Schnader Aviation Group

AVIATION HAPPENINGS

WINTER 2019

Volume 5, Issue 4

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The Ninth Circuit Upholds Dismissal of Marine Helicopter Crash Suit Based on the Government Contractor Defense

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In *Determan v. Boeing Co.*, 728 Fed. Appx. 657 (9th Cir. 2019), the United States Court of Appeals for the Ninth Circuit upheld a United States District Court for the District of Hawaii decision dismissing a product liability action because the claims against the helicopter and helicopter component manufacturers were precluded by the government contractor defense.

Determan arose out of the crash of a Marine MV-22 Osprey helicopter. The Osprey crashed after an engine failure caused by a compressor stall. The compressor stall resulted from sand ingestion that occurred when the helicopter encountered "brownout" conditions during a landing attempt that churned up sand and debris. According to the plaintiffs, the sand ingested by the engine was "reactive," meaning corrosive, and had the sand been nonreactive, the engine would not have failed.

The plaintiffs—representatives of the estate of Lance Corporal Matthew Determan, who died in the crash—brought suit against The Boeing Company, Bell Helicopter Textron, Inc, and Eaton Aerospace, LLC claiming that the Osprey's engine air particle separator ("EAPS") system—which removes sand, dust, and other foreign objects from the air entering the engine—was defectively designed. The defendants filed motions for summary judgment arguing that they could not be held liable for the design of the EAPS system because the design conformed to specifications approved by the Naval Air Systems Command ("NAVAIR"), and they were therefore protected from liability by the government contractor defense.

The government contractor defense protects military and other government contractors from product liability when (1) the United States approved reasonably precise specifications for the product at issue; (2) the product conformed with those specifications; and (3) the contractor warned the government about dangers in the product's use that were known to the contractor but not to the government.

Aviation Group News and Notes

- **Bob Williams** moderated the session titled "Trial Tips from the Trenches: Things They Don't Teach You in Law School About Trying Aviation Lawsuits" at the ABA Aviation conference in Washington, D.C. in October. Bob Williams is a Vice-chair of the Aviation and Space Law General Committee of the ABA.
- **Barry Alexander** spoke on a panel on the topic of cargo liability and insurance issues at the 12th Annual McGill Conference on International Aviation, Liability, Insurance and Finance in Montreal in October.
- **Denny Shupe** discussed "Eleventh Hour Defense Tactics as Jury Selection Approaches" at the DRI Annual Meeting on October 17 in New Orleans.
- **Lee Schmeer** published "An Advocate's Charge: Important Tips for Tailoring Jury Instructions to Your Case" on the American Bar Association's website.
- **Barry Alexander, Denny Shupe and Bob Williams** attended the Aviation Insurance Association meeting in London in November. Bob is Director of the AIA's Attorney Division.
- **Samantha Demuren** joined the Aviation Group.
- **Barry Alexander, Stephen Shapiro, Denny Shupe, Jonathan Stern** and **Bob Williams** were selected for listing in *Who's Who Legal: Transport 2020* as leading practitioners in the aviation sector.

The district court granted the defendants' motions for summary judgment based on the government contractor defense. The plaintiffs appealed.

In their appeal, the plaintiffs first argued that the defendants failed to meet the first element of the government contractor defense (the government approved reasonably precise specifications) because (1) the Navy only approved performance standards, not the design of the EAPS system; and (2) the government was required to specifically approve the impacts of reactive sand on the EAPS system, as opposed to the EAPS system itself. The Ninth Circuit held that the undisputed evidence indicated that the government did not simply approve performance standards for the Osprey's EAPS system. Rather, the government approved detail specifications and final, top-level drawings of the aircraft that included design specifications for the EAPS system. The Ninth Circuit also rejected the notion that the government should have approved the specific impacts of reactive sand on the EAPS system because "a contractor need not obtain the government's consent for every possible defect or alternative design."

