COMMITTEE ON AERONAUTICS NEWSLETTER

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IN THIS ISSUE:

The views and opinions expressed in these articles are those of the authors and do not necessarily reflect the views of the New York City Bar Association.

From the Committee Chair:

Alan D. Reitzfeld[1]
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Committee Chair

Best wishes to all for a Very Happy, Healthy and Successful New Year.

This is our third issue (the first in 2018) of the Committee on Aeronautics Newsletter. The prior issues have received a very warm welcome. I hope that our Committee Members and alumni (and, of course, other readers accessing this Newsletter on the New York City Bar's website) continue to find each issue of the Newsletter very interesting.

The Committee continues to meet on a monthly basis. Our meeting this month will be held on January 16th, and, among other Committee business, it will feature a presentation by Racquel Reinstein (Chair, Regulatory Subcommittee) on the Port Authority of New York and New Jersey.

As discussed at the November meeting, our Committee may sponsor or co-sponsor a transportation-oriented CLE program for the City Bar. At the January 16th meeting, the "interim planning committee" will update the Committee on developments in that regard.

A number of Committee members have had significant career developments recently. Therefore, with this issue of the Newsletter we are introducing a "Committee News" section in order to pass on the good news.[2]

Many thanks to Committee Secretary Sarah Passeri for organizing a very successful, and fun, Committee Holiday Dinner (a/k/a our December Committee Meeting).

Please stay tuned for more information about upcoming Committee activities.

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[1] Alan D. Reitzfeld is a partner in Holland & Knight LLP's Litigation Practice Group. For over 35 years, Mr. Reitzfeld has played a leading role in defending airlines in multi-district litigation arising out of numerous major domestic and foreign commercial jet airline crashes and other incidents.

[2] Readers are encouraged to please submit items for the Committee News section via email to alan.reitzfeld@hklaw.com.

From the Committee Secretary:

Sarah G. Passeri[1]
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Committee Secretary

A very Happy New Year and a big thanks to all who joined us to celebrate the holidays with sangria, mojitos, and some amazing Cuban cuisine at Victor's Café. Alan's (timed) thirty second toast kicked off the festivities, which were full of laughter, fun, and fellowship. Discussion highlights were the new Star Wars movie, binge-worthy T.V., upcoming vacations, new jobs, and anticipated additions to the families (congrats to Dan Agius on your new addition!). To those who couldn't join us, you were missed. Already planning the end-of-the year bash.

COMMITTEE NEWS

Congratulations to Committee Members:

- Erin Applebaum (Chair, Commercial Airline Casualty Subcommittee) on joining the law firm of Kreindler & Kreindler LLP as an associate.
- Flora Lau on joining 360i as General Counsel.
- Patrick Morris (Chair, Fuel Subcommittee) on passing the New York State bar examination.
- Sarah Passeri (Committee Secretary) on becoming a partner at the law firm of Holland & Knight LLP.
- Allison Surcouf (Former Committee Chair) on becoming a partner at the law firm of Condon & Forsyth LLP.

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[1] Sarah Passeri is a partner in Holland & Knight LLP's Litigation Practice Group. Ms. Passeri's practice focuses on aviation and complex litigation matters, as well as asset-based financing, leasing, acquisitions, sales and securitizations, with a particular emphasis on aviation and equipment finance. She has experience flying single-engine aircraft.

RECENT DECISIONS

Thorne v. Hudson Estate, 2017 ONCA 208

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The Court of Appeal in Ontario has circumscribed the extraterritorial applicability of the General Aviation Revitalization Act of 1994, Pub. L 103-298, 108 Stat. 1552 (codified at 49 U.S.C. § 40101) ("GARA") in its decision Thorne v. Hudson Estate, 2017 ONCA 208 ("Thorne").

In the Thorne case, a faulty 39-year-old left-engine resulted in the crash of a twin-engine Beech aircraft in Dunkirk, New York in 2007, killing the pilots and passengers.

As the 18-year limitation period in GARA starts to run from the date of delivery of an aircraft to its first purchaser, an action against the manufacturer of the 39-year old faulty engine would have been statute barred.

However, the plaintiffs (the deceased estate) did not pursue the manufacturer, instead they sued the companies whose instructions they relied upon for the maintenance and repair of the aircraft and engines. Specifically they sued for negligent misrepresentations contained in the instructions that had been followed to repair and maintain the faulty engine. The alleged misinformation had been received and acted upon in Ontario, Canada.

It is interesting to observe the two ways in which the Ontario Court determined that the GARA would not apply. The first was by determining that the applicable law was the law of Ontario, Canada, thereby putting the case outside the purview of American federal or state law. In Ontario the law applicable to torts is the lex loci delicti, or the "law of the place where the tortious activity occurred". And, in this case the tortious activity was determined to be the series of negligent misrepresentations by the maintenance and repair companies, which had been received and acted upon in Ontario.

Secondarily, by way of dicta (or obiter dictum in Canada) the Ontario Court of Appeal surmised that even if the laws of New York applied to the facts before it, even then it would be not be necessary to apply the GARA because the United States Court of Appeals, 9th Circuit, in Blazevska v. Raytheon Aircraft Co., 522 F. 3d 948 (2008) held that GARA is only binding upon American Courts, and that "Congress has no power to tell courts of foreign countries whether

[1] Jeffrey Derman is counsel in the Real Property and Planning Group in the Toronto office of the Canadian law firm McCarthy Tétrault. He previously was an attorney at a New York City law firm.

they could entertain a suit against an American defendant. It would be up to any foreign court to determine whether it wanted to apply GARA to litigation occurring within its borders…"

ARTICLES

The Outer Space Treaty And The Space Liability Convention: International Protections in the Unlikely Event You're Hit in the Head by a Falling Chinese Space Station

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Chair, Aerospace Engineering Law and Policy Subcommittee

Grab a telescope and a hardhat! In March the Tiangong-1 space lab, China's first space station, is going to fall from the sky.[2] China launched the 8 ½ metric-ton space station on September 30, 2011.[3] In March of 2016, it "ceased functioning."[4] And in September of 2016, Chinese officials confirmed the station was in an uncontrolled decent from space, and would crash into Earth.[5]

As of now, it is impossible to determine where the Tiangong-1 will land. However, much of the continental United States—everything south of Albany, NY—could be in its path.[6] While the vast majority of it will burn up in the Earth's atmosphere on re-entry, chunks weighing up to 220 pounds could reach the Earth's surface.[7] Additionally, it's possible the space station's hydrazine-fuel could survive reentry; if a person comes into contact with the fuel, it could "cause coughing and irritation of the throat and lungs, convulsions, tremors or seizures."[8]

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[1] Dan Agius is an associate in Cole Schotz P.C.'s Litigation Group. Mr. Agius's practice focuses on all aspects of complex commercial litigation at both the federal and state levels. He has a degree in mechanical engineering and a passion for all things air and space.

[2] Katie Hunt, *China's Tiangong-1 space lab to plunge to Earth by March*, CNN, Jan. 6, 2017, http://www.cnn.com/2018/01/05/asia/china-tiangong-1-return-to-earth-intl/index.html.

[3] Mary Hui and J. Freedom du Lac, *China's 91/2 ton space lab will soon crash to Earth. No one knows where it will hit.*, WASHINGTON POST, Oct. 16, 2017, https://www.washingtonpost.com/news/speaking-of-science/wp/2017/10/16/chinas-first-space-station-will-soon-crash-to-earth-no-one-knows-where-itll-hit/?utm_term=.a374730b7ef1.

[4] Hunt, *supra* note 1.

[5] Hui, *supra* note 2.

[6] Hui, *supra* note 2 (explaining everything south of 42.7° N latitude could in theory be in the path of the space station). Albany, NY sits at 42.64° N latitude. *Albany, NY, USA*, LatLong.net, https://www.latlong.net/place/albany-ny-usa-514.html (last visited Jan. 15, 2018).

