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In this issue:

Are Airplanes like Automobiles? — US Supreme Court to Hear Specific Jurisdiction Cases of Vital Interest to the Aviation and Auto Industries

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On January 17, 2020, the US Supreme Court granted petitions for writs of certiorari and consolidated two products liability cases on appeal from the Montana and Minnesota state supreme courts involving the Ford Motor Company and automobile accidents in those states. The outcome of these consolidated cases is of vital interest to aviation manufacturers and others in the aviation industry, as they address one of the hottest topics in aviation accident litigation over the last few years – the circumstances under which a court has specific personal jurisdiction over a foreign corporation, where no general personal jurisdiction exists.

In both cases the state courts found that they could exercise specific jurisdiction over Ford despite the fact that Ford's contacts with the states did not cause the injuries to the plaintiffs. The vehicles were not designed, manufactured nor originally sold by Ford in these two states.

In one of the cases, *Ford v Bandemer*, the question presented to the Supreme Court in Ford's petition for a writ of certiorari was as follows:

> *The Due Process Clause permits a state court to exercise specific personal jurisdiction over a non-resident defendant only when the plaintiff's claims "arise out of or relate to" the defendant's forum activities….The question presented is: Whether the "arise out of or relate to" requirement is met when none of the defendant's forum contacts caused the plaintiff's claims, such that the plaintiff's claims would be the same even if the defendant had no forum contacts.*

In the decisions below, the Montana and Minnesota state supreme courts declined to adopt a "causal standard" for the exercise of specific personal jurisdiction under which Ford's contacts with the state must have caused the plaintiff's claims. The US Supreme Court previously has held, in *Walden v Fiore*, that "the defendant's *suit-related conduct* must create a substantial connection with the forum State." Notably, the briefing by both petitioner Ford

and by the respondents included citations to aviation cases in which specific jurisdiction was at issue, and typically where jurisdiction was not found.

Ford argued in its petitions that four different approaches to the "arise out of or relate to" requirement have been adopted in state and federal courts: (1) **no causal connection required** (adopted by the highest courts of the District of Columbia, Minnesota, Montana, Texas, and West Virginia, and by the Federal Circuit); (2) **but-for causal connection required** (adopted by the federal Fourth, Ninth and Eleventh Circuits and by the highest courts of Arizona, Massachusetts, and Washington); (3) **stronger connection required than but-for causation** (adopted in various formulations by the federal First, Third, Sixth and Seventh Circuits, and the high courts of Nevada, New Hampshire, Oklahoma and Oregon; and (4) **unspecified causal connection required** (adopted in various formulations by the federal Second, Eighth, and Tenth Circuits and the Supreme Court of Alabama).

Ford argued that the Montana and Minnesota Supreme Courts erred when they concluded that specific jurisdiction could be exercised over Ford under the circumstances of the two accidents, and urged the US Supreme Court to grant its petition for a writ of certiorari to provide the needed clarity for how closely a defendant's forum contacts must be connected to a plaintiff's claim for the "arise out of or relate to" requirement to be met.

In contrast, in *Bandemer*, respondent's formulation of the question presented was much different than Ford's formulation:

> *Whether petitioner Ford Motor Company is subject to specific personal jurisdiction in Minnesota when one of its cars injures a Minnesota resident in Minnesota, where Ford has deliberately targeted the Minnesota market and sold hundreds of thousands of cars in Minnesota, but where the particular car causing the injury was originally sold in a neighboring state.*

And in the Montana case, respondent's formulation of the question presented had a slightly different approach, with emphasis on the causation issues:

> *Should the due-process standard for establishing personal jurisdiction incorporate a but-for or proximate causation requirement derived from tort law, such that Ford Motor Company cannot be held to answer in a forum for injuries caused by a product that it advertises and sells in that forum unless the particular individual product that caused the injury can be traced to Ford's direct contacts with the forum state?*

Respondents unsuccessfully argued that Ford's petition should be denied, *inter alia*, because "no federal court of appeals or state high court has accepted Ford's argument for importing a rigid tort-based causation standard into due process," and because the decisions below did not reflect a split requiring resolution now, but instead were a "straightforward application of this Court's personal jurisdiction precedents." Respondents focused upon precedents applying stream of commerce analysis, such as from West Virginia's highest court, which has held that "focus in a stream of commerce … analysis is not the discrete individual sale, but, rather, the development of a market for products in the forum."

