities Act is entitled to a non-jury trial. 28 U.S.C.A. § 1441(d) (West, Westlaw through P.L. 116-19).

11 For example, International Air Services Transit Agreement, 7 December 1944, 59 Stat. 1693, 84 U.N.T.S. 389; Convention on the International Recognition of Rights in Aircraft, 19 June 1948, 4 U.S.T. 1830; United Nations Convention on Offences and Certain Other Acts Committed on Board Aircraft, 14 September 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention for

***The Chicago Convention***<sup>12</sup>

US courts recognise that Articles 5, 8, 15, 16, 20, 24, 29, 32, 33 and 35 are self-executing, and thus do not require Congress to act to implement them.<sup>13</sup>

Regulation of foreign carrier operation in US airspace incorporates and requires compliance with International Civil Aviation Organization (ICAO) standards.<sup>14</sup> A court applied ICAO standards in a case involving a passenger who suffered cardiac arrest and claimed that the lack of an automated external defibrillator constituted an ‘accident’ under the Montreal Convention.<sup>15</sup> The court rejected the claim, noting that the foreign carrier operated under ICAO standards, which recommended, but did not require, a defibrillator.<sup>16</sup> The court concluded that the failure to comply with the ICAO’s recommendation was insufficient to constitute an ‘accident’ under the Montreal Convention.<sup>17</sup>

The FAA assesses foreign ICAO members’ compliance with ICAO safety standards under its International Aviation Safety Assessment programme. The FAA examines each country’s efforts to ensure its air carriers comply with ICAO requirements.<sup>18</sup> Countries deemed in compliance with ICAO standards are designated Category I countries whose carriers are allowed to operate freely to the United States. Countries deemed not to meet ICAO standards are designated Category II countries. Carriers originating from Category II countries that were already operating to the United States at the time of the FAA investigation may continue subject to heightened FAA surveillance. All other Category II carriers are prohibited from commencing service to the United States unless their operations

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the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 23 September 1971, 24 U.S.T. 565, 974 U.N.T.S. 177; 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 24 February 1988, 27 I.L.M. 627; Agreement To Ban Smoking on International Passenger Flights, U.S.-Austl.-Can., 1 November 1994, T.I.A.S. No. 12,578; see also The Cape Town Convention, and Protocol to Matters Specific to Aircraft Equipment, Cape Town Treaty Implementation Act, Pub. L. No. 108–297, 118 Stat 1095 (2004). For complete list of treaties, see US Department of State, *Treaties in Force* (2013), available at [www.state.gov/s/l/treaty/tif/index.htm](http://www.state.gov/s/l/treaty/tif/index.htm) (last visited 12 April 2019).

12 Convention on International Civil Aviation, 7 December 1944, 61 Stat. 1180, 15 U.N.T.S. 295.

13 *British Caledonian Airways Ltd v. Bond*, 665 F.2d 1153, 1161 (D.C. Cir. 1981); see generally Jordan J Paust, *Self-Executing Treaties*, 82 Am. J. Int’l L. 760, 776 (1988).

14 14 C.F.R. Section 129.5 (West 2019). In implementing this regulation the FAA recognised that ICAO standards ‘define the minimum level of safety necessary for the recognition by Contracting States to the Chicago Convention of certificates of airworthiness, certificates of competency and licences that allow for the flight of aircraft of other States into or over their territories’. Dep’t of Transp. (DOT) Fed. Aviation Admin. (DOT 19 February 2013) 2013 WL 1793680. By contrast, US airlines must comply with operating specifications set forth in 14 C.F.R. pt. 121. By statute, foreign carriers may navigate in US airspace ‘only – (1) if the country of registry grants a similar privilege to aircraft of the United States; (2) by an airman holding a certificate or licence issued or made valid by the United States Government or the country of registry; (3) if the Secretary of Transportation authorises the navigation; and (4) if the navigation is consistent with terms the Secretary may prescribe’. 49 U.S.C.A. Section 41703 (West, Westlaw through P.L. 116–19).

15 *Aziz v. Air India Ltd*, 658 F. Supp. 2d 1144 (C.D. Cal. 2009).

16 *id.* at 1153.

17 *id.*

18 Olga Barreto, *Safety Oversight: Federal Aviation Administration, International Civil Aviation Organization, and Central American Aviation Safety Agency*, 67 J. Air. L. & Comm. 651, 652 (2002).

are performed using aircraft wet-leased from a Category I country. To encourage greater international compliance, the FAA drafted the model Civil Aviation Safety Act and model regulations, which may be adopted by other Convention member states.<sup>19</sup>

### *The Montreal Convention*<sup>20</sup>

The United States ratified the Montreal Convention in 2003.<sup>21</sup> In interpreting the Montreal Convention, courts rely on precedent interpreting the predecessor Warsaw Convention.<sup>22</sup>

The Convention contains a two-year statute of limitations for initiating claims, which has been interpreted in the United States as a condition precedent to suit, and therefore not subject to tolling.<sup>23</sup>

US courts interpret 'accident' for purposes of Article 17 liability as occurring where a passenger's injury or death is 'caused by an unexpected or unusual event or happening that is external to the passenger, and not where the injury results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft'.<sup>24</sup>

More recent cases have further clarified this definition. For instance, an accident under the Convention may be found where a passenger suffers from an in-flight medical condition such as an asthma attack, heart attack or stroke, and makes an express request for medical assistance that goes unanswered.<sup>25</sup>

A variety of events have been held to constitute accidents in cases addressing non-medical injuries, including injury caused by a hypodermic needle protruding from an aeroplane seat;<sup>26</sup> a flight attendant spilling hot water on a passenger;<sup>27</sup> bottles falling from an open overhead compartment;<sup>28</sup> and a 'jolt' from another passenger causing a tray table to shake and hot tea to spill.<sup>29</sup> Conversely, a federal court in New York held that tripping over luggage in the aisle while boarding is not an accident because 'there is nothing unexpected or unusual about the

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- 19 Model Civil Aviation Regulations, version 2.8 (June 2016), available at [www.faa.gov/about/initiatives/iasa/mcar/](http://www.faa.gov/about/initiatives/iasa/mcar/) (last visited 15 April 2019).
  - 20 Convention for the Unification of Certain Rules for International Carriage by Air (hereinafter Montreal Convention), 28 May 1999 (entered into force on 4 November 2003), reprinted in S. Treaty Doc. No. 106-45, 1999 WL 33292734 (2000).
  - 21 Entry Into Force of the 1999 Montreal Convention, U.S. Dept. of State Archive (4 November 2003), <https://2001-2009.state.gov/r/pa/prs/ps/2003/25920.htm>.
  - 22 *Narayanan v. British Airways*, 747 F.3d 1125, 1127 n.2 (9th Cir. 2014).
  - 23 Montreal Convention, Article 35(1), footnote 20 above; *Schoenebeck v. Koninklijke Luchtvaart Maatschappij NV*, No. CV 13-04992 SI, 2014 WL 1867001 (N.D. Cal. 8 May 2014).
  - 24 *Air France v. Saks*, 470 U.S. 392 (1985).
  - 25 *Olympic Airways v. Husain*, 540 U.S. 644, 656–58 (2004) (asthma attack); *Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651, 652 (S.D.N.Y. 2001) (heart attack); *McCasey v. Cont'l Airlines Inc.*, 159 F. Supp. 2d 562, 574 (S.D. Tex. 2001) (stroke). But see *Twardowski v. Am Airlines*, 535 F.3d 952, 960 (9th Cir. 2008) (holding airline's failure to warn passengers about the risk of developing deep vein thrombosis on international flight is not an Article 17 accident); *Baillie v. MedAire, Inc.*, 2017 U.S. Dist. LEXIS 150160 (D. Ariz. 14 September 2017) (holding that failure of remote medical service to recommend diversion for passenger suffering heart attack is not an Article 17 accident).
  - 26 *Doe v. Etihad Airways, PJSC*, 870 F.3d 406 (6th Cir. 2017), cert. denied, 138 S. Ct. 1548 (2018); *Waxman v. C.I.S. Mexicana De Aviacion SA*, 13 F. Supp. 2d 508, 512 (S.D.N.Y. 1998).
  - 27 *Fishman v. Delta Airlines Inc*, 132 F.3d 138, 143 (2d Cir. 1998).
  - 28 *Maxwell v. Aer Lingus Ltd*, 122 F. Supp. 2d 210, 212-13 (D. Mass. 2000).
  - 29 *Wipranik v. Air Canada*, No. CV 06-3763 AHM (AJWx), 2007 WL 2441066 (C.D. Cal. 15 May 2007).

presence of a bag in or near the aisle during the boarding process'.<sup>30</sup> Deviations from airline policies and procedures may be considered unexpected and unusual enough to constitute an accident under the Convention.<sup>31</sup>

Whether an injury occurs during 'embarking' or 'disembarking' is considered a question of law to be decided by the court.<sup>32</sup> A federal court in New York held that the embarking process had not begun merely because a passenger had checked in for his flight because he 'had ample time to roam freely about the [public] terminal before his flight was called'.<sup>33</sup>

Based on US Supreme Court cases that construed 'bodily injury' under the Warsaw Convention as not including pure mental distress,<sup>34</sup> most US courts have held that conditions such as fear and post traumatic stress do not constitute bodily injury under the Convention.<sup>35</sup> A federal appellate court recently rejected reliance on cases decided under the Warsaw Convention, holding instead that the Montreal Convention permits recovery of mental anguish damages by a passenger who claimed fear of contracting a contagious disease after being pricked by a hypodermic needle in a seatback pocket.<sup>36</sup>

US courts are split on the pre-emptive scope of the Montreal Convention. By analogy to the Warsaw Convention, state-based claims that do not fall within the scope of delay, damage, loss or injury to passengers, baggage or cargo are arguably not pre-empted by the Convention.<sup>37</sup> However, at least one court extended the Montreal Convention in this regard by focusing on the intent of the treaty to promote international uniformity.<sup>38</sup> US courts have also held that the doctrine of *forum non conveniens* applies under the Montreal Convention.<sup>39</sup> In a case arising from the 2005 crash of West Caribbean Flight 708, a US Circuit Court of Appeals rejected the plaintiffs' attempt to circumvent a *forum non conveniens* dismissal by invoking the Convention and purposefully rendering the alternative forum unavailable.<sup>40</sup>

