dri The Voice of the Defense Bar




Skywritings

The Newsletter of the Aviation Law Committee

5/27/2014 Volume 15 Issue 1

In this Issue

Leadership Note

From the Chair

by Bob Williams

Greetings Aviation Law Committee Members!

I hope you enjoy this edition of *Skywritings*. As always, aviation law continues to be filled with turbulence and excitement, including proliferation of drones, new caselaw on the statute of limitations under the Montreal Convention, and a call for regulatory imposition of better flight tracking technology and standards in the wake of Malaysia Airlines Flight 370.

Your Aviation Law Committee is always looking for ways to keep you current and informed, and is working to expand substantive programming. We have our own "go team" ready to evaluate and act upon opportunities for new programs and timely topics. If you are interested in presenting or have any ideas or suggestions for programs, please contact me, our Vice-Chair, Jim Robinson, or our Programming Subcommittee Chair, Petra Justice. We also continue to have leadership opportunities on our Steering Committee, including Chair of the Expert Witness Subcommittee. Please contact me or Jim Robinson if you are interested!

Wishing you high ceilings and unlimited visibility,

Bob Williams
Chairman, Aviation Law Committee

Featured Article

No Claims in the US for International Flight Delays Without Breach of Contract

by Anna Kazaz

In the recent years, several cases have been filed with the United States District Court for the Northern District of Illinois against various airlines for damages due to flight delays. In all of these cases, passengers were trying to obtain in one form or another, compensation under the European Parliament and Council Regulation No. 261/2004 (EU 261), which requires airlines to assist passengers in case of delays or cancellation of flights departing from or arriving to an EU Member State.

This article will explain why EU 261 has been so attractive for passengers seeking compensation for flight delays in US courts. Further, it will address other legislation pertinent to defending EU 261 claims. Finally, the article will discuss these recent decisions and compare their outcomes.

EU Regulation 261/2004

The European Parliament and the Council of the European Union adopted EU 261 on February 17, 2004.[1] EU 261 establishes passengers' legal rights in

Join a Committee

Committee Leadership

Committee Chair
Robert J. Williams
Schnader Harrison Segal
rwilliams@schnader.com

Vice Chair
James E Robinson
Gordon Rees
jrobinson@gordonrees.com

Publications Chair
Michael McGrory
SmithAmundsen
mmcgrory@salawus.com

Click to view entire Leadership

Upcoming Seminar

cases when they have been involuntarily denied boarding or when their flights have been cancelled or delayed.[2] EU 261 applies to passengers departing from an airport located in the territory of a Member State to which the Treaty applies.[3] In addition, EU 261 applies to passengers departing from an airport located in a third country to an airport situated in the territory of a Member state to which the Treaty applies, provided that a Community carrier operates a flight.[4] A Community Carrier is an air carrier with a valid operating license granted by a Member State. EU 261 distinguishes between denied boarding, cancellation, and delay.[5] EU 261 defines each of these events and describes triggering circumstances, imposing upon air carriers an obligation to provide assistance to passengers. Assistance may be in the form of compensation, reimbursement or re-routing, and passenger care. Under EU 261, passengers may be entitled to compensation in case of denied boarding or cancellation, but not delay. A delay of three or more hours, however, is tantamount to cancellation, according to the European Court of Justice.

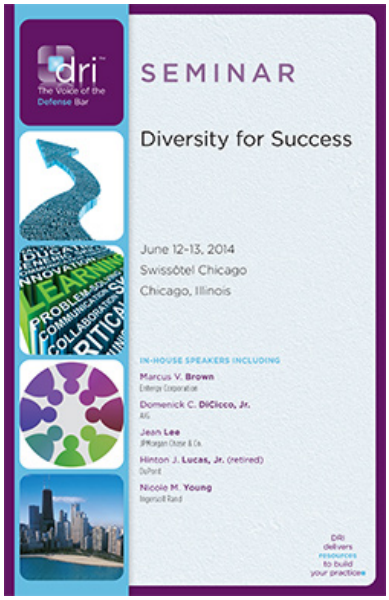
Other relevant legislation

Two other sources of law impact EU 261 litigation. First, the Airline Deregulation Act of 1978 ("ADA") provides that "a [s]tate . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier. . . ."[6] One exception exists to ADA preemption for routine breach of contract claims "seeking recovery for an airline's breach of its own self-imposed undertakings."[7]

Second, the Montreal Convention provides passengers with the right to damages arising from "any carriage in which, according to the Agreement between the parties, the place of departure and the place of destination . . . are situated. . . within the territory of two State Parties."[8] The Montreal Convention preempts state law causes of action that are in conflict with the provisions of the Convention.[9] Under Article 19 of the Convention, a passenger has a right to limited compensation in the event of a flight delay.[10]

