Schnader Aviation Group

AVIATION HAPPENINGS

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In this issue:

U.S. Supreme Court Will Determine Whether Consent-by-Registration Jurisdiction is Constitutional

Edward J. Sholinsky[1], *Philadelphia*
esholinsky@schnader.com

The U.S. Supreme Court granted certiorari in *Mallory v. Norfolk Southern Railway Co.* to resolve the question of "whether the Due Process Clause of the Fourteenth Amendment prohibits a state from requiring a corporation to consent to personal jurisdiction to do business in the state." [2] Simply put, the issue is whether Norfolk Southern voluntarily consented to general jurisdiction in Pennsylvania when it registered to do business there as a foreign corporation.

The Court will review the Pennsylvania Supreme Court's holding that Pennsylvania's law subjecting to general jurisdiction a foreign corporation registering to do business there is unconstitutional. The Pennsylvania Supreme Court held that Norfolk Southern did not voluntarily consent to general personal jurisdiction by registering to do business in Pennsylvania. Rather, the Court held that subjecting Norfolk Southern to general jurisdiction without voluntary consent unconstitutionally infringed on its due process rights. Per the Court, consent requires that the due process liberty interest must be "voluntarily, knowingly, and intelligently waived."

Petitioner argued in his cert petition to the U.S. Supreme Court that the Pennsylvania Supreme Court had incorrectly interpreted "consent" because Norfolk Southern knew that consent to general jurisdiction was a prerequisite to doing business in Pennsylvania. As a result, Petitioner argued the general jurisdiction analysis in *Goodyear* and *Daimler* were irrelevant.

Norfolk Southern responded that consent-by-registration would conflict with *Goodyear* and *Daimler* by subjecting foreign corporations to all-purpose jurisdiction just because they conducted business in Pennsylvania. Norfolk Southern argued that there is not voluntary consent when the only options are subjecting itself to general jurisdiction, stopping operations in Pennsylvania, or relinquishing the right to sue in Pennsylvania's courts.

The U.S. Supreme Court set a briefing schedule. Petitioner's merit brief is due on July 5. We will

continue to report on the outcome and any other relevant happenings in the case. In addition, we will continue to monitor whether the Supreme Court will grant certiorari in *Cooper Tire & Rubber Co. v. McCall*, a similar, but less clear cut, case on appeal from the Georgia Supreme Court.

[1] Taylor Horn, a Summer Associate with Schnader and rising 2L at Temple Law, contributed invaluable assistance for this article.

[2] The Aviation Group previously reported on the *Mallory* decision in our December 24, 2021 client alert: "Pennsylvania Supreme Court Holds that Requiring Consent to Personal Jurisdiction in Order to Do Business in Pennsylvania Violates Due Process," as well as the Spring 2022 edition of Aviation Happenings: "Plaintiffs Try to Find Loopholes in Landmark *Mallory* Decision."

First Circuit Reverses District Court and Finds Question of Fact on Montreal Convention Accident Determination

Barry Alexander, New York
balexander@schnader.com

Jennifer Moore commenced litigation against British Airways to recover for injuries sustained as she was disembarking a British Airways flight from Boston, Massachusetts to London, England on September 14, 2018, using a mobile staircase. Ms. Moore alleged that she fell because the last step of the mobile staircase was "appreciably more precipitous than the earlier ones" (according to Ms. Moore's expert, each of the steps was 7" in height, while the final one was 13.4"). The district court granted British Airways' motion for summary judgment that no Montreal Convention "accident" had occurred, and the First Circuit reversed that finding on appeal. The First Circuit affirmed the district court's denial of Ms. Moore's motion for partial summary judgment.

