Schnader ATTORNEYS AT LAW
Aviation Group

AVIATION HAPPENINGS

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Update: Airlines Continue to Tighten Emotional Support Animal Policies While Department of Transportation Works Toward an Appropriate Definition

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As we reported last quarter, the United States Department of Transportation ("DOT") recently asked for public comment about amending current regulations relating to the transport of service and support animals based on the increasing concerns and risks that untrained service animals pose to the health and safety of crewmembers and passengers. Although the DOT's action was in response to the tightening of restrictions by certain carriers, carriers have continued to tighten their restrictions while the DOT reviews this issue.

United, American, Delta, JetBlue, Southwest, and Alaska all have tightened their support animal restrictions this summer.

United Airlines: United reported an increase in the number of comfort animals from 43,000 in 2016 to 76,000 in 2017, which was accompanied by a significant increase in onboard incidents. On January 31, 2018, United prohibited a passenger from bringing Dexter, an emotional support peacock, onboard an aircraft. United now requires that people submit veterinary health forms and immunization records, signed letters from a licensed doctor or mental health professional, and signed certification of training, in order to travel with an emotional support animal. United also asks for veterinarian documentation as to whether the animal has ever scratched, bitten, or attacked a person.

American Airlines: American recently added amphibians, ferrets, reptiles, spiders, waterfowl, goats, hedgehogs, insects, non-household birds, and animals with tusks, horns, or hooves to its list of banned animals. Additionally, American now requires that passengers submit extra documentation at least 48 hours before their flight, including a form affirming that the animal can behave properly in the cabin and a signature from a mental health care professional.

Delta Air Lines: Delta now requires passengers with in-flight service or support animals to submit proof of health or vaccinations and a letter from a doctor or licensed mental health professional explaining why the animal needs to be on board, and to sign a document attesting to the animals' ability to behave

Aviation Group News and Notes

- Many Schnader Aviation Group attorneys were selected for inclusion in the 2019 edition of *The Best Lawyers in America*. Selection for this honor is determined through an extensive peer-review survey in which leading attorneys cast confidential votes on the legal abilities of their peers. **Thomas Arbogast**, **Richard Barkasy, Leo Murphy, Bruce Merenstein, Lisa Rodriguez**, **Carl Schaerf, Denny Shupe**, **Ralph Wellington,** and **Keith Whitson** were identified.
- In August, Air Force Reserve member **Lee Schmeer** flew humanitarian missions in support of the Montana firefighting activities.
- **Barry Alexander** and **Carl Schaerf** were included in the 2018 edition of *New York Super Lawyers.*
- **Denny Shupe** and **Barry Alexander** will present at the upcoming ABA TIPS Aviation & Space Law Conference on October 18-19, 2018 in Washington, DC. **Bob Williams** is a committee Vice Chair and program Co-chair.
- **Edward Sholinsky** and **Jonathan Skowron** published "Viewpoint: Pa. Superior Court ruling says out-of-state businesses can be sued here" in the *Pittsburgh Business Times*.
- **Arleigh Helfer** published "Third Circuit Sets Precedent on FDCPA Statute of Limitations" as the lead article in *On Appeal*, the Third Circuit Bar Association's newsletter.
- **Brittany Wakim** published "Why The 3rd Circuit Allowed Removal In Encompass" on Law360.
- **Bob Williams** and **Lee Schmeer** were named to JDSupra's 2018 Readers Choice Awards.
- **Denny Shupe** was named a Local Litigation Star by *Benchmark Litigation*.

in the cabin. Delta also recently added pit bull-type dogs to its list of banned service/emotional support animals.

JetBlue Airways: JetBlue now requires passengers traveling with emotional support animals to submit a verification from a mental/medical health professional certifying that the animal is for emotional and psychiatric service, a liability form certifying that the animal is trained to behave appropriately in public, and a veterinary health form for the animal. Passengers who have an emotional support animal are responsible for injuries to others or damages to property. Additionally, JetBlue only allows cats, dogs and miniature horses on-board as support animals; like American, JetBlue previously banned the in-cabin transport of hedgehogs, ferrets, rodents, snakes, spiders, reptiles, and animals with tusks.