Finally, the Court rejected the plaintiffs' argument that defendants failed to meet the second element of the government contractor defense (conformance with government specifications) because plaintiffs' argument was based on testing of a generic EAPS system that did not meet the government's efficiency requirements, not on the actual system at issue. Instead, the Court found that the government certified that the Osprey's EAPS system complied with its specifications when it executed a DD250 for the aircraft and issued a NAVAIR acceptance letter.

By upholding the application of the government contractor defense in this instance, *Determan* bolsters the nationwide precedent protecting aviation defense contractors from product liability when they design products to conform to the unique needs of the US military.

Third Circuit Interprets Tort Claims Act to Permit Suit Against TSA Agents in Their Individual Capacities

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A recent decision by the Third Circuit Court of Appeals provides airline travelers with an avenue of recourse for mistreatment at the hands of Transportation Security Officers (TSOs).

In *Pellegrino v. United States of America*

Transportation Security, Plaintiff Nadine Pellegrino was randomly selected for additional screening at the Philadelphia International Airport as she travelled home to Boca Raton, Florida. Once selected, Pellegrino requested a more discreet setting, to which the TSOs obliged and took her to a private room. While in the room, Pellegrino alleged the TSOs went through her cellphone, counted coins, smelled her cosmetics and rummaged through her belongings, ultimately damaging her jewelry and eyeglasses. One of the TSOs alleged that Pellegrino struck her as Pellegrino was attempting to repack her bags, and a second officer also alleged Pellegrino struck her while she crawled underneath a table to reach her luggage. As a result of these allegations, the Philadelphia District Attorney's Office charged Pellegrino with ten crimes, including aggravated assault, possession of an instrument of crime (PIC) and terroristic threats. The charges were dismissed after the Transportation Security Administration (TSA) failed to produce any surveillance video of the incident and one of the TSOs failed to appear in court.

After her "ordeal," Pellegrino brought claims against the TSA and several TSOs for various violations, including, but not limited to, property damage, false arrest, false imprisonment, malicious prosecution under the Tort Claims Act, and malicious prosecution under *Bivens* in violation of the First and Fourth Amendments.

In a 9-4 decision, the Third Circuit departed from the long-standing principle and precedent that federal government employees are generally immune from lawsuits. Instead, the Court held that "TSOs are 'investigative or law enforcement officers' as defined in the Tort Claims Act at 28 U.S.C. §2680(h)…[who] are empowered by law to execute searches…[where] they may physically examine passengers and the property they bring with them to airports…'for violations of Federal law." This means TSOs can now be sued in their individual capacity for torts committed while carrying out their official functions because "investigative or law enforcement officers" are exempted from sovereign immunity protections provided by the Tort Claims Act. In articulating the consequences of the Court's ruling, Judge Ambro (writing for the majority) stated, "[i]f TSOs are not 'investigative or law enforcement officers' under the proviso, then plaintiffs like Pellegrino are left with no avenue for redress."

In her dissent, Circuit Judge Cheryl Ann Krause stated that while she was "sympathetic to the concern that the current legal regime provides no obvious remedy" to individuals like Pellegrino, Congress only expressly exempted officers with "traditional police powers" from the immunity provision, and any expansion should be left to those who write the laws, not those who interpret them. ***Pellegrino v. United States Transp. Sec. Admin.*, 931 F.3d 164 (3d Cir. 2019).**

In a Split Decision, Ninth Circuit Rejects FAA Delegation to a Helicopter Manufacturer as the Basis for Removal to Federal Court

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This case involved an appeal by Airbus Helicopters, Inc. ("AHI") of a Nevada federal district court's order remanding to state court a case arising from a 2018 helicopter crash in the Grand Canyon. Plaintiff alleged that the AHI-manufactured helicopter was defectively designed because the fuel tank was not crash-resistant, and could not withstand an impact of a minimal or moderate nature without bursting into flames and engulfing the passenger compartment.

AHI removed the case to federal court, asserting 28 USC § 1442(a)(1) as the basis for removal. This statutory provision permits removal to federal court of an action against "any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or related to any act under the color of such office." AHI is an FAA-certified Organization Designation Authorization ("ODA") Holder with authority to issue Supplemental Certificates, and had exercised that authority in connection with the design and manufacture of the accident helicopter.

