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QUARTERLY

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Aircraft Lessor Liability and Federal Preemption: The Case of Air Philippines Flight 541

By **Charles L. Coleman III**

Considerable attention has been given to the US\$165 million settlement of the consolidated wrongful-death lawsuits pending in the Circuit Court of Cook County, Illinois, against the current and former lessors of the Boeing 737-700 aircraft operated by Air Philippines as its Flight 541. On April 19, 2000, Flight 541 crashed into a hill during a domestic flight between Manila and Davao City in the

Republic of the Philippines, with a loss of all 124 passengers and 7 crew members. Notably, Air Philippines was not a named defendant in the actions, which were brought solely against the lessors (AAR Parts Trading and Fleet Business Credit).

The lessors should have been, but were not, categorically shielded from liability by an applicable U.S. federal statute, currently codified at 49 U.S.C. § 44112(b), which provides:

- (b) Liability.—A lessor, owner or secured party is liable for personal injury, death, or property loss or damage on land or water only when a civil aircraft, aircraft engine, or propeller is in the actual possession or control of the lessor, owner, or secured party, and the personal injury, death, or property loss or damage occurs because of—
- (1) the aircraft, engine, or propeller; or
 - (2) the flight of, or an object falling from, the aircraft, engine, or propeller.

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Who's Liable? An Analysis of Successive and Contracting Carrier Liability

By **John Maggio** and **Allison M. Surcouf**

Since the Montreal Convention took effect in the United States on November 4, 2003, few courts have focused on the interplay between Article 36, "Successive Carriage," and Article 39, "Contracting Carrier—Actual Carrier." Here we discuss recent decisions that have addressed carrier liability under the articles.

The Language of the Montreal Convention

Article 36 (1) and (2) of the Montreal Convention, "Successive Carriage," provides, in relevant part:

- (1) In the case of carriage to be performed by various successive carriers within the definition [of article 1(3)], each carrier . . . is deemed to be one of the parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under its supervision, . . . [and]
- (2) In the case of carriage of this nature, the passenger . . . can take action only against the carrier which performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.¹

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SECTION of LITIGATION
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Message from the Chairs

Welcome to the first edition of our redesigned newsletter. Dave Harrington and Judith Nemsick have been working overtime on this effort. Duke and I have had a busy first quarter of our joint term as cochairs. For some time, we have been promising new items, new utility, and new organization, and now, with major help from our newsletter and web editors, ABA staff, and other contributors, we can finally deliver.

We have nearly completed our subcommittee restructuring, and we have reinvigorated our committee webpage. Have a look at www.abanet.org/litigation/committees/aviation. You will find recent article postings, the current subcommittee roster, and other useful information. Special kudos to Orla Brady for shepherding the web efforts. We suggest that you bookmark this page, as it is becoming a valuable resource for timely materials and information for aviation practitioners.

Our annual Continuing Legal Education seminar is set for Thursday, June 4, 2008, at the Association of the Bar of the City of New York on West Forty-fourth Street. The program will start

by focusing on a handful of hot topics and then will switch gears to the trial of an aviation accident case. We will close with a one-hour interactive presentation for valuable ethics credits. Stay tuned for updates and registration information. Jeremy Hager and Debra Elsasser, our program chairs, are hard at work putting together another excellent event. We will post the agenda and registration information as soon as it is finalized.

Finally, we hope you enjoy this edition of the newsletter. Topics covered this quarter are the economic loss doctrine (Carrie Flynn), aircraft lessor liability (Charles Coleman III), liability of successive and contracting carriers (John Maggio and Allison Surcouf), and subrogation tips (Rick Alimonti).

If you would like to contribute to the newsletter, write a very short (one- to two-page) article for the webpage, suggest a new subcommittee (and chair it!), or otherwise participate more actively in the Aviation Litigation Committee, just send an email to Rick Alimonti (fpa@alony.com) or Andrew "Duke" Maloney (amaloney@kreindler.com), and we will help your idea find a home.

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Subrogation Spotlight: Who Is My Client?