Southwest Airlines: As of September 2018, Southwest instituted a limit of only one dog or cat, either on a leash or in a carrier. Passengers also will be required to submit a "current letter" from their doctor or mental health professional on the day of departure in order to travel with an emotional support animal.

Alaska Airlines: Beginning October 2018, each passenger will be limited to one dog or cat either on a leash or in a carrier. No other species of emotional support animals will be permitted on-board. This new restriction is in addition to Alaska's prior requirements that passengers present documentation that the animal is in good health, a letter signed by a doctor or licensed mental health professional, and documentation that the animal is trained to behave in public settings. Similar to JetBlue, passengers with support animals are required to assume responsibility for damage to any property.

The DOT has been silent in the wake of these new restrictions. It will be interesting to see when and how the DOT responds.

Senator Attempts to Tie Drone Federalism to Long-Term FAA Reauthorization Bill

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A new road block to the passage of the FAA reauthorization bill has arisen in the form of an amendment expected to be offered by Republican Senator Mike Lee (Utah) that would permit state and local regulation of drone deliveries. The proposed amendment has drawn harsh criticism from industry groups.

Senator Lee is a long-time proponent of state and local regulation of drones. As a sponsor of the Drone Federalism Act—which would have permitted local regulation of all drones operating under 200 feet—Senator Lee argued that the process of developing a federal regulatory scheme has been too long and burdensome and has hampered, and will continue to hamper, the growth of the drone industry. He has argued that while US drone operators wait on federal regulations, other countries are moving forward, including Japan, which already has drone deliveries, and Rwanda, where medicine is delivered by drones.

Numerous aviation and drone industry groups, including the Aircraft Owners and Pilots Association ("AOPA"), Aerospace Industries Association ("AIA"), the General Aviation Manufacturers Association ("GAMA"), and the Association of Unmanned Vehicle Systems International ("AUVSI"), among others, signed a letter opposing Senator Lee's proposed amendment. The letter argues that permitting thousands of state and local governments to impose restrictions on drone delivery operations would jeopardize, not promote the growth and development of the industry. This, the letter adds, will deprive the United States of the "immense humanitarian potential" offered by commercial drone air carrier operations, such as the delivery of medical supplies, blood, food, and water to disaster stricken areas.

These industry groups have a point. Already there are hundreds of different local drone regulations touching on issues like privacy and flight over public lands with which the fledging commercial drone delivery industry must grapple. It remains to be seen whether the Senate will be receptive to the amendment. For now, it poses another hurdle for the FAA reauthorization bill to overcome.

Third Circuit Hears Oral Argument in Conflict Preemption Case Involving General Aviation Manufacturer

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Sikkelee v. AVCO Corp, et al. arises from the 2005 crash of a Cessna 172N aircraft, which resulted in the death of Plaintiff's decedent David Sikkelee. Plaintiff alleges that the crash was caused by a defective after-market carburetor in the aircraft's Lycoming engine. The Third Circuit Court of Appeals heard oral argument in July relating to the long-running dispute regarding the extent to which the Federal Aviation Regulations shield manufacturers from state law claims that would require them to diverge from the federal standards under which their products were certified.

The Third Circuit previously held that state law aircraft products liability and negligence claims are not field preempted by federal aviation regulations, but left open the possibility that they may be conflict preempted, and remanded the case to the Middle District of Pennsylvania to address that issue. The district court subsequently held that state law causes of action are conflict preempted by federal regulations, triggering this second appeal.

Appellant argued that "[w]hen a defendant can implement a change or alteration to a design, product or article without first seeking approval from an employee of the FAA, a state-law claim requiring that change is not preempted unless the defendant proves with clear evidence that the FAA would reject the change or alteration."

At argument, counsel for Appellant argued that adopting the district court's conflict preemption stance would result in a "sweeping rule" that would serve to block nearly all state law aircraft product defect claims - claims that plaintiffs have been bringing for seventy years. Appellant also claimed that most modifications, as with the one at issue in this case, are "virtually certain" to receive FAA approval (particularly where made through a Designated Engineering Representative, or DER), and thus manufacturers should not be permitted to wield inaction as a sword in litigation. Appellant also disputed that the design change at issue was a "major" change that would require approval at all.

