
THE AVIATION LAW REVIEW

THIRD EDITION

EDITOR
SEAN GATES

LAW BUSINESS RESEARCH

THE AVIATION LAW REVIEW

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EDITOR'S PREFACE

The Aviation Law Review has become a compulsory purchase for the libraries of those with commercial, legal or academic interest in international aviation law, contributing a unique perspective on these subjects from experts in many countries around the world. In this edition there are several helpful contributions on the approach of different jurisdictions to aircraft registration, made easier now in the United Kingdom following its recent accession to the Cape Town Convention. There are also highly insightful contributions from a number of new jurisdictions, including Colombia, the Isle of Man, the Cayman Islands and Singapore, further extending the reach of the *Review*.

This might be regarded as the year of the drone! With a number of alternative acronyms proposed by a variety of organisations, the remotely piloted unmanned aerial vehicle (UAV) is clearly on its way to becoming ubiquitous. Having been developed primarily for military purposes, it seems likely that its commercial uses will expand from aerial photography to aerial delivery courtesy of Amazon and beyond. While regulatory developments are continuing apace with these vehicles, not all of these are aligned. It is to be hoped that an international body representing the needs of operators will be formed so as to avoid a patchwork of conflict in the regulatory arena. No adequate resolution has yet been found to the vexed issue of the appropriate minimum insurance requirement for UAVs; progress in this matter will be an essential requirement given their potential for damage. The difficulties here include establishing ownership and the viability of small businesses faced with substantial, though arguably realistic, insurance premium demands.

There have been a number of significant decisions in different courts around the world in the preceding year and there are two startling examples of this in relation to airlines' liability to passengers. In the case of *Casey v. Pel Air* in the Supreme Court of New South Wales, the Court held that post-traumatic stress disorder (PTSD) is compensable under the Montreal Convention as bodily injury. The facts of the case are truly appalling and underline the truism that bad facts will never make good law. One has to wonder why, given that all other claims by the passenger were agreed, it was decided that this element of the claim should be resisted. This is an alarming development for carriers and

their insurers, who can expect to receive claims of this sort in Australia every time there is a hard landing or mid-air turbulence. Other jurisdictions will take note of the judicial view that PTSD is evidenced by physiological changes in the brain, opening the issue up for argument in every country where courts have hitherto found in favour of carriers. This was a hard-fought issue at the drafting stages of the Montreal Convention 1999 and the victories won there would seem to have been lost in this decision.

There seems little doubt there is a tide in the affairs of toxic cabin claims that is rising so far as employees are concerned, as represented in litigation in various jurisdictions around the world. The few attempts by passengers to launch such claims have foundered on the difficulty of establishing a probable link between the event and the illness. The current litigation can be expected to fortify passengers with illnesses that might be said to flow from exposure to the elements of 'toxic air', and will encourage plaintiff lawyers to redouble their efforts in pursuit of claims.

The Germanwings accident has electrified debate in a number of areas concerning the legal regulation of aviation. In a recent briefing by the French prosecutor, consideration is clearly being given to the possibility of criminal prosecutions arising out of the accident and the circumstances in which the co-pilot was allowed to continue to fly notwithstanding his serious and worsening psychological condition. Latest reports indicate numerous doctors had seen him and recommended that he stop flying but were constrained from advising his employer by privacy laws in Germany and Europe. Criminal prosecutions in France following aircraft accidents are unremarkable and it seems likely that this investigation will continue with serious consideration being given to criminal redress. The accident itself has again triggered the debate concerning whether cockpit doors should be locked during flight. The events of 9/11 were the trigger for the decision to lock cockpit doors. Both before and after that event, however, there have been numerous events of pilot incapacity and suicide. Different airlines have taken steps to ensure that when one of two pilots must leave the cockpit the other should not be left alone, but whether a determined pilot would be inhibited practically by a second person in the cockpit will be the subject of further debate and probably further rule-making.

Once again I would like to extend my thanks to the many contributors to this volume and welcome those who have joined the group. Their studied, careful and insightful contributions are much appreciated.

Sean Gates

Gates Aviation Limited

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Chapter 34

UNITED STATES

Garrett J Fitzpatrick, James W Hunt and Mark R Irvine¹

I INTRODUCTION

Civil aviation in the United States is regulated almost entirely by the national, or federal, 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. The DOT coordinates with other countries and international organisations in developing and managing international air routes. The DOT 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,² and to regulate state law liability claims.

1 Garrett J Fitzpatrick is the managing partner, James W Hunt is an equity partner and Mark R Irvine is a partner at Fitzpatrick & Hunt, Tucker, Pagano, Aubert, LLP.

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. L.A. Cnty.*, 14 Cal. Rptr. 25 (1961).