In a matter of apparent first impression in the Ninth Circuit, in a 2-1 decision with lengthy majority and dissenting opinions, the Ninth Circuit affirmed the District Court's decision to remand the action to state court. The Court found that AHI had inspected and certified the accident helicopter pursuant to FAA regulations and federal law, and in addition, found that AHI could not make any structural or design changes without the consent of the FAA. Citing to United States Supreme Court and Ninth Circuit decisions, the majority held that "AHI's mere compliance with federal regulations did not satisfy the "acting under" requirement" of Section 1442(a)(1).

In so holding, the Court joined the Seventh Circuit in concluding that "an aircraft manufacturer does not act under a federal officer when it exercises designated authority to certify compliance with governing federal aviation regulations." However, the Court explicitly declined to adopt a **"rule-making -rule-compliance"** distinction that was the basis for the Seventh Circuit decision, and which had been the rationale relied upon by the District Court in remanding the case to state court. Instead, the Ninth Circuit said it was "content to rely on the more clearly articulated common analyses…on whether the private entity is engaged in **mere compliance** with federal regulations." (emphasis added).

In a strongly worded and well-reasoned dissent, Senior Circuit Judge O'Scannlain found that the FAA had delegated to AHI the authority to issue certificates on behalf of the FAA—"certificates that the FAA must otherwise issue on its own before an aircraft can be lawfully flown." Among other authorities, he cited to the following provision of the Federal Aviation Act (found at 49 USC § 44702(d)(1)):

> *(d) DELEGATION.—(1) Subject to regulations, supervision, and review the Administrator may prescribe, the Administrator may delegate to a qualified private person… a matter related to (A) the examination, testing, and inspection necessary to issue a certificate under this chapter; and (B) issuing the certificate.*

Ultimately, he argued that the majority misunderstood the FAA's regulatory scheme for aircraft certification and misapplied Supreme Court precedent addressing the "acting under" requirement, and concluded that because AHI undertakes the certification duties on the FAA's behalf, AHI was "acting under" a federal agency within the meaning of Section 1442(a)(1).

This is a significant case that practitioners should closely examine in evaluating whether to remove a state court action to federal court based on an aircraft or component manufacturer's exercise of delegated authority from the FAA. Otherwise, you may find that what you thought would be a full stop landing in federal court will become no more than a touch and go landing in federal court with a full stop landing back in state court. ***Riggs v Airbus Helicopters, Inc.*, 939 F.3d 981 (9th Cir. 2019).**

Eleventh Circuit Holds Plaintiff Lacked Standing in Lawsuit Alleging that the TSA's Policies Regarding the Use of Advanced Imaging Technology Screeners Were Unconstitutional

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In *Corbett v. Transp. Sec. Admin.*, the Court of Appeals for the Eleventh Circuit dismissed plaintiff's complaint, holding that plaintiff lacked standing to allege the Transportation Security Administration's ("TSA") policies regarding the use of Advanced Imaging Technology ("AIT") screeners were unconstitutional and violated the Administrative Procedure Act ("APA").

Jonathan Corbett brought suit against the TSA, claiming its new policy requiring certain airline passengers to pass through AIT screeners, as opposed to giving the passengers the option of being screened by a physical pat-down, violated the Fourth Amendment and the APA. In reaching its holding that the plaintiff lacked standing, the Court noted that he had previously unsuccessfully sued the TSA for its use of AIT screeners. The Court then discussed the history of the TSA policies at issue in the case, noting that the TSA Administrator "is required to 'assess current and potential threats to the domestic transportation system,' take all necessary steps to protect the Nation from those threats, and improve transportation security in general."

