Schnader Aviation Group

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Eleventh Circuit Upholds Defense Contractor Dismissal while Questioning DOHSA Precedent

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In the appeal of a Florida federal district court's granting of summary judgment to a Department of Defense maintenance contractor arising from a fatal crash of an Air Force F-16 from Tyndall Air Force Base, Florida into the Gulf of Mexico, an 11th Circuit panel affirmed and unanimously held that: (1) the Death on the High Seas Act ("DOHSA") governed the wrongful death action; (2) DOHSA provided the exclusive remedy and preempted all state law claims; and (3) the civilian maintenance contractor, PAE Worldwide Incorporated ("PAE"), was entitled to the protection of the government contractor defense related to maintenance performed at Tyndall Air Force Base.

However, two panel members wrote a separate concurring opinion to explain that while they "agree that we must follow existing precedent to hold that DOHSA applies to (and thereby supplies the exclusive wrongful-death remedy for) any claim arising out of a death occurring on the high seas—even where, as here, the negligence alleged to have caused the death occurred on land—I do so holding my nose, as DOHSA's plain language is squarely to the contrary."

DOHSA's applicable provision (46 U.S.C. Sect. 30302) states, in relevant part, that "[w]hen the death of an individual is caused by **a wrongful act, neglect, or default occurring on the high seas** . . . the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible." (emphasis added). The 11th Circuit found that despite the appellant's plain text argument that DOHSA should apply only for negligence occurring on the high seas, it was bound by well-settled U.S.

Supreme Court precedent and 11th Circuit precedent (while also noting the existence of "mounds" of non-binding precedent) that construed DOHSA to confer admiralty jurisdiction over claims "arising out of airplane crashes on the high seas though the negligence alleged to have caused the crash occurred on land."

In granting PAE's motion for partial summary judgment related to recoverable damages, the district court had held that DOHSA "provides the exclusive remedy for death on the high seas, preempts all other forms of wrongful death claims, and only permits recovery for pecuniary damages." As the 11th Circuit observed, "DOHSA's applicability matters, among other reasons, because it limits a plaintiff's recovery to 'compensation for the pecuniary loss sustained by the individuals for whose benefit the action is brought' and thereby forecloses recovery for emotional injury and punitive damages." The trial court also held that because the state law claims were preempted under DOHSA, the plaintiff was not entitled to a jury trial.

Having concluded that DOHSA supplied the exclusive remedy for appellant's damages claims, the 11th Circuit also affirmed the trial court's grant of summary judgment on liability, holding that the claims against PAE were barred by the government contractor defense's extension of sovereign immunity. For a civilian contractor who provides maintenance services under a government procurement contract, the applicable test in the 11th Circuit has three elements: "(1) the United States approved reasonably precise maintenance procedures; (2) [the contractor's] performance of the maintenance conformed to those procedures; and (3) [the contractor] warned the United States about the dangers in reliance on the procedures that were known to [the contractor] but not to the United States." The parties did not dispute that the first and third elements of the test were satisfied in this case, so the only dispute was over the second element—whether the maintenance conformed to the Air Force's reasonably precise maintenance procedures. The Court concluded that based on the evidence presented by the parties, PAE's performance did not violate reasonably precise government maintenance procedures.

Bottom line: the law is well settled that DOHSA applies to all cases—including aviation-related cases—in which a death occurs on the high seas. ***LaCourse v PAE Worldwide Inc.,* No. 19-13833, 2020 U.S. App. LEXIS 36021 (11th Cir. Nov. 17, 2020).**

Eleventh Circuit Affirms Summary Judgment Dismissal of Claims by Unruly, Disabled Passenger

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In August of 2016, Michael Mennella arrived at Miami International Airport to travel to Las Vegas, Nevada on an American Airlines flight. Mennella, a double amputee, waited curbside for 15-20 minutes for a wheelchair attendant, and when one arrived, she allegedly spoke such poor English that he could not use her. He walked to the ticket counter using his prosthetic legs, where he waited for nearly an hour after asking for a new wheelchair attendant. Fearing that he would miss his flight, he began walking to the gate.

Mennella ultimately was able to board the aircraft, but was noticeably agitated and began asking for a drink. After initially asking the flight attendant serving his area without success, he walked to the back of the plane and began demanding one from the rest of the flight crew. He allegedly was belligerent to the flight crew, spitting as he spoke with a loud voice, and appeared to be intoxicated already. Upon hearing of Mennella's conduct, the Captain mandated that he not be served alcohol because he was in an agitated state. Concerned with advising Mennella of this, the flight attendant involved one of two law enforcement officers on board the aircraft, though this did not deter Mennella's requests. Mennella went so far as to state that it would create a medical emergency if he did not have alcohol, but apparently refused to let a nurse on board help him.

Ultimately, the flight had to be diverted to Dallas due to Mennella's conduct, and he was removed by waiting officers upon arrival. Mennella went willingly, and the officers quickly determined that Mennella was not intoxicated. Mennella eventually traveled to Las Vegas on a different flight.