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.³ The national government regulates aviation based on the need for uniformity in aviation law and certain constitutional powers granted to the federal government.⁴

The federal government consists of three separate branches:⁵ 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.⁶ Most legal disputes concerning agency actions are adjudicated in administrative law courts, which are part of the federal executive branch of government.⁷

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.⁸

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.⁹ To be within a court's personal jurisdiction, the defendant must have a sufficient connection to the court's forum.

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. Nicastro*, 131 S. Ct. 2780, 2789 (2011).

4 U.S. Const. art. I, § 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).

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. § 46301(d)(4) (West, Westlaw through P.L. 114-25).

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. art. III, § 2, cl. 1.

9 See, for example, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011) (North Carolina court lacked personal jurisdiction over European tyre manufacturer arising from accident in France, where only small percentage of tyres were distributed in North Carolina).

Litigants have a right to a jury trial in most cases. 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,¹⁰ including the following main conventions, which US courts are often called upon to interpret:

*The Chicago Convention*¹¹

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.¹²

Regulation of foreign carrier operation in US airspace incorporates and requires compliance with International Civil Aviation Organization (ICAO) standards.¹³ These

10 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, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, 22 U.S.R. 1641, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 23 September 1971, 24 U.S.T. 564, 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, 1589 U.N.T.S. 474; 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 (last visited 26 May 2015).

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

12 *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).

13 14 C.F.R. § 129.5 (2013). 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. § 121 (2013). 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

standards were addressed in a recent 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.¹⁴ The court rejected the claim, noting that the foreign carrier operated under ICAO standards, which recommended, but did not require, a defibrillator.¹⁵ The court concluded that the failure to comply with the ICAO’s recommendation was insufficient to constitute an ‘accident’ under the Montreal Convention.¹⁶

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.¹⁷ Countries deemed in compliance with ICAO standards are designated a Category I country, whose carriers are allowed to operate freely to the United States. Countries deemed not to meet ICAO standards are designated Category II. 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 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.¹⁸

*The Montreal Convention*¹⁹

US courts interpret the Montreal Convention by relying on case law that interpreted ‘substantively similar’ provisions of the Warsaw Convention.²⁰ Nevertheless, interpretation questions have continued to arise since the United States ratified the Montreal Convention in 2003.

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. § 41703 (West, Westlaw through P.L. 114-25).

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

15 *Id.* at 1153.

16 *Id.*

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

18 Civil Aviation Safety Act of 2002, version 2.6 (November 2011), available at www.faa.gov/about/initiatives/iasa/mcar/media/00_model_law_v2.6.docx (hereinafter CASA).

19 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).

20 *Gustafson v. Am. Airlines, Inc.*, 658 F. Supp. 2d 276, 282 (D. Mass. 2009).

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.²¹

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’.²²

More recent cases have further clarified this definition. For instance, 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, an accident under the Convention may be found.²³

In cases addressing non-medical injuries, a variety of events have been held to constitute accidents, including injury caused by a hypodermic needle protruding from an aeroplane seat;²⁴ a flight attendant spilling hot water on a passenger;²⁵ bottles falling from an open overhead compartment;²⁶ and a ‘jolt’ from another passenger causing a tray table to shake and hot tea to spill.²⁷ 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 presence of a bag in or near the aisle during the boarding process’.²⁸ Deviations from airline policies and procedures may be considered unexpected and unusual enough to constitute an accident under the Convention.²⁹

Whether an injury occurs during ‘embarking’ or ‘disembarking’ is considered a question of law to be decided by the court.³⁰ A federal court in New York held that

21 Montreal Convention, Art. 35(1), *supra* footnote 19; *Schoenebeck v. Koninklijke Luchtvaart Maatschappij N.V.*, No. CV 13- 04992 SI, 2014 WL 1867001 (N.D. Cal. 8 May 2014), appeal filed (30 May 2014).

22 *Air France v. Saks*, 470 U.S. 392 (1985).

23 *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); *McCaskey 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) (airline’s failure to warn passengers about the risk of developing deep vein thrombosis on international flight is not an Article 17 accident).

24 *Waxman v. C.I.S. Mexicana De Aviacion, S.A.*, 13 F. Supp. 2d 508, 512 (S.D.N.Y. 1998).

25 *Fishman v. Delta Airlines, Inc.*, 132 F.3d 138, 143 (2d Cir. 1998).

26 *Maxwell v. Aer Lingus, Ltd.*, 122 F. Supp. 2d 210, 212–13 (D. Mass. 2000).

27 *Wipranik v. Air Canada*, No. CV 06-3763 AHM (AJWx), 2007 WL 2441066 (C.D. Cal. 15 May 2007).

