

THE AVIATION LAW
REVIEW

SIXTH EDITION

Editor
Sean Gates

THE LAWREVIEWS

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PREFACE

The sixth edition of *The Aviation Law Review* marks the continuation of one of The Law Reviews' most successful publications; the readership of which has been vastly enhanced by making it accessible online since the fifth edition to over 12,000 in-house counsel as well as subscribers to Bloomberg Law and LexisNexis. This year I welcome new contributors from Egypt, Israel, Lebanon and Romania, as well as extending my thanks and gratitude to our seasoned contributors for their continued support. Readers will appreciate that contributors voluntarily donate the considerable time and effort needed to make these contributions as useful as possible to readers.

As this is written, news has come in of an aviation disaster in Cuba where an ageing 737 operated by Mexican carrier Global Air, on behalf of Cubana crashed during a domestic flight, killing 110 of the occupants. The Mexican carrier had assumed responsibility for the liabilities under its agreement with Cubana and reportedly insured the hull and liabilities in Russia. The accident will throw up familiar issues as to the extent to which Cubana audited the operation of Global Air, the latter having apparently been barred for safety reasons from operating in Guyana. Doubtless plaintiff lawyers from Florida will be gathering to secure instructions and seek routes out of Cuba's jurisdiction to maximise compensation, and questions will be asked about the adequacy of oversight of the operator given reports as to its operating history.

In the year since the last review was published, there have been some significant developments with regard to international air carrier liability, with both Russia and Thailand acceding to the Montreal Convention on air carrier liability of 1999 alongside Chad, Indonesia, Mauritius, Sudan and Uganda. Russia, which seems to have had a disproportionate share of recent aviation accidents (Socchi in 2016 and Saratov in 2018), will now face the challenge of persuading its domestic courts to apply the treaty, as they have, historically, awarded moral damages in the absence of bodily injury in Warsaw Convention cases. Thailand's accession brings one of the jurisdictions that has been most resistant to international regulation of carrier legal liability to passengers (ever since the Warsaw Convention of 1929) within the international family. International practitioners will also be aware of the historic resistance of Brazilian courts to the internationally accepted exclusivity of the Warsaw/Montreal system, with many Brazilian courts preferring to apply conflicting provisions of national law. The recent decision of the Brazilian Supreme Court upholding the supremacy of the Montreal Convention may mark a turning point in what has historically been a difficult country within which to defend aviation liability claims.

Inevitably, the European aviation legal scene continues to be dominated by Brexit where reassuring words, at least by regulators in the UK, have yet to be capped by any positive developments in terms of final agreements. This has led major carriers to focus on developing

European air operator certificates and some are also now ensuring they satisfy the European tests for majority ownership, which may cause interesting issues in the future for some of the low-cost carriers that heretofore have been able to operate from the UK – assuming always that the UK continues to apply majority ownership and control rules and that outmoded rule does not fall away.

The other seemingly inevitable development of note within Europe concerns the infamous EU Regulation 261, which from its humble beginnings as a modest attempt to ensure fair treatment of passengers has become, by virtue of the legislative inclinations of the Court of Justice of the European Union (CJEU), a monster devouring the assets of European airlines. Practitioners will be aware that one of the principal focuses of attack of the CJEU has been to decree that although airlines are entitled to a defence based on exceptional measures, nowadays in Europe there are no exceptions.

The latest decision defining extraordinary as ordinary is that of *Kruesemann v. TUI Fly* where the CJEU held that a wildcat strike by flight staff following a surprise announcement of a restructuring does not constitute an extraordinary circumstance releasing the airline from its obligation to pay compensation in the event of cancellation or long delay of flight. The court reasons that the risks arising from the social consequences that go with such measures are inherent in the normal exercise of the airline's activity. The decision is another in a long line of aviation decisions by the CJEU that underscore the proposition that in European jurisprudence, Orwellian doublethink is alive and well! As was made clear at a recent conference of the European Regions Airlines Association, the uninformed extrajudicial legislative impulses of the CJEU in this area threatens regional connectivity and the operation of routes that are only marginally profitable. It can hardly be appropriate to inhibit operations in the regions so as to provide passengers with compensation from events that in any right-thinking person's view would be regarded as outwith the reasonable control of the operator. The European Regions Airline Association continues with other industry groups to lobby for change, which, once Brexit takes effect and the Spanish veto on progress pending resolution to its satisfaction of the Gibraltar dispute falls away, may at last happen.

