AIRCRAFT BUILDERS COUNCIL, INC. LAW REPORT

REACH FOR THE SKIES: THE EXPANSIVE VIEW OF FEDERAL PREEMPTION

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The ABC Underwriters, as part of their comprehensive insurance plan, have requested Fitzpatrick & Hunt, Tucker, Collier, Pagano, Aubert, LLP to prepare periodic reports on topics of interest to the members. Four articles appear in this Law Report relating to various aspects of products liability law.

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INTRODUCTION

In the last several years, courts in a growing number of jurisdictions have been willing to find that federal laws establish the applicable standard of care in the field of air safety. These holdings have preempted the entire field of "aviation safety" from state and territorial regulation. As one can imagine, the area of aviation safety is vast, potentially covering a broad range of many different types of aviation related operations. As such, courts have struggled with where to draw the "aviation safety preemption" line. How far are the courts willing to go? Based on some circuits' recent decisions, the answer is pretty far. This is evidenced by a recent trend to extend preemption to aviation product manufacturers. While the courts' willingness to impose federal standards of care in place of state standards is continuously tested, this trend is favorable to aviation defendants. This article will examine how the courts have recently dealt with preemption when aviation safety is implicated, with a focus on preemption's application to aviation manufacturers.

FEDERAL PREEMPTION GENERALLY

Federal preemption occurs where federal law so occupies a certain field that state courts are prevented from asserting state law standards. The power of Congress to preempt state law derives from the Supremacy Clause of the United States Constitution which provides that the laws of the United States shall be the supreme Law of The Land.[1] The Supremacy Clause has the effect of invalidating states' laws that interfere with, or are contrary to, federal law.[2] However, when considering issues arising under the Supremacy Clause, courts begin with the assumption that the

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1 U.S. Const. art. VI, cl. 2.

2 *In Air Transport Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218, 220 (2nd Cir. 2008).

historic police powers of the States are not to be superseded unless that is the clear and manifest intent of Congress.[3] The Supreme Court has cautioned that "despite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of preemption with the starting presumption that Congress does not intend to supplant state law."[4]

Accordingly, any preemption analysis must first begin with the purpose behind the federal legislation in question to establish whether Congress did, in fact, intend to supplant state law. The controlling federal legislation that must be examined in any aviation preemption analysis is the Federal Aviation Act (FA Act)[5] and the Airline Deregulation Act (ADA).[6]

The Federal Aviation Act of 1958:

The FA Act was enacted in response to a "series of fatal air crashes between civil and military aircraft operating under separate flight rules."[7] Congress' intent in enacting the FA Act was to create and enforce one unified system of flight rules and to promote, under the authority of the Federal Aviation Administration Administrator, the power to frame rules for the safe and efficient use of the nation's air space.[8] To accomplish this, Congress vested the Administrator of the new Federal Aviation Agency[9] with "full responsibility and authority for the . . . promulgation and enforcement of safety regulations."[10] and left the

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3 *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 366 (3rd Cir. 1999).

4 *Id.*

5 49 U.S.C. § 40101.

6 49 U.S.C. § 41713.

7 *Abdullah*, 181 F.3d at 368.

8 *Id*.

9 The FAA (Federal Aviation Administration) was formerly called the Federal Aviation Agency.

10 *Montalvo v. Spirit Airlines*, 508 F.3d 464, 472 (9th Cir. 2007) (citing H.R. Rep. No. 2360 (1958), as reprinted in 1958 U.S.C.C.A.N. 3741).

door open for the Administrator to choose to preempt subfields of air commerce and aviation safety.[11] The United States Supreme Court sums it up best: "Congress has recognized the national responsibility for regulating our commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands."[12]

The Airline Deregulation Act of 1978:

Twenty years after the FA Act, Congress enacted the ADA which prohibited states from enacting any law, rule, regulation, standard, or any provision relating to **rates, routes or services of any air carrier** having authority to provide air transportation.[13] The ADA, signed into law by Jimmy Carter, was intended to introduce market forces into an industry that for forty years had been economically regulated by the Civil Aeronautics Board (the predecessor to the FAA) for the purpose of ensuring an infusion of capital into what, up until that time, was a young and fragile industry. Economic regulations, while beneficial to the airlines initially, eventually had the effect of thwarting competition and innovation. The ADA signaled official recognition that federal public policy towards airlines was changing from a protective infant industries approach to one of allowing the market forces to take hold.[14] The ADA's purpose was to prevent states from frustrating the deregulation of the airline industry by extensively regulating it on their own. Unlike the FA Act, the ADA expressly preempted

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11 *Skysign Intern., Inc. v. City and County of Honolulu*, 276 F.3d 1109, 1116 (citing 49 U.S.C. §40103(b)(1)-(2) (1994)).

12 *Nw. Airlines v. Minnesota*, 322 U.S. 292, 303 (1944).

13 49 U.S.C. § 41713.

14 Jonathan M. Stern et al, *How Far Will It Reach?—Fresh Air, Fresh Water, Peanuts and Booze*, 50 FOR THE DEFENSE 52, (2008).

state regulation, although only with respect to rates, routes, or services of an air carrier.[15]

Types of Federal Preemption:

The Supremacy Clause, as interpreted by case law, provides three ways in which federal law can preempt state and local law: express preemption, implied conflict preemption and implied field preemption.[16] Express preemption arises when Congress explicitly states its intention to preempt state law. Express preemption cases almost always involve the encroachment of a state's law in the forbidden area of rates, routes, and services under the ADA.

Implied conflict preemption exists where it is impossible for a party to comply with either state and federal requirements or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[17]

Implied field preemption occurs when the federal scheme of regulation is so pervasive that Congress must have intended to leave no room for a state to supplement it.[18] Recent cases finding preemption of state laws in the realm of aviation safety have done so under principles of implied field preemption.

Implied Federal Preemption of Air Safety Standards

The decision laying the ground work for field preemption in the area of aviation safety is *Abdullah v. American Airlines, Inc.*[19] *Abdullah* involved several passengers' claims for injuries as a result of severe turbulence. The first officer had notice of turbulent

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15 *Sikkelee v. Precision Airmotive Corp.*, 731 F. Supp. 2d 429, 433 (M.D. Pa. 2010).

16 *Hoagland v. Clear Lake, Ind.*, 415 F.3d 693, 696 (7th Cir. 2005).

17 *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995).

18 *U.S. Airways v. O'Donnell*, 627 F.3d 1318, 1324 (10th Cir. 2010).

19 *Abdullah*, 181 F.3d 363. The States in the Third Circuit are Delaware, New Jersey, and Pennsylvania.

weather in his flight path, warned the flight attendants, but did not alert the passengers.

The *Abdullah* court held that federal law establishes the applicable standards of care in the field of aviation safety under principles of implied field preemption. In so finding, the court held that the FA Act and relevant federal regulations establish complete and thorough safety standards for interstate and international air transportation. As such, there is no room for supplementation by, or variations among, jurisdictions.[20] In determining the standards of care in an aviation negligence action, the court must refer not only to specific federal regulations, but also to the overall concept embodied in 14 Code of Federal Regulation 91.13(a) that an aircraft may not be operated in a careless or reckless manner so as to endanger the life or property of another.[21] As the court stated in applying federal standards to the plaintiff passenger claims: "It would be illogical to conclude that while federal law preempts state and territorial regulation of matters such as pilot licensing, it does not preempt regulations relating to the expertise of the specific skill for which licensing is necessary—pilot's operation of the aircraft."[22] In short, the court found "no gap" in the federal standards to fill with state common law standards. In other words, federal law covers the *entire* field of aviation safety so as to completely supplant any state laws that touch the same area.

Further, it is important to note that while the court found that the standards of care for the safe operation of aircraft were subject to federal preemption, the court did not find that state and territorial law *remedies* were preempted. The court held that federal preemption of a state's standard of care can coexist with state and territorial tort remedies.[23] In citing the *Silkwood* case, the

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20 *Id.* at 367.

21 *Id.* at 371.

22 *Id*.

23 *Id.* at 375. The FA Act has a savings clause which provides: "A remedy under this part is in addition to any other remedies provided by law." 49 U.S.C.

court observed that Congress had decided to "tolerate whatever tension there was" between finding the standard of care preempted and allowing state remedies at the same time.[24]

Since the groundbreaking decision in *Abdullah*, the courts have been more willing to find federal preemption where issues of aviation safety are implicated, particularly in areas involving in-flight air operations, air space management, and pilot training. Stretching beyond these areas, courts are starting to find that federal law preempts other areas in cases involving product manufacturing defects, failure to warn, and on-ground aviation accidents. A defendant's likelihood of success in asserting preemption in the name of air safety will depend in part on which circuit or state court the case is pending.

POST-*ABDULLAH* PRODUCT LIABILITY PREEMPTION CASES

Preemption Found:

Starting with the case of *Greene v. B.F. Goodrich Avionics Systems, Inc.,*[25] the Sixth Circuit[26] found that plaintiff's failure to warn claims, regarding defendant's alleged defective gyroscope, were preempted by federal law. Plaintiff based her failure to warn claim on the fact that defendant "had no central database structure . . . to track malfunctions, to register employee concerns of gyro system weaknesses or to communicate horizontally between Grand Rapids manufacturing, quality assurance and its field repair facilities."[27] Therefore, plaintiff asserted, defendant was unable to warn operators of complaints or problems concerning their product. However, plaintiff did not allege any violations of federal

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§ 40120(c). *Abdullah*, 181 F.3d points out that this clause clarifies that the FA Act preserves state remedies, such as damages, but not state standards. *Abdullah*, 181 F.3d at 374.

24 *Abdullah*, 181 F.3d at 376 (citing *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984)).

25 *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784 (6th Cir. 2005).

26 The States in the Sixth Circuit are: Kentucky, Michigan, Ohio, and Tennessee.

27 *Greene* at 794.

law or cite any authority requiring defendant to maintain such a database. And, as the court pointed out, the federal regulations do not require defendants to track product anomalies, as suggested by the plaintiff.[28]

The court relied on *Abdullah* in recognizing that Congress intended aviation safety to be exclusively federal in nature and looked to the legislative history of the FA Act for further guidance. The purpose of the Act "was to give the Administrator of the new Federal Aviation Agency full responsibility and authority for the advancement and promulgation of civil aeronautics generally, including promulgation and enforcement of safety regulations."[29] Further, Congress, in its House Report, stated, "It is essential that one agency of government, and one agency alone, be responsible for issuing safety regulations if we are to have timely and effective guidelines for safety in aviation."[30] In short, the court agreed with the Third Circuit's holding in *Abdullah* that federal law establishes the standards of care in the field of aviation safety and thus preempts the field from state regulations.

Interestingly, Justice Cole, dissenting from the court's preemption finding, read *Abdullah* more narrowly: "*Abdullah* can truly only be relied on for the limited proposition that a State's standard of care for aviation personnel is preempted by the FA Act. The situation before us is not like that in *Abdullah*, because in this case, there are no federal regulations which lay out the exact standard of care. Therefore, I would not expand the proposition in *Abdullah* to apply to commercial enterprises that manufacture aviation equipment."[31] Justice Cole's dissent reflected future court's struggle with just how far the reach of federal preemption should extend in the name of aviation safety.

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28 *Id*.

29 *Id.* (citing H.R. Rep. No. 2360 (1958), as reprinted in 1958 U.S.C.C.A.N. 3741).

30 *Id.* at 794.

31 *Id.* at 798.

In *Montalvo v. Spirit Airlines,*[32] the Ninth Circuit[33] found that certain of plaintiffs' claims, for injuries sustained from developing deep vein thrombosis (DVT), were preempted. *Montalvo* dealt with three state tort claims against the airline. In their first claim, plaintiffs alleged that the airline was negligent because the crew did not warn them about blood clots or how to lessen the risk. The court held that this failure to warn claim was preempted by the FA Act based on the Act's pervasive regulations pertaining to passenger warnings. The court states:

> If the FAA did not impliedly preempt state requirements for passenger warnings, each state would be free to require any announcement it wished on all planes arriving in, or departing from, its soil, or to impose liability for the violation of any jury's determination that a standard the jury deems reasonable has been violated. Such a 'patchwork of state laws in this airspace would create a crazyquilt effect.' (Citation omitted) Congress could not reasonably have intended an airline on a Providence-to-Baltimore-to-Miami run to be subject to certain requirements in, for example Maryland, but not Rhode Island or in Florida.[34]

Plaintiffs' second claim alleged negligence against the airlines in providing an unsafe seating configuration causing plaintiffs to develop DVT due to inadequate leg room. The District Court dismissed this claim holding that it was preempted by the ADA in that providing more leg room would reduce the number of seats per aircraft and thereby increase ticket prices to offset the

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[32] *Montalvo v. Spirit Airlines*, 508 F.3d 464 (9th Cir. 2007).

[33] The States in the Ninth Circuit are Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, and Washington.

[34] *Montalvo*, 508 F.3d at 473.

decreased revenue.[35] The court found that the price increase would amount to an indirect regulation of an air carrier's "rates" forbidden under the ADA. The Appellate Court however reversed the District Court's determination on the seating configuration claim remanding the case for further factual development since the court did not have sufficient information before it to determine to what extent seat reconfiguration would affect airline prices.

In their third claim, plaintiffs alleged that the aircraft seats were defectively designed. The District Court held that the FAA impliedly preempted this claim because seat designs were pervasively regulated, noting that "the FAA Administrator had enacted a wealth of federal regulations governing the design, maintenance, structure and position of aircraft seats."[36] Notably, plaintiffs did not even appeal that ruling presumably signifying their agreement that the area of seat design was clearly preempted by the FA Act.

In the recent case of *U.S. Airways, Inc. v. O'Donnell,*[37] the Tenth Circuit[38] has joined the ranks of the Third, Sixth, and Ninth

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35 *Id.* at 474.

36 *Martin v. Midwest Exp. Holdings, Inc.*, 555 F.3d 806, 810 (9th Cir. 2009) (citing *In Re Deep Vein Thrombosis Litg.*, WL 591241 at *14 (N.D. Cal. 2005)).

37 *U.S. Airways v. O'Donnell*, 627 F.3d 1318 (10th Cir. 2010). The *U.S. Airways* case essentially overruled the Tenth Circuit's previous authority, *Cleveland vs. Piper Aircraft Corp.,* 985 F.2d 1438 (10th Cir. 1993), in which the Tenth Circuit concluded that Congress had not indicated a clear and manifest intent to occupy the field of airline safety to the exclusion of state common law. The *Cleveland* court determined that the express preemption provision of the ADA pertaining to rates, routes and services, excluded consideration of all forms of implied preemption. *Cleveland*, 985 F.2d at 1447. While *U.S. Airways* acknowledged the *Cleveland* court's reasoning that implied preemption is generally inapplicable to a federal statute that contains an express preemption provision, the court also acknowledged that the Supreme Court appears to have rejected this reasoning. Accordingly, *U.S. Airways* did not allow the *Cleveland* case to dictate its outcome.

38 The States in the Tenth Circuit are Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.

Circuits in holding that federal law impliedly preempts state law in the entire field of aviation safety. In *O'Donnell*, a U.S. Airways passenger, after consuming excessive alcohol on board his flight, drove home on the wrong side of a highway and crashed into a minivan, killing himself and a family of five. Under intense media pressure, the state of New Mexico served U.S. Airways with a cease and desist order directing it to refrain from selling alcoholic beverages due to its failure to comply with New Mexico's alcohol licensing requirements. The state ultimately denied U.S. Airways' liquor license based on the incident and two others in which flight attendants had allegedly served alcohol to visibly intoxicated passengers. U.S. Airways filed suit seeking injunctive relief on the grounds that federal law preempted New Mexico's efforts to apply its state's liquor laws. The court viewed the issue of alcohol service on airlines to come within the purview of aviation safety. Based on the pervasive federal regulations concerning flight attendant and crew member training, and the aviation safety concerns involved when regulating an airline's alcoholic beverage services, the court concluded that New Mexico's liquor laws' application to an airline were preempted since Congress intended federal law to be exclusive.[39]

In *Vass v. Facility Services & Systems, Inc.,*[40] a Pennsylvania District Court held that plaintiff's claim against the airline and facility service provider for injuries suffered as a result of being sprayed with deicing fluid while boarding, were impliedly preempted. Plaintiff, in arguing against preemption, tried to convince the court that *Abdullah* did not apply because the deicing occurred *before* boarding and therefore did not implicate *airline* safety. Preemption begins "at the door of the aircraft," when passengers are inside the airplane, plaintiff asserted, not as they board it.[41] Further, plaintiff argued that deicing was not pervasively

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39 *U.S. Airways*, 627 F.3d at 1325.

