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Aviation Group

AVIATION HAPPENINGS

SPRING 2018—PART B

Volume 4, Issue 1B

In this issue:

SDNY Holds That Limitations Period in Article 35 of the Montreal Convention Does Not Apply to Claims for Contribution and Indemnification

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Article 35 of the Montreal Convention provides that "[t]he right to damages shall be extinguished if an action is not brought within a period of two years." In *AGCS Marine Insurance Co. v. Geodis Calberson Hungaria Logisztikai KFT*, 2017 U.S. Dist. LEXIS 195270 (S.D.N.Y. Nov. 28, 2017), the United States District Court for the Southern District of New York ("SDNY") held that the two year limitations period in Article 35 does not govern claims for contribution and indemnification.

In *AGCS Marine*, the plaintiff insurance company's insured contracted with the defendant, Geodis, to transport computer equipment from Hungary to the United States. Alleging that the computer equipment was damaged in transit, the plaintiff sued Geodis.

More than two years after delivery of the shipment, Geodis filed a third-party complaint against the airline that transported the equipment, as well as two agents that provided ground handling and transportation services at the arrival airport (the "Third-Party Defendants"). The third-party complaint pled, among other counts, claims for contribution and indemnification.

The Third-Party Defendants moved to dismiss Geodis' claims on the grounds that they were barred by the two year limitations period in Article 35. In deciding the motion, the court analyzed the only other case to address the issue in the context of the Montreal Convention, *Chubb Ins. Co. of Europe S.A. v. Menlo Worldwide Forwarding, Inc.*, 634 F.3d 1023 (9th Cir. 2011). In *Chubb*, the Ninth Circuit held that the "right to damages" that Article 35 extinguishes after two years refers to "the cause of action under the Montreal Convention by which a passenger or consignor may hold a carrier liable for damage sustained to passengers, baggage, or cargo." The *Chubb* court reasoned that claims for contribution and indemnification do not seek compensation for damage sustained to passengers, baggage, or cargo, but rather seek compensation for the amounts the third-party plaintiff is required to pay for that damage. Therefore, the Ninth Circuit held, claims for contribution and indemnification are not "rights to damages" within the meaning of Article 35 that are subject to the two year time bar.

The *Chubb* court also relied on Article 37 of the Montreal Convention ("Right of recourse against third parties"), which says that "[n]othing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person." The Ninth Circuit reasoned that Article 35 must not apply to claims for contribution and indemnification because, if it did, Article 35 would do precisely what Article 37 says the Convention does not do – prejudice the "right of recourse."

Adopting the Ninth Circuit's analysis, the *AGCS Marine* court held that Geodis' third-party claims for contribution and indemnification were not subject to the two year limitations period in Article 35 of the Montreal Convention.

The Third-Party Defendants relied on a number of previous cases from the SDNY holding that Article 29 of the Warsaw Convention, which is virtually identical to Article 35 of the Montreal Convention, barred claims against carriers for contribution and indemnification filed more than two years after the incident giving rise to the claim. Indeed, before *Chubb*, courts regularly applied the two year limitations period in the Warsaw convention to dismiss time-barred claims for contribution and indemnification. The *AGCS Marine* court, however, refused to join this line of cases. The court first noted that the "right of recourse" provision in Article 37 of the Montreal Convention was a new addition that appeared nowhere in the Warsaw Convention. Then, parroting *Chubb*, the court concluded that Article 37 exempted contribution and indemnification claims from the limitations period in Article 35, even though the court cited to no evidence suggesting that the drafters of the Montreal Convention intended that result.

The *AGCS Marine* decision is disappointing to those who were hopeful that a court outside the Ninth Circuit would adhere to the pre-*Chubb* line of cases holding that contribution and indemnification claims against carriers are subject to a two year limitations period.

***AGCS Marine Insurance Co. v. Geodis Calberson Hungaria Logisztikai KFT*, 2017 U.S. Dist. LEXIS 195270 (S.D.N.Y. Nov. 28, 2017).**

Plaintiff Successfully Moves for Remand of Crash Case to California State Court in Tort Action Removed Under 28 U.S.C. Sect 1441(a)

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Another federal trial court has rejected an attempt by aviation defendants to remove a personal injury tort action from state to federal court under 28 U.S.C. Sect. 1441(a), which enables a defendant to remove a civil action from state court if the action could originally have been filed in federal court.

This case arose out of an aircraft crash in September of 2015 in which Cathryn Dupuy was killed when the aircraft's engine allegedly lost power. Plaintiffs alleged that the engine lost power after a replacement carburetor malfunctioned. The defendants were business entities that sold and distributed the replacement carburetor. The plaintiffs sued for wrongful death under a strict products liability state law theory.

