

---

# **AIRCRAFT BUILDERS COUNCIL, INC. LAW REPORT**

## **RISE OF THE MACHINES: THE GROWTH OF UNMANNED AIRCRAFT AND AN OVERVIEW OF THE ISSUES AND LIABILITY CONCERNS WITH THEIR COMMERCIAL USE**

*Christopher S. Hickey  
Los Angeles*

## **INTERNATIONAL JURISDICTIONAL CONFLICTS IN MONTREAL CONVENTION CASES: WHAT ARE THE CONSEQUENCES FOR THE DOCTRINE OF *FORUM NON CONVENIENS*?**

*Stephen Tucker, New York  
Maud Elezam, Los Angeles*

## **THE COMBATANT ACTIVITIES DEFENSE: ANOTHER OPTION FOR MILITARY PRODUCT MANUFACTURERS**

*Darrell M. Padgett  
Los Angeles*

## **GARA UPDATE: IS IT TIME FOR COURTS TO RETHINK HOW THEY DETERMINE THE “MAXIMUM SEATING CAPACITY” OF AN ACCIDENT AIRCRAFT?**

*Christopher S. Hickey  
Los Angeles*



Aircraft Builders Council, Inc.

**Presented by:**  
**Fitzpatrick & Hunt,**  
**Tucker, Collier, Pagano, Aubert, LLP**  
**Fall 2012**

---

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.

---

The ABC Underwriters invite the assureds to take advantage of the services available under their comprehensive insurance plan. Your brokers can make appropriate arrangements.



## **TABLE OF CONTENTS**

---

<b>RISE OF THE MACHINES: THE GROWTH OF UNMANNED AIRCRAFT AND AN OVERVIEW OF THE ISSUES AND LIABILITY CONCERNS WITH THEIR COMMERCIAL USE</b>	Page 1
<b>INTERNATIONAL JURISDICTIONAL CONFLICTS IN MONTREAL CONVENTION CASES: WHAT ARE THE CONSEQUENCES FOR THE DOCTRINE OF <i>FORUM NON CONVENIENS</i></b>	Page 23
<b>THE COMBATANT ACTIVITIES DEFENSE: ANOTHER OPTION FOR MILITARY PRODUCT MANUFACTURERS</b>	Page 43
<b>GARA UPDATE: IS IT TIME FOR COURTS TO RETHINK HOW THEY DETERMINE THE “MAXIMUM SEATING CAPACITY” OF AN ACCIDENT AIRCRAFT?</b>	Page 61

---



**RISE OF THE MACHINES:  
THE GROWTH OF UNMANNED AIRCRAFT AND AN  
OVERVIEW OF THE ISSUES AND LIABILITY CONCERNS  
WITH THEIR COMMERCIAL USE**

By  
Christopher S. Hickey

INTRODUCTION

Unmanned aircraft have been with us throughout the history of aviation. Early (and smart) aviation pioneers used them to test their design theories. The Wright brothers, for example, flew their first glider designs as a tethered kite in the strong winds at Kitty Hawk before climbing aboard, themselves. Today, pilotless aircraft are much more sophisticated. No longer tethered to human hands, many are not tethered to human guidance in any manner, and can provide capabilities that traditional manned aircraft cannot match: longer operating times, higher and lower operating altitudes, more precise navigation, and greater variation in shapes and sizes to reduce costs. While the development and use of the modern unmanned aircraft has been mainly used for military purposes, the innovative design opportunities these aircraft accommodate are increasingly serving a civil rather than military function. The U.S. Congress recognized this change and the inevitable push of unmanned aircraft into all areas of civil airspace by including in the Federal Aviation Administration (FAA) Modernization and Reform Act of 2012 a requirement that the FAA have a plan to fully integrate unmanned aircraft into civil airspace by September 2015.

The age of unmanned aircraft in the civilian sector will soon be here and with it a new set of challenges for the aviation industry. This article will discuss the growth of the civil unmanned aircraft market, the potential risks associated with unmanned aircraft operations in civil airspace and some of the current strategies and defenses used in manned aircraft litigation that will also likely be applicable to litigation stemming from unmanned aircraft crashes.

### TERMINOLOGY

The global community has yet to adopt consistent terminology for unmanned aircraft. Drones, robot planes, pilotless aircraft, unmanned aerial vehicles, are just a few of the terms that are used to describe these types of aircraft. The term “unmanned aircraft system” or “UAS” is probably the most accurate as it is an entire system that keeps a modern unmanned aircraft in the air. Initially coined by the FAA in 2004, this term recognizes that the aerial vehicle is but one component in a larger machine that includes control and monitoring stations, data and voice communication relays and, yes, even a human operator. It is this integrated system that sets today’s unmanned aircraft apart from the tethered and radio-controlled aircraft of the past. However, for the purposes of this article, the term “unmanned aerial vehicle” or “UAV” will be primarily used since it is the aerial vehicle that is the focus of much of this article. The phrase “unmanned aircraft system” will be also be used when the article is referring to the entire system.

### THE HISTORY AND GROWTH OF THE UAV

The U.S. Army first experimented with unmanned aircraft in 1917 with a flying bomb known as the *Kettering Bug*. Fairly sophisticated for its day, the *Bug* was guided to its target with a gyroscope. An onboard mechanical system counted the number of propeller revolutions and when it reached the desired number a cam would fall, shutting off the engine and releasing the bolts keeping the wings attached. The fuselage (bomb) would then fall on a ballistic trajectory toward the target. With a 30% success rate during tests, the *Kettering Bug* was determined to be too unreliable to send over the heads of allied troops toward a target and was never used.

During World War II, both the U.S. and British governments experimented with radio-controlled aircraft as flying bombs. In one such experiment (“Operation Aphrodite”), the U.S. used radio-controlled B-17 bombers as guided munitions with,

again, very little success and notably costing the life of Joseph P. Kennedy, the future President Kennedy's older brother, during the testing phase in 1944. While not a promising start, the Cold War would sprout renewed interest and in 1960 the U.S. began a concerted effort to develop a reliable unmanned aircraft system with a highly classified program known by the code name "Red Wagon."

The Red Wagon program was a product of Cold War spy games. By the late 1950s, the U.S.'s most reliable reconnaissance spy plane was the U-2. However, that aircraft's limitations caused both military and political leaders angst over the potential for a shoot down and capture of an American pilot by the Soviets. Those fears were realized when Gary Powers was shot down over Soviet airspace on May 1, 1960, captured and put on trial. Within three months of the downing of Power's U-2, the Red Wagon project was born and it produced the Ryan Aeronautical (now Northrop Grumman) *Firebee* and *Lightning Bug* unmanned aerial reconnaissance aircraft. These aircraft were pre-programmed to fly a certain distance, in one direction and altitude. Although it was a successful reconnaissance program and used extensively during the Vietnam War, unmanned aircraft development languished once the Vietnam War ended with their use limited to being mainly target drones.

It was not until the early 1990s, with the maturing and miniaturization of applicable technologies, that the true potential of UAVs became obvious. General Atomics' *Predator*, the first of the modern UAVs and first true unmanned aircraft system, was developed during this time period and deployed in the Balkans in 1995 and then to Iraq in 1996. Used sparingly throughout the 1990s, the *Predator's* utilization increased dramatically in the post 9/11 world and with great success. The result has been astronomical growth in the development and use of UAVs, particularly since 2005. The unmanned aircraft system now utilizes all classes of aircraft platforms including airplanes, rotorcraft and airships and they range in size from the diminutive AeroVironment *Wasp* that

utilizes a small 16 inch aerial vehicle launched with a slingshot, to Northrop Grumman's *Global Hawk* with a length of 47 feet and wingspan of 130 feet (larger than a Boeing 737). Due to this growth in UAVs, manned aircraft have decreased from 95% of all Department of Defense (DoD) aircraft in 2005 to just 59% today.<sup>1</sup>

This growth in UAV operations has not been limited to the DoD. The number of UAV flights allowed by the FAA in civilian airspace tripled from 2007 to 2009,<sup>2</sup> and the civilian UAV market is projected to increase by 700%, from \$363.7 million to \$2.8 billion, by 2018.<sup>3</sup> This growth should not be surprising given that current civilian applications are broad and expanding: disaster response, border security, law enforcement, crop dusting, topographic imaging for developing land, crime prevention, weather monitoring, telecommunications platform, fish and wildlife preservation, and forestry management, just to name a few. In June 2010, at the New York Wired Disruptive Business Conference, FedEx founder Fred Smith stated that he wants to start using UAVs as air cargo freighters as soon as possible and urged UAV manufactures to start planning larger vehicles.

This growth is also due in part to the FAA's gradual opening of the skies to UAV flights by private entities. In July 2005, the FAA issued the first UAV special airworthiness certificate in the experimental category to General Atomics *Altair* UAV for research and development, market survey, and crew training operations. The certification came with a number of flight restrictions but was nonetheless a watershed event. Since then, 77

---

<sup>1</sup> Jeremiah Gertler, Cong. Research Serv., R42136, *U.S. Unmanned Aerial Systems*, Congressional Research Service 9 (Jan, 3, 2012), available at <http://www.fas.org/sgp/crs/natsec/R42136.pdf>.

<sup>2</sup> J. Randolph Babbitt, Administrator, Fed. Aviation Admin, *Remarks to AIA: Unmanned Aircraft Systems: Safety Must Come First* (Nov. 18, 2009), available at [http://www.faa.gov/news/speeches/news\\_story.cfm?newsId=10964](http://www.faa.gov/news/speeches/news_story.cfm?newsId=10964)

<sup>3</sup> WinterGreen Research, Inc., *Commercial Unmanned Aerial Systems (UAS): Market Shares, Strategies and Forecasts, Worldwide, 2012-2018* (2012).

additional experimental certificates have been issued to 17 different unmanned aircraft types.

Although commercial UAV flights are still not allowed in U.S. airspace, the continued growth of this industry appears certain. However, the path to the first commercial UAV flight does have a few obstacles.

#### POTENTIAL UAV SAFETY ISSUES AND CONCERNS AS COMPARED TO TRADITIONAL AVIATION

If the anticipated growth of UAV use comes to fruition, then the aviation industry can expect some number of accidents and claims each year. Data to date (primarily from the military) shows that UAVs have had a significantly higher accident rate than manned aviation. U.S. Air Force data from as recently as 2005 shows the *Global Hawk* with an accident rate roughly 10 times that of manned aircraft. It is because of such figures that many in the aviation community have expressed concerns about UAVs operating routinely in civil airspace.<sup>4</sup> Such figures, however, need to be tempered by the fact that UAVs have been to a great extent operating in a combat environment in an area of the world (southwest Asia) whose environment has been the bane of manned aircraft, as well. In addition, the larger UAVs such as *Global Hawk* and *Predator* actually flew missions while still under development, entering service well prior to their anticipated operational readiness date. In fact, UAVs are performing at about the same mishap rate as other aircraft at this stage of their development and they are improving.<sup>5</sup> The military's 2009 data shows the *Predator*

---

<sup>4</sup> Doyle, J., *GA Group Worried About Increasing UAV Use*, Aviation Daily, 364:61 (2006); *Fasten your seatbelts, this could get scary*, New Scientist Magazine (13 December 2003).

<sup>5</sup> Def. Sci. Bd. Dep't of Def., *Defense Science Board Study on Unmanned Aerial Vehicles and Uninhabited Combat Aerial Vehicles*, 17 (February 2004), available at <http://www.fas.org/irp/agency/dod/dsb/uav.pdf>.

has already reach a level of safety comparable to general aviation.<sup>6</sup> With time and sufficient resources, the UAV can achieve the same level of reliability as manned aircraft and perhaps even surpass the safety of their manned counterparts.

Whatever the level of reliability that is eventually obtained in commercial unmanned aircraft operations, it is still certain that accidents will occur. While the types of accidents UAVs experience will be the same as those of manned aircraft (i.e.: mid-air collisions, controlled flights into terrain, crashes due to mechanical failure, hard landings, collisions with ground vehicles, etc.), there are some safety issues unique to unmanned aviation. Full integration into civil airspace will require the UAV community to overcome these obstacles and thereby limit the liability exposure to UAV manufacturers and operators, and allow the utilization of commercial UAVs to reach their full potential.

#### **A. Autonomous Control Issues/Collision Avoidance**

Collision avoidance has emerged as one of the key issues for UAV access to civil airspace. This issue includes two interrelated concerns: (1) the level of UAV autonomy and (2) the ability of the UAV to detect and avoid other air traffic. All UAVs fall into one of three basic families, categorized according to their level of autonomy: (1) manually piloted; (2) semi-autonomous; and (3) autonomous. Manually piloted UAVs require constant input from a ground-based remote operator. Semi-autonomous flight only requires a ground-based pilot input during critical portions of the mission such as take-off, landing, and certain manoeuvres. General Atomics' *Predator*, used extensively by the U.S. Air Force in Iraq and Afghanistan, is perhaps the most familiar example of this type of system. The *Predator* must be piloted during take-off and landing but once airborne an autopilot can be engaged and the

---

<sup>6</sup> Jeremiah Gertler, Cong. Research Serv., R42136, *U.S. Unmanned Aerial Systems*, Congressional Research Service 23-24 (Jan, 3, 2012), available at <http://www.fas.org/sgp/crs/natsec/R42136.pdf>.

aircraft will follow a set of pre-programmed waypoints. Autonomous flight requires no human input in order to carry out a mission. Northrop Grumman's *Global Hawk* is an example of a UAV with autonomous capabilities although it is not often operated in that manner. Since there are areas of civil airspace that already experience high volumes of aviation related traffic and the projected increase in UAV flights might significantly exacerbate the risk of an air-to-air mishap, most governments and commentators currently propose either full manual or semi-autonomous control of UAVs while in civil airspace, particularly over populated cities and near major airports. Only Australia's CASA specifically allows full autonomous operations but only so long as the UAV's performance is monitored by a person capable of taking control of the UAV at any time.<sup>7</sup>

Collision avoidance involves more than just the level of autonomy given to the machine. In order to help prevent mid-air mishaps, manned aircraft have at least a "see and avoid" capability—pilots are required to scan the sky for traffic—and many aircraft have some type of electronic traffic deconfliction assistance such as radar or Traffic Collision Avoidance System (TCAS). Unfortunately, the optical sensors on most UAVs have a limited field of view and a scan rate that does not allow for the level of visual traffic avoidance that the human eye can provide and many UAVs flying today also do not have any type of electronic collision avoidance system. Radar typically is not appropriate for UAVs due to their limited weight and available power. TCAS has been experimented with and while it works well with high performance UAVs such as *Global Hawk*, UAVs with low-cruise speeds and maneuvering capabilities end up creating numerous nuisance alarms in manned aircraft. Further complicating matters, the small size of many UAVs reduce their radar signature and

---

<sup>7</sup> Civil Aviation Safety Authority, *Advisory Circular 101-0(0)—Unmanned Aircraft and Rockets: UAV operations, design specification, maintenance and training of human resources* (30 October 2006)

visibility, making it difficult for pilots and observers in manned aircraft to detect and avoid them.