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- 30 *Sethy v. Malev-Hungarian Airlines*, No. 98 Civ. 8722 (AGJ), 2000 WL 1234660 (S.D.N.Y. 31 August 2000) aff'd, No. 00-9325, 13 Fed. Appx. 18 (2d Cir. 12 June 2001); accord *Plonka v. US Airways*, 2015 WL 6467917 (E.D. Pa. 27 October 2015) (holding that an injury to passenger's leg, which struck in-flight entertainment box during takeoff held not to result from incident).
- 31 See *Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651, 663 (S.D.N.Y. 2001); cf. *White v. Emirates Airlines Inc.*, No. 11-20843, 493 F. App'x 526, 534 (5th Cir. 1 October 2012).
- 32 *Ugaz v. Am Airlines Inc.*, 576 F. Supp. 2d 1354, 1361 (S.D. Fla. 2008) (citing *Rolnick v. El Al Isr Airlines Ltd.*, 551 F. Supp. 261, 263 (E.D.N.Y. 1982)).
- 33 *Hunter v. Deutsche Lufthansa AG*, 863 F. Supp. 2d 190, 207 (E.D.N.Y. 2012).
- 34 *E Airlines Inc. v. Floyd*, 499 U.S. 530, 552 (1991).
- 35 *Terrafranca v. Virgin Atl Airways Ltd.*, 151 F.3d 108 (3d Cir. 1998); *Bobian v. Czech Airlines Inc.*, No. 03-1262, 93 Fed. Appx. 406 (3rd Cir. 29 March 2004).
- 36 *Doe v. Etihad Airways, PJSC*, footnote 26, above.
- 37 Tory A Weigand, *Recent Developments under the Montreal Convention*, 77 Def. Couns. J. 443, 445-46 (2010).
- 38 See *Knowlton v. American Airlines Inc.*, No. RDB-06-854, 2007 WL 273794 (D. Md. 31 January 2007) (holding that, as a matter of public policy, airlines should not be subject to contract claims in state courts involving a US\$3 breakfast).
- 39 See *Khan v. Delta Airlines Inc.*, No. 10. Civ. 2080 (BMC), 2010 WL 3210717 (E.D.N.Y. 12 August 2010). *Forum non conveniens* is a common law doctrine under which US courts have discretion to dismiss cases filed in the United States in favour of refileing the case in a more appropriate foreign country. *Piper Aircraft Co v. Reyno*, 454 U.S. 235, 241 (1981).
- 40 *Galbert v. W Caribbean Airways*, 715 F.3d 1290 (11th Cir. 2013).

## ii Internal and other non-convention carriage

General rules governing tort liability apply to non-convention carriage within the United States. Tort law is traditionally based on state common law, in which courts define what claims are actionable.<sup>41</sup> Many statutes also define the contours of tort law. A carrier will be subject to tort liability when found to have acted negligently in causing harm. Negligence is determined by assessing the carrier's conduct under an applicable standard of care, which generally is conduct lacking reasonable care under all the circumstances.<sup>42</sup> Courts may adopt statutes, regulations or even international treaty provisions in formulating the standard of care. Most states hold common carriers to an elevated standard of care.<sup>43</sup>

In some instances, federal law will pre-empt state law, such that state law has no force.<sup>44</sup> Pre-emption is based on constitutional supremacy of federal law over state law in certain areas, and may apply where 'it is impossible for a private party to comply with both state and federal requirements'.<sup>45</sup> In *Abdullah v. American Airlines Inc*, plaintiffs brought state tort claims against the airline after suffering injuries from severe turbulence.<sup>46</sup> The court determined that state standards of care were pre-empted, because FAA regulations completely established 'the applicable standards of care in the field of air safety, generally, thus pre-empting the entire field from state and territorial regulation'.<sup>47</sup>

An act of Congress known as the Airline Deregulation Act (ADA) expressly pre-empts state law relating to 'a price, route or service of an air carrier that may provide air transportation'.<sup>48</sup> Before the ADA, many commercial aspects of aviation were regulated, including entry into the market, routes and fares.<sup>49</sup> In enacting the ADA, Congress determined that 'maximum reliance on competitive market forces', rather than regulation, would best further 'efficiency, innovation, and low prices' as well as 'variety [and] quality . . . of air transportation services'.<sup>50</sup>

41 Dan B Dobbs, Paul T Hayden, and Ellen M Bublick, *The Law of Torts*, Section 1, at p. 2 (2d ed. 2011).

42 Restatement (Third) of Torts: Phys. & Emot. Harm Section 3 (2010).

43 See, for example, Cal. Civ. Code Section 2100 (West, Westlaw through 2019 legislation) ('A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill.').

44 See, for example, *Gade v. Nat'l Solid Wastes Mgmt Ass'n*, 505 U.S. 88, 109 (1992) ('First, Congress can adopt express language defining the existence and scope of pre-emption. Second, state law is pre-empted where Congress creates a scheme of federal regulation so pervasive as to leave no room for supplementary state regulation. And third, "state law is pre-empted to the extent that it actually conflicts with federal law".').

45 *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 480 (2013); U.S. Const. Art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land.').

46 *Abdullah v. Am Airlines Inc*, 181 F.3d 363 (3d Cir. 1999).

47 id. at 367. But see *Sikkelee v. Precision Airmotive Corp*, 822 F.3d 680 (3d Cir. 2016) (clarifying the scope of *Abdullah* and holding that federal pre-emption of the field of aviation safety does not extend to state law products liability claims); *Sikkelee v. Precision Airmotive Corp.*, 901 F.3d 701 (3d Cir. 2018) (holding that state tort law was not conflict pre-empted where engine manufacturer could have simultaneously complied with both state tort law and federal regulations).

48 49 U.S.C.A. § 41713(b) (West, Westlaw through P.L. 116–19).

49 *Morales v. Trans World Airlines Inc*, 504 U.S. 374, 422 (1992) (Stevens, J., dissenting).

50 id. at 378 (majority opinion); 49 U.S.C. Sections 40101(a)(6), (12) (West, Westlaw through P.L. 116–19); cf. *Hickcox-Huffman v. US Airways Inc*, 855 F.3d 1057 (9th Cir. 2017) (distinguishing state law breach of contract claim relating to baggage fee based on a voluntarily assumed obligation and thus not pre-empted).

Admiralty accidents are governed exclusively by federal law.<sup>51</sup> In the aviation context, federal admiralty law will govern where the claimed tort bears ‘a significant relationship to traditional maritime activity’.<sup>52</sup> Another act, known as the Death on the High Seas Act (DOHSA), also applies federal law to accidents involving commercial aviation that occur on the high seas beyond 12 nautical miles of the US shoreline.<sup>53</sup> For non-commercial aircraft, DOHSA applies if the accident occurs beyond three nautical miles from the US shore.<sup>54</sup> Claims for pre-impact pain and suffering and punitive damages are unavailable under DOHSA.<sup>55</sup>

Choice of law rules may also affect carrier liability. Courts must often decide which state’s law to apply in aviation cases because of the interstate nature of aviation. For example, in determining which state’s punitive damages law applied in litigation arising from the 1979 DC-10 crash at Chicago’s O’Hare airport, the court considered the laws of numerous states with a connection to the case, including: the plaintiffs’ residences (Connecticut, Hawaii, Indiana, Massachusetts, New York, Japan and Saudi Arabia, among others);<sup>56</sup> the defendant aircraft builder’s and airline’s places of incorporation and operation (Maryland, Missouri, Delaware, New York, Texas and Oklahoma); and lastly, the place of the crash (Illinois) and the intended destination (California). The court applied the ‘most significant relationship’ analysis and determined that the law of the place of the injury governed, which did not permit recovery of punitive damages.<sup>57</sup>

### iii General aviation regulation

As noted, the FAA promulgates administrative regulations (FARs), which govern most aspects of aviation.<sup>58</sup> Congress created the FAA in order ‘to provide for the safe and efficient use of the airspace by both civil and military aircraft, and for other purposes’.<sup>59</sup> The FAA’s purview accordingly extends to making and enforcing rules ‘on all safety matters relating to the operation of airports, the manufacture, operation, and maintenance of aircraft, and the

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51 28 U.S.C.A. Section 1333 (West, Westlaw through P.L. 116–19).

52 *Exec Jet Aviation Inc v. City of Cleveland, Ohio*, 409 U.S. 249, 268 (1972).

53 46 U.S.C.A. Section 30307 (West, Westlaw through P.L. 116–19).

54 46 U.S.C.A. Section 30302 (West, Westlaw through P.L. 116–19) (defining general applicability); *Helman v. Alcoa Global Fastener Inc*, 637 F.3d 986 (9th Cir. 2011) (interpreting DOHSA to apply in the area between three and 12 nautical miles from the US shore for non-commercial aircraft accidents).

55 *Dooley v. Korean Airlines*, 524 U.S. 116, 118 (1998).

56 *In re Air Crash Disaster Near Chicago, Illinois* on 25 May 1979, 644 F.2d 594 (7th Cir. 1981).

57 *id.* at 613; see also Restatement (Second) of Conflict of Laws Section 146 (1971).

58 *Sikkelee v. Precision Airmotive*, footnote 47, above at p. 721 (Roth, J., dissenting) (‘FAA regulations and the Act itself prescribe the operative safety standards for the manufacture of airplanes and their components’).

59 Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (codified as amended at 49 U.S.C.A. § 40101) (West, Westlaw through P.L. 116–19).

efficiency of the National Airspace System'.<sup>60</sup> The FAA also develops the nation's airports and navigation systems, implements new technologies and maintains the aircraft ownership registry.<sup>61</sup>

#### iv Passenger rights

DOT regulations cover, among other topics, a carrier's liability to passengers for domestic baggage, the overbooking of flights, tarmac delays, and related procedures.

The baggage liability regulations apply to domestic flight segments using large aircraft.<sup>62</sup> For qualifying flights, a carrier cannot limit its liability for the damage, loss or delay in delivery of passenger baggage to less than US\$3,500 per passenger.<sup>63</sup> Notice of limitations relating to baggage liability must be conspicuous,<sup>64</sup> and failure to provide notice may be considered unfair and deceptive practice.<sup>65</sup>

Overbooking regulations apply to flights with 30 or more seats on domestic or non-stop foreign flights originating in the United States.<sup>66</sup> Compensation for passengers involuntarily denied boarding depends on the alternate transportation that the carrier offers,<sup>67</sup> and can range from no compensation to 400 per cent of the fare, with a maximum of US\$1,350.

Tarmac delay regulations apply to certified or commuter domestic carriers that operate scheduled passenger or public charter service on aircraft with 30 or more seats.<sup>68</sup> These regulations also apply to foreign carriers when new passengers are picked up in the United States. Carriers must adopt contingency plans for lengthy tarmac delays, which must provide for adequate food and water no later than two hours after leaving the gate or landing.<sup>69</sup> The plan must also assure operating bathrooms, and medical attention if needed. Passengers must be allowed to deplane within three hours of tarmac delay for domestic flights, and within four hours of tarmac delay for international flights, in the absence of safety concerns. A delay is measured for US carriers from the point when the main aircraft door is closed to when the carrier begins its return to a suitable disembarkation point.<sup>70</sup> Airlines that fail to comply with tarmac delay rules are subject to civil penalties of up to US\$32,140 for each violation.<sup>71</sup>

60 49 C.F.R. Section 1.82 (West 2019). Regulations are subject to judicial review if the regulation exceeds the statute authorizing the agency to act, or if the regulation is arbitrary, capricious or an abuse of discretion, among other grounds. 5 U.S.C.A. § 706 (West, Westlaw through P.L. 116–19); *Pinney v. Nat'l Transp. Safety Bd.*, 993 F.2d 201 (10th Cir. 1993) (FAA regulation allowing for suspension of pilot licence for unlawfully importing marijuana held to be within FAA's jurisdiction based on reasonable relationship between drug law conviction and safety of flight).