As a general rule, where a plaintiff's complaint does not raise a federal claim on its face, federal question jurisdiction may exist when federal law completely preempts a state law cause of action. Where federal law does not completely preempt a state law cause of action, federal preemption (such as conflict preemption between federal and state law requirements) may only be raised as a defense to plaintiff's claims.

In his decision, District Judge Manuel Real held that the Federal Aviation Act does not create a federal cause of action for personal injury suits, and therefore did not create a federal cause of action for the wrongful death of Cathryn Depuy. Accordingly, the Federal Aviation Act did not displace plaintiffs' state law products liability claims, and the complete preemption doctrine did not provide a basis for removal.

In reaching this conclusion, the Court further reasoned that resolution of this tort case would not depend on interpretation of the Federal Aviation Act, and the fact that portions of the Act may conflict with state law did not mean that any federal issues presented were "substantial." Judge Real also noted that the Act preserves state law tort claims and remedies.

Finally, the Court also observed that litigation of tort claims from an airplane crash largely is a "factual inquiry."

For all of these reasons, the Court found that this general aviation air crash case provided no basis for removal to federal court, and remanded the case to state court for further proceedings.

***Depuy v Aircraft Spruce & Specialty Co.,* 2018 WL 376701 (C.D. Cal. Jan. 10, 2018).**

Turbulent Times for Airlines and Service Animals

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Lately, there's been a lot of news covering feathers, fur, and fury on airplanes. Several factors have contributed to more animals up in the air, including an increase in the number of pets flying in the cabin as well as an increase in the variety of animals on board (from pigs to miniature horses to ducks, oh my!).

Flying pets as cargo can be dangerous and the cost of a pet's plane tickets can add up, which may be enough reason for passengers to claim that their animals aren't just pets, but emotional support animals. By law, emotional support animals fly for free. An avalanche of websites make it easy for pet owners to acquire the required documentation. The fee for this, which grants a pet "unlimited" free flights on any airline costs around the same as one pet's one-way ticket.

The increased number of incidents involving animals on airplanes is likely due to this lack of regulation: there is no specific training or certification required for service or emotional support animals. For emotional support animals, no training is required at all. An untrained animal in a confined space can create unsafe conditions during air travel. This may be as inconvenient as incessant barking and pet-induced allergies or as severe as a case in 2017 where a man was mauled in the face by a fellow passenger's 70-pound emotional support dog. The man could not escape because he was cornered in a window seat. This surge of incidents is penalizing airlines, whose staff and passengers have to deal with untrained animals and accidents; in turn, such incidents are resulting in more lawsuits.

Airlines may have valid defenses under the Americans With Disabilities Act ("ADA") and Air Carrier Access Act of 1986 ("ACAA"), which prevent discrimination against and allow service and emotional support animals to fly. However, airlines have begun and should continue to take proactive and preemptive measures. It was a result of the mauling mentioned above that prompted Delta to issue a new policy requiring more documentation for service animals. United followed Delta's footsteps with its own policy after its denial of boarding to an emotional support peacock went viral. It can be a fine line for an airline to impose more restrictions, as it may create additional burdens for those who legitimately use service animals.

Aviation Group News & Notes

- The Pennsylvania Bar Association will present **Denny Shupe** a special *pro bono* award later this year. The Jeffrey A. Ernico Award is an occasional award of the PBA that recognizes individuals who have achieved unique *pro bono* accomplishments, demonstrated long-standing commitment to equal justice, and served those who had nowhere else to turn. Denny is receiving the Ernico Award in recognition of his service as a model for leadership in *pro bono* and public interest legal service, addressing the unmet needs of our country's military veterans.
- *Finance Monthly* named Schnader the Aviation & Maritime Law Firm of the Year – USA.
- *Worldwide Financial Advisor Awards Magazine* named Schnader a 2018 Excellence Awards Winner in the category of Insurance Services.
- Denny Shupe will speak on a panel titled, "General Aviation Revitalization Act – An Update" at the annual International Air & Transportation Safety Bar Association conference in May.

Any policy should continue to preserve and respect the rights of individuals with disabilities to travel with service animals, as required under the ADA. However, the Department of Transportation has said that airlines are not required to accommodate unusual service animals like snakes, reptiles, ferrets, rodents, and spiders, and can refuse animals too big for the cabin or that are a direct threat to passengers and crew.