Mennella commenced litigation in Florida state court asserting claims for defamation per se, negligence, IIED, and NIED. The action was removed to federal court and Mennella amended the complaint to assert a claim that American Airlines violated Title III of the Americans with Disabilities Act ("ADA"), defamed him by calling him a "drunk," and negligently trained its employees to handle a disabled passenger.

American Airlines filed a motion for summary judgment dismissing the defamation and negligence causes of action, which was granted. On appeal, the Eleventh Circuit first affirmed the dismissal of the defamation claims on the basis that three of the four

Aviation Group News and Notes

- Schnader was named to *U.S. News* "Best Law Firms in America" list for aviation law.
- **Jonathan Stern** moderated a panel discussion "Why is That Excluded?" hosted by the Aviation Insurance Association on September 30.
- **Denny Shupe** presented a webinar on "Planning for Autonomous Aircraft and Products Litigation – an Aviation Trial Lawyer's Perspective," for the General Aviation Manufacturers Association (GAMA) on November 18.
- **David Struwe** co-authored the article "Veterans Day Reflections: How Military Service Benefits Our Work in the Law," published in *The Legal Intelligencer*. The article featured reflections from **Denny Shupe, Leo Murphy, Lee Schmeer, David Struwe,** and other Schnader attorneys and staff who served in the military.
- **Lee Schmeer** was featured in the *Law360* article, "Dogs, Coded Notes, Christmas Trees: Attorneys' Military Memories."
- **Barry Alexander** and **Carl Schaerf** were named to the "New York Super Lawyers" list.

allegedly defamatory statements were not published to any third party (each of which related to flight crew members referring to Mennella as intoxicated), and the fourth (a flight attendant's statement to one of the officers in Dallas that she did not serve Mennella alcohol because she thought he had had enough to drink) was not sufficiently defamatory to constitute defamation per se.

The Eleventh Circuit next affirmed dismissal of the negligence claim on the basis that it was preempted under the Airline Deregulation Act. In so holding, the Court found that Plaintiff's claims that the airline provided untimely wheelchair service and failed to properly accommodate his disability (or train its employees to do so) related to services of American so as to implicate the Airline Deregulation Act. Finding that the claims implicated services, and without further analysis, the Court found that these claims were properly dismissed as preempted.

Handling unruly, and potentially intoxicated passengers, often raises difficult issues for airlines, and there have been well-publicized cases where courts perhaps did not protect airlines' actions as airlines (or their counsel) might have liked (*see, e.g.*, *Eid v. Alaska Airlines*, 621 F.3d 858 (9th Cir. 2010)). Thus, this decision dismissing claims arising out of American Airlines' handling of an obviously unruly passenger should be welcomed, even if the Airline Deregulation Act analysis is not necessarily as robust as one might hope. ***Mennella v. Am. Airlines*, No. 20-11703-E, 2020 U.S. App. LEXIS 24380 (11th Cir. Aug. 11, 2020).**

New York Court Addresses Governmental Confiscation of Aircraft, Insurance Coverage, and Loss

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This insurance coverage case involved a tug-of-war over an aircraft in Brazilian courts. The dispute about ownership involved its owner (CIT Group), the company that leased it (Savon), and the Brazilian government. The question before the New York court in the coverage litigation was whether and when in the course of eleven years the owner suffered a physical loss of the aircraft, and whether that loss was compensable under a war and allied perils coverage provision in the insurance policies it obtained for the aircraft.

CIT Group, owner of a Hawker Beechcraft Premier 1A aircraft, leased its aircraft to Savon, Industria, Comercio, Importacao e Exportancao Ltda., Inc. in 2008 for 60 months for operations in Brazil. At about the same time, the Brazilian Federal Revenue Service ("FRS") began investigating Savon in connection with importation irregularities.

In March 2012, the FRS issued a preliminary order prohibiting Savon from operating the aircraft and ordering that the aircraft was to remain grounded pending the results of its investigation.

CIT Group first found out about the FRS investigation of Savon and the preliminary order about a year later (in April 2013) from a third-party company hired to

maintain the aircraft. CIT Group promptly issued a notice of circumstances to the insurers that issued policies regarding the aircraft, identifying the risk that the Brazilian government might seize the aircraft.

Within a month of CIT Group's notice of circumstances, the FRS issued an administrative confiscation order.

CIT Group learned of the confiscation order a few months later in July 2013. At about that time, the 2008 60-month lease of the aircraft to Savon was expiring. CIT Group entered a new lease of the aircraft to Savon for an additional 30 months—subject to numerous protective provisions and conditions considering the considerable risk that the Brazilian government might seize and dispose of the aircraft—to ensure Savon would have standing to challenge the confiscation order in court.

Savon then challenged the confiscation order in federal court in Brazil. Within a few weeks, the Court granted Savon preliminary injunctive relief barring the FRS from disposing of the aircraft before Savon's federal case was resolved. At about the same time in 2013, CIT Group filed its own lawsuit in federal court in Brazil to prevent the FRS from seizing the aircraft.

