AVIATION SECTION NEWSLETTER
STATE BAR OF GEORGIA

AVIATION LAW SECTION

Fall 2002

PREFLIGHT

Chairman's Message:

Inside this issue:

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As we find ourselves in the midst of fall, I know we are all reassured by the fact that the anniversary of September 11, did not visit challenges upon our country like those presented just over one year ago. America is a nation united facing the future with hope and optimism. As our Section faces the future, there are two events I wish to call to your attention.

Our Section's Annual Meeting will be held in conjunction with the Bar's mid-year meeting at the Swissotel. Our annual meeting will take place Friday, January 10, 2003, between 12:00 p.m. and 1:30 p.m., local time. In addition to our fellowship and discussion of the Section's business, we will have a World War II fighter pilot in the form of Bob "Punchy" Powell as our luncheon speaker. Bob Powell flew with the 352nd Fighter Group which included such aces as Chuck Yeager and Bud Anderson. Together with others, Bob has written a book about the exploits of the 352nd Fighter Group in World War II. Also, he has recently written a two-part story about the experiences of the 352nd Fighter Group, this having been featured in Air Classics Magazine. Finally, Bob has worked on a documentary film dealing with the exploits of the 352nd Fighter Group. I understand that Bob has gun camera footage, and his presentation should be very interesting.

The next item I wish to call you your attention is the Aviation Law Seminar we have scheduled for Friday, February 7, 2003. I know this has been referenced in an earlier issue of Pre-Flight. Nonetheless, I wish to remind everyone that we anticipate this seminar will be conducted at the Marriott Century Center and will feature the following speakers and topics:

(1) Mark Stuckey [The Victims' Compensation Fund];
(2) Hon. John Goglia, Member, National Transportation Safety Board [The Work of the NTSB];
(3) David Boone [Professionalism]
(4) Andy Scherffius [Expert Witnesses]
(5) Bob McCormack [Ethics];
(6) John McClune [Daubert Motions]; and
(7) Capt. Dave Kennedy [Retired Navy Test Pilot, Aerial Coordinator for the movie "Pearl Harbor," and Technical Consultant to the movie "Behind Enemy Lines"].

Lisa McCrimmon and I will co-chair this meeting. A considerable amount of work has gone into assembling the panel of speakers, and I hope your schedule will afford you the opportunity to attend this seminar. It should be both informative and entertaining.

Happy landings,

Alan

AVIATION LAW UPDATE

By Chuck Young

This issue of the Aviation Law Update features two legal developments that demonstrate the continuing echoes of September 11: a new Georgia statute designed to tighten airport security that will be of interest to anyone who takes a commercial flight, and a revised federal appellate opinion in a previously discussed case that raises interesting Warsaw Convention issues with respect to security screeners' liability.

Georgia's Transportation Security Act of 2002

In November of 2001, with the terrorist attacks of September 11 still fresh in the minds of every air traveler, a University of Georgia football fan named Michael Shane Lasseter ran down an "up" escalator at Hartsfield International Airport on what he claimed was a quest for a lost video camera. Lasseter's conduct forced an evacuation of the terminal and a three-hour airport shutdown that snarled aviation traffic along the eastern seaboard. Perhaps only Roy "Wrong Way" Riegels, the University of California lineman who ran a recovered fumble more than 50 yards and almost to his own goal line against Georgia Tech in the 1929 Rose Bowl, rivals Lasseter in directionally challenged college football infamy.

After a pained search for an appropriate criminal sanction, Clayton County prosecutors ultimately charged Lasseter with criminal trespassing. (Further, AirTran sued Lasseter in federal court, claiming $100,000 in damages and later settling for an undisclosed amount.) Lasseter struck a plea bargain on the criminal charges in which he agreed to spend five weekends in jail and two years on probation, perform 500 hours of community service, and forego attending Georgia football games this season.

Michael Lasseter

If Lasseter's historic run is ever repeated, a newly enacted Georgia statute called the Transportation Security Act of 2002 (Act 911, S.B. 330), which went into effect on June 1, will give prosecutors more ready and tailored sanctions to levy. The statute, which amends O.C.G.A. §§ 6-3-27, 16-10-28, 16-11-37, and 16-12-121 through –125, and which enacts O.C.G.A. §§ 16-12-126 through –128, criminalizes attempts to interfere with ***or avoid*** security measures or disable or inhibit safety devices, as well as attempts to hijack a bus, rail vehicle, or aircraft. It further provides criminal sanctions for false alarms and terroristic threats involving destructive devices or hazardous substances. The statute also forbids the introduction of weapons, chemicals, and hoax items into any transportation terminal.