This author previously wrote that the district court's decision was "unremarkable based on the facts." [1] Apparently, the First Circuit felt otherwise. The Court accepted British Airways' evidence that the height of the final stair was not "unusual" in light of industry-wide practices. Ultimately, however, it focused on the "unexpected" portion of the "unusual or unexpected" definition of "accident" set forth by the Supreme Court in *Air France v. Saks*, 470 U.S. 392 (1985). Of import, the Court held "that whether an event is unexpected under the Saks definition of 'accident' should be judged from the perspective of a reasonable passenger with ordinary experience in commercial air travel."

In finding a question of fact as to whether the height of the final stair constituted an "accident," the Court focused on four facts:

1. All of the steps prior to the last one had a uniform, lesser height;
2. The passenger prior to Ms. Moore also had difficulty navigating the final step, though she did not fall or get injured;
3. Passengers were not warned of the difference in height with the final step; and
4. Ms. Moore's expert referenced standards, including a European standard (voluntary, not required) for air stairs, stating that all steps should have the same riser height and none should exceed 10.24".

Based on the foregoing, and notwithstanding the evidence that the set-up of the mobile air stairs for this flight comported with industry practice, the Court found that the "accident" inquiry was a question of fact to be determined at trial. This author is somewhat troubled by the Court's opinion, in that it is difficult to understand how "a reasonable passenger with ordinary experience in commercial air travel" could be surprised by the height of the final step if all airlines set up stairs in the same manner (with a higher final step), which was not rebutted by Ms. Moore. The reference to the European standard, while perhaps nice on paper, is a red herring since it is difficult to imagine (m)any passengers reading those standards before traveling. Unfortunately, the Court's decision leaves airlines in a difficult position, as setting up air stairs in the "usual" manner now might be deemed "unexpected" so as to support liability under the Montreal Convention. Presumably, that now is a battle for a different day.

[1] The district court's opinion was discussed in the Spring 2021 edition of Aviation Happenings: "Massachusetts Federal Court Finds No Montreal Convention Accident."

***Moore v. British Airways PLC,* 2022 U.S. App. LEXIS 11692 (1st Cir. Apr. 29, 2022).** ✈

Eleventh Circuit Ruling on Negligence Standards Applicable to Cruise Line Passenger Altercation During Disembarkation Provides Airlines With Issues to Consider

Aviation Group News & Notes

✈ For the tenth consecutive year, Schnader has received recognition from Chambers and Partners, ranking **Schnader's Aviation Group** among the top six firms in the country for Aviation Litigation and ranking nationally three of the senior attorneys in the group, **Denny Shupe**, **Jonathan Stern**, and **Barry Alexander**.

✈ **Richard Barkasy, Denny Shupe, Jonathan Stern**, **Keith Whitson**, **Robert Williams**, and **Gordon Woodward** were all named as Super Lawyers for 2022.

✈ **Brandy Ringer, Lee Schmeer**, and **Brittany C. Wakim** were named as 'Rising Stars' by Super Lawyers for 2022.

✈ **Denny Shupe** was named to the Board of Managers for The University of Pennsylvania Carey Law School's Law Alumni Society.

✈ **Lee Schmeer** was named a 'Lawyer on the Fast Track' by The Legal Intelligencer.

✈ **Barry Alexander, Denny Shupe**, **Jonathan Stern**, and **Robert Williams** were selected as Leading Aviation Lawyers in North America by Who's Who Legal: Transport 2022. Denny Shupe also was named as one of six Global Elite Thought Leaders, and Denny and Barry Alexander were named as "Leading Individual" aviation defense lawyers.

✈ **Barry Alexander** and **Edward Sholinsky** were elected to Schnader's Executive Committee

✈ **Brittany C. Wakim** published an article, "Third Circuit Grants Rule 23(f) Petition of a Class Certification Order Without a Defined Class," in the May 2022 edition of On Appeal, the newsletter of the Third Circuit Bar Association.

✈ **Jonathon B. Skowron** published an article, Statute of Limitations in Legal Malpractice Claims – Continuous Relationship versus Continuous Representation," in *Professional Liability Defense Quarterly*, the official publication of the Professional Liability Defense Federation (PLDF).