As a result, there have been incidents of military UAVs hitting helicopters at low altitudes and near misses at high altitude between UAVs and fighter jets.<sup>8</sup> There has also been one case in Israel where a UAV entered civil airspace and came near a passenger jet.<sup>9</sup> While these incidents are very rare considering the number of flight hours unmanned aircraft have accumulated, commercial UAVs will need to either incorporate additional or wider angle cameras for situational awareness or some type of electronic traffic avoidance. There are numerous sensor and surveillance technologies (electro-optical, infrared, transponders, radio) that are appropriate for these types of aircraft. The Swedish Air Force, for example, installed a nose-mounted color camera and an infrared 360 degree camera on their French made *Sperwer* UAVs just for situational awareness. Needless to say, the results of a mid-air collision between a UAV and passenger jet could be catastrophic and liability could potentially reach many aviation companies, including the UAV operator and manufacturer, the passenger jet operator and manufacturer and the entity performing air traffic control.

## **B. Control Loss—Lost Link**

Another safety issue is a loss of control of the UAV. The unmanned aircraft system relies on external frequency data-links to communicate between a ground control station and the UAV and, like all data-links, is vulnerable to jamming and interference. Loss of the communication link can occur through a variety of situations: failure of the ground signal transmission, failure of the UAV signal transmission, failure of signal relay stations,

---

<sup>8</sup> Geoff Fein, *Air Space Deconfliction Remains an Issue for UAV Use*, Defense Daily 1 (27 October 2005).

<sup>9</sup> Arie Egozi, *Israeli Pilots Demand Stricter UAV Regulations*, Flight International 170:5044 (2006).

interferences with line-of-sight communications, interference by a third party, or breaches of secure frequencies, just to name a few. The abundance of electronic devices in a particular area and the greater distance of the UAV from its ground control station increase the potential for interference.

A lost link by itself, however, should not typically to be a major concern—though certainly not desirable. Most modern UAVs contain an automated recovery program which will fly the aircraft along a pre-determined route back to its base of operation or some other pre-determined point. In addition, the FAA has already promulgated regulations requiring UAVs operating in civil airspace to have a pre-programmed recovery plan and also that the plan be communicated to air traffic control to ensure airspace separation during the UAV's automated maneuvers. Still, manufacturers will need to ensure that communication data-links used by a UAS are robust enough to minimize the occurrence of lost links.

A related and more troubling potential problem is the threat of malicious hacking or "spoofing." In a spoofing attack, a third-party creates a false GPS signal and beams that to the UAV. If the UAV is being controlled by an autopilot, then these false signals trick the aircraft's GPS receiver (and, thus, the autopilot) into steering a new navigational course determined by the hacker/hijacker. GPS signals come from the same satellites for both military and civilian receivers but the military signals are encrypted whereas the civilian signals are transmitted without such protections so it is possible to mimic them. Both the military and civilian manufacturers have been developing spoofing countermeasures, but earlier this year researchers at the University of Texas demonstrated before the Department of Homeland Security the ability to take over control of a UAV by spoofing GPS signals. The remote pilot can end such spoofing attacks by turning off the autopilot and manually inputting directional control but by the time control is re-established, the UAV may either be out of control or at a point of imminent collision.

The damage caused by a hacking/hijacking event would certainly be the result of intentional misconduct but that will not necessarily absolve the operator and manufacturer of liability. Manufacturers and operators would certainly want to be able to demonstrate in a lawsuit that they took steps to prevent this type of attack but, as has been shown in litigation stemming from the hijackings and bombings of passenger aircraft, a judge or jury may still assign them a certain measure of culpability.

### **C. Piloting Experience and Training Issues**

There is currently an absence of any standard directive from the FAA or any other civil aviation authority, regarding UAV piloting requirements while operating in civil airspace. To date, the FAA has only promulgated piloting requirements in conjunction with the issuance of Certificate of Waiver or Authorizations (COA) for limited UAV flights in civil airspace by state and federal public entities—private entities cannot obtain a COA. The pilot qualifications are not extensive and essentially require the UAV remote pilot to pass a private pilot written test and demonstrate an understanding of the airspace in which the COA flight will be conducted.<sup>10</sup> Even the U.S. Armed Forces, by far the largest current operator of UAVs worldwide, has not established consistent guidelines. The U. S. Air Force UAVs are remotely piloted by IFR (instrument rated) pilots plucked from the manned aircraft squadrons, while the Army has no aviation rating requirements.

The relatively recent development of UAV operations is probably the primary reason for the lack of consensus regarding piloting requirements, but it also due to the vastly different operating controls from one class of UAVs to the next. While almost all regulated manned aircraft have essentially the same controls (stick-and-rudder and engine throttle) and basic instruments (altimeter, magnetic compass and the attitude, airspeed, vertical speed, turn and heading indicators), UAV

---

<sup>10</sup> FAA Memorandum, AFS-400, UAS Policy 05-01.

controls vary from hand-held, computer gaming-type controllers for small UAVs, to complete on-the-ground cockpits for UAVs such as the *Predator* and *Reaper*, to a computer with multiple video screens and a mouse for clicking instructions such as with the *Global Hawk*. Operating environments differ greatly, as well. While it may be wise to require a UAV flying from or near an airport to have an operator with significant piloting experience, it is probably unnecessary to require that level of skill from a science team using a small UAV to monitor remote wildlife.

Developing UAV piloting experience and training standards will be a chore, but a necessary one. A 2005 report that looked at over 200 UAV accidents from 1994 to 2003 concluded that 68% were due to human error.<sup>11</sup> The U.S. Air Force, operator of both the *Predator* and *Global Hawk*, estimates that 79% of its UAV accidents involve human error. While the semi-autonomous nature of most UAV flights certainly reduces the pilot's workload, there are other factors which make UAV remote piloting in some ways more difficult than traditional piloting. First, the pilot is essentially always flying by instruments due to the limited visual information provided by even the most sophisticated cameras on large UAVs. Vision is the most important of the senses for piloting as it constantly provides reference information during flight. Second, UAV missions tend to be lengthy. One of the clear advantages of UAVs over manned aircraft is the additional hours it can stay aloft but lengthy operations also challenge the endurance of the pilot. Third, as a result of mission length, there can be one or more flight crew change-overs during a single flight. Such change-overs increase the opportunity for human error. In 2006, a U.S. Customs and Border Protection *Predator* crashed because the pilot inadvertently shut off the fuel to the engine after switching to a

---

<sup>11</sup> William T. Thompson, Major Anthony P. Tvaryanas, and Stefan H. Constable, *U.S. Military Unmanned Aerial Vehicle Mishaps: Assessment of the Role of Human Factors Using Human Factors Analysis and Classification System (HFACS)*, U.S. Air Force, 311th Human Systems Wing, HSW-PE-BR-TR-2005-0001, Brooks City-Base, TX, March 2005

back-up control panel. Due to a miscommunication during a crew change-over, the back-up control panel's fuel selector was in the off position.

#### **D. Nuisance Issues**

UAV operators will also need to concern themselves with the extent to which unmanned aircraft operations interfere with property rights, namely the ability to use and quietly enjoy property. Many UAVs operate at significantly lower altitudes than manned aircraft and this could both increase air pollution and alter the noise and visual landscape of a particular area. This could lead to claims by home owners in such areas similar to the numerous noise related lawsuit brought by home owners living near airports, today.

#### **E. Privacy Issues**

The primary mission of future commercial UAV aircraft will likely be some type of surveillance. Whether it is the police conducting aerial surveillance over a city, U.S. Customs and Border Patrol guarding the border, or an oil company surveying its pipeline, UAVs are designed to fly overhead and view what lies below. This type of mission has the potential to violate an individual's "reasonable expectation of privacy." While the expectation of privacy is more commonly litigated in matters concerning the government's intrusion on an individual's privacy, individuals can also violate the right to privacy. A common situation involves home security surveillance cameras set up in such a way that the camera's field of vision captures not only the house it is designed to protect but also the neighbor's backyard or, through a window, the inside of the neighbor's house. This type of surveillance has been found to be an invasion of privacy.

In the context of aerial surveillance conducted by law enforcement aircraft, the U.S. Supreme Court has ruled the public has *no* reasonable expectation of privacy because the view from an

aircraft is available to anyone in the public flying overhead.<sup>12</sup> This general rule has its limits, however. Where the surveillance involves the use of technology, the Court has generally upheld the surveillance when: (1) the technology is commonly available; and (2) the technology does not reveal the intimate activities associated with family privacy, the home and its “curtilage”.<sup>13</sup> In other words, the Supreme Court is concerned with the use of technological devices that can reveal details of a private home that could not otherwise be known without a physical intrusion. Devices such as telescopes and binoculars are generally acceptable forms of aerial surveillance because these items are widely available to the general public and cannot penetrate the walls of a home. The Court has suggested that technology such as thermal imaging could, in certain situations, violate a person’s right to privacy.<sup>14</sup>

This issue is mainly a concern for law enforcement agencies since general surveillance with a UAV is probably an activity that only governmental law enforcement agencies will perform. However, private companies have already expressed an interest in using UAVs with advanced imaging technologies for a variety of tasks from pipeline inspection to wild life monitoring. As with the home security camera that inadvertently captures activities within a neighbor’s home, so too might a commercial UAV with advanced imaging technology.

#### THE CURRENT REGULATORY ENVIRONMENT

The potential safety issues discussed above should be addressed by Federal Aviation Regulations (FARs). The FAA uses the FAR rule-making process to define the regulatory criteria and standards that fulfill air flight safety objectives. Certain FARs

---

<sup>12</sup> *California v. Ciraolo*, 476 U.S. 207, 214 (1986); *Florida v. Riley*, 488 U.S. 445, 455 (1989).

<sup>13</sup> *Dow Chemical v. United States*, 476 U.S. 227 (1986). Curtilage refers to the area around the home in which the intimate activity associated with the home and private life are extended.

<sup>14</sup> *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

define the airworthiness standards for each category of aircraft. Another FAR specifies the aviation knowledge level and operational skills a pilot must possess. Still other FARs define the operational equipment and procedures that are mandated in order to maintain flight safety.

The first attempts to regulate UAV operations came in 1991, at the urging of the fledgling UAV industry itself. The FAA sought to resolve the UAV regulatory issues through the use of the Aviation Rulemaking Advisory Committee (ARAC) process. As a result of the ARAC direction, an industry support group comprised of the FAA, the Association for Unmanned Vehicle Systems International (AUVSI), a private organization representative of the UAV industry, and the Air Traffic Control Association was established. The industry support group was referred to as the “UAV Work Group,” and its purpose was to address the various issues regarding criteria that were needed to ensure safe operation of UAVs in civil airspace. Over the next few years, the UAV Work Group developed four draft Advisory Circulars regarding UAV design criteria, maintenance, pilot qualifications and training, and operations that were presented to the FAA for further consideration. Unfortunately, the FAA did not act on any of the UAV Work Group’s proposals. As a result, in the U.S. today, except where regulations for conventional aircraft clearly pertain, there are very few certification procedures, regulatory processes, or operating requirements specifically for UAVs. The situation is not much better around the globe. That, however, should change in 2015. In February of 2012, Congress passed the FAA Modernization and Reform Act of 2012. This statute tasks the FAA with creating a comprehensive plan to integrate UAV operations into civil air space by September 30, 2015.<sup>15</sup>

The UAV industry, itself, has also made its own efforts to self-regulate. The Association for Unmanned Vehicle Systems

---

<sup>15</sup> FAA Reauthorization And Reform Act Of 2012, H.R. REP. NO. 112-381 (2012) (Conf. Rep.).

International (AUVSI), a 2,100 member organization, released the “Unmanned Aircraft System Operations Industry Code of Conduct,” providing members of the UAV industry a set of guidelines for safe, non-intrusive operations to help accelerate public confidence in UAVs.<sup>16</sup> The three themes of the code of conduct are safety, professionalism and respect. Safety stresses the airworthiness of aircraft, the fitness of operating crews, and the safety of people and property on the ground and in the air. Professionalism stresses compliance with federal, state and local law, being responsible members of the aviation community and considering the needs of the public. Respect stresses consideration of the rights of other users of airspace, public safety concerns and the privacy of individuals.

#### SOME BASICS REGARDING FUTURE UNMANNED AIR CRASH LITIGATION

Even if all the safety risks discussed so far are diminished to a marginal level through federal regulation and/or the UAV industry’s own efforts to self-regulate, accidents of course will still occur and litigation will follow. The past century of manned aircraft litigation will provide a prolific body of law that will certainly guide future litigation stemming from UAV accidents and will help defend against claims or resolve those claims on reasonable terms. To be sure, as UAV air crash litigation develops it is bound to diverge from manned air crash litigation on some legal issues. However, there are also other legal doctrines that appear to be applicable to both. Below is a brief outline of some of the potential commonality between manned and unmanned air crash litigation and also one of the key differences.

---

<sup>16</sup> Association for Unmanned Vehicle Systems International, *Unmanned Aircraft System Operations Industry “Code of Conduct,”* available at <http://higherlogicdownload.s3.amazonaws.com/AUVSI/958c920a-7f9b-4ad2-9807-f9a4e95d1ef1/UploadedFiles/AUVSI%20UAS%20Operations%20Code%20of%20Conduct%20-%20Final.pdf>

### **A. Damages and Liability Issues**

The level of damages resulting from an UAV crash is likely to be the most significant and positive differences between manned and unmanned air crash litigation. Certainly a mid-air collision between a medium to large size UAV and a passenger jet could result in enormous damages. However, in light of the fact that UAVs have no crew nor passengers, will likely fly many commercial missions over remote or sparsely inhabited areas, and are on average smaller than their passenger carrying counterparts, it seems reasonable to anticipate that most accidents will result in just the destruction of the UAV with little or no collateral damage on the ground. While the owner and/or operator of the destroyed UAV may wish to seek compensation from the manufacturer, properly drafted purchase contracts between the parties that contain liability limitation, dispute resolution and choice of law provisions should forestall litigation in most jurisdictions on the basis of the economic loss rule defense which bars recovery in tort if there is no damage to person or other property, only financial loss (i.e.: only the UAV, itself, is damaged).<sup>17</sup>

UAV cases involving injury to persons or damage to property other than the UAV, will not be as easily resolved. Individuals that have suffered an injury or loss due to a crashing UAV will likely pursue negligence and strict products liability causes of action against one or more the following class of defendants: manufacturers and component part suppliers, operators, maintenance contractors, and various government agencies such as air traffic control. That is the formula generally seen in manned aircraft litigation and it seems likely to continue with UAV crash litigation.