The TSA issued a notice of proposed rulemaking, which was "designed to 'codif[y] the use of AIT to screen individuals at aviation security screening checkpoints.'" The preamble of the final rule "for the first time codified that AIT screening will be mandatory for some passengers as warranted by security considerations." (emphasis in original). Specifically, this new policy would apply to passengers that the TSA designated as "selectees." A passenger could be designated a "selectee" based on risk information. Other passengers could be randomly designated a "selectee" and be required to go through the mandatory AIT screening on a particular trip. The TSA has explained that "this policy was designed to inform the general public that 'screening is conducted on a random basis,' thereby deterring '[u]nknown terrorists' without significantly impeding checkpoint operations."

The TSA has also explained "that mandatory AIT screening will be required 'in a very limited number of circumstances,' so it will not affect the 'vast majority of passengers.'"

After analyzing the history of the policy, the Court concluded that Corbett lacked standing based on his complaint. The Court noted that "[t]he three prerequisites for standing are that (1) the plaintiff has suffered an 'injury in fact' – an invasion of a judicially cognizable interest, which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) there be a causal connection between that injury and the conduct complained of – the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) it be likely, not merely speculative, that the injury will be redressed by a favorable decision." Ultimately, the Court ruled that Corbett lacked standing because, although the Court recognized that there was a chance he might be randomly selected in the future for AIT screening, he had failed to establish that that possibility would result in a "substantial likelihood of future injury that is 'real and immediate,' 'actual and imminent,' and not 'conjectural' or 'hypothetical.'" (emphasis in original).

As further support for its ruling, the Court noted that plaintiff's "claim of future injury is weakened still further, because, even accepting the small chance that [plaintiff] may be randomly subjected to the new policy at some indeterminate time in the future, there [is] an even smaller chance that his random selection for participation in the mandatory screening program will result in a constitutional injury." (emphasis in original). The Court had previously ruled in a different lawsuit that the use of the AIT screeners was constitutional "because the governmental interest in preventing terrorism outweighs the degree of intrusion on [plaintiff's] privacy[,] and the scanners advance that public interest." The Court also stated that previous court rulings also indicated plaintiff's APA claims would fail.

Accordingly, the Court held that Corbett lacked standing because he had not claimed a sufficient injury in fact. ***Corbett v. Transp. Sec. Admin.,* 930 F.3d 1225 (11th Cir. 2019)**

SDNY: The ADA Preempts Removed Passenger's Tort Claims

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A flight attendant on a Spirit Airlines flight asked a passenger seated in an emergency exit row to stop using his cell phone while she conducted the exit row safety briefing. The parties disagreed about whether the passenger complied with the instruction, and gave conflicting accounts of the ensuing interactions between the passenger and the crew. The passenger eventually deplaned before the flight departed, though the parties disputed whether he did so voluntarily.

The passenger brought a pro se lawsuit against Spirit in the United States District Court for the Southern District of New York ("SDNY"). The passenger pled several tort claims, as well as claims for breach of contract and breach of the implied covenant of good faith and fair dealing. Spirit sought summary judgment on the grounds that the Airline Deregulation Act ("ADA"), which expressly preempts any state law "related to a price, route, or service of an air carrier," preempted the passenger's claims.

The SDNY applied the three-part test that courts in the Second Circuit routinely apply to analyze whether the ADA preempts tort claims (the *Rombom* test). Addressing the first and second parts of the test, the Court analyzed whether the conduct at issue related to an airline service and, if so, whether it did so directly or tenuously. The Court concluded that, because the passenger's "claims related to defendants' decision to remove [him] from the plane," and because "'[t]here are few acts more fundamental to the service of air travel than the decision by an airplane crew whether or not to transport a passenger,'" the claims at issue directly related to an airline service. Addressing the third part of the *Rombom* test, the Court examined whether the alleged tortious conduct was reasonably necessary in order to provide the service. Because there was no evidence that the airline has discriminated against the passenger, physically injured him, had him arrested or the like, the passenger had failed to establish that the airline's conduct was not reasonably necessary to provide its service. Therefore, the Court concluded that the ADA preempted all of the passenger's tort claims.

Relying on the United States Supreme Court's holding in *Northwest, Inc. v. Ginsberg*, the SDNY concluded that the ADA preempted the passenger's claim for breach of implied covenant of good faith and fair dealing. The Court also struck the passenger's demand for punitive damages because the ADA "forbids the invocation of state law to enlarge or enhance remedies for breach beyond those provided in the contract."