28 *Sethy v. Malev-Hungarian Airlines*, No. 98 Civ. 8722 (AGJ), 2000 WL 1234660 (S.D.N.Y. 31 Aug 2000) *aff’d*, No. 00-9325, 13 Fed. Appx. 18 (2d Cir. 12 June 2001).

29 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, 532 (5th Cir. 1 October 2012).

30 *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)).

although a passenger had already checked-in for his flight, the embarking process had not begun because he ‘had ample time to roam freely about the [public] terminal before his flight was called’.³¹

Based on US Supreme Court cases that construed ‘bodily injury’ under the Warsaw Convention as not including pure mental distress,³² most US courts have held that conditions such as fear and post traumatic stress do not constitute bodily injury under the Convention.³³

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.³⁴ However, at least one court extended the Montreal Convention in this regard by focusing on the intent of the treaty to promote international uniformity.³⁵ US courts have also held that the doctrine of *forum non conveniens* applies under the Montreal Convention.³⁶ In a recent 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.³⁷

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, rather than the legislature, define what claims are actionable.³⁸ 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

31 *Hunter v. Deutsche Lufthansa AG*, 863 F. Supp. 2d 190, 207 (E.D.N.Y. 2012).

32 *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 552 (1991).

33 *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).

34 Tory A. Weigand, *Recent Developments under the Montreal Convention*, 77 Def. Couns. J. 443, 445-46 (2010).

35 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 \$3 breakfast).

36 See *Khan v. Delta Airlines, Inc.*, No. 10. Civ. 2080 (BMC), 2010 U.S. Dist. LEXIS 82293 (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 re-filing the case in a more appropriate foreign country. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981).

37 *Galbert v. W. Caribbean Airways*, 715 F.3d 1290 (11th Cir. 2013).

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

the circumstances.³⁹ 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.⁴⁰

In some instances federal law will pre-empt state law, thus excluding the effect of state tort law.⁴¹ The concept of pre-emption is based on constitutional supremacy of federal law over state law in certain areas.⁴² In *Abdullah v. American Airlines*, plaintiffs brought state tort claims against the airline after suffering injuries from severe turbulence.⁴³ 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’.⁴⁴

In addition, an act of Congress known as the Airline Deregulation Act (ADA) expressly pre-empt state law relating to ‘a price, route or service of an air carrier that may provide air transportation...’.⁴⁵ Before the ADA, many commercial aspects of aviation were regulated, including entry into the market, routes and fares.⁴⁶ 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’.⁴⁷

Admiralty accidents are also governed exclusively by federal law.⁴⁸ In the aviation context, federal admiralty law will govern where the claimed tort bears ‘a significant relationship to traditional maritime activity’.⁴⁹ 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.⁵⁰ For

39 Restatement (Third) of Torts: Phys. & Emot. Harm § 3 (2010).

40 See, for example, Cal. Civ. Code § 2100 (West, Westlaw through Ch. 2 of 2015 Reg. Sess.) (‘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.’).

41 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”.’).

42 U.S. Const. art. VI, cl. 2 (‘This Constitution, and the Laws of the United States ... shall be the supreme Law of the Land.’).

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

44 *Id.* at 367.

45 49 U.S.C.A. § 41713 (West, Westlaw through P.L. 113-296).

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

47 *Id.* at 378 (majority opinion); 49 U.S.C. §§ 1302(a)(4), 1302(a)(9).

48 28 U.S.C.A. § 1333 (West, Westlaw through P.L. 113-296).

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

50 46 U.S.C.A. § 30307 (West, Westlaw through P.L. 113-296).

non-commercial aircraft, DOHSA applies if the accident occurs beyond three nautical miles from the US shore.⁵¹ Claims for pre-impact pain and suffering and punitive damages are unavailable under DOHSA.⁵²

Apart from pre-emption, choice of law rules may determine carrier liability 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 plaintiffs' many residences, including Connecticut, Hawaii, Indiana, Massachusetts, New York, Japan and Saudi Arabia, among others.⁵³ The defendant aircraft builder was incorporated in Maryland and operated in Missouri. The defendant airline was a Delaware corporation, with business operations in New York, Texas and Oklahoma. The crash occurred in Illinois during a scheduled flight to 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.⁵⁴

iii General aviation regulation

As noted, the FAA promulgates administrative regulations (FARs), which govern most aspects of aviation. 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'.⁵⁵ 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 efficiency of the National Airspace System'.⁵⁶ The FAA also develops the nation's airports and navigation systems, implements new technologies such as 'NextGen' and maintains the aircraft ownership registry.⁵⁷

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.⁵⁸ For qualifying flights, a carrier cannot limit its liability for the damage, loss

51 46 U.S.C.A. § 30302 (West, Westlaw through P.L. 113-296) (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).

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

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

54 *Air Crash Disaster Near Chicago*, 644 F.2d at 613; see also Restatement (Second) of Conflict of Laws § 146 (1971).