CJEU 261 decisions are not uniformly in favour of consumers. In May 2017, the Court held in *Marcela Pešková v Travel Service* that a collision between an aircraft and a bird may constitute extraordinary circumstances. The decision is contrary to the EU advocate general's 2016 opinion in the case, which stated that bird strikes do not constitute extraordinary circumstances. The ruling is inconsistent as it appears to contradict the consolidated consumer-friendly court's orientation regarding the interpretation of extraordinary circumstances, and though welcome to carriers and comporting with common sense, underlines that the CJEU does little to ensure the predictability of the court; which of course is in conflict with its own principle of legal certainty, in its supposedly mandatory General Principles of Law.

The year 2017 also posed a number of new old problems for aviation legal practitioners in the context of aviation liquidations; not least of Air Berlin, Alitalia and Monarch Airlines. The collapse of Monarch and the consequent costs incurred by the UK Department for Transport (DFT) posed another challenge to the funds held by the DFT to support passengers stranded in the event of airline collapse. The DFT has announced an independent airline insolvency review to determine whether its system is fit for purpose and adequate to protect passengers after having to repatriate 110,000 passengers following the collapse. The risk for operators is, of course, that the assets of the many will be used to repatriate the passengers

of the few at further and greater cost to the many, which has inevitably resulted in resistance from trade bodies including the International Air Transport Association.

In the regulatory world, the General Data Protection Regulation has been an immense boon to regulatory lawyers while burdening all industries including aviation. Numerous developments have also taken place with regard to unmanned aerial devices following a series of near misses around the world. At the same time, Amazon and Google are collaborating on package delivery by drone and Boeing is actively pursuing the goal of pilotless aircraft. Each of these developments has and will continue to produce new regulations, and developments in this area will continue to be followed closely in this Review.

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 by all those who now refer to *The Aviation Law Review* as one of their frontline resources.

Sean Gates

Gates Aviation Limited

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July 2018

UNITED STATES

*Garrett J Fitzpatrick, James W Hunt and Mark R Irvine*¹

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 it 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 tax² 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.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

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, 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. LA Cnty*, 363 P.2d 25 (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. Nicastro*, 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: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.

Litigants have a right to a jury trial in most cases.¹⁰ 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,¹¹ including the following main conventions, which US courts are often called upon to interpret.

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. 115-140).

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. 115-140).

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. Section 1441(d) (West, Westlaw through P.L. 115-140).

11 For example, International Air Services Transit Agreement, 7 Dec 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 Sept 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft, 16 Dec 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against

The Chicago Convention¹²

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.¹³

Regulation of foreign carrier operation in US airspace incorporates and requires compliance with International Civil Aviation Organization (ICAO) standards.¹⁴ 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.¹⁵ The court rejected the claim, noting that the foreign carrier operated under ICAO standards, which recommended, but did not require, a defibrillator.¹⁶ The court concluded that the failure to comply with the ICAO’s recommendation was insufficient to constitute an ‘accident’ under the Montreal Convention.¹⁷

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.¹⁸ Countries deemed in compliance with ICAO standards are designated as 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. 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

the Safety of Civil Aviation, 23 Sept 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 Feb. 1988, 27 I.L.M. 627; Agreement To Ban Smoking on International Passenger Flights, U.S.-Austl.-Can., 1 Nov 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 17 May 2018).

12 Convention on International Civil Aviation, 7 Dec 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 2018). 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 Feb 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. 115-140).

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. & Com.* 651, 652 (2002).

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.¹⁹

The Montreal Convention²⁰

US courts interpret the Montreal Convention by relying on case law that interpreted 'substantively similar' provisions of the Warsaw Convention.²¹ Nevertheless, interpretation questions have continued to arise since the United States ratified the Montreal Convention in 2003.