Airlines should continue to monitor and modify policies in order to ensure the safety of their passengers. Laws on the ground are also evolving: nineteen states criminalize passing off pets as service animals and Arizona may become the twentieth. The Department of Transportation also plans to receive public comments on proposed regulations in July, which may result in new rules regarding service animals taking off.

The "Stream of Commerce" Runs Shallow: Two State Court Decisions Limit the Exercise of Specific Personal Jurisdiction Over Foreign Defendants

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Most attorneys and claims professionals are well aware of the United States Supreme Court's 2014 decision in *Daimler AG v. Bauman*, which held that general personal jurisdiction over a corporation exists only in the state or states where it is incorporated and maintains its principal place of business. Although some courts initially were reluctant to embrace *Daimler*, it is now firmly entrenched as the law of the land. Consequently, plaintiffs seeking favorable and convenient venues for litigation against foreign defendants have attempted to expand the court's exercise of *specific* personal jurisdiction, by invoking a "stream of commerce" analysis. Two recent decisions, however, illustrate the strict constitutional boundaries of that argument: *Venuti v. Continental Motors, Inc.*, No. 20160645-CA, 2018 Utah App. LEXIS 2 (Utah Ct. App. Jan. 5, 2018) and *Mierzwa v. Cirrus Design Corporation,* No. 69DU-CV-16-2716 (6th Judicial Dist. Minnesota, Dec. 11, 2017).

The *Venuti* action arose from a helicopter crash near Green River, Utah. Plaintiff filed in Utah state court a wrongful death action, *inter alia*, against the manufacturer of the accident helicopter's magnetos, Continental Motors, Inc. ("CMI"). CMI originally sold the subject magneto to a third-party located in California, which subsequently overhauled it and sold it to a Nevada company, which then sold it to the Utah company that installed it into the accident helicopter.

CMI is a Delaware corporation with its principal place of business in Mobile, Alabama. CMI is not licensed or registered to do business in Utah, has no office and does not own real estate there, and does not specifically target Utah for sales or marketing purposes. However, CMI consistently sells and ships components, including magnetos, to at least eight fixed base operators in Utah. It retains demographic data on its sales to Utah residents and businesses, and also advertises in national publications whose circulation includes Utah.

Plaintiff conceded that the Utah court does not have general personal jurisdiction over CMI. Instead, plaintiff argued that the court should exercise specific personal jurisdiction over CMI because the claims were sufficiently related to its regular component sales in Utah, and CMI had placed the subject magneto into the stream of commerce, knowing that it could end up in Utah. The Utah Court of Appeals disagreed. As to the first argument, the court admonished that specific personal jurisdiction requires the claims to arise out of the foreign company's contact with the forum. Since the subject magneto was not purchased by the owner and operator from one of the eight fixed base operators in Utah to whom CMI sells components, plaintiff's claims did not relate sufficiently to CMI's business contacts with Utah. As to the latter, the court explained, "The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution and retail sale. . . Once a product has reached the end of the stream of commerce and is purchased by a consumer, a third-party's unilateral decision to take the product to the forum state is insufficient to confer personal jurisdiction over the manufacturer." 2018 Utah App. LEXIS 2, at *13 (internal citations omitted).

A Minnesota state district court utilized an even more restrictive approach to stream of commerce in *Mierzwa*. That case involved the crash of a Cirrus SR22 aircraft off the coast of Grand Bahama Island. Cirrus is a Wisconsin corporation with its principal place of business in Minnesota. The aircraft's engine was designed and manufactured by CMI in Alabama,

but purchased by Cirrus in Minnesota, shipped to Minnesota and installed in the accident aircraft in Minnesota.

Plaintiffs sued CMI in Minnesota. They did not contend the Minnesota court had general personal jurisdiction over CMI, but instead, that the contract between Cirrus and CMI, pursuant to which CMI sold and shipped the accident aircraft's engine to Minnesota, warranted the exercise of specific personal jurisdiction. Once again, the court disagreed with plaintiffs. It reasoned, "As the United States Supreme Court quoted in *Bristol-Myers Squibb*, 'even regularly occurring sales of a product in a State do not justify the existence of jurisdiction over a claim unrelated to those sales.' Here, even [CMI's] regular sales of motors to Cirrus do not justify the exercise of personal jurisdiction over a claim alleging the improper manufacture and design of a product when that manufacture and design of the product took place in Alabama, and arose out of an incident that occurred outside of Minnesota to nonresidents."