[7] Hui, *supra* note 2.

[8] Hunt, *supra* note 1.

Don't panic. The odds of debris from the Tiangong-1 hitting a human are less than one in a trillion.[9] You have a far greater chance of winning the Powerball, the odds of which are a more promising one in 292 million.[10] And on the outside chance you are actually harmed by the Tiangong-1 (or any other piece of falling international space junk), there are treaties in place to ensure you are compensated for your injuries.

The first such treaty is the Outer Space Treaty, which was entered into in 1967.[11] The general purpose of the Outer Space Treaty is to prevent a country from putting weapons of mass destruction in outer space, and to ensure space is utilized and explored exclusively for peaceful purposes.[12] Article VII holds each party of the treaty "internationally liable" for any damage to another party or to its "natural or juridical persons" by any object it launches into space.

The Space Liability Convention, agreed to in 1972, goes into far more detail regarding how a person would actually be compensated if he or she was struck by another country's falling space object.[13] Article II of the Space Liability Convention holds a launching state "absolutely liable" for compensatory damages caused by its space object hitting Earth. Specifically, the launching state is responsible to the injured party for the damages necessary to "restore" that person to "the condition which would have existed if the damage had not occurred."[14] The treaty goes into detail regarding how the injured party can be compensated. Importantly, the person seeking compensation does *not* have their own private right of action; rather that person's country has to seek redress on the injured party's behalf. If their country determines the claim should not proceed (such as due to political considerations), then the injured person would have no redress under the treaty.[15]

Should they proceed with the claim, the state of the injured party first must present a claim for damages to the launching state.[16] The parties then have 1 year to reach a settlement. If they cannot agree to one, then they must establish a Claims Commission to decide the amount of damages to be awarded.[17] The Claims Commission would have three members: one appointed by the claimant state, one appointed by the launching state, and one jointly agreed to by the parties.[18]

Last week, China's top engineer pushed back against the claim that the Tiangong-1 was out of control, reassuring people that it "will fall into a designated area of the sea, without endangering

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[9] Hunt, *supra* note 1.
[10] Aimee Picchi, *Powerball and Mega Millions: What are the odds of winning?*, CBS NEWS, Dec. 29, 2017, https://www.cbsnews.com/news/powerball-mega-millions-lottery-odds-of-winning/.
[11] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 UST 2410, 610 UNTS 205.
[12] *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, U.S. DEPARTMENT OF STATE, https://www.state.gov/t/isn/5181.htm.
[13] Convention on International Liability for Damage Caused by Space Objects, Sept. 1, 1972, 24 UST 2389, 961 UNTS 187 [hereinafter "Space Liability Convention"].
[14] Space Liability Convention, Article XII.
[15] Michael Listner, *Revisiting the Liability Convention: reflections on ROSAT, orbital space debris, and the future of space law*, THE SPACE REVIEW, Oct. 17, 2011, http://www.thespacereview.com/article/1948/1.
[16] Space Liability Convention, Article VIII.
[17] Space Liability Convention, Articles XIV-XV.
[18] Space Liability Convention, Article XV.

the surface."[19] If he happens to be mistaken, and you happen to get hit by a hydrazine-fuel covered, 220-pound chunk of falling space station, have comfort that the Space Liability Convention and the Outer Space Treaty are in place to ensure you're fully compensated for your injuries.

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[19] *China's Tiangong-1 space lab is not out of control: top Chinese engineer*, REUTERS, Jan. 7, 2018, https://www.reuters.com/article/us-china-space/chinas-tiangong-1-space-lab-is-not-out-of-control-top-chinese-engineer-idUSKBN1EX09H.

Worst-Case Scenario: How To Survive A Plane Crash

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January 10, 2018

According to a newly-released report by the Dutch aviation consultancy firm To70, 2017 was the safest year on record for worldwide commercial air travel. Zero passengers died in large commercial jet crashes last year, compared to six fatal civil aviation accidents in 2016.[2] Though the average passenger's chances of dying aboard a commercial flight now stand at approximately 1 in 16 million,[3] there will always remain a small risk of crashing. Naturally, passengers may find themselves wondering the inevitable: *What if my flight is the unlucky one?*

Contrary to movie and media portrayals, it is highly possible to survive a plane crash. According to the most recent report on the subject published by the National Transportation Safety Board (NTSB), the passenger survival rate for plane crashes between 1983 and 2000 was 95.7%.[4] Even in serious commercial accidents involving fire and substantial damage, 76.6% of passengers made it out of the aircraft alive. Of the fatalities that did occur, 40% were estimated to have happened in survivable crashes.[5]

Several experts have put together a selection of tips for how to ensure your safety in the event of a plane crash.

Christine Negroni, author of <u>The Crash Detectives: Investigating the World's Most Mysterious Air Disasters:</u>[6]

[1] Erin Applebaum is an associate at Kreindler & Kreindler LLP representing passengers injured or killed during the course of commercial air travel.
[2] Meyer, Zlati. (2018, Jan. 1). "Report: 2017 was safest year for commercial airline passengers ever." Retrieved from https://www.usatoday.com/story/money/2018/01/01/report-2017-safest-year-commercial-airline-passengers-ever/994504001/.
[3] *Id.*
[4] McKay, Brett and Kate. (2017, Nov. 27). "How to Survive a Plane Crash: 10 Tips That Could Save Your Life." Retrieved from https://www.artofmanliness.com/2013/07/30/how-to-survive-a-plane-crash-10-tips-that-could-save-your-life/.
[5] *Id.*
[6] McGuire, Caroline. (2017, March 8). "9 Simple Tips to help you survive a plane crash" Retrieved from https://nypost.com/2017/03/08/9-simple-tips-to-help-you-survive-a-plane-crash/

- Avoid cheap airlines: Foreign countries with lax regulations and a poor record of flight safety are unlikely to provide proper funding to their mechanics, air traffic controllers and safety inspectors.

- Listen to the pre-flight safety briefing: In emergency situations, many passengers experience a type of fearful paralysis called "negative panic," where they freeze instead of taking action. Instead of wearing headphones during the pre-flight safety briefing, it's a good idea to tune in and be reminded of exactly where to go and what to do in the event of a crash.

- Dress for survival: Try to wear clothing made from cotton or natural fibers, since synthetic clothing is extremely flammable and more likely to burn quickly during a fire. Wear practical shoes that will allow you to run quickly. The aircraft floor could be very hot, covered in oil or on fire, and you may also find yourself standing outside in hazardous terrain. Don't remove your shoes in flight, as your chances of escaping quickly could be seriously hindered.

Ed Gallea, fire safety engineer at the University of Greenwich in England:[7]

- Choose your seat wisely: Try to sit in the rear of the aircraft, in an aisle seat, as close to the exit row as possible.[8] An oft-cited study performed by Popular Mechanics in 2007 found that passengers seated in the rear of the aircraft were 40% more likely to survive than those in the front. Aisle seats were found to be somewhat safer than window seats, while locations near the exit rows were most preferable, as the majority of passengers who survived post-crash fires moved five rows or fewer before exiting the plane. Avoid the bulkhead, as the walls don't have as much "give" as an aircraft seat upon impact.

Ben Sherwood, author of The Survivor's Club:

- Stay alert during takeoff and landing: Close to 80% of all plane crashes occur during the first three minutes after takeoff and the last eight minutes before landing.[9] Be as vigilant as possible during this time period: Remain awake, keep your shoes on, ensure that your seatbelt is securely fastened and don't drink too much alcohol. Make sure that you have an action plan in place and be prepared to act immediately.

