AVIATION SECTION NEWSLETTER
STATE BAR OF GEORGIA

AVIATION LAW SECTION

Summer 2002

PREFLIGHT

Chairman's Message:

Inside this issue:

Please mark your calendars for February 7th of next year, since that will be the date of our next seminar. Lisa McCrimmon, your Vice-Chair and I have been developing a program that should be interesting and entertaining. We have the following speakers lined up so far:

(1) David Kennedy is a retired Navy captain and was a test pilot. He was the technical advisor for the motion pictures "Pearl Harbor" and also "Behind Enemy Lines." Mr. Kennedy also testifies as an expert witness in aviation litigation matters. His presentation about the activities of a test pilot as well a technical director in aviation movies should be very interesting.

(2) John Goglia is a member of the National Transportation Safety Board. Member Goglia will give a presentation dealing with the work of the NTSB in aviation accident investigations.

(3) David Boone, Esq., a prominent trial lawyer here in Atlanta and a pilot will give a presentation on professionalism.

(4) John McClune, Esq. of the firm Schaden, Katzman, Lampert & McClune will give a presentation on Daubert motions.

(5) Mark Stuckey, Esq., a trial lawyer in Macon and Editor of Preflight, will give a presentation on the 911 Victims Fund and related legislation, as well as its tort reform implications.

Lisa and I are working to develop an aviation seminar that should be interesting and fun. We are hopeful that members of this Section will reserve Friday, February 7, 2003, as a date to attend our Section's seminar. We anticipate the seminar will take place at the Marriott Century Center Hotel near the DeKalb-Peachtree Airport.

I hope everyone has a safe and enjoyable summer.

Happy landings.

Alan

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Two torpedoes on the Japanese aircraft carrier *Akagi* prior to the Pearl Harbor attack. The *Akagi* was later sunk at the Battle of Midway.

AVIATION CASE LAW UPDATE

By Chuck Young

Does the Warsaw Convention preempt civil rights claims brought by passengers bumped from an international flight? Does a municipality's imposition of airport fees give rise to a private right of action under the Anti-Head Tax Act? Does the Federal Aviation Act completely preempt state court trespass actions based on over-flights? Can an airline employee rely on state whistleblower statutes to assert retaliatory discharge claims? And, perhaps most importantly, is flying to have lunch at a private airport's restaurant a "recreational activity"?

Answers to these and other questions await you in this edition of the Update. As always, please e-mail Mark Stuckey or me if you know of an instructive aviation case that could benefit other practitioners. Case notes appear below in chronological order by date of decision.

Southwest Air Ambulance, Inc. v. City of Las Cruces, 268 F.2d 1162 (10th Cir. 2001); Miller Aviation v. Milwaukee County Bd. of Supervisors, 273 F.3d 722 (7th Cir. 2001).

Businesses and others affected by municipal airports' myriad fees should note that the Tenth and Seventh Circuits have now held that the federal Anti-Head Tax Act ("AHTA"), 49 U.S. C. § 40116, does ***not*** create a private right of action in which one can challenge such fees. Previously, the First and Sixth Circuits had held the opposite. Interface Group, Inc. v. Massachusetts Port Auth., 816 F.2d 9 (1st Cir. 1987); Northwest Airlines, Inc. v. County of Kent, 955 F.2d 1054 (6th Cir. 1992), aff'd, 510 U.S. 355 (1994) (with the Supreme Court not reaching the question of whether the AHTA provides for a private right of action). This split of authority in the circuits increases the likelihood of Supreme Court review of this important issue.

The AHTA prohibits state and local governments from charging fees based on, among other things, the gross receipts of air commerce or transportation. Airport user fees are permissible only if, and to the extent, they fall within the rubric of "reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities." In the Las Cruces case, an ordinance imposed fees on aviation operators based on their gross receipts. In the Milwaukee case, the plaintiff aviation business claimed that the landlord/county's denial of certain of its requests with respect to its lease violated the AHTA and other statutes.

Both courts analyzed congressional intent and concluded that Congress did not mean to create a private right of action under the AHTA. Rather, Congress gave the Secretary of Transportation the duty to administer all federal aviation laws, including the AHTA. In addition, Supreme Court precedent states that the Federal Aviation Act encompasses the AHTA such that anyone aggrieved by an airport fee's existence or scope may file a complaint with the Secretary of Transportation. Because the AHTA is thus fully enforceable through a general regulatory scheme, it appeared unlikely to the Tenth and Seventh Circuits that Congress meant to grant private rights of action as well.