---

<sup>17</sup> This defense would not be available in all jurisdictions. Washington, for example, adheres to the economic loss rule doctrine unless the damage is the result of a “sudden calamitous event.” Although not yet ruled upon, it seems more likely than not that a crashing UAV would be consider such an event by Washington courts.

There are also several liability-related questions long resolved as to manned aviation, which are likely to come up in early litigation concerning UAV crashes. First, are UAV operations an “ultra-hazardous activity”? Early in the 20<sup>th</sup> Century, aviation was considered an ultrahazardous activity, meaning that no matter how carefully constructed, maintained and operated, an airplane may still crash injuring persons and property on the ground. As a result, courts allowed strict liability claims against the aircraft operator for any ground damage caused by a crashing airplane. Even today, there are a few states in the U.S. that maintain the strict liability doctrine as to aircraft operations causing ground damage.

Next, is a person operating a UAV a “pilot-in-command”. Current FAA regulations state the pilot-in-command is “directly responsible for, and is the final authority as to, the operation of the aircraft.”<sup>18</sup> If a UAV remote pilot is not a pilot-in-command then there is an open question as to just what his/her responsibility is and, if they are not ultimately responsible for the safe operation of the UAV, then who is? This question will be even more pronounced when dealing with the crash of a fully autonomous UAV. The answer to this question could impact the potential liability of operators as compared to manufacturers. The more automated a machine, the more culpability for an accident may flow away from operators and onto the manufacturer. Thus, manufacturers should not rely solely on the FAA to regulate the training and experience requirements of UAV remote pilots but, rather, should take an active roll in the training of those that will operate their machines.

## **B. Pre-Trial Strategies**

It is common in current air crash litigation for defendants to attempt to remove cases from state court to federal court, and to change venue to another jurisdiction or force the plaintiff to dismiss their U.S. litigation in favor of a more appropriate foreign jurisdiction. Should litigation ensue following a UAV accident,

---

<sup>18</sup> FAR 91.3

pre-trial strategies to move a case to a more appropriate forum or venue will be just as applicable to UAV litigation as to manned air crash litigation.

Removal to federal court is generally advantageous to the defense because federal judges tend to be more receptive to legitimate grounds for summary judgment motions and are more conservative gate keepers of evidence that gets admitted at trial. Thus, defendants typically are better off in front of a federal judge.

Removal can be based on diversity of the parties and/or on the presence of a question of federal law. Diversity is available when all the plaintiffs are from different locations than all of the defendants and no defendant is from the jurisdiction where the lawsuit was filed. This basis for removal to federal court is often available in air crash litigation because the aviation industry is anything but local. Passengers, manufacturers, operators, maintenance facilities, etc. all tend to be spread out around the country and globe. This is equally true of the UAV industry and, thus, diversity will likely provide an avenue to federal court in a number of UAV lawsuits.

There should also be commonality between manned and unmanned air crash litigation on two other bases for removal: issues of federal law and the actions of a federal officer. In the manned aircraft industry, the manufacturers are subject to numerous federal regulations and a claim based on such a regulation will many times allow a case to be removed so that a federal judge can rule on the federal issue. Similarly, the aircraft airworthiness certification process involves the use of a number of the manufacturer's employees who act as both engineers for the manufacturer and as Designated Engineering Representatives (DER) or Designated Manufacturing Inspection Representatives (DMIR) for the FAA. These employees review the progress of an aircraft's manufacture, and approve the process as conforming to FAA regulations. If a plaintiff's complaint claims negligence in the certification process, this can provide a basis for removal to federal court.

As with manned aviation, UAV air crashes will occur in countries other than the U.S. and like manned air crash litigation, plaintiffs' attorneys will almost certainly attempt to litigate those cases in the U.S. rather than in any overseas jurisdiction as the likelihood of a favorable result is perceived to be greater before a U.S. judge and jury. Thus, defendants have for years relied on the legal doctrine *forum non conveniens* (an inconvenient forum) to counter such "forum shopping" on the part of plaintiffs. Pursuant to the *forum non conveniens* doctrine, judges will weigh various factors (location of the crash, witnesses' and plaintiffs' home, interest of the possible jurisdictions—to name a few) to determine which jurisdiction is the most appropriate for litigating the case. If the court determines there is an adequate alternative foreign jurisdiction, then the U.S. complaint will be dismissed and the plaintiff advised to re-file their complaint in the foreign jurisdiction.

### **C. Potential Defenses to Claims**

There also may be commonality between some of the defenses manufacturers have been able to utilize in manned aircraft crash litigation. The General Aviation Revitalization Act of 1994 (GARA), is a prime example. GARA was enacted by Congress to address the problem of excessive liability costs for general aviation aircraft manufacturers. The act denies all claims against aircraft manufacturers for damages, injury or death occurring 18-years after an aircraft's delivery if the accident aircraft is a "general aviation aircraft" at the time of the accident per the GARA's definition of that term.<sup>19</sup>

While there is nothing in the statute that specifically mentions UAVs, the statute defines "general aviation aircraft" as "any aircraft for which a type certificate or an airworthiness certificate has been issued by the Federal Aviation Administration" and which has a "maximum seating capacity of fewer than 20

---

<sup>19</sup> 49 U.S.C. § 40101 (2004).

passengers.” All UAVs have zero passenger capacity, and since July 2005 there have been 78 special airworthiness certificates in the experimental category issued by the FAA for UAVs. It is currently unclear if the FAA will one day require all classes of UAVs to obtain a type and airworthiness certificate, but it is difficult to imagine the FAA one day approving integration of UAV flights into civil controlled airspace without first requiring UAVs to adhere to similar airworthiness standards as the manned aircraft with whom they will be sharing airspace. Thus, unless the courts or Congress carve out an exception for UAVs, GARA appears to be a viable defense for the UAV industry.

Another potential legal defense is the government contractor defense. In *Boyle v. United Technologies*, the Supreme Court recognized this defense, holding:

liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.<sup>20</sup>

Essentially, if the design at issue in a lawsuit was the result of a government requirement, then the manufacture should not be held liable for a design defect. Generally, the greater involvement the government has in the design of a product, the more likely the government contractor defense will apply.<sup>21</sup> Even if the product later passes from the government’s hands to a private party, the

---

<sup>20</sup> *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).

<sup>21</sup> See *Lewis v. Babcock Indus., Inc.*, 985 F.2d 83 (CA2 NY 1993); *Zinck v. Itt Corp.*, 690 F. Supp. 1331 (SD NY 1988); *Maguire v. Hughes Aircraft Corp.* 912 F.2d 67 (CA3 NJ 1990).

government contractor defense usually continues.<sup>22</sup> Modern UAVs were initially designed to meet a governmental function—support of military operations. Thus, there are aspects of many UAV designs that were at the urging of the U.S. government and those designs should provide a good basis for filing a motion for summary judgment on the basis of this defense.

The potential difficulty the UAV industry may have in utilizing this defense is that UAV technology, being relatively new, incorporates existing “off-the-shelf” technology that was not originally developed for a military application. Products developed for the private sector, rather than the military, are not protected by the government contractor defense even if they are being utilized on a current military aircraft.<sup>23</sup> In addition, future commercial UAVs will likely be designed and built specifically for the function they are expected to perform. UAVs are smaller and less robust than manned aircraft which must protect the crew and passenger during flight and limit injury as much as possible in the event of an accident. Thus, a UAV platform can be more readily re-designed and built for a particular application. Nonetheless, it would be a good practice for UAV manufacturers to maintain a complete history of those UAV designs that are a product of the government’s requirements and inputs during development of a particular UAV. With that information always at the ready, UAV manufacturing defendants will be able to determine if a future plaintiff’s complaint is alleging a defect in a design that is the product of governmental discretion and thus grounds for raising the government contractor defense.

It should also be noted that although *Boyle* concerns military equipment, it is still unclear if the scope of this defense is limited to just military products. Thus, UAV manufacturers who

---

<sup>22</sup> *Miller v. United Technologies Corp.*, 223 Conn. 732 (1995).

<sup>23</sup> *In re Hawaii Federal Asbestos Cases*, 960 F.2d 806 (CA9 Hawaii, 1992). Asbestos was not specifically produced for the military so manufacturer had already calculated cost of tort expenses in developing product.

designed their UAVs per the specifications of the U.S. Customs and Border Protection, Department of Homeland Security, U.S. Forest Service, etc. should also have this defense in mind and take steps to preserve the history of designs that stem from governmental input.

The above, of course, is just a sampling of the various legal issues that may one day impact the successful defense against a UAV air crash claim. Suffice to say, though, the law of manned aircraft litigation will almost certainly provide the outline courts will follow when working through UAV air crash litigation issues. The UAV industry needs to understand that law if it is to properly plan and prepare for the defense of their products.

#### CONCLUSION

UAVs are becoming a significant member of the aviation industry. Having demonstrated major successes on the battlefield, their future success and growth will be determined, in part, by how well they are integrated into civilian applications. While there are still obstacles to overcome, both the UAV industry and the FAA are working to overcome those obstacles. The result will be future skies filled with unmanned aircraft performing a variety of functions from crime prevention surveillance over major metropolises to surveys of oil pipelines and power lines in the most remote, inaccessible corners of the Earth. The UAV industry appears poised to introduce commercial UAVs into civil air space. Those that support the aviation industry should be developing an understanding of these new machines in order to also be poised to adequately protect UAV manufacturers and operators against future claims.

**INTERNATIONAL JURISDICTIONAL CONFLICTS IN  
MONTREAL CONVENTION CASES: WHAT ARE THE  
CONSEQUENCES FOR THE DOCTRINE OF *FORUM NON  
CONVENIENS*?**

By  
Stephen Tucker  
Maud Elezam

**INTRODUCTION**

On September 26, 2007, the United States District Court for the Southern District of Florida became the first court to decide on the applicability of the doctrine of *forum non conveniens* under the Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, (Montreal Convention) in *In re West Caribbean Airways (West Caribbean)*.<sup>1</sup> In this case, the suit arose out of the crash of an airplane operated by West Caribbean Airways in August 2006 in Venezuela, en route from Panama to Martinique.<sup>2</sup> The 160 passengers killed in the crash were residents of Martinique and all but one were French citizens.<sup>3</sup> None of the deceased were United States citizens or residents, and defendant West Caribbean is a Colombian corporation.

Pursuant to the Montreal Convention, plaintiffs could have filed the action in Martinique but instead decided to file it in the Southern District of Florida. The defendants filed a motion to dismiss on *forum non conveniens* grounds and the U.S. district court held that the doctrine of *forum non conveniens* was applicable under the Montreal Convention and that Martinique was a competent forum where plaintiffs could commence their action without inconvenience or prejudice. In fact, defendants had

---

<sup>1</sup> *In re West Caribbean Airways*, 619 F.Supp.2d 1299 (S.D. Fla. 2007).

<sup>2</sup> Martinique is an overseas department of France in the Caribbean.

<sup>3</sup> One passenger was a citizen of Italy.

conceded liability, waived jurisdictional objections, waived statute of limitations objections and waived damage caps under the Convention in the Martinique court. Additionally, the district court determined that the private interest factors favored Martinique since only damages were at issue and all relevant evidence would be located in Martinique and France, as all the passengers were residents of Martinique. Finally, the court held that the public interest factors weighed also in favor of Martinique because of Martinique's superior interest in redressing injuries to its residents. Therefore, Judge Ungaro reasoned, Martinique was clearly the more convenient forum with the far closer connection to the cases.

However, plaintiffs fought to have their case litigated in the United States, presumably because of the generous standards for compensation here. Plaintiffs decided to appeal to the U.S. Court of Appeals for the Eleventh Circuit. The Court of Appeals, however, agreed with the district court and upheld the *forum non conveniens* dismissal order.<sup>4</sup> Plaintiffs did not stop there. They engaged in a four year jurisdictional battle: moving for a rehearing, petitioning the United States Supreme Court for a Writ of Certiorari twice, moving to vacate the *forum non conveniens* order pursuant to rule 60(b), trying to intervene in another case, all of which was denied. Additionally, plaintiffs were simultaneously actively fighting jurisdiction in French courts, seeking to persuade the French courts in Martinique not to accept jurisdiction. However, the lower court, the Tribunal de Grande Instance de Fort de France, Martinique, ruled in August 2009 that it had jurisdiction and that it would proceed forward to trial. Plaintiffs continued to press on with their jurisdictional challenge instead of pursuing their damages award and appealed to the French appellate court. When the Cour d'Appel de Fort de France affirmed the lower court's decision in June 2010, plaintiffs requested review by the Cour de Cassation, the French highest court.

---

<sup>4</sup> *Pierre Louis v. Newvac*, 584 F.3d 1052 (11<sup>th</sup> Cir. 2009).

On December 7, 2011, most unexpectedly, the Cour de Cassation reversed the appellate court's decision reasoning that according to their interpretation of the Montreal Convention, the *forum non conveniens* doctrine could not be applicable under the Convention since plaintiffs have an inviolate right to choose one of the five fora offered by the Convention, stripping away the other fora's jurisdiction. Therefore the court held that the French forum in Martinique was not available to litigate the case.<sup>5</sup> Finally victorious, the plaintiffs came back to the U.S. District Court for the Southern District of Florida, arguing that the *forum non conveniens* dismissal had to be vacated since the recent French decision rendered the Martinique forum unavailable and that therefore plaintiffs had nowhere to have their case heard on the merits and to obtain compensation. On May 16, 2012, District Judge Ursula Ungaro refused to reinstate the case in the district of Florida, leaving the plaintiffs with no forum to have their wrongful death claims heard.<sup>6</sup>

The recent *West Caribbean* decision raises important issues for the future of the coexistence of the doctrine of *forum non conveniens* and the Montreal Convention. In fact, since the French and American courts disagreed on treaty interpretation, and because one of the goals of the treaty is to achieve uniformity and harmony, it is interesting to consider the future of the Convention under such circumstances. Additionally, the French interpretation of the jurisdictional provision, if followed by other countries and in particular by the European Union as a whole, could seriously challenge the viability of the doctrine of *forum non conveniens* in aviation cases. Finally, it is also important to determine whether the doctrine of *forum non conveniens* as applied by U.S. courts is

---

<sup>5</sup> Cour de Cassation [Cass.] [Supreme court for judicial matters] 1e civ. Dec. 7, 2011, Bull. civ. I. No. 10-300919 (Fr.)

