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Third Circuit Holds that Federal Aviation Regulations do not Preempt State Law Claims Against General Aviation Manufacturer

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In October, the Third Circuit issued its long-awaited opinion in *Sikkelee v. Avco Corp.* as to whether state law negligence and strict liability claims are conflict preempted by the Federal Aviation Regulations. In an apparent blow to aviation manufacturers, the court held that absent clear evidence that the FAA would not have approved a proposed design change, state law claims would not be preempted under impossibility conflict preemption.

The *Sikkelee* decision diverges from analogous recent Supreme Court precedent holding in the context of pharmaceuticals that a plaintiff's proposed changes to a warning label, though likely feasible, were conflict preempted because the manufacturer could not simultaneously implement the proposed label change and remain compliant with federal regulations. In other words, the proposed change first had to be approved by the FDA.

The majority's test for conflict preemption also places judges in the shoes of experienced FAA certification officials by requiring them to predict whether the FAA would certify changes proposed by plaintiffs during litigation.

The *Sikkelee* dissent is consistent with the recent Supreme Court jurisprudence, and would deem preempted a state law claim based on a proposed change to an FAA-certificated item that could not be implemented without first obtaining FAA approval.

Of note, the Court attributed substantial import to previous discussions the defendant had with the FAA regarding safety of the component at issue, and also to the fact that similar previous modifications to the component had received FAA approval. If either of those factual prerequisites are missing from aviation products cases (or, of course, if the case is venued outside the Third Circuit), conflict preemption may still provide a viable defense.

Moreover, the majority's opinion rests on narrow grounds, and actually provides a reassuring passage regarding the role of Designated Engineering Representatives (DERs). The Court refused to adopt the plaintiff-appellant's proposed rule, which would have made the defendant's showing contingent on a demonstration that an FAA employee (as opposed to a DER) would have rejected the design change. The

Aviation Group News and Notes

- **Bob Williams** has been named Director-Elect of the Attorneys Division and Board Member for the Aviation Insurance Association.
- Several Aviation Group attorneys were selected for inclusion in the 2019 edition *Who's Who Legal: Aviation,* including **Barry Alexander, Steve Shapiro, Denny Shupe**, **Jonathan Stern,** and **Bob Williams**.
- **Jonathan Skowron** published "Dissent In Sikkelee Ruling Offers Preemption Road Map" on *Law360*.
- **Denny Shupe** and **Barry Alexander** presented at the ABA Aviation Litigation Conference in October in Washington, DC. Denny participated as a panelist on the ethics panel and Barry spoke on the panel titled, "A New World Order: Navigating the Arbitration Landscape."
- Schnader was identified as an Insurance Services Law Firm of the Year - USA in *Worldwide Financial Advisor Awards Magazine*.
- **Bob Williams** was listed in *Lawyer Monthly - Legal Awards 2018* as winner in the category of Aviation & Maritime Law – Lawyer of the Year - USA.

court noted that "the involvement of DERs in the certification – and change – approval process alone cannot defeat conflict preemption."

Lycoming has petitioned for panel rehearing on a secondary issue: whether a manufacturer, that did not manufacture, design, or install the component at issue, which was installed decades after the engine left Lycoming's hands, may still be held liable under Pennsylvania law. Lycoming has expressed its intent to seek Supreme Court review on the conflict preemption issue if its petition is denied.

***Sikkelee v. AVCO Corp, et al.*, 2018 U.S. App. LEXIS 30071 (3d Cir. Oct 25, 2018).**

Wrongful Death Claims Arising out of Plane Crash Into Residential Power Line Covered Under Insurance Policy

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The United States District Court for the Northern District of Ohio denied U.S. Specialty Insurance Co.'s ("U.S. Specialty") Motion for Summary Judgment, holding that coverage was not excluded for a plane crash that resulted in the death of one woman from a downed power line. The Court instead held that U.S. Specialty must defend its insured (an aerial advertising company) in a wrongful death action stemming from the 2016 accident.