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.²²

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'.²³

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.²⁴

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;²⁵ a flight attendant spilling hot water on a passenger;²⁶ bottles falling from an open overhead compartment;²⁷ and a 'jolt' from another passenger causing a tray table to shake and hot tea to spill.²⁸ 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

19 Model Civil Aviation Regulations, version 2.8 (June 2016), available at www.faa.gov/about/initiatives/iasa/mcar/ (last visited 18 May 2018).

20 Convention for the Unification of Certain Rules for International Carriage by Air (hereinafter Montreal Convention), 28 May 1999 (entered into force on 4 Nov 2003), reprinted in S. Treaty Doc. No. 106-45, 1999 WL 33292734 (2000).

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

22 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).

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

24 *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. Con'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); *Baillie v. MedAire, Inc.*, 2017 U.S. Dist. LEXIS 150160 (D. Ariz. Sept. 14, 2017) (failure of remote medical service to recommend diversion for passenger suffering heart attack is not an Article 17 accident).

25 *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).

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

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

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

about the presence of a bag in or near the aisle during the boarding process'.²⁹ Deviations from airline policies and procedures may be considered unexpected and unusual enough to constitute an accident under the Convention.³⁰

Whether an injury occurs during 'embarking' or 'disembarking' is considered a question of law to be decided by the court.³¹ A federal court in New York held that 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'.³²

Based on US Supreme Court cases that construed 'bodily injury' under the Warsaw Convention as not including pure mental distress,³³ most US courts have held that conditions such as fear and post traumatic stress do not constitute bodily injury under the Convention.³⁴ 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.³⁵

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.³⁶ However, at least one court extended the Montreal Convention in this regard by focusing on the intent of the treaty to promote international uniformity.³⁷ US courts have also held that the doctrine of *forum non conveniens* applies under the Montreal Convention.³⁸ 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.³⁹

29 *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); accord *Plonka v. US Airways*, 2015 WL 6467917 (E.D. Pa. 27 Oct 2015) (injury to passenger's leg, which struck in-flight entertainment box during take off held not to result from incident).

30 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 Oct 2012).

31 *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)).

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

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

34 *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 Mar 2004).

35 *Doe v. Etihad Airways, PJSC*, footnote 25, above.

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

37 See *Knowlton v. American Airlines Inc*, No. RDB-06-854, 2007 WL 273794 (D. Md. 31 Jan 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).

38 See *Khan v. Delta Airlines Inc*, No. 10. Civ. 2080 (BMC), 2010 WL 3210717 (E.D.N.Y. 12 Aug 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).

39 *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, rather than the legislature, define what claims are actionable.⁴⁰ 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.⁴¹ 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.⁴²

In some instances, federal law will pre-empt state law, such that state law has no force.⁴³ 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'.⁴⁴ In *Abdullah v. American Airlines Inc*, plaintiffs brought state tort claims against the airline after suffering injuries from severe turbulence.⁴⁵ 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'.⁴⁶

In addition, an act of Congress known as the Airline Deregulation Act (ADA) expressly pre-empted state law relating to 'a price, route or service of an air carrier that may provide air transportation'.⁴⁷ Before the ADA, many commercial aspects of aviation were regulated, including entry into the market, routes and fares.⁴⁸ 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'.⁴⁹

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

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

42 See, for example, Cal. Civ. Code Section 2100 (West, Westlaw through 2018 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.').

43 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".').

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

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

46 *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. AVCO Corp.*, 268 F. Supp. 3d 660, 709 (M.D. Pa. 2017) (state tort law held to be conflict pre-empted where engine manufacturer could not simultaneously comply with state tort duty and federal regulation).

47 49 U.S.C.A. Section 41713(b) (West, Westlaw through P.L. 115-140).