Cynthia Corbett, human factors specialist at the Federal Aviation Administration (FAA):[10]

- Position yourself correctly: Place a bag underneath the seat in front of you before takeoff. Broken legs and feet are common injuries sustained upon impact, and a bag will create a barrier to prevent your feet and legs from sliding under the seat. When impact is inevitable, assume the survival position: if you have a seat in front of you, cross your hands on the

[7] *Id*.
[8] *Id*.
[9] McKay, Brett and Kate. (2017, Nov. 27). "How to Survive a Plane Crash: 10 Tips That Could Save Your Life." *Supra*.
[10] Lallanilla, Mark. (2013, 8 July). "How to Survive a Plane Crash." Retrieved from http://www.livescience.com/38015-how-to-survive-a-plane-crash-ntsb.html.

seatback and place your forehead on top of your hands. If you're seated in the bulkhead, bend forward and hug your knees with your head down.

- Get out as fast as you can: The first 90 seconds after the crash are absolutely critical, since most deaths occur during post-crash fires that spread quickly after impact.[11] Proceed immediately to an aircraft exit; do not sit and wait for orders or waste time retrieving your personal belongings. Every second wasted on the aircraft could be the difference between life and death.

Though it's smart to prepare for the worst-case scenario, it's important to remember that commercial flights are by far the safest way to travel.[12] Vast improvements in aviation safety training, aircraft design and firefighting equipment have made flying much safer than driving; while your odds of dying in a plane crash are infinitesimal, your chances of dying in an auto accident are approximately one in 5,000.[13] All in all, there's no need to be paranoid while flying, as long as you remain "vigilantly relaxed."[14]

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[11] *Id.*
[12] McKay, Brett and Kate. (2017, Nov. 27). "How to Survive a Plane Crash: 10 Tips That Could Save Your Life." *Supra*.
[13] *Id.*
[14] *Id.*

USAIG Celebrates 90th Year

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United States Aircraft Insurance Group ("USAIG") is an institution within the aviation/insurance industry. With the turn of the calendar to 2018, USAIG will be celebrating its 90th anniversary. The following provides a brief timeline of the history of USAIG in honor of this milestone.

USAIG began in 1928 when two former World War I aviators, Reed M. Chambers and David C. Beebe, recognized a need for an insurance company deeply rooted in aviation and also one that understood the needs of aviation generally.[2] Together, the two founded USAIG as well as U.S. Aviation Underwriters Inc.

USAIG has been instrumental in providing insurance for major flight-related instances over the course of its 90-year tenure. One of the first headlines for USAIG was when it insured Lieutenant James (Jimmy) Doolittle's blind flight in 1929.[3] During this flight, Lieutenant Doolittle proved that advanced technology made it possible for pilots to safely land in the fog. Fast forward to May 6, 1937: the *Hindenburg* disaster. At that time, this was the worst crash in aviation history and USAIG handled all of the claims involving American citizens. Interestingly, the insurance policy for the Hindenburg was on display at the New York City Fire Museum to honor the 80th anniversary of the explosion.[4]

Fast forward to 1970 when USAIG insured the first commercial flight of the Boeing 747 on January 22.[5] This particular flight originated out of John F. Kennedy International Airport and flew to London carrying a crew of 20 and 332 passengers. In 1977, USAIG assisted with all of the claims arising out of the collision of a KLM 747 (KLM Flight 4805) and a Pan Am 747 (Pan Am Flight 1736), which occurred above Tenerife, Canary Islands.[6] The Tenerife airport disaster (as it is often referred to) became aviation's worst disaster and claimed the lives of 580 passengers and crew members.[7]

USAIG is more than just an insurance company - it works hard to contribute to safety within aviation. In 1983, USAIG was the first aviation insurance organization to receive the FAA's

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[1] Sophia L. Cahill is a defense attorney in Manhattan representing defendants across various industries, including aviation.
[2] USAIG. (10 Jan. 2018) "History." Retrieved from: https://www.usau.com/caf_about_history.php
[3] *Id.*
[4] New York Daily News (5 May 2017) "New York City Fire Museum Shows Hindenburg Insurance Policy to Commemorate 80th Anniversary of Explosion." Retrieved from: http://www.nydailynews.com/new-york/new-york-city-fire-museum-shows-hindenburg-insurance-policy-article-1.3138233.
[5] USAIG (10 Jan. 2018) "History." Retrieved from: https://www.usau.com/caf_about_history.php
[6] *Id.*
[7] *Id.*

award for distinguished service as a result of its contribution to aviation safety.[8] In 1990, USAIG established its very own Safety & Engineering Department to help its policyholders improve upon all aspects of flight operations.[9] In 2000, USAIG paired up with AOPA Air Safety Foundation to produce more than 100,000 safety booklets.[10] The booklets were provided to owners and operators of the most popular general aviation airplanes.[11]

In recent years, USAIG now provides online training materials and programs to assist aviation organizations in staying up-to-date on safety trends.[12] In 2011, USAIG debuted a suite known as Performance Vector of web-based individual safety training programs and department-wide safety webinars available to various aviation organizations. This particular program is continually upgraded to provide insight, strategies and practical pointers for those policy holders.

USAIG has had a rich history since its inception in 1928. Wishing USAIG a happy 90th anniversary and much success in the future!

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[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] USAIG (10 Jan. 2018) "History." Retrieved from: https://www.usau.com/caf_about_history.php
[12] *Id.*

FAA Panel Fails to Agree on Which Drones Should be Subject to Identification and Tracking Requirements

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Members of a federal advisory panel formed to recommend technologies to identify and track drones failed in December to agree on a basic threshold issue: which drones should be covered by the rules and which should be exempt.

The Unmanned Aircraft Systems (UAS) Identification and Tracking Aviation Rulemaking Committee (ARC) was chartered by the FAA in June 2017. The ARC has 74 members, encompassing the aviation community, law enforcement, drone manufacturers and others. Members include the Air Line Pilots Association, X (formerly Google X), leading drone manufacturer DJI, Ford Motor Company, GE and the General Aviation Manufacturers Association. The ARC's charter was to provide input to the FAA on a crucial issue: what technologies should be implemented to identify and track drones in flight for public safety purposes.

After extensive deliberations, the ARC's recommendations (the "ARC Report")[2] were released in December. Although consensus was reached on most technical issues, the members were sharply divided on the extent to which drones used by the public for recreational purposes should be subject to any ID and tracking requirements.

Section 6.1 of the Report suggests two options to be considered by the FAA:

> Option 1: Except for those members who strongly favor a weight-based threshold for applicability and those members who strongly oppose an exemption for model aircraft operated in compliance with 14 CFR part 101 . . . , the ARC recommends that all UAS be required to comply with remote ID and tracking requirements *except* under the following circumstances:

[1] Michael G. Davies is the principal of the Law Offices of Michael G. Davies LLC, based in New York, New York. Mr. Davies specializes in aviation law and dispute resolution, representing aircraft owners, lessors, operators and other industry professionals in the U.S. and abroad in a range of commercial matters and disputes, including the emerging field of unmanned aerial systems. Mr. Davies also specializes in U.S. commercial litigation and international litigation and arbitration.

[2] https://www.faa.gov/regulations_policies/rulemaking/committees/documents/media/UAS%20ID%20ARC%20Final%20Report%20with%20Appendices.pdf

1. The unmanned aircraft is operated within visual line of sight of the remote pilot and is not designed to have the capability of flying beyond 400' of the remote pilot.

2. The unmanned aircraft is operated in compliance with 14 CFR part 101, *unless* the unmanned aircraft:

a. Is equipped with advanced flight systems technologies that enable the aircraft to navigate from one point to another without continuous input and direction from the remote pilot.

b. Is equipped with a real-time downlinked remote sensor that provides the remote pilot the capability of navigating the aircraft beyond visual line of sight of the remote pilot.