On June 27, 2016, Drake Aerial Enterprises ("Drake") was towing a banner advertisement in the Detroit area when the pilot ran out of fuel and lost power. The pilot released the advertisement banner and crash landed in a residential neighborhood. During the landing, the airplane struck and downed a power line, which came into contact with Ms. Theresa Surles. Ms. Surles died later that day from the effects of the electrical shock.

Ms. Surles' estate filed a wrongful death suit against Drake in Michigan state court. Drake tendered its defense to its insurer, U.S. Specialty, who declined coverage and commenced a declaratory judgment action in Ohio federal court seeking a declaration absolving the company of any duty to cover Drake in connection with the claims based on an exclusion under the insurance policy.

U.S. Specialty argued that coverage was precluded by an exclusion for injuries arising from the "impact of the aircraft or the advertising apparatus with transmission lines." According to U.S. Specialty, the term "transmission line" should be construed broadly to encompass the power line that was downed during the emergency landing.

Drake and Ms. Surles' estate took the position that a "transmission line" is a power line that carries high-voltage power over long distances and is not the same as a power line that conveys power to customers' residences. According to them, the

airplane struck a "distribution line" rather than a "transmission line," so the exclusion was not implicated.

In reaching its decision, the court looked to the Merriam-Webster dictionary definition of the term "transmission line," and found that "transmission line" refers to a power line that carries energy at high-voltage over long distances. As the power line struck by the aircraft did not fall within that definition, the Court held that U.S. Specialty could not rely on the coverage exclusion and its coverage therefore was triggered. This decision reinforces that insurance policies will be interpreted based on the plain meaning of their terms.

***U.S. Specialty Insurance Co. v. Drake Aerial Enterprises, LLC*, 328 F.Supp.3d 781 (N.D. Ohio Sept. 10, 2018).**

Class Action Relating to Baggage Fees Preempted by Airline Deregulation Act

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A federal court held that the Airline Deregulation Act ("ADA") preempted a class action lawsuit relating to baggage fees and granted Spirit Airlines' motion to dismiss the case.

A group of twenty-two individuals who had purchased Spirit Airlines tickets through third party travel agencies brought a class action lawsuit against Spirit for breach of contract, unjust enrichment, and fraud. The plaintiffs alleged that they purchased tickets for a set price through third party agencies, but when they arrived at the airport, Spirit charged them additional fees for carry-on baggage. The plaintiffs alleged that the carry-on baggage fees were "unanticipated" and "unforeseen."

In dismissing the plaintiffs' claims, the Court noted that the ADA "prohibits States from enacting or enforcing a law, regulation, or other provision having the force and effect of law relating to a price, route, or service of an air carrier." The Court further noted that the purpose of the ADA was "to ensure that the States would not undo federal deregulation." The Court then found that the plaintiffs' claims regarding baggage fees directly related to price, and consequently were preempted by the ADA.

The Court highlighted that the contracts signed by plaintiffs were only for "the price term, destination and dates of travel." Importantly, the contracts did not include any agreement with respect to carry-on baggage fees. The plaintiffs argued that notwithstanding these terms of the agreement, they were under the impression that the price included carry-on baggage fees. The Court found this argument unpersuasive, stating: "[p]laintiffs' … claim does not seek to enforce the terms of the agreement between the parties, but instead depends on an 'enlargement or enhancement' of the scope of that agreement and is therefore preempted by the ADA."

This decision reinforces that the ADA preempts state-based claims related to price, and that courts are unwilling to consider parties' subjective understanding when interpreting the terms of a contract.

***Cox et al. v. Spirit Airlines, Inc.*, 2018 U.S. Dist. LEXIS 201386 (E.D.N.Y. Nov. 20, 2018).**

Iowa Appellate Court Holds that Federal Aviation Act Does Not Preempt State Nuisance Law

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The Iowa Court of Appeals recently held that the Federal Aviation Act (the "Act") does not expressly preempt, field preempt or conflict preempt an Iowa state law prohibiting the construction of certain structures near airports.

In *Carroll Airport Commission v. Danner*, the owners of property near an airport in Carroll County, Iowa constructed a grain leg on a portion of their property within the protected zone of an airport. Acting on a request from the county airport commission, the Federal Aviation Administration ("FAA") conducted an aeronautical study and determined that the structure would not constitute a hazard if the property owners made certain modifications, which the owners made. Nevertheless, alleging that the grain leg was a nuisance *per se* because it constituted an "airport hazard" under state law (the "Iowa Statute"), the airport commission sought an order requiring the property owners to abate the nuisance. The trial court granted the request.