In 2014, the court hearing Savon's lawsuit accepted a cash collateral guarantee from Savon, enjoined the FRS from confiscating the aircraft, and released the aircraft to Savon pending the resolution of the lawsuit. However, Savon then stopped making lease payments to CIT Group, which placed Savon in default.

Savon did not cure its default under the 30-month lease, and CIT Group brought action in Brazilian state court to obtain an order of repossession, which the state court granted in August 2014. Within a few weeks, CIT Group representatives went to the hangar where Savon was storing the Aircraft. There, they took possession of the official log books. The CIT Group representatives made arrangements to transport the aircraft to an adjacent hangar, where they stored the aircraft while satisfying administrative requirements to repatriate the aircraft to the United States.

Savon appealed the state court ruling and argued that CIT Group could not obtain possession of the aircraft because the 2013 administrative confiscation order made the aircraft the property of the FRS. The appellate court granted Savon's appeal in part, vacating the lower court's order of repossession pending the outcome of the litigation. Savon got the aircraft back and resumed using it without making payments to CIT Group.

Meanwhile, CIT Group appealed from its federal lawsuit to bar FRS from confiscating the aircraft, which had been unsuccessful. In 2015, the federal appellate court denied CIT Group's appeal. CIT Group then sought to intervene in Savon's federal lawsuit to require Savon to post additional collateral; however, the federal court hearing Savon's lawsuit denied CIT Group's petition.

Savon continued to operate the aircraft without paying CIT Group until it turned the aircraft over to the FRS, which ultimately sold the aircraft at auction in 2019.

CIT Group tendered a claim for the losses resulting from the confiscation to the aircraft's insurers, which denied coverage. CIT Group brought suit in New York state court to obtain coverage.

The insurers raised numerous defenses and argued that they were entitled to summary judgment in their favor for a number of reasons:

1. The evidence established that the FRS restrained and controlled the aircraft as a result of the 2012 preliminary order and its chain of restraint and control continued unbroken until the FRS sold the aircraft at auction in 2019 (claiming that the courts merely granted Savon a temporary and limited right to use the aircraft for the term of the guaranty and that CIT never completed its repossession of the aircraft);
2. CIT could not have suffered a physical loss of the aircraft during the 2014-2015 policy period because by that time the FRS was already the owner of the aircraft;
3. CIT's claim was barred under the "known loss" doctrine and the 2014-2015 Policy's Government of Registry Exclusion; and
4. The 2014-2015 policy should be rescinded because CIT failed to disclose that the aircraft had been confiscated in 2012.

The court rejected all of insurers' arguments, finding that Savon—not the FRS—had possession of the aircraft for the entire period from 2008 until 2019 with the exception of the month it was in CIT Group's possession in 2014. The court ruled that the loss of use of the aircraft following the 2012 FRS preliminary order was not a "physical loss" under the policies but a loss of use. Thus, any actual loss occurred sometime after the 2014-2015 policy period, and only when the FRS finally arrested the aircraft from Savon and sold it. This fact led the court to conclude that CIT Group did not violate the known loss doctrine: CIT Group did not

have knowledge of a loss in the 2014-2015 timeframe because then-pending litigation—both its own and Savon's federal lawsuits—could have resulted in vacation of the confiscation order (*i.e.*, no actual loss). The court explained that knowledge of risk of a loss is not knowledge of a loss for purposes of the "known loss" doctrine.

Similarly, the notice of circumstances CIT Group issued to its insurers in 2013 put the insurers on notice of the potential loss and the 2012 confiscation of the aircraft, the court observed, and the insurers underwrote the 2014-2015 policy anyway despite the risk.

Finally, the court ruled that the Government of Registry coverage exclusion was nullified by a policy Savon procured in the 2014-2015 period that named CIT Group as an additional insured and wrote back coverage for the risk of governmental seizure of the aircraft.

In sum, the case demonstrates that aircraft insurers must be exceptionally careful to gather facts and take notice of all potential elements of risk to an aircraft before underwriting a policy covering the aircraft. Here, the insurers might have narrowed coverage considering the risks of confiscation by taking into account the CIT Group's notice of circumstances and the Savon-obtained policy that wrote coverage back that the Government of Registry Exclusion was designed to exclude. ***CIT Group / Equip. Fin., Inc. v. Starr Surplus Lines Ins. Co.*, 2020 N.Y. Misc. LEXIS 6422, 130 N.Y.S.3d 648 (N.Y. Sup. Ct. Sept. 24, 2020).**

No Personal Jurisdiction over Garmin in Obstacle Crash Suit

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The Western District of Louisiana held that it did not have personal jurisdiction over Garmin International, Inc. in a matter arising from a fatal plane crash that occurred when an aircraft originating in Texas collided with a 1,800-foot tower in Louisiana.