Counsel for Appellee Avco argued that it was not relevant whether the FAA was certain to approve a design change, as that merely would encourage courts to engage in a "predictive" analysis. Instead, courts should look only to whether approval of the design change was necessary. Appellee also argued that Appellant's proposed new rule essentially admitted that major design changes (which counsel argued was the category of design change in which the addition of the after-market carburetor fell), and even some minor changes, required FAA approval.

This case has major implications regarding the preemptive impact of FAA certification on state law tort litigation, and we will promptly update you once the panel issues its decision.

Passenger, but not Airline, Potentially Liable for Alleged Lack of Care in Reclining Seat

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In *Spencer v. Am. Airlines, Inc.*, the Missouri Court of Appeals affirmed summary judgment for American Airlines but reversed the grant of summary judgment for an American passenger who allegedly forcefully reclined his seat into Karen Spencer's knee.

Spencer premised her case against American on pre-injury behavior of the other passenger, Jimmy Lee, who had been arguing with his traveling companion in the gate area prior to boarding and on the airplane. According to Spencer, Lee became frustrated because his traveling companion ignored him. "Lee unfastened his seatbelt, stood up, and put one knee on his seat. Lee then 'got so angry [ ] his partner would not acknowledge him[ ] that he motioned forward, and then lunged back as hard as he could in the seat, which then crunched [Plaintiff's] knee' and immediately caused Plaintiff to be in pain."

On appeal, the issue as to the propriety of American's summary judgment turned on whether American owed a duty to Spencer to prevent her knee injury. Despite holding that American, as a common carrier, owed the "highest duty of care" to Spencer, the court concluded that it did not owe Spencer a duty to anticipate from Lee's pre-flight conduct that he would lunge his knee into his seatback and thereby injure Spencer. The court observed, "[T]here is no evidence in the record to support a finding AA or its employees knew Lee was a danger to Plaintiff or other passengers before the incident on the plane occurred." The court also concluded that there was no evidence from which American should have anticipated the actions that led to Spencer's injury.

The result was different for Jimmy Lee. While acknowledging that a passenger has the right to recline his or her seat during phases of flight in which the airline allows seats to be reclined, a passenger must act reasonably in reclining the seat. The record evidence before the trial court was that "Lee … stood up, … put one knee on his seat …, and then lunged back as hard as he could in the seat …." Therefore, a jury could conclude that Lee breached the duty of care he owed to Spencer to act reasonably carefully in reclining his seat. Summary judgment as to Lee was reversed and the case remanded for trial.

Spencer v. American Airlines Inc. et al., No. 105809, 2018 WL 3193720 (Mo. Ct. App., June 29, 2018).

Ohio Court of Appeals Affirms Dismissal of Claims for Injury Caused by Baggage Falling out of Overhead Bin

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The Ohio Court of Appeals affirmed summary judgment in favor of United Airlines and against Plaintiff Marc Meyer, a passenger who was struck by a carry-on bag that fell from an overhead bin during takeoff of a flight from Hawaii to Chicago. Plaintiff asserted a cause of action for negligence against United alleging that it breached a duty of care to secure the overhead bin imposed by Federal Aviation regulations.

Plaintiff relied on 14 CFR 121.589, which requires "at least one crew member" to verify that each article of carry-on baggage is safely stowed and restrained prior to takeoff. On summary judgment, Plaintiff argued that there was a material issue of fact as to whether United verified that the overhead bin was secure and that the carry-on baggage inside was properly stowed for takeoff.

United argued that it needed only to visually verify that the carry-on baggage was safely stowed, as opposed to having to conduct a manual inspection of each bin, which it was undisputed United did. Moreover, all parties agreed that the flight attendant closed the bin at issue and verified that it was secured prior to takeoff before an unidentified passenger re-opened the bin.

The court below dismissed the complaint on the basis that the flight attendant complied with the applicable federal regulations by visually inspecting and closing the bin. On appeal, the Ohio Court of Appeals held that a visual inspection or verification is enough to properly comply with federal aviation regulations, there being no legal authority to support a contention that manual inspection is required in preparation for taxiing and takeoff.