The lesson of *Venuti* and *Mierzwa* is that specific personal jurisdiction requires a direct relationship among the defendant, the forum and the claims. It is not enough that the defendant simply have some contact with the forum state. That contact must relate to the claim and the plaintiff. Foreign corporations now have well-developed authority for both general and specific personal jurisdiction challenges.

Be Nice to Crewmembers

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Emotional-assistance peacocks and hamsters have occupied the airline passenger news of late. But not to be outdone, the issue of passenger removals from aircraft has recently made headlines. In February, a male passenger on an Alaska Airlines flight from Anchorage to Seattle entered the lavatory, removed his clothes, and then refused to obey crewmember instructions. Flight attendants reportedly donned latex gloves to "handle" the situation. The FBI and local police met the flight and removed the passenger. In January, an "Instagram fitness model" failed to get along with personnel on an American Airlines flight from Miami to New York. The model reportedly had arisen from her seat while, despite a delay, the seatbelt light was illuminated, and it grew from there. Police boarded the flight and removed her.

While flight crewmembers should seek to defuse, rather than escalate, unpleasant encounters with passengers, passengers would be wise to maintain proper decorum and show respect for crewmembers. Air carriers are well within their rights to remove passengers whose presence on the airplane may be "inimical to safety." This standard does not require a threat of a terroristic nature. It can be conduct that suggests the passenger might not follow crewmember instructions, could interfere with crewmembers in the performance of their duties, or might distract crewmembers from their duties.

The courts routinely recognize that an airline's discretion to determine whether carriage of a passenger might be inimical to safety is very broad. The captain of a flight, as decision maker on removal of a passenger, is entitled to rely on information provided to him by the cabin crew and others and has no obligation to investigate. Many courts, in fact, place the burden on the passenger to disprove that the airline had grounds to remove her.

The bottom line is that a passenger who "pisses off" a crewmember and is removed from the flight will have an uphill battle seeking any relief in the courts. If for no other reason, be nice to crewmembers.

Sikkelee II – What Will the Third Circuit Do on Appeal of the Trial Court's Summary Judgment Decision on Conflict Preemption Grounds?

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The Third Circuit soon will have an opportunity to address the scope of its recent 2016 decision in *Sikkelee v. Precision Airmotive Corporation ("Sikkelee I")*, where it held that the Federal Aviation Act (the "Act") does not preempt the field of aircraft products liability claims, but left open the possibility of conflict preemption. Last month, Plaintiff-Appellant Sikkelee filed its Opening Brief in "Sikkelee II" before the Third Circuit, after she appealed the trial court's 2017 grant of summary judgment on remand from the Third Circuit.

As you may recall, in 2005, pilot David Sikkelee died when his plane crashed less than 400 hours after a third-party manufacturer installed an aftermarket carburetor into his Lycoming engine without Lycoming's knowledge or approval. In granting summary judgment on remand from the Third Circuit, the trial court found that there was no genuine issue of material fact "as to whether plaintiff's state law claims are conflict preempted, because the FAA's regulations rendered it impossible for Lycoming to unilaterally implement what design changes Pennsylvania law allegedly required of it." The Court also found that there was no genuine dispute of material fact "as to whether the engine was defective when it left Lycoming's hands in 1969, or alternatively, as to whether Lycoming could have reasonably foreseen introduction of the alleged defect." Accordingly, the court rejected plaintiff's strict liability and negligence claims.

Following this grant of summary judgment, the Court also granted Lycoming's motion for reconsideration of the Court's previous decision that plaintiff's claims under 14 C.F.R. Sect. 21.3, Reporting of Failures, Malfunctions, and Defects, could proceed to trial. In granting the motion for reconsideration of the viability of the FAR 21.3 claims, the Court cited to a 2008 federal court decision from Texas which found that "[b]y its plain terms, Sect. 21.3(a) applies only to a type certificate holder that also manufactured the subject product or part that is determined to be defective."

On appeal now in Sikkelee II, Plaintiff-Appellant argues that the trial court's "preemption holding is unprecedented. If affirmed, almost every aviation design defect claim will be preempted. That result is incompatible with this Court's admonition that courts should not hold, 'that the mere issuance of a type certificate exempts designers and manufacturers of defective airplanes from the bulk of liability for both individual and large-scale air catastrophes.' It also violates bedrock principles of preemption law." The appellants are arguing that the challenged aspects of Lycoming's engine carburetor design—the use of lock tab washers and choice of gasket materials—do not have the FAA's express approval, and thus no conflict preemption should be found.

With respect to their state law claims, the appellants have proposed in Sikkelee II that the Third Circuit adopt this rule: "When 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."