40 *Vass v. Facility Servs. & Sys., Inc.*, WL 4015605 (M.D. Pa. 2009).

41 *Id.* at *3.

regulated and therefore not subject to preemption. The court disagreed stating that preemption "is not limited to what occurs within the aircraft or in the skies. Instead, case law establishes that preemption occurs within the field of air safety as established by federal regulation."[42] Airline safety "is not limited to occurrences in the airplane, but extends to care of runways, loading of aircraft and other measures which serve to get planes in the air."[43] Thus, the court found that deicing is integral to the safe operation of an aircraft and federal authority preempts state actions to set safety standards in that area.[44] The court further pointed out that, though neither party brought them to the court's attention, comprehensive federal regulations exist in the area of deicing.[45]

In another recent Pennsylvania case, *Sikkelee v. Precision Airmotive Corp.*,[46] involving the crash of a Cessna resulting in the

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42 *Id.*

43 *Id.*

44 *Id.*

45 The regulations pertaining to deicing cited by the *Vass* court are: " . . . no person may dispatch, release, or take off an aircraft any time conditions are such that frost, ice, or snow may reasonably be expected to adhere to the aircraft, unless the certificate holder has an approved ground deicing/anti-icing program in its operations specifications and unless the dispatch, release, and takeoff comply with that program." 14 C.F.R. § 121.629(c). The regulations require that any "approved ground deicing/anti-icing program" contain "at least . . . a detailed description of . . . the procedures for implementing ground deicing/anti-icing operational procedures" and "[t]he specific duties and responsibilities of each operational position or group responsible for getting the aircraft safely airborne while ground deicing/anti-icing operational procedures are in effect." 14 C.F.R. § 121.629(c)(1) (iii)-(iv). The regulations also require "[i]nitial and annual recurrent ground training and testing for flight crewmembers and qualification for all other affected personnel (e.g., aircraft dispatchers, ground crews, contact personnel) concerning the specific requirements of the approved program and each person's responsibilities and duties under the approved program." 14 C.F.R. § 121.629(c)(2). This training must cover "[a]ircraft deicing/anti-icing procedures, including inspection and check procedures and responsibilities." 14 C.F.R. § 121.629(c)(2)(iv). *See also Vass*, WL 4015605, at *4.

46 *Sikkelee v. Precision Airmotive Corp.*, 731 F.Supp.2d 429 (M.D. Pa. 2010).

death of the pilot, the court found that plaintiff's action against the engine and carburetor manufacturers was subject to federal preemption. In applying preemption to the aircraft's part manufacturers, the court engaged in the following analysis:

> We were called upon to interpret and apply the essential holding of *Abdullah* in *Duvall v. Avco Corporation,* 05-cv-1786,[47] an action that involved a fatal aircraft accident. The plaintiff asserted claims sounding in wrongful death, negligence, and products liability and alleged that the accident was caused by malfunctions of the aircraft's engine and fuel servo. Upon the filing of a motion to dismiss or for a more definite statement, we were presented with nearly the same arguments regarding preemption of claims as we are today. We originally found that the holding of *Abdullah* applied only to the *operation* of an aircraft, but not the *manufacturing* of aircraft parts. (citation omitted) However, upon consideration of the defendants' motion for reconsideration, we were compelled to reluctantly agree with the defendants that we originally misconstrued the essential holding of *Abdullah*. . . . . we noted that the Third Circuit did not limit its opinion in *Abdullah* to piloting or aircraft operation, and explicitly "rejected the approach adopted by other courts that found only certain aspects of aviation safety to be preempted. . . ." **Thus, we interpreted *Abdullah* as evidencing the Third Circuit's intent, primarily through its precise language, to hold that the *entire* field of aviation is preempted: including its application to the**

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47 *DuVall v. AVCO Corp.*, WL 224020 (M.D.Pa. 2006).

> **manufacturing of aircraft parts.** Our sister courts in this Circuit have also declared that the Third Circuit intended to hold that the entire field of aviation safety is preempted by federal law.[48]

The court dismissed plaintiff's claims based on a state law standard of care but granted plaintiff leave to amend her complaint to properly assert her claims under appropriate federal standards. Plaintiff then filed a voluminous amended complaint including citations and the text of hundreds of federal aviation regulations. Defendant moved to dismiss again on grounds that the amended complaint was not filtered of improperly asserted state regulations and state-law standards of care.[49] The court agreed, but allowed plaintiff another chance to amend her complaint to "remove all impertinent or previously-dismissed allegations relating to claims or Defendants."[50] The court strongly cautioned the plaintiff to carefully consider each allegation and its necessity and viability based upon the court's prior decision.[51] In a timely response, plaintiff filed an edited 139-page second amended complaint in April 2011.[52] *Sikkelee* provides a good example of how courts are dealing with preemption at the pleading stage. Unless plaintiff can successfully plead violations of federal regulations, plaintiff's action will be dismissed. In defendant's favor, federal regulations set only "minimum standards" of care.[53] Therefore, even if plaintiffs are able to get beyond the pleading stage, plaintiff will be foreclosed from holding defendants to a more rigorous state standard of care.

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48 *Sikkelee*, 731 F. Supp at 437 (citing to *Landis v. U.S. Airways, Inc.,* WL 728369 at *2 (W.D. Pa. 2008)) (emphasis added).

49 Memorandum & Order, *Sikkelee v. Precision Airmotive Corp.*, Case No.: 4:07-cv-00886-JEJ, filed Apr. 8, 2011 (M.D. Pa.).

50 *Id.* at 16.

51 *Id*.

52 Second Amended Complaint, *Sikkelee v. Precision Airmotive Corp.*, Case No: 4:07-cv-00886-JEJ, filed Apr. 18, 2011 (M.D. Pa.).

53 49 U.S.C. § 1421.

Preemption Not Found:

Post-*Abdullah*, the courts have been willing to stretch the reach of federal preemption in the name of aviation safety beyond the limits previously set. However, many courts are still struggling with how far they should really go. Recent examples of this include *Martin v. Midwest Exp. Holdings, Inc.,*[54] decided in 2009, and *Elassaad v. Independence Air, Inc.,*[55] decided in 2010. Although these cases were decided in courts—*Elassaad* in the Third Circuit and *Martin* in the Ninth Circuit—that previously found that federal law preempts the area of air safety, they are representative of the courts' attempts to set some boundaries.

Both *Martin* and *Elassaad* involve passenger claims for injuries upon disembarking an aircraft. In *Elassaad*, the plaintiff was an amputee who fell upon descending aircraft stairs. Defendants argued that under *Abdullah*, plaintiff's claims were preempted. However, the court disagreed distinguishing *Abdullah* on the grounds that it applied to "in flight safety," which does not include deplaning operations. Further, the court noted an absence of federal regulations pertaining to safety during disembarkation; "rather, the statute's safety provisions appear to be principally concerned with safety in connection with operations associated with flight. Indeed, as we noted in *Abdullah*, Congress enacted the Aviation Act to protect the lives of persons who travel on board aircraft."[56] In drawing this line, the court further noted that at the time of the accident, the aircraft had landed, taxied to the gate, and come to a complete stop; the crew had already opened the door and lowered the plane's stairs; and all the passengers other than Elassaad had deplaned.[57] The court ultimately concluded that because the aircraft was not being operated for the purpose of air

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54 *Martin v. Midwest Exp. Holdings, Inc.*, 555 F.3d 806 (9th Cir. 2009).
55 *Elassaad v. Independence Air, Inc.*, 613 F.3d 119 (3rd Cir. 2010).
56 *Id.* at 128.
57 *Id.* at 130.

navigation at the time of the accident, plaintiff's injuries were not preempted.

In *Martin*, a pregnant woman fell from an airplane's stairs, injuring herself and her fetus. Plaintiff alleged that the stairs were defectively designed given only one handrail. While the facts giving rise to plaintiff's injuries are the same as those in *Elassaad*, the *Martin* court's rationale, in not finding preemption, is different. Unlike the *Elassaad* court, the *Martin* court did not focus on the line between "in-flight air operations" versus "disembarkation" as a basis for not finding preemption, but instead focused on the lack of pervasiveness of regulations in the area of disembarkation. Responding to the Court's "lack of pervasiveness" argument, the airstair's manufacturer argued that defective product claims are preempted by the federal certification process required for every plane design, including regulations as set forth in 14 C.F.R. § 25.601, prohibiting design features that experience has shown to be hazardous or unreliable.[58] The court disagreed:

> Airstairs are not pervasively regulated; the only regulation on airstairs is that they can't be designed in a way that might block the emergency exits. 14 C.F.R. § 25.810. The regulations have nothing to say about handrails, or even stairs at all, except in emergency landings. No federal regulation prohibits airstairs that are prone to ice over, or that tend to collapse under passengers' weight. The regulations say nothing about maintaining the stairs free of slippery substances, or fixing loose steps before passengers catch their heels and trip. It's hard to imagine that any and all state tort claims involving airplane stairs are preempted by federal law. Because the agency has not comprehensively regulated airstairs, the

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[58] *Martin*, 555 F.3d at 811-812.

> FAA has not preempted state law claims that the stairs are defective.[59]

In short, unless the particular area at issue is governed by pervasive regulations, the state's standard of care remains applicable. Arguably, *Martin* and *Elassaad* represent a deviation from the Ninth and Third Circuits' previous determinations embracing *Abdullah* and preemption in the entire area of aviation safety.

While most circuits have been willing in recent years to stretch aviation safety to cover areas beyond in-flight operations, the Eleventh Circuit,[60] as of yet, has not. In a recent 2011 Florida District Court decision, *North v. Precision Airmotive Corporation*,[61] the court was presented with the opportunity to find preemption of plaintiff's claim against the airplane fuel control system manufacturer, but declined to do so.

In *North*, plaintiff claimed that defendant's product was defectively designed, manufactured and accompanied by defective and inadequate instructions and warnings. Defendant argued that federal law preempts state law in the field of aviation safety and therefore, the federal law is the exclusive source of any duty to warn and that most courts that have considered this issue have reached this conclusion. However, the court noted that among the minority of courts to have reached the opposite conclusion, are those cases in the Eleventh Circuit. Specifically, the court cited *Public Health Trust of Dade County, Florida v. Lake Aircraft, Inc.*,[62] which involved a passenger's claim for negligence and strict liability against the manufacturer of the aircraft. The plaintiff in *Public Health Trust* argued that under state law, certain components of the

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59 *Id.* at 812.

60 The states in the Eleventh Circuit are Alabama, Georgia, and Florida.

61 *North v. Precision Airmotive Corp.,* WL 679932 (M.D. Fla. 2011).

62 *Pub. Health Trust of Dade County, Florida v. Lake Aircraft, Inc.*, 992 F.2d 291 (11th Cir. 1993).

plane were defective even though they complied with federal design and performance standards.

In refusing to find preemption, the *Public Health Trust* court focused on the provisions of the ADA finding that Congress's enactment of a provision defining certain items as preempted, meant that items outside the scope of that provision were not preempted. In other words, because the passengers' design defect claims lay outside the scope of "rates, routes, and schedules," the court held they were not preempted.[63] The court noted that several United States Supreme Court opinions, subsequent to *Public Health Trust,* have found that the presence of an express preemption clause does not necessarily preclude implied preemption of matters outside the scope of that clause. However, the court found that the cases cited by defendant left open the possibility that an express preemption clause may, in fact, indicate Congress's intent to foreclose preemption beyond those items outside the scope of the clause.[64] Essentially, the court rejected field preemption in the area of aviation safety. More importantly, despite defendant's assertion that the *Public Health Trust* decision was based on authority that has long since been abandoned, the court noted that it remains good law.

CONCLUSION

With the exception of the Eleventh Circuit, most courts have followed in *Abdullah's* footsteps. That is, most courts have agreed that the intricate and pervasive web of federal regulations, covering virtually every aspect of aircraft operation and design, provides ample evidence of Congress's clear and manifest intent to preempt the entire area of air safety. While initially courts seemed willing only to extend the doctrine to certain areas pertaining to air operations, courts recently have extended preemption further to cover product liability cases and aircraft component manufacturers.

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63 *North*, WL 679982, at *5.

64 *Id.* at *5 (citing *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1994)).

However, courts continue to struggle with how far to push the "air safety preemption" line.

Refusing to find preemption based on which side of the aircraft door the injury occurred, such as the court did in *Elassaad*, is a good example. In contrast is *Vass*, the deicing case, in which the court found preemption despite the fact that plaintiff's injuries occurred outside of the aircraft. *Martin*, the other disembarkation case in which the court refused to find preemption, provides the better rationale to reconcile the court's conflicting conclusions in *Vass* and *Elassaad*. Namely, in both *Martin* and *Vass*, the court focused on the pervasiveness of the regulations in the particular area at issue to justify their decision. Specifically, in *Martin*, the court based its finding on the fact that there were scant regulations pertaining to airstairs, while in *Vass,* the court based its decision on the fact that there were numerous and comprehensive regulations in the area of deicing. Neither decision focused on "where" the injury took place, but instead, focused on determining whether Congress had sufficiently manifested its intent, by way of pervasive regulations, to preempt *that* area. Accordingly, while the courts continue to define the parameters of aviation safety preemption, pervasiveness of regulations in the specific area at issue, continues to be a determining factor.

The good news is that preemption is a viable defense and is available to a broader category of aviation defendants. Accordingly, aviation defendants, upon being served with a complaint, should always consider moving to dismiss on preemption grounds. If plaintiff does not and cannot plead violations of governing federal aviation rules and regulations, plaintiff's claims will be dismissed. Even if plaintiff is able to successfully amend to allege violations of federal standards, defendant's conduct will be measured only by those minimal federal standards, thus foreclosing plaintiffs from enforcing upon defendants additional or more stringent state standards of care.

SEVERING BUREAUCRATIC RED-TAPE TO SECURE EVIDENCE FROM THE FEDERAL GOVERNMENT IN AVIATION CASES

By
Darrell M. Padgette

INTRODUCTION

In the blistering heat of mid-summer, a battle-hardened Chinook lifts off from the sand-swept fields of Bagram. Inside its bowels, a "chalk" of Rakkasans contemplate their next rendezvous with destiny deep into the Shigal Mountains of Kunar Province, Afghanistan. Their three-day mission: to conduct RSTA[1] operations and disrupt insurgent activities in the area. With surgical precision and nap of the earth flight, the U.S. Army Chinook traverses ancient valleys and mountain spurs with purpose and commanding speed toward the landing zone. Aboard, you can't help but notice the scars on terrain passing by which bear witness to numerous wars dating back to antiquity. Inside the cockpit, the landing zone first appears as a blip on the radar and moves slowly to center of the Multipurpose Display. Time-To-Insert: 60 seconds, and the Rakkasans prepare for their exit using the Fast Rope Insertion and Extraction System (FRIES). Time-To-Insert: 30 seconds, as the pilots begin to visualize the approaching landing zone. But this time was different. The elevation, humidity, and high temperature of the rugged landscape causes low density air to starve the powerful T-55 engines. As the Chinook arrests its forward speed and transitions into rapid descent and hover, unstable air currents and crosswinds create a vortex ring effect. The crew is unable to maintain hover, and the Chinook starts to settle with power. Recovery proves impossible, and the occupants brace for impact. The helicopter strikes uneven terrain, and familiar

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[1] Reconnaissance, Surveillance and Target Acquisition

headlines involving U.S. casualties are splashed across the nightly news.