Recent decisions involving EU 261

In *Polinovsky v. Deutsche Lufthansa*, passengers sued Lufthansa based under a state law breach of contract theory after the passengers' flight was delayed for more than three hours.[11] Initially, the court found that that the conditions of carriage adopted certain remedies under EU 261: "[i]n the case of a flight cancellation or flight delay, we offer assistance and compensation to the concerned passengers according to [EU 261]."[12] As such, the Court allowed the passengers to proceed with their breach of contract claims and denied Lufthansa's motion to dismiss. In so doing, the court rejected Lufthansa's argument that the passengers had failed to exhaust all other administrative remedies in EU courts, finding that EU 261 required no exhaustion of administrative remedies. Then, the Court held that neither the ADA nor the Montreal Convention preempted the passengers' claims. With respect to the ADA, the Court observed that Lufthansa incorporated EU 261 into its Condition of Carriage. Therefore, the passengers' claims for the airline's breach of its own self-imposed regulations were not preempted under the ADA. Further, the passengers' claims under EU 261 were consistent with the Montreal Convention's delay provisions, and, therefore, were not preempted by the Convention.



Diversity for Success

June 12–13, 2014
Chicago, Illinois

DRI Publications

DRI Survey of Federal and State Court Electronic Filing Rules

DRI Social Links

PDF Version

Subsequently, the passengers amended their complaint, adding a claim directly under EU 261. However, the Court dismissed this direct claim, finding that EU 261 does not provide a private right of action enforceable outside the European Union.[13] In the Court's opinion, EU 261 directly links enforcement to bodies designated by a Member State. The Court discounted the passengers' reliance on the court's previous ruling, explaining that its previous ruling dealt with the passengers' state law breach of contract claim, and not with the issue of whether a United States court could enforce EU 261 directly.

In *Lozano v. United Continental Holdings, Inc.*, passengers filed a class action against Continental Airlines seeking compensation under EU 261 after their flight from Scotland to the US arrived over 50 hours late.[14] In their original complaint, the passengers asserted a breach of contract claim, arguing that their contract for carriage incorporated EU 261because a copy of EU 261 had been posted on Continental's website. After Continental moved to dismiss the breach of contract claim, the passengers added a claim directly based on a violation of EU 261.

The Court dismissed the passengers' breach of contract claim, finding no intent to incorporate EU 261 into the contract for carriage. The Court also dismissed the passengers' direct claim under EU 261 finding that EU 261 did not create a private right of action to file a claim with US courts. The Court concluded that the European Union intended claims under EU 261 be filed only in courts of European Union Member States. The Court found support for its ruling in the overall structure of EU 261, which consistently uses the phrase "Member States" when discussing various rights and duties. Previously, the European Union expressed concerns about the consistency of judicial enforcement among the courts of the Member States. This goal of legal consistency would be jeopardized by the possibility that foreign courts, not subject to direct review by the European Court of Justice, would issue conflicting rulings. The Court also considered that allowing claims under EU 261 in courts outside the European Union might take away the incentive for Member States to comply with EU 261.

The court in *Volodarskiy v. Delta Air Lines, Inc.* ruled similarly to the *Lozano* court, dismissing a state law breach of contract claim because Delta's conditions of carriage did not expressly incorporate EU 261,[15] and dismissing the passengers' EU 261 claim because the law does not provide for a private cause of action in U.S. jurisdictions.The court also found that the ADA preempted the passengers' delay claims because Delta did not adopt EU 261 as a self-imposed obligation. Notably, the court stated that to the extent a direct claim under EU 261 could have been viable, it would not be preempted by the ADA, which preempts only domestic state law, not foreign law such as EU 261. Finally, the Court found that if the direct claim under EU 261 had been enforceable in US Courts, the Court would not have declined jurisdiction for comity purposes, because the US citizens were on both sides of the dispute, and there were no parallel claims pending in any European court.

In *Giannopoulos v. Iberia Lineas Aereas De Espana*, the Court allowed the passengers' breach of contract claims because the airline in this case expressly incorporated EU 261 into its passenger contract.[16] Yet, the Court followed the reasoning of the *Volodarskiy* and *Lozano* in dismissing the passengers' direct claims under EU 261 and finding thatEU 261 did not create a private right of action for bringing such claims in US Courts.[17] The Court agreed with the *Volodarsky* court that the ADA would not have expressly preempted a direct claim under EU 261. Yet, in the Court's opinion, such a claim would have been impliedly preempted by the ADA. As such, even if the US Courts were permitted to enforce the provisions of EU 261, the passengers' direct claims under EU 261 would still be dismissed based upon the implied preemption by the ADA. Indeed, the passengers sought to apply EU 261 to flights that began or ended in the United States, and Congress expressly intended for the ADA to apply to "foreign air carriers" and flights that travel between the US and a foreign country.