By **Frederick Alimonti**

If you made it past the title, I assume you know what subrogation is, and you have likely participated in a subrogation claim in some manner. As in most other areas of the law, law school teaching on the matter falls short of capturing the reality and practicalities of practice.

The basic facts of a subrogation claim start with an insured loss and the insurer's payment of first-party benefits. Let's start with a simple hypothetical situation to illustrate our story:

In Our Time Airlines (IOT Airlines) operates a fleet of twin turboprops. In November 2007, one of its aircraft suffered a prop strike that required a replacement blade. Rather than purchase from the original equipment manufacturer, IOT Airlines purchased a replacement blade from C-Speed Propellers. On December 25, 2007, while in the course of run-up, the replacement blade fractured. No one was injured, but the aircraft was taken out of service, as the engines had suffered vibration damage and cracked mounts. The entire engine had to be removed, inspected, and overhauled. The cost of the repair was \$500,000. Investigation of the propeller revealed that it was manufactured with an unapproved and substandard aluminum alloy clearly outside of the FAA Parts Manufacture Approval (PMA) authority for C-Speed. IOT Airlines is insured by Swift Fleet Insurance Co., which specializes in aviation.

As you can see, we have manufactured quite a strong case for liability against C-Speed. Swift Fleet will no doubt decide to pursue a subrogation claim against C-Speed for the cost of repair and other out-of-pocket expenses. For its part, IOT also wants to recover its \$50,000 deductible, the \$200,000 cost of a replacement leased

aircraft, \$100,000 that it claims is a diminution in the value of the aircraft, and \$100,000 in lost revenue. In addition, IOT seeks \$50,000 representing the increase in insurance premium that it claims is attributable to the accident.

We all know the mantra that a subrogated insurer "steps into the shoes" of the subrogor. As such, Swift Fleet can have no greater rights and remedies than its insured, IOT Airlines. This is just a starting place, but it is not the first issue to be tackled in assembling the claim. The starting place, though, is nothing short of an ethical dilemma for which there is little specific guidance in case law or ethical literature. Beware—you may be about to represent two adverse parties.

In this simple fact pattern, both the insurer and the insured have adverse interests in the outcome of the subrogation claim.¹ They both want to maximize their own portion of the recovery. A lawyer rushing in armed with little more than a subrogation receipt may be in for an unpleasant surprise when he or she finds that the case cannot be settled without the insured's signature on the release. Woe is the lawyer who has not dealt with this issue up-front.

It is critical that you have a sharing point—and you had better not negotiate it! Let's go back to our fact pattern. The insurer has paid out a fixed sum of relatively ascertainable and tangible damages. For the sake of simplicity, we have limited the insurer's claim to \$500,000 in repair costs. IOT Airlines claims the following (listed from hard to soft):

- \$50,000 for the deductible (spent on repairs)
- \$200,000 for the cost of a leased replacement aircraft
- \$100,000 for lost revenue
- \$100,000 for diminution in value
- \$50,000 for increased insurance premium

After the first item, various elements of uncertainty and complexity creep in. The cost of a replacement aircraft is not the actual amount of damages. The saved operating costs from the original aircraft must be deducted to get to a truer figure of actual damages. Lost revenue can be estimated only on the basis of past and anticipated future performance. Diminution of value is generally a crapshoot and a battle of experts.² I have yet to see the increased insurance argument carry much weight.

Although it is a generalization, it is fair to say that the insurer's out-of-pocket damages will be easier to prove than most of the insurer's softer damages. The insurer is subrogated to \$500,000. The insured's claim (conveniently) totals the same \$500,000. As such, it may seem fair to simply enter into a 50-50 sharing agreement, whereby the parties share equally in the cost of litigation and, hopefully, in the eventual recovery. However, when it comes to making actual offers of proof, the insurer's subrogated expenses based on repair costs and the insured's deductible contribution toward the repair costs are likely to be far more persuasive elements of the claim than many elements of the insured's loss. Accordingly, to carve an objectively fair sharing agreement, some discounting of the uninsured losses is appropriate.