Without any evidence of enemy fire, the Army's safety investigation focuses on potential materiel failure. A concurrent collateral investigation focuses on potential crew misconduct. Several months pass by but neither investigation can determine a cause of the loss. Moreover, Army brass is staunchly unwilling to posthumously blame the decorated crew. Selective portions of the investigation materials are eventually released to families of the deceased, and spin from news organizations fill the vacuum with speculation of engine failure. After time, the families of the deceased consult a lawyer who files suit against the manufacturers for product liability and negligence in the design and manufacture of the helicopter and engines, filling the void of information with speculation and conjecture. When the manufacturer attempts to defend itself in litigation by closing the information gaps through requests to the Army, the Army responds with a myriad of privileges, unfriendly regulations, and draconian bureaucratic procedure.

Using the example above, this article attempts to cut away the bureaucratic red-tape and examines various approaches to effectively and efficiently secure evidence from federal departments, branches, and agencies when the government is not a party to the litigation. While the example deals with the Army, the procedures discussed herein are applicable to any department, branch, or federal agency.

TOOLS OF THE TRADE

When faced with the need to obtain information from the federal government, legal practitioners must be able to understand and utilize the most effective asset in their arsenal of available tools. Any starting point should begin with scouring the internet for

publicly available information.[2] If the actual object of inquiry is not found, at least the exercise will enable the refinement of requests down the road.

A. Freedom of Information Act

The Freedom of Information Act ("FOIA")[3] was enacted by Congress to make federal agency files and information more accessible to the general public.[4] The FOIA contains nine categories of information or documents which are exempt from disclosure.[5] While the theory of the Act was to expand the public's access to official records, the reality is that numerous exemptions have engulfed the rule.

If the information sought comes within the purview of any listed exemption, Congress has pre-determined that the public's interest in maintaining confidential records outweighs the public's interest in knowing what its government does. "In the FOIA context, the requesting party's need for the information is irrelevant; the most urgent need will not overcome an applicable FOIA exemption."[6] But it does not follow that information exempt from disclosure under FOIA is also unavailable through discovery

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2 Aside from performing a search using one of the many available internet search engines, most departments, branches, and agencies of the U.S. Government have websites and Freedom of Information Act ("FOIA") Reading Rooms in which documents are posted that are believed to have a wide public interest. Other sources, while too numerous to mention, include Wikileaks (which can be found at http://www.wikileaks.org/) and similar websites. It is surprising, indeed disconcerting, to find the breadth of information publically available on the internet.

3 5 U.S.C. § 552.

4 *United Steel Corp. v. Mattingly*, 89 F.R.D. 301, 304 (D. Colo. 1980), *rev'd on other grounds*, 663 F.2d 68 (10th Cir. 1980); *see also Sample v. Bureau of Prisons*, 466 F.3d 1086, 1087-88 (D.C. Cir. 2006) (the term "record" within the meaning of FOIA includes electronic records).

5 *See* 5 U.S.C. § 552(b)(1)(9).

6 *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1344 (D.C. Cir. 1984).

procedures in a civil action.[7] As a result, "[t]he FOIA acts as a 'floor' when discovery of government documents is sought in the course of civil litigation."[8]

FOIA requests should always be made as an opening salvo in any civil discovery strategy. However, experience has yielded mixed results with the FOIA approach, depending on the federal agency involved and the nature of the information being sought. Usually, the type of information needed for litigation triggers the application of one or more exemptions. Moreover, after there has been a partial or complete denial of a FOIA request, the requestor is usually forced to suffer an administrative appeals process before seeking judicial review of an agency's decision.[9] Because of the substantial time and expense involved in exhausting administrative remedies and thereafter prosecuting a collateral FOIA lawsuit, the FOIA process is not seen as an effective approach in most circumstances. Therefore, FOIA requests should not be used with any greater anticipation of results than what any other members of the public would expect had they made their own.

B. Administrative Procedure Act

In contrast to FOIA, a more effective, but equally inadequate approach involves the Administrative Procedure Act ("APA") through the use of judicial demands. This method has been around since the formation of the United States. One of the earliest examples of judicial demands to the executive branch was in 1807 during the sensational trial of Aaron Burr.[10] Defending

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7 *See Friedman*, 738 F.2d at 1344.

8 *Id*.

9 *See Oglesby v. Dep't of the Army*, 920 F.2d 57, 62-64 (D.C. Cir. 1990).

10 *United States v. Burr*, 25 F. Cas. 30, 37 (No. 14692d) (C.C.D. Va. 1807) (federal court subpoena duces tecum issued to President Thomas Jefferson directing him to produce a letter and other papers written by General Wilkinson to the President, the President's response to the letter, and the accompanying military and naval orders). For historical perspective, the Aaron Burr trial

against the charge of treason, Aaron Burr requested and the district court issued a subpoena to President Thomas Jefferson for production of records that were material to Aaron Burr's defense and the prosecution against him.[11] But this approach is not without its own pitfalls and entrapments. Judicial demands for executive documents are as legion as autumn leaves, but usually fall in the blight of administrative procedure.

1. Sovereign Immunity

When litigants seek documents from a non-party federal agency, the analysis varies depending on whether litigation is venued in state or federal court.[12] For litigation in state court, the federal government is cloaked in sovereign immunity, and a state court lacks the power to enforce its subpoenas, absent an immunity waiver.[13] In contrast, sovereign immunity does not apply to federal courts exercising their subpoena powers against federal agencies or officials.[14] "In federal court, the federal government has waived its sovereign immunity, *see* . . . 5 U.S.C. § 702, and neither the Federal Housekeeping Statute nor the *Touhy* decision authorizes a federal agency to withhold documents from a federal court."[15] Consequently, state-court litigants must resign themselves to requesting documents from a federal agency pursuant to the agency's own set of regulations. "If the agency refuses to produce

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testimony and argument are reported at *United States v. Burr*, 25 F. Cas. 55 (No. 14693) (C.C.D. Va. 1807).

11 *Burr*, 25 F. Cas. at 37.

12 *Houston Bus. Journal, Inc. v. Office of Comptroller of the Currency*, 86 F.3d 1208, 1211 (D.C. Cir. 1996); *Connaught Labs., Inc. v. SmithKline Beecham P.L.C.*, 7 F. Supp. 2d 477, 479 (D. Del. 1998).

13 *Mak v. FBI*, 252 F.3d 1089, 1092 (9th Cir. 2001); *Boron Oil Co. v. Downie*, 873 F.2d 67, 70 (4th Cir.1989); *Connaught Labs., Inc.*, 7 F. Supp. 2d at 479.

14 *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 778 (9th Cir. 1994); *Houston Bus. Journal, Inc.*, 86 F.3d at 1212; *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 n. 2 (D.C. Cir. 1984) ("Since at least 1965 . . . this court has assumed the nonapplicability of sovereign immunity to such a subpoena").

15 *Houston Bus. Journal, Inc.*, 86 F.3d at 1212.

the requested documents, the sole remedy for the state-court litigant is to file a collateral action in federal court under the APA."[16]

The doctrine of derivative jurisdiction warrants mention here. If an action is removed from state court to federal court pursuant to 28 U.S.C. § 1442 (federal agency or officer removal) to adjudicate that part of the state court proceeding relating to the enforcement of the judicial demand against an agency or officer,[17] the jurisdiction of the federal court is only derivative to that of the state court.[18] "Where the state court lacks jurisdiction of the subject matter or of the parties, the federal court acquires none, although in a like suit originally brought in a federal court it would have had jurisdiction."[19]

2. The Housekeeping Statute

In further discussing the APA, Congress has authorized the head of federal agencies to place limits on how their employees disseminate official information.[20] Section 301 of Title 5 of the United States Code, known as the office "housekeeping statute,"[21] provides:

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16 *Id*.

17 *Boron Oil Co.*, 873 F.2d at 69 ("It is well established that an action seeking specific relief against a federal official, acting within the scope of his delegated authority, is an action against the United States, subject to governmental privilege of immunity").

18 *Arizona v. Manypenny*, 451 U.S. 232, 241-42 (1981); *Edwards v. U.S. Dep't of Justice*, 43 F.3d 312, 315 (7th Cir. 1994); *Boron Oil Co.*, 873 F.2d at 70; *Houston Bus. Journal, Inc.*, 86 F.3d at 1212.

19 *Boron Oil Co.*, 873 F.2d at 70.

20 *Moore v. Armour Pharm. Co.*, 927 F.2d 1194, 1196-97 (11th Cir. 1991).

21 The original housekeeping statute was enacted in 1789 "to help General Washington get his administration underway by spelling out the authority for executive officials to set up offices and file Government documents." *Exxon Shipping Co.*, 34 F.3d at 777 (citing 2 U.S. Code Cong. & Admin. News 3352 (1958)). Over the years, the executive branch began using the statute as a means to withhold information from the public. The statute was first apparently used to refuse information in 1877, when a California

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

The housekeeping statute authorizes "what the APA terms 'rules of agency organization, procedure or practice' as opposed to 'substantive rules'."[22] Numerous administrative agencies have promulgated their own housekeeping regulations, under color of this statute, that generally require litigants to make administrative requests for agency information before proceeding in court.

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newspaperman wanted to examine files of the Hayes Administration to uncover political recommendations for federal jobs. *Id*. Since that time, executive officials "gradually moved in" and the statute had "become a convenient blanket to hide anything Congress may have neglected or refused to include under specific secrecy laws." *Exxon Shipping Co.*, 34 F.3d at 777 (citing 2 U.S. Code Cong. & Admin. News at 3353. For example, in 1905, the statute was used as authority to refuse information in litigation involving the Secretary of Commerce and Labor. 2 U.S. Code Cong. & Admin.News at 3352. In 1951, the Secretary of the Army took his liberties with the statute. *Id*. Following World War II, the demand for government records had intensified, as had the executive branch's reliance on the housekeeping statute to restrict information. *Id*. By 1958, Congress was so concerned the statute had been "twisted from its original purpose as a 'housekeeping' statute into a claim of authority to keep information from the public and, even, from the Congress," that it amended the statutory language by adding the last sentence: "This section does not authorize withholding information from the public or limiting the availability of records to the public." *Exxon Shipping Co.*, 34 F.3d at 777 (citing 2 U.S. Code Cong. & Admin. News at 3353).

22 *Chrysler Corp. v. Brown*, 441 U.S. 281, 310 (1979).

3. *Touhy* Regulations

In *U.S. ex rel. Touhy v. Ragen*, the Supreme Court upheld the authority of department heads to promulgate and use these regulations to prevent employees from disseminating information and documents in private litigation.[23] Thereafter, agency regulations restricting the release of agency information have been ubiquitously referred to as *Touhy* regulations.

Stripping away the vernacular, the *Touhy* doctrine provides that *subordinate* federal employees cannot be held in contempt for refusing to testify or produce documents in response to a *state or federal* court order, if such testimony or production would violate their agency's validly promulgated regulations which prohibit compliance.[24] In other words, *Touhy* regulations set forth the agency's procedure to be followed when demands for

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[23] *U.S. ex rel. Touhy v. Ragen*, 340 U.S. 462, 469 (1951); *see also Moore*, 927 F.2d at 1197. The *Touhy* case and its Ninth Circuit progeny, *In re Boeh*, 25 F.3d 761, 764 (9th Cir. 1994), have held that a subordinate FBI official may not be held in contempt for failing to comply with a court order if a valid regulation prohibits compliance. *Touhy* and *In re Boeh* have also held that federal agencies may validly promulgate regulations which prohibit subordinate officials from supplying evidence without prior approval from their superiors. *McClure v. United States*, 54 F.3d 785, *1 (9th Cir. 1995). In so holding, the *In re Boeh* case relied upon a trilogy of other cases. *In re Boeh*, 25 F.3d at 764 (citing Boske v. Comingore, 177 U.S. 459 (1900); *Swett v. Schenk*, 792 F.2d 1447 (9th Cir. 1986); and *Ex Parte Sackett*, 74 F.2d 922 (9th Cir. 1935)).

[24] *Touhy*, 340 U.S. at 468-69. "Under *Touhy*, neither state-court nor federal court litigants may obtain a subpoena *ad testificandum* against an employee of a federal agency that has enacted a *Touhy* regulation." *Houston Bus. Journal, Inc.*, 86 F.3d at 1211 n.4 ("In that situation, the litigant must proceed under the APA, and the federal court will review the agency's decision not to permit its employee to testify under an 'arbitrary and capricious' standard"); *In re Boeh*, 25 F.3d at 766; *N.L.R.B. v. Capitol Fish Co.*, 294 F.2d 868, 873 (5th Cir. 1961) ("The opinion in the [*Touhy*] case carefully avoided the question of the power of the agency head to refuse a proper judicial demand for the production of records").

information are received.[25] These regulations are utterly centralized in that release authority for information is typically only reserved to the department head.[26] Consequently, when *Touhy* is applicable (i.e., when in state court and/or when someone other than the department head himself receives a judicial demand), litigants must generally exhaust their administrative remedies before filing an APA action in federal court.[27]

This approach has not been without criticism. The Ninth Circuit has acknowledged that "collateral APA proceedings can be costly, time-consuming, inconvenient to litigants, and may 'effectively eviscerate [ ]' any right to the requested testimony."[28] A district court remarked, "[a]lthough both efficiency and economy are compromised by the requirement of a separate claim brought

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25 *Owings v. Hunt & Henriques*, 673 F. Supp. 2d 1104, 1107 (E.D. Cal. 2009). For example, the Federal Aviation Administration's *Touhy* regulations can be found at 49 C.F.R. § 9 *et. seq*. The National Transportation Safety Board's *Touhy* regulations are found at 49 C.F.R. § 837 *et. seq*. Keeping in line with this Article's Introduction, the Army's *Touhy* regulations are codified at 32 C.F.R. § 516 *et. seq*.

26 *Capitol Fish Co.*, 294 F.2d at 873 ("Validation of the regulations rests directly on the theory that as a matter of internal management the head of an agency is authorized to reserve to himself the authority to release the records"); the *Touhy* opinion, decided earlier, specifically avoided the question of power of an agency head to refuse a court order for the production of records. *Touhy*, 340 U.S. at 467 ("we find it unnecessary, however, to consider the ultimate reach of the authority of the Attorney General to refuse to produce at a court's order the governmental papers in his possession, for the case as we understand it raises no question as to the power of the Attorney General himself to make such a refusal").

27 *McKart v. United States*, 395 U.S. 185, 194 (1969); *see also Woodford v. Ngo*, 548 U.S. 81, 88-89 (2006).

28 *Exxon Shipping Co.*, 34 F.3d at 780 n.11 (citing *In re Boeh*, 25 F.3d at 770 n.4 (Norris, J., dissenting) (if plaintiff has a right to obtain the witness' testimony, "he had a right to obtain it when he needed it, which in this case was immediately, when the trial was still going on")).

pursuant to the Administrative Procedure Act, that is what the law of this Circuit requires."[29]

3a. *Touhy* Regulations Do Not Protect Against Court Orders Directed at Department Heads

To avoid the *Touhy* problem and resultant headache with the APA, federal litigants have a different tool at their disposal. They can send their subpoenas *duces tecum* to the department heads directly. *Touhy* protects only *subordinate* federal officials from court process aimed at directing them to take action contrary to instructions from their superiors.[30] *Touhy* does not protect against court orders or subpoenas that are directed at the agency heads themselves.[31] While an agency has a legitimate and tidy housekeeping objective in centralizing its decisions on the assertion of privilege, that objective is fulfilled when permission is requested from the agency's head.[32] When an order is directed to the head of the agency, *Touhy* is no longer relevant.[33]

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29 *Quezada v. Mink*, 2010 WL 4537086, *5 (D. Colo. 2010) (the appropriate means for challenging an agency's denial under *Touhy* is a separate APA action in federal court).

30 *Bosaw v. Nat'l Treasury Employees' Union*, 887 F. Supp. 1199, 1211 (S.D. Ind 1995).