Addressing the passenger's breach-of-contract claim, the Court explained that "'[t]he Supreme Court has held that the ADA does not preempt state -law based adjudication of routine breach-of-contract claims, so long as courts confine themselves to enforcing the parties' bargain.'" Because the record contained conflicting evidence about whether Spirit refused to transport the passenger or whether he deplaned voluntarily, and whether the passenger had acted in a manner that would have permitted Spirit to remove him from the flight under the terms of Spirit's Contract of Carriage, the Court denied Spirit's request for summary judgment on the plaintiff's breach-of-contract claim. ***Starker v. Spirit Airlines*, 2019 U.S. Dist. LEXIS 149702 (S.D.N.Y. Sept. 3, 2019).**

Connecticut District Court Grants Summary Judgment to JetBlue Airways Corp. Finding No Assurance of Special Seating Arrangements in its Standard Contract-of-Carriage

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In *Rivera v. JetBlue Airways Corp*., the United States District Court for the District of Connecticut dismissed a breach of contract suit against JetBlue stemming from Plaintiff's dissatisfaction with seating accommodations on her round-trip flight from JFK to LAX.

At the time of her booking, plaintiff did not inform JetBlue that she had "three disabilities relevant to air travel: [] a blood clot disorder, a need to get up and move about during a flight, and a severe allergy to fur-bearing animals." On the morning of her flight from JFK to LAX, Plaintiff called JetBlue and told the representative about the first two of her disabilities, but never requested a disability seat. As a result, the JetBlue representative "simply noted her conditions without indicating that Rivera wanted or needed a disability seat."

When Plaintiff checked in for her fully-booked flight, she was assigned a middle seat, which did not accommodate her medical needs. JetBlue upgraded her seat, without charge, to an "Even More Space Seat," with extra legroom, but according to Plaintiff, the upgraded seat was also a middle seat. Plaintiff nevertheless took the seat and the flight ensued without incident.

Plaintiff errantly assumed that JetBlue was aware of her need for a disability seat on her return flight. Because the flight was fully booked, Plaintiff paid $90 for an "Even More Space Seat" to accommodate her needs to move around during the flight. Unbeknownst to Plaintiff and JetBlue, however, a passenger seated in front of Plaintiff had two small dogs in her carry-on baggage, which caused Plaintiff to have a severe allergic reaction. Although the flight crew moved the other passenger and dogs to the rear of the aircraft, Plaintiff was immediately hospitalized on her return home.

Plaintiff initially filed an action against JetBlue in Connecticut state court, raising claims of disability discrimination under State law and violations of the Connecticut Unfair Trade Practices Act (CUTPA). JetBlue timely removed the action to the District Court of Connecticut and moved to dismiss.

The Court granted JetBlue's motion to dismiss Plaintiff's claims, concluding that Plaintiff "did not have a private right of action under the state disability law and that her CUTPA claim was preempted by federal law." By leave of court, Plaintiff filed an amended complaint consisting of a single claim for breach of contract.

JetBlue subsequently moved for summary judgment. The Court granted JetBlue's motion for summary judgment, finding no genuine issue of fact to support Plaintiff's claim for breach of contract. The Court found that the standard contract-of-carriage was the only written contract between Rivera and JetBlue, "which contained no assurance that Rivera would be entitled to special seating or to seating away from any fur-bearing animals." Moreover, the Court found that although Plaintiff "told JetBlue for the first time about her allergy to animals [at the airport before boarding her return flight], there [was] no evidence of any agreement between her and any representative of JetBlue that she would not be seated near an animal." ***Rivera v. JetBlue Airways, Corp.*, No. 3:17-cv-00960, 2019 U.S. Dist. LEXIS 142713 (D. Conn. Aug. 22, 2019).**

Southern District of Alabama Reminds Aviation Insurers of the Precarious Issues they Face When Deciding How to Handle Coverage Issues Arising out of a Crash

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Those of us who do coverage work, especially in aviation, understand the difficulties insurers face when coverage questions arise from aircraft accidents. While insurers understandably often wish to resolve those coverage issues prior to the conclusion of underlying wrongful death or bodily injury litigation, especially in light of the very substantial exposure in many of those cases, US courts often are loathe to let coverage declaratory judgment actions proceed ahead of the underlying litigation. In this author's humble opinion, this often results more from reflex than solid legal reasoning. This leaves insurers in the unenviable position of paying (and perhaps seeking reimbursement) or denying coverage and risking bad faith liability.