[*Subparagraphs 3 and 4 omitted*]

Option 2: Except for those members who strongly favor a weight-based threshold for applicability, . . . the ARC recommends UAS with either of the following characteristics must comply with remote ID and tracking requirements:

1. Ability of the aircraft to navigate between more than one point without direct and active control of the pilot.

2. Range from control station greater than 400' *and* real-time remotely viewable sensor.

A number of ARC members objected vehemently to the proposed options on the ground that they would exempt millions of recreational drones from regulation. GE, Ford, the General Aviation Manufacturers Association, the Aerospace Industries Association and others filed a dissent[3] asserting that the two proposed options effectively amounted to a model aircraft/hobbyist exemption excluding "a huge segment of UAS from compliance with future ID and Tracking regulations." X, formerly Google X, likewise characterized the proposed options as exempting all hobbyist drones "from complying with any UAS ID and tracking requirements." According to the dissenters, the alleged exemption would have "direct, adverse implications for the safety and efficiency of the NAS ["National Airspace System"], public safety, and the efficacy of future UTM ["UAS Traffic Management"] systems." In lieu of the proposed options the dissenters advocated a simple weight-based threshold: as a general rule, any drone weighing 250 grams or more would be required to comply with ID and tracking regulations.

In contrast, DJI (widely viewed as the world's biggest drone manufacturer), argues in support of the ARC Report that the dissenters misstate the scope of the recreational drone exemption and that a "vast majority" of hobbyist drone sales would not be exempted.[4] DJI further argues that a

[3] https://www.commercialdronealliance.org/letters-comments/2017/12/18/alliance-dissent-to-remote-id-arc-report
[4] https://www.dropbox.com/s/brcukg8t4j0agic/DJI%20Remote%20ID%20Discussion%20Paper.pdf?dl=0

250 gram threshold "is not based on science, any showing of risk, or any threat assessment presented to the ARC."

The ARC Report is currently under consideration by the FAA and will be used by it in crafting a proposed rule for public comment.

Sexual Harassment and the Montreal Convention

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Chair, International Aviation Treaties Subcommittee

December 29, 2017

One cannot pick up a newspaper or watch the news without hearing about incidents of sexual harassment in the workplace, in the entertainment industry, and perhaps most unfortunately in Congress and the White House.

Recently there have been several reports of sexual harassment on aircraft. Of course, passenger on passenger torts are almost a common occurrence in these days of crowded aircraft, due to stressful travel conditions, delays and the overarching fear of a new terrorism attack onboard. How does the Montreal Convention deal with sexual harassment on international flights and what recourse do victims have when confronted with sexual predators?

In the landmark decision of *Wallace v. Korean Air*, 214 F. 3d 293 (2d Cir. 2000), the Second Circuit Court of Appeals dealt precisely with this issue under the Warsaw Convention. The plaintiff, Brandi Wallace, was a passenger on a Korean Air flight from Seoul, South Korea to Los Angeles, CA on the evening of August 17, 1997. It was the middle of summer so Ms. Wallace wore a t-shirt and jean shorts with a belt. Initially the flight passed uneventfully, while Ms. Wallace was seated next to a window in economy class. She fell asleep shortly after finishing her in-flight meal. Two male passengers sat between Ms. Wallace's window seat and the aisle. Seated close to Ms. Wallace was one Kwang-Young Park. Prior to falling asleep, Ms. Wallace had never spoken to or given the slightest indication of familiarity with Mr. Park. However, three hours into the flight, Ms. Wallace awoke in the darkened plane to find that Mr. Park had unbuckled her belt, unzipped and unbuttoned her shorts and had placed his hands into her underwear to fondle her. Ms. Wallace awoke with a start and immediately turned her body to the window causing Mr. Park to withdraw his hands. However, Mr. Park resumed his unwelcomed advances and when Ms. Wallace recovered from her shock, she hit him hard, then climbed out of her chair and jumped over the sleeping man in the aisle to make an escape. At the back of the plane, Ms. Wallace found a flight attendant and made a complaint about the assault. She was reassigned to another seat and when the plane arrived in Los Angeles, Ms. Wallace told airport police about the incident. They arrested Mr. Park and he subsequently pled guilty to the

[1] Mr. Kende is a Member of the law firm Cozen O'Connor. He is admitted to practice in the states of New York, Massachusetts, California and the District of Columbia and numerous federal courts around the country.

crime of engaging in unwelcome sexual conduct with another person in violation of Federal Statute 18 U.S.C. § 2244(b).

In February 1998, Wallace brought an action against Korean Air in the US District Court for the Southern District of New York, claiming liability for Park's sexual advances under what was then the Warsaw Convention (the predecessor to what now is the Montreal Convention). Following discovery, Wallace moved for summary judgment on her Warsaw Convention claim, but the motion was denied by the District Court under the theory that a sexual assault was not "a risk characteristic of air travel". Therefore, the assault did not constitute an "accident" under the Warsaw Convention as defined by the *Saks* case. *Saks v. Air France*, 470 U.S. 392 (1985).

Wallace appealed to the Second Circuit. The court unanimously reversed, finding that the assault constituted an "accident" under Article 17 of the Warsaw Convention, as a general matter, ducking the issue of whether the term "accident" excludes risks which are not characteristic of air travel. Although the court recognized that the characteristics of air travel "increased Ms. Wallace's vulnerability to Mr. Park's assault" the Court reasoned that the attack may well have been due to lack of supervision by flight attendants during the flight. As the Court noted, "while Ms. Wallace lay sleeping, Mr. Park, 1) unbuckled her belt; 2) unbuttoned her shorts; 3) unzipped her shorts and 4) squeezed his hands into her underpants. These could not have been 5 second procedures even for the nimblest of fingers. Nor could they have been entirely inconspicuous. Yet, it is undisputed that for the entire duration of Mr. Park's attack, not a single flight attendant noticed a problem and it is not without significance that when Ms. Wallace woke up, she could not get away immediately, but had to endure another of Mr. Park's advances before clamoring out to the isle."

Under this rational and what appears to be a concern about lack of supervision or oversight by the flight crew, the court found that this incident constituted an accident because it was an "unexpected or unusual event or happening that was external to the passenger" citing the language of the *Saks* case.

Interestingly, the concurring opinion took issue with the court's ducking of the question of whether the term "accident" is limited to risks characteristic of air travel, or whether the term should be construed more broadly to include any type of incident whether or not related to air travel, which is unexpected and external to the passenger. It is submitted that given the expansion of the term "accident" since the decision in *Wallace* and the nature of sexual harassment as an offensive and unacceptable form or behavior, a court today faced with the same issue would have no hesitation in finding sexual assault to be an accident regardless of the issue of whether it is part of the inherent risk of air travel.

One caveat, however, to this decision. In the court's conclusion, the majority noted that it expressed no opinion on any other aspect of Ms. Wallace's Warsaw Convention claim. This is no doubt because of the issue of emotional distress not being recoverable under the Warsaw Convention, in the absence of physical injury. There does not appear to be further elaboration as to what happened in the *Wallace* case. My guess is the matter settled.

However, notwithstanding the broad interpretation of the term accident to include a sexual assault, it is certainly questionable whether Ms. Wallace would have been entitled to recover

pure emotional distress damages in the absence of any physical injury, notwithstanding the recent expansion of the concept in the *Doe v. Etihad Airways* case, 870 F.3d 406 (6th Cir. 2017), reh'g en banc denied (Oct. 6, 2017), petition for cert. filed (U.S. Jan. 4, 2018) (No. 17-977), which was the subject of such a lively debate at a recent meeting of the Aeronautics Committee. Even a scratch, no matter how slight, may have sufficed to allow for emotional distress damages, much like the needle prick in *Doe*. However, Ms. Wallace alleged no physical injury. So Ms. Wallace's victory may have been Pyrrhic.