Amici curiae briefs in support of Ford's petition were submitted by the Chamber of Commerce of the United States of America, the National Association of Manufacturers, the American Tort Reform Association, and the Alliance of Automobile Manufacturers.

We have heard that at least one state appellate court recently hearing arguments about specific jurisdiction in an aviation case specifically referenced these Ford cases now pending before the US Supreme Court and the importance of the resolution of the Ford cases to the jurisdiction issues before that state court.

How the Supreme Court rules in these automobile cases could have a dramatic effect on recently observed trends in aviation litigation, including successful jurisdiction challenges by defendants and the filing of multiple protective actions by plaintiffs in the absence of applicable "savings statutes."

Ford filed its petitioner's brief in the consolidated cases on February 28. The United States filed an amicus curiae brief supporting Ford's challenge to specific jurisdiction under settled law of jurisdiction, but urging the Supreme Court not to adopt Ford's proximate-cause test for specific jurisdiction. Seven additional amicus briefs in support of petitioner, including one joined by the General Aviation Manufacturers Association, have been filed with the Court as of March 6. The consolidated cases have been listed for one hour of oral argument on April 27.

We will report further about developments in upcoming issues of *Aviation Happenings* as circumstances warrant. ***Ford Motor Co. v. Bandemer,* No. 19-369, 205 L. Ed. 2d 215, -- S Ct. -- , 2020 U.S. Lexis 536 (2020). *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, No. 19-268, 205 L. Ed. 2d 219, -- S. Ct. -- , 2020 U.S. Lexis 533 (2020)**

Aviation Group News and Notes

- **Bob Williams** (pictured below) officially received his wings from the Civil Air Patrol and was awarded CAP's Achievement Award for Outstanding Service as the squadron's Safety Officer.
- **Barry Alexander** moderated the panel "Top of the Agenda: Current Legal Issues for Airline In-House Counsel and Airline Insurers" at the IATA Legal Symposium 2020 on February 20 in New York.
- **Denny Shupe** published "Tenth Circuit Affirms Summary Judgment in Premier 390 Accident Litigation After Plaintiffs' Expert Testimony Excluded" in *Skywritings*, the newsletter of DRI's Aviation Law Committee.
- **Jonathan Skowron** was named a partner at the firm.
- **Barry Alexander** was quoted in a January 12 article, "Treaty on unruly passengers takes effect: U.S. not on board" in *Travel Weekly*.
- In February, **Lee Schmeer,** a Major in the U.S. Air Force Reserve, and his squadron delivered a dog tag from a downed B-17 aircraft commander back to his family in Prescott, Arizona. The dog tag was found by a potato farmer in France. Photo below.
- **Bob Williams** will moderate a panel at the Aviation Insurance Association's Annual Meeting in Tucson, Arizona in May.
- **Barry Alexander, Stephen Shapiro, Denny Shupe, Jonathan Stern and Bob Williams** were recognized among the leading aviation attorneys in the 2020 edition of *Who's Who Legal: Transport.* Denny was also recognized as one of five "Global Elite Thought Leaders" for North America in the Aviation—Contentious category. Denny and Barry were each recognized as one of eight "Leading Individual" aviation defense lawyers in the U.S.

D.C. Circuit Affirms *Forum Non Conveniens* Dismissal of Multidistrict Claims Arising from Malaysia Airlines Flight 370 Disappearance

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In the early hours of March 8, 2014, Malaysia Airlines Flight MH370 disappeared somewhere over the Southern Indian Ocean. The Boeing 777 that carried 239 passengers and crew, including three U.S. citizens, has never been found.