61 *id.*

62 14 C.F.R. Section 254.4 (West 2019).

63 *id.* (relating to 'provable direct or consequential damages resulting from the disappearance of, damage to, or delay in delivery of a passenger's personal property, including baggage').

64 *id.* at Section 254.5.

65 *id.* at Section 399.85.

66 *id.* at Section 250.2.

67 *id.* at Section 250.5.

68 *id.* at Section 259.2.

69 *id.* at Section 259.4.

70 FAA Extension, Safety, and Security Act of 2016, Pub. L. No. 114-190, 15 July 2016, 130 Stat. 615, § Section 2308.

71 See 14 C.F.R. Section 259.4(f) (citing 49 U.S.C.A. Section 41712 (West, Westlaw through P.L. 116–19)); 14 C.F.R. Section 383.2; 49 U.S.C.A. Section 46301 (West, Westlaw through P.L. 115-140). The DOT takes the position that a separate violation occurs for each passenger forced to remain on

Qualifying carriers must provide information regarding flight cancellation, delays of 30 minutes or more, and diversions, within 30 minutes of becoming aware of such changes.<sup>72</sup>

The Air Carrier Access Act (ACAA) prohibits air carriers from discriminating against individuals on the basis of a physical or mental impairment that substantially limits one or more major life activities.<sup>73</sup> A majority of courts hold that the ACAA does not create a private right of action.<sup>74</sup>

## v Other legislation

### *US environmental policy*

The National Environmental Policy Act of 1969 (NEPA) requires an environmental impact statement (EIS) whenever major federal actions significantly affect the quality of the human environment.<sup>75</sup> Thus, an EIS is necessary for any airport expansion or major change in flight routes. Some states have similar requirements.<sup>76</sup> The FAA ensures that the aviation and space industry complies with NEPA.<sup>77</sup> Litigation over FAA NEPA compliance is extensive. Pursuant to the Clean Air Act of 1970, the Environmental Protection Agency (EPA) regulates air pollution from aircraft.<sup>78</sup> In setting aircraft engine emission standards, the EPA consults with the FAA, and largely follows ICAO standards.<sup>79</sup>

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board, and accordingly has imposed fines on that basis. American Airlines, Inc., Dkt. OST 2016-0002 (14 December 2016), available at [www.regulations.gov/document?D=DOT-OST-2016-0002-0027](http://www.regulations.gov/document?D=DOT-OST-2016-0002-0027). The DOT withdrew rule-making notices on Transparency of Airline Ancillary Fees and Other Consumer Protection Issues, pursuant to Executive Orders by President Trump relating to regulation reduction. Proposed rule; withdrawal, 82 Fed. Reg. 58777-01 (2017).

72 14 C.F.R. Section 259.8(a) (West 2019).

73 49 U.S.C.A. Section 41705(a) (West, Westlaw through P.L. 116–19).

74 *Segalman v. Sw. Airlines Co.*, 895 F.3d 1219, 1224–25 (9th Cir. 2018).

75 42 U.S.C.A. Section 4332(C) (West, Westlaw through P.L. 116–19).

76 See Timothy R Wyatt, *Balancing Airport Capacity Requirements with Environmental Concerns: Legal Challenges to Airport Expansion*, 76 J. Air L. & Com. 733, 737 (2011).

77 Clay Hartmann, *Nepa: Business As Usual: The Weaknesses of the National Environmental Policy Act*, 59 J. Air L. & Com. 709, 715 (1994); FAA Guide to the Best Practices for Environmental Impact Statement Management, available at [http://www.faa.gov/airports/environmental/eis\\_best\\_practices/](http://www.faa.gov/airports/environmental/eis_best_practices/); 80 Fed. Reg. 44208-01 (2015) (Final Order 1050.1F (Environmental Impact: Policies and Procedures)); 14 C.F.R. Section 431.91 (West 2019).

78 Clean Air Act, Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified as amended at 42 U.S.C. Sections 7401-7671q); E.g., 40 C.F.R. pt. 87.

79 *Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1225-26 (D.C. Cir. 2007); 42 U.S.C.A. Section 7572 (West, Westlaw through P.L. 116–19). In 2016, the EPA made a final endangerment determination that greenhouse gas emissions from aircraft engines (from those that power smaller jet aircraft such as Cessna Citation CJ3+ up to large commercial jet aircraft such as Airbus A380) cause air pollution which contributes to climate change. 81 Fed. Reg. 54422-01. The determination was in 'preparation for a future domestic rulemaking process to adopt future' greenhouse gas standards for aircraft engines. Fact Sheet: EPA Finalizes First Steps to Address Greenhouse Gas Emissions from Aircraft Engines, available at <https://www.epa.gov/regulations-emissions-vehicles-and-engines/final-rule-finding-greenhouse-gas-emissions-aircraft> (as of 22 April 2019).

### ***US anti-corruption law***

US law criminalises bribery to influence any official government act.<sup>80</sup> Bribery is broadly interpreted, and includes ‘illegal gratuities’ – or direct or indirect giving, offering or promising of anything of value to any federal public official for or because of any official act performed or to be performed.<sup>81</sup> Violations of US bribery law are punishable by up to 15 years in prison.<sup>82</sup> Conspiracy to commit bribery constitutes a separate offence. Each state also has its own bribery laws.

The Foreign Corrupt Practices Act (FCPA) contains anti-bribery provisions relating to foreign officials. It applies to American individuals or corporations, and foreign corporations publicly traded in the United States.<sup>83</sup> In 1995, Lockheed paid a US\$24.8 million penalty for FCPA violations after admitting to bribing a member of the Egyptian parliament to influence the sale of three transport planes to Egypt.<sup>84</sup> The largest FCPA penalty ever imposed was in 2008 for US\$450 million against Siemens, a US exchange-listed foreign corporation.<sup>85</sup>

The FCPA includes international anti-corruption commitments relating to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.<sup>86</sup> The United States is also a party to the Inter-American Convention Against Corruption.<sup>87</sup>

## **III LICENSING OF OPERATIONS**

### **i Licensed activities**

All aircraft operation in the United States, including intrastate operation, is subject to federal regulation. Consequently, operators must obtain and maintain appropriate certification from the DOT and the FAA, in addition to any pertinent state permits.

#### ***Aircraft certification***

Aircraft must be registered and certified airworthy. An aircraft may be registered if it is not registered in another country, and is owned by: (1) a US citizen; (2) a resident alien; (3) a US governmental unit or subdivision; or (4) a non-citizen corporation lawfully organised and doing business under US law, provided that the aircraft is based and primarily used in the United States.<sup>88</sup> Applicants must show proof of ownership.

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80 18 U.S.C.A. Section 201(b) (West, Westlaw through P.L. 116–19).

81 id. at Section 201(c).

82 id. at Section 201.

83 15 U.S.C.A. Sections 78m(b), 78dd-1, 78dd-2, 78dd-3 (West, Westlaw through P.L. 116–19).

84 James F Peltz, *Lockheed Agrees to Pay Record Fine: Aerospace: Calabasas firm pleads guilty in connection with bribing an Egyptian politician*, LA Times, available at [http://articles.latimes.com/1995-01-28/business/fi-25231\\_1\\_egyptian-politician](http://articles.latimes.com/1995-01-28/business/fi-25231_1_egyptian-politician) (28 January 1995).

85 Press Release, SEC, SEC Charges Siemens AG for Engaging in Worldwide Bribery (15 December 2008), available at [www.sec.gov/news/press/2008/2008-294.htm](http://www.sec.gov/news/press/2008/2008-294.htm).

86 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 December 1997, S. Treaty Doc. No. 105-43.

87 Inter-American Convention Against Corruption, 29 March 1996, S. Treaty Doc. No. 105-39.

88 14 C.F.R. Section 47.3 (West 2018).

Airworthiness certification indicates that an aircraft conforms to its approved design and is safe for operation.<sup>89</sup> The two types of certificates are a standard airworthiness certificate, issued for normal, utility, acrobatic, commuter, transport and special classes of aircraft; and a special airworthiness certificate, issued for primary (personal use), restricted (e.g., agricultural), multiple or limited categories, experimental, special flight permit (e.g., flying to a point for repair) and provisional aircraft.

Owners of foreign-registered civil aircraft who do not have the equivalent of a US standard airworthiness certificate must apply for a special flight authorisation to operate the aircraft within the United States.<sup>90</sup> In addition, DOT authorisation is required for foreign civil aircraft registered in a country that is not a member of the ICAO.

The FAA certifies that the design for aircraft, engines and propellers meets airworthiness and related requirements.<sup>91</sup> The FAA also certifies aircraft components by issuing technical standard orders, and approves design modifications and replacements by issuing parts manufacture approval.<sup>92</sup> The FAA does not approve products manufactured outside the United States, unless a bilateral airworthiness agreement has been signed between the United States and the country of manufacture.

### ***Carrier certification***

US carriers must obtain two separate authorisations to conduct operations: (1) economic authority from the DOT; and (2) safety authority from the FAA. The DOT evaluates all applicants to determine if they are 'fit, willing and able' to conduct airline operations and to ensure ownership and control by US citizens (see Section III.ii, *infra*). The DOT assesses the carrier's managerial competence, operating and financial plans, and compliance and safety record. Certificates are available for interstate or foreign transport of passengers or cargo and mail, and commuter air carriers. The DOT continues to monitor operations and financial conditions of certified air carriers to ensure continued compliance with the regulations.

FAA Flight Standards District Offices issue safety authority certifications: 14 CFR Part 121 governs operating requirements for domestic, flag and supplemental operations, while 14 CFR Part 135 governs commuter and on-demand operations. The FAA determines the applicant's ability to comply with regulations and safety standards, and to manage risks in the operating environment. The FAA utilises an Air Transportation Oversight System to assess the safety of Part 121 operations. The FAA ensures compliance with regulations when a new aircraft type is added to an existing certificate by examining hardware, programme and procedural issues pertinent to the new aircraft.

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89 *id.* at Section 21.1(b)(1); The FAA implemented new rules in 2017 designed to streamline the certification process for general aviation aircraft. 14 C.F.R. Section 23; FAA, New Certification Rule for Small Airplanes Becomes Effective (5 September 2017), available at <https://www.faa.gov/news/updates/?newsid=88746> (as of 16 May 2019).

90 FAA Order 8130.2H (4 February 2015), available at [www.faa.gov/documentLibrary/media/Order/FAA\\_Order\\_8130\\_2H.pdf](http://www.faa.gov/documentLibrary/media/Order/FAA_Order_8130_2H.pdf).

91 14 C.F.R. Section 21.21 (West 2019). Design certification is confirmed by a type certificate that includes the design type, operating limitations, a certificate data sheet and any applicable conditions. *id.* at Section 21.41.