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

49 *Id.* at 378 (majority opinion); 49 U.S.C. Sections 40101(a)(6), (12) (West, Westlaw through P.L. 115-140); 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 also governed exclusively by federal law.⁵⁰ In the aviation context, federal admiralty law will govern where the claimed tort bears 'a significant relationship to traditional maritime activity'.⁵¹ 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.⁵² For non-commercial aircraft, DOHSA applies if the accident occurs beyond three nautical miles from the US shore.⁵³ Claims for pre-impact pain and suffering and punitive damages are unavailable under DOHSA.⁵⁴

Apart from pre-emption, 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);⁵⁵ 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.⁵⁶

iii General aviation regulation

As noted, the FAA promulgates administrative regulations (FARs), which govern most aspects of aviation.⁵⁷ 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'.⁵⁸ 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

50 28 U.S.C.A. Section 1333 (West, Westlaw through P.L. 115-140).

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

52 46 U.S.C.A. Section 30307 (West, Westlaw through P.L. 115-140).

53 46 U.S.C.A. Section 30302 (West, Westlaw through P.L. 115-140) (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).

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

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

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

57 *Sikkelee v. AVCO Corp.*, footnote 46, above at p. 666 ('FAA's regulations are highly particularized, govern nearly every aspect of the regulated field, and are born from the twin aims of ensuring the safety of consumers and protecting the public.').

58 Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (codified as amended at 49 U.S.C.A. Section 40101) (West, Westlaw through P.L. 115-140).

efficiency of the National Airspace System'.⁵⁹ The FAA also develops the nation's airports and navigation systems, implements new technologies such as 'NextGen' and maintains the aircraft ownership registry.⁶⁰

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.⁶¹ 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.⁶² Notice of limitations relating to baggage liability must be conspicuous,⁶³ and failure to provide notice may be considered unfair and deceptive practice.⁶⁴

Overbooking regulations apply to flights with 30 or more seats on domestic or non-stop foreign flights originating in the United States.⁶⁵ Compensation for passengers involuntarily denied boarding depends on the alternate transportation that the carrier offers,⁶⁶ 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.⁶⁷ 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.⁶⁸ 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.⁶⁹ Airlines that fail to comply with tarmac delay rules are subject to civil penalties of up to US\$32,140 for each violation.⁷⁰

59 49 C.F.R. Section 1.82(a) (West 2018). 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. Section 706 (West, Westlaw through P.L. 115-140); *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).

60 Id.

61 14 C.F.R. Section 254.4 (West 2018).

62 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'.

63 Id. at Section 254.5.

64 Id. at Section 399.85.

65 Id. at Section 250.2.

66 Id. at Section 250.5.

67 Id. at Section 259.2.

68 Id. at Section 259.4.

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

70 See 14 C.F.R. Section 259.4(f) (citing 49 U.S.C.A. Section 41712 (West, Westlaw through P.L. 115-140)); 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 board,

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.⁷¹

The Air Carrier Access Act (ACAA) prohibits discrimination against handicapped individuals by an air carrier in the United States.⁷² Handicapped individuals are those with a physical or mental impairment that substantially limits one or more major life activities.⁷³ Courts are split as to whether the ACAA creates a private right of action.⁷⁴ Among the courts that recognise a private right of action, there is a further split on the availability of emotional distress and punitive damages.

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.⁷⁵ Thus, an EIS is necessary for any airport expansion or major change in flight routes. Some states have similar requirements.⁷⁶

The FAA ensures that the aerospace industry complies with NEPA.⁷⁷ Litigation over FAA NEPA compliance is extensive. By 2003 there had been approximately 100 NEPA cases involving airport expansion.⁷⁸ The FAA also requires NEPA compliance for commercial space transportation.⁷⁹

Pursuant to the Clean Air Act of 1970, the Environmental Protection Agency (EPA) regulates air pollution from aircraft.⁸⁰ In setting aircraft engine emission standards, the EPA consults with the FAA, and largely follows ICAO standards.⁸¹

and accordingly has imposed fines on that basis. American Airlines, Inc., Dkt. OST 2016-0002 (14 Dec 2016), available at 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).

71 14 C.F.R. Section 259.8(a) (West 2018).

72 49 U.S.C.A. Section 41705(a) (West, Westlaw through P.L. 115-140).

73 Id.

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

75 42 U.S.C.A. Section 4332(c) (West, Westlaw through P.L. 115-140).

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).

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

79 14 C.F.R. Section 431.91 (West 2018).