31 *Reynolds v. United States*, 192 F.2d 987, 992-993 (3rd Cir. 1951), *rev'd on other grounds*, 345 U.S. 1 (1953); *In re Boeh*, 25 F.3d at 764 (indicating in dicta that plaintiffs might have succeeded by bringing the agency head into court to contest his decision not to release evidence); *Comm. for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 788, 793 (D.C. Cir. 1971) ("When it is the head of the executive department who presents a challenge to an order requiring the production of documents, the claim of privilege is one for consideration by the court, which could give attention to the reasons presented by the head of the agency for failing to produce the information").

32 *Capitol Fish Co.*, 294 F.2d at 875.

33 *See supra* note 31 and accompanying text.

C. Federal Court Subpoena to Department Head

Subsequent cases have made clear that an agency head has no power to refuse a federal court order, although courts have undertaken different approaches in reaching this conclusion.[34]

The statutory authority for *Touhy* regulations, 5 U.S.C. § 301, "does not create an independent privilege to withhold government information or shield federal employees from valid subpoenas."[35] *Touhy* regulations themselves do not establish any sovereign right to refuse to comply with federal court orders.[36] As the Supreme Court has stated, "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[37] Any such regulation would exceed congressional delegation of authority and would not be recognized.[38]

As a result, federal agencies are bound by discovery rules in the same manner as any other litigant.[39] "The Framers 'built into the tripartite Federal Government . . . a self-executing safeguard

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[34] *Exxon Shipping Co.*, 34 F.3d at 778-79 ("As the Supreme Court has said, 'judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. *United States v. Reynolds*, 345 U.S. 1, 9-10, 73 S. Ct. 528, 532-33, 97 L. Ed. 727 (1953).' We decline to hold that federal courts cannot compel federal officers to give factual testimony.")

[35] *Owings*, 673 F. Supp. 2d at 1106-07; *see also* history of the "housekeeping statute," *supra* note 21.

[36] *Exxon Shipping Co.*, 34 F.3d at 778 n.6 ("The proposition for which *Touhy* is often cited—that a government agency may withhold documents or testimony at its discretion—simply is not good law and hasn't been since 1958"); *Leyh v. Modicon, Inc.*, 881 F. Supp. 420, 424 (S.D. Ind. 1995).

[37] *In re Boeh*, 25 F.3d at 768 (citing *Reynolds*, 345 U.S. at 9-10; *In re Bankers Trust Co.*, 61 F.3d 465, 470 (6th Cir. 1995) (Congress did not empower federal agencies to prescribe regulations that direct a party to disobey a judicial demand requiring the production of information)).

[38] *In re Bankers Trust Co.*, 61 F.3d at 470; *Mistretta v. United States*, 488 U.S. 361, 382 (1989) ("we have not hesitated to strike down provisions of law that . . . undermine the authority and independence of one or another coordinate Branch").

[39] *Sperandeo v. Milk Drivers & Dairy Employees Local Union No. 537*, 334 F.2d 381, 384 (10th Cir. 1964).

against the encroachment or aggrandizement of one branch at the expense of the other."[40] "To allow an officer of the executive branch of the government to single-handedly control what information or materials will be in evidence in a case in federal court would seem to violate the Constitutional scheme of dispersing the federal powers between Congress, the Executive, and the Judiciary."[41]

Accordingly, when the agency head is properly before the court, district courts will follow the federal rules of discovery to decide on requests made to agency heads.[42] As such, in order to support a *Touhy*-based claim of insulation from subpoena, the department head will have to establish that the information is protected by a recognized discovery privilege.[43] "Some cases, consequently, simply apply the discovery rules of the Federal Rules of Civil Procedure ('FRCP') and order information supplied if it is relevant, not privileged and available without serious inconvenience."[44]

D. Writ of Mandamus

The last approach discussed in this article, identified here for want of completeness, is a mandamus action. A separate action could be brought against the department head or his designee to require the granting of permission.[45] However, like collateral FOIA and collateral APA proceedings, a collateral mandamus action

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40 *Clinton v. Jones*, 520 U.S. 681, 699 (1997).

41 *Bosaw*, 887 F. Supp. at 1213.

42 *See Owings*, 673 F. Supp. 2d at 1107.

43 *In re Boeh*, 25 F.3d at 764 (citing *Comm. for Nuclear Responsibility, Inc.*, 463 F.2d at 793 ("When the head of an agency challenges a subpoena, 'the claim of privilege is one for consideration by the court'")).

44 *Bosaw*, 887 F. Supp. at 1213 (citing *Exxon Shipping Co.*, 34 F.3d at 779; *Laxalt v. McClatchy*, 809 F.2d 885, 889 (D.C. Cir. 1987); and *Leyh*, 881 F. Supp. at 424).

45 *See In re Boeh*, 25 F.3d at 764 n.3 (citing 28 U.S.C. § 1361).

would be an arduous and time consuming process that creates its own problems.[46]

In summary, this article has addressed the different approaches to obtaining evidence, including the FOIA, the APA, serving a federal court subpoena directly upon the department head, and a writ of mandamus. Of all these approaches, the federal court subpoena, where available, is the most expedient, has the best recourse, but is also the trickiest. Consequently, the balance of this article discusses how to deploy this approach.

CUTTING THROUGH RED-TAPE: A WALKTHROUGH OF THE FEDERAL SUBPOENA APPROACH

The introductory example about the Army Chinook will be used for this purpose.

A. The Court Order or Subpoena *Duces Tecum*

The Army has its own set of *Touhy* regulations[47] which collectively describe the policies and procedures for "[r]elease of official information and testimony by DA personnel with regard to litigation."[48] Section 516.40(a) governs the release of information and appearance of witnesses pursuant to *inter alia*, subpoenas and other orders related to judicial proceedings involving private litigation or in litigation in which the United States has no interest.

Of significance, the Department of the Army ("DA") is separately organized from the Department Of Defense ("DOD")

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46 *See id.* (suggesting that a mandamus action may lie to compel an agency head to produce documents); *but c.f. Giza v. Secretary of HEW*, 628 F.2d 748, 752 (1st Cir. 1980) (declining to sustain mandamus action because state court plaintiffs were seeking a federal mandamus to compel a federal employee's deposition as an expert). The *Giza* court found that there was no duty on the part of the federal agency to supply expert witnesses for plaintiff's state court action. *Giza*, 628 F.2d at 752.

47 32 C.F.R. § 516 *et. seq.*

48 32 C.F.R. § 516.1(a)(3).

under the Secretary of the Army ("SECARMY").[49] The SECARMY "is the head of the Department of the Army."[50] The Office of the SECARMY, whose function it is to assist the SECARMY, has sole responsibility for "information management."[51]

In light of these *Touhy* regulations, it is axiomatic to say that any subpoena or court order should be drawn in the name of the current SECARMY.[52]

Next, a decision should be made as to whether to use a court order versus subpoena. Although both are technically the same, this article advocates for getting a court order. The reasons are two-fold and there are probably more. First, you eliminate any potential argument down the road by creative Army lawyers about the lack of showing "good cause." By seeking a court order, rather than simply issuing a subpoena, you will have necessarily demonstrated "good cause" to the court and will have averted this later argument. Second, the production of certain materials, i.e., Personal Health Information ("PHI"), generally requires an order signed by a judge.[53] Getting the order from the outset avoids any issue on this point.

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49 10 U.S.C. § 3011.

50 10 U.S.C. § 3013(a)(1).

51 10 U.S.C. § 3014(c)(1)(D).

52 This approach has been advanced by the Ninth Circuit. *See In re Boeh*, 25 F.3d at 764 (suggesting that plaintiff might have succeeded by other means in bringing the agency head or their designated "proper Department official" into court to contest the agency's decision); *see also McClure*, 54 F.3d at *1 (reiterating its suggestion in *Boeh* that the court could have issued its order directly against the "proper Department official"); *Cates v. LTV Aerospace Corp.*, 480 F.2d 620, 622-23 (5th Cir. 1973) (considering the Navy's *Touhy* regulations and finding that "[t]hese regulations, requiring personal service on a departmental head, are designed to centralize the determination of whether a subpoena *duces tecum* will be obeyed or challenged on the grounds of privilege").

53 *See* Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 ("HIPAA"); 45 C.F.R. § 164.512(e)(i).

B. Service of the Judicial Demand

The Army's *Touhy* regulations also provide that "[t]he Chief, Litigation Division, shall accept service of process for Department of the Army or for the Secretary of the Army in his official capacity."[54] Be that as it may, this article recommends that service be made on the SECARMY himself,[55] with duplicative service upon the Army's Chief, Litigation Division.[56] Duplicative service avoids other issues that lawyers could argue endlessly about. The Federal Rules of Civil Procedure provide additional guidance on service, to whom and how it should be made.[57]

Please note that some courts have had trouble issuing a demand that requires documents, in the custody or control of the head of an agency located outside the judicial district, to be brought into the judicial district.[58] More recently, however, this has not been a problem.[59] Nevertheless, Federal Rule of Civil Procedure, Rule 45(a)(2) contemplates that a demand would be issued from the district court whose district covers Washington, D.C. and/or in Arlington, Virginia (if service is to be made on the

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54 32 C.F.R. § 516.14.

55 The SECARMY is located at 102 Army Pentagon, Washington D.C. 20310-0102.

56 U.S. Army, Litigation Division, HQDA (DAJA-LT), 901 North Stuart Street, Arlington, VA 22203-1837.

57 *See* FED. R. CIV. P. 4(i) and 45.

58 *Cates*, 480 F.2d at 623; *Marcoux v. Mid-States Livestock*, 66 F.R.D. 573, 580 (W.D. Mo. 1975) ("it is apparent that these materials are now located beyond the territorial limits of this judicial district. Under these circumstances, it is concluded that, in the absence of exceptional circumstances not shown to exist in the case at bar, this Court is without power to compel the Comptroller, who is not a party to this action, to produce requested materials which are in his custody and are located outside the jurisdictional boundaries of this Court"); *Saunders v. Great W. Sugar Co.*, 396 F.2d 794, 795 (10th Cir. 1968); *compare* 28 U.S.C. § 1361 (district courts have original jurisdiction over any action in the nature of mandamus to compel federal officers to perform their duties); *and* 28 U.S.C. § 1391(e) (discussing venue for actions where federal officers are defendants).

59 *See, e.g. Owings*, 673 F. Supp. 2d at 1106-07.

Chief, Litigation Divsion). The SECARMY, if he chose to do so, could then litigate any privileges or objections he may have before the district court in which the subpoena was filed. If available, local rules may modify this approach and should be reviewed.[60]

C. When the Head of the Agency is Properly Before the Court

Once the head of the federal agency is properly before the court, the court will proceed to adjudicate any objections or privileges. The agency asserting a privilege has the burden of establishing its applicability to the documents in question.[61] "Exceptions 'to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for the truth.'"[62] The court will apply different analyses to different privileges, a discussion of which is beyond the scope of this article.

Suffice to say, practitioners may encounter the assertion of executive privilege,[63] state secrets,[64] deliberative process privilege[65] and/or the self-critical analysis privilege.[66] Other discovery based objections might also be encountered. *In camera* inspection of allegedly privileged documents, when appropriate, is

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60 For example, C.D. Cal. L.R. 58-9 provides that: "When a judgment, order or decree is entered by the Court directing any officer of the United States to perform any act, unless such officer is present in Court when the order is made, the Clerk shall forthwith transmit a copy of the judgment, order or decree to the officer ordered to perform the act."

61 *Schreiber v. Soc'y for Sav. Bancorp, Inc.*, 11 F.3d 217, 220 (D.C. Cir. 1993).

62 *In re Boeh*, 25 F.3d at 772.

63 *See Northrop Corp.*, 751 F.2d at 399 n.2; *Executive Privilege*, 26A Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5673 (1st ed. 1992).

64 *See Doe v. C.I.A.*, 576 F.3d 95, 102-05 (2nd Cir. 2009); *Northrop Corp.*, 751 F.2d at 399-400; *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 980-86 (N.D. Cal. 2006).

65 *Greenpeace v. Nat'l Marine Fisheries Serv.*, 198 F.R.D. 540, 543 (W.D. Wash. 2000); R.L. Weaver & J.T.R. Jones, *The Deliberative Process Privilege*, 54 Mo. L.Rev. 279 (1989).

66 *See Dowling v. Am. Hawaii Cruises, Inc.*, 971 F.2d 423, 425-26 (9th Cir. 1992).

an accepted procedure.[67] Similarly, the court may use Federal Rule of Civil Procedure, Rule 26(a) to limit discovery of agency materials based upon the comparative interests of the litigant and of the government in conserving scarce resources.[68] What the government cannot do, however, is ignore the court order or engage in unreasonable delay, as this could operate as a waiver.[69]

CONCLUSION

In the final analysis and using the preferred procedure discussed herein, there is a substantial likelihood that the majority of materials requested will be produced. "No nation ever yet found any inconvenience from too close an inspection into the conduct of its officers, but many have been brought to ruin, and reduced to slavery, by suffering gradual imposition and abuses, which were imperceptible, only because the means of publicity had not been secured."[70]

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67 *Friedman*, 738 F.2d at 1344-45; *Northrop Corp.*, 751 F.2d at 401-02 (discussing how to evaluate state secrets).

68 *Exxon Shipping Co.*, 34 F.3d at 779-80; *Northrop Corp.*, 751 F.2d at 403; *Moore*, 927 F.2d at 1198 (considering the cumulative impact of allowing the discovery); *Leyh*, 881 F. Supp. at 424 (allowing litigants "unbridled discretion" to call on agency employees could turn the agency into a "speakers' bureau for private litigants" or a "tax-supported pool of experts"); Boron Oil Co., 873 F.2d at 70.

69 *Owings*, 673 F. Supp. 2d at 1106-07.

70 *Reynolds*, 192 F.2d at 995 (citing Edward Livingston, I Works 15).

FLYING FREE: CRIMINALIZATION IN THE AVIATION INDUSTRY

By:
Maura Buehner
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In recent years the aviation community has seen a trend toward criminal investigations/prosecutions of aircraft accidents and incidents. The rise in criminalizing aviation accidents has been debated by both international and domestic governing bodies. In today's media, the need for sensationalizing stories has made the public more aware of the potential disasters involved in aviation and has in turn put more pressure on politicians to attempt to place criminal blame and hold someone accountable for the accidents. Prosecutors now look at the pilot, the flight crews, the maintenance employees, the corporate airlines, air traffic control, manufacturers, and regulatory officials to show the public that the government and law enforcement officials will not tolerate unsafe skies.

One study has shown that there were only 27 cases of aviation accidents which were criminally investigated in a span of 43 years from 1956-1999, however, in the ten years following that number jumped to 28 cases.[1] The recent trend suggests there will be a significant increase in cases where aviation accidents will be followed by criminal prosecutions.[2] Prosecutors assume that the public will expect results and that criminal prosecution will ensure aviation safety and protect the public.[3]

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1 Andreas Mateou and Sofia Michaelides-Mateou, *Flying in the Face of Criminalization: The Safety Implications of Prosecuting Aviation Professionals for Accidents*, Farnham, Surrey, England, and Burlington, Vermont, U.S.: Ashgate, 2010. 232 pp.; as quoted by Rick Darby, *When Worlds Collide*, available at http://flightsafety.org/aerosafety-world-magazine/february-2011/when-worlds-collide.

2 *Id.*

3 *Id.*

However, it is the overwhelming view of the aviation industry that criminal investigations interfere with technical investigations to determine the cause of an accident, are not effective deterrents and are not in the public interest.[4] The International Civil Aviation Organization (ICAO) and its signatories draft international standards for use in the investigation of aviation disasters. ICAO frowns upon the use of technical investigation records being used to criminally prosecute those involved in an accident absent convincing evidence that there was criminal intent. The United States, as a signatory to ICAO, has one of the safest aviation records in the world and yet is one of the least willing to prosecute aviation professionals after an accident. France, the United Kingdom, Germany, Japan, and Indonesia, all have a much higher rate of conviction and bring charges more readily. Also, Asia, Europe and the United States all have very different reporting systems, and investigation policies for violations of aviation safety practices the purpose of which is to further aviation safety. These reporting systems and investigation policies are being threatened by the possibility that by admitting mistakes which was intended to further aviation safety could now cause someone to lose their job, licenses, company, or freedom.