<sup>6</sup> *In re West Caribbean Airways*, No. 06-22748-CIV, 2012 WL 1884684 (S.D. Fla. May 16, 2012).

beneficial to the international private legal order and in particular in aviation cases.

**LEGAL PRECEDENTS: THE APPLICABILITY OF *FORUM NON  
CONVENIENS* UNDER THE WARSAW CONVENTION**

The Warsaw Convention of 1929 was the Montreal Convention's predecessor treaty regulating liability for international carriage by air.<sup>7</sup> The Warsaw Convention and the Montreal Convention have very similar jurisdictional clauses. Where claims arise out of international carriage, Article 28 of the Warsaw Convention and Article 33 of the Montreal Convention set forth the fora in which the litigation may be brought. According to both conventions, "an action for damages must be brought, **at the option of the plaintiff**" in (1) the domicile of the carrier; (2) the carrier's principal place of business; (3) the place of business where the contract of carriage was made; or (4) the place of destination.<sup>8</sup> Article 33(2) of the Montreal Convention adds a fifth jurisdiction in the permanent residence of the injured passenger. Of particular relevance to the applicability of the doctrine of *forum non conveniens* to the conventions is the phrase "at the option of the plaintiff" and the conventions' statement that "questions of procedure shall be governed by the law of the court seised of the case."<sup>9</sup> In fact, one interpretation could be that *forum non conveniens*, being a question of procedure in the United States, could be applicable in Warsaw or Montreal cases and thus courts could decide to dismiss the case because a plaintiff's choice of forum is not convenient. Another interpretation would be that article 28(2) of the Warsaw Convention and article 33(4) of the

---

<sup>7</sup> Convention for the Unification of Certain Rules Relating to International Carriage by Air, concluded at Warsaw, Poland, October 12, 1929 (Warsaw Convention).

<sup>8</sup> Warsaw Convention, Art. 28(1); Montreal Convention, Art. 33(1) (emphasis added).

<sup>9</sup> Warsaw Convention, Art. 28(2); Montreal Convention, Art. 33(4).

Montreal Convention do not include the doctrine of *forum non conveniens*, as the choice of the plaintiff is meant to be supreme.

### **A. Application of *Forum Non Conveniens* to Warsaw Cases**

The first appellate court decision to address the issue of the application of *forum non conveniens* to the Warsaw Convention was *In re Air Crash Disaster Near New Orleans (New Orleans)*.<sup>10</sup> The litigation arose out of Pan Am Flight 759, which crashed shortly after takeoff in Kenner, Louisiana, killing all 154 passengers. Plaintiffs, personal representatives of Uruguayan deceased passengers, commenced litigation in the Eastern District of Louisiana. Plaintiffs argued that the action could not be dismissed on *forum non conveniens* grounds because the phrase “at the option of the plaintiff” of Article 28(1) of the Warsaw Convention granted them absolute power to decide in which of the four available fora their lawsuit would be litigated. However, the U.S. Court of Appeals for the Fifth Circuit disagreed, as they stated: “we are of the opinion that article 28(1) offers an injured passenger or his representative four forums in which a suit for damages may be brought. The party initiating the action enjoys the prerogative of choosing between these possible national forums but that selection is not inviolate. That choice is then subject to the procedural requirements and devices that are part of that forum’s internal laws.”<sup>11</sup> The court also added that the plaintiff’s interpretation of article 28(1) cuts against the Convention’s underlying purpose of ensuring that a dispute arising out of an air travel accident is litigated in a forum that has an actual interest in the matter.<sup>12</sup>

Similarly, in 1999, over ten years after *New Orleans*, the District Court for the Southern District of New York in *In re Air Crash off Long Island New York (Long Island)* found that

---

<sup>10</sup> *In re Air Crash Disaster Near New Orleans, La., on July 9, 1982*, 821 F.2d 1147 (5<sup>th</sup> Cir. 1987).

<sup>11</sup> *New Orleans*, 821 F.2d at 1161.

<sup>12</sup> *Id.* at 1162.

Article 28(1) of the Warsaw Convention did not preclude application of the *forum non conveniens* doctrine.<sup>13</sup> The case arose out of TWA Flight 800 from New York to Paris, which crashed shortly after take-off. Defendants moved to dismiss all claims of French citizens and residents on *forum non conveniens* grounds. The court held that article 28(2) of the Warsaw Convention, stating that “questions of procedure shall be governed by the law of the court seised of the case”, should be understood to allow the application of the doctrine of *forum non conveniens* in common law countries in which it was familiar, without forcing it upon civil law countries where it was not.<sup>14</sup>

Thus, courts in the U.S. seemed to believe that the doctrine of *forum non conveniens* was still available under the Warsaw Convention and that the phrase “at the option of the plaintiff” did not prevent the application of the U.S. federal common law for questions of procedure. In fact, in many Warsaw cases, the U.S. courts applied the doctrine of *forum non conveniens* without even determining whether the doctrine applied under Warsaw.<sup>15</sup> However, in 2002, the U.S. Court of Appeals for the Ninth Circuit in *Hosaka v. United Airlines Inc. (Hosaka)*<sup>16</sup> reversed this trend and brought back the debate over the applicability of the *forum non conveniens* doctrine to the Warsaw and Montreal Conventions.

---

<sup>13</sup> *In re Air Crash off Long Island New York, on July 17, 1996*, 65 F.Supp. 2d 207 (S.D.N.Y. 1999).

<sup>14</sup> *In re Air Crash off Long Island New York*, 65 F.Supp. 2d at 214-215.

<sup>15</sup> See *McLoughlin v. Commercial Airways (Pty) Ltd.*, 602 F.Supp. 29 (E.D.N.Y. 1985); *Harpalani v. Air India, Inc.*, 622 F.Supp. 69 (N.D. Ill. 1985); *Robert Bosvh Corp. v. Air France*, 712 F.Supp 688 (N.D. Ill. 1989). *Lu v. Air China Intern. Corp.*, No. CV 92-1254, 1992 WL 453646 (E.D.N.Y. Dec. 16, 1992); *Thach v. China Airlines, Ltd.*, No. 95 Civ. 8468, 1997 WL 282254 (S.D.N.Y. May 27, 1997).

<sup>16</sup> *Hosaka v. United Airlines Inc.*, 305 F.3d 989 (9<sup>th</sup> Cir. 2002).

**B. *Hosaka's* Draw Back from the Application of *Forum Non Conveniens* under Warsaw**

*Hosaka* was the first appellate court case to find that Article 28(1) of the Warsaw Convention overrides the discretionary power of the federal courts to dismiss an action for *forum non conveniens*. In so holding, the Ninth Circuit Court of Appeals rejected the decision of the Fifth Circuit Court of Appeals in *New Orleans*. In *Hosaka*, the plaintiffs were Japanese citizens who sustained injuries during a United Airlines flight from Tokyo to Hawaii when the aircraft encountered severe turbulences over the Pacific Ocean.

The court in *Hosaka* found that the text of Article 28(1) and (2) was ambiguous and therefore resorted to other treaty interpretation tools in order to determine whether the doctrine of *forum non conveniens* was applicable under the Warsaw Convention. In fact, the Ninth Circuit looked at the treaty's purposes, its drafting history and the parties' post ratification understanding. The court held that the purpose of the Convention was to achieve uniformity of rules governing claims arising from international air transportation and that the use of *forum non conveniens* would undermine this purpose. In fact, the court in *Hosaka* relied on the decision of the British Court of Appeals in *Milor v. British Airways*, in which the court held that parties to the treaty intended to create a "self-contained code on jurisdiction" that "harmonizes different national views on jurisdiction."<sup>17</sup> Moreover, the court in *Hosaka* held that the Convention was drafted by civil law jurists, to whom *forum non conveniens* was an alien concept and therefore concluded that most drafters did not intend to have an interpretation of the Convention allowing for *forum non conveniens*. Finally, the court emphasized that when the Warsaw Convention was signed in 1929 the doctrine of *forum non conveniens* was not the "valuable tool that it might be considered

---

<sup>17</sup> *Milor v. British Airways, Plc.*, [1996] Q.B. 702, 707 (Eng.C.A.).

today”<sup>18</sup> and thus that the historical context justified an interpretation of the Warsaw Convention that would override the doctrine of *forum non conveniens*.

Thus, the opinion in *Hosaka* was an important drawback regarding the application of *forum non conveniens* in aviation cases that could have significantly changed aviation litigation. However, when *Hosaka* was decided, the Montreal Convention had been signed but not yet ratified, and the court explicitly stated that it offered “no opinion as to whether the text and drafting history of the Montreal Convention demonstrate whether *forum non conveniens* would be available in an action brought under that as-yet-unratified treaty”<sup>19</sup>, therefore leaving the door open to the applicability of the doctrine for future aviation cases under the new Montreal Convention.

#### INTERNATIONAL DISAGREEMENT OVER THE APPLICATION OF *FORUM NON CONVENIENS* IN MONTREAL CONVENTION CASES

##### **A. The U.S. Interpretation of the Montreal Convention**

In the United States, *Hosaka* seems to have been a minor retreat that did not really affect the application of *forum non conveniens* to Montreal cases. In fact, since the court in *Hosaka* explicitly stated that its decision did not affect the applicability of the doctrine to Montreal cases, *Hosaka* had a limited precedential value to the following aviation cases arising under Montreal. The United States District Court for the Southern District of Florida became the first court to address the availability of *forum non conveniens* under the Montreal Convention in *West Caribbean*, and ruled as a matter of first impression that the doctrine of *forum non conveniens* was applicable under Montreal.<sup>20</sup>

---

<sup>18</sup> *Hosaka v. United Airlines Inc.*, 305 F.3d at 1002.

<sup>19</sup> *Hosaka v. United Airlines Inc.*, 305 F.3d at 1001, n.17.

<sup>20</sup> *In re West Caribbean Airways*, 619 F.Supp.2d 1299 (S.D. Fla. 2007).

### 1. The *West Caribbean* decision

The court in *West Caribbean* mainly disagreed with the reasoning in *Hosaka* in reaching its decision. In fact, the *West Caribbean* court found that article 33(4) is unambiguous since it expressly provides that questions of procedure shall be governed by the law of the forum and because the doctrine of *forum non conveniens* was firmly entrenched in the procedural laws of the United States by the time the Montreal Convention was drafted, the text by implication clearly permits the application of the doctrine in domestic litigation. Additionally, according to the court this interpretation is in accordance with the rules used to construe treaty provisions and in particular with the principle endorsed by the Supreme Court that “absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.”<sup>21</sup>

The court in *West Caribbean* also found that the historical context of the Montreal Convention justified the availability of the doctrine of *forum non conveniens* under the Convention. In fact, unlike in 1929 when the Warsaw Convention was signed, when the Montreal Convention was drafted in 1999, the federal courts in the United States had used the doctrine of *forum non conveniens* routinely since 1947 including in Warsaw Convention cases.<sup>22</sup> Therefore, the different historical context in Warsaw and Montreal allowed the court in *West Caribbean* to reconcile the decision in *Hosaka* with its decision to hold that *forum non conveniens* is applicable under Montreal even though both Warsaw and Montreal have almost similar jurisdictional provisions.

The *West Caribbean* court then also found that the purposes of the Montreal Convention are compatible with the application of the doctrine of *forum non conveniens*. In fact, the court found that the main purpose of Montreal was to modernize

---

<sup>21</sup> *Breard v. Greene*, 523 U.S. 371, 375 (1998).

<sup>22</sup> *In re West Caribbean Airways*, 619 F.Supp.2d at 1312.

and consolidate the Warsaw Convention and that, because the U.S. courts and some other foreign courts<sup>23</sup> had consistently applied the doctrine in Warsaw aviation cases, the utilization of the doctrine comported with modern practice and was consistent with the goal of modernization. Additionally, the court determined that the use of *forum non conveniens* was not incompatible with the goals of uniformity and predictability since the U.S. courts had applied the doctrine on a regular basis in aviation cases and thus, preserving the doctrine would maintain the status quo in international aviation litigation and increase predictability. Moreover, the court in *West Caribbean* argued that since the Convention's cardinal goal is uniformity, *forum non conveniens* did not threaten the uniform implementation of the Montreal Convention's liability regime, as if it did, the drafters of the Convention would have explicitly excluded it.

Furthermore, the court in *West Caribbean* found that the drafting history of the Montreal Convention also supported their conclusion that *forum non conveniens* is applicable under the Convention. The court stated: "in the end, the consensus among the delegates was to omit any language respecting the applicability of *forum non conveniens* to avoid imposing the doctrine on states that do not employ it and distorting its application in states where it is commonly employed. In other words, the delegates determined to maintain the status quo, which is that signatory countries employing the doctrine would continue to do so pursuant to 33(4) "questions of procedure shall be governed by the law of the court seised of the case", and signatory countries that do not employ the doctrine would not be required to adjust their legal system to accommodate the doctrine in cases arising under the Convention."<sup>24</sup>

---

<sup>23</sup> The court cites to a decision by the Supreme Court of Singapore in support of its argument, *Brinkerhoff Maritime Drilling Corp. v. P.T. Airfast Servs. Indonesia* [1992] SGCA 45.

<sup>24</sup> *In re West Caribbean Airways*, 619 F.Supp.2d at 1325-26.

Finally, the court in *West Caribbean* relied on a Statement of Interest filed in this case by the U.S. government since “the meaning attributed to treaty provisions by the government agencies charged with their negotiation and enforcement is entitled to great weight.”<sup>25</sup> The court found that the Statement of Interest makes it clear that the U.S. did not relinquish the ability of its courts to apply *forum non conveniens* in Montreal Convention cases because it and its component agencies are often named in suits arising under the Convention and because the United States has a significant interest in avoiding forum shopping and congestion in its courts when a foreign forum provides a more just, convenient and suitable alternative.<sup>26</sup> Thus the U.S. interpretation of Montreal Convention allows for the application of the doctrine of *forum non conveniens*.

## 2. *West Caribbean* as precedent

The *West Caribbean* decision, which was upheld by the Eleventh Circuit Court of Appeals<sup>27</sup>, was followed by two other district court cases. In *In re Crash over the Mid Atlantic*, an Air France flight left Brazil for France and crashed over the Atlantic.<sup>28</sup> Some plaintiffs filed a lawsuit in the U.S. and defendants filed a motion to dismiss on *forum non conveniens* grounds, asserting that France was an adequate forum. The court reasoned that the Montreal Convention incorporates the procedural law of the site of the lawsuit but is silent about whether the doctrine of *forum non conveniens* is available. However, since by the time the Convention was ratified the doctrine of *forum non conveniens* was well established and had even been used in the United States to dismiss Warsaw Convention actions, the court held that the Montreal Convention does not override the discretionary power of the U.S.

---

<sup>25</sup> *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982).