In August 2018, Marcus Todd Samson piloted a Piper PA-28R into a radio tower, killing himself and his daughter, and destroying the radio tower. Plaintiff Agape Broadcasters, Inc. owned the radio tower. The aircraft was equipped with a Garmin GPS unit. The plaintiff alleged that the Garmin GPS unit had an obstacle avoidance function designed to alert the pilot of potential obstacles in the aircraft's path, but malfunctioned and failed to alert the pilot of the tower, violating the Louisiana Product Liability Act. Garmin moved to dismiss for lack of personal jurisdiction.

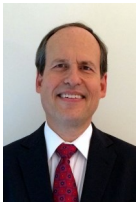
First, the Court held that it did not have general jurisdiction over Garmin, a Kansas corporation with its principle place of business in Kansas.

Next, the Court considered the Fifth Circuit's three-part test for analyzing specific jurisdiction: (1) whether the defendant has minimum contacts with the forum state; (2) whether the plaintiff's claims arise out of forum-related contacts; and, (3) whether exercise of personal jurisdiction is fair and reasonable. The focus of the Court was on the second prong: whether Garmin's suit-related conduct created a substantial connection with Louisiana.

Garmin argued that the "suit-related conduct" was its sale of the GPS unit at issue and its installation in the accident aircraft—neither of which was alleged to have occurred in Louisiana. Rather, the aircraft was based in Texas and flew Garmin's product into Louisiana—an insufficient contact to create jurisdiction over Garmin.

The plaintiff argued that the Court had personal jurisdiction over Garmin under what it called a stream of commerce theory. Specifically, the plaintiff argued that because Garmin acknowledged that it sold the model of GPS unit at issue in 49 states, including Louisiana, and Garmin therefore expected that that the GPS unit involved in the accident could be purchased and used in Louisiana, the Court had personal jurisdiction over Garmin.

The Court disagreed. The Court explained that, under Fifth Circuit precedent, for the stream of commerce theory to work, the product must still be in the stream of commerce when it reaches the forum state. But here the product was purchased and installed out of state, and was flown into Louisiana. Therefore, the Court held that Agape had not demonstrated that the accident at issue arose out of Garmin's contacts with Louisiana. On that basis, the Court granted Garmin's motion to dismiss for lack of personal jurisdiction. ***Agape Broadcasters, Inc. v. Matix,* Case No. 6:19-CV-01099, 2020 U.S. Dist. LEXIS 180068 (W.D. La. Sept. 28, 2020).**



It Takes Two to Tango: Dismissal at Pleading Stage Premature Where Concurrent Duties of Air Traffic Control may Create Liability on ATC Provider in Airplane Crash

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Grant Aviation, Inc. v. Serco Inc., No. 3:20-CV-00043-JWS (D. Alaska Sep. 11, 2020), arose out of a non-fatal stall accident of a Cessna Caravan during a go-around at Bethel, Alaska. The Caravan was approaching for landing on Runway 12 while other aircraft were using Runways 1L and 1R. The pilot of the Caravan responded to an ATC instruction to "turn left immediately," upon which the airplane began a left turn, stalled, and impacted terrain. All six occupants escaped before the airplane was destroyed in a post-crash fire. Bethel was a contract tower with service provided by Serco under contract with the Federal Aviation Administration.

Figure 1. The accident aircraft during better times.

Grant Aviation, which owned and operated the passenger-carrying flight, alleged negligence by Serco's air traffic controller. Grant claimed that the controller failed to maintain separation between the Caravan and another aircraft simultaneously landing on another runway, which necessitated an urgent instruction to turn left because of the proximity of the other aircraft when the Caravan initiated a go around.

Serco moved to dismiss the Complaint for failure to state a claim on which relief can be granted. Serco argued the pilot had ultimate responsibility for operating the airplane. Grant Aviation responded that its pilot also had a duty to comply with ATC instructions. Applying the *Twombly*/*Iqbal* plausibility standard for evaluating the Complaint, the Court found Serco's position to lack adequate support.

Figure 2. The Caravan was attempting landing on Runway 12 while other aircraft were using Runways 1L and 1R.

The Court read the law to create concurrent standards of care for pilots and air traffic controllers: "While a pilot may be directly responsible for the aircraft's operation, a pilot's negligent performance of that duty does not necessarily relieve air traffic control of its own responsibilities." The Court decided that the liability questions in the case could not be resolved at the pleading stage because the finder of fact would have to "consider what the pilot should have known and done in light of all the circumstances …." The case continues, and the NTSB has not yet closed its investigation. ***Grant Aviation, Inc. v. Serco Inc.*, No. 3:20-CV-00043-JWS, 2020 U.S. Dist. LEXIS 166382 (D. Alaska Sep. 11, 2020).**

An Airline that Registered to do Business in Pennsylvania Is Subject to General Personal Jurisdiction in Pennsylvania, Says Federal Judge

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According to Pennsylvania statute, out-of-state corporations that register to do business in Pennsylvania (which they must do if they wish to conduct business in the Commonwealth) consent to general personal jurisdiction in Pennsylvania. Relying on this statute and appellate authority applying it, the Honorable Berle M. Schiller of the United States District Court for the Eastern District of Pennsylvania

recently held that the Court could exercise general personal jurisdiction over a foreign airline in a case in which a passenger alleged that she was injured on a flight that had no connection to Pennsylvania.