80 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.

81 *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. 115-140). 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

US anti-corruption law

US law criminalises bribery to influence any official government act.⁸² 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.⁸³ Violations of US bribery law are punishable by up to 15 years in prison.⁸⁴ 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.⁸⁵ 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.⁸⁶ The largest FCPA penalty ever imposed was in 2008 for US\$450 million against Siemens, a US exchange-listed foreign corporation.⁸⁷

The FCPA includes international anti-corruption commitments relating to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.⁸⁸ The United States is also a party to the Inter-American Convention Against Corruption.⁸⁹

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.⁹⁰ Applicants must show proof of ownership.

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 May 2018).

82 18 U.S.C.A. Section 201(b) (West, Westlaw through P.L. 115-140).

83 *Id.* at Section 201(c).

84 *Id.* at Section 201.

85 15 U.S.C.A. Sections 78m(b), 78dd-1, 78dd-2, 78dd-3 (West, Westlaw through P.L. 115-140).

86 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 (28 Jan 1995).

87 Press Release, SEC, SEC Charges Siemens AG for Engaging in Worldwide Bribery (15 Dec 2008), available at www.sec.gov/news/press/2008/2008-294.htm.

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

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

90 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.⁹¹ 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.⁹² 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 meet airworthiness and related requirements.⁹³ The FAA also certifies aircraft components by issuing technical standard orders, and approves design modifications and replacements by issuing parts manufacture approval.⁹⁴ 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.

91 Id. at Section 21.1(b)(1).

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

93 14 C.F.R. Section 21.21 (West 2018). Design certification is confirmed by a type certificate that includes the design type, operating limitations, a certificate data sheet and any applicable conditions. Id. Section 21.41.

94 14 C.F.R. Section 21.8 (West 2018).

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.⁹⁵ 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.⁹⁶

The FAA is also authorised to issue commercial space transportation licences for launch or re-entry vehicles.⁹⁷

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.⁹⁸

Foreign carriers

Foreign carriers⁹⁹ 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.

The DOT's Foreign Air Carrier Licensing Division reviews foreign air carrier applications, which must be filed in the public docket.¹⁰⁰ 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

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

96 14 C.F.R. pt. 139.

97 Id. at Sections 413.3, 413.19 (2016).

98 Id. at Section 204.2(c).

99 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. 115-140). '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).

100 14 C.F.R. Sections 211.1, 302.3 (West 2018).

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.¹⁰¹

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.¹⁰² Additionally, a shortened process exists for Canadian charter air taxi operators.¹⁰³

FAA safety authority for foreign airlines is referred to as 'operation specifications'.¹⁰⁴ 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 2008,¹⁰⁵ and the United States has not suffered a fatal large commercial aviation accident since February 2009.¹⁰⁶ 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.¹⁰⁷

101 49 U.S.C.A. Section 41313 (West, Westlaw through P.L. 115-140); 14 C.F.R. Sections 313.5(a), 243.7 (West 2018).

102 49 U.S.C.A. Section 40109 (West, Westlaw through P.L. 115-140); 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 (last visited 17 May 2018).

103 14 C.F.R. Section 294.1 (West 2018).

104 Id. at Section 129.5.

105 Fact Sheet – Commercial Aviation Safety Team, Fed. Aviation Admin., www.faa.gov/news/fact_sheets/news_story.cfm?newsId=18178 (last visited 17 May 2018).

106 2011–2012 Most Wanted List Page – General Aviation Safety, Nat'l Transp. Safety Board, www.ntsb.gov/safety/mwl/Pages/mwl-2.aspx (last visited 17 May 2018).

107 Fact Sheet – General Aviation Safety, Fed. Aviation Admin. (high altitude air traffic control system completed in March 2015; by 1 Jan 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 (last visited 17 May 2018).

FAA regulations and airworthiness requirements also promote safety, and cover a wide range of topics from maintenance to aircraft design to pilot training.¹⁰⁸

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.¹⁰⁹ 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 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.¹¹⁰ 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

108 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. Part 135 provides operation requirements for commuter and on-demand operations. 14 C.F.R. pt. 135. 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.