Lessons from the EU 261 Litigation

These recent cases make it clear that passengers cannot pursue direct claims under EU 261 with US courts. However, passengers will not be barred from pursuing state law breach of contract claims alleging failure to compensate for cancelled or delayed flights contrary to passenger contracts and EU 261. For these breach of contract claims to be successful, EU 261 must be expressly incorporated into the applicable conditions of carriage. Typically, as demonstrated

by the above decisions, tickets issued by European airlines incorporate EU 261, while tickets issued by American airlines do not. As such, a passenger will have a better chance of obtaining compensation under EU 261 from European airlines. Moreover, if an airline self-imposes an obligation to comply with EU 261 by making it an express part of their conditions of carriage, neither the ADA nor the Montreal Convention will preempt passengers' breach of contract claim.

Anna Kazaz *is an associate at SmithAmundsen, LLC and she has concentrated on aviation litigation for seven years, including several significant trials. Currently, Anna serves on the Board of Directors of Chicago Volunteer Legal Services, an organization that provides free legal services to low-income Chicagoans. Prior to working as an attorney in the United States, Anna successfully practiced law in Russia for four years in the areas of business and commercial law.*

Forward to a Friend

---

[1] Jae Woon Lee & Joseph Charles Wheeler, *Air Carrier Liability for Delay: a Plea to Return to International Uniformity*, 77 J. Air L. & Com. 43, 61 (Winter 2012).

[2]*Id.*

[3] Regulation (EC) No. 261/2004 of the European Parliament and of the Council of February 11, 2004, Article 3(1)(a)-(b), Official Journal of the European Union.

[4]*Id.*

[5] Lee & Wheeler, *supra* note 1, at 61.

[6] 49 U.S.C. § 41713(b)(1)(2014).

[7]*American Airlines v. Wolens*, 513 U.S. 219 (1995).

[8] Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. Treaty Doc. 106-45, 2242 U.N.T.S. 350 (hereinafter Montreal Convention).

[9]*El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 175 (1999).

[10]*See* Montreal Convention, *supra* note 8.

[11]*Polinovsky v. Deutsche Lufthansa*, 2012 WL 1080415 (N.D. Ill. March 30, 2012).

[12]*Id.* at *1.

[13]*Polinovsky v. Lufthansa*, 2014 WL 958666 (N.D. Ill. March 12, 2014).

[14]*Lozano v. United Continental Holdings, Inc.*, 2013 WL 5408652 (N.D. Ill. Sept. 26, 2013).

[15]*Volodarskiy v. Delta Air Lines, Inc.*, 2012 WL 5342709, at *1-5 (N.D. Ill. Oct. 29, 2012).

[16]*Giannopoulos v. Iberia Lineas Aereas de Espana*, 2012 WL 5383271 (N.D. Ill. Nov. 1, 2012).

[17]*Giannopoulos v. Iberia Lineas Aereas de Espana*, 2014 WL 551603 (N.D. Ill. Feb. 12, 2014)

Articles of Note

Daimler AG v. Bauman Places Limits on General Jurisdiction

by Erica Tate Healey

January, the United States Supreme Court significantly limited where companies can be sued for claims *unrelated* to their activities in a state. In *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014), the Court unanimously reversed the Ninth Circuit and held that due process did not permit exercise of general jurisdiction over a foreign corporation sued in California. Most significantly, the Court held general jurisdiction will exist only in the states where a corporation is "at home", which the Court equated with corporate citizenship in the given state via (i) incorporation there or (ii) the presence of the corporation's principal place of business there. Thus, post-*Daimler*, in many instances states will no longer have general jurisdiction over a foreign company on claims that are unrelated to the company's in-state activities just because the company is licensed to do business in the state or operates a branch in that state.

This holding will have a broad impact on where mass tort and product liability cases can be litigated. In particular, this opinion will have a widespread impact on aviation litigation, as foreign plaintiffs will no longer be able to forum-shop and sue airframe or aircraft component-part manufacturers in states that are wholly unrelated to the incident in question that is not the manufacturer's principal place of business or place of incorporation. For example, when plaintiffs are injured overseas or in foreign states, they will no longer be able to sue in a state just because a manufacturer or distributor distributes aircraft in that state, has significant sales in that state, or owns subsidiaries in the state.

Daimler A.G. v. Bauman

In *Daimler*, twenty-two Argentinean residents sued Daimler Chrysler Aktiengesellschaft (Daimler), a German company that sells cars world-wide, in a California federal district court. The plaintiffs sought to hold Daimler responsible for the alleged conduct of its Argentinean subsidiary for conduct that occurred in Argentina. The plaintiffs asserted personal jurisdiction over Daimler was appropriate because Daimler itself had a presence in California. In the alternative, they asserted personal jurisdiction over Daimler was appropriate based on the California contacts of Mercedes-Benz USA, LLC (MBUSA), its subsidiary. Specifically, Daimler sold cars in the United States through MBUSA, a Delaware company with its principal place of business in New Jersey. MBUSA distributes Daimler-manufactured cars to dealerships throughout the states, including California. The Ninth Circuit upheld a finding of general jurisdiction, reasoning that MBUSA was Daimler's agent for jurisdictional purposes and that MBUSA did enough business in California to answer forany lawsuit filed against it in California.