Arleigh Helfer, Philadelphia
ahelfer@schnader.com

In *Fuentes v. Classica Cruise Operator Ltd.*, plaintiff alleged that a co-passenger attacked him, causing him to suffer injuries while disembarking from an international cruise. Plaintiff brought numerous negligence claims, including failure to warn claims. The district court dismissed plaintiff's claims on summary judgment. Plaintiff appealed.

The Eleventh Circuit, similar to the district court, applied maritime law—not state law—in finding that summary judgment in favor of the cruise line was proper, explaining that plaintiff's injury occurred while the ship was in navigable waters. The Eleventh Circuit affirmed the district court's ruling, agreeing that the cruise line did not have any particular duty to protect appellant from an attack that was not foreseeable under the circumstances of the case.

Under maritime law, the cruise line owed its passengers a duty of reasonable care under the circumstances. Plaintiff did not present evidence that his injuries were foreseeable to the cruise line, which had no knowledge of a prior verbal dispute between plaintiff and his alleged assailant or notice—constructive or actual—of any specific risk that passengers were likely to attack one another physically during disembarkation.

Significantly, the Eleventh Circuit explained that cruise lines are not general insurers of their passengers' safety: their duty extends to protecting passengers from particular, foreseeable injuries. There was no such injury here.

Airlines may encounter similar situations, especially as the global pandemic appears to have heightened tensions among passengers on flights. Airlines may face different standards depending on whether the flight is international and, thus, likely to involve the liability provisions of the Montreal Convention.

If the Montreal Convention applies, only injuries arising from an "accident" occurring during the flight or during the embarkation or disembarkation

processes would be compensable. (An "accident" is an "unexpected or unusual event or happening that is external to the passenger.")

If the flight is domestic and the Montreal Convention does not apply, then courts addressing claims arising from embarkation or disembarkation processes will look to state law to supply the relevant negligence standards.

As passengers more frequently act out in aggression, *Fuentes* demonstrates the importance of airlines gauging and evaluating specific risks of passenger-on-passenger attacks in the embarkation or disembarkation process, and provides analysis that is close (or at least instructive) to the analyses required under the various potential legal frameworks.

***Fuentes v. Classica Cruise Operator Ltd.*, 32 F.4th 1311 (11th Cir. 2022).** ✈

Pennsylvania Intermediate Appellate Court Rejects "Failure to Train" Claim Against Flight School

Brandy S. Ringer, Pittsburgh
bringer@schnader.com

On April 19, 2018, a 2001 Cirrus SR22 G1 crashed in Pennsylvania, resulting in the death of the pilot and passenger on board. Plaintiff, the widow of the deceased passenger, sued the flight instruction school and two flight instructors who provided the pilot with flight instruction in the six months prior to the accident. Plaintiff alleged that the defendants failed to properly instruct the pilot in the use and operation of the aircraft's safety features, including the autopilot and the Cirrus Ballistic Parachute System [CAPS]. Plaintiff claimed that had the pilot been properly instructed and trained, the fatal accident would not have occurred.

The defendants moved to dismiss for failure to state a claim (styled "preliminary objections in the nature of a demurrer" in Pennsylvania), asserting that the Plaintiff's claim sounded in educational malpractice, which is not a recognized tort under Pennsylvania law. The trial court agreed and sustained the defendants' preliminary objection, and dismissed the complaint. In reaching its decision, the trial court analyzed Pennsylvania tort precedent, as well as the law of other states, and found that "no states other than Montana [] permit educational malpractice claims to be brought against public schools, private schools, trade schools, or specialty schools." The trial court also concluded that educational malpractice claims are contrary to public policy.

On appeal to the Pennsylvania Superior Court, the Plaintiff acknowledged that Pennsylvania law does not recognize educational malpractice claims against "traditional educational institutions," but attempted to distinguish her claim by arguing that flight schools "teach [] a precise activity, which … is ultrahazardous."