<sup>26</sup> *In re West Caribbean Airways*, 619 F.Supp.2d at 1328.

<sup>27</sup> *Pierre Louis v. Newvac*, 584 F.3d at 1052.

<sup>28</sup> *In re Crash over the Mid Atlantic on June 1, 2009*, 760 F.Supp.2d 832 (N.D. Cal. 2010).

courts to dismiss an action for *forum non conveniens*. Similarly, in *Khan v. Delta Airlines*, where a Canadian plaintiff filed a lawsuit in the U.S. for injuries suffered at the Toronto airport, the U.S. District Court for the Eastern District of New York held that the doctrine of *forum non conveniens* was applicable under the Montreal Convention.<sup>29</sup> In fact the court emphasized that article 33(4) of the Montreal Convention is not ambiguous since it states that questions of procedure are governed by the law of the forum and thus the doctrine of *forum non conveniens*, being procedural rather than substantive, is included in Article 33(4).

Additionally, in at least two cases since *West Caribbean*, federal courts have applied the doctrine of *forum non conveniens* in Montreal cases without questioning its applicability under the convention,<sup>30</sup> therefore demonstrating that in the U.S. the courts interpret the Montreal Convention in a way that allows for the doctrine of *forum non conveniens* to be applied. However, the recent decision of the French Cour de Cassation in the *West Caribbean* case directly challenges the U.S. interpretation of Montreal and the applicability of *forum non conveniens* in Montreal cases.

### **B. The French Cour De Cassation's Challenge to the Application of *Forum Non Conveniens* in Montreal Cases**

On December 7, 2011, the Cour de Cassation, France's highest court, held that the plaintiffs in *West Caribbean* have an actual and legitimate interest to act in order to have their right of optional jurisdiction under the Montreal Convention recognized. In fact, the court's interpretation of Article 33 of the Montreal Convention differs widely from the U.S. courts' interpretation. According to the Cour de Cassation, the phrase "at the option of

---

<sup>29</sup> *Khan v. Delta Airlines, Inc.*, No. 10 Civ.2080 (BMC), 2010 WL 3210717 (E.D.N.Y. Aug. 12, 2010).

<sup>30</sup> See *Delta Air Lines, Inc. v. Chimet, S.p.A.* 619 F.3d 288 (3d Cir. 2010); *Seales v. Panamanian Aviation Co.*, 356 Fed.Appx. 461 (2d Cir. 2009).

the plaintiff” in Article 33(1) means that a plaintiff’s choice of a forum is supreme and automatically strips the other four possible fora of jurisdiction. Additionally, the French court does not believe that Article 33(4) allows for the use of *forum non conveniens* since, according to the French court, Article 33(4) cannot include internal rules of procedure that can override the choice of the plaintiff. Moreover, the French court held that in order to satisfy the purpose of predictability, security and uniformity of the Montreal Convention, the plaintiff must be able to decide in which forum it would like to have its case litigated, without having to be subjected to an internal procedural rule contradicting its choice.

Therefore, the French court’s interpretation can become an issue in the application of the Montreal Convention in the future. In fact, if the French courts believe that the plaintiff’s choice is supreme, France will deny jurisdiction in cases where the plaintiffs did not choose France as a forum. Thus, such a denial of jurisdiction will force the forum that the plaintiff chose to accept the case even though that forum might not be convenient and will therefore result in the abandonment of the use of *forum non conveniens* in Montreal cases. Considering the value of *forum non conveniens* as a procedural tool in the U.S. and the U.S. courts’ decisions since *West Caribbean* to maintain the doctrine in Montreal cases, one can wonder whether the Montreal Convention as a treaty is still viable considering the significant international disagreement. Additionally, the French Cour de Cassation also held that since the Montreal Convention is part of the European law and should be applied uniformly on the European Union territory, the European Court of Justice should define the uniform criteria and interpretation of the Montreal Convention regarding jurisdiction. Thus, if the European Court of Justice decides to agree with the French interpretation, the treaty’s viability might be seriously threatened. In fact, such an international disagreement would either make the treaty unviable or would force the U.S. to let go of the *forum non conveniens* doctrine in Montreal cases.

THE CONSEQUENCES OF THE INTERNATIONAL DISAGREEMENT OVER  
THE JURISDICTIONAL PROVISIONS OF MONTREAL

**A. Consequences on the Future of the Doctrine of *Forum Non Conveniens***

As the French Cour de Cassation ruled that, according to their interpretation of the Montreal Convention, the choice of the plaintiff should be inviolate, it denied jurisdiction in France for the *West Caribbean* plaintiffs, therefore rejecting the use of the doctrine of *forum non conveniens* by U.S. courts in Montreal cases. Moreover, the French Cour de Cassation reasoned that the plaintiffs will have no problem reinstating the case in the Southern District of Florida since the French court believes that when a U.S. court dismisses a case on *forum non conveniens* grounds, it does not mean that the case is finally dismissed by the U.S. judge since the case could always be reinstated in the U.S. forum if the more convenient forum becomes unavailable. Therefore it is interesting to wonder what the consequences of the French decision are on the doctrine of *forum non conveniens*.

The finally victorious *West Caribbean* plaintiffs moved to reinstate the case in the Southern District of Florida since the French alternative forum was not available anymore. However, on May 16, 2012, Judge Ungaro denied their motion, refusing to agree with the French interpretation of Montreal and defending the doctrine of *forum non conveniens* in spite of the international attack.<sup>31</sup> The court reasoned that as far as the U.S. court is concerned it would not reinstate the case because the Martinique forum is still available. In fact, the court stated that:

Martinique is available under article 33(1) of the Montreal Convention. The court disagrees with the Cour de Cassation's conclusion that, under the Convention, Plaintiffs' choice of forum in

---

<sup>31</sup> *In re West Caribbean Airways*, No. 06-22748-CIV, 2012 WL 1884684 (S.D. Fla. May 16, 2012).

America deprives Martinique of jurisdiction. The Montreal Convention is an international treaty and therefore the U.S. courts do not have to agree with the French courts' interpretation of an international treaty. Neither court is bound by the analysis of the other. **Where a *forum non conveniens* dismissal is concerned, American courts do not blindly accept the jurisdictional rulings of laws of foreign jurisdictions that purport to render their forum unavailable.**<sup>32</sup>

Thus, the U.S. court in *West Caribbean* decided to resist the French attack on the doctrine of *forum non conveniens* even if it meant denying the plaintiffs a forum in which to have their case heard. In fact, the U.S. courts particularly dislike when foreign courts challenge their common laws. In particular, regarding the doctrine of *forum non conveniens*, U.S. courts have usually stood their ground when foreign courts tried to implement laws in order to circumvent the U.S. doctrine.

For example, the U.S. courts have usually resisted when Latin American countries have tried to enact statutory provisions that serve to inhibit a U.S. court from dismissing or transferring a case to a foreign court on *forum non conveniens* grounds. In particular, Panamanian and Venezuelan statutes are good examples of anti-*forum non conveniens* statutes. The Panamanian statute provided that suits brought in Panama as a result of foreign judgment of *forum non conveniens* preclude jurisdiction in Panama<sup>33</sup> and the Venezuelan statute provided that Venezuela was deprived of jurisdiction when the plaintiff did not consent to it.<sup>34</sup> Therefore, both these statutes prevent U.S. courts from using the

---

<sup>32</sup> *In re West Caribbean Airways*, 2012 WL 1884684, at \*15-16 (emphasis added).

<sup>33</sup> See *Scotts Co. v. Hacienda Loma Linda*, 2 So. 3d 1013, 1015 (Fla. 3d DCA 2008).

<sup>34</sup> See *Morales v. Ford Motor Co.*, 313 F. Supp.2d 672, 675 (S.D. Tex. 2004).

doctrine of *forum non conveniens* because if the plaintiff decides to sue in the U.S., mostly because he or she anticipates a higher award for damages, the Panamanian and Venezuelan home courts will automatically become unavailable as alternative fora, thus completely circumventing U.S. federal common law. Similar anti-*forum non conveniens* statutes also exist in Ecuador, Costa Rica, Guatemala, and the Philippines.<sup>35</sup> However, the U.S. courts, when faced with such foreign statutes attempting to challenge the doctrine of *forum non conveniens* have held that the alternative forum remained available and that plaintiffs may not assume that a foreign country preemption or blocking laws will be recognized in the U.S.<sup>36</sup> Thus the *West Caribbean* court's refusal to reinstate the case in the U.S. after the French Cour de Cassation's decision is in accordance with previous decisions involving *forum non conveniens*' foreign challenges, and seems to indicate that U.S. courts are willing to fight in order to defend the doctrine.

However, one can wonder if the U.S. courts will be able to resist any longer in aviation cases where the plaintiffs, such as in *West Caribbean*, are left with no forum in which they can have their claims heard. In fact, the case might be appealed to the Eleventh Circuit another time and may be ripe for a review by the U.S. Supreme Court, considering the change of circumstances caused by the French decision. Of particular worry for the future of the doctrine of *forum non conveniens* in Montreal cases, if U.S. courts maintain *forum non conveniens* whereas foreign courts deny jurisdiction in the alternative forum, is the fact that plaintiffs have no forum where to litigate their claims and to obtain compensation. This type of situation could make the Court of Appeals or the Supreme Court review either their position regarding the

---

<sup>35</sup> Allan I. Mendelsohn, *Recent Developments in the Forum Non Conveniens Doctrine*, FEDERAL LAWYER, Feb. 2005, at 47-48.

<sup>36</sup> See *Scotts Co. v. Hacienda Loma Linda*, 2 So. 3d at 1017-18; *Morales v. Ford Motor Co.*, 313 F. Supp.2d at 675.

applicability of the doctrine under Montreal<sup>37</sup> or review the U.S. position towards the treaty.

**B. The U.S. Court's Defense of the Doctrine of *Forum Non Conveniens* Benefits the International Legal Order**

Even though the future of the applicability of *forum non conveniens* under Montreal is still a little bit uncertain after the recent French decision, in particular when considering the possible review by the European Court of Justice on the European side and by the Supreme Court on the U.S. side, it is crucial to wonder whether the application of the doctrine in international aviation cases benefits the international legal order by helping the resolution of conflict of laws and jurisdiction in private international law issues.

First, the U.S. use of *forum non conveniens* in aviation cases is beneficial to the international legal order because in declining to exercise jurisdiction over cases having very little connection to the United States, the U.S. courts are exercising a very positive form of judicial restraint, which is necessary in private international matters. In fact, as one scholar puts it, “instead of deciding every case that might come before them and applying U.S. law as though it were the best law or the only one that is applicable, U.S. courts are requiring foreign plaintiffs to sue in the courts of their home countries and thus have the amount of their compensation determined by laws and standards of the victim’s own homeland.”<sup>38</sup> In fact, judicial restraint allows for courts in different countries to respect one another and to have a way to

---

<sup>37</sup> See *Leon v. Million Air, Inc.*, 251 F.3d 1305 (11<sup>th</sup> Cir. 2011), where the court held that dismissal of an action in *forum non conveniens* grounds in favor of Ecuador was affirmed notwithstanding a blocking statute that made jurisdiction in Ecuador uncertain. However the court in dictum said that the “District Court would presumably reassert jurisdiction over the case in the event that jurisdiction in the Ecuadorian courts is declined.” *Id.* at 1315.

<sup>38</sup> Allan I. Mendelsohn, *Judicial Restraint in International Law*, FEDERAL LAWYER, May 2010, at 52.

judiciously deal with conflict of laws and jurisdictional issues in complex international litigation. Thus doctrines such as *forum non conveniens* are an important modernizing tool in international law and international judicial practices.

Moreover, the doctrine of *forum non conveniens* is also beneficial to the international legal order as it allows an international case to be litigated in the forum with the closer and more important interest in the matter. In fact, the U.S. use of *forum non conveniens* is helpful in respecting a foreign court's more important interest to litigate a matter. Additionally, U.S. courts improve international judicial practices when applying *forum non conveniens* in Montreal cases, even when a foreign court that is more closely related to the case decides to reject jurisdiction. It would not make much sense for the U.S. to devote judicial resources in a matter when a foreign country chooses to turn away its own citizens' lawsuit for damages.<sup>39</sup> Thus, the U.S. courts' application of the doctrine of *forum non conveniens* in Montreal Cases results in a more efficient international legal order, where the cases are litigated by the forum having an actual interest in the matter.

Finally, the doctrine of *forum non conveniens* also contributes to a modernization and improvement of private international law as it prevent plaintiffs from playing jurisdictional games when motivated by greed. This argument is perfectly summarized by Judge Ungaro in her decision in *West Caribbean*:

Although none [of the plaintiffs] are United States citizens, what they hope to gain apparently is a more financially generous forum. The Plaintiffs are not content with receiving 100 percent of their Montreal Convention damages from a French court—they would rather play their hand here. But their

---

<sup>39</sup> See *Scotts*, 2 So. 3d at 1018.

transparent avarice hardly suffices as a fair, just, or equitable reason to vacate the earlier *forum non conveniens* order...To now reverse course in response to the plaintiffs' persistent efforts to un-do the *forum non conveniens* dismissal would sanction plaintiffs' disrespect for the lawful order of this U.S. court and encourage other litigants to engage in similar conduct.<sup>40</sup>

### CONCLUSION

The *West Caribbean* passenger case is an important one for the aviation community. In fact, this case established a precedent regarding the applicability of the doctrine of *forum non conveniens* under the Montreal Convention. Such a decision reaffirmed the importance of *forum non conveniens* as a procedural tool for U.S. courts seized of cases and was in agreement with what most U.S. courts had held under Montreal's predecessor treaty, the Warsaw Convention.

However, the recent decision of the French Cour de Cassation holding that Article 33 of the Montreal Convention is incompatible with *forum non conveniens* brought back some doubts regarding the future of the doctrine in aviation cases, just as *Hosaka* had brought doubts back when the Ninth Circuit Court of Appeals held that *forum non conveniens* was not applicable under the Warsaw Convention. Thus, the international disagreement over Article 33 might result in a review by the U.S. Supreme Court and by the European Court of Justice, which could change the way *forum non conveniens* is applied in Montreal Cases or could present a serious challenge to the Montreal Convention as a viable treaty.

It is important to emphasize, however, that the doctrine of *forum non conveniens* is an important procedural tool that is quite beneficial to the international legal order. In fact, *forum non*

---

<sup>40</sup> *In re West Caribbean Airways*, 2012 WL 1884684, at \*24.