INTERNATIONAL REPORTING STANDARDS

ICAO was created in 1947 to promote the safe and orderly development of international civil aviation throughout the world. ICAO discourages the use of information obtained during the course of an accident investigation for a criminal investigation unless the need for such information outweighs the impact such

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[4] Joint Resolution Regarding Criminalization of Aviation Accidents, dated October 17, 2006, signed by Flight Safety Foundation, Academie Nationale de L'Air et de L'Espace, Royal Aeronautical Society, Civil Air Navigation Services Organization, European Regions Airlines Association, International Federation of Air Traffic Controllers' Association, Professional Aviation Maintenance Association, International Society of Aviation Safety Investigators,

disclosure would have on future investigations. The International Civil Aviation Organization (ICAO) Standards and Recommended Practices, Annex 13, Aircraft Accident and Incident Investigation, tells state accident investigation bodies: "The sole objective of protecting safety information from inappropriate use, defined as the use of safety information for purposes different from the purposes for which it was collected, namely, use of the information for disciplinary, civil, or administrative and criminal proceedings against operational personnel, and/or disclosure to the public, is to ensure its continued availability so that proper and timely preventive actions can be taken and aviation safety improved."[5]

Further, Annex 13 says that the investigators shall not make the information gathered public to prosecutors or police "unless the appropriate authority for the administration of justice determines that their disclosure outweighs the adverse domestic and international impact such action may have on future investigations."[6] ICAO, however, has no authority over any signatory state's legal system. ICAO urges and recommends, but defers to the state's judiciaries as to the practicality of following the ICAO's recommendations for joint involvement in the investigations. States are simply asked to notify ICAO if there are differences in the individual state's standards from the international standards set out in Annex 13.[7] ICAO Annex 13 recommends that states promote the free exchange of information, but their recommendations cannot guarantee that all states in the international aviation community are willing to accept those recommendations and decline to turn over evidence and information to be used in criminal litigation.[8]

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5 ICAO Annex 13 to the Convention on International Civil Aviation, Aircraft Accident and Incident Investigation (9thedn ICAO Montréal 2001). Attachment E, Paragraph 1.1

6 *Id.* ICAO Annex 13, Attachment E, Paragraph 4.1(c)

7 *Id.* ICAO Annex 13 Forward

8 *Id.* ICAO Annex 13, Chapter 8, Paragraph 8.4-8.9.

Annex 13, Chapters 5.10, 5.11 and 5.12 provides for coordination and cooperation of various judicial and regulatory authorities with investigation authorities during accident investigations. Should these entities refuse to interact and cooperate during criminal investigations of air accidents, it could result in non-uniformity of accident investigations, the very ideal for which ICAO Annex 13 was established. Annex 13 provides for cooperation with the judiciary. Annex 13 also protects certain types of records collected by the investigative authority to prevent the misuse of the safety-related data by parties conducting concurrent investigations serving a purpose other than aviation safety. The disclosure of safety information can be allowed if "the appropriate authority for the administration of justice in that State determines that the disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigation".[9] Consequently, this provision creates uncertainty and denies international uniformity by delegating the standard of necessary disclosure to individual states, subjecting the accident investigation to the criminal justice system of the accident State and judicial and statutory interpretation and application of the criminal laws and statutes of that State. ICAO Annex 13 relies that each state will make its own laws regarding the appropriate level of intent needed to disclose materials. Unnecessary, incongruent criminal investigations further hamper ICAO's effectiveness uniform accident investigation procedures and dissemination of such reports to promote improvement of the safety of air navigation.

ICAO Annex 13 provides that during the investigation, if it is known or suspected that unlawful interference was involved, aviation security authorities must be informed.

While there must be a balance between improving aviation safety on the one hand and the proper administration of

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[9] *Id.* ICAO Annex 13, Attachment E, Paragraph 4.1(c).

justice on the other hand, overzealous, unwarranted criminal investigations of aircraft accidents could have a detrimental affect on air safety.[10]

Annex 13 requires the establishment of a mandatory incident reporting system to aid the gathering of information on safety. States are also encouraged to establish a voluntary incident reporting system, preferably non-punitive, and to implement measures to protect the sources of information. This system, also adopted by the FAA, is more effective in promoting aviation safety.

Reporting and Investigation Trends Around the Globe

On July 27, 2000, in response to the ValuJet crash in 1996, U.S. House of Representatives held a hearing on the Trend Toward Criminalizing Aviation Accidents.[11] The legislature wanted to get expert opinion on the benefit or detriment caused to aviation safety by criminal investigations. The consensus was that the industry is concerned that criminal investigations will not be a deterrent for air safety mistakes, but will be a deterrent to "voluntary cooperation and reporting prevalent in the industry today."[12] However, since the inception of these voluntary reporting programs aviation has seen a decrease in the number of catastrophic aircraft accidents. Other regulatory agencies, such as the FDA, have encouraged similar voluntary reporting programs.

The U.S. prosecutes aviation accidents in fewer instances than the international community and yet, the U.S. maintains a strong safety record, debunking the myth that prosecutions are a deterrent. Due to the use of the tort system and civil/monetary

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10 Mildred Trogeler, *Criminalisation of Air Accidents and the Creation of a Just Culture*, available at http://media.leidenuniv.nl/legacy/mildred-tr-366geler-eala-prize.doc).pdf.

11 *Trends Toward Criminalization of Aircraft Accidents,* Hearing Before the House Committee on Transportation and Infrastructure (July 27, 2000) available at http://commdocs.house.gov/committees/Trans/hpw106-105.000/hpw106-105_0f.htm.

12 Statement of Honorable John J. Duncan, Jr., *Id*.

liability imposed upon U.S. Airlines to properly operate and maintain aircraft, there is already the added incentive of protecting the lives of themselves and others, not being responsible for loss of life, the guilt associated with a mistake that caused another's death, not losing one's livelihood in the form of job loss, unemployment, defunct companies, and certificate revocation. These are deterrents without the added stress of loss of freedom. A prosecutorial system may serve the interests of justice but it seems that a focus on the technical investigation better supports the interest of safety.

United States

In recent years, criminal cases in Spain, Italy, Brazil, Canada and Indonesia have sparked concern among industry experts. For example, two American pilots and one air traffic controller were convicted of criminal charges in May 2011, for the mid-air collision of a Legacy 600 jet and GOL Airlines Boeing 737 commercial jet by a Brazilian federal court. All received prison sentences; however, the prison sentences were commuted to community service to be carried out in the United States, and Brazil, respectively. The pilots were held to be imprudent, and for failing to verify the function of equipment for more than an hour. Both aircraft had been cleared to fly at the same level, which raised the issue of excessive workloads, low pay and blind spots of air traffic controllers.

However, the first case that really brought the issue of criminalization to the U.S. doorstep was the crash of ValuJet McDonnell Douglas DC-9 in Miami, May 1996.

The ValuJet accident allegedly occurred due to a carton of oxygen canisters being placed in the forward cargo hold of the aircraft which then ignited shortly after takeoff, incapacitating the cockpit crew and causing the aircraft to crash outside of Miami into the Everglades with the loss of life of all on board. The National Transportation Safety Board (NTSB) determined that the empty oxygen canisters that had recently been removed from the aircraft

overhead seating compartments were improperly labeled and loaded onto the flight by ValuJet's maintenance provider, SabreTech. Based on the NTSB's conclusion, three SabreTech mechanics were indicted by a Florida court on criminal charges. The court acquitted the mechanics on the grounds that they "committed mistakes, but they did not commit crimes."[13] SabreTech was also brought up on criminal charges and of the nine counts that Sabretech was convicted of eight were overturned. The ninth went to appeal.

Before this seminal case, aviation accident investigation in the United States began with the NTSB's investigation of the disaster site, testing of the physical evidence, cooperation with manufacturers and other experts, and thorough interviews of all those with information relevant to the cause of the crash. The NTSB and the Federal Aviation Administration (FAA) work towards a goal of determining the cause and correcting safety issues. They work together to implement procedures or warn the aviation community of potential problems that will help prevent the next accident.

The NTSB, the FAA and other Regulatory agencies "often employ an 'emphasis' or 'special safety enhancement' approach to enforcement."[14] In the United States, the investigation of an aircraft accident often involves several federal authorities. The NTSB has been given the designation by Congress, to be the lead investigating authority for aircraft accidents and for "'reporting the facts, circumstances and cause or probable cause of'" the accident to Congress.[15] However, the FAA also investigates aircraft accidents and incidents because the FAA retains

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13 *U.S. v. Sabretech, Inc.,* 271 F.3d 1018 (2001).

14 NTSB Bar Association, Select Committee on Aviation Public Policy, *Aviation Professionals and the Threat of Criminal Liability—How Do We Maximize Aviation Safety?* , *67 J. Air L. & Com. 87*, Southern Methodist University School of Law, Journal of Air Law and Commerce, Summer 2002.

15 *Id*.

jurisdiction over aviation professionals, and it is the FAA that maintains and enforces laws and regulations that promote aviation safety and can revoke licenses and certificates.[16] Additionally, the FAA and NTSB cooperate with each other in the investigation of aviation accidents. When more serious accidents occur the Federal Bureau of Investigation (FBI) is also called in to investigate.[17]

Parallel investigations between criminal and civil authorities occur in the U.S. and abroad due to the concurrent jurisdiction of the federal agencies. These parallel investigations lead to complications in determining which agency has the primary authority over the accident investigation.[18] It has not become a major problem yet in the United States, but other countries that prioritize law enforcement and the judiciary, have made the technical investigations almost impossible to complete.

The United States legislature codified the relationship between the NTSB and the FBI in the NTSB Amendments Act of 2000.[19] As codified, the statute authorizes the FBI to assume primary authority over investigations, only in circumstances in which the "Attorney General, in consultation with the Chairman of the NTSB determines and notifies the NTSB that circumstances reasonably indicate that the accident may have been caused by an intentional criminal act."[20] In all other cases, the NTSB remains the primary investigative authority in the investigation of civil or public aircraft accidents.[21]

In order to help facilitate the investigation and exchange of knowledge, the FAA has instituted a third party voluntary reporting system called the Aviation Safety Reporting System ("ASRS"), which "is a small but important facet of the continuing

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16 *Id*.
17 *Id*.
18 *Id*.
19 NTSB Amendments Act of 2000, Pub. L. 106-424, eff. Nov. 1, 2000; *Id*.
20 *Id*.
21 *Id*.

effort by government, industry, and individuals to maintain and improve aviation safety."[22] The ASRS collects voluntarily submitted aviation safety incident/situation reports from pilots, controllers, and others. It is monitored by NASA, as a third party; so that the FAA receives the information de-identified and cannot use the information in administrative actions. The ASRS acts on the information these reports contain. It identifies system deficiencies, and issues alerting messages to persons in a position to correct them. Its database is a public repository which serves the FAA and NASA's needs and those of other organizations world-wide which are engaged in research and the promotion of safe flight. The ASRS collects, analyzes, and responds to voluntarily submitted aviation safety incident reports in order to lessen the likelihood of aviation accidents.

Though the NTSB and the FAA have safeguards in place, a voluntary reporting system, and quick response time to accident sites for optimal witness involvement and evidentiary preservation, the repercussions from ValuJet and similar international criminal investigations has taken its toll. The FBI now has more immediate and active a role in investigations, as do other quasi law enforcement offices. The NTSB now has a more difficult task in gathering information through witness statements due to the possibility of being forced to turn over those statements for criminal prosecutions. Corporations will now have to consider the cost of both civil and criminal defense counsel. Though there is no Fifth Amendment privilege for corporations in the United States, counsel in criminal investigations will advise individual clients to assert their Fifth Amendment privilege rather than risk self-incrimination or a possible violation of the false statement statute, which often results in revocation of licenses, and is only one of the many statutes prosecutors are using to indict aviation professionals.[23]

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[22] FAA Office of System Safety PowerPoint available on the FAA.gov website.

[23] *U.S. v. Hays, 103 Fed.Appx. 255 (2004); 18 U.S.C. 1001.*

Other commonly cited statutes are Hazardous Materials Transportation Act (used against Sabretech), and Resource and Destruction of an Aircraft, which is usually reserved for terrorists.[24] Without the ability to offer voluntary informers any type of immunity from criminal litigation, witnesses may be unwilling to discuss the accident. The NTSB and FAA do not have the authority to grant immunity in criminal proceedings. They can only offer immunity to enforcement actions within their own powers, such as revocation of licenses.[25] NTSB probable cause reports are inadmissible as evidence for civil proceedings, but so far, statements made to NTSB and FAA investigators are not off limits for criminal proceedings. However, courts should weigh the necessity of entering such prejudicial evidence into the court record. It does not benefit the main purpose of accident investigations. The Court in *U.S. v Hays* stated that that "the district court abused its discretion by admitting evidence of dangerous defects found in the airplanes certified by the defendant. This evidence had only a very slight probative value and did not outweigh its prejudicial effect. The government did not need this prejudicial evidence to prove the elements of the defendant's crime which was completed when the defendant signed his name to the certifications."[26] Though this was more prejudicial to the individual, it also advises that any records found, or any statements made as to the truth of maintenance safety, later found to be false, can be used in criminal proceedings towards a conviction.

Statements made to the NTSB and FAA may still be used in future litigation. The United States and international aviation communities are struggling to slow the trend of criminalization, but, unfortunately, most U.S. attorneys share the view that criminalizing aviation accidents, regardless of clear intent, will save

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24 *U.S. v. Sabretech, Inc., 271 F.3d 1018 (2001).*

25 http://asrs.arc.nasa.gov/overview/immunity.html.

26 U.S. v. Hays, 103 Fed.Appx. 255, 257 (2004).

lives. This sends a clear message that prosecutors will continue to investigate aviation accidents in the United States.

Europe

France, Greece and Italy have all incarcerated controllers. France has pilots in jail, and is attempting to convict and Italy has put controllers and aviation managers behind bars. The European Union has begun drafting directives to attempt to unify Europe's efforts to investigate aircraft accidents and incidents in conformance with ICAO Annex 13 standards. Individually, each country still has its own legal liability which will take precedence.

After Air France Concorde flight 4590 crashed shortly after take-off on July 25, 2000, killing all 109 people aboard and four others on the ground, a French Prosecutor filed involuntary manslaughter charges against Continental due to the titanium strip from a Continental Airlines DC-10 that was lying on the runway during takeoff of the Concorde, which allegedly caused the explosion of the Concorde's tires, starting a fire. In addition, two employees of the Concorde Program, and an employee of the French Civil Aviation Authority were also indicted stating that they were aware of design defects in the Concorde for years without taking action. In late 2010, the court ordered Continental to pay Air France $1.43 million for damages to Air France's reputation and an additional fine of $265,000. John Taylor, a Continental mechanic, received a fine of 2,000 Euro and a 15-month suspended prison sentence for involuntary manslaughter, while another airline operative and three French officials were cleared of all charges. Only the American companies and employees were held responsible, and not the designers of the Concorde. The French government holds an interest in Air France/-KLM and politics arguably plays a large part in criminalizing aviation.

Similarly, the recent Air France 447, which crashed into the Atlantic Ocean while en route from Rio de Janeiro to Paris in June 2009, has been the subject of a possible criminal investigation.

Recently, the French Pilots' Union, Syndicat National des Pilotes de Ligne, (SNPL), has withdrawn its participation in the ongoing investigation stating that the BEA report is ignoring possible technical issues with the stall warning system and is focusing instead on blaming the deceased flight crew. The French Pilot's Union called for recommendations for necessary modifications to the aircraft systems instead of indictments of deceased pilots. The technical investigation to make modifications to a possible faulty system should take precedence over blaming the deceased flight crew.