Beginning in early 2016, approximately forty lawsuits related to Flight MH370's disappearance were filed in district courts across the United States. The Judicial Panel on Multidistrict Litigation transferred the cases to the U.S. District Court for the District of Columbia for pretrial proceedings.

After a year of discovery on threshold issues, including issues of jurisdiction, the defendants filed a joint motion to dismiss, claiming *forum non conveniens*. The Malaysian Airline defendants also sought dismissal based on sovereign immunity and lack of subject matter jurisdiction under the Montreal Convention.

Declining to reach the jurisdictional issues, the district court found that Malaysia is an adequate alternative forum for the plaintiffs' Montreal Convention and state law wrongful death and product liability claims (against Boeing). In exercising its discretion, the district court explained that Malaysia is not inadequate merely because it has less favorable substantive law. The district court also balanced the relevant public and private interest factors, ruling that Malaysia's public interest in hearing claims arising from Flight MH370's disappearance far outweighed that of the United States, even as to the tort claims the plaintiffs asserted against Boeing. Further, the district court found that the interests of the parties would be better served by trying the cases in Malaysia in light of the overwhelming amount of evidence and witnesses located there (and the challenges of making that evidence available in a United States court).

The D.C. Circuit, giving substantial deference to the district court's reasoning, as it is obliged to do under standards governing review of *forum non conveniens* decisions, found that there was no abuse of discretion. It rejected appellants' arguments that the district court failed to give sufficient deference to the plaintiffs' choice of forum, finding that the court's discussion demonstrated that it had given plaintiffs' choice of forum the appropriate consideration, including giving a U.S. citizen plaintiff the highest degree of deference. The D.C. Circuit also rejected appellants' arguments that the district court improperly declined to reach the sovereign immunity challenges raised by the airline while pointing to "intractable immunity questions" as a reason for *forum non conveniens* dismissal.

Finally, the D.C. Circuit found that appellants had waived multiple arguments they failed to raise before the district court. Thus, the D.C. Circuit did not consider the U.S. citizen's argument that he could not secure counsel of his choice in Malaysia and rejected other appellants' arguments that tort damages are inadequate under Malaysian law.

While the result is perhaps not surprising, the case serves as a reminder that litigants must be careful to preserve their arguments in the trial court. In the press of motions practice, counsel should carefully consider whether to involve appellate practitioners to spot potential arguments to preserve for appeal. ***In re Air Crash Over the South Indian Ocean*, 946 F.3d 607 (D.C. Cir. 2020).**

No More Snakes on a Plane: Proposed DOT Rule Would Limit Service Animals to Dogs

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Emotional support peacocks, ducks, and squirrels have all made headlines in recent years as unusual travel companions. While the public may love reading about the kookiest animals to take to the skies, these loosely regulated animals cause headaches for airlines, passengers, and other service animals. But exotic animals getting a free ride in coach may soon be a thing of the past. On February 5, 2020 the Department of Transportation ("DOT") published a notice of proposed rulemaking seeking to amend its regulations implementing the Air Carrier Access Act ("ACAA")—the law that prohibits air carriers from discriminating based on disability—that would drastically limit the definition of "service animals" that are permitted to fly for free with travelers.

The DOT seeks to amend the definition of "service animal" to "a dog that is individually trained to do work for or perform tasks for the benefit of a qualified individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability." The current definition of "service animal" has no species restriction, with the exception of unusual species (think spiders and rodents), and includes "any animal shown by documentation to be necessary for the emotional well-being of a passenger," *i.e.* emotional support animals. Thus, the new definition would dramatically reduce the scope of service animals protected by the ACAA by limiting service animals to dogs and removing protections for emotional support animals.