55 Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (codified as amended at 49 U.S.C. § 40101 (2000)).

56 49 C.F.R. § 1.82 (2012).

57 *Id.*

58 14 C.F.R. § 254.4 (2015) (revised by 80 Fed. Reg. 30144-01, 27 May 2015).

or delay in delivery of passenger baggage to less than \$3,500 per passenger.⁵⁹ Notice of limitations relating to baggage liability must be conspicuous,⁶⁰ and failure to provide notice may be considered unfair and deceptive practice.⁶¹

Overbooking regulations apply to flights with 30 or more seats on domestic or non-stop foreign flights originating in the United States.⁶² Compensation for passengers involuntarily denied boarding depends on the alternate transportation that the carrier offers,⁶³ and can range from no compensation to 400 per cent of the fare, with a maximum of \$1,300.

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.⁶⁴ 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.⁶⁵ 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. Airlines who fail to comply with tarmac delay rules are subject to civil penalties of up to \$27,500 for each violation.⁶⁶

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.⁶⁷

The Air Carrier Access Act (ACAA) prohibits discrimination against handicapped individuals by an air carrier in the United States.⁶⁸ Handicapped individuals are those with a physical or mental impairment that substantially limits one or more major life

59 Id. Covers direct or consequential damages resulting from the disappearance of, damage to, or delay in delivery of a passenger's personal property, including baggage.

60 Id. § 254.5.

61 14 C.F.R. § 399.85 (2012); unfair and deceptive practice within the meaning of 49 U.S.C. § 41712.

62 14 C.F.R. § 250.2 (2008).

63 14 C.F.R. § 250.5 (2015) (revised by 80 Fed. Reg. 30144-01, 27 May 2015).

64 14 C.F.R. § 259.2 (2011).

65 14 C.F.R. § 259.4 (2011).

66 49 U.S.C. §§ 41712, 46301 (West, Westlaw through P.L. 113-296); A proposed DOT regulation, scheduled to be codified in December 2015, clarifies that such penalties may be imposed on a per-passenger basis. Transparency of Airline Ancillary Fees and Other Consumer Protection Issues, 79 Fed. Reg. 29970, 29992 (2014).

67 14 C.F.R. § 259.8(a) (2012).

68 49 U.S.C.A. § 41705(a) (West, Westlaw through P.L. 113-296).

activities.⁶⁹ Courts are split as to whether the ACAA creates a private right of action.⁷⁰ Among the courts that recognise a private right of action, there is a further split on the availability of emotional distress and punitive damages.

The DOT has proposed additional passenger protection rules that will require carriers and ticket agents to disclose fees for checked bags, carry-on items and advance seat assignment, at all points of sale.⁷¹

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.⁷² Thus, an EIS is necessary for any airport expansion or major change in flight routes. Some states have similar requirements.⁷³

The FAA ensures that the aerospace industry complies with NEPA.⁷⁴ Litigation over FAA NEPA compliance is extensive. By 2003 there had been approximately 100 NEPA cases involving airport expansion.⁷⁵ The FAA also requires NEPA compliance for commercial space transportation.⁷⁶

Pursuant to the Clean Air Act of 1970, the Environmental Protection Agency (EPA) regulates air pollution from aircraft.⁷⁷ In setting aircraft engine emission standards, the EPA consults with the FAA, and largely follows ICAO standards.⁷⁸

69 Id. § 41705(a).

70 Kristine Cordier Karnezis, J.D., Annotation, *Recovery for Discriminatory Conduct Under Air Carrier Access Act*, 49 U.S.C.A. § 41705, 188 A.L.R. Fed. 367, § 3 (2003).

71 Transparency of Airline Ancillary Fees and Other Consumer Protection Issues, 79 Fed. Reg. 29970 (2014).

72 42 U.S.C.A. § 4332(c) (West, Westlaw through P.L. 113-296).

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

74 Clay Hartmann, *Nepa: Business As Usual: The Weaknesses of the National Environmental Policy Act*, 59 J. Air L. & Com. 709, 715 (1994).

75 Jeffrey A. Berger, *False Promises: NEPA's Role in Airport Expansions and the Streamlining of the Environmental Review Process*, 18 J. Env'tl. L. & Litig. 279, 288 (2003).

76 14 C.F.R. § 431.91 (2015).

77 Clean Air Act, Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified as amended at 42 U.S.C. §§ 7401-7671q); E.g., 40 C.F.R. pt. 87 (2012).