Municipalities Face Funding Shortfalls Due to FAA Policy

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On December 8, 2017, an FAA rule took full effect requiring compliance with 49 U.S. Code § 47107.[2] The law states that local taxes on aviation fuel (except taxes in effect on December 30, 1987) and the revenues generated by a public airport must be expended for the capital or operating costs of: (i) the airport; (ii) the local airport system; or (iii) other local facilities owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property. But contrary to the rule, many cities and towns have been directing aviation fuel tax revenue into the general coffers of the municipalities.[3] While the rule has generally been overlooked, the Department of Transportation issued a "Final Policy Amendment," on November 7, 2014.[4] The final policy confirmed the FAA's long-standing policy on Federal requirements for the use of sales tax proceeds.[5]

According to the FAA website, extensions of the December 8 deadline were considered on a "case by case basis," for "good cause."[6] To be granted an extension states need to show the steps that they have taken to achieve compliance, the process to achieve compliance and the proposed new deadline.[7] New York, New Jersey and Connecticut have all submitted plans to the FAA and

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[2] 75 Fed. Reg. 216, 66282. https://www.gpo.gov/fdsys/pkg/FR-2014-11-07/pdf/2014-26408.pdf.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] https://www.faa.gov/airports/airport_compliance/aviation_fuel_tax/.
[7] *Id.*

are listed as "qualified,"[8] with additional information required. While several states including Wisconsin, Rhode Island and West Virginia are listed as compliant, most states are either listed as qualified or not reporting as of January 9, 2018.[9]

In Illinois, for example, an aircraft owner will typically pay 6.25% in sales tax.[10] The state retains 5% while local municipalities keep the remaining 1.25%.[11] Illinois ranks highest in fees per gallon at $0.328, almost $0.20 higher than neighboring states.[12] According to the FAA website, Illinois was granted an extension for compliance from December 8, 2017 to June 30, 2018.[13] But Illinois has not yet formulated a final plan to both comply with the law and fill the funding gap that will result from compliance. Failure to comply with the FAA policy could have disastrous consequences. "Failure to comply [with the FAA rule] could cost the state as much as $129 million in federal sanctions in 2018 alone and make the state ineligible for more than $67 million in federal assistance block grants under the Airport Improvement Program," according to the Governor's office.[14]

While most states have chosen to comply with the law, some localities have chosen to fight the rule, including Clayton County, location of Atlanta's Jackson-Hartsfield Airport.[15] Jackson-Hartsfield is the busiest airport in the world, accommodating more than 104 million passengers in 2016.[16] The tax revenue generated by fuel sales in Clayton County accounts for nearly $20 million.[17] Clayton County chairman, Jeff Turner, stated that the loss of revenue will have "an impact on the services [Clayton County] provides to seniors and children."[18] In response to the FAA policy, Clayton County filed suit in the 11th circuit last January.[19] The County is arguing that the fuel tax revenue is an offset to the nearly $100 million that the county could receive in property tax revenue from the airport. The FAA has countered that it is a Georgia law that stands between Clayton County and the collection of property tax. Oral argument is scheduled for March 9, 2018.[20]

Proponents of the law include Delta Airlines. In 2012 it was an email written by an attorney representing Delta asking for a meeting with the FAA and Delta's then-chief legal officer Ben Hirst on "an issue concerning revenue diversion at airports in Georgia, arising out of state and

[8] *Id.*
[9] *Id.*
[10] Bishop, Greg. "Illinois' Jet Fuel Tax Runs Afoul of Federal Rules," *Illinois News Network*, Oct. 27, 2017, https://www.ilnews.org/news/statewide/illinois-jet-fuel-tax-runs-afoul-of-federal-rules/article_ef4f6874-b99b-11e7-932c-37739ee0b176.html.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] Yamanouchi, Kelly. "Clayton fights loss of Hartsfield-Jackson jet fuel sales tax revenue," *The Atlanta Journal-Constitution*, Dec. 12, 2017, http://www.myajc.com/business/clayton-fights-loss-hartsfield-jackson-jet-fuel-sales-tax-revenue/pxNFgM27s0k7cfYuLIF4FL/
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*

local taxes on aviation fuel."[21] The FAA said the purpose of requirements of how airport revenue can be used is to "prevent a 'hidden tax' on air transportation," and to ensure that federal airport grants are used to support airport projects and not simply substituting funds diverted from the airport to other uses.[22] Airlines argue that the law prevents local governments from using airports as "cash cows" and funneling money away from them to use for other purposes.[23] Since large commercial carriers pay substantial landing and gate fees, they hope to see a reduction in long-term price increases through enforcement of 49 USC § 47107.[24] In addition to commercial carriers, comments sent to the FAA included criticism of slow implementation of both noise and pollution abatement measures.[25]

UPDATE – Parker-Hannifin Settlement with DOJ

The Justice Department filed a legal challenge over Parker-Hannifin Corp.'s (PH) acquisition of Clarcor, Inc.[26] The complaint, filed in Delaware, argued that Parker-Hannifin created an unlawful monopoly in its Energy Institute (EI) qualified aviation fuel filtration systems and filter elements in the United States through the acquisition of its only competitor, the Facet division of Clarcor.[27]

Before the announced acquisition, Parker-Hannifin and Clarcor were the only two companies in the United States that supplied technology for EI fuel filtration. According to the DOJ complaint, Parker-Hannifin and Clarcor, "engaged in vigorous head-to-head competition. That competition enabled customers to negotiate better pricing and to receive more innovative products and better terms of service. The transaction eliminated this competition."[28]

On December 17, 2018, Parker-Hannifin announced that it had reached a settlement with the DOJ to divest the Facet filtration business, while retaining the other assets acquired from Clarcor. Facet is an approximately $60 million revenue business line. Parker issued the following statement:

> "We are pleased to reach this proposed settlement with the Department of Justice. Through this agreement, Parker will sell the Facet filtration business, providing an opportunity for a wide range of strategic buyers to enter this sought-after business. Parker anticipates court approval of the Proposed Final Judgment and looks forward to ultimately resolving this matter. We continue with the successful integration of the broader filtration businesses acquired in the CLARCOR merger."

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[21] Yamanouchi, Kelly. "Clayton fights loss of Hartsfield-Jackson jet fuel sales tax revenue," *The Atlanta Journal-Constitution*, Dec. 12, 2017, http://www.myajc.com/business/clayton-fights-loss-hartsfield-jackson-jet-fuel-sales-tax-revenue/pxNFgM27s0k7cfYuLIF4FL/.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] 75 Fed. Reg. 216, 66282. https://www.gpo.gov/fdsys/pkg/FR-2014-11-07/pdf/2014-26408.pdf
[26] https://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-against-parker-hannifin-regarding-company-s
[27] *Id.*
[28] *Id.*

The proposed settlement must be approved by the U.S. District Court for the District of Delaware. The Department of Justice also released a comment regarding the proposed settlement stating that if approved, the settlement, "would resolve the lawsuit, restore competition in the markets for aviation fuel filtration systems and elements, and address the Department's competitive concerns.[29]

According to the court filings, Parker-Hannifin has 135 days from December 18 to divest the assets of the Facet filtration business and two years from the Final Judgment to transition all retained products from the "PECOFacet" brand to a brand that does not include the Facet name.[30]

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[29] Crain's Cleveland Business, Scott Suttell, December 19, 2017, "Parker Hannifin reaches settlement with Justice Department in antitrust lawsuit." http://www.crainscleveland.com/article/20171219/news/146236/parker-hannifin-reaches-settlement-justice-department-antitrust-lawsuit.

[30] https://www.justice.gov/opa/press-release/file/1018596/download.