The DOT explains that it limited the definition of "service animal" to dogs because "dogs have both the temperament and ability to do work and perform tasks while behaving appropriately in a public setting while surrounded by a large group of people." The DOT considered allowing other species of service animals, such as capuchin monkeys and miniature horses, but the DOT determined that these animals were not well suited to air travel. Capuchin monkeys may transmit disease and can exhibit unpredictable and aggressive behavior, and miniature horses are too big for aircraft.

The new definition of service animal would also permit airlines to treat emotional support animals

like any other pet. The DOT argues that this approach is more in line with the Department of Justice's regulatory definition of "service animal" under the Americans with Disabilities Act, which does not recognize emotional support animals as service animals. The DOT's decision to remove protections for emotional support animals is based in part on comments from airlines indicating that emotional support animals jeopardize the safety of passengers, crew, and service animals. Moreover, there is concern that the proliferation of cheap and easy phony credentials has resulted in a rise in fraudulent claims that house pets are emotional support animals. For example, American Airlines reported a 48-percent increase in the number of emotional support animals on its flights between 2016 and 2017 and a 17-percent decline in the number of requests it received to transport pets for a fee during the same period. The DOT notes that airlines could still elect to recognize emotional support animals and transport them for free.

Other changes proposed by the DOT include a rule permitting airlines to place size limitations on service animals, a rule permitting airlines to require a service animal to be harnessed, leashed, or tethered, a rule permitting airlines to require travelers with a service animal to provide documentation of the animal's behavior, training, health, and, in the case of flights over eight hours, documentation that the animal would not need to relieve itself during the flight, and a rule prohibiting airlines from restricting service animals based solely on breed or generalized type of dog.

The DOT is accepting comments on the proposed rule until April 6, 2020. **Traveling by Air with Service Animals, 85 Fed. Reg. 24 (Feb. 5, 2020) (to be codified at 14 C.F.R. pt. 382).**

Minnesota Appellate Court Denies Damages Retrial Despite Admitted Attorney Misconduct

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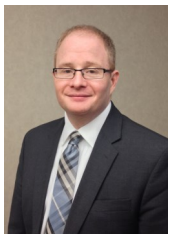
Few motion picture sequels are better than the original. The same can be said about *Kedrowski v. Lycoming Engines*. This saga began when the Minnesota Court of Appeals affirmed the trial court's grant of judgment as a matter of law to Lycoming because the opinions of plaintiff's liability expert, Don Sommer, did "not survive the intellectually rigorous application of the basic engineering principles involved." No. A17-0538, Minn. Ct. App. (May 15, 2018) ("Kedrowski I"). In the sequel, the Minnesota Supreme Court reversed that decision because, even though Mr. Sommer's principal methodology was flawed, his opinions also were supported by his "differential diagnosis" or process of elimination methodology. Accordingly, the Supreme Court ruled that his opinion should not have been excluded in its entirety, and ordered a new trial on liability (but not on the $28 million damages verdict). No. A17-0538, Minn. (Sept. 11, 2019) ("Kedrowski II").

In the third installment, the Minnesota Court of Appeals recently affirmed the trial court's refusal to grant a new trial on the issue of damages. No. A17-0538, Minn. Ct. App. (February 10, 2020) ("Kedrowski III"). The gist of Lycoming's argument was that Kedrowski's counsel had engaged in repeated misconduct during the trial, which warranted a new trial on both liability and damages. In particular, Kedrowski's counsel referred to alleged failures of other fuel pumps, used a Lycoming newsletter for (unspecified) purposes other than that for which it had been admitted, and made disparaging comments about Lycoming, its defense strategy, and corporations in general.