On appeal, the property owners argued that the FAA's determination that the structure as modified was not a hazard preempted any state law to the

contrary. The court rejected this argument. First, the court held that the Act does not expressly preempt state laws like the one at issue. Second, the court noted that the Act only sets "minimum standards" for aviation safety and held that it does not preempt state laws like the Iowa Statute, that impose standards greater than those mandated by the Act. Third, the court held that the Iowa Statute did not conflict with the Act because, although it imposed more stringent construction requirements than the Act imposed, "complying with the local zoning ordinances [did] not make it impossible to also comply with the federal statute."

***Carroll Airport Commission v. Danner*, 2018 Iowa App. LEXIS 844 (Iowa Ct. App. Sept. 12, 2018).**

Nebraska Supreme Court Reverses Summary Judgment in Favor of Insurer in Coverage Dispute Over Stolen Aircraft

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DS Avionics Unlimited LLC ("DSA") unwittingly involved itself in a bitter landlord-tenant dispute when it delivered its Piper Twin Comanche aircraft to a mechanic ("O'Daniel") for routine maintenance. O'Daniel operated his business from a hangar leased from the airport owner ("Edquist"). Edquist notified O'Daniel that the hangar would "no longer be available to him" as of December 1, 2014. O'Daniel removed his property from the hangar, but left DSA's Comanche inside. He returned on December 2 to remove the aircraft, but Edquist already had changed the lock. O'Daniel nevertheless gained unauthorized access to the hangar, removed the aircraft and left it on the tarmac.

DSA attempted to retrieve the aircraft on December 12, but Edquist had parked a large truck in front of it to prevent removal. Sometime between December 12 and 17, Edquist moved the aircraft into a different undisclosed hangar on the field. On December 17, DSA reported the aircraft stolen. When the sheriff subsequently contacted Edquist, he told them the aircraft would be released only upon payment of $1,750. Edquist's attorney explained that the basis of his claim was a Nebraska lien statute pertaining to persons who advance work, labor, care or diligence upon personal property pursuant to an express or implied contract. Consequently, the sheriff concluded that no crime had been committed and the dispute was purely civil in nature.

On February 18, 2015, DSA submitted a sworn proof of loss to its insurer, USSIC, contending that "a theft loss occurred on or about the 11th day of December, 2014." USSIC denied the claim on April 21, 2015, on two grounds.

First, the policy defined "accident" as "a sudden event during the policy period, neither expected nor intended by you, that involves your aircraft and causes physical damage to or loss of the aircraft during the policy period," and USSIC concluded that no accident had occurred because DSA knew where the aircraft was located and who had it, it was undamaged, and DSA had done nothing to recover it through available civil action.

Second, the policy excluded coverage for loss or damage "[i]f anyone to whom you relinquish possession of the aircraft embezzles, converts or secretes [sic.] the aircraft." USSIC apparently took the position that the alleged loss of the aircraft was the result of DSA's relinquishment of possession.

In August 2015, USSIC filed a declaratory judgment action seeking a no-coverage determination, while DSA counterclaimed for coverage and asserted a bad faith claim. The trial court ruled in USSIC's favor, finding there was no "accident" because the aircraft was "being held by . . . Edquist under demand of payment."

On appeal, the Nebraska Supreme Court held that the trial court abused its discretion by ruling in USSIC's favor. Nebraska's declaratory judgment statute requires all persons with an interest in the outcome to be made parties, yet USSIC did not name O'Daniel or Edquist as parties to the action. Furthermore, a declaratory judgment action should not be entertained where another action is pending that involves the same parties and the same issues. When USSIC filed its declaratory judgment action, there was ongoing litigation between O'Daniel and Edquist in which DSA had intervened. The pendency of that related action therefore precluded USSIC's separate declaratory judgment action. Accordingly, the Nebraska Supreme Court reversed the trial court's decision.