Nonetheless, absent the consent of both parties, there are several ethical pitfalls for counsel actively negotiating this agreement with the insured. If you purport to represent the insurer in negotiating an agreement with the insured, you have clearly taken an adversarial position vis-à-vis the insured. As such, you could proceed only to represent both parties in the subrogation claim with a conflict waiver from both parties. Similarly, you cannot properly represent both sides in the negotiation of the sharing agreement.³ (It may be left

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Fifth Circuit Refuses to Create Exception to Economic Loss Doctrine

By Carrie Flynn

The Fifth Circuit Court of Appeals, in *Memorial Hermann Healthcare System, Inc. v. Eurocopter Deutschland, GmbH*, recently issued an important and favorable ruling for manufacturers and other companies that face lawsuits when an alleged defect in a product causes damage to that product.¹

Claims Alleged in *Memorial Hermann*

Memorial Hermann owned and operated a helicopter that was damaged after a door separated from the helicopter and struck its main rotor blades. No one was injured, and no property other than the helicopter sustained damage as a result of the incident. Memorial Hermann and its insurer sued Eurocopter, the helicopter's manufacturer, claiming that Eurocopter negligently failed to warn of an alleged danger discovered after the sale of the helicopter. Therefore, the plaintiff's primary claim was one of postsale negligence.

The Economic Loss Doctrine

The economic loss doctrine precludes tort actions for the recovery of economic losses caused by an allegedly defective product when that product causes damage only to itself and does not cause injury to persons or other property. Under the economic loss doctrine, the claimant is limited to the contractual remedies, if any, allowed under the contract for sale. The rationale for barring tort claims when a product has caused damage only to itself is the desire to keep separate the spheres of contract law and tort law, thereby limiting tort law to actions for personal injury and damage to other property and leaving actions for economic losses governed by contract law.

Product liability defendants seek a broad application of the doctrine, as

it serves to limit tort claims. Plaintiffs, in contrast, have sought to limit the doctrine in recent years by attempting to carve out an exception for claims of postsale negligence. Plaintiffs have argued that contract remedies may appropriately govern manufacturer negligence that occurs at or before the time of sale but should not serve to prospectively limit the recovery of damages caused by a manufacturer's or seller's negligence that takes place after the sale of the product at issue.²

Courts applying the economic loss doctrine generally look to the U.S. Supreme Court's decision in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, a case decided under federal maritime law, for guidance.³ As a result, the economic loss doctrine is often referred to as the "East River doctrine." Prior to *Memorial Hermann*, only the Third Circuit had addressed the question of whether there should be an exception to the economic loss doctrine for postsale negligence claims; in that maritime case, the Third Circuit found no such exception.⁴

District Court and Fifth Circuit Opinions

In *Memorial Hermann*, Eurocopter filed a motion to dismiss the plaintiff's tort claims, arguing that the economic loss doctrine barred them and that no exception to the doctrine existed for claims of postsale negligence. Texas law governed the case, and the district court granted the motion, ruling that Texas courts have not recognized such an exception and that it was not the proper role of federal courts to make new state law.⁵ The Fifth Circuit, in a published decision, affirmed the district court's ruling and went further to discuss the merits of the plaintiff's argument for the economic loss doctrine, concluding that the plaintiff "failed to provide a meaningful difference between

post-sale negligence claims and other negligence claims."⁶ The court also disapproved of an Eleventh Circuit case decided before *East River* that has been universally relied on in arguing for such an exception.

Although the Fifth Circuit's opinion is technically limited to Texas law, the court's overall discussion of the economic loss doctrine and rejection of the plaintiff's postsale negligence argument provide strong authority on these issues. The decision should help defeat future arguments that a claim of postsale negligence survives the economic loss doctrine or, better yet, dissuade potential plaintiffs from bringing such claims in the first place. ■

Carrie Flynn is currently corporate counsel at Symantec Corporation in Cupertino, CA.