New trials are to be granted on account of attorney misconduct where the misconduct "prejudices" the other party. Here, the Court of Appeals found that the jury's $28 million damage award was *less* than what Kedrowski requested, and was consistent with his medical and wage loss records. Furthermore, Lycoming did not challenge damages at trial. Instead, its counsel specifically told the jury, "[W]e're not here fighting about Mr. Kedrowski's damages and injuries." The Court of Appeals therefore held that Lycoming is not entitled to a new trial on damages because the effect of Kedrowski's attorney's misconduct was limited to liability issues and did not prejudice the jury's damages decision. In so holding, the Court explained, "[A] new trial on liability does not require a new trial on damages if the issues are 'so distinct and separable that one issue can be justly determined without a determination of the other.'"

This story has at least one more chapter, *i.e.,* the retrial on liability. Stay tuned.



Central District of California Decision Reminds Us That Sixth Circuit's Decision In *Doe v. Etihad Airways* Continues to Have Potential Adverse Consequences

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It has been almost three years now since the Sixth Circuit surprised the aviation legal industry by holding in *Doe v. Etihad Airways* that Article 17 of the Montreal Convention permits recovery for emotional injury as long as there is an accompanying physical injury, even where the emotional injury is not caused directly by the physical injury. The industry concern in the aftermath of that decision has waned somewhat over the past few years, but the Central District of California's decision in *Leung v. China Southern Airlines* serves as a reminder to proceed with caution so as to avoid a second potentially adverse decision that could tumble the dominoes the decision in *Doe* to date has not.

William Leung, a severely disabled man, and his father Jim Leung, with whom he was traveling, asserted a claim for bodily and emotional injuries allegedly sustained as a result of mistreatment by a wheelchair attendant at Los Angeles International Airport. The Leungs, who were traveling from Los Angeles to Ho Chi Min City, Vietnam via Guangzhou, People's Republic of China, specifically alleged that the wheelchair attendant assigned with transporting William to the boarding gate:

- "demanded that Plaintiff William Leung speak to her, yelling, 'Can't you talk?,'" when they arrived at the security checkpoint;
- ordered William to get up and walk through the checkpoint, eventually shaking the wheelchair and then pulling it backwards, causing William to fall to the floor and twist his ankle;
- disappeared for forty-five minutes after William walked through the security checkpoint before finally returning to take him the rest of the way to the boarding gate;
- ordered William to walk onto the plane after arriving at the gate, again pulling the wheelchair backwards so that William fell to the floor and twisted his ankle again; and
- left plaintiffs at the gate without a wheelchair.

Plaintiffs further alleged that "the wheelchair attendant's actions 'caused severe emotional distress to both plaintiffs' and, while on the airplane, Plaintiff William Leung suffered a series of seizures, lost control of his bowel, vomited, and trembled uncontrollably." China Southern Airlines moved for summary judgment, arguing that the state law claims were preempted by the Montreal Convention, and that neither plaintiff had sustained a bodily injury supporting recovery under the Montreal Convention.

The district court dismissed the state law claims as preempted, but held that there was a question of fact as to whether Plaintiff William Leung had sustained a bodily injury – specifically referencing the claims that he twisted his ankle. In light of the decision in *Doe v Etihad*, it is good that the Court did not address specifically whether and under what circumstances plaintiffs could recover for their allegedly far more significant emotional injuries. The action subsequently settled, so we need not worry in this case about any subsequent adverse decision from these potentially compelling allegations of emotional injury.

In light of the issues raised by the parties in the briefing on the motion for summary judgment, China Southern Airlines may have been fortunate that the district court's decision was vague with regard to the recoverability of emotional injuries not caused directly by any bodily injury. While China Southern's opening memorandum of law seeking to strike the emotional injury claims made no mention of any alleged bodily injury, plaintiffs in opposition pointed out there was in fact an allegation of bodily injury, and relied upon *Doe* for their claims that the bodily injury alleged was sufficient to permit recovery for the serious emotional injuries regardless of the relationship between the emotional injuries and that bodily injury. In reply, China Southern focused exclusively on whether the evidence of bodily injury was sufficient to raise a question of fact, and did not address the question addressed by the court in *Doe* – whether damages may be recovered for emotional injury that is unrelated to any bodily injury.