The Court rejected this argument and adopted the trial court's opinion as its own, which held that public policy concerns "stand regardless of the subject matter or the dangerousness of the content taught." Specifically, the court found that "[a] cause of action seeking damages for acts of negligence in the educational process must be precluded by considerations of public policy," because (1) "there is no clear definition of the standard of care for a reasonably prudent flight school for instruction on airplane specific safety mechanisms;" (2) "it is difficult to determine if the Defendants' instruction on a certain subject would have prevented the Plaintiffs damages;" (3) it would cause a flood of litigation because "virtually every future plane crash will raise the specter of a negligent training claim against the flight school or aviation training center … for no other reason than they have an attenuated connection to the pilot's actions on the date of the crash since the flight school provided the pilot the knowledge to become licensed by the FAA;" and (4) "[t]rial courts have no business meddling in the field of day-to-day educational standards of pilot schools" particularly because "[f]ederal regulations clearly delineate standards for certification and operation of Part 141 schools."

***Grady v. Aero-Tech Servs., Inc.*, 2022 Pa. Super. Unpub. LEXIS 582* (Mar. 8, 2022).** ✈

Montana District Court Applies Ford Motor Company "Relating to" Test to Find Specific Personal Jurisdiction Over Foreign Helicopter Manufacturer

Robert J. Williams, Pittsburgh
rwilliams@schnader.com

A Montana federal district court has found contacts with the forum state merely "relating to" the cause of action are sufficient to support the exercise of specific personal jurisdiction over a foreign helicopter manufacturer. Thomas Duffy died when the K-Max helicopter he was piloting on an aerial firefighting mission crashed in Oregon. Mr. Duffy's estate and his employer, Central Copters, Inc., commenced a product liability action against the helicopter manufacturer, claiming that the crash was caused by a defective rotor flap.

Kaman moved to dismiss the complaint for lack of personal jurisdiction in Montana. The crux of Kaman's argument was that none of its forum contacts were causally related to plaintiffs' claims. In support, it asserted that the company did not sell the accident helicopter to Central Copters. Instead, Central Copters purchased the accident helicopter from the U.S. State Department in 2007. Furthermore, Central Copters is Kaman's only customer in Montana, and its sales to Central Copters comprise only 1% of all global K-Max sales.

Since 1997, however, Kaman's marketing manager visited Montana several times to promote K-Max model helicopters to Central Copters and otherwise to assist Central Copters with its purchases of K-Max helicopters from third-parties. Kaman sent technicians to Montana on several occasions to assist and train Central Copters' personnel regarding K-Max inspections and service. Central Helicopters is one of only sixteen K-Max operators in the world. With respect to the accident helicopter, although Kaman did not sell it to Central Copters, Kaman did transport it to Montana for Central Copters in exchange for $50,000 USD.

Citing the United States Supreme Court's recent decision in *Ford Motor Company v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017, 1026 (2021), the district court explained that a "causation-only" approach to specific personal jurisdiction is not supported by judicial precedent. Instead, due process is satisfied where an action arises out of or relates to a defendant's contact with the forum state. The district court found that plaintiffs' claims sufficiently relate to Kaman's contact with Montana even though, unlike in *Ford*, the accident occurred outside the forum state. Accordingly, the court denied Kaman's motion.

***Duffy v. Kaman Aerospace Corporation,* 2022 U.S. Dist. LEXIS 42735 (D. Mont. Mar. 10, 2022).** ✈

Enter a Passenger, Leave a Felon: An Update On Airline Passenger Disturbances and Continuing Response and Crackdown

Kristi J. Doughty, Wilmington
kdoughty@schnader.com

Unruly passenger behavior resulting in investigations by the FAA has increased to more than 5,000 reports in 2021. One such incident involved frustrated passengers who assisted an off duty U.S. Marshall in restraining obnoxious behavior when they taped Max Berry, an inebriated aggressor, to his seat after Berry groped female flight attendants and punched a male flight attendant. [1]

The TSA received more than 4,000 reports of mask-related noncompliance incidents from February, 2021 to September, 2021. A female passenger who failed to wear her mask and fasten her seatbelt, punched a flight attendant in the mouth which resulted in two broken teeth and required 3 stitches. The passenger was sentenced to fifteen months in prison and ordered to pay more than $30,000 in fines and restitution.