Doubtless the statute was drafted, at least in part, with Lasseter's scamper in mind. Its sponsor, former State Senator Greg Hecht (D-Morrow), told the Atlanta Journal-Constitution, "We are fortunate [Lasseter] was not intending to cause problems, but our laws probably are not very protective."

But the laws may now be over-protective. As one example, query whether there is a need for a state statute prohibiting attempted hijackings of aircraft when federal authorities do the same thing. See 49 U.S.C. § 46502 (prohibiting aircraft piracy). Nevertheless, the statute should at least have the salutary effect of deterring wrongheaded conduct like Lasseter's at a time when air travelers' tensions remain high.

Dazo v. Globe Airport Security Services, 295 F.3d 394 (9th Cir. 2002)

This case, which appeared in the Winter 2000 edition of Preflight (268 F.3d 671 (9th Cir. 2001)), has since been reheard by the Ninth Circuit and a new opinion has been issued reversing the initial opinion and setting forth different rulings on important Warsaw Convention issues.

Plaintiff was a passenger ticketed to fly from San Jose to Toronto on TWA, with a connection in St. Louis. When Plaintiff

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Aviation Law Update (cont.)

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went through airport security in San Jose, her carry-on bag, allegedly containing $100,000 of jewelry, disappeared. She sued the airport security company and the three airlines it served (TWA, America West, and Continental) for negligence and breach of an implied bailment contract seeking damages for an alleged theft of her bag.

In its original opinion, issued on October 11, 2001, the Ninth Circuit affirmed the trial court's dismissal of the complaint, holding that the passenger's flight, which she was in the process of embarking upon at the time of the alleged theft, was an international flight within the ambit of the Warsaw Convention. That treaty applies to airlines and their agents, the court held, including the airport security company. Since the Warsaw Convention preempts state law claims, and because the alleged conduct of the airlines and the security company did not amount to "willful misconduct" under California law so as to avoid the Convention's limit on liability, the court held that the plaintiff's claim was properly dismissed and that the plaintiff was limited to a $400 recovery for her lost luggage prescribed by the Convention.

But in its new opinion after rehearing, issued on May 16 of this year, the Ninth Circuit held that the Warsaw Convention does ***not*** apply (a) to an airport security company rendering services to ***both*** international and domestic passengers, or (b) to airlines that do not provide international air carriage to a plaintiff. In other words, the security company and the two airlines that did not provide the Plaintiff's international air carriage could not limit their liability by invoking the Convention; only the airline that Plaintiff planned to fly internationally (TWA) could do so.

The court observed that the security company was serving as the common agent of all three airlines, and that it checked international and domestic passengers as well as non-passengers seeking access to the gates and retail establishments beyond the checkpoint. Federal law requires all airlines to conduct such security checks, regardless of whether the flights at issue are domestic or international, or whether the person screened is boarding any flight.

Given all of that, the court found that the security company could not be viewed as a Warsaw Convention "carrier" because its services "were not in furtherance of the contract of carriage of an international flight, but were basic airport security services required at all airports by domestic federal law. Since the Warsaw Convention did not require the security screenings, the court reasoned, it did not apply to the case.

In a footnote, the court noted the post-September 11 enactment of the federal Aviation and Transportation Security Act, Pub. L. No. 107-71, 2002 U. S.C.C.A.N. (115 Stat.) 597 (2001). In the court's view, the statute's enhancement of security measures and federalization of passenger screening functions "only serve to emphasize that airport security and passenger screening are part of a national program wholly independent of the

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The Dazo crime scene - the luggage conveyor system

Aviation Law Update (cont.)

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Warsaw Convention."

The court also distinguished a line of cases in which "carrier" status had been extended to agents of airlines providing international carriage. None of those cases, the court stated, involved a company that was a dual agent: the agent of more than one airline, including one with non-Warsaw Convention status. Thus, no case supported the proposition that a security company acting as the common agent for multiple airlines, domestic and international, and providing basic security services mandated by federal law regardless of passenger destination, should enjoy "carrier" status "simply because the person whose belongings were stolen happened to be ticketed on an international flight."