The district court's decision in *Leung* should raise the caution flag for airlines and their insurers in cases with potentially compelling evidence of emotional injury, as was alleged here. While most in the industry feel strongly that the Sixth Circuit's decision

in *Doe* is contrary to the text and drafting history of the Warsaw and Montreal Conventions, it is extremely important that this issue be taken very seriously in briefing before other courts so as to avoid another court ruling that could give the *Doe* court's holding real traction. After all, many feel just as strongly that removal of a Montreal Convention action from state court to federal court is proper, yet the opposing minority view that seemingly started with just the district courts in California has proliferated over the years to a significant number of jurisdictions that hold removal to be improper. ***Leung v. China Southern Airlines*, 2019 U.S. Dist. LEXIS 222665 (C.D. Cal. Oct. 17, 2019).**

Northern District of Illinois Holds Passengers Were Not Inconvenienced Such That Montreal Convention Provided Relief

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The U.S. District Court for the Northern District of Illinois recently held in *Bandurin v. Aeroflot Russian Airlines*, 2020 U.S. Dist. LEXIS 10296 (N.D. Ill. Jan. 22, 2020), that American passengers could not maintain a claim under the Montreal Convention arising from various inconveniences largely suffered while travelling through Moscow. The key allegations included significant travel delays, physical injuries suffered when the airline did not provide a wheelchair for a disabled passenger, and checked baggage delays and damage. Plaintiffs also brought breach of contract claims against Aeroflot and Finnair, and a RICO claim against Aeroflot only.

The foreign airline defendants moved to dismiss, arguing that the Court lacked personal jurisdiction and that plaintiffs failed to plead necessary elements of Montreal Convention Articles 17 (Death and Injury of Passengers and Damage to Baggage) and 19 (Delay). They also argued plaintiffs did not specify which contract terms the airlines allegedly breached, and that plaintiffs failed to plead necessary RICO elements.

The Court granted nearly all aspects of the defendants' motion to dismiss, holding that this was not the "exceptional case" that would have allowed the Court to exercise general personal jurisdiction over these two foreign airline defendants under *Daimler AG v. Bauman*, 571 U.S. 117 (2014), nor did any alleged conduct by the airlines relate to Illinois such that the Court could maintain specific personal jurisdiction. Several plaintiffs' Montreal Convention, breach of contract and RICO claims survived the Court's personal jurisdiction analysis. Of those, the Court held: 1) the disabled plaintiff was not "embarking" for purposes of an injury under Montreal Convention Article 17 as she walked through the terminal to purchase a new ticket after she missed her initial flight, so the airline's failure to provide her a wheelchair was not actionable; 2) passengers who were denied boarding did not adequately state a claim for delay under Article 19, as the issue was one of nonperformance, as opposed to delay; 3) a passenger who was delayed due to mechanical malfunction had stated a claim for delay under Article 19 (although recovery would be limited to economic damages only); 4) plaintiffs failed to plead predicate acts of fraud or the existence of an enterprise necessary for their RICO claim to survive the motion to dismiss; and 5) plaintiffs had not adequately alleged what contractual terms the airlines violated by vaguely alleging a "voluntary contractual duty."

Bandurin shows that Montreal Convention claims have the potential to invite personal jurisdiction challenges, particularly where plaintiffs bring suit in jurisdictions unrelated to the underlying travel. After all, the jurisdiction conveyed in Article 33 does not also convey personal jurisdiction.

The United States Judicial Panel on Multidistrict Litigation Denies Motion to Centralize Four Lawsuits

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The United States Judicial Panel on Multidistrict Litigation ("Judicial Panel") denied a motion to centralize four lawsuits, all arising in the aftermath of a forced landing of a Beechcraft Bonanza A36 airplane shortly after its takeoff from the Savannah/ Hilton Head International Airport on August 28, 2017. The forced landing killed both the pilot – Randall Hunter — and the plane's two passengers, William and Catherine Cocke. The pilot's wife and children ("Hunter Plaintiffs"), the executor of the estate of the deceased passengers, and the guardians of the deceased passengers' five children ("Cocke Plaintiffs") filed lawsuits in Nebraska and Georgia against

various defendants. The litigation ultimately consisted of two lawsuits filed in the U.S. District Court for the Southern District of Georgia and two lawsuits filed in the U.S. District Court for the District of Nebraska.