92 14 C.F.R. Section 21.8 (West 2019).

### ***Other FAA certifications***

The FAA also certifies airmen, and has broad authority to modify, suspend or revoke the certificates when deemed necessary for safety and public interest.<sup>93</sup> Certification is required for pilots and flight instructors, flight engineers, flight navigators, aircraft dispatchers, control tower operators, mechanics, repairmen and parachute riggers. Pilot and flight instructor certificates are available in the following categories, each with distinct privileges and eligibility requirements: student, sport, recreational, private, commercial, and airline transport certificates. Type ratings and instrument ratings may be required for pilots of certain aircraft. In addition, medical certification is required for all pilots, flight instructors, flight engineers and flight navigators.

The FAA also certifies all airports that serve both scheduled passenger-carrying operations conducted in aircraft designed with more than nine passenger seats, and unscheduled passenger-carrying operations conducted in aircraft designed with at least 31 passenger seats.<sup>94</sup>

The FAA is also authorised to issue commercial space transportation licences for launch or re-entry vehicles.<sup>95</sup>

### **ii Ownership rules**

US carriers must be owned and controlled by a US citizen to obtain and maintain US carrier certification.<sup>96</sup> 'Citizen of the United States' is defined as: (1) an individual who is a citizen of the United States or one of its possessions; (2) a partnership whose partners are each individuals with US citizenship; or (3) a corporation or association organised under US laws, of which the president and at least two-thirds of the directors and other managing officers are US citizens, and which is under the actual control of US citizens, with at least 75 per cent of the voting interest owned or controlled by US citizens.<sup>97</sup>

### ***Foreign carriers***

Foreign carriers<sup>98</sup> must likewise obtain two separate authorisations to conduct operations in the United States: (1) economic authority from the DOT;<sup>99</sup> and (2) safety authority from the FAA.<sup>100</sup>

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93 See W. J. Dunn, *Annotation, Revocation or Suspension of Airman's License or Certificate*, 78 A.L.R. 2d 1150 (1961).

94 14 C.F.R. pt. 139.

95 id. at Sections 413.3, 413.19 (2016).

96 49 U.S.C.A. § 40102(a)(2), (a)(15) (West, Westlaw through P.L. 116–19).

97 14 C.F.R. . at Section 204.2(c).

98 A 'foreign air carrier' is defined as 'a person, not a citizen of the United States, undertaking by any means, directly or indirectly, to provide foreign air transportation'. 49 U.S.C.A. Section 40102(a)(21) (West, Westlaw through P.L. 116–19). 'Foreign air transportation' is 'the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft, between a place in the United States and a place outside the United States when any part of the transportation is by aircraft'. id. at Section 40102(a)(23). Domestic carriers operate under a certificate while foreign carriers operate under a permit. *In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 692 (9th Cir. 2011).

99 49 U.S.C.A. § 41301 (West, Westlaw through P.L. 116–19).

100 id. at § 44711(a)(1). The FAA has authority to grant exemptions to foreign carriers. id. at § 44711(b).

The DOT's Foreign Air Carrier Licensing Division reviews foreign air carrier applications, which must be filed in the public docket.<sup>101</sup> The carrier must provide information about the ownership, management personnel, financial condition, operating plan and the ability of the company and its personnel to comply with US laws and regulations. In addition, the carrier must provide evidence of operating authority granted by its homeland state. Foreign air carriers must also comply with, among other things, accident plan requirements and requirements concerning energy and passenger manifest information.<sup>102</sup>

Carriers with operating authority from the European Union, Norway and Iceland undergo an abbreviated application process based on procedures for the reciprocal recognition of regulatory determinations. The DOT accepts the determinations made by the authorities of Member States instead of making independent evidentiary findings.<sup>103</sup> Additionally, a shortened process exists for Canadian charter air taxi operators.<sup>104</sup>

FAA safety authority for foreign airlines is referred to as 'operation specifications'.<sup>105</sup> To obtain operation specifications, a carrier must have an economic or exemption authority from the DOT, as well as airworthiness and registration certificates. A foreign carrier must also comply with security requirements, be properly equipped to conduct operations and hold a valid air operator certificate issued by the homeland state. A carrier must strictly comply with the operation specifications, which include each regular and alternate airport to be used in scheduled operations, the type of aircraft and registration markings of each aircraft, the approved maintenance programmes and minimum equipment list of US registered aircraft authorised for use. The FAA has broad authority to amend, suspend or revoke operation specifications. Foreign airworthiness certificates are accepted via bilateral airworthiness and aviation safety agreements.

#### IV SAFETY

The fatality risk for commercial aviation in the United States dropped by 83 per cent from 1998 to 2008,<sup>106</sup> and the United States has not suffered a fatal large commercial aviation accident since February 2009.<sup>107</sup> The FAA's Safety Management System (SMS) has been recognised as a worldwide standard for safety in aviation. The SMS is similar to the Quality Management System published by the International Organization for Standardization, but focuses on the safety of a service or product rather than its quality. The FAA is also

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101 14 C.F.R. Sections 211.1, 302.3 (West 2019).

102 49 U.S.C.A. Section 41313 (West, Westlaw through P.L. 116–19); 14 C.F.R. Sections 313.5(a), 243.7 (West 2019).

103 49 U.S.C.A. Section 40109 (West, Westlaw through P.L. 116–19); DOT, Application Procedures for Foreign Air Carriers of the European Union, available at [www.dot.gov/policy/aviation-policy/application-procedures-foreign-air-carriers-european-union](http://www.dot.gov/policy/aviation-policy/application-procedures-foreign-air-carriers-european-union) (last visited 6 May 2019).

104 14 C.F.R. Section 294.1 (West 2019).

105 *id.* at Section 129.5.

106 Fact Sheet – Commercial Aviation Safety Team, Fed. Aviation Admin., [www.faa.gov/news/fact\\_sheets/news\\_story.cfm?newsId=18178](http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=18178) (last visited 6 May 2019).

107 2011–2012 Most Wanted List Page – General Aviation Safety, Nat'l Transp. Safety Board, [www.ntsb.gov/safety/mwl/Pages/mwl-2.aspx](http://www.ntsb.gov/safety/mwl/Pages/mwl-2.aspx) (last visited 6 May 2019).

implementing the Next Generation Air Transportation System (NextGen), a series of technological and system capabilities to advance air carrier operations by enhancing safety, reducing travel delays, saving fuel and reducing aviation's environmental impact.<sup>108</sup>

FAA regulations and airworthiness requirements also promote safety, and cover a wide range of topics from maintenance to aircraft design to pilot training.<sup>109</sup>

The FAA may issue immediately effective orders when it determines an emergency exists related to air safety.<sup>110</sup>

FAA Airworthiness Directives (AD) notify certified owners and operators of known safety deficiencies that must be corrected to maintain the aircraft's airworthiness.<sup>111</sup> Operators must document AD compliance in the aircraft logbook. ADs usually derive from service difficulty reports provided by operators or accident investigators, and can be issued on an emergency basis. For example, in January 2013, the FAA issued an emergency AD grounding all Boeing 787 Dreamliners because of a fire hazard created by its lithium battery. This AD was lifted in April 2013 after approval of a revised battery design.

The FAA Office of Aviation Safety enforces FAA safety regulations and directives.<sup>112</sup> Depending on the violation, the FAA may impose a civil fine or refer the matter for criminal prosecution.

The prompt and accurate reporting of accidents and incidents in the field enhances safety and accident prevention. To gather this information, the FAA administers the Aviation Safety Action Program, a voluntary safety reporting programme.<sup>113</sup> The FAA also requires owners and operators to self-report any maintenance incidents or difficulties through the Service Difficulty Reporting System. These reports are publicly available through the FAA's website and are meant to identify trends or problems with service.

The National Transportation Safety Board (NTSB) is an independent agency charged by Congress with investigating transportation accidents, including aviation accidents.<sup>114</sup> The NTSB issues factual findings and a probable cause determination (if found) for each accident, as well as safety recommendations to prevent future accidents. These recommendations are not regulatory, but can be adopted by the industry. NTSB safety recommendations have led to important changes in aviation safety, such as mid-air collision avoidance technology,

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108 Fact Sheet – General Aviation Safety, Fed. Aviation Admin. (high altitude air traffic control system completed in March 2015; by 1 January 2020, all aircraft in controlled airspace must be equipped with Automatic Dependent Surveillance-Broadcast which enhances general aviation pilots' awareness of other traffic and improves safety in areas that radar does not reach), [www.faa.gov/news/fact\\_sheets/news\\_story.cfm?newsId=21274](http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=21274) (last visited 10 May 2019).

109 FAR Part 121 contains requirements for domestic, flag and supplemental operations, including manual and equipment requirements, maintenance, training, crew member qualifications, flight time limitations, continued airworthiness and safety improvements, among other topics. 14 C.F.R. pt. 121. FAR Part 135 provides operation requirements for commuter and on-demand operations. 14 C.F.R. pt. 135. FAR Part 91 provides additional general operating and flight rules such as keeping a logbook of all historical data for the aircraft, among other requirements. 14 C.F.R. pt. 91.

110 49 U.S.C.A. § 46105(c) (West, Westlaw through P.L. 116-16).

111 14 C.F.R. § 39.5 (West 2019).

112 14 C.F.R. pt. 13.

113 Advisory Circular No. 120-66B, Aviation Safety Action Program (15 November 2002), available at [https://www.faa.gov/documentLibrary/media/Advisory\\_Circular/AC120-66B.pdf](https://www.faa.gov/documentLibrary/media/Advisory_Circular/AC120-66B.pdf).

114 49 U.S.C.A. § 1111 (West, Westlaw through P.L. 116-16); 49 C.F.R. § 800.3 (West 2019).

ground proximity warning systems, and smoke detectors in lavatories. In the litigation context, only the NTSB's factual findings are admissible as evidence at trial; probable cause findings are not.

## V INSURANCE

The FAA mandates that US and foreign direct air carriers have aviation accident liability insurance coverage to operate in interstate or foreign air transportation.<sup>115</sup> This coverage can be provided by a US authorised insurer, or a self-insurance plan. The carrier must make the insurance policy available for inspection by the DOT and ensure that the current insurance certification or summary of self-insurance is on file with the DOT's Office of Aviation Analysis and available for public inspection. Required minimum insurance coverage is set forth in 14 CFR Section 205.5. If insurance cannot be obtained on reasonable terms, the FAA may issue aviation insurance to US certificated carriers, in the interests of air commerce, national security and US foreign policy.<sup>116</sup>

The FAA does not presently mandate that aircraft owners, operators or service providers carry insurance. While some states within the United States have adopted their own more stringent insurance requirements, there is no overarching federal policy on this issue. In a recent FAA publication, the FAA stated simply that 'responsible aircraft owners always carry sufficient insurance on their aircraft'.<sup>117</sup>

## VI COMPETITION

US antitrust or anti-competition law is a combination of federal and state statutes that regulate business to promote fair competition for the benefit of consumers. The main federal statutes governing antitrust are the Sherman Antitrust Act of 1890 and the Clayton Antitrust Act of 1914.<sup>118</sup> These Acts restrict the formation of cartels (or agreements among competing firms), restrict mergers and acquisitions between companies that would lessen competition, and prohibit monopolies.