The Supreme Court granted certiorari to decide whether California could exercise personal jurisdiction over Daimler under the Due Process Clause of the Fourteenth Amendment. First, the Court explained the difference between specific and general jurisdiction. Specific jurisdiction is limited to claims arising from specific forum-directed conduct by a foreign defendant. General jurisdiction, though, subjects a foreign defendant to suit in the forum state for any dispute arising anywhere in the world even if wholly unrelated to the forum. The Court explained that most modern personal jurisdiction case law, starting with the infamous 1945 *International Shoe* decision, addresses due process limitations on personal jurisdiction in the context of specific jurisdiction. The Argentinean plaintiffs, then, could not rely on *International Shoe* and its progeny because they sought to invoke general jurisdiction.

The Court then confirmed that general jurisdiction is appropriate only if the defendant's contacts with the forum state are so "continuous and systematic" as to render it essentially "at home" in the forum state. The Court explained that merely placing a product into the stream of commerce does not warrant a determination that the forum has general jurisdiction over a defendant. Rather, those ties are significant only to specific jurisdiction. The Court stated that only a very limited set of affiliations with a forum will render a defendant amenable to general jurisdiction there, and that the exercise of general jurisdiction "calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide." Simply put, if a corporation has substantial contacts in a foreign state or country, those foreign contacts weigh heavily against the exercise of general jurisdiction in the forum state because a "corporation that operates in many places can scarcely be deemed at home in all of them."

The Court then provided a stringent definition of what it means for a corporation to be "at home" in a state, clarifying that "the place of incorporation and principal place of business are paradigm bases for general jurisdiction." In so holding, the Court explicitly rejected the plaintiffs' argument that the exercise of general jurisdiction is appropriate in every State in which a corporation "engages in a substantial, continuous, and systematic course of business," reasoning that this principle is "unacceptably grasping."

The Court next considered whether Daimler's affiliations with California were so continuous and systematic as to render Daimler at home in California. First, the Court briefly addressed whether MBUSA's conduct could even be attributed to Daimler for purposes of personal jurisdiction, and implied that the usual agency test for imputing actions to a parent corporation was relevant only in the context of specific jurisdiction, not general jurisdiction. The Court, however, declined to decide the issue and held that even assuming MBUSA's contacts were imputable to Daimler and even assuming that MBUSA is at home in California, California has no general jurisdiction over Daimler.

In particular, the Court noted that neither Daimler nor MBUSA were incorporated in California, nor did either have its principal place of business there. Despite the fact MBUSA was the largest supplier of luxury vehicles to the California market and MBUSA's California sales accounted for 2.4% of Daimler's worldwide sales, the Court held that Daimler, even with MBUSA's contacts attributed to it, was not at home in California. The reality of this holding is that California courts could not exercise general jurisdiction over Daimler despite the fact that the corporation (via MBUSA), *inter alia*, (1) had multiple California-based facilities, including a regional office, a vehicle preparation center, and a classic center; (2) annually distributed in California tens of thousands of cars which generated billions of dollars in sales in California; and (3) provided service and sales support to customers throughout the state.

The Court did note that in the "exceptional case," a corporation's contacts with a third state may be so substantial and of such a nature as to render the corporation at home in that State. *See, e.g.*, *Perkins v. Benquet Consol Mining Co.*, 72 S. Ct. 416 (1952) (holding general jurisdiction was appropriate in Ohio because the foreign company had temporarily ceased its mining operations abroad and the president of the company moved to Ohio, where he kept an office, maintained the company's files, and oversaw the company's activities). But the Court did not explore the exception, stating that Daimler's activities in California "plainly" did not approach that level.

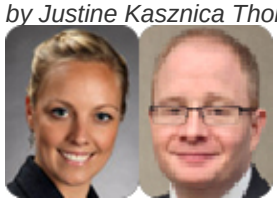
Advice for the Defense Practitioner

The practical reality of *Daimler* is that California did not have general personal jurisdiction over a corporation despite the fact that its subsidiary, whose contacts were assumed attributed to it, was the largest supplier of luxury vehicles to the California market. Accordingly, after *Daimler*,courts may no longer have jurisdiction over airframe and component-part manufacturers merely because those manufactures distribute significant aircraft in the state, operates branches in the state, or own subsidiaries in the state. In addition, *Daimler* admonished that merelyplacing a product into the stream of commerce does not warrant a determination that the forum has general jurisdiction over a defendant. While some district courts have expressed reluctance at applying the seemingly new sweep of *Daimler*, many district courts have taken heed and are dismissing claims against foreign defendants. Consequently, keep *Daimler* in mind for your next aviation case where the claims arise from activities occurring outside the forum state.