78 *Nat'l Ass'n of Clean Air Agencies v. E.P.A.*, 489 F.3d 1221, 1225-26 (D.C. Cir. 2007); 42 U.S.C.A. § 7572 (West, Westlaw through P.L. 114-9). At the time of this publication, the EPA had issued notice of proposed findings and rule-making in anticipation of ICAO establishing international CO2 emissions standards for aircraft in 2016. Fact Sheet: EPA Takes First Steps To Address Greenhouse Gases from Aircraft Engines (June 2015), available at <http://epa.gov/otaq/aviation.htm> (last visited 23 June 2015).

US anti-corruption law

US law criminalises bribery to influence any official government act.⁷⁹ 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.⁸⁰ Violations of US bribery law are punishable by up to 15 years in prison.⁸¹ 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.⁸² In 1995, Lockheed paid a \$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.⁸³ The largest FCPA penalty ever imposed was in 2008 for \$450 million against Siemens, a US exchange-listed foreign corporation.⁸⁴

The FCPA includes international anti-corruption commitments relating to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.⁸⁵ The United States is also a party to the Inter-American Convention Against Corruption.⁸⁶

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;

79 18 U.S.C.A. § 201(b) (West, Westlaw through P.L. 113-296).

80 18 U.S.C.A. § 201(c) (West, Westlaw through P.L. 113-296).

81 18 U.S.C.A § 201 (West, Westlaw through P.L. 113-296).

82 15 U.S.C. §§ 78m(b), 78dd-1, 78dd-s, 78dd-3 (West, Westlaw through P.L. 113-296).

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

84 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.

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

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

(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.⁸⁷ Applicants must show proof of ownership.

Airworthiness certification indicates that an aircraft conforms to its approved design and is safe for operation.⁸⁸ 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.⁸⁹ 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 the design for aircraft, engines and propellers.⁹⁰ The FAA also certifies aircraft components by issuing technical standard orders, and approves design modifications and replacements by issuing parts manufacture approval. 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 carrier. 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

87 14 C.F.R. § 47.3 (2010).

88 14 C.F.R. § 21.1(b)(1) (2010).

89 FAA Order 8130.2H (4 February 2015), available at www.faa.gov/documentLibrary/media/Order/FAA_Order_8130_2H.pdf

90 14 C.F.R. § 21.41 (2011). A type certificate specifies the design type, operating limitations, a certificate data sheet, and any applicable regulations and conditions.

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.

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.⁹¹ 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.⁹²

The FAA is also authorised to issue commercial space transportation licences for launch or reentry vehicles.⁹³

ii Ownership rules

US carriers must be owned and controlled by a US citizen to obtain and maintain US carrier certification. '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.⁹⁴

Foreign carriers

Foreign carriers⁹⁵ must likewise obtain two separate authorisations to conduct operations in the United States: (1) economic authority from the DOT; and (2) safety authority from the FAA.

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

92 14 C.F.R. pt. 139 (2013).

93 14 C.F.R. §§ 413.3, 413.19 (2007).

94 14 C.F.R. § 204.2(c) (2007).

95 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. § 40102 (a)(21) (West, Westlaw through P.L. 113-296). 'Foreign air transportation' is 'the transportation of passengers or property by aircraft as a common carrier for compensation, or

The DOT's Foreign Air Carrier Licensing Division reviews foreign air carrier applications, which must be filed in the public docket.⁹⁶ 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.⁹⁷

Carriers with operating authority from the European Union, Norway and Iceland undergo 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.⁹⁸ Additionally, a shortened process exists for Canadian charter air taxi operators.⁹⁹

FAA safety authority for foreign airlines is referred to as 'operation specifications'.¹⁰⁰ 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 2008,¹⁰¹ and the United States has not suffered a fatal large commercial

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'. 49 U.S.C. § 40102 (a) (23) (West, Westlaw through P.L. 113-296).

96 14 C.F.R. §§ 211.10, 302.3 (2008).

97 49 U.S.C. § 41313 (West, Westlaw through P.L. 113-296); 14 C.F.R. §§ 313.5(a) (1995), 243 (1998).

98 49 U.S.C. § 40109 (West, Westlaw through P.L. 113-296); DOT, Application Procedures for Foreign Air Carriers of the European Union, www.dot.gov/policy/aviation-policy/application-procedures-foreign-air-carriers-european-union (last updated 9 August 2012).

99 14 C.F.R. pt. 294 (1995).

100 14 C.F.R. § 129.5 (2007).

101 Fact Sheet – Commercial Aviation Safety Team, Fed. Aviation Admin., www.faa.gov/news/fact_sheets/news_story.cfm?newsId=18178 (last visited 27 May 2015).

aviation accident since February 2009.¹⁰² 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 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.

FAA regulations and airworthiness requirements also promote safety, and cover a wide range of topics from maintenance to aircraft design to pilot training.¹⁰³

Airworthiness Directives (AD) are FAA notifications to certified owners and operators of known safety deficiencies that must be corrected to maintain the aircraft's airworthiness. 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.¹⁰⁴ 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. 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. 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

102 2011–2012 Most Wanted List Page – General Aviation Safety, Nat'l Transp. Safety Board, www.nts.gov/safety/mwl/Pages/mwl-2.aspx (last visited 27 May 2015).