The Sherman Act outlaws 'every contract, combination, or conspiracy in restraint of trade', and any 'monopolisation, attempted monopolisation, or conspiracy or combination to monopolise'. Price-fixing is strictly forbidden by the Sherman Act. The Clayton Act prohibits mergers and acquisitions where the effect 'may be substantially to lessen competition, or to tend to create a monopoly'. The Clayton Act requires that companies planning large mergers or acquisitions notify the government in advance.

The Federal Trade Commission<sup>119</sup> and the Department of Justice (DOJ) both enforce antitrust laws. Private individuals may also file civil lawsuits for antitrust violations, and may seek up to three times their proven damages.

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115 14 C.F.R. pt. 205.

116 14 C.F.R. pt. 198.

117 Fed. Aviation Admin., *Plane Sense, General Aviation Information* (2008), available at [www.faa.gov/regulations\\_policies/handbooks\\_manuals/aviation/media/aa-h-8083-19A.pdf](http://www.faa.gov/regulations_policies/handbooks_manuals/aviation/media/aa-h-8083-19A.pdf) (last visited 6 May 2019).

118 *Guide to the Antitrust Laws, F.T.C.*, [www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws](http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws) (last visited 6 May 2019).

119 The Federal Trade Commission (FTC) also has authority to regulate a commercial firm's cybersecurity practices. *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236 (3d Cir. 2015).

Antitrust violations can also lead to criminal prosecution, which is generally limited to intentional and clear violations. The criminal penalty for a corporation can be up to US\$100 million, and for an individual up to US\$10 million and 10 years in prison.<sup>120</sup>

Regulation of airline mergers is based on a rationale of competition for the benefit of the consumer.<sup>121</sup> Proposed mergers are analysed by considering the markets in which passengers buy air travel, which are identified by the origin and destination city pairs on which passengers fly. A proposed merger that would eliminate competition between city-pair markets (i.e., that would reduce a passenger's option for travel between two cities to one airline) would not be permitted. The government also ensures that passengers have the option of choosing to pay more for a direct flight or accept the inconvenience of stops at a decreased fare. The government also analyses the financial condition of the proposed merging companies.

Several mergers by large commercial carriers have been approved by the US government, including American and US Airways in 2013, United Air Lines and Continental Airlines in 2010, and Delta Airlines and Northwest Airlines in 2008.

Global alliances between airlines, such as Oneworld or Star Alliance, raise antitrust regulation issues.<sup>122</sup> Currently, the DOT has allowed antitrust immunity for global alliances where the home countries of the immunity-seeking carriers that are part of the alliance enter liberal 'open-skies' aviation trade accords with the United States. The DOJ has criticised this, and believes there should be a presumption against such alliances.<sup>123</sup>

## VII WRONGFUL DEATH

Although early decisions by US courts did not recognise wrongful death claims, recovery for wrongful death has been permitted by statute in every state for some time.<sup>124</sup> The state statutes lack a uniform approach and vary on many aspects such as statutes of limitation, survivors entitled to sue, types of damages recoverable and methods for calculating damages. The statutes often distinguish between wrongful death and survival actions, the former creating a new action to compensate heirs, and the latter preserving a decedent's claim suffered before death.<sup>125</sup> Most states measure wrongful death damages based on loss of the decedent's financial support and aid to survivors, including compensation for lost advice, assistance and

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120 See FTC Guide to the Antitrust Laws, footnote 118 above.

121 J Bruce McDonald, Antitrust for Airlines, U.S. Dep't of Justice (3 November 2005), available at [www.justice.gov/atr/file/517896/download](http://www.justice.gov/atr/file/517896/download) (last visited 6 May 2019).

122 Gabriel S Sanchez, *An Institutional Defense of Antitrust Immunity for International Airline Alliances*, 62 Cath. U. L. Rev. 139 (2012).

123 See Charles N W Schlagen, *Differing Views of Competition: Antitrust Review of International Airline Alliances*, 2000 U. Chi. Legal F. 413, 430 (2000); Comments of the Department of Justice on the Show Cause Order (Public Version), Air Canada, Docket No. OST-2008-0234, at 12-13 (26 June 2009), available at [www.justice.gov/sites/default/files/atr/legacy/2009/06/30/247556.pdf](http://www.justice.gov/sites/default/files/atr/legacy/2009/06/30/247556.pdf) (last visited 6 May 2019).

124 Restatement (Second) of Torts Section 925 cmt. a. Federal statutes govern in certain contexts, such as admiralty and international carriage. Jones Act, 46 U.S.C. Section 30104 (West, Westlaw through P.L. 116-19); Death on the High Seas Act, footnote 53, above; Montreal Convention, footnote 20, above.

125 For example, recovery for wrongful death in California is distinct from a survival claim, each with different and mutually exclusive damages. Cal. Code of Civ. Proc. Section 377.60 (West, Westlaw through 2019 legislation) (allowing wrongful death claim by certain enumerated survivors); id. at § 377.30 (allowing survival claim by decedent's personal representative or successor in interest).

companionship.<sup>126</sup> Other states base damages on loss to the estate, which focuses on the loss of the decedent's accumulation of property had he or she lived, as opposed to support.<sup>127</sup> Other variations include whether recovery is permitted for pain and suffering, and for punitive damages.<sup>128</sup> Levels of compensation payable for wrongful death consequently vary based on the jurisdiction where the claim is filed.

## VIII ESTABLISHING LIABILITY AND SETTLEMENT

### i Procedure

A lawsuit is commenced by the filing and service of a complaint by an aggrieved party. The complaint must identify the premise of the claim and the asserted damages. In the case of an aviation accident, the plaintiff may sue any individual or company believed to be responsible for causing or contributing to the accident, including the aircraft owner and operator, the manufacturers of the aircraft and component parts, the pilots and any maintenance providers. With regard to equipment designed for the US government by contractors, the government's immunity to suit may extend to government contractors.<sup>129</sup>

A plaintiff may file a lawsuit in any state or federal court in the United States, whether or not plaintiff is a US citizen, and irrespective of the plaintiff's state of residence. However, a defendant may move to dismiss an action based on the chosen court's lack of jurisdiction, improper venue or unfairness of the forum (*forum non conveniens*).<sup>130</sup>

Venue is typically considered proper in the county (state court) or district (federal court) where the event giving rise to the lawsuit occurred or where the defendant resides. In the absence of an otherwise available forum, any venue where the court has personal jurisdiction over all the defendants is proper.<sup>131</sup> Even where the venue is technically proper, a case may be dismissed under the doctrine of *forum non conveniens* if the venue is unfair to one or more parties, typically where the events giving rise to the litigation occurred in a foreign country.

Statutes of limitation set the maximum amount of time in which a lawsuit can be filed following the injury-causing event. These vary by the nature of the claim (e.g., personal injury or breach of contract) and by state. Statutes of repose also set time limits, but based on

126 Restatement (Second) of Torts Section 925 cmt. b.

127 id.; see also, for example, Ga. Code Ann. Section 51-4-1 (West, Westlaw through 2019 legislation) (permitting wrongful death recovery in Georgia for the 'full value' of life, including intangible factors which supplement economic value that are said to 'elude precise definition'); *Miller v. Jenkins*, 412 S.E.2d 555, 556 (Ga. Ct. App. 1991).

128 For example, punitive damages are the only type of damages recoverable under Alabama's wrongful death act, which 'rests upon the Divine concept that all human life is precious'. *Atkins v. Lee*, 603 So. 2d 937, 942 (Ala. 1992). In California, punitive damages are not recoverable for wrongful death, but are recoverable in a survival claim. Cal. Code of Civ. Proc. Code Section 377.34 (West, Westlaw through 2019 legislation); *Boeken v. Philip Morris USA Inc*, 48 Cal. 4th 788, 796 (2010). Pain and suffering damages are not recoverable in a California survival claim, but such damages are recoverable in a survival claim under Ohio law. 30 Ohio Jur. 3d Death Section 92 (Third Ed.).

129 28 U.S.C.A. Section 2680(a) (West, Westlaw through P.L. 116-19); *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). This is commonly referred to as the 'government contractor defence'.

130 Fed. R. Civ. P. 12; *Piper Aircraft Co v. Reyno*, 454 U.S. 235, 241 (1981).

131 28 U.S.C.A. Section 1391 (West, Westlaw through P.L. 116-19) (federal venue statute).

an event other than the injury-causing event.<sup>132</sup> An important statute of repose in the aviation context is the General Aviation Revitalization Act of 1994 (GARA), a federal statute that bars lawsuits against manufacturers of general aviation aircraft that are more than 18 years old at the time of the accident.<sup>133</sup> Several states have their own statutes of repose, some with more stringent time limits.<sup>134</sup>

If the plaintiff presents a colourable claim against the defendant, the parties then engage in fact and expert discovery to assess the merits of the plaintiff's claims and defendant's defences. Discovery typically consists of depositions and written requests for information or documents. If after the completion of discovery, a party believes either that there is no evidence to support the other side's claim or defence, or that the only dispute is one of law, that party may file a motion for summary judgment, which, if granted, is likely to end the case.<sup>135</sup>

Each litigant normally has the right to a trial by jury.<sup>136</sup> If more than one defendant is found liable for the same injury, those defendants may be jointly liable, severally liable, or jointly and severally liable, depending on the structure adopted by the jurisdiction where the case is tried. Joint liability means that each defendant is liable up to the full amount of the damages awarded, although the plaintiff can recover no more than the awarded amount. Where the defendants are severally liable, each defendant is liable only according to its specific percentage of fault. Joint and several liability combines these concepts, and allows a plaintiff to recover the full damage award from any of the defendants found liable, and provides for contribution claims among the defendants for payments in excess of their percentage of fault. Most courts and state legislatures have adopted some form of comparative responsibility that relates to these various approaches.<sup>137</sup>

Settlement of lawsuits is strongly encouraged by US courts. Mediation or mandatory settlement conferences are typically required to encourage pretrial resolution.

## ii Carriers' liability towards passengers and third parties

The civil liability of aircraft carriers to passengers and third parties is generally governed by fault-based negligence principles, requiring evidence that the carrier breached a duty owed to the claimant, which proximately caused the claimant's damages.

Carriers may also be sued for intentional tort such as fraud, assault, battery, false imprisonment, intentional infliction of emotional distress or defamation. Carriers also face

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132 'Statutes of limitations are designed to encourage plaintiffs "to pursue diligent prosecution of known claims" . . . [and] begin to run "where the cause of action accrues" . . . [typically] "when the injury occurred or was discovered." In contrast, statutes of repose are enacted to give more explicit and certain protection to defendants. These statutes "effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time." . . . For this reason, statutes of repose begin to run on "the date of the last culpable act or omission of the defendant.'" *California Pub Employees' Ret Sys v. ANZ Sec Inc*, 137 S. Ct. 2042, 2049 (2017).