*conveniens* allows courts to judiciously exercise restraint, and enables courts with a real and actual interest in the matter to more appropriately and efficiently litigate the case. Moreover, *forum non conveniens* prevents plaintiffs' jurisdictional games that are motivated by greed, which also contributes to a better international legal order. Therefore, the U.S. courts' resistance against the international attacks of the doctrine is contributing to the modernization and improvement of the complex private international law that governs aviation litigation. In closing, it should be noted that crew cases were also filed in the Southern District of Florida federal court, which Judge Ungaro did not dismiss on *forum non conveniens* grounds, reasoning that the balancing of public and private interest factors weighed differently largely because the crew were Columbian nationals and not Martinique citizens. The passenger and crew cases continue to provide an intellectual feast for legal scholars.

**THE COMBATANT ACTIVITIES DEFENSE:  
ANOTHER OPTION FOR MILITARY PRODUCT  
MANUFACTURERS**

By  
Darrell M. Padgette

ABSTRACT

On July 28, 1945, a U.S. Army B-25 weaved through New York City's skyscrapers, following a track along 42nd Street, and then south near 5th Avenue. The roaring engines alarmed onlookers who were paralyzed in horror and disbelief. The bomber crashed into the north face of the Empire State Building. Floors 77 through 80 ignited in flame, and one engine dropped through an elevator shaft igniting another large fire in the substructure. The other engine shot through the opposite side of the Empire State Building coming to rest inside of a building across the street. The toll of that day's tragedy tallied 14 lives, 26 injured and \$1,000,000 in property damage.

There was no question that the pilot's negligence caused the crash. He flew the personnel transport mission well below altitude minimums and despite warnings of zero visibility. There was also no question that his negligence was imputable to the United States Army under the master-servant relationship rule. But the United States government was immune from tort liability under the doctrine of sovereign immunity. This Empire State Building crash catalyzed passage of the Federal Tort Claims Act ("FTCA"), which waived the government's sovereign immunity in tort, subject to certain exceptions.

One FTCA exception, explored in this article, is the "combatant activities" exception, under which the Government's immunity is retained for any claim arising out of combatant activities during a time of war. Application of this exception has increased recently, as a byproduct of continuous combat. The

exception has developed into a “federal common law” defense that is rooted in the preemption doctrine and which can be utilized by private military contractors and manufacturers to avoid liability for wartime torts arising out of the combatant activities of the United States. This Article discusses the contours of the “combatant activities” exception as a “federal common law” defense for military contractors.

**BIRTH OF THE FEDERAL TORT CLAIMS ACT AND  
THE COMBATANT ACTIVITIES EXCEPTION**

Although Americans rejected the maxim that the “King could do no wrong” as a political belief, the legal doctrine derived from “Crown immunity” persisted for more than 100 years following the country’s founding. But this historical underpinning of sovereign immunity eventually gave way to a general belief that the government should pay damages for torts committed by its agents and employees. “As the Federal Government expanded its activities, its agents caused a multiplying number of remediless wrongs—wrongs which would have been actionable if inflicted by an individual or a corporation but remediless solely because their perpetrator was an officer or employee of the Government”.<sup>1</sup> In 1946, soon after the Empire State Building crash, Congress passed the FTCA, which waived sovereign immunity for common law torts, and retroactively allowed the victims of the Empire State Building crash to sue the government for damages.

But it was not a complete waiver. Congress included several exceptions, including the combatant activities exception, which precludes tort liability for “[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.” The congressional record does not contain much discussion on the reason for this exception. In a 1940 survey of claims legislation and exceptions, it was noted that the

---

<sup>1</sup> *Feres*, 340 U.S. at 139-40.

combatant activities exception would “exclude any damages arising out of the acts of military or naval forces, or Coast Guard, during time of war.”<sup>2</sup> The only rationale given was that “[t]his would seem to be very desirable.”<sup>3</sup>

Further justification was articulated in 1942, during congressional hearings.<sup>4</sup> “You cannot afford to have Army and Navy officers subpoenaed all over the country, in time of war.”<sup>5</sup> “[Y]ou just cannot say to a colonel who is miles distant from this country, possibly in the Philippine Islands, ‘Come back to testify in this tort case.’ It is out of the question in these times.”<sup>6</sup> “It is even out of the question to say to certainly most officers, even if they are right in the locality, ‘Come over and spend your time in a lawsuit.’... [Y]ou probably would not want to subject the Army to lawsuits on torts.”<sup>7</sup> In 1948, the U.S. Court of Appeals weighed in on the rationale for the exception, concluding that the combatant activities exception “relates to Governmental activities which by their very nature should be free from the hindrance of a possible damage suit.”<sup>8</sup>

#### DEVELOPMENT OF THE COMBATANT ACTIVITIES EXCEPTION THROUGH CASE LAW

Courts have continued to develop “federal common law” defenses which shield military contractors from liability under FTCA exceptions, including the more prominent “government contractor defense,” and the “combatant activities exception” defense. A recent court opinion has explained that the underlying

---

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Hearings Before the Committee on the Judiciary, House of Representatives, 76th Cong., 2d Sess. On H.R. 5373 and H.R. 6463, p. 12, January 29, 1942.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Johnson v. U.S.*, 170 F.2d 767, 769 (9th Cir.1948).

rationale for the combatant activities exception, “is simply the elimination of tort from the battlefield, both to preempt state or foreign regulation of federal wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit.”<sup>9</sup> The combatant activities exception is Congress’ recognition that “war is an inherently ugly business for which tort claims are simply inappropriate.”<sup>10</sup>

The combatant activities exception has been used to shield an Aegis Air Defense System manufacturer from liability for a shoot down of civilian aircraft;<sup>11</sup> it resulted in dismissal of claims against a missile manufacturer brought by heirs of U.S. Marines killed in a friendly-fire incident in Operation Desert Storm;<sup>12</sup> it protected helicopter and component parts manufacturers against liability from heirs of deceased service members arising out of a crash in Afghanistan;<sup>13</sup> it was used to dismiss claims brought by DynCorp employees against a private military contractor arising out of operations and maintenance services at Camp Shield, Iraq;<sup>14</sup> it precluded a lawsuit against two private military contractors arising out of detainee operations in Iraq;<sup>15</sup> and most recently, it resulted in dismissal of a lawsuit against a private military contractor arising out of operations and maintenance services provided at the Radwaniyah Palace Complex, Iraq.<sup>16</sup>

---

<sup>9</sup> *Saleh*, 580 F.3d at 7.

<sup>10</sup> *Ibrahim v. Titan Corp.*, 391 F.Supp.2d 10, 18 (D. D.C. 2005).

<sup>11</sup> *E.g. Koochi v. United States*, 976 F.2d 1328, 1333 n.5 (9th Cir. 1992), *cert. denied*, 508 U.S. 960 (1993).

<sup>12</sup> *Bentzlin v. Hughes Aircraft Co.*, 833 F.Supp. 1486, 1494 (C.D. Cal. 1993).

<sup>13</sup> *Flanigan ex rel. Flanigan v. Weswind Technologies, Inc.*, 648 F.Supp.2d 994, 1007 (W.D. Ten. 2008).

<sup>14</sup> *Aiello v. Kellogg, Brown & Root Services, Inc.*, 751 F.Supp.2d 698, 706 (S.D.N.Y. 2011).

<sup>15</sup> *Saleh*, 580 F.3d at 6.

<sup>16</sup> *Harris v. Kellogg, Brown & Root Services, Inc.*,—F.Supp.2d—, 2012 WL 2886674, \*45-48 (W.D. Pa 2012).

## A. “Combatant Activities Exception” Is Among The Broadest of FTCA Exceptions

### 1. Combatant Activities

The term “combatant activities” includes “not only physical violence, but activities both necessary to and in direct connection with actual hostilities.”<sup>17</sup> “Aiding others to swing the sword of battle is certainly a ‘combat activity.’”<sup>18</sup> “Combat consists of more than the actual exercise of physical force. That definition would exclude ammunition supply, the movement of troops during or in preparation for combat, and holding prisoners of war”,<sup>19</sup> all of which have been held to be a combatant activity.

The “combatant activities” exception “paint[s] with a far broader brush” than other exceptions which remove from the Court’s jurisdiction claims arising out of a subset of injuries in select areas.<sup>20</sup> In addition to the broad language used in the exception, the Supreme Court has refused to read the FTCA as permitting tort suits against military contractors.<sup>21</sup> The same considerations that underlie preemption under the “government contractor defense” which turns on the FTCA’s “discretionary

---

<sup>17</sup> *Johnson*, 170 F.2d at 770 (9th Cir. 1948) (supplying ammunition to warships in a combat zone during war is undoubtedly a “combatant activity”), cited in *Koohi*, 976 F.2d at 1333 n.5 (“The tracking and attempted identification of an unidentified and apparently threatening aircraft is a necessary adjunct of the power of self-defense [and therefore], under *Johnson*, [qualifies] as ‘combatant activities.’”)

<sup>18</sup> *Johnson*, 170 F.2d at 770.

<sup>19</sup> *Aiello*, 751 F.Supp.2d at 712.

<sup>20</sup> See *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 489-90 (2006) (contrasting combatant activities exception in § 2680(j) with the mail delivery exception in § 2680(b), that preserves immunity for only three types of loss).

<sup>21</sup> See *Boyle v. United Technologies Corp.*, 487 U.S. 500, 511-512 (1988) (establishing the government contractor defense rooted in the discretionary function exception of § 2680(a)).

function exception”,<sup>22</sup> apply equally to preemption under the “combatant activities exception”.<sup>23</sup>

## 2. “During Time of War”

The combatant activities exception applies to claims arising from combatant activities of the U.S. military regardless of whether Congress has formally declared war.<sup>24</sup> As a result, the phrase “time of war” means periods of significant armed conflict, rather than Congressional declarations of war.<sup>25</sup> The past operations in Iraq and the continuing operations in Afghanistan have had no trouble meeting this definition.<sup>26</sup> The United States’ military operations in these areas and elsewhere, have been commonly referred to as the Global War on Terrorism.

### B. Considerations That Underlie *Boyle* Preemption Apply To Combatant Activities

The leading case to apply the FTCA preemption doctrine to suits against military contractors is *Boyle v. United Technologies Corp.*<sup>27</sup> The *Boyle* case fashioned the “government contractor

---

<sup>22</sup> 28 U.S.C. § 2680(a).

<sup>23</sup> 28 U.S.C. § 2680(j); *Aiello*, 751 F.Supp.2d at 710-71; *Saleh*, 580 F.2d at 6-11.

<sup>24</sup> *Koohi*, 976 F.2d at 1333-35 (“[W]e have no difficulty in concluding that when, as a result of a deliberate decision by the executive branch, United States armed forces engage in an organized series of hostile encounters on a significant scale with the military forces of another nation, the FTCA exception applies. Under those circumstances, a ‘time of war’ exists, at least for purposes of domestic tort law.”).

<sup>25</sup> *Id.* at 1333-34; *Rotko v. Abrams*, 338 F.Supp. 46, 47-48 (D. Conn. 1971) (during “time of war” includes undeclared wars).

<sup>26</sup> In response to the September 11, 2001, terrorist attacks, Congress authorized the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” Pub. L. 107-40, § 2(a), 115 Stat. 224 (2001).

<sup>27</sup> *Boyle*, 487 U.S. at 504.

defense” based on the FTCA’s discretionary function exception.<sup>28</sup> The same “*Boyle* preemption analysis also supports preemption of suits arising in the context of war.”<sup>29</sup> “The combatant activities exception manifests the federal interest in determining the duty of care in combat.”<sup>30</sup> As such, the combatant activities exception creates a federal common law defense that shields manufacturers from tort claims arising from war.<sup>31</sup> “Such a defense for manufacturers of equipment that allegedly malfunctions during combat arises from the fact that certain federal interests implicated in war—such as secrecy of wartime strategy and military morale—would be undermined by state tort suits against such manufacturers.”<sup>32</sup>

### **1. *Boyle* Preemption Analysis Extends to Combatant Activities Exception**

Courts have explained the differences between *Boyle*’s analysis which relies on the FTCA’s discretionary function exception (underpinning the government contractor defense)<sup>33</sup> and the combatant activities exception. The Court in *Bentzlin* noted that “[t]he precise analysis of the conflict between federal interest and state law, and the degree to which state law must be preempted differs from that in *Boyle*, although the general structure of

---

<sup>28</sup> *Bentzlin*, 833 F.Supp. at 1488.

<sup>29</sup> *Id.* at 1492.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 1493.

<sup>33</sup> The Supreme Court explained that federal common law governed *Boyle* preemption: “we have held that a few areas, involving uniquely federal interests, are so committed ... to federal control that state law is preempted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts- so called federal common law.” *Boyle*, 487 U.S. at 504. The *Boyle* Court then articulated the federal common law rule and test for providing military contractors with a complete “government contractor defense” against design-defect claims. *Id.* at 512.

reasoning is the same.”<sup>34</sup> The “combatant activities” exception is “even broader than the discretionary function exception. In the latter situation, to find a conflict, one must discover a discrete discretionary governmental decision, which precludes suits based on that decision, but the former is more like field preemption because it casts a immunity net over any claim that *arises* out of combat activities.”<sup>35</sup> “[T]he relevant question is not so much whether the substance of the federal duty is inconsistent with a hypothetical duty imposed by the state or foreign sovereign. Rather, it is the imposition *per se* of the state or foreign tort law that conflicts with the FTCA’s policy of eliminating tort concepts from the battlefield. The very purposes of tort law are in conflict with the pursuit of warfare.”<sup>36</sup>

Consequently, *Boyle*’s preemption analysis mandates that a claimant’s lawsuit will be preempted by the combatant activities exception where (1) a uniquely federal interest is at stake, and (2) the substantive tort law would “significantly conflict” with that federal interest.<sup>37</sup> If both of these conditions are present, the underlying tort claims are preempted under this federal common law defense.<sup>38</sup>

---

<sup>34</sup> *Bentzlin*, 833 F.Supp. at 1490.

<sup>35</sup> *Saleh*, 580 F.2d at 6.

<sup>36</sup> *Id.* at 7.

<sup>37</sup> *Boyle*, 487 U.S. at 507; *Aiello*, 751 F.Supp.2d at 709.

<sup>38</sup> *E.g. Bentzlin*, 833 F.Supp. at 1489. “*Boyle* preemption, like sovereign immunity, may be invoked to bar state law claims, the encapsulated rights serve distinct purposes. State law claims are preempted under *Boyle* simply because the imposition of liability in such situations is irreconcilable with uniquely federal interests. The right conferred through federal preemption, in other words, is the right not to be bound by a judgment stemming from state law duties.” *Shimari v. CACI Intern, Inc.*, 679 F.3d 205, 218 (4th Cir. 2012) (“In stark contrast, immunity has consistently been administered as a protection against the burden of litigation altogether.”) The entitlement to preemption “is only a corollary financial benefit flowing from the government’s sovereign immunity.” *Shimari*, 679 F.3d at 218. “The right conferred through federal preemption, in other words, is the right not to be bound by a judgment

**a. Uniquely Federal Interests Are At Stake In Products Liability Suits Against Military Contractors**

Under the first step of *Boyle's* analysis, product liability lawsuits arising from the military's use of complex and sophisticated equipment during wartime implicate "uniquely federal interests" as a matter of law. These federal interests include "military procurement," "controlling military policy in war," "determining the duty of care in combat," the "secrecy of wartime strategy," upholding "military morale," and avoiding the risk of "interfering with the military's combat mission."