In *American National Property & Casualty Co. v. Gulf Coast Aerial, LLC*, the United States District Court for the Southern District of Alabama tackled such an issue. American National commenced a declaratory judgment action seeking a declaration that it owed no duty to defend or indemnify its insureds, Gulf Coast Aerial, LLC ("Gulf Coast") and Mike Collins (Gulf Coast's managing member), against a wrongful death action pending in Alabama state court that arose out of the crash of an American Champion Scout aircraft (the "Incident"). American National contended that "neither Gulf Coast nor Collins [was] due coverage under the subject policy because of an exclusion for 'bodily injury' to 'passengers' that occurs when an insured aircraft is engaged in 'aerial advertising,' as those terms are defined in the subject policy."

Gulf Coast filed a motion to dismiss the action on the basis that it was premature, or "not ripe," in light of the fact that the underlying wrongful death action was pending. The Court noted that prior circuit case law was inconsistent on the issue of whether a declaratory judgment action must be dismissed for lack of subject matter jurisdiction where the underlying action is pending but held that subject matter jurisdiction existed – i.e., that dismissal was not mandatory. Nevertheless, the Court stayed litigation of the duty-to-indemnify claim based on prudential considerations. In addition to not being ripe, the Court concluded that "factual disputes material to determining the duty to indemnify [were] also likely to arise in the underlying action."

The Court reached a different result, however, for the duty-to-defend claim. Analyzing whether to abstain from deciding this claim through application of the *Brillhart-Wilton* or *Wilton-Brillhart* abstention doctrine (named for the two Supreme Court cases out of which it arose), the Court held that it would proceed to resolve the issue of whether American National owed a duty to defend. While the Court applied each of the nine *Brillhart* factors, the central basis for its determination was that the coverage exclusion applied only where the aircraft was being used for "aerial advertising," and because there was no reference to aerial advertising in the complaint, "it appears unlikely at this time that the Court will have to look beyond Fields's complaint in determining whether American National has a duty to defend…."

In other words, despite the Court's later statement that resolution of the duty-to-defend claim might ultimately resolve the duty-to-indemnify claim if no duty to defend was found (since the duty to defend is broader than the duty to indemnify), the decision reads as though the Court decided to proceed with the duty to defend claim solely because the duty to defend was clear from the face of the Complaint.

Though not nearly as interesting as the other issues, it should be noted for the sake of completeness – and to prove that the author read the entire decision – that the Court rejected Gulf Coast's argument that diversity jurisdiction was lacking because the jurisdictional amount in controversy had not been met. In reaching this determination, the Court reminded the parties that in determining the amount in controversy in an insurance coverage case, both the potential legal costs and the potential liability must be considered.

In sum, even though the Court refused to dismiss or stay the duty-to-defend claim, it did so because that claim could easily be resolved based on the "four corners rule." Thus, it seems that aviation insurers remain in a precarious situation when there are strong, but uncertain, coverage defenses for claims arising out of an accident. ***Am. Nat'l Prop. & Cas. Co. v. Gulf Coast Aerial, LLC*, 2019 U.S. Dist. LEXIS 148531 (S.D. Ala. Aug. 29, 2019).**

Minnesota Supreme Court Reverses Complete Exclusion of Expert's Opinions

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The Minnesota Supreme Court recently held that it is reversible error to exclude an expert's opinion in its entirety, where only one of the three methodologies upon which that opinion is based is flawed. *Kedrowski v. Lycoming Engines,* No. A17-0538, Minn. (Sept. 11, 2019). We previously reported on the intermediate appellate court's decision to affirm the wholesale exclusion of Don Sommer's opinion in the Summer 2018 edition of *Aviation Happenings*. The Minnesota Supreme Court now has reversed that decision.