133 See footnote 147 et seq., below.

134 See, for example, Or. Rev. Stat. Section 30.905(2)(a) (West, Westlaw through 2018 legislation) (limiting the period in which the product manufacturer can be sued to 10 years following the date of the first sale of the product).

135 Fed. R. Civ. P. 56.

136 A foreign carrier that qualifies as a 'foreign state' under the Foreign Sovereign Immunities Act is entitled to a non-jury trial. 28 U.S.C.A. § 1441(d), footnote 10, above.

137 Restatement (Third) of Torts: Apportionment of Liab. Section 1 (2000).

liability for discrimination under the ACAA based on race, colour, national origin, religion, a perceived physical or mental impairment, gender or ancestry.<sup>138</sup> In making a claim under the ACAA, no proof of intent to discriminate is required so long as there is proof of a violation.<sup>139</sup>

Courts may apply the doctrine known as ‘federal pre-emption’, which precludes a plaintiff from basing liability on state law tort standards where such standards conflict with federal regulations – which in effect provides a defence to carriers that comply with FAA regulations.<sup>140</sup> Similarly, the ADA contains an express pre-emption clause that a ‘state . . . may not enact or enforce a law, regulation, or other provision having the force or effect of law related to a price, route or service of an air carrier’.<sup>141</sup>

There are typically no limits to the economic damages sought by and awarded to a claimant who proves liability for such damages. Non-economic damages, such as those for pain and suffering or emotional distress, are occasionally capped by statute. In instances where the carrier’s conduct is proven to be fraudulent, malicious or grossly negligent, the claimant may also recover punitive damages, which are designed to punish reprehensible behaviour. The US Supreme Court has placed limits on the amount of punitive damages that may be awarded,<sup>142</sup> and many states impose their own limits on punitive damages.

The contract of carriage may limit the amount of damages recoverable by the passenger. For instance, most carriers limit the recovery for lost luggage to US\$3,500, which is the minimum set by the DOT.<sup>143</sup> Damages in claims under the Montreal Convention are also limited.<sup>144</sup>

### iii Product liability

Civil actions against product manufacturers and sellers are generally based on the theory of strict liability, in addition to negligence.<sup>145</sup> Under strict liability, a claimant need only prove that the product was defective when it left the manufacturer, and that the defect caused the claimed injury. Strict liability does not require the claimant to prove any negligence on the part of the manufacturer, and in fact the manufacturer can be liable even if it exercised all possible care in the production and sale of the product.

Strict liability cases are based on a claim of design defect, manufacturing defect or the failure to warn of an inherent danger. Possible defences to a strict liability claim are misuse by the consumer, assumption of risk and contributory or comparative fault by the consumer.

138 49 U.S.C.A. Section 41705 (West, Westlaw through P.L. 116-16); 14 C.F.R. pt. 382 (DOT regulations).

139 *Rowley v. American Airlines*, 885 F. Supp. 1406 (D. Or. 1995).

140 See, for example, *Abdullah v. Am Airlines Inc*, 181 F.3d 363 (3d Cir. 1999); *Witty v. Delta Air Lines Inc*, 366 F.3d 380 (5th Cir. 2004); *Montalvo v. Spirit Airlines*, 508 F.3d 464 (9th Cir. 2007). But see *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680 (3d Cir. 2016) (holding that federal pre-emption of the field of aviation safety does not extend to state law products liability claims); *Sikkelee v. Precision Airmotive Corp.*, 907 F.3d 701 (3d Cir. 2018) (holding that state tort law was not conflict pre-empted where engine manufacturer could have simultaneously complied with both state tort law and federal regulations).

141 49 U.S.C.A. § 41713(b) (West, Westlaw through P.L. 116-16); see *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992).

142 *State Farm Mut Auto Ins Co v. Campbell*, 538 U.S. 408 (2003).

143 14 C.F.R. Section 254.4 (West 2019).

144 See Montreal Convention, footnote 20, above.

145 Restatement (Second) of Torts Section 402(A) (1965).

With respect to a design defect claim, the absence of an economically feasible alternative safer design may be an additional element of the claimant's proof or may be a defence available to the manufacturer, depending on the jurisdiction.

Liability may also be based on breach of an express or implied warranty. The Uniform Commercial Code, which has been adopted by all 50 states with slight variations and which generally governs the sale of goods, includes warranties of fitness and merchantability. An express warranty generally requires a contract between the parties and express statements about the product's fitness or merchantability.

The economic loss rule applies where damage is limited to the product itself, with no further property damage or personal injury. This rule limits recovery to contract damages, and precludes recovery in tort. Tort remedies are generally broader than contract damages, and thus application of the economic loss rule may result in reduced recovery. Most states have adopted an economic loss rule.<sup>146</sup>

### ***The General Aviation Revitalization Act***

The General Aviation Revitalization Act of 1994 (GARA) is a federal statute of repose that places an 18-year time limit on bringing a products liability action against manufacturers of allegedly defective general aviation aircraft or component parts.<sup>147</sup> GARA sought to rejuvenate the general aviation market by limiting long-term liability exposure. GARA applies only to accidents involving 'general aviation aircraft'.<sup>148</sup> 'Aircraft' is broadly defined under GARA<sup>149</sup> and thus can include virtually anything that is built for leaving the ground that meets the statute's criteria.

A new replacement part resets GARA's repose period as to that part.<sup>150</sup> Aircraft flight manuals that are continuously revised may reset the repose period if the plaintiff alleges that those revisions caused the accident.<sup>151</sup>

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146 *HDM Flugservice GmbH v. Parker Hannifin Corp*, 332 F.3d 1025, 1029 (6th Cir. 2003) ('The economic loss rule, in some form, is the rule in the majority of jurisdictions'). Most states also apply exceptions to the rule. Illinois, for example, has three exceptions to the economic loss rule: '(1) where the plaintiff sustained damage, i.e., personal injury or property damage, resulting from a sudden or dangerous occurrence [cite omitted]; (2) where the plaintiff's damages are proximately caused by a defendant's intentional, false representation, i.e., fraud [cite omitted]; and (3) where the plaintiff's damages are proximately caused by a negligent misrepresentation by a defendant in the business of supplying information for the guidance of others in their business transactions'. *In re Chicago Flood Litig*, 680 N.E.2d 265, 275 (Ill. 1997).

147 General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552 (codified as amended at 49 U.S.C.A. Section 40101 note (West, Westlaw through P.L. 116-16)) (hereinafter GARA), Section 2(a); Robert F Hendrick, *A Close and Critical Analysis of the New General Aviation Revitalization Act*, 62 J. Air L. & Com. 385 (1996).

148 GARA defines 'general aviation aircraft' as any aircraft that: (1) has been granted a type certificate or airworthiness certificate by the FAA; (2) has a maximum seating capacity of fewer than 20 passengers; and (3) was not engaged in scheduled passenger-carrying operations at the time of the accident. GARA Section 2(c).

149 49 U.S.C.A. Section 40102(a)(6) (West, Westlaw through P.L. 116-19).

150 GARA Section 2(a)(2).

151 *Caldwell v. Enstrom Helicopter Corp*, 230 F.3d 1155, 1157 (9th Cir. 2000) (allowing the application of GARA and distinguishing the basis of the cause of action from *Alter v. Bell Helicopter Textron*, 944 F. Supp. 531 (S.D. Tex. 2010), which did not apply GARA to an alleged breach of the duty to warn); see also *S. Side Tr. & Sav Bank of Peoria v. Mitsubishi Heavy Indus. Ltd*, 927 N.E.2d 179 (Ill. App. Ct. 2010) (affirming that GARA applies to flight manuals, but declining to extend to aircraft maintenance manuals).

GARA contains four exceptions: (1) the knowing misrepresentation exception, where the manufacturer misrepresents information required for FAA certification; (2) the emergency exception, when a passenger for medical or emergency treatment is injured; (3) the ‘not aboard’ exception, for those injured on the ground; and (4) the written warranty exception, where the manufacturer’s warranty extends beyond 18 years.<sup>152</sup>

Similar protections may be available under state repose laws, and repose periods vary. GARA expressly pre-empts state laws that allow civil actions to be brought beyond the 18-year period of repose.<sup>153</sup>

#### iv Compensation

Recoverable damages in a personal injury case consist of compensatory damages that are intended to make the injured plaintiff whole. Compensatory damages consist of (1) special (economic) damages, such as those for past and future medical expenses, lost wages, loss of earning capacity and damage to property; and (2) general (non-economic) damages, such as those for pain and suffering, loss of consortium or emotional distress. Several states have enacted statutes limiting non-economic damages. In certain cases, plaintiffs may also claim punitive damages, which are designed to punish the tortfeasor.

If a person is injured while working in the course and scope of employment, he or she may be entitled to compensation from the employer for medical expenses and lost wages. If the injury is caused by a third party, the employer may seek reimbursement of the sums paid to the employee from the responsible third party. The employer may intervene in a lawsuit brought by the injured employee against that third party, or file its own subrogation lawsuit against the third party for reimbursement.

In the event the injured plaintiff receives or anticipates medical benefits from Medicare – a national insurance programme – the federal government is entitled to reimbursement for those costs from any award received by the injured plaintiff from a third party. To protect its interest, the government has instituted a Medicare secondary payer recovery programme, which requires plaintiffs and defendants alike to regularly report personal injury claims and qualifying settlements to Medicare, or risk steep penalties.<sup>154</sup>

All certificated carriers, including foreign carriers, must submit a family assistance plan to the DOT and NTSB addressing the needs of families of passengers involved in an aircraft accident in the US resulting in a major loss of life.<sup>155</sup> The plan must include a process for notifying families of passengers after verifying passenger identity, and state how the carrier will publicise and operate a reliable, toll-free telephone number for calls from families of passengers.<sup>156</sup> The plan must also contain several other assurances, including concerning the return of possessions, consultation with family about construction of monuments, and compensation for travel, care and assistance.<sup>157</sup>

152 GARA Sections 2(b)(1)-(4).

153 *id.* at Section (2). Repose periods for the ‘useful safe life’ of a product will be interpreted to be limited to 18 years to retain consistency with GARA. Christopher C McNatt, Jr and Steven L England, *The Push for Statutes of Repose in General Aviation*, 23 *Transp. L.J.* 323, 327-42 (1995).

154 42 U.S.C.A. Section 1395y(b)(2)(B)(ii) (West, Westlaw through P.L. 116-19).

155 49 U.S.C.A. Sections 41113 (US carriers), 41313 (foreign carriers) (West, Westlaw through P.L. 116-19); see also *id.* Section 1136 (NTSB responsibilities) (West, Westlaw through P.L. 116-19).

156 *id.*, at Sections 41113(b)(1)-(3), 41313(c)(1)-(3).

157 *id.*, at Sections 41113(b)(5)-(8), (10)-(12), 41313(c)(5)-(8), (10)-(12).