Meyer et al. v. United Airlines Inc., 2018 WL 3203142 (Ohio Ct. App., 6th Dist. June 29, 2018).

No New Trial after Jury Finds that Near Collision Between Departing and Landing Aircraft at Uncontrolled Colorado Airport Was Not the Fault of Either Pilot

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The Colorado Supreme Court reversed the trial court, finding that Plaintiffs' motion for a new trial should not have been granted after a jury found that both pilot defendants were not negligent in causing a near collision that resulted in the crash of one aircraft and death of its five occupants at Erie Municipal Airport, Colorado.

On the day of the crash, an aircraft piloted by Oliver Francona was inbound for landing on Runway 33 at Erie, which is an uncontrolled airport; he had four passengers on board. At the same time, an aircraft piloted by Joseph Lechtanski was attempting to take off in the opposite direction (Runway 15) on the same runway surface. The two planes nearly collided mid-air over the runway; to avoid the collision, Lechtanski reportedly veered right, and Francona attempted a go around maneuver, during which his aircraft stalled and crashed. The heirs of the four deceased passengers brought an action against Francona's estate and Lechtanski, alleging that one or both of them was responsible for the crash.

The jury returned a verdict in favor of both defendants, answering "no" as to whether Lechtanski and Francona were negligent. The verdict form had permitted the jury to find that one, both, or neither of the defendants was negligent.

The trial court ultimately granted Plaintiffs' motion for a new trial, agreeing with Plaintiffs that the jury's verdict not holding either pilot responsible was a "miscarriage of justice." The trial court also indicated a belief that the jury misunderstood its role due to the trial court sustaining an objection at trial during questioning of Francona's accident reconstruction and piloting expert, Douglas Stimpson. The trial court specifically did not permit Stimpson to testify as to the percentage of fault he would apportion to each of the pilots.

In granting the motion for a new trial, the trial court found that "[T]he evidence does not support the jury's verdict that neither pilot was negligent….Based on the evidence presented at trial, the undisputed facts must result in a verdict implicating one or both pilots as the negligent cause of the crash. The finding of no liability as to both pilots therefore is a miscarriage of justice."

The Colorado Supreme Court reversed, finding that Colorado Rule 59(d) does not provide for a new trial where a jury's verdict is deemed to be a "miscarriage of justice," which was the basis of the trial court's ruling below. The Court found that the record did not reveal any error sufficient to constitute an irregularity (such as the omission of a necessary jury instruction), or any basis to conclude that the jury was confused or misunderstood its role.

Bottom line—the Supreme Court found that the trial court's stated reasons for a new trial did not meet the requirements of Rule 59(d), and that a trial court abuses its discretion if it grants a new trial for a reason other than those stated in the rule.

Rains et al. v. Barber et al., 2018 WL 3099077 (Colo. June 25, 2018).

Court Dismisses Montreal Convention Action for Lack of Subject Matter Jurisdiction

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In *Wendelberger v. Deutsche Lufthansa AG,* the district court dismissed Montreal Convention claims based on a lack of Article 33 subject matter jurisdiction. The complaint arose out of burn injuries sustained by Iris Wendelberger when a cup containing a scalding hot liquid slid off of an allegedly defective seatback tray table and spilled on her during Lufthansa Flight 422 from Frankfurt, Germany to Boston.

Lufthansa filed a motion to dismiss the complaint on the basis that the district court in California was not within any of the States provided with subject matter jurisdiction pursuant to Article 33 of the Montreal Convention. The fora provided in Article 33 of the Convention are:

1. Domicile of the Carrier (here, Germany);
2. Principal Place of Business of the Carrier (here, Germany);
3. Place Where the Contract for Carriage Was Made (here, Austria);
4. The Place of Destination of the Carriage (here, Austria); and
5. The Passenger's Principal and Permanent Residence (here, Austria).