The Las Cruces court did, however, allow the plaintiff aviation business to pursue a section 1983 civil rights action against the city for violating the business's right "to be free of levies or charges based on gross receipts." And, the plaintiff was allowed to assert added section 1983 claims for independent constitutional violations arising from, among other things, the city's prosecution of criminal charges for nonpayment of the fees.

Gordon v. Havasu Palms, Inc., 112 Cal. Rptr. 2d 816 (Cal. Ct. App. 2001).

The plaintiff, who had just purchased a Piper Arrow, decided to fly it to a private, unlisted airstrip near a lake to work on his boat and meet his niece for lunch at the airstrip's restaurant. The flight ended with a crash that began sometime during normal descent, seriously injuring the pilot and a passenger.

Ultimately, the case boiled down to a dispute between the pilot/

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plaintiff and the owner of the private airstrip. The pilot asserted that the airstrip was negligently designed and maintained; it had a 9:1 clearance approach instead of a 20:1 approach mandated by state regulations, and it had a landing area gradient of 2.3 percent, which exceeded the FAA allowable maximum of 2.0 percent. The airstrip owner contended that it had no duty to design or maintain the airstrip in compliance with regulations and that the pilot had assumed the risk of his injury.

After an analysis of California negligence law that has little value for Georgia practitioners, the court rejected the airstrip owner's arguments. But the court also considered an interesting defense: a California statute, analogous to O.C.G.A. § 51-3-23, providing immunity to real estate owners from any duties to those who enter their property for "any recreational purpose." The airstrip owner argued that the plaintiff was engaged in the "recreational" activity of meeting his niece for lunch, but the court disagreed, holding that "Eating is not an activity sufficiently similar to the ones listed in the statute to be included. Although [the California statute, like Georgia's] includes picnicking as a recreational purpose, picnicking contemplates bringing food and eating at an outdoor location. It cannot be said going to a restaurant and buying food is similar, even if one were to eat outside."

Voorhees v. Naper Aero Club, Inc., 272 F.3d 398 (7th Cir. 2001).

A property owner near an airport may file a state court trespass action to challenge over-flights without being preempted by the Federal Aviation Act ("FAA"), according to this Seventh Circuit decision. The plaintiff here owned a farm near a small private airport from which flying clubs operated. On takeoff and landing, planes using one of the airport's runways crossed the farm's airspace at low altitudes. The plaintiff sought a permanent injunction against the planes' trespass in state court, and defendants removed on the ground that regulating airports is exclusively within the federal government's control. Plaintiff moved to remand, arguing that the FAA did not preclude the application of state trespass laws. The district court disagreed, but the Seventh Circuit found the argument had merit, remanding the case and noting that federal question jurisdiction arises only when the *claim for relief* depends on federal law.

In so doing, the court drew a distinction between "complete preemption," which affects federal courts' subject matter jurisdiction, and "conflict preemption," which relates to the merits of a claim. The court strongly hinted that the FAA would ultimately preempt the plaintiff's state law claims, but it held that the existence of a federal statute providing a defense to a state law claim does not necessarily mean Congress has taken the subject away from state tribunals. Curiously, the court also suggested that the plaintiff consider pursuing a takings claim in the Court of Federal Claims.

Densberger v. United Techs. Corp., 283 F.3d 110 (2d Cir. 2002).

The plaintiffs, injured or widowed after an Army Blackhawk helicopter crash in Germany, brought state-law products liability claims against the manufacturers of the helicopter and its external fuel stores support system and won a $22.9 million jury verdict. On appeal, the court considered numerous issues of Connecticut product liability law that have little usefulness for Georgia practitioners. But the court also considered the application of the oft-cited "government contractor defense" to the plaintiffs' failure to warn claim and found the defense irrelevant. The defense extends the Federal Tort Claims Act's discretionary function immunity to government contractors faced with state law tort claims if a "significant conflict" exists between the requirements

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of state law and the contractor's obligations to the federal government. It applies, the court pointed out, only if the government exercised significant control over the relevant contractor actions. In failure-to-warn cases, the ultimate product user cannot sue the contractor for failure to warn if the government controlled which warnings the contractor was allowed to provide the end-users. Since the plaintiffs' claim was that the contractor had failed to warn *the Army itself* of risks that factored into the accident, the defense had no application; a reasonable seller, the court stated, cannot invoke the defense to limit the warnings it makes to the government.