The DOT fined Asiana Airlines US\$500,000 for failure to adhere to its family assistance plan following the crash of flight 214 at San Francisco International airport on 6 July 2013.<sup>158</sup> The DOT faulted Asiana for delaying by one day the publicising of a telephone number for family members, for taking two days to contact only 75 per cent of passenger families, and for taking two days to send an adequate number of trained staff to San Francisco.<sup>159</sup> The DOT stated the fine ‘establishes a strong deterrent to future similar unlawful practices’, despite practical concerns raised by Asiana, such as that the crash occurred on a US holiday weekend, when it was 3.30am in Korea, that passengers and particularly travel agencies did not provide next-of-kin contact information when booking, and that Asiana had only 12 representatives located at the San Francisco airport, which stopped operations after the crash.<sup>160</sup>

## IX DRONES

The FAA regulates drones or ‘unmanned aircraft systems’ (UAS) pursuant to congressional directives to ‘safely accelerate the integration of civil unmanned aircraft systems into the national airspace system’.<sup>161</sup>

The FAA has promulgated regulations in phases, balancing demands of the burgeoning drone industry<sup>162</sup> with safety concerns that pose risk to manned aircraft and persons and property on the ground.<sup>163</sup> The Small UAS rules took effect in August 2016 and apply to UAS weighing less than 55 pounds.<sup>164</sup> Absent a waiver, small UAS may be flown only in daytime hours and within 400 feet above the ground. The pilot must maintain visual line of sight with the UAS and may not fly near airports or in other restricted airspace. Small UAS operators must possess a remote pilot certificate and register the UAS with the FAA.<sup>165</sup>

The ubiquitous nature of UAS has resulted in regulation at the state and local level.<sup>166</sup> Overlapping federal and local regulation raises jurisdictional issues. The FAA takes the position that local ordinances may result in ‘fractionalized control of the navigable airspace’, which

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158 Asiana Airlines, Inc, Dkt. OST-2014-0001 (25 February 2014), available at [www.regulations.gov/document?D=DOT-OST-2014-0001-0006](http://www.regulations.gov/document?D=DOT-OST-2014-0001-0006).

159 id.; see also US Department of Transportation Fines Asiana Airlines for Not Adhering to Family Assistance Plan Following Crash, DOT, [www.transportation.gov/briefing-room/us-department-transportation-fines-asiana-airlines-not-adhering-family-assistance-plan](http://www.transportation.gov/briefing-room/us-department-transportation-fines-asiana-airlines-not-adhering-family-assistance-plan) (last visited 6 May 2019).

160 Sujin Lim, *The Foreign Air Carrier Family Support Act: Lessons from Asiana Flight 214*, Air & Space Law, 1, 19-22 (2016).

161 FAA Modernization and Reform Act of 2012, PL 112-95, 14 February 2012, 126 Stat 11, Section 332(a)(1), codified at 49 U.S.C. Section 40101 note.

162 More than 1 million drones are registered with the FAA. U.S. Dept. of Transportation, Press Release, FAA Drone Registry Tops One Million (10 January 2018), available at <https://www.transportation.gov/briefing-room/faa-drone-registry-tops-one-million> (as of 17 May 2019).

163 Operation and Certification of Small Unmanned Aircraft Systems, 81 FR 42064-01.

164 14 C.F.R. Section 107.3 (West 2019). Model aircraft flown strictly for hobby or recreational use are exempt from certain small UAS requirements. id., Sections 107.1, 101.41; *Taylor v. Fed. Aviation Admin.*, 895 F.3d 56 (D.C. Cir. 2018).

165 14 C.F.R. Sections 107.12, 107.13, 107.29, 107.31, 107.41, 107.43, 107.51 (West 2019). Deviations from these limitations may be authorised by obtaining a certificate of waiver from the FAA. id. Section 107.200.

166 See e.g. Cal. Civ. Code Section 1708.8 (West 2019) (expanding liability for physical invasion of privacy to knowing entry into the airspace above the land of another person without permission); Ark. Code Ann. § 5-60-103 (West 2019) (‘A person commits the offense of unlawful use of an unmanned aircraft system if

could 'severely limit the flexibility of the FAA in controlling airspace and flight patterns.'<sup>167</sup> A federal court ruling in *Singer v. City of Newton* acknowledged the possibility of parallel regulations, and adopted 'conflict pre-emption' as the basis to determine the enforceability of local ordinances.<sup>168</sup>

The FAA publishes reports of drone sightings near airports and manned aircraft and warns that such unauthorised operation is subject to fines and criminal charges.<sup>169</sup> The NTSB determined that a drone's collision with a US Army Black Hawk helicopter in 2017 was caused by the drone operator intentionally flying the drone out of visual sight.<sup>170</sup>

## X VOLUNTARY REPORTING

The FAA established its most prominent voluntary and confidential reporting programme in 1975, known as the Aviation Safety Reporting Program, which is designed to encourage all users of the national air system to report incidents concerning aviation safety.<sup>171</sup> To ensure anonymity, the programme is managed by the National Aeronautics and Space Administration, which states that no reporter's identity has ever been breached in over 1 million submissions to date.<sup>172</sup> The FAA is precluded by regulation from using reports in any enforcement action, except reports of accidents or criminal activity.<sup>173</sup> A finding of violation may still occur, but a penalty will not be imposed if the report is made within 10 days following the violation, the reporter has not committed a violation in the preceding five years and the violation was not deliberate.<sup>174</sup> The database containing reports is publicly available.

Congress enacted a whistle-blower protection act in 2000 known as AIR21 that prohibits discrimination against employees who report information relating to air carrier safety.<sup>175</sup> The programme applies to US air carriers and their contractors who perform

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he or she knowingly uses an unmanned aircraft system to conduct surveillance of, gather evidence or collect information about, or photographically or electronically record critical infrastructure without the prior written consent of the owner of the critical infrastructure').

167 Office Of The Chief Counsel, Fed. Aviation Admin., State and Local Regulation of Unmanned Aircraft Systems, Fact Sheet (2015) (available at [https://www.faa.gov/uas/resources/policy\\_library/media/uas\\_fact\\_sheet\\_final.pdf](https://www.faa.gov/uas/resources/policy_library/media/uas_fact_sheet_final.pdf) (as of 20 May 2019)).

168 *Singer v. City of Newton*, 284 F.Supp.3d 125 (D. Mass. 2017), appeal dismissed, No. 17-2045, 2017 WL 8942575 (1st Cir. 7 December 2017).

169 FAA, UAS Sightings Reports, available at [https://www.faa.gov/uas/resources/public\\_records/uas\\_sightings\\_report/](https://www.faa.gov/uas/resources/public_records/uas_sightings_report/) (as of 20 May 2019).

170 Press Release, NTSB, Drone Operator Errors Caused Drone, Helicopter Collision, available at <https://www.ntsb.gov/news/press-releases/Pages/PR20171214.aspx> (as of 20 May 2019).

171 FAA Advisory Circular 00-46E (16 December 2011), available at [www.faa.gov/documentLibrary/media/Advisory\\_Circular/AC%2000-46E.pdf](http://www.faa.gov/documentLibrary/media/Advisory_Circular/AC%2000-46E.pdf). Additional voluntary reporting programmes concerning aviation safety are summarised in 'Fact Sheet – Aviation Voluntary Reporting Programs', Fed. Aviation Admin. (12 April 2016), available at [www.faa.gov/news/fact\\_sheets/news\\_story.cfm?newsId=20214](http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=20214) (last visited 6 May 2019).

172 Confidentiality and Incentives to Report, Aviation Safety Reporting System, available at <http://asrs.arc.nasa.gov/overview/confidentiality.html> (last visited 6 May 2019).

173 14 C.F.R. Section 91.25 (West 2019).

174 FAA Advisory Circular 00-46E (16 December 2011); See *Nebez v. Nat'l Transp Safety Bd*, 30 F.3d 1165 (9th Cir. 1994) (pilot's self-reported violation affirmed, but 30-day suspension of licence not imposed).

175 49 U.S.C.A. Section 42121 (West, Westlaw through P.L. 116-19).

safety-sensitive functions.<sup>176</sup> The FAA and Department of Labor's Occupational Safety and Health Administration (OSHA) enforce the law and respectively address air safety and employment discrimination complaints.<sup>177</sup> OSHA publishes data on the outcome of all whistle-blower complaints including AIR21 complaints.<sup>178</sup>

## XI THE YEAR IN REVIEW

Congress enacted the FAA Reauthorization Act of 2018, which continues to mandate accelerated integration of drone or UAS operations 'into the low-altitude national airspace system.'<sup>179</sup> The new law requires the FAA to update existing regulations by October 2019 to authorise small UAS carriage of property for compensation.<sup>180</sup> The law also requires the FAA to authorise UAS manufacturers to 'self-certify' UAS compliance with 'risk-based consensus safety standards' relating to design and production of small UAS.<sup>181</sup> The new law also exempts small UAS flown strictly for recreational purposes from FAA certification and operating authority.<sup>182</sup>

The FAA Reauthorization Act of 2018 also addresses various passenger rights and requires among other things that the FAA issue regulations establishing minimum dimensions for passenger seats that are necessary for passenger safety.<sup>183</sup> The Act also prohibits air carriers from denying a checked-in passenger permission to board, or involuntarily removing a passenger, once their boarding pass has been collected or scanned.<sup>184</sup> The Act also requires any carrier with passenger seating of 30 or more seats to include a telephone number, email and mailing address on the carrier's website for submission of complaints, as well as the

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- 176 id., Section 42121(a), (e); Fact Sheet: Whistleblower Protection for Employees in the Aviation Industry, available at [https://www.osha.gov/OshDoc/data\\_General\\_Facts/factsheet-whistleblower-aviation-industry.pdf](https://www.osha.gov/OshDoc/data_General_Facts/factsheet-whistleblower-aviation-industry.pdf) (as of 16 May 2019).
- 177 29 C.F.R. § 1979.100 (West 2019); Advisory Circular No. 120-81, Whistleblower Protection Program (Air Carrier) (25 March 2004), available at [https://www.faa.gov/documentLibrary/media/Advisory\\_Circular/AC120-81.pdf](https://www.faa.gov/documentLibrary/media/Advisory_Circular/AC120-81.pdf).
- 178 Available at <https://www.whistleblowers.gov/sites/default/files/3DCharts-FY2008-FY2018.pdf> (as of 16 May 2019).
- 179 49 U.S.C.A. Section 44802 (West, Westlaw through P.L. 116–19).
- 180 id. Section 44808. The FAA must consider the views of communities impacted by UAS package delivery in promulgating regulations. id. Subsection (b)(4)(D).
- 181 id. Section 44805.
- 182 id. Section 44809. The FAA announced in response that it will permit limited recreational operation in certain 'fixed sites' in controlled airspace, instead of reviewing requests on a case-by-case basis as under prior regulations, and that 'in the future' it will allow recreational flyers to obtain authorisation to fly in controlled airspace. News and Updates, FAA, FAA Highlights Changes for Recreational Drones (16 May 2019), available at <https://www.faa.gov/news/updates/?newsId=93769>.
- 183 FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 42301, 132 Stat. 2186, 3394 (2018). The FAA had declined to issue rules on commercial airline seat dimensions in response to a petition by an airline passengers' rights group and resulting appellate court opinion that found the FAA's explanation for failing to rule legally inadequate. *Flyers Rights Educ. Fund, Inc. v. Fed Aviation Admin.*, 864 F.3d 738 (D.C. Cir. 2017). The FAA stated that it 'has no evidence that current seat sizes are a factor in evacuation speed, nor that current seat sizes create a safety issue necessitating rulemaking....' Letter from Dorenda D. Baker, FAA Aviation Safety Executive Director, Aircraft Certification Service, to Paul Hudson, President, FlyersRights.org (2 July 2018), available at <http://files.constantcontact.com/7a85813b001/d1d4f4f1-9864-46a2-a056-69180fe2f2ed.pdf> (as of 21 May 2019).
- 184 FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 42301, 132 Stat. 2186, 3394 (2018).