Forward to a Friend

From Tech Toy to a New Industry: Commercial Use of Drones and the Regulatory Foundation Laid by *Pirker*

by Justine Kasznica Thornton and Barry S. Alexander



From Tech Toy to New Industry

In 2007, Jordi Munoz was 21 years old and awaiting his green card, unable to work, attend school or obtain a driver's license. With nothing but time on his hands, he combined the control wand from his Nintendo Wii and a $60 gyroscope he purchased on eBay to modify a radio-controlled toy helicopter to fly itself. Five years later, he co-founded 3D Robotics, which produces components for hobbyist drones and earned more than $300,000 in revenue in December 2011.[i]

Jordi's story is not unique, as the unmanned aerial vehicle ("UAV")/unmanned aircraft system ("UAS") market, once the subject of science fiction, is now very much a reality, with UAV/UAS spending projected by some to total as much as $89 billion over the next 10 years. While UAVs/UASs have been around in some form for a number of decades, the potential for widespread personal/commercial use of drones largely has not.

The potential commercial uses for UAV/UAS are myriad, with numerous industries beginning to embrace this technology, including education, oil, gas and energy, photography/film (just in the last several weeks, the use of drones to take photographs of the Washington Nationals during spring training and the collapsed buildings in Harlem has made news), marketing, real estate, security, retail (delivery/transportation of cargo), and agriculture.

Autonomous landing, navigation and vision systems are being developed at universities at a rapidly increasing rate, fueled by interest and research funding from defense and industry sectors. Tech transfer offices at research universities across the country are seeing the emergence of start-ups looking to commercialize technologies relating to UAS, or to build commercial companies looking to solve industry problems in security, surveying, exploration, advertising, logistic and delivery services.

As with any new and burgeoning industry, especially one employing a new technology, legal issues and hurdles are certain to arise. For UAVs/UASs, the first major legal hurdle/issue that must be cleared involves FAA regulation, as demonstrated by the recent decision of an NTSB Administrative Law Judge in Huerta v. Pirker.[ii]

Huerta v. Pirker—A Case of First Impression

Raphael Pirker is a radio-controlled airplane aficionado and drone photographer who has developed a reputation and significant social media following for his use of a five pound Styrofoam radio-controlled aircraft to film and post viral footage of iconic landmarks, such as the Statue of Liberty and the French Alps.[iii] On October 17, 2011, Pirker operated his UAS over the University of Virginia Medical Center to aerially film the campus. He sold the video and images he obtained from the UAS to an advertising agency for the purpose of creating a promotional commercial about the medical school.

On April 13, 2012, the FAA issued a Notice of Proposed Assessment proposing to assess a civil penalty of $10,000 against Pirker for operating the UAS in violation of 14 C.F.R. §91.13(a), which states that "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another." On June 27, 2013, the FAA issued an Order of Assessment assessing the $10,000 penalty.[iv] According to the FAA, Pirker operated the UAS recklessly and endangered the life and property of others by flying it "at extremely low altitudes over vehicles, buildings, people, streets, and structures"[v] and within close proximity to campus buildings and public walkways sometimes using abrupt obstacle avoidance.

Pirker appealed the penalty to the National Transportation Safety Board ("NTSB"), and the matter went before Patrick Geraghty, an administrative law judge.

Although the FAA has issued dozens of cease-and-desist letters to operators of UAVs/UASs who used them for commercial purposes including filming, surveying, and other forms of data collection, the FAA had not assessed a civil penalty prior to the *Pirker* case. As the first and only instance in which the FAA has used its presumed authority to impose a civil penalty for the commercial use of a UAS, the *Pirker* case was thus of substantial interest to many as a case of first impression.

The central issue on appeal was whether the FAA had regulatory authority to assess the penalty. The FAA argued that the UAS fell within the definition of "aircraft" set forth in 14 C.F.R. §1.1, which defines an "Aircraft" as a "…device that is used or intended to be used for flight in the air ….," and that its operation is therefore governed by §91.13.[vi]

The FAA further argued that Pirker's operation of the UAS was subject to FAA "policy statements" issued in 2005 and 2007, with the 2007 statement noting that "operators who wish to fly an unmanned aircraft for civil use must obtain an FAA airworthiness certificate the same as any other type aircraft."

In response, Pirker argued that there is no FAA regulation applicable to the commercial use of UAS. Noting that the FAA has not yet issued any regulations specifically governing the operation of UAS, Pirker relied upon the FAA's historical distinction between "aircraft" and "model aircraft" as evidence that the Federal Aviation Regulations ("FARs") definition of aircraft does not include UAS. Specifically, the FAA had in the past exempted model Aircraft from the application of the FARs.

For example, in 1981, the FAA released *voluntary* guidelines[vii] outlining safety standards for model aircraft operation. Notably, the guidelines suggested a maximum altitude of 400 feet to avoid interference with manned aircraft, and made no distinction between model airplanes used for recreational purposes and those used for commercial purposes.

Moreover, Pirker's attorneys emphasized that neither the 2005 nor the 2007 policy statement provided a definition for "unmanned aircraft," nor could either replace or substitute for properly promulgated FARs.