103 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 (2015). Part 135 provides operation requirements for commuter and on-demand operations. 14 C.F.R. pt. 135 (2014). 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 (2015).

104 14 C.F.R. pt. 13 (2006).

collision avoidance technology, 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.¹⁰⁵ 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.¹⁰⁶

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'.¹⁰⁷

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 1914.¹⁰⁸ 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.

105 14 C.F.R. pt. 205 (2015).

106 14 C.F.R. pt. 198 (2015).

107 Fed. Aviation Admin., *Plane Sense, General Aviation Information* (2008), available at www.faa.gov/regulations_policies/handbooks_manuals/aviation/media/faa-h-8083-19A.pdf, (last visited 27 May 2015).

108 FTC Guide to the Antitrust Laws, Fed. Trade Comm'n, www.ftc.gov/bc/antitrust/antitrust_laws.shtml, (last visited 27 May 2015).

The Federal Trade Commission¹⁰⁹ 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.

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 \$100 million, and for an individual up to \$10 million and 10 years in prison.¹¹⁰

Regulation of airline mergers is based on a rationale of competition for the benefit of the consumer.¹¹¹ 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 recently, 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.¹¹² 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.¹¹³

VII 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

109 The scope of the Federal Trade Commission's (FTC) authority to regulate a commercial firm's cybersecurity practices is the subject of a pending appeal. *F.T.C. v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602, 609 (D.N.J. 2014), appeal docketed, No. 14-3514 (3d Cir. argued 3 March 2015).

110 See FTC Guide to the Antitrust Laws, *supra* footnote 108.

111 Dept. of Justice, Antitrust for Airlines, Remarks by J. Bruce McDonald (3 Nov. 2005), www.justice.gov/atr/public/speeches/217987.pdf, (last visited 27 May 2015).

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

113 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), www.justice.gov/atr/public/comments/247556.pdf, (last visited 27 May 2015).

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.¹¹⁴

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*).¹¹⁵

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.¹¹⁶ 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 (i.e., personal injury or breach of contract) and by state. Statutes of repose also set a time limits, but based on an event other than the injury-causing event. 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.¹¹⁷ Several states have their own statutes of repose, some with more stringent time limits.¹¹⁸

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.¹¹⁹

Each litigant normally has the right to a trial by jury. If more than one defendant is found liable for the same injury, those defendants may be jointly liable, severally liable, or

114 28 U.S.C. § 2680(a) (West, Westlaw through P.L. 113-296); *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). This is commonly referred to as the 'government contractor defence'.

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

116 28 U.S.C. § 1391 (West, Westlaw through P.L. 113-296) (federal venue statute).

117 See *infra* footnote 130 et seq.

118 See, for example, Or. Rev. Stat. § 30.905(2)(a) (West, Westlaw through Ch. 74 of the 2015 Reg. Sess.) (limiting the period in which the product manufacturer can be sued to 10 years following the date of the first sale of the product).

119 Fed. R. Civ. P. 56.

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.¹²⁰

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 liability for discrimination under the ACAA based on race, colour, national origin, religion, a perceived physical or mental impairment, gender or ancestry.¹²¹ In making a claim under the ACAA, no proof of intent to discriminate is required so long as there is proof of a violation.¹²²

Following a recent trend, some courts apply a 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 who comply with FAA regulations.¹²³ 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'.¹²⁴

There are typically no limits to the economic damages sought by and awarded to a claimant who proves loss 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

120 Restatement (Third) of Torts: Apportionment of Liab. § 1 (2000).

121 49 U.S.C. § 41705 (West, Westlaw through P.L. 113-296); DOT regulations at 14 C.F.R. pt. 382 (2009).

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

123 See, for example, *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 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).

124 49 U.S.C. § 41713(b) (West, Westlaw through P.L. 113-296); see *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992).

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,¹²⁵ 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 \$3,500, which is the minimum set by the DOT.¹²⁶ Damages in claims under the Montreal Convention are also limited.¹²⁷

iii Product liability

Civil actions against product manufacturers and sellers are generally based on the theory of strict liability, in addition to negligence.¹²⁸ 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. 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.¹²⁹

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

126 14 C.F.R. § 254.4 (2015) (revised by 80 Fed. Reg. 30144-01, 27 May 2015).

127 See Montreal Convention, *supra* footnote 19.

128 Restatement (Second) of Torts § 402(A) (1965).

129 *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

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.¹³⁰ GARA sought to rejuvenate the general aviation market by limiting long-term liability exposure. GARA applies only to accidents involving 'general aviation aircraft'.¹³¹ 'Aircraft' is broadly defined under GARA¹³² and thus can include virtually anything that is built to leave the ground that meets the statute's criteria.