In *Diab v. British Airways, PLC*, the plaintiff was a passenger on a British Airways flight from New York to London. The plaintiff suffered injuries when the flight encountered "severe and extreme turbulence." The plaintiff brought a Montreal Convention claim against British Airways in federal court in Philadelphia, and the airline moved to dismiss for lack of personal jurisdiction.

Joining a number of other district courts that have reached the same conclusion, Judge Schiller first held that although Article 33 of the Montreal Convention provides courts with subject matter jurisdiction over claims arising under the Convention, it does not provide courts with personal jurisdiction over carriers. A passenger who pleads an otherwise viable claim under the Convention still must establish, under the law of the state in which the passenger filed suit, that the court may exercise personal jurisdiction over the airline.

Turning to state law, Judge Schiller explained that pursuant to Pennsylvania statute (42 Pa. C.S. § 5301 (a)(2)(ii)), out-of-state corporations that register to do business in Pennsylvania consent to general personal jurisdiction in Pennsylvania. The Judge also observed that, in the 1991 case *Bane v. Netlink, Inc*., the United States Court of Appeals for the Third Circuit applied the statute to conclude that an out-of-state corporation that had registered to do business in Pennsylvania was subject to general personal jurisdiction in the Commonwealth. Because British Airways had registered to do business in Pennsylvania, Judge Schiller concluded that the Court could exercise general personal jurisdiction over the airline.

Judge Schiller acknowledged that district courts in Pennsylvania disagree as to whether the United States Supreme Court's 2014 decision in *Daimler AG v. Bauman* has rendered the consent-by-registration statute unenforceable and has impliedly overruled *Bane*. The *Daimler* Court held that, except in "exceptional circumstances," a corporation only is subject to general personal jurisdiction in the state in which it is incorporated or the state in which its principal place of business is located. Several district courts in Pennsylvania have held that, in light of *Daimler*, Pennsylvania's consent-by-registration statute is unconstitutional and *Bane* is no longer good law. Other courts, however, have held that *Daimler* is irrelevant on the issue of consent by registration because it did not address the question. Concluding that "*Daimler* did not address the constitutionality of Pennsylvania's statutory scheme," Judge Schiller elected to "join the numerous courts that continue to follow *Bane* despite the decision in *Daimler*."

Until the Third Circuit or the Pennsylvania Supreme Court address the constitutionality of Pennsylvania's consent-by-registration statute in the wake of *Daimler*, the split in authority among district courts likely will continue to expand. Resolution of the split may be on the horizon, however, as a case directly addressing the issue currently is before the Pennsylvania Supreme Court (*Mallory v. Norfolk Southern Railway,* 2020 Pa. Super. Unpub. LEXIS 3425 (Pa. Super. Ct. Oct. 30, 2020)). ***Diab v. British Airways, PLC*, No. 20-3744, 2020 U.S. Dist. LEXIS 218765 (E.D. Pa. Nov. 23, 2020).**

Eastern District of New York Dismisses Airline Passenger's Claims for Emotional and Psychological Injuries Allegedly Caused by Removal From Flight

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The U.S. District Court for the Eastern District of New York recently dismissed claims against JetBlue Airways for emotional and psychological injuries a passenger allegedly sustained as a result of mistreatment by airline personnel while awaiting takeoff on his flight from Barbados to New York.

According to his complaint, the plaintiff questioned a JetBlue employee why a family of four, who caused a delay in takeoff while rearranging their seats, were "rewarded with an upgrade of seats" at the front of the plane. After the employee responded by saying it was "none of [his] business," another employee offered him a seat upgrade "as consolation for his colleague's unprofessional response." The first employee, however, would not permit the plaintiff to change seats and instructed him to return to his original seat. Plaintiff complied, but upon return to his original seat, he and the first employee engaged in a verbal exchange that resulted in Plaintiff being "ordered to deplane and [] escorted to the Immigration office, where he was held in custody and questioned until being released."

After Plaintiff brought a lawsuit against JetBlue for violations of the Federal Aviation Act of 1958 ("FAA"),

common law breach of contract, false imprisonment, intentional infliction of emotional distress, assault, and battery, JetBlue moved to dismiss the complaint for failure to state a claim upon which relief can be granted. The Court granted JetBlue's motion in part and denied it in part.

The Court first dismissed Plaintiff's claim under the FAA, noting that there is no such private right of action. The Court further held that the plaintiff's remaining state law claims were preempted by the Montreal Convention because his alleged injuries occurred "on board the aircraft or in the course of any of the operations of embarking or disembarking." Specifically, with respect to Plaintiff's claims for false imprisonment, the Court found that because he was removed from the flight and brought to the Immigration office by police, not JetBlue personnel, the entirety of JetBlue's conduct "took place on board the aircraft or in the course of … the operations of embarking."

The Court also dismissed Plaintiff's claims for emotional injuries "because 'mental injuries are recoverable under Article 17 [of the Montreal Convention] only to the extent that they have been caused by bodily injuries,'" which were not alleged by Plaintiff.