address for the DOT Aviation Consumer Protection Agency.<sup>185</sup> The Act also directs the Secretary of Transportation to require US carriers to submit a one-page summary describing passenger rights including compensation guidelines for flight delays, diversions, cancellations, mishandled baggage, overbooking and involuntary denial of boarding.<sup>186</sup> The Act also directs the DOT to create an 'Airline Passengers With Disabilities Bill Of Rights', and to conduct rulemaking concerning service animals, including consideration of measures to ensure pets are not claimed as service animals.<sup>187</sup>

A federal court addressed the Montreal Convention's 'fifth jurisdiction' and determined that the airline must directly conduct business from US premises for an American passenger on a Malaysia-to-Cambodia flight to bring suit in the US.<sup>188</sup> The court determined that the plaintiff must meet each element of the Convention's Article 33(2), including that the 'carrier conducts its business of carriage . . . from premises' in the forum country. The court rejected arguments that Article 32(2) could be satisfied based on an affiliate carrier's flights to the US, or based on the fact that the carrier's website was accessible to American passengers.<sup>189</sup>

A federal district court determined that the Montreal Convention's two-year limitations period barred a passenger's lawsuit, concluding that the claim of unjustified confinement did not extend beyond the passenger's disembarkation process where the plaintiff alleged an airline employee unjustifiably held him on the aircraft and then walked him into the terminal 400 yards, where he was kept for 15 minutes before returning to the aircraft area.<sup>190</sup>

American Airlines and Southwest Airlines settled class action antitrust lawsuits by passengers asserting that various large airlines conspired to fix prices by colluding to limit capacity.<sup>191</sup> The plaintiffs alleged that the airlines carried out the conspiracy by airline executives who made repeated assurances beginning in 2009 that their companies were engaging in 'capacity discipline'.<sup>192</sup> American settled for US\$45 million and Southwest settled for US\$15 million.<sup>193</sup> United Airlines and Delta Airlines continue to defend against the lawsuits.

Another product liability pre-emption ruling was issued in the long-running *Sikkelee* litigation, in which the plaintiff alleged that an engine design defect caused a crash. In 2016, an appellate court reversed a district court ruling that the claims were subject to field pre-emption, and remanded the case to the district court to consider conflict pre-emption.<sup>194</sup> On remand, the district court ruled that the claims were subject to conflict pre-emption.<sup>195</sup> The appellate court most recently reversed again, concluding the defendant failed to show

185 49 U.S.C.A. Section 42302 (West, Westlaw through P.L. 116–19).

186 FAA Reauthorization Act of 2018, Pub. L. No. 115–254, § 42301, 132 Stat. 2186, 3394 (2018).

187 id.

188 *Erwin-Simpson v. Air Asia Berhad*, No. 18-CV-00083, 2019 WL 1317337 (D.D.C. 22 March 2019).

189 id. at p. 7.

190 *Dagi v. Delta Airlines, Inc.*, 352 F.Supp.2d 117 (D. Mass. 2018).

191 *In re Domestic Airline Travel Antitrust Litig.*, No. MC 15-1404, 2019 WL 2082906 (D.D.C. 13 May 2019).

192 *In re Domestic Airline Travel Antitrust Litig.*, 221 F.Supp.3d 46, 59 (D.D.C. 2016).

193 *In re Domestic Airline Travel Antitrust Litig.*, footnote 191, above, 2019 WL 2082906, at pp. 2–3.

194 *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680 (3d Cir. 2016).

195 *Sikkelee v. AVCO Corp.*, 268 F.Supp.3d 660 (M.D. Pa. 2017).

that it was impossible to simultaneously comply with federal regulations that certified one design and state law requiring a different design because the evidence showed that the FAA likely would have permitted a design change.<sup>196</sup>

The FAA exercised its emergency power authority and issued an order grounding Boeing 737 Max aircraft.<sup>197</sup> The order was in response to the recent crashes of aircraft operated by Lion Air and Ethiopian Airlines. The order prohibits the affected aircraft from being operated in the US and by US certified operators.

## XII OUTLOOK

In response to legislative directives, the FAA and DOT will conduct rulemaking proceedings on several topics, including minimum seat size on commercial airlines and standards governing service animals on board aircraft.<sup>198</sup>

The FAA will continue promulgating rules designed to integrate drones into the national airspace. The agency is developing traffic management systems for drones, and has opened rulemaking to relax prohibitions on flying over people and at night.<sup>199</sup> The FAA will also propose rules for marking drones with identification and for delivery of cargo.<sup>200</sup>

Recent crashes of two Boeing 737 Max aircraft and the FAA's response have raised questions regarding the FAA's certification process and the agency's safety oversight generally. The DOT recently announced that the FAA plans to revamp its oversight process and approach by July 2019.<sup>201</sup>

Federal pre-emption of state product liability laws remains hotly contested after the most recent decision in *Sikkelee v. Precision Airmotive Corp.*, which held that state tort law was not conflict pre-empted by FAA regulations where evidence suggests the FAA would have approved a design change consistent with state law requirements.<sup>202</sup> A petition for US Supreme Court review has been filed in the case.

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196 *Sikkelee v. Precision Airmotive Corp.*, 907 F.3d 701, 714 (3d Cir. 2018).

197 Operators of Boeing Company Model 737-8 and Boeing Company Model 737-9 Airplanes: Emergency Order of Prohibition, 84 Fed. Reg. 9705-01; also available at [https://www.faa.gov/news/updates/media/Emergency\\_Order.pdf](https://www.faa.gov/news/updates/media/Emergency_Order.pdf).

198 FAA Reauthorization Act of 2018, Pub. L. No. 115-254, § 42301, 132 Stat. 2186 (2018).

199 Operation of Small Unmanned Aircraft Systems Over People, 84 Fed. Reg. 3856, 3857 (2019).

200 External Marking Requirement for Small Unmanned Aircraft, 84 Fed. Reg. 3669 (2019)

201 Statement of Calvin L. Scovell, III, DOT Office of Inspector General, Perspectives on Overseeing the Safety of the U.S. Air Transportation System (27 March 2019), available at [https://www.oig.dot.gov/sites/default/files/Aviation%20Safety%20Long%20Statement\\_3-27-19\\_final.pdf](https://www.oig.dot.gov/sites/default/files/Aviation%20Safety%20Long%20Statement_3-27-19_final.pdf).

202 *Sikkelee v. AVCO Corp.*, footnote 195, above.

# ABOUT THE AUTHORS

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Gary is the managing partner of Fitzpatrick & Hunt, Pagano, Aubert, LLP and has been practising in the areas of product liability and aviation law for over 35 years, representing various companies all over the world. Gary is lead defence counsel for his clients in claims and complex litigation arising from major airline catastrophes, military crashes and general aviation accidents.

His expertise in product liability played an instrumental role in creating and adopting the 'government contractor defence' in military defence litigation. One of his cases for a major defence contractor was the first to uphold this defence at the Federal Appellate Court level, and was subsequently adopted by the US Supreme Court.

Gary serves as the legal head of the Aircraft Builders Council Program, which is one of the longest-running aviation product insurance programmes anywhere in the world. In addition to handling the defence of claims and litigation of the numerous diversified companies insured under this programme, he has been instrumental in providing a variety of claims prevention services to these companies, including product liability seminars. For companies manufacturing various commercial product lines, these seminars also cover important related subjects including active product integrity programmes; contractual reviews; document management; post-sale responsibilities and warnings and other preventative measures. These seminars are conducted at each company's facilities across the United States as well as abroad.

Gary has also lectured on product liability and aviation law at various legal and insurance conferences, and is the author of articles published in both legal and insurance journals and periodicals.

## **JAMES W HUNT**

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After college, Jim proudly served for three years in the US Army as an artillery officer and helicopter pilot before attending law school. He practised for several years with a criminal defence firm, and for the past 35 years has specialised in litigating civil cases. Jim has been lead counsel in numerous large and complex lawsuits, including both multi-district and class-action cases, in a variety of state and federal trial courts, as well as in the context of private alternative dispute resolution. He has also argued numerous cases before both state and federal appellate courts.

Jim's experience as a litigator has involved many interesting legal questions pertaining to treaties and international law, and the regulatory, tort, contract and criminal law of the United States, numerous states and many foreign jurisdictions. The subject matter of these cases often related to complex scientific and engineering issues arising in the context of mass disasters involving transportation accidents, fires, explosions and other mishaps, as well as disputes pertaining to contractual intent and alleged bad faith or fraud.

Jim is a frequent lecturer at legal seminars and his advice is sought by many clients on issues related to loss prevention, contractual protections and litigation. He has been an instructor on legal subjects at the USC Aviation Safety Course. Jim has been designated as an Outstanding Advocate by the Public Council Law Center Children's Rights Project and has been rated AV for many years by Martindale Hubbell.

Jim is admitted to practise in the state and federal courts of New Jersey, New York and California, numerous appellate courts and the United States Supreme Court.

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Mark is a partner in the firm's Los Angeles office. Mark's previous work as a Court Attorney in both the California State Court of Appeal and the California Superior Court gives him a unique background for his practice, which emphasises appellate and civil law and motion proceedings. Mark has extensive experience handling a wide range of litigation matters in both state and federal courts, in areas of product liability, aviation, toxic torts, premises liability, insurance coverage and bad faith, e-discovery and public entity liability. His insurance experience involves general and professional liability, first-party property and primary/excess. Mark also provides advice to corporate clients on contractual indemnity issues, and handles amicus briefing.

Representative cases include obtaining summary judgment for a military defence contractor, which was affirmed on appeal in a published opinion; defence of a successor product manufacturer resulting in a favourable published appellate opinion; defence of a multimillion-dollar attorney-fee claim under a private attorney general theory; obtaining summary judgment for a professional liability insurer against a claim for defence costs, which was affirmed on appeal; and an administrative challenge to the National Transportation Safety Board, resulting in reversal of an adverse probable cause finding.

While attending Pacific McGeorge School of Law, Mark served as articles editor of the *Pacific Law Journal*.

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