This case arises out of the September 3, 2010 crash of a Glasair RG Super IIS. The NTSB determined that the accident was caused by the pilot's failure to maintain control of the aircraft in gusty wind. Plaintiff maintained, however, that he crashed because the engine lost power. Plaintiff retained Don Sommer as his accident reconstruction and aircraft design expert. Although Mr. Sommer had not previously overhauled or tested an engine-driven diaphragm-style fuel pump, he concluded that it failed to deliver adequate fuel to the engine because of design and manufacturing defects. His conclusions were based principally upon his own flow bench testing of the pump.

Mr. Sommer conceded that the pump was not defective if it met design specifications, which included production of certain fuel quantities at specified pressures and revolutions per minute (RPMs). However, he ***never*** tested the pump at those specified parameters. Mr. Sommer also conceded that the engine would receive adequate fuel if the pump was capable of producing outlet pressures between 10 and 22 psi, yet ***never*** tested it within those parameters.

Lycoming sought in advance of the trial to preclude Sommer's opinions, but the trial court deferred its ruling, allowing him to testify about his opinions and the bases therefor. The jury returned a verdict for plaintiff in the amount of $27.7 million. The trial court set that verdict aside, however, because it determined Mr. Sommer's testimony should have been excluded in its entirety due to the anomalies with his flow bench testing. The intermediate appellate court agreed and affirmed the entry of judgment for Lycoming as a matter of law.

On further review, the Supreme Court agreed that Sommer's flow bench test results properly were excluded. However, his ultimate conclusions that the fuel pump was defective and caused the accident also were based upon his "differential diagnosis." That is, he disassembled the engine and found nothing wrong with it. Having eliminated the engine as a potential cause of the alleged loss of power, the remaining explanation (to him) was a malfunctioning fuel pump. Additionally, Mr. Sommer's conclusions were based upon the pilot's testimony about the operating history of the aircraft, specifically, that on several occasions the engine would not operate on the engine-driven fuel pump alone, but needed assistance from the electrical boost pump.

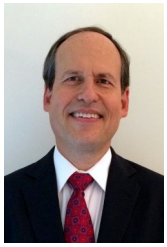
The Supreme Court explained, "[W]e cannot see how the deficiencies in Sommer's flow-bench testing tainted Sommer's investigation as a whole. Sommer's differential analysis and interpretation of Kedrowski's boost-pump experience independently support his opinion that the defective Lycoming pump caused Kedrowski's power loss and crash." Because the trial court's improper admission of Sommer's flow bench testing results "might reasonably have influenced the jury and changed the results of the trial," the Supreme Court ordered a new trial on liability.

The *Kedrowski* decision is problematic for several reasons. First, it gives unwarranted weight and credence to Sommer's differential diagnosis methodology. That methodology is flawed in an aviation context because it assumes the existence of the very condition that is in question. In other words, Sommer began with the premise that the engine lost power, then assigned the most probable cause among the two or three potential causes that he considered.

Furthermore, there is no indication in the opinion that Sommer considered (and eliminated) other causes for the accident, including pilot error, air in the fuel lines, and improper fuel-air mixture. While it generally is true that a plaintiff is not required to ***dis***prove alternate causation theories, that should not be the standard where the expert's methodology itself requires differentiation among all possible causes.

Moreover, expert testimony generally is admitted where it adds something to the factual record and assists the factfinder in understanding scientific or technical concepts. Mr. Kedrowski himself was capable of testifying that the engine sometimes would not operate on the engine-driven fuel pump alone, and the jury was equally capable of inferring from that testimony that there could have been a malfunction with that component. Sommer's "testimony" and reliance upon that evidence hardly qualifies as scientific method and did not aid the jury in understanding something that otherwise was beyond their abilities.