Arawak Aviation, Inc. v. Indemnity Ins. Co. of N. Am., 285 F.3d 954 (11th Cir. 2002).

In this insurance coverage case arising from Florida, it was undisputed that the pilot failed to secure his plane's oil cap during a preflight check of the oil level. During the subsequent flight, the crew noticed a low oil pressure indication and immediately landed. The engine had lost 4.5 quarts of oil, and the loss of oil pressure had caused excessive heat and considerable engine damage.

The aircraft owner had purchased an insurance policy that excluded damages caused by (a) heat that resulted from engine operation and (b) the breakdown, failure, or malfunction of any engine part or accessory. The insurer claimed that these exceptions applied to the damages at issue, and the Eleventh Circuit affirmed the district court's grant of summary judgment to the insurer. The owner argued that the pilot's negligence — a cause of damage covered by the policy — had caused the overheating and the subsequent engine damage such that coverage should exist. But the court disagreed, reasoning that interpreting the exclusionary clauses in that manner would render them meaningless and would "encourage policy holders . . . dangerously to forego maintenance on their aircraft in order to ensure maximum coverage."

King v. American Airlines, Inc., 284 F.2d 352 (2d Cir. 2002).

In this case, the Second Circuit held that the Warsaw Convention preempts discrimination claims arising from events that occur during embarkation on an international flight. Critical to the analysis, as in all Warsaw Convention claims, was the precise location of the passengers at the time of the events giving rise to the complaint.

Two African-American passengers held confirmed tickets and boarding passes on a flight from Miami to Freeport, Grand Bahamas. The airline informed the passengers that the flight was overbooked and offered monetary compensation in return for giving up the seats, but the passengers declined. After being allowed to board the vehicle that took passengers from the terminal to the aircraft, American agents confiscated the boarding passes and informed the passengers they were being involuntarily bumped from the flight. The passengers claimed that (a) they were the only African-Americans who did not voluntarily relinquish their seats and (b) all white passengers were allowed to board, including those without confirmed reservations. They filed a race discrimination claim under 42 U.S.C. § 1981, the Federal Aviation Act, and other state and federal laws, but they did so more than two years after the events occurred.

The court held that the plaintiffs' claims fell within the scope of Article 17 of the Warsaw Convention because the events occurred during embarking. Although Article 17 limits recovery to passengers who have sustained "bodily injury," the court cited the Supreme Court case of Israel Airlines, Ltd. v. Tseng, 525 U.S. 155, 161 (1999) for the proposition that the liability restriction "affects neither the analysis of the substantive scope of the

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provision nor its preemptive effect." Further, the court noted, the plaintiffs were "actively engaged in preparations to board the plane" and had progressed further in those preparations than had other plaintiffs whose claims had been preempted by the Convention. And, the court noted, every court that has addressed the issue of whether the Convention preempts discrimination claims after Tseng has concluded that it does. Finally, the court observed that the plaintiffs could have filed a complaint with the Secretary of Transportation because the Federal Aviation Act prohibits air carriers, including foreign air carriers, from subjecting a person to "unreasonable discrimination."

Chu v. American Airlines, Inc., 285 F.3d 756 (8th Cir. 2002).

In this case arising from the crash of American Flight 1420 near Little Rock, Arkansas, the court reversed the plaintiff's $5.6 million damage award and remanded for a new trial because the trial court erroneously instructed the jury, in response to a written question, that the plaintiff's attorneys' fees would be paid by any amount the plaintiffs received. Because attorneys' fees are not an element of damages under Arkansas law, the appellate court reasoned, the trial court should have responded to the jury's question by simply referring the jury to the previously given instruction on damage elements.

Botz v. Omni Air Int'l, 286 F.3d 488 (8th Cir. 2002).

The Airline Deregulation Act of 1978 (the "ADA") and the Whistleblower Protection Program (the "WPP") of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century preempt airline employees' retaliatory discharge claims under state whistleblower statutes according to this recent Eighth Circuit decision. The plaintiff, a flight attendant, was twice assigned to work both legs of a round-trip flight from Alaska to Japan. She took the first such assignment even though she believed it violated Federal Aviation Regulations limiting flight attendants' "duty periods" to 20 hours, but she refused a second assignment, citing the regulations, and was eventually fired. She filed suit under Minnesota's whistleblower statute, but the trial court dismissed the claim on preemption grounds.