A new replacement part resets GARA's repose period as to that part.¹³³ Aircraft flight manuals that are continuously revised may reset the repose period if the plaintiff alleges that those revisions caused the accident.¹³⁴

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.¹³⁵

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.¹³⁶

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).

130 General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552 (codified as amended at 49 U.S.C. § 40101 (2000)) (hereinafter GARA), § 2(a); Robert F. Hendrick, *A Close and Critical Analysis of the New General Aviation Revitalization Act*, 62 J. Air L. & Com. 385 (1996).

131 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 § 2(c).

132 49 U.S.C. § 40102(a)(6) (1994).

133 49 U.S.C. § 40101(2)(a)(2) (2000).

134 *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 *South Side Trust and Sav. Bank of Peoria v. Mitsubishi Heavy Industries, 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).

135 GARA §§ 2(b)(1)-(4).

136 49 U.S.C. § 40101(2)(d) (2000). 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).

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.

Although wrongful death claims were not permitted under common law, every state now allows some type of wrongful death claim. Typically, a decedent's survivors may pursue wrongful death recovery for loss of future financial support, and of care, comfort and companionship. Recovery for the survivor's grief, and the decedent's pain and suffering before death, are usually not recoverable. However, several states have also enacted survival statutes, in which the decedent's estate may assert a claim that could have been brought by the decedent prior to his or her death. Under such a statute, the estate may recover the decedent's medical expenses and lost earnings incurred prior to death, as well as pre-death pain and suffering in certain instances.

If a person is injured while working in the course and scope of employment, he 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.¹³⁷

VIII THE YEAR IN REVIEW

The FAA issued a \$10,000 civil fine against the pilot of an unmanned aircraft for reckless flying during commercial filming.¹³⁸ An administrative law judge vacated the fine based on a ruling that the FAA regulations were not enforceable against pilots of unmanned aircraft.¹³⁹ The NTSB reversed the administrative law judge's order, concluding that

137 42 U.S.C.A. § 1395y(b)(2)(B)(ii) (West, Westlaw through P.L. 113-296) (amended by Pub. L. 114-10, 129 Stat. 87, 16 April 2015).

138 *Huerta v. Pirker*, No. CP-217 (N.T.S.B. 6 March 2014), available at www.nts.gov/legal/alj/Documents/Pirker-CP-217.pdf.

139 *Id.*

the FAA acted within its authority, and ruling that the definition of ‘aircraft’ – any ‘device ... used for flight in the air’ – includes unmanned aircraft, as well as small, model-sized aircraft.¹⁴⁰

The FAA continued to implement its NextGen programme, including deployment of an Automatic Dependent Surveillance-Broadcast (ADS-B) system for control of US airspace, which will replace radar-based surveillance.¹⁴¹ Aircraft equipped with ADS-B technology periodically broadcast the aircraft’s horizontal and vertical position and velocity, and other information, thereby enhancing safety and efficiency. The ADS-B ground structure is now operational across the country, and aircraft operating in designated airspace must be equipped with ADS-B avionics by 2020.

US disagreement over the EU Emissions Trading Scheme continued.¹⁴² The pertinent Congressional committee takes the position that US aircraft operators should be held harmless from the EU system, and that the DOT should exercise authority to prohibit US civil aircraft from participating in the EU system.

IX OUTLOOK

Regulation of unmanned aircraft systems for commercial purposes will continue apace. The FAA states that it ‘is partnering with several industry associations to promote safe and responsible use of unmanned aircraft’,¹⁴³ and it recently granted Amazon.com permission to conduct test flights for a package-delivery venture.¹⁴⁴

The FAA has also proposed adoption of new rules to allow operation of unmanned aircraft systems in the national airspace system.¹⁴⁵

140 *Huerta v. Pirker*, No. CP-217 (N.T.S.B. 18 November 2014), available at www.nts.gov/legal/alj/Documents/5730.pdf.

141 14 C.F.R. §§ 91.225 (2015), 91.227 (2011).

142 Press Release, Transportation and Infrastructure Committee, T&I Leaders’ Joint Statement on EU Aviation Emissions Cap & Trade Reversal, (6 March 2014) (<http://ti.house.gov/news/documentsingle.aspx?DocumentID=371982>); see also European Union Emissions Trading Scheme Prohibition Act of 2011, Pub. L. No. 112-200, 126 Stat. 1477 (2012) (codified at 49 U.S.C. § 40101 note) (directing Secretary of Transportation to ‘prohibit an operator of a civil aircraft of the United States from participating in the emissions trading scheme unilaterally established by the European Union’).