***U.S. Specialty Insurance Company v. DS Avionics Unlimited LLC*, 301 Neb. 388 (Neb. 2018).**

Florida Supreme Court Rejects the Federal Court *Daubert* Standard for the Admission of Expert Testimony in State Court

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In *DeLisle v. Crane Co.*, a case involving the admissibility and exclusion of expert witness testimony about asbestos exposure and injury causation, the Florida Supreme Court held in a 4-3 decision that the Florida legislature's amendment of the state's Evidence Code in 2013 to incorporate the expert witness testimony admissibility requirements from *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), was unconstitutional under the Florida state constitution.

In so holding, the Court found that the amendment violated the constitutional provision requiring a two-thirds vote of both the House and Senate of Florida's legislature to repeal the *Frye v. United States* standard for admission of expert witness testimony, a procedural rule of evidence previously adopted and repeatedly reaffirmed by the Florida Supreme Court over decades of case law. The Legislature's adoption of the Evidence Code amendment received only a majority vote in the House, although the Senate did approve the amendment by the requisite two-thirds vote.

Frye and *Daubert* are competing methods utilized by trial judges to determine the reliability of expert testimony before allowing it to be admitted into evidence. As the Court explained, under the *Frye* rule, "the results of mechanical or scientific testing are not admissible unless the testing has developed or improved to the point where experts in the field widely share the view that the results are scientifically reliable as accurate." This often is referred to as the "general acceptance" standard for admissibility. The Court further noted that the *Frye* rule is narrowly applied, stating that "*Frye* is inapplicable to the vast majority of cases because it applies only when experts render an opinion that is based upon new or novel scientific techniques," and "a trial court has broad discretion in determining the range of the subjects on which an expert can testify, and the trial judge's ruling will be upheld absent a clear error."

The Florida Supreme Court further observed that medical causation testimony is not new or novel, and therefore is not subject to *Frye* analysis in determining its admissibility.

The *Daubert* standard (as incorporated into Federal Rule of Evidence 702), in contrast, applies to the admission or exclusion of a much broader range of possible expert testimony. Under the Evidence Code amendment adopted by the Florida legislature in order to replace the *Frye* standard with the *Daubert* standard, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify about it in the form of an opinion or otherwise, if: (1) The testimony is based upon sufficient facts or data; (2) The testimony is the product of reliable principles and methods; and (3) The witness has applied the principles and methods reliably to the facts of the case."

The Supreme Court commented that "*Frye* relies on the scientific community to determine reliability whereas *Daubert* relies on the scientific savvy of trial judges to determine the significance of the methodology used." The Court further cautioned that trial courts should "resist the temptation to usurp the jury's role in evaluating the credibility of experts and choosing between legitimate but conflicting scientific views."

A concurring opinion also reasoned that *Daubert* methodology "has the potential to unconstitutionally impair civil litigants' right to access the courts," and that "once the trial court determines that the expert testimony will assist the trier of fact and is not unduly prejudicial, the jury is entitled to hear the expert testimony. Any other approach … reflects a mistrust of the jury system and the ability of jurors to weigh the evidence." This concurring opinion also concluded that *Daubert* has limited access to courts in two significant ways: (1) it applies in substantially more cases than *Frye*; and (2) unlike *Frye*, which applies only to testimony which is predicated on new or novel scientific evidence, *Daubert* applies to all expert testimony. Therefore, "more litigants are exposed to the risk of the exclusion of their experts' testimony under *Daubert*."

Finally, the concurring opinion also cited the Florida Bar's Code and Rules of Evidence Committee for the proposition that "Florida's judges have not been provided the level of resources and time available to their federal counterparts. The impact of *Daubert* procedures in Florida state courts would only worsen this disparity." On December 6, the Supreme

Court, also in a 4-3 decision, denied the defendants' motions for rehearing.