The French government agency responsible for technical investigation of civil aviation accidents and incidents on French territory is the Bureau d'Enquêtes et d'Analyses pour la sécurité de l'aviation civile (BEA) which is an agency placed within the Ministry of Civil Aviation. In Europe, a 1994 Directive (94/56/CE) outlined the legal framework for accident investigations for the 37 contracting states so that they may closely follow the rules of Annex 13. It specifies that an investigation, systematically in the case of an accident or serious incident, shall be conducted or supervised by a permanent specialized organization, that this organization be functionally independent of the aviation authorities responsible for airworthiness, air traffic control, etc., as well as of any of any other interested party, and that the report be made public.[27]

Criminal investigations in France occur when there have been a large number of fatalities, and should be a joint effort between the BEA and law enforcement. In the past the government instructed the agencies not to interfere with each others' investigations as much as possible or to the detriment of the others' case.[28] The judiciary trusted and relied on the BEA's expertise.

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[27] BEA website for Judicial Framework; http://www.bea.aero/en/bea/qui-sommes-nous/cadre-juridique.php.

[28] Mildred Trogeler, *Supra*.

French law, however, follows the Napoleonic Code, which states that fatal accidents must be investigated in order to establish blame.[29] The only court that has the right to investigate cases dealing with fatalities is the criminal court, unlike other jurisdictions that allow civil restitution without a coinciding criminal case. Though the BEA and Judiciary used to work together, criminal investigations now take precedence. During the investigation of a crash of an Air New Zealand A320 off the French coast French prosecutors held the flight data recorders hostage from the technical investigators and went so far as to comment to the press regarding screaming that could be heard at the ends of the recording.[30] Criminal prosecutions in France can take up to 15 years, seriously hindering the progress of a technical investigation and the need for safety related answers.

One case changed the aviation investigation hierarchy in France, similar to the role of the ValuJet case in the United States. When Airbus A320-111 crashed on June 26, 1988, in a forest and caught fire, killing some of the passengers the BEA and the judiciary had a role reversal.[31] The BEA lost the trust of the judiciary, which decided to pull rank, and criminal investigations began to take precedence over technical investigations due to missing seconds from the flight data recorder when they received the instruments from the BEA. It was alleged that the BEA tampered with the records in order to protect themselves or the aircraft manufacturer.[32] Now, though the BEA and other international technical investigations may have concluded, the French Judiciary may continue to search for the appropriate party to which they may apportion fault, if they are not satisfied with the findings of the official technical report.[33]

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29 *Id*.

30 *Id*.

31 Aviation Safety Network as operated by the Flight Safety Foundation available at http://aviation-safety.net/database/record.php?id=19880626-0.

32 http://www.bea.aero/docspa/1988/f-kc880626/pdf/f-kc880626.pdf.

33 Mildred Trogeler, *supra.*

England's aircraft accident investigation department is very different than the one in France. The Air Accidents Investigation Branch (AAIB) of the Department of Transportation in England is similar in objective to the NTSB in the United States. Whereas in France the judiciary takes the lead and is granted access to evidence and flight data records before they are handed over to the BEA or before the BEA is allowed to make copies of any information, English investigators are given immediate access to the accident site, the physical evidence and any other records they deem relevant.[34] They are not required to preserve evidence for other investigative bodies or law enforcement. In conformance with the ideals of ICAO Annex 13, the investigations are for the purpose of safety recommendations and not fault apportionment.[35] England follows a Memorandum of Understanding between the Crown Prosecution Service and the AAIB.[36] England focuses on the public interest before that of the criminal prosecutors and whereas many prosecutors may disagree, England law states that public interest "requires that safety considerations are of paramount importance, the consequence of which may mean that the interests of an AIB investigation have to take precedence over the criminal investigation."[37] This Memorandum of Understanding stresses the importance of witnesses' statements and the need for witnesses to talk openly to an accident investigator.[38]

A corporation in America can be charged with crimes, and fines just like a person. Corporations' crimes are usually more fiscally or environmentally related, but occasionally, as in Sabretech, they can be charged with murder. That is not the situation elsewhere. However, when the U.K. does criminally prosecute aviation accidents, they now can indict corporations for

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34 Memorandum of Understanding between the Crown Prosecution Service and the AAIB, *http://www.aaib.gov.uk/cms_resources.cfm?file=/MOU%20AIB-CPS.pdf.*

35 http://www.aaib.gov.uk/about_us/index.cfm.

36 *http://www.aaib.gov.uk/cms_resources.cfm?file=/MOU%20AIB-CPS.pdf.*

37 *Id*.

38 *Id*.

manslaughter. Parliament passed a law in April of 2008 called the Corporate Manslaughter Act.[39] The Act allows for the prosecution of companies in public transportation accidents, including aviation. The Act has lowered the standard required to prove manslaughter charges. A company now has the burden of proving that its safety processes conform to industry standards, as opposed to the prosecutor needing to show gross negligence. [40]

Germany is even more prosecutorial. Germany originally investigated aircraft accidents solely to apportion criminal liability due to the lack of codified aviation law.[41] Recently, Germany was audited by ICAO, which advised of some of the shortcomings of the German Accident Aviation Investigation System.[42] ICAO stated that the Federal Bureau of Aircraft Accident Investigation (BFU) was decreasing in size though their tasks and importance had increased.[43] The BFU is under the authority of the Federal Ministry of Transport; however, to ensure independence, the ministry cannot advise or insist on the scope or content of the investigation.[44] Germany has now joined in following the European Union Directives to become more progressive in their gathering of accident and safety data.[45] Germany has delegated the duty of accident investigation to the German Federal Bureau of Aircraft Accident Investigation (BFU). Germany implemented a number of mandatory incident reporting systems and is about to establish a single integrated mandatory incident reporting scheme, based on EC Directive 2003/42. This mandatory reporting system will be managed by the LBA, Germany's version of the FAA. Germany

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39 http://www.hse.gov.uk/corpmanslaughter/faqs.htm.

40 *Id*.

41 Mildred Trogeler, *Supra*.

42 ICAO Audit; http://www.icao.int/fsix/AuditReps/CSAfinal/Germany_CSA_%20Final_Report.pdf.

43 *Id*.

44 § 4 (3) Flugunfalluntersuchungsgesetz.

45 ICAO Audit; http://www.icao.int/fsix/AuditReps/CSAfinal/Germany_CSA_%20Final_Report.pdf.

does not yet have a voluntary reporting system.[46] The BFU is still required to reply to the request for further information by prosecutors. Though one of the main standards of ICAO Annex 13 is the preservation of evidence for use solely in the furtherance of airline safety, prosecutors in Germany merely need to request evidence and the BFU must respond.[47] This includes witness interviews which could potentially incriminate the speaker, who is unaware of the potentially criminal liability because they have not been "Mirandized" because they were not "interrogated by a judicial authority", which is becoming the aviation industry's most significant impediment to safety information gathering; fear of self incrimination for providing accident information to a non-judicial authority who has access to those statements. Witnesses will become silent.

Asia

In Asia, one report stated that every time a pilot survives an accident criminal liability will be pursued.[48] In Korea there is a flight crew who crashed a plane in Libya which sustained fatalities, and when they were extradited back to Korea, they were jailed for life.[49] A Chinese pilot accidently crashed a plane in Korea, even though he was using U.S. Air Force standards for a circling approach, and he has been put under house arrest.[50] Indonesia air workers are threatening to strike due to the prosecution of a Garuda Indonesia pilot.[51] The United States has a tort system that

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46 *Id*.

47 Mildred Trogeler, *Supra*.

48 David Esler, *Flight Risk: The Threat of Criminalization*, Aviation Week (March 10, 2009) available at http://www.aviationweek.com/aw/generic/story_generic.jsp?channel=bca&id= news/bca0309p1.xml&headline=Flight%20Risk:%20The%20Threat%20of%20Criminalization&next=20.

49 *Id.*

50 *Id.*

51 *Jakarta Globe;* http://www.thejakartaglobe.com/justAdded/uneasy-air-workers-threaten-to-strike-over-garuda-pilot-verdict/274280.

will apportion civil liability and attempt to consider a decedent or a crash survivor's restitution for being involved in a devastating and tragic accident, but not considered a crime. Other countries do not have tort liability in the same way as the United States for handling wrongdoing on a civil level.

Similar to France, in Japan, if the incident results in death, "there is no alternative system for publicly assessing culpability, no way to tell the public who was at fault, so they use a criminal trial to fulfill that societal obligation."[52] Every time there is an aviation accident, Japan holds a criminal trial. Most often it is the pilot that is held accountable.

There is a difference between the aviation industry's need for a rapid determination of accident cause so that they may implement safety issues and the public's growing need for a scapegoat in any instance of tragedy. Currently there is a trial ongoing for two controllers involved in a near miss of two aircraft. The controllers were acquitted once, but in Japan, the prosecutor has the right to appeal.[53] A recent press release was penned by the International Foundation of Air Traffic Controllers, the Flight Safety Foundation and the International Federation of Air Line Pilots' Association (IFALPA).[54] It criticizes the prosecution of these two controllers on duty during the near miss at Yaizu, Japan on 31 January 2001.[55] The press release states that there was no clear indication of intent and thus the conviction goes against every standard that the aviation community holds to further free flow of

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52 Ramon Lopez, *Accident Probes Hamstrung By Criminal Sanctions*; Aviation Today(March 6, 2009), available at http://www.aviationtoday.com/regions/sa/Accident-Probes-Hamstrung-by-Criminal-Sanctions-Safety-News_30308.html.

53 *Id.*

54 Joint IFATCA—FSF—IFALPA Press Release; *Front line operators and Flight Safety Foundation criticize the conviction and sentencing of two Air Traffic Controllers in Japan,* available at http://www.zenunyu.net/zen-usr/907bin/img/PR_IFATCA_FSF_IFALPA_seime i.pdf.

55 *Id.*

information and prioritizing safety.[56] The joint request from these three organizations state that "omissions or decisions taken by [aviation professionals] that are commensurate with their experience and training and do not involve gross negligence or willful violations" should not be punished with criminal liability.[57] Japan, and most of Asia, does not agree.

PUBLIC INTEREST AND MEDIA ATTENTION

Across the globe criminal investigations are taking precedence over technical investigation and the promotion of safety in air travel at an alarming and exponential rate. These criminal actions are often fueled more by politics, media attention, and public pressure than they are legitimate actions to bring justice and deter corporations and individuals from making the same mistake twice. Often, it is a fine line between making a mistake and intentional, reckless or negligent acts. Unless the criminal intent is blatant, like terrorism or drunkenness or drug impairment, it may be difficult to determine whether the degree of negligence or the recklessness of the mistake reaches the level of criminal intent.

Captain Paul McCarthy, a former airline pilot and attorney for IFALPA used the example of a pilot currently in jail that picked up a fishing party to bring them back to their point of origin.[58] Before the pilot left the airport he was aware that he did not have enough fuel to make the trip should he hit inclement weather, but headed out to the fishing party anyway. On the way back, he had to perform a missed approach due to weather and ran out of fuel, crashed, and killed all the passengers aboard the flight. He survived and was convicted of manslaughter. He was knowingly reckless. However, had the pilot taken off with a broken fuel gauge and unknowingly flown without enough fuel to conduct a missed approach, he could still be convicted even though there was no

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56 *Id.*
57 *Id.*
58 David Esler, *Supra.*

intent. There's also a difference between having a maintenance issue that was a mistake and unknown and being indicted upon discovery of the mistake, and post accident discovering a discrepancy and actively falsifying documents after the fact to cover up the mistake.[59]

Often the rush to prosecute has been influenced by the demands of the public, brought about by unnecessary media attention, and political pressure. Prosecutors and government officials like to use high profile cases to show the public that they are doing their jobs and investigating aviation for public safety, when they may, in fact, be hindering it.[60] As mentioned above, French prosecutors took the FDR recording and discussed the last few gruesome moments of the flight with the media, going so far as to describe the screams. There is no benefit to either a criminal proceeding or a technical investigation for such raw truth, other than to enrage the public and justify the convictions. The media attention given to a case certainly influences the decision by a prosecutor to pursue criminal charges and some ambitious prosecutors could look at the opportunity of such a high profile case the "making of one's carrier", however, "in today's environment of instant and intense media scrutiny, mega verdicts and our litigious society, the accident itself is already more than adequate punishment."[61] During the SabreTech investigation in ValuJet the FBI raided the facility with 50 agents and seized documents. Prosecutors and homicide detectives went to employees' home at night to question them, and then brought the mechanics up on charges of Destruction of an Aircraft, a statute that is usually reserved for intentional acts of terrorism. In this

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59 Statement of Stewart Matthews, *Trends Toward Criminalization of Aircraft Accidents,* Hearing Before the House Committee on Transportation and Infrastructure (July 27, 2000) available at http://commdocs.house.gov/committees/Trans/hpw106-105.000/hpw106-0]105_0f.htm.

60 *67 J. Air L. & Com. 87, Supra.*

61 Geoffrey Thomas, *Aviation on Trial*, available at http://www.iasa.com.au/folders/Safety_Issues/RiskManagement/GeoffreyThomas.html.

case, the media circus did nothing to help aviation safety, did not provide additional compensation for the victims of the crash, and terrified the public and aviation community. Though the technicians were ultimately acquitted, the repercussions from the drama and implications associated with the case will reverberate throughout international aviation for many decades to come. The NTSB works at its own pace to gather all relevant information, however, the public, the prosecutors, and the media, usually require more rapid fire results, though to the detriment of repairing what went wrong to cause the aircraft accident in the first place. Plaintiff's attorneys may also support criminal prosecutions to support and strengthen their case in civil actions.

Conclusion

In the event of willful, intentional, gross negligence, no one can deny that criminal prosecutions against aviation personnel are necessary. Acts of terrorism are obviously going to be prosecuted. However, when there is a fine line between recklessness and an honest mistake, there is international agreement that criminal prosecutions, whether the accused are acquitted or face a guilty verdict, does not help improve airline safety, maintenance practices, or regulatory discretion. Nations around the world and the international aviation community have agreed to the guidelines and rules set out in ICAO Annex 13, however, the individual nations have begun letting politics and the media outweigh their responsibility to aviation safety as set out in Annex 13. France has allowed criminal investigations to take precedent, and Asia guarantees a prosecution every time there is a major aircraft accident. We are seeing a rise in criminal investigations in both the United States and the United Kingdom. Governments have allowed media needs for a gripping story, which influences public perception to then influence politicians who need to appease their constituents with a culpable party in the event of an air disaster. The aviation officials in these countries cannot stress enough the damage this practice does to an open, information gathering, society for the advancement of aviation safety.

DEFENDING CLAIMS OF KNOWING MISREPRESENTATION UNDER THE GENERAL AVIATION REVITALIZATION ACT

By
Aghavni V. Kasparian[1]

The General Aviation Revitalization Act of 1994 (GARA) provides defendant manufacturers with a powerful tool in the defense of product liability suits. GARA provides, in short, that no civil action for death or injury arising from an aviation accident may be brought against the manufacturer of the aircraft involved, or against the manufacturer of any new component, system, subassembly, or other part of the aircraft, where the aircraft, or new component, system, subassembly, or other part, was more than eighteen years old at the time of the accident.[2]

The Act established an 18-year statute of repose for general aviation aircraft which was intended to eliminate the endless tail of liability that had haunted defendant manufacturers and threatened the survival of the general aviation industry during the mid-1990s.[3] Since its enactment, GARA has faced a number of obstacles. Creative plaintiffs' attorneys continue to challenge GARA's applicability to aircraft litigation, often employing clever tactics to invoke one of the statute's four exceptions. As the body of GARA case law has developed, one trend has undoubtedly emerged: of GARA's four exceptions, plaintiffs most frequently resort to claims of knowing misrepresentation in order to skirt the prohibition of their claims.

With a sufficient understanding of GARA and the requirements of the knowing misrepresentation exception, many

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1 The author thanks Los Angeles summer associate Brian Headman, University of San Diego School of Law, for his assistance in preparing this article.