The procurement of military equipment by the United States Government is unquestionably an area of "uniquely federal interest."<sup>39</sup> Civil liabilities arising out of the performance of federal procurement contracts are also areas of "uniquely federal interests."<sup>40</sup> "The Federal Government's interest in the procurement of equipment is implicated... even though the dispute is one between private parties."<sup>41</sup> "[I]f claims against a contractor arising out of combatant activities were not preempted, then there would be a legitimate need for the contractor's lawyers, engineers and/or investigators to inspect the condition of the scene of the allegedly tortuous act and interview witnesses, including military personnel. Inherently, these activities would pose a significant risk of interfering with the military's combat mission."<sup>42</sup> "The

---

stemming from state law duties. By contrast, immunity is a limited protection against the burden of litigation altogether." *Al-Quraishi v. L-3 Services, Inc.*, 657 F.3d 201, 212 (4th Cir. 2011).

<sup>39</sup> The Government's procurement of equipment requires "not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness." *Boyle*, 487 U.S. at 511.

<sup>40</sup> *Boyle*. 487 U.S. at 505-06.

<sup>41</sup> *Id.*

<sup>42</sup> *Aiello*, 751 F.Supp.2d at 711.

alternative, relegating the contractor to defending the claim without the benefit of such an investigation, could result in a deprivation of the contractor's property without the important right to discover favorable evidence; this, in turn, would lead to higher costs of contracting for the United States."<sup>43</sup>

In addition, the "combatant activities" defense "for manufacturers of equipment that allegedly malfunctions during combat arises from the fact that certain federal interests implicated in war- such as secrecy of wartime strategy and military morale- would be undermined by state tort suits against such manufacturers."<sup>44</sup> Such suits "satisfy prong one of *Boyle's* preemption analysis not only due to the federal interest in military procurement, but because they implicate the federal interest in controlling military policy in war."<sup>45</sup> "The federal interests that exist in wartime would be frustrated by allowing state tort suits against government contractors that arise from wartime deaths, even when plead as manufacturing defect claims."<sup>46</sup>

**b. Tort Claims Against Military Contractors  
"Significantly Conflict" With Uniquely  
Federal Interests**

Tort laws that hold military contractors liable for equipment defects can present a "significant conflict" with federal policy requiring displacement.<sup>47</sup> Preemption analysis under *Boyle*

---

<sup>43</sup> *Id.*; *Saleh*, 580 F.2d at 10 ("Congress at least has indicated that common law tort suits "arising out of" combatant activities conflict with the very real interests of the military in time of war").

<sup>44</sup> *Bentzlin*, 833 F.Supp. at 1493.

<sup>45</sup> *Id.* at 1492.

<sup>46</sup> *Id.* ("The combatant activities exception manifests the federal interest in determining the duty of care in combat.")

<sup>47</sup> *Boyle*, 487 U.S. at 512.

requires courts to examine the circumstances of each case to determine if preemption applies.<sup>48</sup>

To determine whether a “significant conflict” exists and hence preemption applies, *Boyle* directs courts to evaluate the three principles underlying tort law against the circumstances of a particular case. The three principles of tort law include: (1) the theory that the prospect of liability makes the actor more careful; (2) whether the “punitive aspect” of tort law would be furthered by holding the military contractors here liable; and (3) a desire to secure justice and provide remedies to innocent victims.<sup>49</sup>

During wartime, “the traditional rationales for *tort* law—deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors—are singularly out of place in combat situations, where risk-taking is the rule.”<sup>50</sup> Other policy reasons include the significant practical problems of accumulating or retaining evidence.<sup>51</sup> “Preserving and maintaining evidence from

---

<sup>48</sup> The level of “control by the military” is not relevant under the *Boyle* analysis pertaining to complex military equipment (in contrast to *Saleh* preemption of the battlefield). The issue of “control” is only relevant in private *service* contractor cases (as in *Saleh*) where the contractors themselves are acting as combatants under the direction of the military during actual combat operations. *Saleh*, 580 F.3d at 9 (discussing *Saleh* preemption and noting that “[d]uring wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor’s engagement in such activities shall be preempted.”) Most recently, the *Johnson* test was utilized in a service contractor case where the court conducted its analysis to determine whether the contractor’s activities were “both necessary to and in direct connection with actual hostilities.” *Harris*, 2012 WL 2886674 at \*45-48. In contrast, where claims involve military equipment procured by the government and utilized for war, the issue of control or the contractor action on the battlefield is not implicated under the *Boyle / Koochi* analysis. See *Fisher v. Halliburton*, 390 F.Supp.2d 610, 615-16 (S.D. Tex. 2005).

<sup>49</sup> See *Koochi*, 976 F.2d at 1334-35.

<sup>50</sup> *Saleh*, 580 F.2d at 7.

<sup>51</sup> *Bentzlin*, 833 F.Supp. at 1495.

the scene of an accident is essential to the ability to prosecute product liability claims. In wartime, it would be inappropriate to have soldiers assembling evidence, collected from the ‘battlefield.’”<sup>52</sup> “Additionally, allowing such claims would require soldiers to testify for and against each other’s interests, potentially undermining the unity of the forces.”<sup>53</sup>

**i. Tort Law Concepts Of Deterrence “Significantly Conflicts” With Risk-Taking Behavior Encouraged During War**

The first premise of tort law is deterrence, with the threat of liability meant to make tortfeasors more careful. In contrast, Congress did not want the military to “exercise great caution at a time when bold and imaginative measures might be necessary to overcome enemy forces.”<sup>54</sup>

During war, manufacturers should not be made overly cautious in producing military equipment as “delay may lead to missed strategic opportunities and deaths of American soldiers.”<sup>55</sup> “The exigencies of war often require high-tech equipment to be delivered to the ‘front’ as quickly as possible. In war, the benefit of producing weapons and transporting them as quickly as possible to arm American soldiers far outweighs the risks of defective workmanship; soldiers’ lives may be lost as the result of delays in the delivery of weapons.”<sup>56</sup> Exposing military contractors to tort liability would place undue pressure on manufacturers to act too cautiously, particularly when the national interest is better served by expeditious production rather than defect-free equipment.<sup>57</sup>

---

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 1493, *citing Koohi*, 976 F.2d 1328.

<sup>55</sup> *Bentzlin*, 833 F.Supp. at 1493.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

Deterrence aspects of tort law also runs counter to the combatant activities exception because:

“During war, the United States Defense Department may authorize the use of equipment that might not be authorized in less urgent times, or it may waive, expressly or impliedly, standard manufacturing procedures. The balancing of the interests of fitness of design, quality of manufacture, immediacy of delivery, and thoroughness of training is essential to the conduct of war. Decisions must be made and compromises accepted in the national interest by the government and its contractors without fear of the consequences of civil liability. Indeed, federal interests would be frustrated if discovery was required to determine whether a malfunction was caused by the United States’ wartime policy or a manufacturer’s shoddy workmanship.”<sup>58</sup>

**ii. Tort Law “Significantly Conflicts” With Federal Measures Already In Place**

Tort law is meant to punish tortfeasors.<sup>59</sup> In contrast, the combatant activities exception manifests Congress’ intent that the government should not be punished for mistakes made during war. The purpose of the exception applies equally to military contractors who make the government’s tools of war. “The United States government is in the best position to monitor wrongful activity by contractors, either by terminating their contracts or through criminal prosecution.”<sup>60</sup> “The government therefore is in a position to control the quality of work by its contractors through the threat

---

<sup>58</sup> *Id.* at 1495.

<sup>59</sup> *Id.* at 1493.

<sup>60</sup> *Id.*

of terminating business relationships with contractors who manufacture defective equipment as well as the threat of bringing criminal suits against contractors whose misconduct is egregious.”<sup>61</sup>

Equally significant, the fact-finding process of the judicial system is not appropriately equipped to handle cases of this nature whose inquiry necessarily entails peeling back and reviewing the decision-making processes and design considerations of complex military machinery, and will necessarily involve the evaluation of documents subject to the Arms Export Control Act (“AECA”), International Traffic in Arms Regulations (“ITAR”) and classified materials. The Government is in a far superior position and better equipped to handle enforcement and punishment. Indeed, federal interests would be frustrated if discovery was required to determine whether a malfunction was caused by the United States’ wartime policy or a manufacturer’s shoddy workmanship.”<sup>62</sup> “Such proceedings, no doubt, will as often as not devolve into an exercise in finger-pointing between the defendant contractor and the military, requiring extensive judicial probing of the government’s wartime policies.”<sup>63</sup> “The federal government’s interest in preventing military policy from being subjected to fifty-one separate sovereigns ... is not only broad—it is also obvious.”<sup>64</sup>

### **iii. Providing Remedies For Combatant Activities Creates a Significant Conflict**

#### **(a). Differential Compensation Schemes Are Inappropriate**

War presents an inherent conflict with the underlying premise of tort law which is to provide a remedy to “innocent victims.”<sup>65</sup> Application of this third principle of tort law is

---

<sup>61</sup> *Id.* at 1494.

<sup>62</sup> *Id.* at 1495.

<sup>63</sup> *Saleh*, 580 F.2d at 7.

<sup>64</sup> *Id.* at 11.

<sup>65</sup> *Bentzlin*, 833 F.Supp. at 1494, *citing Koochi*, 976 F.2d at 1333-34.

grounded in part on the fact that victims of war should not be compensated differently from each other.

Soldiers who die in combat receive an automatic “death gratuity” from the United States government.<sup>66</sup> The death gratuity can be further supplemented by the Servicemembers’ Group Life Insurance (“SGLI”).<sup>67</sup> There is “...no advantage to be gained from carving out a differential compensation scheme for certain survivors of soldiers killed or injured in war, judging one mechanism of death in war to be preferred over another.”<sup>68</sup> It has been recognized:

“the federal interest in maintaining the military dignity of casualties suffered by soldiers fighting a war on behalf of the United States would be harmed by allowing soldiers killed or injured in war to bring suits against military contractors. Unfortunately, soldiers die and are injured in combat. Casualties are contemplated prior to war and judged to be a necessary consequence of the decision to go to war. Deaths and injuries of soldiers in war arise from a plethora of circumstances, many of which may be judged to involve some degree of fault. Unsuccessful military strategy, unwise orders by individual officers and mistakes by fellow soldiers all lead to the loss of life, and these causes clearly do not give rise to civil liability. Neither do the deliberate acts of an enemy soldier give rise to liability. Where a deliberate choice has been made to tolerate tragedy for some higher

---

<sup>66</sup> See 10 U.S.C. § 1475 *et. seq.*

<sup>67</sup> See 38 U.S.C. § 1965 *et. seq.*

<sup>68</sup> *Bentzlin*, 833 F.Supp. at 1494 (“In a wartime context, state law cannot establish the duty of care owed to American soldiers who necessarily assume the risk of death.”)

purpose, civilian state law standards cannot be applied to those who suffer tragedies contemplated in war.”<sup>69</sup>

**(b). Preemption Applies To All Actors, Not Just “Enemies”**

One of the early cases to construe the combatant activities exception in a products liability context was *Koochi v. United States*. The court in *Koochi* suggested that the combatant activities exception only applied to suits brought by so-called “enemies” of the United States. Indeed, several subsequent cases have cited to this aspect of the case in denying motions based on the combatant activities exception. However, later cases have flatly rejected that any such “enemy” limitation exists within the combatant activities exception.<sup>70</sup> Consequently, the exception has been and continues to

---

<sup>69</sup> *Id.*

<sup>70</sup> “Nothing in the *Koochi* court’s decision suggests that its reasoning was intended to be narrowly construed.” *Id.* (“For the same reasons that the United States has chosen not to waive its sovereign immunity to tort suits arising from wartime deaths, a government contractor who manufactures the weapons of war cannot be held liable for deaths of American soldiers arising from combat activity.”); see also *Flanigan ex. rel. Flanigan*, 648 F.Supp.2d at 1005-1007 (same); *Aiello*, 751 F.Supp.2d at 709 (criticizing *Koochi*’s dicta, “[t]o remove the duty of care only as to ‘those against whom force is directed’ is unduly narrow.”) “The combatant activities exception preserves immunity as to any ‘claim arising out of the combatant activities of the military.’” *Id.* at 709 (noting that the 2nd Circuit has held this language to be expansive). “To narrow the scope of the combatant activities exception to claims by ‘those against whom force is directed’ could potentially mean that a duty of care would still exist as to bystanders and allies, even in actual live-fire combat events.” *Id.* at 710 (“Force not ‘directed’ at them could still cause them harm.”) This exception “reflects the need to avoid second-guessing military ‘judgment as to the balancing of many technical, military, and even social considerations.’” *Id.*, quoting *Boyle*, 487 U.S. at 511. “It also reflects the federal interest in freeing ‘military commanders from doubts and uncertainty inherent in potential subjection to civil suit,’ and recognizes that ‘the costs of imposing tort liability on government contractors is passed through to the American taxpayer.’” *Aiello*, 751 F.Supp.2d at 710, quoting *Saleh*, 580 F.2d at 7-8. “These

be applied to suits brought on behalf of United States service members.

**(c). There Are No “Innocent Victims” In War,  
Particularly “Combatants”**

The fundamental premise of tort law to provide compensation for “innocent victims” also presents a “significant conflict” with combatant activities that occur during armed conflict. Most notably, there are no “innocent victims” who occupy the battlespace (the phrase “innocent victims” is merely a domestic tort law characterization).<sup>71</sup> Rather, on the battlefield, the laws of war<sup>72</sup> more accurately classify persons as combatants, non-combatants and civilians.<sup>73</sup>

The critical distinction here involves “combatants”<sup>74</sup> (i.e., those who directly participate in hostilities) and “civilians”<sup>75</sup> (i.e., those who are to be protected from its dangers). Applying tort

---

purposes would not be served by the narrow *Koochi* formulation, which limits the interest to precluding suits brought by those against whom force is directed.” *Aiello*, 751 F.Supp.2d at 710 (“This Court respectfully disagrees with the *Koochi* Court’s formulation of the United States’ interest in claims against military contractors arising out of combat operations.”)

<sup>71</sup> Making a determination as to who is “innocent” or not for purposes of application of domestic tort law on a foreign battlefield could present issues which are inextricably intertwined into a Gordian Knot.