143 FAA, Unmanned Aircraft Systems, www.faa.gov/uas/ (last modified 6 May 2015).

144 FAA, Amazon Gets Experimental Airworthiness Certificate, www.faa.gov/news/updates/?newsid=82225 (last modified 19 March 2015); Letter from Paul Misener, Vice President of Global Pub. Policy, Amazon, to James H. Williams, Manager at UAS Integration Office, FAA (7 December 2014) (www.regulations.gov/#!documentDetail;D=FAA-2014-0474-0014).

145 Operation and Certification of Small Unmanned Aircraft Systems, 80 Fed. Reg. 9544 (proposed 23 February 2015). Congressional legislation to establish an interim rule governing unmanned aircraft for commercial purposes has also been introduced. Commercial UAS Modernization Act, S. 1314, 114th Cong. (2015).

The DOT is analysing comments relating to proposed additional passenger protection rules, which constitute a third phase of such DOT rule-making.¹⁴⁶ If adopted, the proposed rules would require additional fee disclosures for ancillary services, expand reporting of performance data, include internet-based agents within the meaning of 'ticket agent', require greater disclosure of code-share operations and prohibit post-purchase price increases.

Federal pre-emption in aviation cases will continue as a developing area of law. Defendants increasingly assert pre-emption as a defence by arguing that FARs should apply as the standard of care in certain cases, as opposed to state tort law standards of care. Courts have reached varying results depending on their analysis of whether the federal law was intended to control the particular tort claim in question.

The FAA will assess cybersecurity risks posed by continued modernisation of technology and the transition to the NextGen system. Recent Congressional reports caution the FAA to take measures to address such risks, including threats to aircraft connected to the internet, weaknesses in technical controls, significant interconnectivity between the National Airspace System (NAS) and non-NAS systems with insufficient boundary controls to restrict access, and a need to develop a cybersecurity threat model.¹⁴⁷

146 Transparency of Airline Ancillary Fees and Other Consumer Protection Issues, 79 Fed. Reg. 29970 (proposed 23 May 2014).

147 GAO, FAA Needs To Address Weakness in Air Traffic Control Systems, (29 January 2015), <http://gao.gov/assets/670/668169.pdf>; GAO, FAA Needs a More Comprehensive Approach To Address Cybersecurity as Agency Transitions to NextGen (14 April 2015), www.gao.gov/assets/670/669627.pdf.

Appendix 1

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Garrett J Fitzpatrick is located in the New York office of Fitzpatrick & Hunt, Tucker, Pagano, Aubert, LLP and is the firm's managing partner. He has been practising aviation law for over 35 years, and has defended clients in claims and litigation arising from major airline catastrophes, military crashes and general aviation accidents worldwide. His expertise in the aviation field played an instrumental role in the development of the 'government contractor defence'. He also serves as the legal head of the Aircraft Builders Council programme, which is one of the longest-running aviation product insurance programmes in the world. He regularly provides a variety of claims prevention services to aviation companies. Mr Fitzpatrick is a member of the New York State Bar and received his education at the University of Dayton and St John's University School of Law.

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James W Hunt has been litigating civil cases for in excess of 30 years, and has been lead trial counsel on numerous large and complex cases during that time, including both multi-district and class action cases. Among these are the Air Canada in-flight fire litigation, Covington, Kentucky; the American Airlines accident at Cali, Colombia; the Pepcon 'AP' fires and explosions resulting in large subrogation claim in Las Vegas, Nevada; the Astrium telecommunication satellites solar array litigation; and the TAM Fokker 100 'thrust reverser' crash, São Paulo, Brazil.

Jim is a frequent lecturer at legal seminars, and his advice is sought by many clients regarding litigation and loss prevention. He has been an instructor on legal subjects at the USC Aviation Safety Course. He has been designated an 'outstanding advocate' by the Public Counsel's Children's Rights Project of the Public Counsel Law Center, and is rated AV by *Martindale-Hubbell*.

Jim is admitted to practise in state and federal courts in New Jersey, New York and California, as well as the United States Supreme Court. He received his Undergraduate Degree from Siena College and his law degree from Seton Hall University School of Law.

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Mark R Irvine's practice focuses on defence of aviation cases at the trial and appellate levels, in both state and federal courts. Representative cases include obtaining summary judgment for a military defence contractor arising from the crash of a Chinook helicopter in Afghanistan, a ruling that was affirmed on appeal in a published decision; 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; and an administrative challenge to the National Transportation Safety Board, resulting in reversal of an adverse probable cause finding.

Mark also has experience in insurance coverage matters in defence of bad faith and declaratory relief actions. Mark has worked as a court attorney in both the California State Court of Appeal and the California Superior Court. While attending McGeorge School of Law, Mark served as articles editor of the Pacific Law Journal.

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