109 14 C.F.R. pt. 13.

110 14 C.F.R. pt. 205.

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.¹¹¹

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’.¹¹²

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 1914.¹¹³ 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 Commission¹¹⁴ 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 US\$100 million, and for an individual up to US\$10 million and 10 years in prison.¹¹⁵

Regulation of airline mergers is based on a rationale of competition for the benefit of the consumer.¹¹⁶ 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

111 14 C.F.R. pt. 198.

112 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 (last visited 17 May 2018).

113 *Guide to the Antitrust Laws, F.T.C.*, www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited 17 May 2018).

114 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).

115 See FTC *Guide to the Antitrust Laws*, footnote 113 above.

116 J Bruce McDonald, *Antitrust for Airlines*, U.S. Dep’t of Justice (3 November 2005), available at www.justice.gov/atr/file/517896/download (last visited 17 May 2018).

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.¹¹⁷ 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.¹¹⁸

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.¹¹⁹ 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.¹²⁰ 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 companionship.¹²¹ 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.¹²² Other variations include whether recovery is permitted for pain and suffering, and for punitive damages.¹²³ Levels of compensation payable for wrongful death consequently vary based on the jurisdiction where the claim is filed.

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

118 See Charles N W Schlangen, *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 (last visited 17 May 2018).

119 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. 115-140); Death on the High Seas Act, footnote 52, above; Montreal Convention, footnote 20, above.

120 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 2018 legislation) (allowing wrongful death claim by certain enumerated survivors); Id. Section 377.30 (allowing survival claim by decedent's personal representative or successor in interest).

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

122 Id.; see also, for example, Ga. Code Ann. Section 51-4-1 (West, Westlaw through 2018 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).

123 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

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.¹²⁴

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*).¹²⁵

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.¹²⁶ 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 an event other than the injury-causing event.¹²⁷ 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.¹²⁸ Several states have their own statutes of repose, some with more stringent time limits.¹²⁹

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- 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 2018 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.).
- 124 28 U.S.C.A. Section 2680(a) (West, Westlaw through P.L. 115-140); *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). This is commonly referred to as the 'government contractor defence'.
- 125 Fed. R. Civ. P. 12; *Piper Aircraft Co v. Reyno*, 454 U.S. 235, 241 (1981).
- 126 28 U.S.C.A. Section 1391 (West, Westlaw through P.L. 115-140) (federal venue statute).
- 127 '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*, No. 16-373, 2017 WL 2722415, at *6-7 (U.S. 26 June 2017).
- 128 See footnote 138 et seq., below.
- 129 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).

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.¹³⁰

Each litigant normally has the right to a trial by jury.¹³¹ 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.¹³²

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.¹³³ In making a claim under the ACAA, no proof of intent to discriminate is required so long as there is proof of a violation.¹³⁴

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

130 Fed. R. Civ. P. 56.

131 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. Section 1441(d), footnote 10, above.

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

133 49 U.S.C.A. Section 41705 (West, Westlaw through P.L. 115-140); 14 C.F.R. pt. 382 (DOT regulations).

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

regulations.¹³⁵ 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'.¹³⁶

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,¹³⁷ 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.¹³⁸ Damages in claims under the Montreal Convention are also limited.¹³⁹

iii Product liability

Civil actions against product manufacturers and sellers are generally based on the theory of strict liability, in addition to negligence.¹⁴⁰ 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,

135 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. AVCO Corp.*, 268 F. Supp. 3d 660, 709 (M.D. Pa. 2017) (state tort law held to be conflict pre-empted where engine manufacturer could not simultaneously comply with state tort duty and federal regulation).

136 49 U.S.C.A. Section 41713(b) (West, Westlaw through P.L. 115-24); see *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992).

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

138 14 C.F.R. Section 254.4 (West 2018).

139 See Montreal Convention, footnote 20, *supra*.

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

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.¹⁴¹

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.¹⁴² GARA sought to rejuvenate the general aviation market by limiting long-term liability exposure. GARA applies only to accidents involving ‘general aviation aircraft’.¹⁴³ ‘Aircraft’ is broadly defined under GARA¹⁴⁴ 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.¹⁴⁵ Aircraft flight manuals that are continuously revised may reset the repose period if the plaintiff alleges that those revisions caused the accident.¹⁴⁶

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.¹⁴⁷

141 *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).