Given the pronouncements of *Kedrowski,* it is difficult to imagine a scenario where an expert's testimony might be excluded in its entirety. As long as the expert's opinions are based upon several methodologies, and at least one of those methods has even a modicum of scientific or technical merit, the opinions will be admissible. Take heed.



Heavy Lifting Down Under — *Armstrong v. Hawaiian Airlines, Inc.*

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Armstrong flew on Hawaiian Airlines from Kauai to Brisbane. In Brisbane, he received wheelchair service to baggage claim, but the Qantas employee who—pursuant to a ground handling agreement—provided the wheelchair service advised him no assistance with his luggage was available. Armstrong did not live up to his name. He injured his arm lifting one of his bags from the luggage carousel.

The Montreal Convention provides: "The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking." The issue for the federal court on the airline's motion for summary judgment was whether there had been such an "accident." An "accident" is "an unexpected or unusual event or happening that is external to the passenger." *Air France v. Saks*, 470 U.S. 392, 405 (1985). Thus, if—as in *Saks*, the injury results from normal operation and is attributable to a passenger's abnormal internal reaction thereto—no "accident." Recognizing that injuries generally result from a chain of events, the courts require only that one link in the causal chain qualify.

Hawaiian argued that Armstrong's arm injury resulted from his own internal reaction to normal and expected operations. Armstrong, on the other hand, said it was the unusual and unexpected declination by Hawaiian's ground handler to provide assistance with luggage that caused his injury. The Court recognized that the event triggering the "accident" could be inaction, as was the case in *Olympic Airways v. Husain*, 540 U.S. 644 (2004). There, a passenger gravely allergic to cigarette smoke was denied the opportunity to change seats to distance himself from cigarette smoke. Such a declination could be the event that would constitute an "accident" even though the injury also resulted from the passenger's unusual internal reaction to exposure to cigarette smoke.

In *Armstrong*, there was an unusual internal reaction to lifting a bag from the carousel. Nonetheless, the Court had to decide whether another link in the causal chain was unusual or unexpected and external to the passenger. The Court held that the refusal to provide assistance upon request could so qualify. The question is whether that refusal was unusual or unexpected. The Court observed that the Ninth Circuit has held that "the jury would consider industry standards, best practices, expert medical testimony, and any other relevant evidence" to determine whether the challenged action was unexpected or unusual. 2019 U.S. Dist. LEXIS 129971, at *22-23 (citing *Baillie v. MedAire, Inc.*, 764 Fed. App'x 597, 598 (9th Cir. 2019)). Finding sufficient evidence to raise a question of fact whether the declination of assistance was unusual or unexpected, the Court denied the carrier's motion for summary judgment. ***Armstrong v. Hawaiian Airlines, Inc.*, 2019 U.S. Dist. LEXIS 129971 (D. Haw. Aug. 2, 2019).**

Montreal Convention Limits to Increase for First Time in 11 Years

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Montreal Convention limits are set to increase by 13.9% on December 28, 2019. The increase is intended to compensate for inflation that has occurred since the limits were last increased in 2008.

Enacted in 1999, the Montreal Convention establishes a liability regime for international commercial air carriers, and provides numerous rights and remedies for passengers traveling between member states. The Convention quantifies possible monetary recovery using Special Drawing Rights ("SDRs"), an artificial currency set by the International Monetary Fund. As of December 2, 2019, one SDR equaled $1.37.

The limits will increase as follows:

- Limits for injury or death caused by accident on board the aircraft or in the course of embarking or disembarking will increase from 113,100 SDRs to 128,821 SDRs;
- Delay limits will increase from 4,694 SDRs to 5,346 SDRs;
- Baggage destruction, loss, damage or delay limits will increase from 1,131 SDRs to 1,288 SDRs per passenger; and
- Cargo destruction, loss, damage or delay limits will increase from 19 SDRs per kilogram to 22 SDRs per kilogram.

To the extent your business involves insurance or contracts relating to international commercial air travel, now may be a good time to review any such policies or documents that could be impacted by the Convention's upcoming limit increases. ✈

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