The Eighth Circuit affirmed, finding that the ADA's preemption provision (49 U.S.C. § 41713(b)(1)) and the WPP's comprehensive regulatory scheme (to be codified at 49 U.S.C. § 42121) preempted the state law claim. In the court's estimation, the Minnesota statute "includes broad authorization to flight attendants to refuse assignments, jeopardizing an air carrier's ability to complete its scheduled flights." As such, it was a state attempt to impose its own public policies or regulatory theories on an air carrier's operations, an imposition that the ADA was meant to preempt. The enactment of the WPP supported this rationale, the court said, by providing a reporting and complaint procedure and a remedy for claims like the plaintiff's that are based on an air carrier employee's attempts to redress possible air safety violations.

Miles v. Naval Aviation Museum Found., Inc., 289 F.3d 715 (11th Cir. 2002).

When the federal government obtains an aircraft, it has a duty to perform competent mandatory inspections of the aircraft per existing regulations, and it can be liable for resulting injury when it fails to do so.

The government acquired a Beech Queen Air from a criminal drug forfeiture. Beechcraft, the FAA, and the Department of Defense required that owners have trained, certified mechanics perform certain tests on the Queen Air model to detect nose fatigue cracks at specified time intervals; the intent of the regulations was to prevent accidents in which nose gear would collapse.

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The government's mechanics performed the tests, but the mechanics were not properly trained or certified. Eventually, the Queen Air was involved in an accident where its nose gear broke and its wheel valves flew off, hitting the plaintiff and injuring his leg such that it had to be amputated. Plaintiff recovered $436,904.70 at trial, but the government appealed, arguing that the discretionary function exception to the Federal Tort Claims Act should apply.

The Eleventh Circuit rejected the argument, finding that the government's failure to follow federal regulations in using trained, certified mechanics to perform the fatigue tests did not involve an element of judgment or choice. Since the government had no discretion in the challenged conduct, the discretionary function exception did not shield the government from liability.

Kemelman v. Delta Air Lines, Inc., 740 N.Y.S.2d 434 (N.Y. App. Div. 2002).

In another Warsaw Convention case, the family of a man who suffered a heart attack on a flight from New York to Moscow won the right to a trial to determine whether Delta was guilty of willful misconduct. The passenger began complaining of chest pains four hours into the flight and fretting over an impending heart attack. A senior flight attendant asked other passengers if a doctor was on board, but got no response. There was a dispute over whether the attendant tried to give the passenger oxygen or whether the oxygen tank was empty. There was also a dispute about whether the passenger had asked for an emergency landing. Eventually, the passenger lost consciousness and the plane diverted to Copenhagen, Denmark. Two doctors came forward in response to a repeated request, and one doctor said nothing came out of the oxygen tank when he tried to administer oxygen to the passenger. The passenger never revived after landing in Copenhagen and later died in a hospital.

The plaintiff contended that the decedent's demise was caused by an "accident" within the meaning of the Warsaw Convention. The appellate court noted that an injury resulting from routine procedures in aircraft operation could be an "accident" if those procedures are carried out unreasonably. Given the evidence, the court ruled that it could not be said, as a matter of law, that the routine procedures Delta's employees followed in response to the passenger's medical situation were executed in a reasonable manner. The court further found that it could not be said, as a matter of law, that the passenger's injuries did not result from "willful misconduct," meaning that the Warsaw Convention's $75,000 damage cap could be avoided at trial.

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.

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What's Good for General Motors . . .

By Don Mitchell

"What's good for General Motors is good for America." This statement was reportedly made by General Motors' past President Charles E. Wilson in testimony before a Senate subcommittee in the 1950's. The premise of this decades-old theme was again put to good use following the events of September 11 – this time, for the benefit of the airline industry. The immediate result was the Air Transportation Safety and Stabilization Act followed by other legislation including the Aviation Transportation Security Act.

In early May, I had the opportunity to attend a meeting with Representative Johnny Isakson (R-GA), Georgia's representative for the 6th District to the U.S. House of Representatives (www.house.gov/isakson) and member of the Aviation Sub-Committee. The primary topic of discussion was aviation security and stability. The clear message was – *FLY*.

There is no dispute that without airlines, there's not much future for the industries that support them or that live by them. On that premise, Mr. Isakson said that Congress moved rapidly to pass the Stabilization Act which contains, among other things, direct cash payments totaling up to $5 billion and loan guarantees up to $10 billion. In light of tax revenues generated by the industry and the overall federal budget, not to mention the employees who work in it, Mr. Isakson considers this a comparatively small investment.