These are just a handful of the passenger incidents on board airliners that have brought about deep governmental concern and record-breaking fines and criminal penalties.

A quick refresher on applicable federal law may be helpful. First, special aircraft jurisdiction covers actions taken only while an aircraft is "in flight" (i.e., "from the moment when all external doors are closed following boarding…through the moment when one external door is opened to allow passengers to leave the aircraft." 49 U.S.C. §46501(1))(A). Violations of 49 U.S.C. §46504 (Interference with Flight Crew Members and Attendants) occur when "[a]n individual on an aircraft in the special aircraft jurisdiction of the United States who, by assaulting or intimidating a flight crew member or flight attendant of the aircraft, interferes with the performance of the duties of the member or attendant or lessens the ability of the member or attendant to perform those duties…" Such violations can result in up to 20 years imprisonment and/or assessment of fines.

If a dangerous weapon is used, a term of years or life imprisonment can be imposed. 18 U.S.C. §113 makes assault by striking and wounding in special aircraft jurisdiction punishable by a fine and/or imprisonment of up to a year.

In one recent case, a passenger smelling strongly of alcohol pretended to shoot at passengers and shoved a flight attendant into a galley wall causing her to suffer injuries. The passenger then breached the main cabin door, triggered the alarm and caused the pilots to declare an emergency. After pleading guilty to interfering with flight crew and assault in special aircraft jurisdiction, the passenger was sentenced to serve a one year federal prison term, payment of civil penalties and a fine of $7,500. [2]

Civil remedies also are possible for unruly passenger behavior. In 2000, Congress made passengers civilly liable if they physically assault or threaten flight or crew, or any other individual on the aircraft. [3] The TSA can bring civil actions against passengers who violate the federal mask mandate while on board an aircraft. [4] As another example, the FAA recently proposed a fine of more than $50,000 for a passenger who struck and knocked down a flight attendant and attempted to breach the cockpit door on a Delta Airlines flight from Honolulu to Seattle. The FAA has proposed its largest ever fines since January, more than $80,000, and Transportation Secretary Buttigieg has succinctly encapsulated the FAA's policy as "if you are on an airplane, don't be a jerk…"

Delta has implemented a "no-fly" list banning passengers with a record of disruptions, which has drawn the ire of some legislators who claim the "no-fly" list would severely restrict citizens' constitutional right to engage in interstate transportation.

This is a rapidly evolving field, with the extent to which these penalties actually are serving as a deterrent, still coming into focus. It appears, at least, that the various stakeholders, including airlines and regulatory bodies, are making good on their promises to hold accountable those responsible for jeopardizing the safety of those working and traveling on board commercial aircraft.

[1] *USA v. Berry*, 1:21cr20598 (S.D. Fla. May 5, 2022).

[2] *United States of America v. Kameron C. Stone*, 2022 U.S. Dist. LEXIS 24387 (N.D. Fla. Feb. 8, 2022).

[3] Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, §511, 114 Stat. 61, 142 (2000).

[4] *See Penalty for Refusal to Wear a Face Mask,* tsa.gov, ttps://www.tsa.gov/coronavirus/penalty-mask.

Federal Court Strikes NTSB Report and Expert Opinion that Relied on It

Jonathan M. Stern, Washington, D.C.
jstern@schnader.com

In *Olympic Air, Inc. v. Helicopter Tech. Co.*, the District Court for the Western District of Washington struck a National Transportation Safety Board report and portions of an expert's declaration that relied on it. The argument to strike was that its inclusion violated the federal statute that provides, "No part of a report of the Board, related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report." 49 U.S.C. § 1154(b). The counterargument was that factual information from an NTSB investigation is admissible in a civil action, and the points relied on were factual findings.