2 General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552 (codified as amended at 49 U.S.C. § 40101 note (2000)).

3 General Aviation Revitalization Act of 1994, § 2(a).

general aviation defendants can position themselves to avoid this exception and dispose of expensive product liability suits in a cost-effective manner.

BACKGROUND AND LEGISLATIVE HISTORY OF GARA

GARA was enacted at a time when manufacturers of general aviation aircraft desperately needed reprieve from suffocating product liability costs. Growing tort liability had eroded the profitability of American manufacturers and led to stalled production.[4] By 1994, the industry's annual liability expenses exceeded $200 million, an increase of over 830% in roughly 15 years.[5] Production had tapered industry-wide as a result, and output as a whole reached a historic low of just 954 units in 1993.[6] In its darkest hour, Cessna—one of the largest and most recognized general aviation aircraft manufacturer—was forced to discontinue its production of single-engine aircraft. The shutdown, according to Cessna Chairman Russell W. Meyer, was required "solely because of the unlimited cost of products liability."[7]

Coinciding with the decline in aircraft production was a substantial loss of jobs. Between 1978 and GARA's adoption in 1994, 20,000 jobs had been lost by general aviation manufacturers and another 80,000 in related industries.[8] This decline in manufacturing worsened America's position in international

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4 H.R. REP. NO. 103-525, pt. 1, at 2 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 1644.

5 *Id.*

6 *Id.*

7 J. Anthony Salmon, *Aviation Products Liability as the Cause of the Decline in Small Aircraft Manufacturing: An Examination of Possible Solutions*, 19 AM. J. TRIAL ADVOC. 171, 180 (1995) (quoting Andy Zipser, *A Return Visit to Earlier Stories. Into the Wild Blue Yonder: After Years of Being Grounded, Small-Plane Makers are Ready to Take Off*, BARRON'S, Aug. 15, 1994, at 14) (internal citations omitted).

8 H.R. REP. NO. 103-525, pt. 1, at 2 (1994).

trade,[9] while skyrocketing liability made product liability insurance unaffordable for many manufacturers.[10] According to Cessna's Chairman, Russell W. Meyer, the cost of liability insurance had become the single greatest expense of each aircraft produced.[11]

By 1994, industry conditions called for the reform of general aviation manufacturers' tort liability. The Committee on Public Works and Transportation, to whom GARA was referred, recommended the Act pass as an effort "to establish time limitations on certain civil actions against aircraft manufacturers."[12] In its decision, the Committee acknowledged that Federal regulatory oversight creates a level of involvement and regulation in general aviation manufacturing that is incomparable to any other industry. This and other "distinguishing characteristics" of general aviation justified the bill, which "acknowledges that, for those general aviation aircraft and component parts in service beyond the [18 year] statute of repose, any design or manufacturing defect not prevented or identified by the Federal regulatory process by then should, in most instances, have manifested itself."[13]

The Act supersedes any state law that would otherwise permit a civil action barred by GARA, but does not affect the force

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9 Scott D. Smith, *The General Aviation Revitalization Act of 1994: The Initial Necessity For, Outright Success Of, and Continued Need For The Act To Maintain American General Aviation Predominance Throughout The World,* 34 OKLA. CITY U. L. REV. 75, 108 (2009) (citing Gen. Aviation Mfrs. Ass'n, *2006 General Aviation Statistical Databook*, 9 (2007)).

10 By 1987, Piper Aircraft Co. had no product liability coverage, while Cessna and Beech Aircraft Corp. were self-insured for their first $100 million and $50 million of loss, respectively. Thomas H. Kister, *General Aviation Revitalization Act: Its Effect on Manufacturers,* 65 DEF. COUNS. J. 109, 111 (1998) (citing ROBERT MARTIN, GENERAL AVIATION MANUFACTURING: AN INDUSTRY UNDER SIEGE, IN THE LIABILITY MAZE, 478, 483-84 (Peter W. Huber & Robert Litan eds. 1991)).

11 *Id.* at 113 (citing David J. Moffitt, *The Implications of Tort Reform for General Aviation*, 10 AIR & SPACE LAW. 8 n6 (1995)).

12 H.R. REP. NO. 103-525, pt. 2, at 5.

13 *Id.*

of any state statute of repose. Where possible, a GARA defense may often be used alongside a defense based on an individual state statute of repose.

While GARA bars a portion of general aviation litigation, it includes four exceptions that may be used by plaintiffs to circumvent the Act's restrictions.[14] Most notably, Section 2(b)(1) of GARA provides an exception for "knowing misrepresentation"—that is, an exception to GARA's eighteen year limitation period if a plaintiff pleads "with specificity" facts necessary to prove and proves (1) knowing misrepresentation, or concealment, or withholding; (2) of Federal Aviation Administration (FAA) required information that is material and relevant; and (3) that is causally related to the harm he suffered.[15]

The Early Development of the Knowing Misrepresentation Exception

As the body of GARA case law developed, it became obvious that the true value of the statute lies in its ability to dispose of litigation at the summary judgment stage. Only then is GARA able to best accomplish its goals of limiting liability costs and unburdening manufacturers of expensive litigation. As defendant manufacturers filed GARA motions for summary judgments, plaintiffs' attorneys quickly realized that the knowing misrepresentation exception presented the most likely hope of relief from GARA's prohibition. This may have been fueled by a belief that the exception was vulnerable to well-pled complaints and subjective interpretations. Accordingly, the knowing misrepresentation exception has received much of its treatment in the context of summary judgment rulings.

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14 General Aviation Revitalization Act of 1994, § 2(b).

15 General Aviation Revitalization Act of 1994, § 2(a)*; see also Robinson v. Hartzell Propeller, Inc.*, 326 F. Supp. 2d 631, 647 (E.D. Pa. 2004).

One of the early cases applying the knowing misrepresentation exception to GARA, *Cartman v. Textron*, rejected the plaintiff's claim that the defendant knowingly misrepresented, concealed, or withheld safety information from the FAA and granted the defendant's motion for summary judgment based on its GARA defense.[16] The opinion highlighted the particularity of the exception and provided a necessary foundation for future interpretations. In the case, the plaintiff alleged that the defendant corporation was aware of an alleged design defect in its product without ever explicitly asserting that the defendant corporation knew that a misrepresentation to the FAA had taken place.[17] The Court found this evidence insufficient to establish a misrepresentation due to the "very particular requirements" of the exception, under which knowledge of the alleged defect, alone, is not enough.[18] The plaintiff needed to show a *knowing* misrepresentation of that information.[19] Even the "broadest language in the exception"—likely a reference to the "withholding" clause of the knowing misrepresentation exception—could only be met if the plaintiff had pled with specificity that the defendant failed to meet its obligations to provide FAA required information.[20] The Court went on to clarify that manufacturers need not volunteer information to the FAA which is not required under the Federal Aviation Regulations (FARs).[21]

The Court's disciplined reading of the knowing misrepresentation exception set the initial standard for future

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16 *Cartman v. Textron Lycoming Reciprocating Eng'g Div*., No. 94-CV-72582-DT, 1996 WL 316575, at *3 (E.D. Mich. Feb. 27, 1996).

17 *Id.* at 3.

18 *Id.*

19 *Id*.

20 *Id*.

21 *Id.* (stating "[t]he Court is unwilling to infer a duty under § 2(b)(1) requiring defendants to volunteer information which is (1) not required by statute or regulation, (2) not in response to a direct inquiry by the FAA, or (3) not necessary in order to correct information previously supplied directly by the defendant to the FAA.").

plaintiffs and helped clarify for defendants the conduct that would justify the exception's application. However, because the decision was partially based on the reporting requirements of the FARs, the potential for future courts to subjectively interpret the requirements in favor of sympathetic plaintiffs remained a continued risk for defendants.

After this case, plaintiffs' attorneys were forced to get more creative. In *Rickert I*, a plaintiff again attempted to avoid summary judgment dismissal by pleading knowing misrepresentation.[22] In support of the knowing misrepresentation exception, the plaintiff combined extensive expert analysis of the design with evidence of letters exchanged between the defendant's president and general counsel.[23] According to plaintiff, the letters exposed internal disagreements among Mitsubishi directors regarding the aircraft's safety for flight in icing conditions, while the expert testimony suggested misrepresentations regarding testing and safety disclosures.[24]

The Court did not agree. It read the exception and its pleading requirements clearly: "'[t]he terms 'misrepresentation' and 'concealment' are not infinitely malleable. [The plaintiff] cannot avoid GARA's period of repose simply by dressing up [its] evidence . . . as 'misrepresentations' and 'concealments.' GARA requires more than innuendo and inference; it demands 'specificity.'"[25] The plaintiff had obviously failed to understand the pleading requirements of the knowing misrepresentation exception, and the Court was not moved. The decision made clear that pleading negligence or other culpable behavior will not suffice to avoid summary judgment under GARA.[26] Although seemingly obvious,

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22 *See Rickert v. Mitsubishi Heavy Indus. (Rickert I)*, 923 F. Supp. 1453 (D. Wyo. 1996).

23 *Id.* at 1456.

24 *Id.*

25 *Id* at 1462.

26 *Id*.

Rickert had failed to meet this standard, and the Court dismissed the claim.

Rickert I served as a wake-up call to plaintiffs that GARA summary judgment motions cannot be overcome in passing.[27] Although its motion for summary judgment was ultimately set aside in *Rickert II*, the message was not lost: "GARA erects a formidable first hurdle to such suits, not only at the summary judgment stage but also at the trial stage. The plaintiff who leaps GARA's knowing misrepresentation exception then faces the usual product liability obstacles."[28]

Plaintiffs' attorneys were humbled by this first round of judicial interpretations, but they were not defeated. GARA had altered the landscape of general aviation tort liability,[29] but plaintiffs quickly began to understand how to maneuver the pleading requirements of its exceptions. Much of their success came from the courts' willingness to interpret the FARs in favor of aviation victims. As plaintiffs' attorneys have gotten smarter, the courts have become increasingly receptive to crafty pleadings.

Studying a modern plaintiff's successful use of the exception helps illustrate this point and provides a better understanding of the exception's appropriate application. With this firmer understanding, manufacturers may better avoid the exception's application altogether.

KNOWING MISREPRESENTATION, CONCEALMENT, OR WITHHOLDING: A CASE STUDY

Where the knowing misrepresentation exception has been used to bypass the repose period, the evidence of the defendant's

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27 *Rickert v. Mitsubishi Heavy Indus. (Rickert II)*, 929 F. Supp. 380, 381 (D. Wyo. 1996).

28 *Id.* at 383-84 (stating "[t]his case should stand as a lesson for all plaintiffs who would bring product liability lawsuits against aircraft manufacturers.").

29 *Id.* at 381.

concealment has generally been strong. After all, even a strictly literal reading of the knowing misrepresentation exception gives way to evidence which creates a material issue of fact regarding misrepresentations to the FAA.

Butler v. Bell Helicopter Textron, Inc. is a prime example of the knowing misrepresentation exception's application to bar summary judgment.[30] In that case, the defense's GARA-based grant of summary judgment was overturned based on the Court's application of the exception.[31] The California Court of Appeal found that the proffered evidence was sufficient to allow the case to proceed.[32]

Bell Helicopter Textron, Inc. had manufactured the accident helicopter which allegedly crashed due to the in-flight failure of its tail rotor yoke.[33] The survivors and successors of the four decedents brought suit against Bell Helicopter based on theories of products liability, negligence, warranty, and fraud.[34] Absent the applicability of the knowing misrepresentation exception, GARA would have likely barred these claims because the aircraft and the failed component were more than eighteen years old at the time of the accident.[35] Instead, evidence was presented which excepted GARA's application under the knowing misrepresentation exception.

Bell had allegedly withheld information from the FAA concerning its knowledge of five military aircraft accidents which were caused by a failure identical to that which caused the crash in the case.[36] Moreover, despite this knowledge, Bell allegedly

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30 *Butler v. Bell Helicopter Textron, Inc*., 109 Cal. App. 4th 1073 (Cal. Ct. App. 2003).

31 *Id.*

32 *Id*.

33 *Id.* at 1075.

34 *Id*.

35 *Id*.

36 *Id.*

increased the retirement life of the tail rotor yokes in question by twenty-five percent without conducting any additional fatigue testing or analysis to justify the increase.[37]

Distilled to its core, the Court of Appeal's decision presents one very important point: the FARs may be open to the individual interpretation of each court. If a court wants to avoid summary judgment, it may use the FARs as a scapegoat. The *Butler* Court relied heavily on the FARs in its decision. The Court's choice of interpretation affirms that the earlier principles remain potent—that is, that a knowing misrepresentation will not be shown unless a manufacturer fails to report *required* information to the FAA.[38] However, courts may improperly vary their interpretation of what constitutes *required* information. The Court in *Butler*, for instance, held that even though the FAA does not regulate military manufacturers, Bell was required to report the military accidents because the component in question was used in civil applications as well.[39]

The holding relied on a plain meaning interpretation of the FARs, indicating that the reporting requirements must be taken on their face. Nevertheless, this same reading cannot be guaranteed in future cases.

Constant adherence to the FARs remains central to avoiding the application of the knowing misrepresentation exception. Unfortunately, no bright line rules exist regarding their

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37 *Id.* at 1078.

38 *Cartman v. Textron Lycoming Reciprocating Eng'g Div*., No. 94-CV-72582-DT, 1996 WL 316575, at *3 (E.D. Mich. Feb. 27, 1996) (holding that a manufacturer does not have an affirmative duty to volunteer information to the FAA unless it is required by statute or regulation, is in response to a direct inquiry by the FAA, or is necessary in order to correct information previously supplied directly by the defendant to the FAA.).

39 *See Butler*, 109 Cal. App. 4th at 1083 (holding "Bell had an affirmative duty to report the failures that occurred in identical tail rotor yokes installed on military aircraft . . . [and] [t]he withholding of that information brings these lawsuits within the [knowing misrepresentation exception].").

interpretation. Questions will almost certainly remain as to how individual courts will interpret these reporting requirements, and defense counsel will be required to evaluate each claim on a case-by-case basis. Meanwhile, plaintiffs' attorneys are becoming more innovative in creating skepticism of manufacturer adherence.

MODERN INTERPRETATIONS OF THE KNOWING MISREPRESENTATION EXCEPTION

The early cases highlighted the strict pleading requirements of the knowing misrepresentation exception and the tendency for the courts' literal reading of GARA to play in the favor of defendants. However, it became clear with time that GARA's pleading requirements would not be enough to stave off witty plaintiffs. Shifting the discussion now to the exception's modern interpretations illustrates the current trends of the exception, what precautions manufacturers should take, and how general aviation manufacturers in the current legal climate can use Section 2(b)(1)'s causation requirement to try to avoid the exception.

In 2009, the Supreme Court of Pennsylvania published its opinion in *Moyer v. Teledyne Continental Motors, Inc.*[40] Not surprisingly, the plaintiffs in *Moyer* attempted to avoid GARA-based summary judgment by pleading that the defendants knowingly withheld or misrepresented required information from the FAA through the issuance of a defective Service Bulletin.[41] Plaintiffs asserted that the defendant, TCM, maintained a secret "in-house prohibition" of certain maintenance procedures which contradicted the affirmative representations it had made to the FAA and others.[42] These assertions were predicated on the Service Bulletin's history and an argument that TCM's approval of the maintenance procedures at issue was insufficiently based on a

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40 *Moyer v. Teledyne Continental Motors, Inc*., 979 A.2d 336 (Pa. 2009).