With respect to the grant of summary judgment on the FAR 21.3 claims, the appellants argue that the trial court improperly held that "because Lycoming's co-defendant Kelly Aerospace overhauled the carburetor, Lycoming could not be liable for design defects—even though the overhauled carburetor was installed on an engine that Lycoming built, and even though Kelly followed Lycoming's design, as well as its defective service instructions, in all material respects when it overhauled the carburetor. Under Pennsylvania law, these questions should have gone to the jury." Finally, the appellants allege that "the district court erred in holding that Lycoming had no duty to notify the FAA of defects in its design."

Lycoming's brief was due on February 26, 2018. We will report further on developments in our future newsletters.

***Sikkelee v. Precision Airmotive Corporation*, Third Circuit Court Dkt. No. 17-3006.**

Minnesota Statute of Repose Can Bar an Action For Wrongful Death Before Death

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Can a state's statute of repose, a statute that cuts off certain substantive legal rights if they are not acted on before a specific deadline, bar a cause of action for wrongful death prior to the death of the decedent? In Minnesota it can.

In September 2003, Robinson Helicopter Company manufactured a Model R44 II helicopter in California that was sold one year later to Four Winds Leasing, LLC in Minnesota. Over seven years later, in November 2011, John Zacher, the president of Four Winds, and his wife Vickie Zacher were occupants of the helicopter flying from Alexandria, Minnesota to Hackensack, Minnesota when the helicopter lost control and crashed into Ten Mile Lake. While Mrs. Zacher was able to swim to safety, Mr. Zacher drowned in the lake. Two years after the crash, in November 2013, Mrs. Zacher filed a wrongful death action against Robinson Helicopter in California state court for the death of her husband alleging wrongful

death as well as fraudulent concealment on the part of Robinson for their alleged failure to warn pilots about problems with the Model R44 II.

California, like many states, has a borrowing statute, a specific statutory provision to address the choice of law analysis for statutes of limitation and statutes of repose. A borrowing statute directs the forum state to "borrow" the relevant statute of limitations and/or repose from another jurisdiction under certain circumstances. California's borrowing statute hinges on where the cause of action "has arisen." If a cause of action arose in another state, the California court must apply the statute of limitations and/or statute of repose of the state where the action arose.

Here, even though the Model R44 II was manufactured in California and the lawsuit was brought in California state court, the court determined that the cause of action arose in Minnesota, such that Minnesota limitations law was "borrowed" and applied. The court used a common sense meaning approach to determine where the cause of action arose. Mrs. Zacher contended that her cause of action for wrongful death arose in California because that is where Robinson's alleged wrongful conduct took place, the design, assembly, marketing and sale of the Model R44 II. Mrs. Zacher argued that her tort cause of action arose when the wrongful act was committed even though damages from that wrongful act were not sustained at that time. The court disagreed with Mrs. Zacher's interpretation. While some tort causes of action may follow Mrs. Zacher's reasoning, a cause of action for wrongful death is unique. A wrongful death action does not "arise" until the death of the decedent, which took place in Minnesota in this case. The court held that Mrs. Zacher's cause of action for wrongful death arose when the Model R44 II crashed in Minnesota resulting in Mr. Zacher's death, such that Minnesota limitations law was to be "borrowed" and applied to determine whether her wrongful death action was time-barred.

Minnesota has a three-year statute of limitations for wrongful death actions and a six-year statute of repose. A statute of limitations is a procedural limit on the time within which a party can pursue a remedy. A statue of repose is a substantive limit on the time within which a party can acquire a particular cause of action. Put more simply, Minnesota's statute of repose can substantively bar a cause of action for wrongful death even before the death of the decedent. While the court noted this statutory framework may be seen as unjust and/or illogical, the court held that Mrs. Zacher's wrongful death action was time-barred even though her cause of action (Mr. Zacher's death in 2011) had not yet accrued by the time the six year statute of repose ran (2010). While fraudulent concealment may serve to toll the statute of limitations where there is affirmative conduct to further the concealment, Mrs. Zacher only alleged that Robinson concealed the alleged defects in the Model R44 II by failing to disclose them to consumers. Mrs. Zacher did not allege any affirmative acts. Therefore, it is imperative to analyze whether the forum state has a "borrowing statute" and the different state-based statutory limitations laws that could apply to a plaintiff's cause of action because, as in *Zacher*, certain causes of action could be substantively barred before they even arise.

Zacher v. Robinson Helicopter Co., Inc., **No. B279673, 2017 WL 6333908, (Cal. Ct. App. Dec. 12, 2017).**✈

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