On March 6, 2014, the ALJ ruled in favor of Pirker, concluding that because the FAA "has not issued an enforceable FAR regulatory rule governing model aircraft operation [and] has historically exempted model aircraft from the statutory FAR definitions of 'aircraft' by relegating model aircraft operations to voluntary compliance …, [Pirker's] model aircraft operation was not subject to FAR regulation, and enforcement."[viii]

The FAA timely appealed the NTSB ruling, citing concern that "this decision could impact the safe operation of the national airspace system and the safety of people and property on the ground."[ix] This appeal stays the effect of the ALJ decision until the decision is reviewed.

Although currently of no legal effect, the NTSB's ruling has sent ripples throughout the aviation world, with model aircraft operators, scholars and industry experts touting the *Pirker* case as a blow to the FAA and an important precedent for the future of the commercial UAS industry in the United States. In actuality, the decision likely will have only a temporary impact regardless of the outcome on appeal, as the FAA was given express authority to issue regulations governing UAVs/UASs by the FAA Modernization and Reform Act of 2012 ("FMRA"),[x] and a formal regulatory scheme is expected sometime in 2015.

The Future of Commercial UAS and the Legal Community

Time will tell what, if any, lasting impact the *Pirker* decision will have on the future of the commercial UAS industry. Although the FAA has issued several documents that provide some indication of the regulatory scheme to come (the Integration of Civil Unmanned Aircraft Systems (UAS) in the National Airspace System (NAS) Roadmap, a Notice of Final Privacy Requirements for UAS Test Sites, and a UAS Comprehensive Plan mandated by the FMRA), it is unclear just how burdensome the FAA regulations will be.

While the FAA's aggressive approach in *Pirker* is seen by some as an indication that the regulations will be strict, it is abundantly clear that the opportunities for commercial UASs are many, and the need for proper, but reasonable, regulation is substantial. This new industry is not without significant risks and challenges. Obvious concerns include the safety of civilians from drone malfunction or operator error, the potential for hijacking or repurposing of commercial drones for use as weapons by those with evil intentions, the widespread use of drones for civilian surveillance and the potential impact on privacy, and the growth of "drone crimes" including theft and destruction of property.

Manufacturers and consumers of UAVs/UASs will need to stay informed of the legal landscape, including potential legal issues relating to privacy, intellectual property, state-law torts such as trespass/nuisance, not to mention personal injury or property damage, and FAA preemption issues (some states have already passed legislation regulating UAS/UAV use). Regardless of the outcome of the appeal in *Pirker* or the regulations ultimately issued by the FAA to govern UAS use, two things seem certain: the UAS industry is going to expand exponentially in the years to come, and a great number of legal issues will have to be addresse

Justine Kasznica Thornton *is a corporate attorney and the Chairman of the Innovation Practice Group at Schnader Harrison Segal & Lewis LLP. She services cutting edge technology clients that are building innovative products, companies, and industries. Her services includes business formation, initial capitalization, as well as angel, venture, equity and debt financing, protection and exploitation of intellectual property, commercial agreements, and exit planning. Her clients include high growth potential start-ups, investor groups, universities and research institutions seeking to commercialize new technologies, and later stage companies developing innovative products and services. Mrs. Thornton focuses her practice on the robotics, aerospace and IT industries, with clients ranging from space robotics companies and UAS technologies spun out of*

university research labs to biotech, and healthcare and data security automated SaaS companies.

***Barry Alexander** is a Partner in the New York office of Schnader Harrison Segal & Lewis. Barry represents domestic and international air carriers in state and federal courts throughout the United States. Barry's focus areas include aviation law and litigation, commercial litigation, bankruptcy law and insurance coverage. A frequent lecturer, Mr. Alexander has given multiple aviation-related lectures and seminars on various liability and regulatory issues, including a recent presentation on Airline Liability for Parental Child Abduction at the 48th Annual SMU Air Law Symposium. He also is an accomplished writer, having published articles and book chapters on subjects including the admissibility of expert evidence, removal of Montreal Convention actions, notice of claim in Montreal Convention cargo actions, tort reform and the doctrine of forum non conveniens. Barry received his Bachelor of Science from Cornell University, and his Juris Doctorate from Duke University School of Law.*

Forward to a Friend

---

[i] Hruby, Patrick. "Out of 'Hobby' Class, Drones Lifting off for Personal, Commercial Use." *The Washington Times*. March 14, 2012. Web. April 8, 2014.

<http://www.washingtontimes.com/news/2012/mar/14/out-of-hobby-class-drones-lifting-off-for-personal/?page=all>.

[ii] Huerta v. Pirker. NTSB Docket No. CP-217. March 6, 2014. Web. April 8, 2014.

<http://www.ntsb.gov/legal/Pirker-CP-217.pdf>.

[iii] Feith, David. "The Drone That Shot Down the Feds." *The Wall Street Journal*. March 24, 2014. Web. April 8, 2014.