Endnotes

1. *Memorial Hermann Healthcare Sys., Inc. v. Eurocopter Deutschland, GmbH*, 2008 U.S. App. LEXIS 7859 (5th Cir. Apr. 11, 2008) (applying Texas law).
2. The plaintiff's exception, if recognized, would have swallowed the rule for manufacturers that maintain a postsale service bulletin program, because a plaintiff can always devise some hypothetical service bulletin or other postsale warning that it can argue should have been issued to address the alleged defect claimed in any particular case.
3. *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986).
4. *See Sea-Land Serv., Inc. v. Gen. Elec. Co.*, 134 F.3d 149, 155-56 (3d Cir. 1998).
5. 2007 U.S. Dist. LEXIS 62335, at *8-9 (S.D. Tex. Aug. 23, 2007).
6. *Memorial Hermann*, 2008 U.S. App. LEXIS 7859, at *8.

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Aircraft Lessor Liability and Federal Preemption: The Case of Air Philippines Flight 541

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Section 44112(a) defines “lessor” as “a person leasing for at least 30 days a civil aircraft, aircraft engine, or propeller.”

Four months before the crash of Flight 541, the Appellate Court of Illinois for the First District (Cook County) handed down its decision in *Retzler v. Pratt & Whitney Co.*¹ In *Retzler*, the

The success of plaintiffs in the Air Philippines cases prompted several U.S.-based plaintiffs’ lawyers to pursue actions against U.S.-based lessors.

Illinois Appellate Court decided that, notwithstanding the clear language to the contrary of 49 U.S.C. § 44112, it did not preempt tort and bailment claims against an aircraft lessor based on Illinois state law.

When the survivors of the Flight 541 decedents brought suit in Illinois against the aircraft lessors, the lessors sought dismissal of the claims on the basis of 49 U.S.C. § 44112 and the doctrine of forum non conveniens. In *Layug v. AAR Parts*

Trading, Inc.,² the court found that “[t]he Illinois Appellate Court for the First District in [*Retzler*] . . . clearly held, based upon an analysis of applicable federal and state law, that section 44112 of the Federal Aviation Act does not preempt state law claims against aircraft lessors.” With this starting point, the court concluded: “The Defendants’ argument with regard to the issue of control of the aircraft is without merit as that was a distinction that had no bearing on the issue of preemption in the applicable case law. Accordingly, the Court here finds that the Plaintiff’s state law claims are not preempted by the Federal Aviation Act.”³

Approximately two years later, in May 2005, the defendants exhausted their efforts to secure dismissal of the Air Philippines cases based on forum non conveniens.⁴ This left the lessor defendants stripped of their federal statutory immunity and facing Illinois tort claims based on alleged defects in the aircraft leased to Air Philippines, as well as claims of spoliation of the evidence of the alleged defects. In this posture, the insurers for Air Philippines (who were obliged to indemnify the lessors) ended up settling for \$165 million in 2008.

Significance of the Air Philippines Cases

The success of the plaintiffs in the Air Philippines cases in Cook County has prompted several U.S.-based plaintiffs’ lawyers to pursue actions against U.S.-based lessors. This underscores the importance to aircraft owners, lessors, operators, and their insurers of understanding what happened in the Air Philippines cases.

A Perfect Storm for Insurers in Cook County

Illinois is one of only two states in the United States (the other being Michigan) whose courts have failed to apply 49 U.S.C. § 44112 in circumstances where it

should have insulated the aircraft lessor from liability. In the cases that resulted from the Air Philippines crash, the obvious purpose of bringing suit against the lessors (who were based in or near Chicago) was to secure a favorable (and otherwise probably unavailable) forum for the plaintiffs, most of whom resided outside the United States. This procedural ploy paid off handsomely for the plaintiffs and their counsel in this instance, but only because of the several unique circumstances, discussed subsequently, that are unlikely to recur, especially in combination, in the future.

The *Retzler* and *Layug* Decisions in Cook County

Because of a poorly reasoned ruling of the Illinois Appellate Court in the *Retzler* case, which courts of other jurisdictions have roundly criticized, the Circuit Court of Cook County felt obliged in the *Layug* case to ignore a federal statute (49 U.S.C. § 44112) that clearly applied to the facts before it and just as clearly should have precluded the plaintiffs’ actions against the aircraft lessors.