Airport Baggage X-Ray Machine

Further, the court declined to allow the Convention to shield the carriers who did not provide Plaintiff's carriage, citing the Restatement (Second) of Agency's axioms on principals' liabilities for their agents' conduct within the scope of their agency. Granting the non-carrying airlines Warsaw Convention immunity would be a "windfall" that would conflict with basic common law rules and would not further the Convention's purposes. The court did, however, stick to its previous decision that the alleged conduct of the airlines and the security company did not amount to "willful misconduct" under California law so as to avoid the Convention's limit on liability.

In a partial dissent, one Ninth Circuit judge contended that the security company (but not the non-carrying airlines) should have enjoyed Warsaw Convention protection. The dissent agreed that the company served multiple masters, *i.e.*, the three airline defendants. But because serving one airline did not involve an abandonment of the others, the dissent urged, the security company should be viewed as TWA's agent. The dissent pointedly asked, "Why should the arbitrary happenstance of whether a security service contracts with multiple partners determine whether a person's claims are preempted by the Warsaw Convention?"

With airport screening now in the process of being fully federalized in the wake of September 11, it is unclear whether Dazo and the cases discussed therein will have lasting impact. The court's footnote discussion of the new security federalization statute could be read as support for an argument that no Warsaw Convention liability limits will exist for a plaintiff who wants to sue the federal government for injuries suffered during screening, since of necessity a single federal screening entity will be "a national program" that serves multiple airlines, some wholly domestic. For now, however, there is at least federal appellate authority for the proposition that a still-operating private security company cannot invoke the Warsaw Convention to limit its liability for wrongful conduct if it serves multiple airlines, some of which operate outside the Convention. ※

Chuck Young is an associate with Alston & Bird LLP and a member of the firm's Litigation and Trial Practice Group, where he focuses on aviation, business, technology, and personal injury litigation. Please send any comments and suggestions for future Updates to cyoung@alston.com

VICKERS-VIMY TO FLY AGAIN IN 2003

By Joel Sherlock

December 17, 2003, will mark the 100 year anniversary of the first controlled flight by Wilbur and Orville Wright at Kitty Hawk, North Carolina. While there are a plethora of events, exhibitions and commemorations planned for next year, there is one in particular in which you can personally be a part of history once again. This event is the recreation of the Vickers-Vimy first direct Atlantic Ocean crossing by Captain John Alcock and Lieutenant Arthur Whitten-Brown in June 1919.

Vickers Vimy FB27 Replica a.k.a. NX7IMY

In June 2003, the Vimy Atlantic Team will attempt to recreate the historic flight from Newfoundland to Clifden Island, Ireland. The original flight of nearly 1900 miles was the answer to a challenge put forth by the British newspaper, The Daily Mail, who offered a 10,000 lb. prize to the first person to successfully cross the Atlantic nonstop.

Captain Alcock and Lieutenant Brown were the perfect men for the job. Both had extensive flight experience in some of the worst conditions imaginable. Captain Alcock was born in 1892 in Britain and was an experienced pilot from WWI who had been shot down in a bombing raid and taken as a prisoner of war in Turkey. Upon his release after the war, he eagerly took up the challenge of being the first to cross the Atlantic non-stop. Lieutenant Brown, born in 1886 in Scotland, served as an engineer/ navigator in WWI, and also spent time as a prisoner of war, having been shot down over Germany. After the war, Lieutenant Brown, while visiting the Vickers Engineering firm, was asked to navigate for Captain Alcock during the upcoming trans-Atlantic flight.

Pilot Jeremy Palmer with the Vimy

As for the plane that made them heroes, the Vickers-Vimy, named after the famous WWI Battle of Vimy Ridge, was designed by the Vickers firm in WWI as a then heavy bomber. It had a sixty-eight (68) foot wingspan, was approximately forty-three and one-half (43 ½) feet long, fifteen (15) feet tall, weighed over seven thousand (7,000) pounds, and could reach a max speed of one hundred three (103) miles per hour. The Vimy first flew in November of 1917 and continued in service in varying capacities in the Royal Air Force until 1929. After the war, the Vimys made three historic "first flights" which spawned an entire era of development in the long distance aviation world. In addition to the first trans Atlantic flight in 1919, the Vimy also successfully made a fifteen thousand (15,000) mile trek from England to Australia in 1919 and the first London, England, to Capetown, South Africa flight in 1920.

The flight was a harrowing trek which almost cost the men their lives. Captain Alcock and Lieutenant Brown arrived on Clifden Island on June 15, 1919, having left Newfoundland sixteen hours,

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Vickers-Vimy (cont.)