Mr. Isakson is keen to recent criticism about the size of the package which benefits just one industry among many that were impacted by the events of September 11. Small businesses and general aviation were particularly hard hit. In response, Mr. Isakson stated that just one third of the total $15 billion package is in the form of a direct cash subsidy. The remainder is in the form of financial guarantees from which the government, and hence the taxpayers, stand to profit. Philosophical issues aside, he compared this assistance to previous programs offered to Chrysler and the City of New York.

In response to the targeted nature of the package, Mr. Isakson stated that limited funds were applied in what was viewed as the most effective method. As airlines recover, all who are tied to the industry would benefit. Indeed, the federal government was not the only proponent of this "trickle down" theory. Aggressive workouts and restructurings made by the industry, including many of our clients, are essentially private contributions to the same cause.

The Stabilization Act also includes important liability protection for the airlines by, essentially, federalizing exposure to liability for the attacks. Airline liability was capped at the amount of insurance coverage maintained on the date of the attacks. Taxpayers assume the rest. A victim compensation program was created requiring an irrevocable election of remedies for victims directly impacted by the attacks. Victims cannot claim under the program and alternatively sue the airlines in court. As of our meeting, Mr. Isakson reported that only one lawsuit for damages related to the events of September 11 had been filed.

Federal war risk insurance is also addressed in the Stabilization Act. Shortly after the attacks, the insurance market reduced war risk insurance coverage limits to $50 million. This created an immediate crisis for operators required to maintain substantially more under leases and other financing arrangements. While excess insurance is now available in commercial markets, premiums are quite costly. This federal coverage is scheduled to expire on August 17, 2002, and the airlines are considering a self-insured pool to cover losses after that date.

The liability protection and insurance measures benefited the insurance industry as well. Mr. Isakson said that if broad action had not been taken, the insurance industry would have changed dramatically. Even with these protections in place, premiums have skyrocketed, coverage has been curtailed and

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What's Good for General Motors . . . (cont).

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insurers are expected to incur substantial losses from claims related to the attacks.

Although aimed at enhancing aviation system security, the Safety Act provides yet more aid to the industry. The Safety Act imposes many additional requirements, including positive baggage matching, on the airlines. This, in turn, increases their costs. But, airlines will benefit from having airport security and its related cost federalized. Passengers, not airlines, must now pay for security of up to $10.00 per trip. In fact, there is now discussion on raising that fee up to $20.00 per trip. The end result should be the return of passengers feeling more secure about boarding flights.

As a result of enhanced security measures including positive baggage matching and profiled passenger searches and screening, Mr. Isakson believes that flying is now safer than ever. He also referred to a sea change in the attitude of crew and passengers. He doesn't expect that crew or passengers will sit idly by should hijackers make another attempt. He pointed out that not one of the four threatening "incidents" aboard airliners since September 11 succeeded due to aggressive attention paid by passengers and crew. He believes new technology on the horizon, including "smart" identification cards and biometric devices, will only improve the system.

Rep. Johnny Isakson

Lastly, Mr. Isakson believes airlines, not the government, should decide whether or not pilots should be armed. He expressed concern over "stun guns" and how they might affect avionics and how firearms, even when used as a defensive measure, may ultimately cause harm to the very individuals who need to be protected. He stated that cockpit security should be the primary focus so that *all* intrusions can be prevented.

A recent industry executive stated simply that the airlines operate on very thin margins while all the others cream the profits. Few can argue with the proposition that what's good for the airlines is good for related industries. Whether or not you believe Congress was "hoodwinked" into helping the airline industry by effective and timely lobbying, swift action was required and swift action, with the best interests of the industry and country in mind, were taken.

Don Mitchell is Counsel in the Atlanta, Georgia office of the law firm of Smith, Gambrell & Russell, LLP and concentrates his practice in domestic and international aviation and aircraft equipment finance transactions and litigation. Please e-mail any questions or comments to: dbmitchell@sgrlaw.com

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SKYNOTES

ATLA National Convention
July 20-24 at Hyatt Regency, Atlanta; ATLA Aviation Law Section to meet July 21; www.atlanet.org

EAA's AirVenture at Oshkosh
July 23-29 at Oshkosh, WI; www.airventure.org

NBAA Annual Convention
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