The Cocke Plaintiffs filed a motion pursuant to 28 U.S.C. § 1407 to centralize pretrial proceedings in the Southern District of Georgia for all the cases. The Hunter Plaintiffs and some defendants supported centralization of pretrial proceedings; however, other defendants opposed the motion. 28 U.S.C. § 1407 (a) provides that "civil actions involving one or more common questions of fact… may be transferred to any district for coordinated or consolidated pretrial proceedings [where] transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."

Ultimately, the Judicial Panel denied the motion to centralize, after concluding that "centralization is not necessary for the convenience of the parties and witnesses or to further the just and efficient conduct of this litigation." In reaching its conclusion, the Judicial Panel noted that that there were "only four actions, brought by two plaintiff groups, in two districts, with no indication of more to come." The Judicial Panel stated that difficulty in obtaining personal jurisdiction over a party is generally not a pertinent factor in deciding whether to grant centralization. The Judicial Panel also noted that it had previously denied centralization in other cases involving similar aircraft crashes. Given that there were relatively few parties, few actions, and few districts involved, the Judicial Panel determined that "informal coordination and cooperative efforts by the involved courts and parties are practicable and preferable to formal centralization under Section 1407." ***In re Air Crash near Ellabell, Ga.*, 396 F. Supp. 3d 1357 (J.P.M.L. 2019)**

Court Rejects Montreal Convention Claim for Mental Injury Where No Bodily Injury (or Accident)

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The Montreal Convention, which governs claims for injuries sustained on many international flights, prohibits recovery for purely mental injuries. A passenger only may recover for mental injuries if he or she also sustained a bodily injury. The United States District Court for the Northern District of California recently rejected a passenger's attempt to link a minor physical injury to his alleged mental injury in order to allow him to attempt to recover for the alleged mental distress.

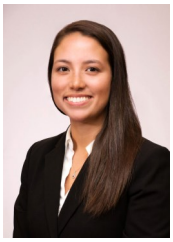
During a United Airlines flight from Chicago to London, a crack developed in the outer layer (but not the inner layer) of the cockpit windshield. The pilots diverted to and safely landed in Goose Bay, Canada. The plaintiff alleged that, as a result of the incident, he experienced terrifying mental distress – and also a back injury. Plaintiff alleged that during the diversion, the flight descended rapidly, causing a minor injury to his lower back. The injury was so minor, in fact, that plaintiff did not report it at the time, continued on his vacation during which he participated in physically demanding activities, and sought no medical attention until, ten months after the flight and four days before his deposition, he saw a physiatrist at the recommendation of his lawyer. The physiatrist ordered an MRI, which showed a disc tear and bulge.

On United's motion for summary judgment, the Court observed that, other than his own subjective observation, plaintiff offered no evidence that the flight descended rapidly. United, on the other hand, offered the testimony of the pilots, who explained that the aircraft descended at a typical rate and that autopilot controlled the aircraft for much of the descent. United also presented the reports of experts, who examined flight data and opined that the descent and landing were routine. Therefore, the Court concluded, plaintiff had failed to establish a genuine dispute of material fact as to the "linchpin of his causation theory" – namely, that the aircraft descended rapidly.

Even if the plaintiff had presented evidence that the flight descended more quickly than normal, the plaintiff still would have lacked evidence that the descent caused his alleged back injury. The plaintiff attempted to establish causation through his medical expert, who concluded that, because plaintiff's back soreness manifested itself shortly after the unscheduled descent, it was more likely than not that the descent caused the back injury. The expert also claimed that the rate of descent did not matter because even a normal descent could have caused the plaintiff's injury. According to the medical expert, "a disc bulge 'can be caused by something as minimal as coughing or sneezing.'"