Finally, the Court concluded that Plaintiff could not proceed under a non-performance theory of breach of contract for "failing to provide [him with] the service and use of transport" on the flight from which he was removed because "his ticket was rebooked on the next available flight at no additional cost to him." The Court determined, however, that Plaintiff sufficiently pleaded facts to support a claim for damages resulting from the delay, but clarified that Plaintiff's alleged economic loss from the delay would be the sole relief available to him under this claim if he prevailed. ***Lynda v. JetBlue Airways Corporation*, 20-cv -47 (BMC), 2020 U.S. Dist. LEXIS 102575 (E.D.N.Y. June 11, 2020).**

Texas Court Declines to Exercise Specific Personal Jurisdiction over In-State Product Line Successor in *Burton v. Honeywell International, Inc.*

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A Texas appellate court held that a product line successor's in-state presence was insufficient for specific personal jurisdiction where the product at issue was designed and manufactured by its Canadian affiliate and the successor's in-state presence did not relate sufficiently to the allegedly failed product. *Burton v. Honeywell International Inc.*, 2020 Tex. App. LEXIS 8600 (Tex. App. Oct. 30, 2020). The case arises out of the 2017 crash of a twin engine Piper aircraft in Texas that killed the Texas pilot and his Texas passenger. Plaintiffs alleged that the crash was caused by a defectively designed and manufactured DPF2 fuel control unit (FCU).

The FCU in the accident aircraft was designed and manufactured in Canada in 1980 by Aviation Electric Limited, a Canadian corporation. Subsequent thereto and until approximately 2005, Honeywell Limited/ Limitée (a successor Canadian corporation) manufactured the FCUs in Indiana. In 2005, Honeywell Aerospace took over the FCU product line. Pratt & Whitney purchases 99% of all FCUs made by Honeywell Aerospace, for use exclusively with the PT-6 engine. A mechanic in Texas can purchase an FCU from Honeywell Aerospace through its distribution center in Florida, or from one of its licensed repair centers, although there have not been any in Texas since 2014.

Honeywell Aerospace maintains offices in Texas and employs sixty-nine people in Texas; however, none of those employees are involved with production of the FCUs, nor are they associated with Honeywell Limited/Limitée. Honeywell Aerospace is an unincorporated division of Honeywell International. Honeywell International is a Delaware corporation with its principal place of business in New Jersey until 2019, when it was moved to North Carolina.

Plaintiffs sued Honeywell International and Honeywell Limited/Limitée on negligence and strict product liability claims. Although they did not name Honeywell Aerospace as a defendant, they argued that its activities and presence in Texas should be imputed to Honeywell International. The sole issue on appeal was whether the Texas Court had specific personal jurisdiction over these two named defendants.

Texas Courts may exercise personal jurisdiction over a nonresident defendant where it is authorized by the Texas long-arm statute and doing so is consistent with federal and state due process considerations. The Texas long-arm statute permits the Court to exercise personal jurisdiction over a nonresident who commits a tort "in whole or in part" in Texas. In order to comport with due process for specific personal jurisdiction, the nonresident defendant must have contact with Texas that results from his own efforts to seek a benefit, advantage or profit from that contact,

i.e., "purposeful availment," and the lawsuit must relate to that contact.

Because the FCU in the accident aircraft was manufactured in Canada by a Canadian corporation, sold to Pratt & Whitney and installed on a PT-6 engine in Canada, which then was sold to Piper Aircraft Corporation, which installed it in an aircraft in Florida or Pennsylvania and sold to its first owner in California, and it was overhauled in West Virginia and reinstalled on the accident engine in Kentucky, the Texas Court of Appeals found there was no basis upon which to exercise specific personal jurisdiction over Honeywell Limited/ Limitée in Texas. The Court agreed to impute Honeywell Aerospace's Texas presence and activities to Honeywell International, and found those contacts constituted purposeful availment. However, that purposeful availment was insufficient because it did not relate to the actual FCU in the accident aircraft. The Court of Appeals explained, "For specific jurisdiction purposes, purposeful availment has no jurisdictional relevance unless the defendant's liability arises out of or relates to the forum contacts." Accordingly, the Court affirmed the dismissals of Honeywell International and Honeywell Limited/Limitée. ***Burton v. Honeywell International Inc.*, No. 12-20-00108-CV, 2020 Tex. App. LEXIS 8600 (Tex. App. Oct. 30, 2020).**

Federal Court Dismisses Complaint Alleging that Airline Failed to Timely Refund Plaintiff for a Flight Cancelled Due to the COVID-19 Pandemic

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The United States District Court for the Central District of California granted defendant Norwegian Air Shuttle ASA's ("Norwegian") motion to dismiss, finding that Norwegian did not breach its contract by allegedly failing to timely refund Plaintiff after cancelling Plaintiff's flight due to the COVID-19 pandemic.

Plaintiff bought a Norwegian airline ticket; however, her flight was cancelled because of the coronavirus travel ban imposed between the United States and Europe in March 2020.