General Aviation – Meeting The "ADS-B" Mandate By January 1, 2020

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December 10, 2017

For as long as all living pilots can remember, the FAA requirement in respect of a pilot's medical fitness had to be met by obtaining your "airman medical certificate" (i.e., certification of fitness to fly) from an Aviation Medical Examiner or AME. AMEs are physicians qualified by the FAA to conduct medical examination of pilots and issue either a Class I (for airline transport pilots or ATP) with a six-month expiration, or a Class II (for other commercial operations, such as charters) with a twelve-month expiration or a Class III (for non-commercial, private operations) with a twenty-four month expiration. (14 CFR 61.23(d))

The only alternative to an airmen medical certificate since 2004 was for "sport pilots". The sport pilot rule allows a pilot to fly "light-sport aircraft" – aircraft severely limited as to weight and scope of operation - without the need for an FAA medical certificate. However, a sport pilot must hold at least a current and valid U.S. driver's license in order to exercise this privilege and must not know or have reason to know of any medical condition that would make the person unable to operate the aircraft in a safe manner and must not have had an airman's medical certificate denied, revoked or suspended. (14 CFR 61.23(c)(1))

An intense lobbying effort from the Aircraft Owners and Pilots Association ("AOPA") was conducted over many years. The argument advanced was as follows: At least for private operations, the once-every-two-year visit to an AME for a Class III airman medical certificate was costly to the pilot ($90.00) and did not have the desired benefit to the pilot or the public because it only evaluated the pilot's health once every twenty-four months at a moment in time (the day of the exam). Moreover, AOPA argued, the AME's exam was conducted by a physician who typically was not aware generally of the pilot's overall health and had no personal relationship with the "patient". In practice, pilots failed these medical exams because of a bout of high blood pressure exceeding the 95/155 standard or some other 'temporary' condition that was disqualifying. Between exams, pilots are required to report any change in their condition where the pilot (1) knows or has reason to know of any medical condition that would make the person unable to meet the requirements for the medical certificate necessary for the pilot operation or (2) is taking medication or receiving other treatment for a medical condition that results in the

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pilot being unable to meet the requirements for the medical certificate necessary for the pilot's operation of an aircraft. (14 CFR61.53)

The new "BasicMed" regulations (14 CFR 61.23(c)(3)), promulgated under the FAA Extension, Safety, Security Act of 2016, became effective as of May 1, 2016. Now most general aviation pilots flying non-commercially under 14 CFR Part 91 will no longer have to be examined by an AME. Instead, the pilots take a free online aeromedical factors course every two years and visit their personal physician for a checkup every four years.

BasicMed allows pilots to fly within the U.S. Many GA pilots fly their aircraft to The Bahamas that recognizes BasicMed. As of this writing, Canada and Mexico do not.

Here is the FAA's on-line summary of the Basic Med rules:
(https://www.faa.gov/licenses_certificates/airmen_certification/basic_med/)

On July 15, 2016, Congress passed legislation to extend the FAA's funding. This legislation, FAA Extension, Safety, Security Act of 2016 (FESSA) includes relief from holding an FAA medical certificate for certain pilots. This relief is called BasicMed.

When can I fly under BasicMed?
If you meet the BasicMed requirements, you can operate under BasicMed (without an FAA medical certificate) right now!

What do I need to do to fly under BasicMed?

1. *Comply with the general BasicMed requirements (possess a U.S. driver's license, have held a medical after July 14, 2006).*
2. *Get a physical exam with a state-licensed physician, using the Comprehensive Medical Examination Checklist*
3. *Complete a BasicMed medical education course;*
4. *Go fly!*

Aircraft Requirements:

- *Any aircraft authorized under federal law to carry not more than 6 occupants*
- *Has a maximum certificated takeoff weight of not more than 6,000 pounds*

Operating Requirements:

- *Carries not more than five passengers*
- *Operates under VFR or IFR, within the United States, at less than 18,000 feet MSL, not exceeding 250 knots.*
- *Flight not operated for compensation or hire*

Medical Conditions Requiring One Special Issuance Before Operating under BasicMed:

(1) A mental health disorder, limited to an established medical history or clinical diagnosis of—

1. *A personality disorder that is severe enough to have repeatedly manifested itself by overt acts;*
2. *A psychosis, defined as a case in which an individual—*
    1. *Has manifested delusions, hallucinations, grossly bizarre or disorganized behavior, or other commonly accepted symptoms of psychosis; or*
    2. *May reasonably be expected to manifest delusions, hallucinations, grossly bizarre or disorganized behavior, or other commonly accepted symptoms of psychosis;*
3. *A bipolar disorder; or*
4. *A substance dependence within the previous 2 years, as defined in §67.307(a)(4) of 14 Code of Federal Regulations*

(2) A neurological disorder, limited to an established medical history or clinical diagnosis of any of the following:

1. *Epilepsy;*
2. *Disturbance of consciousness without satisfactory medical explanation of the cause; or*
3. *A transient loss of control of nervous system functions without satisfactory medical explanation of the cause.*

(3) A cardiovascular condition, limited to a one-time special issuance for each diagnosis of the following:

1. *Myocardial infarction;*
2. *Coronary heart disease that has required treatment;*
3. *Cardiac valve replacement; or*
4. *Heart replacement.*

DOT Drops Proposed Baggage Fee Rule

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On December 7 of last year, the U.S. Department of Transportation (DOT) withdrew a Notice of Proposed Rulemaking (NPRM) and Supplemental Notice of Proposed Rulemaking (SNPRM) as

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part of the Trump administration's effort to reduce regulatory costs.[2] The notice of proposed rulemaking on ancillary airline passenger revenues, which was issued in July 2011, proposed to collect detailed information about ancillary fees paid by airline consumers to determine the total amount of fees carriers collect through the a la carte pricing approach for optional services related to air transportation. The supplemental notice of proposed rulemaking on transparency of airline ancillary service fees, which was issued in January 2017, proposed to require airlines and other entities to disclose baggage fee information to consumers when fare and schedule information is provided. DOT determined that both proposed rules were of limited public value, because there already is mandatory disclosure of fees elsewhere, and there would be significant cost to implementing these rules.

The withdrawal of the SNPRM in particular drew spirited responses from advocates on both sides.

Flyers Rights, a consumer advocate group, blasted the Trump administration and claimed it "does not make air travel great again."[3] Another consumer advocate group, Travelers United, called the move a "dereliction of duty."[4] However, Airlines for America, an airline industry trade association, praised the administration and Transportation Secretary Elaine Chao for "recognizing that airlines, like all other businesses, need the freedom to determine which third-parties they do business with and how best to market, display and sell their products."[5]

Airlines have been steadily increasing baggage fees over the years, and recently Delta Airlines announced it will charge fees for baggage on international flights to Europe.[6] Certainly, these increased fees have raised the ire of air travelers, and thus consumer advocacy groups expressed their consternation at the cancelation of the Obama-era proposed rules. However, the Mercatus Center at George Mason University expressed the idea that the proposed rules should have been more narrowly tailored to only apply to the airlines' own websites. The Mercatus Center believed that the particular crafting of the SNPRM meant that following the SNPRM would mean that online ticket websites would have to sort data in a predetermined manner, when some passengers might be more interested in sorting data by leg room or connection time; requiring the sorting of this data in such a matter might stifle competition between online ticketing agents or stifle innovation in online ticketing.[7]

Ultimately, Congress still has the option to act to pass a law that requires disclosure of baggage fees on all ticketing websites. Whether or not that will happen is something that remains to be seen.