Practice Tips: The issue of whether a particular expert's testimony will be admitted by a trial court may depend on whether the *Frye* or *Daubert* standard is applied. The law in federal courts is relatively well settled. 39 states plus Washington, DC have adopted an approach similar to the *Daubert* standard, 8 (including CA, NY, and PA) have adopted the *Frye* standard, and 3 states apply a combined approach. Under *Frye*, expert testimony that is generally accepted but has a weak scientific foundation can be admitted. In contrast under *Daubert*, which focuses upon methods and principles, opinions that have strong scientific foundation but have not been generally accepted can be admitted. As a general rule in aviation litigation, plaintiffs prefer the application of the *Frye* standard while defendants prefer the *Daubert* standard. In some cases, which standard applies may significantly influence which expert you will seek to retain, and whether you will win or lose your case.

DeLisle v. Crane Co., et al, **2018 Fla. LEXIS 1883 (Fla. Oct. 15, 2018).**

Court Dismisses MH370 Lawsuits on *Forum Non Conveniens* Grounds

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On November 21, 2018, United States District Judge Ketanji Brown Jackson dismissed on the basis of *forum non conveniens* ("FNC") lawsuits arising out of the disappearance of Malaysian Airlines Flight 370 (the "Incident").

The ill-fated flight departed from Kuala Lumpur International Airport for Beijing in March of 2014. It is unknown exactly where MH370 crashed and, with the exception of pieces that have washed up, the wreckage has not been located. Search teams concluded that the flight likely crashed in the southern Indian Ocean after exhausting its fuel. Of interest, although perhaps not ultimately relevant to the Court's decision:

- Although it could not be determined conclusively, it is believed that the loss of communication was intentional;
- No "plausible aircraft or systems failure mode" has been identified "that would lead to the observed systems deactivation, diversion from the filed flight plan and the subsequent flight path taken by the aircraft"; and
- An analysis of a flight simulator taken from the home of the captain revealed seven 'manually programmed' waypoints that "when connected together, will create a flight path from [Kuala Lumpur International Airport] to an area south of the Indian Ocean through the Adaman Sea."

Ultimately, however, "the [ICAO] Annex 13 Investigation Team reported that it was simply 'unable to determine the real cause for the disappearance of MH370.'"

Forty-two MH370 lawsuits were commenced in United States district courts in California, the District of Columbia, Illinois, New York, South Carolina, and Washington State, and the Judicial Panel on Multidistrict Litigation subsequently centralized the pretrial proceedings in the District of Columbia. Judge Brown Jackson noted that the cases generally could be grouped into (1) those asserting Montreal Convention claims against the airlines and/or their insurers, and (2) those asserting common law wrongful death products liability claims against Boeing, the aircraft's manufacturer, with one complaint asserting both sets of claims. The defendants moved to dismiss on a number of grounds, but the Court's decision addresses only FNC.

In determining that all of the claims should be dismissed, the court applied a test that by now is very well known to aviation practitioners, requiring the movants to show that (1) there is an available and adequate alternative forum, and (2) the balance of the various public and private interest factors indicates that maintaining the case in the current forum is comparatively inconvenient. The Court also noted that, "in the context of aviation disasters, '[t]he plaintiff's choice of forum will not be disturbed unless the private and public interest factors strongly favor trial in the forum country,'" though "'the presumption will apply with less force when the plaintiff or real parties in interest are foreign.'"

The Court easily found that Malaysia presented an adequate alternative forum and proceeded to balance the relevant public and private interest factors. While the Court, in its 61-page decision, engaged in a very detailed analysis that cannot be

replicated in this short summary, the following key factors led to the Court's dismissal:

- Malaysia's connection to the accident is substantially superior to that of the United States because the claims arise out of a flight originating in Malaysia involving Malaysia's national carrier; Malaysian air traffic controllers were the last persons to have direct contact with the captain and crew; and Malaysian officials were responsible for leading the civil investigation of the accident and conducted a separate criminal investigation. The Court found especially persuasive that "the Flight MH370 disaster was of such significance to the government of Malaysia that it enacted legislation reorganizing [Malaysian Airlines] and creating [a new entity] in the wake of these events";
- Even with regard to the claims against Boeing, consistent with holdings in litigation arising out of other aviation disasters, the interest of the United States as the home of the aircraft manufacturer paled in comparison to that of Malaysia as the home of the carrier;
- The claims would present complex conflicts-of-law questions; and
- The claims will require discovery of substantial liability evidence located outside the United States and the taking of testimony from many witnesses located in Malaysia, which is not a party to the Hague Convention on the Taking of Evidence Abroad.