Plaintiff filed suit against Norwegian, alleging breach of contract. Plaintiff maintained that the applicable contract – the General Conditions of Carriage ("GCC") – incorporated Department of Transportation ("DOT") regulations as implied terms of the contract. Plaintiff further maintained that these implied, incorporated terms imposed a seven-day deadline on airlines by which to process refunds. Defendant did not process Plaintiff's refund within seven days of cancellation, and Plaintiff brought suit.

Specifically, Plaintiff argued that the following provisions of the GCC effectively incorporated the DOT seven-day reimbursement deadline:

> "'[Norwegian] compl[ies] with all applicable laws, verdicts, conventions and regulations.'"
>
> "'[Norwegian is] subject to national and international Conventions and regulations when transporting its customers. [The] General Conditions of Carriage will apply insofar as they do not conflict with applicable Tariffs or Conventions. In those cases where an inconsistency exists between [Norwegian's] General Conditions of Carriage and applicable Tariffs and Conventions, the Tariffs and/or Conventions will always take precedence over [the] General Conditions of Carriage.'"

The Court disagreed with Plaintiff and concluded that the GCC's general language did not incorporate the seven-day refund requirement. Specifically, the Court held:

> boilerplate contractual language guaranteeing compliance with international or domestic aviation laws does not incorporate extraneous law into the terms of an airfare contract. Instead, only language explicit enough to reflect an intent to be affirmatively bound by a specific aviation law or regulation is sufficient to result in incorporation.

In this case, the Court determined that the GCC's language was not specific enough to incorporate the seven-day reimbursement deadline regulation and stated that "[a] redundant and passive proclamation that an airline is 'subject to' applicable law … is insufficient to warrant incorporation.'"

In the alternative, Plaintiff also alleged that (1) the mere cancellation of the flight was a breach of contract and (2) Norwegian 'breached a statutorily imposed 'duty to refund[]' by failing to refund her in a reasonable amount of time." Again, the Court disagreed, noting that "'[w]here, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged.'" Here, the government-

imposed coronavirus travel ban rendered contract performance impracticable.

Finally, with respect to Plaintiff's second alternative allegation, the Court held that "Plaintiff cannot rely on state law extraneous to a binding agreement to state a viable breach of contract claim [because] the Airline Deregulation Act ("ADA") preempts state regulations creating obligations related to airline fares, routes, and services."

In sum, the Court dismissed Plaintiff's complaint because (1) the GCC's general language did not incorporate the seven-day refund requirement; (2) performance of the contract was made impracticable by the government imposed travel ban; and, (3) the Airline Deregulation Act preempts state regulations creating obligations related to airline fares, routes, and services. ***Daversa-Evdyriadis v. Norwegian Air*, No. EDCV 20-767-JGB (SPx), 2020 U.S. Dist. LEXIS 173854 (C.D. Cal. Sep. 17, 2020)**

Eastern District of New York Rules That Human Remains are "Cargo" for Purposes of the Montreal Convention

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The United States District Court for the Eastern District of New York recently clarified the meaning of "cargo" under the Montreal Convention. Following an unexpected death on October 25, 2017, the decedent's family opted to transport his body to Pakistan for burial. They arranged transportation on a Pakistan International Airlines ("PIA") flight from New York to Pakistan, with one family member travelling on the same flight. As it happened, this was the last flight that PIA was offering on this route, as PIA was discontinuing its U.S. operations. Upon arriving in Pakistan, it was discovered that the decedent's remains never left New York. Ultimately, the remains were interred in the United States. The decedent's family brought suit against PIA and Swissport, the company that provided cargo-handling services for PIA. The family set forth a number of state-law causes of action, which the defendants asserted were preempted by the Montreal Convention, to which both the United States and Pakistan are party. Plaintiffs moved for summary judgment, seeking to strike this affirmative defense, while Defendants counter-moved for summary judgment that the Montreal Convention preempted the state-law causes of action. Plaintiffs argued that human remains do not constitute "persons, baggage, or cargo." The Court disagreed, ruling that human remains are within the meaning of "cargo," although it denied summary judgment as there was a factual dispute as to whether the failure to transport constituted a delay, or complete non-performance.

The Montreal Convention exclusively governs claims related to "damages occasioned by delay in the carriage of passengers, baggage, and cargo…" Plaintiffs filed a summary judgment motion, seeking to strike the preemption affirmative defense. Defendants counter-moved for summary judgment, asserting that the Montreal Convention applied. The Court was thus presented with two questions: whether human remains represented "persons, baggage, [or] cargo," and whether the failure to transport the remains, was a "delay" or complete non-performance.