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[2] https://www.transportation.gov/briefing-room/dot9117
[3] https://www.npr.org/2017/12/12/569960317/dot-suspends-proposed-rule-that-would-force-airlines-to-show-baggage-fee-at-book
[4] https://www.economist.com/blogs/gulliver/2017/12/excess-baggage
[5] https://www.denverpost.com/2017/12/07/airlines-dont-have-to-disclose-baggage-fees/
[6] https://www.azcentral.com/story/travel/airlines/2017/12/08/delta-air-lines-adds-new-bag-fee-basic-economy-europe-flights/933857001/
[7] https://www.mercatus.org/system/files/LeffMcLaughlin-airlinepricing-DOT-PIC_092214.pdf

Sikkelee v. Avco: A Finding that Federal Law Conflict Preempted Product Liability Claim Brought Against Aircraft Engine Manufacturer

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In *Sikkelee*, state tort law claims were brought against engine manufacturer Lycoming arising from an aircraft crash that killed the plaintiff's husband, the pilot of the aircraft.[2] The crash allegedly occurred when the aircraft lost power as a result of the loosening of screws holding together the aircraft engine's carburetor.[3] A third-party aftermarket parts manufacturer, not Lycoming, manufactured and installed the carburetor that was on the aircraft at the time of the incident.[4] It was argued, however, that Lycoming was connected to the incident by reason that federal regulations required the third-party manufacturer to follow type certificate holder Lycoming's designs when it made modifications to the engine's carburetor.[5]

Federal Aviation Administration ("FAA") regulations require that a manufacturer obtain three categories of certifications to ensure that new aircraft and component parts comply with design standards: (1) type certification; (2) production certification; and (3) airworthiness certification.[6] Before producing a new aircraft or aircraft engine, a type certificate must be obtained to "confirm[] that the aircraft or its component is properly designed and manufactured, and satisfies all applicable regulatory standards."[7] FAA regulations govern the "often 'intensive and painstaking'" application process for a type certificate, which includes submissions of the "type design, test reports, computations" as well as FAA inspections and testing to allow the FAA to find that a proposed aircraft or aircraft component is "properly designed and manufactured, performs properly, and meets the regulations and minimum standards."[8] A type certificate holder is not allowed to make any type design changes or major alterations to aircraft or components without express FAA approval of such modifications.[9]

Similarly, aircraft replacement components produced by a party other than the original manufacturer must either be produced under the original type certificate (transferred or licensed

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[2] *Sikkelee v. Avco Corp.*, 2017 WL 3317545, at *1 (M.D. Pa. Aug. 3, 2017).
[3] *Id.*
[4] *Id.*
[5] *Id.* at *2.
[6] *Id.* at *3.
[7] *Id.*
[8] *Id.* at *3-4, *citing* 49 U.S.C. 44704(a), 14 C.F.R. 21.20, 21.21, 21.33.
[9] *Id.* at *6-8.

to the third party) or a production agreement, such as a Parts Manufacturer Approval (PMA), which, like a type certificate, requires FAA approval.[10] To obtain a PMA, an application must show that the replacement component is either identical to the original component or submit a "tests and computations" application showing "that an article's design meets the applicable airworthiness requirements of its respective product."[11] Like for type certificates, design changes require FAA approval prior to implementation.[12]

The engine at issue in the *Sikkelee* matter was manufactured by Lycoming in 1969 and shipped to an aircraft manufacturer in September of that year – "shortly after Neil Armstrong walked on the moon."[13] The engine, however, was not installed on an aircraft and was placed into storage until 1998 when it was installed on a 1976 Cessna 172N aircraft.[14] The maintenance of and installation of component parts into the engine were performed by parties other than Lycoming.[15]

In 2004, the aircraft was struck by lightning, and the engine was removed and overhauled.[16] The engine's carburetor was sent to Kelly Aerospace Power Systems ("Kelly") for an overhaul where Kelly "entirely gutted and replaced" the carburetor.[17] Kelly created what was described as a "Frankenstein monster" of a carburetor "melding together two distinct aftermarket carburetor halves produced in subsequent decades before adjoining those two halves with a third set of parts from a different aftermarket parts manufacturer."[18] Lycoming had no involvement in the overhaul, and Kelly obtained a separate PMA from the FAA through a "tests and computations" application.[19] The aircraft crash that was the subject of the litigation occurred approximately one year after the engine overhaul.[20]

The plaintiff commenced a lawsuit in 2007 alleging a design defect which caused the screws holding together the carburetor to come loose and the aircraft's engine to lose power.[21] In 2010, the plaintiff settled with Kelly for $2 million, but the claims against Lycoming remained.[22] The plaintiff asserted that Lycoming was liable for a defect in design suggesting that Lycoming "could have switched the manner in which the carburetors installed in its engines had their two halves fastened by, for instance, 'using a fuel injection systems [sic] in lieu of a carburetor, safety lock wire on the throttle body to blow screws, and different gasket material."[23] After the Court of Appeals reversed the decision of the district court finding the plaintiff's claims field preempted, on remand, the trial district found the claims to be conflict preempted.[24] The court found support for its finding of conflict preemption in two recent United States Supreme Court

[10] *Id.* at *12, *citing* 14 C.F.R. 21.8; 21.9(a)-(b).
[11] *Id.* at *12-13, *quoting* FAA Order 8120.22A, *Production Approval Process.*
[12] *Id.* at *14, *citing* 14 C.F.R. 21.319.
[13] *Id.* at *15.
[14] *Id.* at *15-16.
[15] *Id.* at *16.
[16] *Id.* at *17.
[17] *Id.* at *18.
[18] *Id.*
[19] *Id.* at *19.
[20] *Id.*
[21] *Id.* at *20.
[22] *Id.*
[23] *Id.* at *26.
[24] *Id.* at *22.

decisions applying the doctrine of conflict preemption to claims against pharmaceutical manufacturers: *Mutual Pharm. Co. v. Bartlett*, 133 S.Ct. 2466 (2013)("*Bartlett*") and *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011).[25]

In *PLIVA*, state law failure to warn claims were brought against generic drug manufacturers alleging a failure to provide warning labels stating that a certain drug could cause a severe neurological disorder.[26] It was alleged that these generic drug manufacturers failed to change the drug's label to warn of this disorder despite mounting evidence that taking the drug created a high risk for it.[27]

State tort law required drug manufacturers to provide a warning with respect to dangers of which the manufacturers had actual or constructive knowledge, and it was undisputed that, if state law applied, it would have required the generic drug manufacturers to use a label with a stronger warning.[28] Federal law, on the other hand, required brand-name drug manufacturers to obtain federal approval for a new drug through proving the drug to be safe and adequate and proving that the label is accurate and adequate.[29] In contrast with the requirements for brand-name drug manufacturers, federal law requires generic drug manufacturers to show equivalence to a drug already approved by the FDA and, with respect to the drug's labeling, must show that it "is the same as the labeling approved for the [brand-name] drug."[30] Thus, according to FDA regulations, a generic drug manufacturer is required to match its generic drug labeling with that of the brand-name manufacturer.[31]

Although not able to unilaterally change its label under federal law, under the FDA's interpretation of its regulations, a generic drug manufacturer was required to propose stronger warnings labels to the agency if the manufacturer believed that a stronger warning label was needed.[32] If agreeing with the manufacturer's proposal, the FDA would then work with the brand-name manufacturer to change the drug label.[33]

The Court held it was impossible for the generic drug manufacturers to comply with both state and federal law, and, thus, the state law claims were conflict preempted.[34] According to Justice Thomas' majority opinion, if the generic drug manufacturers would have unilaterally changed the drug labeling, as required by state law, the manufacturers would have violated federal law requiring that the label match that of the brand-name drug manufacturers.[35] Moreover, even if there was a duty requiring generic drug manufacturers to communicate the need for a stronger warning label, the state law claims would still have been conflict preempted because state law specifically required that the manufacturers change the labeling, not communicate a need to