142 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. 115-140)) (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).

143 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).

144 49 U.S.C.A. Section 40102(a)(6) (West, Westlaw through P.L. 115-140).

145 GARA Section 2(a)(2).

146 *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).

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

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.¹⁴⁸

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.¹⁴⁹

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.¹⁵⁰ 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.¹⁵¹ 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.¹⁵²

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 2013.¹⁵³ 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

148 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).

149 42 U.S.C.A. Section 1395y(b)(2)(B)(ii) (West, Westlaw through P.L. 115-140).

150 49 U.S.C.A. Sections 41113 (US carriers), 41313 (foreign carries) (West, Westlaw through P.L. 115-140); see also id. Section 1136 (NTSB responsibilities) (West, Westlaw through P.L. 115-140).

151 Id., at Sections 41113(b)(1)-(3), 41313(c)(1)-(3).

152 Id., at Sections 41113(b)(5)-(8), (10)-(12), 41313(c)(5)-(8), (10)-(12).

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

taking two days to send an adequate number of trained staff to San Francisco.¹⁵⁴ 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 3.30 am 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.¹⁵⁵

IX 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.¹⁵⁶ 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.¹⁵⁷ The FAA is precluded by regulation from using reports in any enforcement action, except reports of accidents or criminal activity.¹⁵⁸ 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.¹⁵⁹ The database containing reports is publicly available.

X THE YEAR IN REVIEW

A federal appellate court permitted an international flight passenger who was pricked by a hypodermic needle hidden in a seatback pocket to recover mental anguish damages based on fear of contracting a contagious disease.¹⁶⁰ The court declined to follow prior cases decided under the Warsaw Convention, and held that such damages are recoverable under the Montreal Convention provided that they are ‘traceable to the accident’ and regardless of whether they are caused directly by the bodily injury.¹⁶¹

Another products liability pre-emption ruling was issued in the long-running *Sikkelee* litigation, which had already generated two prior pre-emption rulings. A district court

154 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 (last visited 21 May 2018).

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

156 FAA Advisory Circular 00-46E (Dec. 16, 2011), available at 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 (last visited 21 May 2018).

157 Confidentiality and Incentives to Report, Aviation Safety Reporting System, available at <http://asr.arc.nasa.gov/overview/confidentiality.html> (last visited 21 May 2018).

158 14 C.F.R. Section 91.25 (West 2018).

159 FAA Advisory Circular 00-46E (Dec. 16, 2011); See *Nehez 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).

160 *Doe v. Etihad Airways*, PJSJC, footnote 25, above.

161 Id., at p. 433.

previously held that state-law products liability claims were subject to categorical ‘field pre-emption’, which was reversed on appeal in a decision that limited the application of field pre-emption in the state products liability context.¹⁶² The more recent district court ruling on remand held that the specific product liability claims in question were subject to ‘conflict pre-emption’ based on inconsistent federal regulations.¹⁶³ The ruling has been appealed.

New legislation was enacted restoring FAA regulations relating to registration and marking requirements for small unmanned aircraft.¹⁶⁴ The new law is in response to a 2017 appellate court decision that held that the FAA regulations were unlawful as applied to model aircraft operated for recreational purposes – this decision was based on a 2012 statute that precluded the FAA from regulating model aircraft.¹⁶⁵ The new statute restores the regulations to effect as of the date of its enactment.

A district court in Massachusetts held that a city ordinance regulating unmanned aircraft for purposes of protecting privacy interests was pre-empted.¹⁶⁶ The challenged ordinance required all unmanned aircraft to be registered, and precluded operation without the city’s or impacted landowner’s permission. The district court struck down the ordinance based on conflicts with FAA regulations.

An airline passenger rights group petitioned the FAA to issue rules governing minimum seat size and spacing on commercial airlines, based on safety concerns relating to emergency egress. The petitioner sought judicial review of the FAA’s refusal to issue rules. The court found the FAA’s explanation legally inadequate and ordered it to conduct a meaningful review of the petition and to address the safety concerns raised.¹⁶⁷ The FAA’s response is expected in 2018.