The Court first determined that human remains are potentially within the scope of the Montreal Convention. Plaintiffs pointed to testimony that PIA did not treat human remains as ordinary cargo, and further cited to *Tarar v. Pakistan Int'l Airlines,* 554 F. Supp. 471 (S.D. Tex. 1982), in which the United States District Court for the Southern District of Texas ruled that because PIA (the defendant in that case as well) did not consider human remains "ordinary commercial goods," such remains were not "persons, baggage, [or] goods" under the Warsaw Convention (the precursor to the Montreal Convention). Defendants cited to multiple later decisions by other courts, including from the Third and Ninth Circuits, that found the term "goods" as used in the Warsaw Convention was intended to be construed broadly, and encompassed human remains. The Court agreed that the weight of law clearly favored a broad interpretation of "goods" when interpreting the Warsaw Convention. It further ruled that "cargo" as used in the Montreal Convention, was broader than "goods" and its usage indicated that the signatories favored a broad reading of the term. Accordingly, the Montreal Convention could apply to cases involving the international transport of human remains.

The Court next considered whether the defendants' failure to transport the remains was analogous to a delay governed by the Convention, or complete non-performance to which the Convention would

not apply. It was undisputed that the Montreal Convention is inapplicable in cases of complete non-performance. The Court recognized that when a person affected by a delay takes action themselves to procure substitute transportation (for example, booking a flight on another airline), the claim remains one of delay, so long as the original carrier attempted to offer alternative transportation. By contrast, if there is no attempt to offer alternative transportation, it is a case of complete non-performance outside the scope of the Convention.

Here, the Court found questions of fact. Defendants maintained that Plaintiffs demanded return of the remains and their ultimate decision to bury the decedent in the United States constituted their securing of alternative arrangements. As such, Defendants argued this was delay, rather than non-performance. The plaintiffs maintained that PIA never presented them with any options for later transportation to Pakistan, and thus this was a case of complete non-performance. Ultimately, the Court determined that the evidence was insufficient for a determination as to whether Defendants' actions represented mere delay, or complete non-performance, and therefore denied both motions for summary judgment. ***Badar v. Swissport USA, Inc.,* No. 18-cv-06390 (DLI) (SMG), 2020 U.S. Dist. LEXIS 185392 (E.D.N.Y. Sep. 30, 2020).**

Pennsylvania Supreme Court Finds Specific Personal Jurisdiction Over Foreign Manufacturer Whose Product Allegedly Caused Injuries to Foreign Plaintiff

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In *Hammons v. Ethicon, Inc.*, 2020 Pa. LEXIS 5511 (Pa. Oct. 21, 2020), the Pennsylvania Supreme Court affirmed the intermediate Pennsylvania appellate court and held that an out-of-state manufacturer defendant was subject to specific personal jurisdiction in Pennsylvania even though the injury to the Indiana plaintiff occurred in Indiana and the defendant's only forum-related conduct was sending raw materials into Pennsylvania for eventual inclusion in a component of the product at issue.

The plaintiff in *Hammons* alleged serious injuries resulting from use of a medical device manufactured by Ethicon, one of the components of which was pelvic mesh. The parties stipulated that the mesh was the only component manufactured in Pennsylvania, and that it was provided by a third-party contractor that used Ethicon's specifications and proprietary materials to construct the mesh. The final assembly of the device was done outside Pennsylvania. Ethicon argued that Plaintiff's claims did not arise from the Pennsylvania contractor's involvement in the manufacturing process, that the contractor was not subject to any corporate governance or other structuring issues at the behest of Ethicon, and that no part of the process that led to selection of the Pennsylvania contractor actually took place in Pennsylvania.

As a preliminary matter, general jurisdiction was not at issue, as Ethicon was not incorporated in Pennsylvania, did not maintain its principal place of business in that state, and was not otherwise "at home" there. With regard to specific jurisdiction, the Court found that Ethicon engaged in sufficient forum-related conduct such that Pennsylvania courts could exercise jurisdiction over it. The Court distinguished this case from the recent *Bristol-Myers Squibb* ("*BMS*") U.S. Supreme Court case, 137 S. Ct. 1773 (2017), which held that out-of-state plaintiffs could not sue an out-of-state defendant in the forum state when none of the suit-related conduct occurred in that state. Here, the majority wrote that "the focus of the jurisdictional question should be the actions of the defendant in relation to the forum," and found there was "little controversy that the mesh is causally related to Plaintiffs' asserted injuries." Finally, the Court differentiated this fact pattern from one in which a manufacturer orders online a "generic" component (the Court used the example of paper on which warnings were printed), with little to no regard for the location of the entity providing the generic component, or involvement with that provider.

While not in an aviation context, this case is important for aviation manufacturers who may be subject to suit in Pennsylvania because it signals that out-of-state aircraft manufacturers who rely on a component manufacturer or a manufacturing process with ties to Pennsylvania may be subject to personal jurisdiction there. The case also shows the limits of relying on the narrow fact pattern in the U.S. Supreme Court's *BMS* case to contest specific jurisdiction. While many of the 'cutting edge' personal jurisdiction cases have focused on registration statutes as a means of conferring personal jurisdiction, this case shows another |potential hurdle for larger manufacturers who rely on in-state component manufacturers. ***Hammons v. Ethicon, Inc.*, No. 7 EAP 2019, 2020 Pa. LEXIS 5511 (Pa. Oct. 21, 2020).**✈

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