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twelve minutes prior. Upon their arrival, Captain Alcock stated, "we are tired of being alone in the fog and drizzle, sometimes discovering that we were flying upside down." Indeed, the flight from its very inception was plagued with problems. The crew's only radio broke down shortly after take-off, and they flew directly into a fog bank which prevented visual flight references for much of the journey. Inclement weather, at one point, threw the plane into a spin from which the crew barely emerged. Lieutenant Brown navigating with a sextant found it almost impossible to navigate through the fog, but as luck would have it, during a break in the clouds, he was able to fix their position using the star Vega and the Moon. Captain Alcock ultimately delivered the mail he had been carrying, and a new era in long distance flight was born.

The Vimy and the men who flew it achieved goals previously thought impossible and inspired generations to come to persist in the pursuit of what others think is impossible. As I mentioned previously, you too can be involved in the recreation of this historic flight. If you would like to be a part of history once again contact the Vimy Atlantic Team, you can e-mail them at blair@vimy.org, visit their website at www.vimy.org or write them at Vimy Restoration, Inc., 120 Bulkley Avenue, #405, Sausalito, California, 94965.

It should be noted, that while the team will carry back up navigational aids it will again be relying upon a sextant for this trip! Many thanks to Blair Adamson, Marketing & Development Director for the project, for all the background information and photos. Good luck to the entire Vimy Atlantic Team in June, and congratulations to the entire aviation community on the upcoming 100 year anniversary of flight. Who knows what the next 100 years hold in store for us all.※

Joel Sherlock specializes in eminent domain and commercial litigation at Sell & Melton in Macon. He is an active member of AOPA, a student pilot, and a life long aviation enthusiast. He served in the United States Air Force from 1988 to 1996 on both active duty and reserve as an aviation fuels specialist and was trained in aviation cryogenics. He has worked for America West Airlines at McCarran International Airport and the Scenic Airlines F.B.O.

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The Heavy Price of the Mile High Club for Virgin Airlines

By Mark Stuckey

It appears that membership in the Mile High Club has an especially high cost for Virgin Atlantic Airlines. Being the responsible, family-oriented airline founded by staunch conservative Richard Branson, Virgin had recently installed a "mother-baby room" in its fleet of A340-600 aircraft.

However, it appears that the diaper changing tables were used for, umm, something other than changing diapers. Not only have the tables been misused, but many have been abused and broken by the passions of those involved. And the pilot always said that it was the **air** that was bumpy. I'll never believe him again.

Of course, a diaper changing table just doesn't do it for me anyway. I mean, every time I see one, it is located in a nasty bathroom at some sporting venue. The atmosphere just doesn't bring on that lovin' feeling—but maybe I'm just not very adventurous now that I'm over 30.

Not to mention the cleanliness issue. While I have faith that 99% of mothers are clean freaks regarding their babies, the fathers I have witnessed in the act of diaper changing have simply wanted to end the ordeal as soon as possible, with very little thought to sanitizing the affected table.

Knowing this, the fear of catching something would keep my head clear of any romantic notions. After all, I would hate for my souvenir from my transatlantic flight to be a case of mumps or German measles. How do you explain that one?

And then of course there's the stealthy act of getting the amorous couple into the baby room in the first place. What I really want to know is how the Virgin Airlines flight attendants missed this—and did so several times, given the damage that was repeatedly done! Wouldn't the fact that the couple **didn't have a baby** tip you off that something was amiss? Unless, of course, the attendants were in on it from the start. Which certainly would explain their smiling faces even after that 8 hour redeye from London. ※

Passengers on Virgin Airlines' A340s now know the real reason for cabin turbulence

SKYNOTES

USAF Thunderbirds
October 19 at Shaw AFB, Sumter, South Carolina;
www.airforce.com/thunderbirds

AOPA Expo '02
October 24-26 in Palm Springs;
www.aopa.org/expo

Navy Blue Angels
November 2-3 at Jacksonville;
www.blueangels.com

Wings Over Georgia Airshow
November 9-10 in Perry;
www.wingsovergeorgia.com

Southern Aviation Safety Conference
November 22-23 in Birmingham; www.faa.gov/fsdo/sasc

Aviation Section Luncheon
January 10 at State Bar Mid-Year Meeting at the Swissôtel, Atlanta; Speaker is Bob Powell

Aviation Section Seminar
February 7 at the State Bar Headquarters, Atlanta