<sup>72</sup> The Laws of War are made up of numerous International Treaties on the Laws of War, as well as, customary public international law (also known as the law of nations).

<sup>73</sup> *Ex Parte Quirin*, 317 U.S. 1, 30-31 (1942) (“By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants”).

<sup>74</sup> Article 43, 8 June 1977 Protocol 1, Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (“Protocol 1”).

<sup>75</sup> Article 50, 8 June 1977 Protocol 1, Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, (“Protocol 1”).

law to direct participants in wartime hostilities, and/or the products they use on the battlefield to further military objectives, would significantly conflict with federal interests in the conduct of war. In contrast, the “innocent victims” formulation under domestic tort law is more akin to the status of civilians, against whom the protection from hostilities is to be afforded.

### CONCLUSION

The FTCA’s combatant activities exception was codified more than sixty years ago, but its scope is only recently being developed in court opinions. There is probably a correlation between the length of the United States’ participation in the war effort in Afghanistan and Iraq, on the one hand, and an increasing application of the combatant activities exception as a defense utilized by military contractors. Time will tell whether this defense, which is based on the reasonable notion that tort liability has no place on the battlefield, will find the same firm footing in American jurisprudence as the government contractor defense.

**GARA UPDATE: IS IT TIME FOR COURTS TO RETHINK  
HOW THEY DETERMINE THE “MAXIMUM SEATING  
CAPACITY” OF AN ACCIDENT AIRCRAFT?**

By  
Christopher S. Hickey

**INTRODUCTION**

The General Aviation Revitalization Act (“GARA”) is a federal statute of repose enacted in 1994 to bar all civil causes of action for damage to property arising from accidents involving *general aviation* aircraft brought against the manufacturer of the aircraft more than 18 years after the product was sold. While the term “general aviation” generally conjures up an image of a single-engine propeller plane or corporate jet, GARA does not focus specifically on the type or size of aircraft. Instead, it is concerned with an aircraft’s “maximum seating capacity;” Specifically, whether or not the aircraft’s seating capacity is less than 20 passengers. Thus, it is not surprising that courts have applied GARA’s statute of repose in cases concerning numerous different types of aircraft of varying sizes from single-engine Piper Cubs, to heavy lift Sikorsky S-61 helicopters. GARA was even applied in a case concerning a World War II era Navy anti-submarine patrol bomber.<sup>1</sup>

Intuitively, it would seem the easiest way to determine whether an aircraft’s maximum seating capacity is less than 20 passengers would be to count the number of passenger seats. However, to date, courts have not done that. Instead, they have focused solely on the language of the subject aircraft’s type certificate and/or airworthiness certificate. If either one of those documents list a maximum seating capacity of less than 20 passengers, then this requirement of GARA has been considered

---

<sup>1</sup> *Schwartz v. Hawkins & Powers Aviation, Inc.*, 2005 U.S. Dist. LEXIS 12188 (D. Wyo. April 8, 2005)

met. That, however, is not the only reading to which the language of GARA is susceptible and there has been an indication from a California federal court that the actual number of seats installed in an aircraft should also be used to determine the maximum seating capacity.<sup>2</sup> Consideration of an aircraft's actual physical seating limitation comports both with the language of GARA and the purpose behind the statute and, in appropriate cases, defendants should begin moving courts to consider an accident aircraft's actual number of installed passenger seats when analyzing a GARA defense.

### 1. General Aviation Aircraft Defined

In its general use, the term "general aviation" is a catch-all label for aviation activity that does not fall under the Federal Aviation Administration's (FAA) regulations for scheduled and nonscheduled airline operations. General aviation includes business aviation, air cargo, flight training, pleasure flying, agricultural aerial application, air taxi and air charter, aerial law enforcement, air ambulance service, and countless other aviation activities that do not include the airlines. GARA, however, has a much more specific definition of "general aviation aircraft":

**any aircraft for which a type certificate or an airworthiness certificate has been issued by the Administrator of the Federal Aviation Administration, which, at the time such certificate was originally issued, had a maximum seating capacity of fewer than 20 passengers, and which was not, at the time of the accident, engaged in scheduled passenger-carrying operations.**<sup>3</sup>

---

<sup>2</sup> *Croman Corp. v. General Electric Co.*, 2006 WL 3201099 (E.D. Cal. Nov. 3, 2006)

<sup>3</sup> General Aviation Revitalization Act of 1994, 49 USC § 40101, note ("GARA") (emphasis added). Why 19 passengers were determined to be the limit is unclear from the Congressional record. However, seating capacities of 20 has

When considering whether an accident aircraft fits the GARA definition of a general aviation aircraft, courts have morphed the first and second clauses of the above sentence into a requirement that the language of the type certificate or airworthiness certificate *must* include a limitation on the number of allowable passengers to less than 20. That, however, is not exactly what the sentence says. GARA mentions “type certificate” and “airworthiness certificate” in only the first clause of the sentence.<sup>4</sup> A more reasonable interpretation of that first clause is that Congress meant only to point out that the GARA statute applies to aircraft for which the FAA has issued such a document. In other words, if an aircraft is being operated completely outside U.S. certification regulations, then it will not receive the benefit of GARA. For example, ultralight aircraft, by definition, do not have either a type certificate nor airworthiness certificate and are thus not “general aviation” aircraft for the purposes of GARA.<sup>5</sup>

The next part of the sentence concerns the seating capacity of less than 20 seats. Here, only in a temporal sense does Congress tie the passenger limitation to the type certificate and airworthiness certification requirements. That is, the statute simply requires that the maximum seating capacity be determined *at the time* either the current type certificate or airworthiness certificate was originally issued. Nowhere in the statute does Congress require the maximum seating capacity to be determined solely *by* the type certificate or airworthiness certificate.

---

been used in other aviation regulations for some time as a dividing line between small and large aircraft. (*i.e.*: 14 CFR 125.1—certification and operation rules for aircraft carrying 20 or more passenger or a payload capacity of 6,000 lbs or more).

<sup>4</sup> A “type certificate” is design approval and applies to all units of a particular model, while an “airworthiness certificate” is issued to each individual aircraft once it is properly registered and it is shown to conform to its type certificate design. For example, there is one type certificate applicable to all 747-200s ever built but each 747-200 aircraft that is flying has an airworthiness certificate that applies to only that aircraft.

<sup>5</sup> 14 CFR 103.1—*Ultralight Vehicles*.

The maximum seating capacity can also be, and should be, determined by the number of passenger seats physically installed on an aircraft. In *Croman Corp. v. General Electric Co.*,<sup>6</sup> a case involving a S-61A helicopter, the court did just that. Plaintiffs argued that because the subject helicopter's maintenance manual indicated that the aircraft had 18 troop seats installed, the helicopter had a maximum seating capacity of 20 passengers when the pilot and co-pilot seats were included. The court confirmed what is clear from the statute's language, that the physical number of seats installed in an aircraft can determine the aircraft's maximum seating capacity for the purposes of the GARA defense. The court ultimately rejected plaintiffs' argument but only because the pilot and co-pilot seats cannot be counted as "passenger seats":

Furthermore, Corpus Juris Secundum, CJS § 7 (Aeronautics & Aerospace), defines "passenger" as "any person riding in an aircraft but having no part in its operation..." Accordingly, the pilot and co-pilot are not "passengers" and thus even if seats for 18 troops were installed on the subject helicopter, it would still have a "maximum seating capacity of fewer than 20 passengers." GARA, §2(c). Since the aircraft's "restricted" airworthiness certificate either did not permit transportation of passengers on board, **or those passengers permitted were fewer than 20**, the subject helicopter is a "general aviation aircraft" as defined in §2(c) of GARA. Therefore, GARA applies to this case.<sup>7</sup>

Thus, a better reading of GARA suggests there are three methods by which to determine the maximum seating capacity of an aircraft: (1) the type certificate, which may expressly limit the

---

<sup>6</sup> *Croman Corp.*, 2006 WL 3201099.

<sup>7</sup> *Croman Corp.*, 2006 WL 3201099 at \*4 (emphasis added).

number of passengers; (2) the airworthiness certificate, which also may limit the number of passengers; or (3) the number of actual seats installed in the aircraft at the time the original type certificate or original airworthiness certificate were issued by the FAA. If any one of those three methods indicates a maximum passenger capacity of less than 20 seats, then the subject aircraft should be considered a general aviation aircraft for the purposes of GARA.

#### THE PURPOSE OF GARA SUPPORTS THIS APPROACH

The first thing to take away from GARA's definition of general aviation aircraft is that Congress chose not to limit general aviation aircraft to just a certain type or size of aircraft. The definition expressly states that "any aircraft" can possibly fit into the general aviation category of aircraft. Instead of type or size, Congress chose to define general aviation aircraft in terms of its passenger carrying capabilities and its type of operation. Specifically, any aircraft that (1) has fewer than 20 passenger seats and (2) is not engaged in scheduled passenger-carrying operations (i.e., it is not an airline or regional commuter), is a general aviation aircraft.

The second important concept to take from the GARA language is that Congress is concerned with the status of an aircraft "at the time" of the accident. Thus, the focus when determining whether an aircraft meets the definition of a general aviation aircraft should be to look at the aircraft at the time of the accident.<sup>8</sup> The GARA definition of general aviation aircraft does reference the "originally" issued type and airworthiness certificate, but

---

<sup>8</sup> *Estate of Kennedy v. Bell Helicopters Textron, Inc.*, 283 F.3d 1107, 1112 (9<sup>th</sup> Cir. 2002) ("an aircraft cannot fulfill the definition of general aviation aircraft until the accident occurs..."); see also *United States Aviation Underwriters v. Nabtesco Corporation*, 2011 WL 1655710 at \*3 (W.D. Wash.) ("an aircraft is not a general aviation aircraft until after it has been in an accident").

“originally”, in this context, does not mean “first”.<sup>9</sup> Rather, the definition of “original” is found in FAA Order 8130.2G “Airworthiness Certification of Aircraft and Related Products”. Original certification can refer to either of the below situations:

Aircraft that previously have been issued an airworthiness certificate and presented for certification in another category or classification, for example; aircraft converted from standard to restricted for the first time or from a special airworthiness certificate to standard for the first time.

Aircraft that have undergone changes to the type design and require flight testing, for example, under an experimental certificate for the purpose of showing compliance with regulations including, as applicable, the issuance or reissuance of a standard airworthiness certificate.

FAA Order 8130.2G, paragraph 223(a)(3)(4).<sup>10</sup> Rather than meaning “first,” by using the phrase “originally issued,” Congress was referring to the type certificate and airworthiness certificate applicable to the aircraft at the time of the accident.

Congress likely understood that while most aircraft built will not deviate from their original type certificate and airworthiness certificate (a Cessna 172 will be configured with four seats when it leaves the factory and will almost always remain with

---

<sup>9</sup> *Croman Corp.*, 2006 WL 3201099 at \*3 (“GARA does not support Plaintiff’s contention that ‘maximum seating capacity’ is determined at the time the aircraft received its *first* airworthiness or type certificate.”)(emphasis in the original).

<sup>10</sup> The *Croman* case refers to FAA Order 8130.2F. That Order was cancelled and replaced with FAA Order 8130.2G on August 31, 2010 but this particular language remained the same.

four seats throughout its operational history), other aircraft can change significantly during their operational life. For an extreme example, a 747 may leave the factory with 500 plus passenger seats and a type certificate and airworthiness certificate that allows such passenger capacity, yet can be later converted to a cargo 747 with zero passenger seats.

For purposes of GARA, it seems clear that while Congress wished to carve out a portion of product liability law as to aircraft that had been in operation for 18 years, it was not willing to do so for aircraft that, at the time of the accident, were carrying large numbers of persons and/or were being operated on regularly scheduled routes by fare paying consumers. How the aircraft may have been utilized in the past was irrelevant to the purpose of GARA. It was Congress' intent to consider only how the aircraft were being used and its passenger carrying capabilities at the time of the accident. Thus, it furthers the purpose of GARA to consider the number of passenger seats physically installed on the subject accident aircraft when analyzing a GARA defense. To ignore the actual number of installed passenger seats will lead to situations in which GARA will be unavailable in cases concerning an aircraft that has possibly operated for years in the realm of general aviation, carrying only a small number of passengers, if any, on non-scheduled flights—exactly the type of aircraft for which GARA was intended to protect.

**THE PHYSICAL NUMBER OF SEATS IS A MORE ACCURATE METHOD  
FOR DETERMINING AN AIRCRAFT'S SEATING CAPACITY**

In certain accidents, the physical number of passenger seats installed on an accident aircraft may be the only accurate information for determining the aircraft's maximum seating capacity. Not all type certificates include maximum seating capacity and very few airworthiness certificates contain such information. Thus, it is not reasonable to think that Congress intended to rely solely on these certificates for evidence of an accident aircraft's maximum seating capacity. Nor would review of the wreckage

always help since in many accidents, there is very little of the aircraft left and in some accidents the wreckage is never recovered, at all. However, an aircraft's empty weight checklist, part of its maintenance records, will include a description of each seat installed in the aircraft and where it is installed. Moreover, the empty weight check list will be updated periodically throughout the life of the aircraft. Although after an aircraft leaves the factory the need or requirement for reweighing varies depending on the type of aircraft and how it is used, there is an FAA requirement that aircraft always have a current and accurate weight and balance report.<sup>11</sup> If the aircraft has equipment installed or removed a new weight and balance report must be created. Thus, whenever a seat is installed or removed, that change will be reflected in the aircraft's empty weight checklist and will forever be a part of the aircraft's historical maintenance records.

---

<sup>11</sup> 14 CFR 23.1519—*Weight and Center of Gravity*.

### CONCLUSION

Courts' determination of what is a general aviation aircraft in the context of GARA has, to date, almost exclusively focused on the accident aircraft's type certificate and/or airworthiness certificate. Neither the language of the statute nor the statute's purpose supports such a narrow reading of GARA. Instead, it appears more reasonable that Congress' intent was for courts to utilize the actual number of passenger seats on the accident aircraft when determining if the accident aircraft fits the GARA definition of general aviation aircraft. In cases where both the type certificate and airworthiness certificates are either silent or indicate a seating capacity of 20 passenger seats or more, defendants should be asking courts to consider the *Croman* opinion and determine the *actual* number of passenger seats installed on the accident aircraft at the time the relevant certificates were issued because even though a type certificate and/or airworthiness certificate may allow the installation of 20 or more passenger seats, the aircraft may very well have operated for years with less seating. If the number of passenger seats was less than 20 and the accident aircraft was not engaged in scheduled passenger-carrying operations at the time of the accident, then the accident aircraft should be considered a general aviation aircraft.