<http://online.wsj.com/news/articles/SB10001424052702304256404579453120221666910>.; *see also* Koebler, Jason. "Drones Could Be Coming to American Skies Sooner Than You Think." *Politico Magazine*. January 28,2014. Web. April 8, 2014.

<http://www.politico.com/magazine/story/2014/01/drones-faa-lawsuit-coming-to-american-skies-102754.html#.UzIziahdWSo>.

[iv]Administrator's Order of Assessment. Huerta v. Pirker. Docket No. CP-217. July 18, 2014. Web. April 8, 2014. <http://www.ntsb.gov/legal/Pirker-CP-217.pdf>.

[v]Complaint, para. 7. Huerta v. Pirker. NTSB Docket No. CP-217. March 6, 2014. Web. April 8, 2014. <http://www.ntsb.gov/legal/Pirker-CP-217.pdf>.

[vi] The FAA also relied upon 49 U.S.C. §40102(a)(6)'s definition of an "Aircraft" as "any contrivance invented, used, or designed to navigate or fly in the air." *See* Huerta, *supra* at n. ii, at pg. 3, n. 5.

[vii]FAA Advisory Circular 91-57. June 9, 1981.

[viii]Huerta, *supra* at n. ii, at pg. 4.

[ix] FAA Press Release. *Federal Aviation Administration*. March 7, 2014. Web. April 8, 2014. <http://www.faa.gov/news/press_releases/news_story.cfm?newsId=15894>.

[x] FAA Modernization and Reform Act of 2012, Pub. L. 112-95. February 14, 2012.

Strategies to Obtain Early Settlement of General Aviation Claims

by R. Bruce Wallace and Robert J. Lowe, Jr.

According to the NTSB, 1,471 general aviation accidents occurred in 2012 alone. These accidents resulted in 432 deaths. This follows the general trend for the last 14 years, when more than 1,400 general aviation accidents occur annually. In 2010, general aviation accounted for 96 percent of all aviation accidents, 97 percent of fatal aviation accidents, and 96 percent of all fatalities for U.S. civil aviation.[i] These statistics demonstrate the stakes associated with general aviation litigation, as approximately 1 in 3 accidents results in death every year.

Practitioners are familiar with the hallmarks of general aviation cases. First, the plaintiffs allege serious, if not catastrophic damages: (1) wrongful death; (2) lost wages; (3) emotional damages; and (3) survivors' damages such as loss of consortium. Second, practitioners are faced with complex issues of liability. General aviation accidents can result from several competing theories: (1) pilot error such as loss of control or mid-air collision; (2) system or component failure; or (3) third party liability. These competing theories lead to an exponential cost in experts, involving complex engineering facets, and often complex and expensive computer modeling to reenact the physics of the accident and/or the mechanics of material failure.

Add to these the ongoing costs of the NTSB investigation and reports, and practitioners face enormous expenses to investigate, reconstruct, and defend general aviation claims. Between the multiple causation experts, damages experts, attorneys, and the geographic dispersion of witnesses, wrongful death claims can often run into the millions before the first demand is ever made; and that demand will be in the millions as well. As a result, there are significant advantages to early settlement negotiations and resolution. First, putative defendants avoid the publicity of a trial. Second, clients salvage their reputations. Third, clients avoid the disclosure of potentially disastrous facts. Fourth, clients avoid the forgoing litigation fees and costs. Finally, clients avoid a potential award of punitive damages.

By contrast, in 2003, approximately 98% of all civil tort actions were settled or dismissed without a trial in federal court.[ii] Of approximately 98,000 tort cases concluded in the United States District Court from 2002-03, less than 1,700 were decided by bench or jury trials. Knowing the slim chance any given claim will be decided by the jury, then, and the extraordinary fees and expenses associated with moving a case to trial, the general aviation practitioner should focus a directed effort on early settlement.

Engage Opposing Counsel Early

Counsel for manufacturers, pilots, repair facilities, and other targeted parties should engage claimant's counsel soon after the accident, assuming a claimant has retained counsel. During these early conversations, practitioners should focus on the complexities ahead and facing both sides. Practitioners should take the time to discuss the lengthy delay a judicial resolution would entail, along with the slim chance a jury will actually decide the action. And, if the claimant were to "hit big," a lengthy appeal will almost certainly follow. Given that financial compensation drives modern tort litigation, claimant's counsel should focus on the time value of money for their clients. Defense counsel should also include thoughtful early settlement engagement in their action plan for the same reasons.

Discussing the uncertainty of a successful outcome for either side provides opportunity to explore multiple different outcomes. Practitioners can explore the possibility of only of many parties being found liable, such as the pilot who was not paying attention on take-off, or the repair facility that failed to follow its station repair manual. This provides an opportunity for claimants to analyze their risk/reward in pursuing multiple parties. If claimants settle with some parties early, they can focus their litigation strategy on the remaining parties.