In response to President Trump’s regulatory reform orders, the DOT announced that its regulations were under review and that public comments were invited on ‘good candidates for repeal, replacement, suspension, or modification’.¹⁶⁸

162 *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680 (3d Cir. 2016), cert. denied, 137 S.Ct. 495 (2016).

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

164 National Defense Authorization Act, 2018 Section 1092(d), PL 115-91, December 12, 2017, 131 Stat 1283.

165 *Taylor v. Huerta*, 856 F.3d 1089, 1092 (D.C. Cir 2017).

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

167 *Flyers Rights Educ. Fund, Inc. v. Fed Aviation Admin.*, 864 F.3d 738 (D.C. Cir. 2017).

168 Notification of Regulatory Review, 82 Fed. Reg. 45750-01 (2017). Executive orders issued by President Trump require elimination of two prior regulations for any new regulation, establishment of a Regulatory Reform Task Force by each agency, and review of regulations that burden domestic energy production. Exec. Order No. 13,771, Reducing Regulation and Controlling Regulatory Costs, 82 Fed. Reg. 9339, 2017 WL 446312 (2017); Exec. Order No. 13,777, 82 Fed. Reg. 12285, 2017 WL 770108 (2017); Exec. Order No. 13,783, 82 Fed. Reg. 16093, 2017 WL 1176680 (2017).

XI OUTLOOK

Plaintiffs asserting claims under the Montreal Convention can be expected to include emotional distress damages with more frequency as a result of the recent decision in *Doe v. Etihad Airways, PJSC*, which permits recovery for emotional distress that is ‘traceable’ to an accident.¹⁶⁹ The US Supreme Court declined to review the recent decision, and it is anticipated that other courts will likely follow the new decision.¹⁷⁰

Federal pre-emption of state product liability laws may occur with greater effect based on the recent district court ruling in *Sikkelee v. AVCO Corp*, which held that an engine manufacturer was not subject to state tort standards of care because the claim conflicts with FAA regulations.¹⁷¹ An appeal of the ruling is pending.

Federal pre-emption will also factor in the regulation of unmanned aircraft. Increased use of unmanned aircraft has raised jurisdictional questions over whether the activity can be regulated at the local level (e.g., by city ordinances concerned with privacy and property rights) and also by federal regulations traditionally concerned with safety and airspace. The recent district 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.¹⁷² A separate, pending challenge to the FAA regulation of unmanned aircraft operation argues that the regulations are invalid for failing to address privacy issues.¹⁷³

New regulations and laws relating to unmanned aircraft are inevitable. The DOT and FAA instituted an Unmanned Aircraft System Integration Pilot Program with the goal of enabling new rules that would expand the current unmanned aircraft regulations, which took effect in August 2016.¹⁷⁴ The agencies also anticipate more complex low-altitude operations under the programme. New laws that would make unsafe drone operation unlawful and subject to monetary fines and imprisonment have been proposed in the US Congress.¹⁷⁵

169 *Doe v. Etihad Airways, PJSC*, footnote 25, above.

170 *Etihad Airways PJSC v. Doe*, 138 S. Ct. 1548 (2018).

171 *Sikkelee v. AVCO Corp.*, footnote 163, above.

172 *Singer v. City of Newton*, footnote 166, above.

173 Amended Brief for Petitioner, *Elec. Privacy Info. Ctr. v. Fed. Aviation Admin.*, 2017 WL 840362 (D.C. Cir. Mar. 2, 2017).

174 Press Release – U.S. Transportation Secretary Elaine L. Chao Announces Unmanned Aircraft Systems Integration Pilot Program Selectees, Fed. Aviation Admin. (9 May 2018), available at https://www.faa.gov/uas/programs_partnerships/uas_integration_pilot_program/ (as of 17 May 2018); current regulations are at 14 C.F.R. part 107 (2018).

175 Drone Operator Safety Act of 2017, S. 1755, 115th Cong. (2017).

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