The Court distinguished claims involving US plaintiffs/decedents, where the presumption against FNC might be stronger, but ultimately was persuaded that even those claims should be dismissed.

Some claims involving US plaintiffs required little further analysis because the US plaintiffs had no readily apparent pre-accident connection to the decedents on whose behalf they were suing – i.e., they were selected as personal representatives solely to attempt to create a connection to the United States.

For other claims involving US plaintiffs, the Court engaged in further analysis. For the cases asserting Montreal Convention claims against the airlines and their insurers, the US plaintiffs comprised such a small percentage of the overall group of plaintiffs that the United States' public interest in litigating those claims paled in comparison to Malaysia's interest in the entirety of the litigation. Dismissal of cases asserting product liability claims against Boeing was deemed proper despite the presence of US citizens on both sides of the litigation because, "given the tort theories on which Plaintiffs are proceeding, evidence and witnesses pertaining to the aircraft, the crew, the events preceding the disappearance, and the search will be indispensable to litigating Plaintiffs' claims."

While the Court's decision assuredly will be appealed, the Court's opinion is well-reasoned and well-written. If you handle aviation disaster litigation, or any other type of litigation where FNC issues arise, this decision is well worth reading.

***In re Air Crash over the Southern Indian Ocean*, on March 8, 2014, Case 1:16-mc-1184 (D.D.C. Nov. 21, 2018).**

Recent Developments in Montreal Convention Cases

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Two recent decisions add to the vast library of Montreal Convention cases. Liability under the Montreal Convention requires that the plaintiff demonstrated: (1) an accident (2) causing bodily injury (3) occurring on the aircraft or during embarking or disembarking. The new cases address the first two elements.

In *Palacios v. United Airlines, Inc.,* the United States District Court for the District of Guam denied United Airlines' motion for summary judgment arguing that the plaintiff's injuries were not caused by a Montreal Convention "accident." The incident out of which this case arose occurred while the plaintiff, who had numerous severe health problems, was traveling from Manila to Guam with a companion. After the plane left the gate, the plaintiff's companion refused to put his seat back into the upright position and attempted to move to an economy plus seat without paying. The flight crew determined that the plaintiff's companion was a risk to the safety of the flight and he was removed.

The plaintiff perceived that she also was removed from the flight and allegedly suffered injury because she experienced fatigue and required oxygen after disembarking the aircraft. United denied that plaintiff was asked to leave the flight.

The Court found that there was a genuine issue of fact as to whether the plaintiff was forcibly removed from the plane or if she left of her own volition. The Court further suggested that her removal would constitute an accident while a voluntary disembarkation would not. The Court also held that the plaintiff sufficiently alleged a bodily injury, but left to the jury whether or not her alleged injuries were proximately caused by the purported accident.

In *Quevedo v. Iberia Lineas Aereas de Espana, Sociedad Anonima Operadora Co.*, a second recent Montreal Convention decision, the plaintiff allegedly suffered injuries after her Iberia Airlines flight from Madrid to Milan descended through severe turbulence while she was not wearing a seatbelt. The United States District Court for the Southern District of Florida held that the incident constituted an "accident" under the Montreal Convention because it was undisputed that the aircraft encountered severe turbulence. The court also rejected the carrier's argument that the plaintiff's failure to wear her seatbelt constituted an intervening and superseding cause of her injuries because the severe turbulence inarguably remained a link in the causal chain leading to the plaintiff's injuries. Presumably, the failure to wear a seatbelt would provide a potential affirmative defense in accordance with Article 30 of the Montreal Convention.

While neither of the above decisions is particularly surprising, they do offer additional examples and fact patterns from which practitioners can draw in analyzing when and whether a Montreal Convention accident has occurred.

***Quevedo v. Iberia Lineas Aereas de España*, 2018 U.S. Dist. LEXIS 170476 (S.D. Fla. Oct. 3, 2018); *Palacios v. United Airlines, Inc.,* 2018 U.S. Dist. LEXIS 156637 (D. Guam Sept. 13, 2018).** ✈

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