The specific issue in dispute was whether the "place of destination" as set forth in Article 33 of the Montreal Convention refers to the ultimate destination of round-trip transportation or, alternatively, refers to the destination of a specific flight segment of an overall round-trip itinerary. Plaintiffs argued that Warsaw Convention case law clearly holding that it is the ultimate destination of round-trip transportation that is relevant should not apply to the Montreal Convention even though the pertinent language of the two Conventions is substantively identical (with the exception that the Warsaw Convention does not include the fifth jurisdiction). The district court dismissed the complaint, holding that in light of the nearly identical language of the two Conventions, the Warsaw Convention case law was instructive.

The district court did not, however, award sanctions against Plaintiffs as requested by Lufthansa. While noting that the support for many of Plaintiffs' arguments was "put generously, strained," and specifically referencing Plaintiffs' questionable reference on an uncertified translation of the Warsaw Convention apparently copied and pasted from Google Translate, the court declined to impose sanctions based on its "hesitance to chill vigorous advocacy."

Wendelberger v. Deutsche Lufthansa AG, 2018 U.S. Dist. LEXIS 88532 (N.D. Cal. May 25, 2018).

Corporate Registration Statutes Continue to be Fertile Battlegrounds for *Daimler* Personal Jurisdiction Challenges

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Much has been and continues to be written about the United States Supreme Court's watershed personal jurisdiction opinion in *Daimler AG v. Bauman*. The interpretation and application of that decision are being litigated actively in state and federal courts throughout the country, particularly insofar as it has impacted statutes that purport to confer personal jurisdiction automatically over any corporation that registers to do business in a particular state. Recent state court decisions in New York and Pennsylvania reached opposite and inconsistent results on that issue.

In *Kyowa Seni, Co., Ltd. v. ANA Aircraft Technics, Co., Ltd.* (2018 NY Slip. Op. 28211, Jul. 5, 2018), Kyowa agreed to manufacture seat covers for aircraft operated by All Nippon Airways. The airline's parent (ANA) subsequently instructed Kyowa to certify that the seat covers had passed flammability tests and to affix certification labels to the covers themselves. Kyowa initially complied, because it believed ANA or the airline conducted the tests. When ANA failed to respond to Kyowa's requests for confirmation of those tests, however, Kyowa withheld additional certifications and labels. Consequently, ANA terminated the parties' agreement.

Kyowa sued ANA for breach of contract and fraud in New York state court, even though the contract was entered into in Japan and all of Kyowa's work was performed in Japan. Among other things, Kyowa argued that the New York court had general personal jurisdiction over ANA because ANA

registered to do business there and appointed the New York Secretary of State as its agent for service of legal process. The Court disagreed and adopted the reasoning of *Brown v. Lockheed Martin Corp*. (814 F.3d 619,640 (2d Cir. 2016)), in which a federal appeals court explained, "If mere registration and the accompanying appointment of an in-state agent – without an express consent to general jurisdiction – nonetheless sufficed to confer general jurisdiction by implicit consent, every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler's* ruling would be robbed of meaning by a back-door thief."

A Pennsylvania appellate court reached the opposite conclusion in *Murray v. American LaFrance, LLC* (2018 PA Super. 267, Sept. 25, 2018). Plaintiffs in that case are New York firefighters that filed a lawsuit in Pennsylvania against a Delaware corporation headquartered in Illinois for alleged hearing loss caused by the defendant's sirens. Plaintiffs contended the Pennsylvania long-arm statute, which provides that "qualification as a foreign corporation," i.e., registration with the Secretary of State, conferred general personal jurisdiction over the defendant. The trial court dismissed the case in accordance with *Daimler* because American LaFrance is not "at home" in Pennsylvania. However, the appellate court disagreed and reversed, stating, "In this case, [American LaFrance] registered as a foreign corporation to do business in Pennsylvania. . . In doing so, we hold that it consented to general personal jurisdiction in Pennsylvania."

Although the New York and Pennsylvania long-arm and registration statutes are not identical, it is difficult to reconcile these decisions, particularly with respect to the general concept of whether merely registering to do business in a state constitutes consent to be sued there on any and all claims and causes of action. It appears the growing discord on this issue may have to be resolved by the U.S. Supreme Court. Until then, whether and to what extent merely registering to do business in a state exposes a corporation to general personal jurisdiction there will depend on the state in which the action is filed.✈

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