41 *Id.*

42 *Id.* at 345.

single test and report.[43] Plaintiffs further alleged that TCM had only reversed its public stance on this type of maintenance because it desired to develop its remanufactured and factory overhaul engine business, and that an approval of the questionable procedure was necessary in order to be competitive in that market.[44]

Meanwhile, TCM had retained an Engineering Report that directly contradicted the plaintiffs' allegations.[45] In fact, the Report revealed that TCM had reviewed and evaluated twelve other tests before issuing the Service Bulletin.[46] Given these facts, the Court held that the plaintiffs had presented inadequate evidence to show a knowing misrepresentation, concealment, or withholding.[47]

Moyer stands as an example of the scrutiny that each manufacturing decision may undergo given a claim of knowing misrepresentation. Because knowledge is a critical part of the exception, plaintiffs' attorneys will scour discovery for any discrepancy in any manufacturing or maintenance decision. Manufacturers should expect desperate attempts to make unfounded suggestions of a culpable state of mind. TCM was able to overcome these attempts in *Moyer* because it had methodically relied on proper testing and documentation before issuing the revised Service Bulletin. This case is an excellent example of the precautions that manufacturers can take in order to prevent potential claims.

Later in 2009, the Ohio Court of Appeals granted summary judgment in *Hetzer-Young* to an aircraft manufacturer because the plaintiff failed to present sufficient evidence to satisfy

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43 *Id. at 346.*
44 *Id.* at 345.
45 *Id.* at 346.
46 *Id*.
47 *Id*.

Section 2(b)(1)'s causation requirement.[48] The causation element of the exception requires a causal link between the misrepresented, withheld, or concealed information and the accident.[49]

Although the plaintiff had succeeded in establishing a genuine issue of material fact as to whether the defendant had misrepresented required information to the FAA regarding the aircraft's defective design, the evidence failed to show that the aircraft in question contained the actual defect or that such a defect had caused the accident.[50] Moreover, the plaintiff was unable to rise to the considerable challenge of proving that, even if the defendant had been completely candid with the FAA, the FAA would have issued an Airworthiness Directive requiring the removal of the defective attribute.[51]

Despite a detailed discussion of the defendant's many shortcomings and a commentary on the broad nature of the reporting requirements of the FARs,[52] the Court remained cognizant that each clause in the knowing misrepresentation exception requires equal consideration and granted summary judgment for the defendant based on causation.[53] The *Hetzer-Young* decision is an example of the most effective modern defense against claims of knowing misrepresentation—the causation requirement. Because today's plaintiffs' attorneys may be able to finagle Section 2(b)(1)'s pleading requirements and the FARs, the causation requirement now presents the greatest opportunity for defendants. As plaintiffs' attorneys have evolved, so too must defendants.

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48 *Hetzer-Young v. Precision Airmotive Corp*., 184 Ohio App. 3d 516 (Ohio Ct. App. 2009).

49 *Id.* at 535-36.

50 *Id.*

51 *Id.* at 536.

52 *Id*.

53 *Id.* at 535-36.

By challenging causation, plaintiffs will be faced with the often difficult task of proving that the defendant's knowing misrepresentation prevented an FAA directive that would otherwise have thwarted the accident. Moreover, because all courts deal with causation, it is more understandable, and thus, more likely to be applied to bar a claim. A plaintiff faced with this heavy burden and with the specific pleading requirements of Section 2(b)(1) will have a tougher challenge to overcome summary judgment.

Finally, the most recent developments of the knowing misrepresentation exception came this year through the Washington Supreme Court's opinion in *Burton v. Twin Commander Aircraft LLC*.[54] The decision drastically limited the scope and applicability of the exception and reaffirmed its specificity requirement.[55]

Predictably, the survival of Burton's claims against Twin Commander hinged on its ability to use Section 2(b)(1) to overcome a GARA motion for summary judgment.[56] The plaintiff's allegations were threefold: Twin Commander had knowledge of a rudder defect in its fleet, it withheld this required information from the FAA, and it had failed to adequately uncover the true scope of the alleged rudder defect.[57] Its support for these claims was based on the implications of two Twin Commander e-mails.[58]

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54 *See Burton v. Twin Commander Aircraft LLC*, 254 P.3d 778 (Wash. 2011).

55 *See id*.

56 *Id*.

57 *Id*.

58 *Id.* at 787. Specifically, the e-mails suggested, in light of a set of current airplane crashes involving Twin Commander planes, that an investigation closed by the NTSB regarding a crash twelve years prior may have come to an inaccurate conclusion. The e-mails simply stated: "the [previous crash] rudder has the same appearance of the two current ones . . . but we do not have any information yet to determine cause . . . . Until that is in[,] NO determination of cause is possible[, and] we have no evidence to point to the [rudder] cap as primary cause of the problem." Burton used these e-mails to suggest

Given that the NTSB's investigation into the perceived rudder problem was incomplete at the time of the suit, and in consideration of the fact that Twin Commander had voluntarily conducted an independent investigation into the rudder conditions of its entire fleet prior to the accident, the Court refused to accept Burton's argument of fraud.[59] Instead the Court saw the plaintiff's allegations for what they were: attempts to recast theories of inadequate investigation and reinvestigation as evidence of knowing misrepresentation, concealment, or withholding.[60] Such an "end run around the statute of repose" was impermissible.[61]

The Court first commended Twin Commander, stating that it had gone above and beyond its FAA requirements by spearheading an investigation in order to determine if there was a reportable event.[62] The Court then undertook a construction of GARA's language that plays heavily in favor of defendant manufacturers. The Court interpreted Section 2(b)(1) as requiring that knowledge, as a state of mind, apply to all three forms of keeping information from the FAA—that is, "'knowingly' modifies each of the words 'misrepresented,' 'concealed,' and 'withheld' in the exception."[63] Thus, in order to invoke the exception with a concealment or withholding of information, a plaintiff must also plead and prove knowledge on the defendant's behalf.

Furthermore, the Court was clear that manufacturers need not shy away from exploring the condition of their active fleet. With respect to the FAA reporting requirements, the Court made clear that manufacturers must make a *subjective* determination of "whether the failure, malfunction, or defect has resulted or could

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knowledge and inadequate investigation on Twin Commander's behalf to uncover the true cause of the past crash. *Id*. at 789.

59 *Id.* at 790.

60 *Id*.

61 *Id*.

62 *Id.* at 788.

63 *Id.* at 780.

result in one of the listed occurrences—a cause and effect analysis." [64] The Court went on to state that it is generally unnecessary for the FAA to be provided reports of a previously reported failure, malfunction, or defect posing safety risks.[65] "Indeed, multiple reportings can cause serious problems for the FAA, which has a limited number of employees to handle them." [66]

This decision may likely represent a launching point for future pro-defense judgments as courts adopt the approach taken by the Washington Supreme Court. However, because much of the decision again relied on a reading of the FARs, manufacturers remain vulnerable to the future whims of a rogue court. Accordingly, it is critical that defendant manufacturers understand what information is explicitly required under the FARs, and the type of conduct that rightfully constitutes a knowing misrepresentation. Couple this with a strategy of attacking the causation requirement of Section 2(b)(1), and defendants are likely to come out ahead in a GARA summary judgment motion.

STATE STATUTES OF REPOSE

Basic game theory tells us that two chances to win are better than one. Likewise, two affirmative defenses are better than a single GARA-based defense. Where available, defendant manufacturers should plead a defense based on GARA, the federal statute of repose, alongside a state statute of repose. There are currently seventeen states that have enacted statutes of repose that may protect general aviation manufacturers from tort liability,[67] while three states, Arizona, Rhode Island, and North

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64 *Burton*, 254 P.3d at 788; *but cf. Butler*, 109 Cal. App. 4th at 1087-88 (the California Court of Appeal held that under the factual scenario, the reporting requirements were based on what the FAA would have done in response to a full disclosure).

65 *Burton*, 254 P.3d at 790.

66 *Id.*

67 *See* Appendix A.

Dakota, have found such repose statutes unconstitutional.[68] State statutes can be very useful alongside a GARA defense, or standing alone, because the repose period of many states begins before the eighteen years required by GARA.

State court judges are a true question mark for defendants in aviation litigation. GARA is a completely unknown and obscure federal statute to many state judges. However, defendants who understand the requirements of the individual state statutes of repose and how they differ from GARA are in the best position to avoid liability. The existence of a state statute of repose may also provide clues on how a particular state court will interpret the ever-important FARs. Appendix A provides a list of potentially applicable state statutes of repose.

CONCLUSION

Though challenged by plaintiffs and open to exception, GARA has generally proven successful in accomplishing its goal of limiting general aviation liability. GARA sparked a 16% increase in general aircraft production in its first full year of enactment.[69] Additionally, by covering roughly 68% of the general aviation aircraft built since 1950 within two years of its enactment,[70] the Act allowed aircraft manufacturers to face manageable liability

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68 *See Hazine v. Montgomery Elevator Co.*, 176 Ariz. 340, 861 (1993) (holding ARIZ. REV. STAT. § 12-551, the Arizona statute of repose for product liability actions, unconstitutional); *Kennedy v. Cumberland Eng'g Co.*, 471 A.2d 1995 (R.I. 1984) (holding R.I. GEN. LAW § 9-1-13, the Rhode Island statute of repose for product liability actions, unconstitutional); and *Dickie v. Farmers Union Oil Co. of LaMoure*, 611 N.W.2d 168 (N.D. 2000) (holding N.D. CENT. CODE § 28-01.3-08, the North Dakota statute of repose for product liability actions, unconstitutional).

69 Gen. Aviation Mfrs. Ass'n, *2003 General Aviation Statistical Databook*, 20 (2003).

70 Robert F. Hendrick, *A Close and Critical Analysis of the New General Aviation Revitalization Act*, 62 J. AIR L. & COM. 385, 418 (1996). These figures do not take into account aircraft manufactured after 1992.

exposure and free assets for renewed investment in sales and development.[71] Jobs also followed. In its *Five Year Results*, the General Aviation Manufacturers Association reported that five years of GARA had materialized into 25,000 new jobs and the doubling of America's production and exportation of general aviation aircraft.[72]

GARA is one of the few statutes that successfully accomplished exactly what its title implies, and much of the credit for that success is owed to the Act's drafters and the disciplined courts that interpreted its language. Absent the early trend of conservative and literal interpretations, the knowing misrepresentation exception could have easily paralyzed GARA in the fight for general aviation tort reform. However, over time, courts have proven increasingly susceptible to crafty plaintiffs' attorneys with sympathetic clients.

The FARs will forever lie at the center of a purported knowing misrepresentation. And although the reporting requirements should be read plainly, they sometimes fall victim to the prejudices of a pro-plaintiff court. A willing judge may read these rather simple regulations as requiring unfeasible and inefficient practices, simply to avoid entering summary judgment for a defendant manufacturer. It can become a truly arduous task to inject reason into such a court's interpretation. Causation is probably a better bet.

Courts nationwide are well versed on the theory of causation. As a result, such arguments are likely to be given a more formal and unbiased review based on a methodical analysis and not an emotional reflex. The causation requirement of the knowing misrepresentation exception presents particularly large hurdles for

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71 Nathan J. Rice, *The General Aviation Revitalization Act of 1994: A Ten-Year Retrospective*, 2004 WIS. L. REV. 945, 967 (2004).

72 Gen. Aviation Mfrs. Ass'n, *Five Year Results: A Report to the President and Congress on the General Aviation Revitalization Act,* 1-2 (1999).

the general aviation plaintiff and should be used to support GARA-based summary judgment in general aviation cases.

GARA's judicial history has resolved a number of interpretive questions in favor of defendants, but defendants must continue to evolve and adapt to the modern realities in order to remain effective in overcoming its knowing misrepresentation exception. Defendants who remain mindful of the FARs and are able to properly assess the applicability of federal and state statutes of repose will find GARA a useful and effective limitation on liability exposure.

APPENDIX A

STATE STATUTES OF REPOSE RELEVANT TO GENERAL AVIATION MANUFACTURERS

State	Repose Requirements and Exceptions
Connecticut	Ten years from the date the manufacturer parted with possession or control of the product, unless the claimant proves that the harm occurred during the useful safe life of the product. Exceptions for express written warranties and intentional misrepresentation or fraudulent concealment. CONN. GEN. STAT. § 52-577a.
Florida	Twenty years after delivery of the product to its first purchaser or lessor who was not engaged in the business of selling or leasing the product or of using the product as a component in the manufacture of another product. However, if the manufacturer specifically warranted, through express representation or labeling, that the product has an expected useful life exceeding twenty years, the repose period shall be the time period warranted in representations or label. Exception for knowing concealment when pled with specificity. FLA. STAT. § 95.031.
Georgia	Ten years from the date of the first sale of the product for use or consumption. Exceptions for manufacturers' willful, reckless, or wanton disregard for life or property. GA. CODE ANN. § 51-1-11.

State	Repose Requirements and Exceptions
Idaho	After the expiration of the product's useful safe life. In claims that involve harm caused more than ten years after the time of delivery of the product, a presumption arises that the harm was caused after the useful safe life had expired. Exceptions for express warranties and intentional misrepresentation or fraudulent concealment. IDAHO CODE ANN. § 6-1403.
Illinois	Twelve years from the date of first sale, lease or delivery of possession by a seller or ten years from the date of first sale, lease or delivery of possession to the product's initial user, consumer, or other non-seller, whichever period expires earlier, unless the defendant expressly has warranted or promised the product for a longer period and the action is brought within that period. 735 ILL. COMP. STAT. § 5/13-213.
Indiana	Within ten years after the delivery of the product to the initial user or consumer. However, if the cause of action accrues at least eight years but less than ten years after that initial delivery, the action may be commenced at any time within two years after the cause of action accrues. IND. CODE § 34-20-3-1.
Iowa	Fifteen years after the product was first purchased or leased for use or consumption unless expressly warranted for a longer period of time. Exception for intentional misrepresentation or fraudulent concealment. IOWA CODE § 614.1.

State	Repose Requirements and Exceptions
Kansas	After the expiration of the product's useful safe life. For claims that involve harm caused more than ten years after the time of delivery of the product, a rebuttable presumption arises that the harm was caused after the useful safe life had expired. Exceptions for express warranties and intentional misrepresentation and fraudulent concealment. KAN. STAT. ANN. § 60-3303(a)(1).
Kentucky	A rebuttable presumption arises that the subject product was not defective if the injury, death, or property damage occurred either more than five years after the date of sale to the first consumer or more than eight years after the date of manufacture. KY. REV. STAT. ANN. § 411.310.
Nebraska	If the product was manufactured in Nebraska, ten years after the date the product was first sold or leased for use or consumption. If the product was manufactured outside Nebraska, within the time allowed by the applicable statute of repose, if any, of the state where the product was manufactured, but in no event less than ten years. NEB. REV. STAT. § 25-224.
New Hampshire	Twelve years after the manufacturer of the product parted with its possession and control or sold it, whichever occurred last. Exceptions for written contractual obligations providing for a different period of limitations, and for fraudulent misrepresentation, concealment, or nondisclosure. N.H. REV. STAT. ANN. § 507-D:2.

State	Repose Requirements and Exceptions
North Carolina	Twelve years after the date of the product's initial purchase for use or consumption. N.C. GEN. STAT. ANN. § 1-46.1.
Ohio	Ten years from the date that the product was delivered to its first purchaser or first lessee who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly or rebuilding of another product. Exceptions for express written warranties and manufacturer or supplier fraud. OHIO REV. CODE ANN. § 2305.10.
Oregon	The later of ten years after the date on which the product was first purchased for use or consumption, or the expiration of any statute of repose for an equivalent civil action in the state in which the product was manufactured or imported. OR. REV. STAT. § 30.905.
Tennessee	Ten years from the date on which the product was first purchased for use or consumption or within one year after the expiration of the anticipated life of the product, whichever is shorter. TENN. CODE ANN. § 29-28-103.
Texas	Fifteen years after the date of the sale of the product by the defendant unless expressly warranted in writing for a longer period. Only applicable where GARA or its exceptions do not apply. TEX. CIV. PRAC. & REM. CODE ANN. § 16.012.

State	Repose Requirements and Exceptions
Washington	After the expiration of the useful safe life of the product. If the harm was caused more than twelve years after the time of delivery, a rebuttable presumption arises that the harm was caused after the useful safe life had expired. Exceptions for express warranties and intentional misrepresentation or concealment. WASH. REV. CODE ANN. § 7.72.060.