The Court held that the statute plainly required that the report be stricken. The Court found that the statute, and a related regulation of the board that interprets "a report of the Board" to be the report that contains the probable cause conclusion, dictated the result and that the statement, "indications of root fitting disbondment … occurred sufficiently early to have been detected if the inspections had been performed in accordance with the [airworthiness directive]" went beyond factual.

Distinguishing fact from opinion can be difficult. With some accidents, the NTSB issues separate factual reports, which are admissible, from its probable cause report, which is not. The trouble is that, with other accidents, the NTSB combines the factual findings with the probable cause, making information that should be available for use by litigants essentially unavailable. That was the case here.

***Olympic Air, Inc. v. Helicopter Tech. Co.,* 2022 U.S. Dist. LEXIS 48654 (W.D. Wash. Mar. 18, 2022).** ✈

The Southern District of Texas Finds Federal Jurisdiction is Proper in Montreal Convention Case Where Alleged Damages Were Incurred Due to Delay

Peter Moomjian, New York
pmoomjian@schnader.com

A District Court in Texas recently denied a plaintiff's motion to remand because the Montreal Convention preempted the claims for damages due to a delayed flight. In *Chapa v. Am. Airlines Grp. Inc.*, plaintiff purchased an airline ticket from American Airlines Group, Inc. ("American") for a February 5, 2022 flight to Saint Maarten in order to connect to Saint Barthelemy (on a separate airline). American canceled the flight to Saint Maarten on the date of departure, which caused plaintiff to miss the connecting flight to Saint Barthelemy and resulted in his forfeiture of the cost of his accommodations for that night. American provided plaintiff with a later flight to his destination.

Plaintiff filed suit against American and asserted three causes of action, including negligence and breach of contract. Plaintiff initially claimed his damages were incurred due to the cancellation of his flight, but eventually conceded that only a delay in travel occurred. American removed the case to federal court on the basis of federal question jurisdiction. Plaintiff filed a motion to remand, asserting his Complaint only contained state law claims.

The District Court denied plaintiff's motion to remand and found that federal jurisdiction was proper because the Montreal Convention completely preempted plaintiff's state law claims. The Court stated that in the Fifth Circuit, the Montreal Convention preempts claims that stem from a delayed international flight. Plaintiff's failure to mention or rely on the Montreal Convention in his complaint was not enough to avoid its application. Therefore, plaintiffs cannot avoid the application of the Montreal Convention through artful pleading. The District Court noted that the outcome would have been different if plaintiff brought suit following a complete nonperformance, such as a refusal to transport a passenger.

***Chapa v. Am. Airlines Grp., Inc.,* 2022 U.S. Dist. LEXIS 49372 (S.D. Tex. Mar. 21, 2022).** ✈

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Brittany C. Wakim *Associate*
Co-Editor of Newsletter

Ralph G. Wellington *Partner*

Keith E. Whitson *Partner*

Gordon S. Woodward *Partner*

Philadelphia Office
1600 Market Street
Suite 3600
Philadelphia, PA 19103

Pittsburgh Office
Fifth Avenue Place
120 Fifth Avenue, Suite 2700
Pittsburgh, PA 15222

New Jersey Office
Woodland Falls Corporate Park
220 Lake Drive East, Suite 200
Cherry Hill, NJ 08002

San Francisco Office
650 California Street
19th Floor
San Francisco, CA 94108

Washington, D.C. Office
1750 K Street, N.W.
Suite 1200
Washington, DC 20006

New York Office
140 Broadway
Suite 3100
New York, NY 10005

Delaware Office
824 N. Market Street, Suite 800
Wilmington, DE 19801