[25] *Id.* at *23.
[26] 564 U.S. at 609.
[27] *Id.*
[28] *Id.* at 611-12.
[29] *Id.* at 612-13, *citing* 21 U.S.C. §§ 355(b)(1), (d).
[30] *Id.*, *citing* 21 U.S.C. § 355(j)(2)(A).
[31] *Id.*
[32] *Id.* at 616.
[33] *Id.*
[34] *Id.* at 618-19.
[35] *Id.* at 618.

change the labeling, and a finding otherwise would have been based upon what the FDA *might* have done after receiving the generic drug manufacturers' proposal.[36] According to the majority opinion, if finding no conflict preemption based upon the *possibility* that the label would have been changed based on the chance that the FDA would grant a proposal to either change the label or to reinterpret federal regulations to allow generic drug manufacturers to unilaterally change the label, "it is unclear when, outside of express preemption, the Supremacy Clause would have any force."[37]

Likewise, in *Bartlett*, decided two Terms after the *PLIVA* decision, the court assessed a New Hampshire design defect claim against a generic drug manufacturer and also found that claim to be conflict preempted.[38] New Hampshire law required manufacturers to satisfy the duty of not selling "unreasonably dangerous" drug products by either changing the drug's design or the labeling.[39] The generic drug manufacturer could not have changed the product's design and, thus, like in *PLIVA*, would have had to change the drug's labeling to comply with New Hampshire law.[40] In finding the design defect claim to not be conflict preempted, the First Circuit offered another alternative that would allow the generic drug manufacturer to comply with both New Hampshire and federal law – stop selling the drug in New Hampshire.[41]

The Court rejected the First Circuit's rationale as "incompatible with our preemption jurisprudence."[42] In rejecting this rationale, Justice Alito, writing for the majority, stated:

Our preemption cases presume that an actor seeking to satisfy both his federal- and state-law obligations is not required to cease acting altogether to avoid liability. Indeed, if the option of ceasing to act defeated a claim of impossibility, impossibility preemption would be "all but meaningless."[43]

Applying *PLIVA* and *Bartlett* to the *Sikkelee* matter, the district court found the duties imposed on Lycoming under Pennsylvania law to be "identical in all practical respects to those in *Bartlett*."[44] For aircraft manufacturers, FAA approval was required for major or minor changes to the type design as well as for major alterations.[45] Thus, because FAA regulations forbid Lycoming from unilaterally making changes in the design as claimed to have been required under state law, it was impossible for Lycoming to comply with both FAA regulations and Pennsylvania state law.[46] Moreover, the district could held that, even if Lycoming made the proposed design changes, "it is unclear whether the subject tort duty would have been met, as

[36] *Id.* at 619.
[37] *Id.* at 621.
[38] 133 S.Ct. at 2470.
[39] *Id.* at 2473-75.
[40] *Id.* at 2477.
[41] *Id.* at 2470.
[42] *Id.* at 2477.
[43] *Id.*, *quoting PLIVA*, 564 U.S. at 621.
[44] *Sikkelee*, 2017 WL 3317545, at *25.
[45] *Id.*
[46] *Id.* at *26, 36.

Lycoming's decision could not guarantee future design decisions by aftermarket parts manufacturers like Kelly."[47]

In reaching this decision, the district court emphasized that state law and federal law often have the same goals, but the court's conflict preemption inquiry is not focused on the end goal, but whether a party can "unilaterally comply with both regimes simultaneously."[48] For instance, both state law and federal regulation may require the exact same change in a product to make it safer; however, federal regulation may also require agency approval before the change is made.[49] Compliance with both regimes would then be impossible because of the additional federal requirement of approval.[50] According to the court, overlooking regulatory approval in a conflict preemption inquiry "would necessarily require a finding that violation of the agency's permitting or approval processes was of no consequence for regulated actors… [i]n other words… [it] would gut regulatory regimes nationwide by a judicial thumbing of the nose."[51]

The district court's *Sikkelee* decision, as well as the United States Supreme Court's *PLIVA* and *Bartlett* decisions, are significant in showing the application of the doctrine of impossibility conflict preemption to product liability claims in two industries subject to extensive federal regulation. Thus, even if federal law does not expressly preempt state law and the doctrine of implied field preemption is found to not apply, in such highly regulated industries, a manufacturer may find it impossible to comply with both state and federal law, and, thus, may have a conflict preemption defense.

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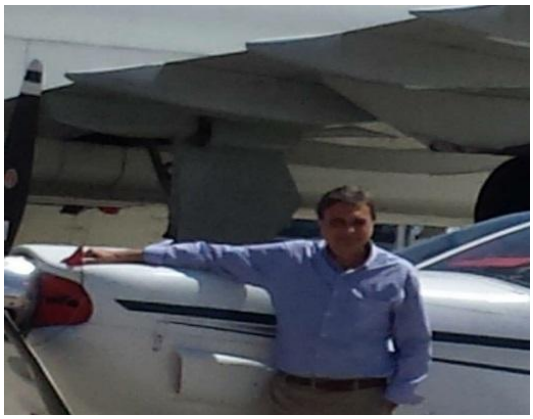
[47] *Id.* at *26.
[48] *Id.* at *30.
[49] *Id.*
[50] *Id.*
[51] *Id.* at *31.

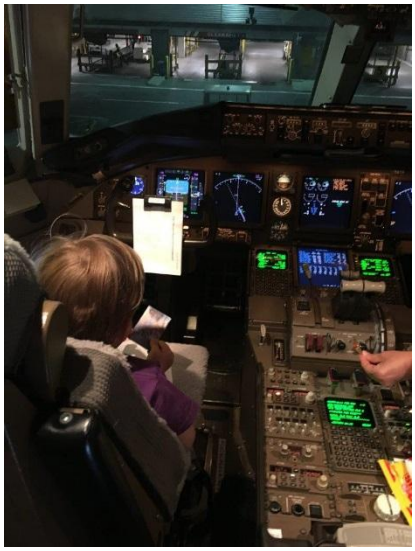
FUN PAGES

Readers are encouraged to please submit (via email to alan.reitzfeld@hklaw.com) aviation-related original cartoons, other works of art (especially airplane doodles), poems, photographs, crossword puzzles, etc. for the Newsletter Fun Pages.

Photos

Thanks go to Fuel Subcommittee Chair Patrick Morris and General Aviation Subcommittee Chair Albert J. Pucciarelli for submitting the photos below (Piper PA32 under the wing of a Boeing 767; a potential Captain inside a Boeing 767-400 cockpit).





Déjà vu?

It has been reported that seven flights which departed on January 1, 2018 landed at their destinations on December 31, 2017. http://www.cnn.com/travel/article/planes-depart-2018-arrive-2017-trnd/index.html

Did you know?

Aviation History: Fifty years ago this month: A group of air traffic controllers formed the Professional Air Traffic Controllers Organization ("PATCO"). http://aireform.com/resources/faa-history-pages/faa-history-1968/ In October 1981 (after PATCO had declared a strike in August 1981 and President Ronald Reagan fired thousands of air traffic controllers who ignored his return to work order) the Federal Labor Relations Authority decertified PATCO. https://en.wikipedia.org/wiki/Professional_Air_Traffic_Controllers_Organization_(1968)

Aviation Vocabulary Builder: Excerpts from 14 CFR 1.2 – Abbreviations and Symbols
V_S means the stalling speed or the minimum steady flight speed at which the airplane is controllable.
V_{S0} means the stalling speed or the minimum steady flight speed in the landing configuration.
V_{S1} means the stalling speed or the minimum steady flight speed obtained in a specific configuration.
V_X means speed for best angle of climb.
V_Y means speed for best rate of climb.
https://www.gpo.gov/fdsys/granule/CFR-2002-title14-vol1/CFR-2002-title14-vol1-sec1-2

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