Lastly, practitioners should remind opposing counsel of the control both sides have in an early, negotiated resolution. Collectively, the best service lawyers can render to their clients is the one whereby we make affordable settlement decisions easier for opposing counsel. By doing so, we can obtain an early resolution for our client. After all, settlement only "hurts" for a short time and a verdict, successful or not, lingers.

Choose the time and place for early settlement discussions

Everyone likes the home court feel, and some are flattered that opposing counsel will travel to discuss settlement. Scholars suggest a positive relationship between legal adversaries "can be more effective for achieving mutually beneficial and equitable outcomes."[iii] Making small concessions to increase your "likability" makes it more probable your opponent will ultimately accept a negotiated offer.[iv]

Another tactic practitioners may employ is to promote settlement discussions while at NTSB inspections or other investigative arenas. The neutrality of the site, while an independent investigation is ongoing, can foster mutuality of purpose with a secondary benefit of setting the stage for later productive discussions. And by abandoning the "see you in court" stalemate, practitioners

can truncate the negotiation process and engage in fruitful discussions.

Avoid discussions of liability

In addition to stalemating discussions, telling opponents they do not have a case will cause them to take similarly extreme positions themselves. So, practitioners should focus the discussion on damages to the exclusion of the root cause(s). If you do not already have it, devote your research to developing a detailed knowledge of the elements of damages recoverable in the jurisdiction where the action is (or would be) pending. Then you can discuss with opponents whether they can recover for a survivorship action depending on whether suffering are presumed or must be proved by independent evidence. You should know and be able to discuss whether caps on non-economic damages exist. Unrealistic demands well outside jury awards in conservative jurisdictions, for example, are harbingers for early failed settlement discussions. Practitioners can manage those expectations with strong, sourced research on damages.

Engage different mechanisms that are educational and economical

If opposing counsel hesitates to negotiate early in the process, practitioners can employ several mechanisms that make negotiation more attractive. For instance, proposing limited damages discovery may entice opponents to tell more of their story. Also, discovery such as a limited deposition of the surviving family members allows the injured party the opportunity to "say their peace," while allowing the client to evaluate the family's credibility, likeability, as well as to measure the loss resulting from the deceased loved one.

Additionally, practitioners can request the economic damages from the claimants and engage a single expert to evaluate those damages. After obtaining the raw data, an expert will develop a clear, early picture of the economic damages, damages which are unlikely to change as the action progresses.

Focus on closure for the survivors

Wrongful death litigation characteristically extends the period of mourning and grief for the survivors and family members. Survivors are constantly required to relive the loss of a loved one while making strategic and tactical litigation decisions, preparing for trial, and testifying (at least twice) about the pain and grief. Thankfully, practitioners often observe that the end of litigation brings an end to the grief itself, or at least claimants can begin the process of healing by putting the blame behind them. By focusing on this closure early, opposing counsel can achieve a goal they cannot often achieve through drawn-out litigation: peace.

Conclusion

Given the nature of general aviation claims and accidents, aviation practitioners should take advantage of early negotiating strategies. Early negotiation should result in savings on many fronts: financial savings, reputational savings, and psychological savings. Remember that a bad settlement is better than a bad trial.

Bruce Wallace *practices in Nexsen Pruet's Charleston office, where he has represented banks, insurers, and corporate clients in a wide range of matters related to business and consumer litigation for almost two decades.*

Bruce has been active with DRI for many years and in several capacities. He is the current Annual Meeting chair, as well as the vice chair of the Lawyer Malpractice SLG of the Professional Liability Committee. In the past, Bruce served as chair of the D&O and E&O SLG of the Commercial Litigation Committee.

With 190 attorneys in eight locations throughout the Carolinas, Nexsen Pruet provides comprehensive legal services to companies both large and small, handling challenges at the deal table, in court, and in the halls of government. To contact Bruce, call 843.720.1760 or email bwallace@nexsenpruet.com.

Robert J. Lowe, Jr. *practices at Lowe & Associates in Charleston, SC., and is a retired Air Force/Air National Guard fighter pilot.*

Bob has represented banks, insurers, corporate clients and government agencies in complex litigation and related matters for over 30 years. These matters have included aircraft wrongful death litigation in the state and federal courts of Virginia

and South Carolina.

He has been a speaker at government, corporate and academic forums on a wide range of issues. Bob also co-authored "Vanguard," the strategic vision for the Air National Guard. To contact Bob, call 843.408.1900 or email rlowe@lowefirm.com.

Forward to a Friend

---

[i] NTSB, Review of U.S. Civil Aviation Accidents 2010 at 33.

[ii] Office of Justice Programs, Bureau of Justice Statistics, www.bjs.gov.

[iii] Richard Birke and Craig R. Fox, Psychological Principles in Negotiating Civil Settlements, HARV. NEGOTIATION L. REV., vol 4:1, at 55 (1999).

[iv] Id.

Delete Table