The Court excluded the opinion of plaintiff's expert on the grounds that it was impermissibly speculative

and, at best, established a correlation between the decent and the back injury, not causation. Having failed to develop any admissible evidence that the descent caused his alleged bodily injury, plaintiff could not recover for his alleged mental injuries. Therefore, the Court granted United's motion for summary judgment because the plaintiff lacked any evidence of an injury for which he could seek compensation under the Montreal Convention. ***Liaw v. United Airlines, Inc.*, 2019 U.S. Dist. LEXIS 204492 (N.D. Cal. Nov. 22, 2019).**



California District Court Declines to Exercise Personal Jurisdiction Over Manufacturer of Fuel Drain Valve but Grants Plaintiffs' Request for Limited Jurisdictional Discovery

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In *Huffaker v. Eagle Fuel Cells, Inc.*, the United States District Court for the Southern District of California declined to exercise personal jurisdiction over Eagle Fuel Cells, Inc. ("Eagle"), and dismissed the claims against it without prejudice.

The lawsuit against Eagle arose from a 2017 airplane crash in Utah that resulted in the death of a Utah couple. Plaintiffs—the family members of the two decedents—alleged that the subject aircraft was equipped with a fuel drain valve that was "designed, manufactured, overhauled, inspected, and distributed" by Eagle, which failed to drain water from the fuel system, causing the aircraft to lose power at the time of the crash.

Eagle, a company incorporated in Wisconsin with its principal place of business in Wisconsin, moved to dismiss the action for lack of personal jurisdiction, arguing that the Court lacked both general and specific jurisdiction. The Court agreed.

First, the Court noted that plaintiffs did not oppose Eagle's argument that general jurisdiction was inappropriate since the "paradigm bases for general jurisdiction"—the place of incorporation and principal place of business—were located in Wisconsin. Moreover, the Court found that Eagle's contacts with California were not "so continuous and systematic [as] to render it 'at home' in [the State]," because Eagle did not "transact or solicit business, maintain offices or any other places of business, own real property, or have any clients or employees in California."

The Court further held that the "exercise of specific personal jurisdiction over [Eagle] would offend due process." In reaching its decision, the Court found that plaintiffs failed to demonstrate that Eagle purposefully directed its activities toward California residents. In particular, the record reflected that California did not have a "'manifest interest' in providing its residents with a convenient forum … because 'no California residents are party to this suit.'" The decedents and the plaintiffs were all residents of Utah. Moreover, although plaintiffs sold and shipped the valve to a recipient in California, that recipient was not a party to the action; "Plaintiffs [did] not claim that [the] recipient [of the valve] suffered any harm in California, let alone had any connection to the Subject Aircraft at the time of the crash[;] … and perhaps more importantly, … fail[ed] to allege that any harm that gives rise to this litigation was sustained in California."

Finally, the Court concluded that Eagle did not purposefully avail itself of the privilege of conducting business in California because there was no evidence that Eagle "engaged in significant activities … or [] created 'continuing obligations' between itself and the residents … such that '[it] should reasonably anticipate being haled into court there." To the contrary, there was no evidence of Eagle's presence in California. Instead, plaintiffs only alleged that Eagle "maintains a 1-800 number, which CA residents can call without incurring charges; … allows customers to request a quote online; performs services across North America and around the country; … sold a defective drain valve to a California resident[; and] ... mail[ed] a product to a non-party California resident in 2007, ten years before the aircraft crash occurred." Accordingly, the Court granted Eagle's motion to dismiss.

The Court, however, granted plaintiffs 45 days to conduct jurisdictional discovery to determine the extent of Eagle's sales of their products and services in California, and leave to amend their complaint within 20 days of the conclusion of jurisdictional discovery. ✈

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