Spoliation Issues

The lessors also faced claims of spoliation of evidence from plaintiffs based on the wreckage of the aircraft reportedly having been encased in concrete, which made it unavailable for inspection by plaintiffs’ representatives to explore their possible alternative theories as to the causes of the Air Philippines crash.⁵

Illinois Plaintiff and Illinois Lessor Defendants

At least one of the plaintiffs (*Layug*) was a resident of Cook County, Illinois, which strengthened plaintiffs’ arguments for choosing Cook County as a forum, because both of the lessors (*AAR* and *Fleet*) were based in or near Chicago.

No Release of Claims Against Lessors Obtained by the Airline

The operator of the aircraft (Air Philippines) was not a party to the Cook County cases and evidently had not obtained a release of the plaintiffs' potential claims against AAR and Fleet by settling with plaintiffs.

Different Lessons Learned According to the Parties

Plaintiffs' counsel contended: "[o]ne of the many lessons from this case is that a company leasing an aircraft has a duty to provide oversight to ensure that passengers fly on airplanes that are adequately equipped, safely maintained, and operated by safely trained pilots."⁶ AAR, a lessor defendant that did not even own the aircraft at the time of the accident, has disputed the plaintiffs' insinuation that the aircraft it leased to Air Philippines was anything other than fully airworthy and safe at the time of delivery to Air Philippines:

At the time of delivery to Air Philippines, the aircraft was certified airworthy and complied with all applicable U.S. government and Philippine maintenance, airworthiness and export requirements, and was in safe operating condition. Immediately prior to delivery, the aircraft was inspected and had had maintenance performed including a "C" maintenance check, and an Export Certificate of Airworthiness was issued by the Federal Aviation Administration. The Philippine Department of Transportation, Air Transportation Office also issued a Certificate of Airworthiness for the aircraft upon its import into the Philippines. . . .

According to the report of the independent investigation committee appointed by the president of the Philippines to investigate the April 2000

accident, the accident was caused by the pilots' loss of situational awareness while on approach to Davao City, which led to the aircraft's collision with terrain approximately three miles northeast of the airfield. The independent investigation committee specifically found that there was no evidence of any structural or mechanical defect that may have contributed to the cause of the accident.⁷

In addition to refuting the plaintiffs' claim that it had lessons to learn from the Air Philippines litigation about the safety of aircraft that it leased, AAR (part of a publicly traded company) also explained to its investors:

The settlement was negotiated and entered into by Air Philippines' insurers[,] who will pay the agreed settlement amount, as well as all defense and court costs of the lawsuit, pursuant to contractual indemnification obligations. The AAR subsidiary was fully indemnified by Air Philippines and its insurers, and the settlement will have no financial impact on AAR or its insurers. The settlement involved no admission of liability by any party in the lawsuit.⁸

Conclusion

Given the actual final outcome, the following conclusions emerge. The lessee airlines and their insurers remain responsible. The duty to provide oversight, which plaintiffs sought to shift to aircraft lessors, actually continued to belong—as it should and in keeping with both practical reality and the policy behind 49 U.S.C. § 44112—only to the actual operators of the aircraft and the governmental authorities that regulate them. The insurance and contractual indemnity provisions that allocated the cost of the \$165 million settlement to the airline and its insurers, and not to the lessors or their insurers, mirrored this policy.

If other U.S. courts were to follow the *Layug v. AAR* decision, insurance costs for airlines that lease aircraft from U.S.-based lessors could increase dramatically. The insurance premiums currently charged to foreign air carriers that do not fly to or from the United States reflect, presumably, the anticipated costs and risks of the foreign air carriers' operations in their respective markets outside the United States but not the costs and risks of U.S.-based litigation by foreign plaintiffs. To the extent that passengers of the foreign airlines are able to pursue big city-sized U.S. damage awards by suing U.S.-based lessors (on a bailment and/or negligent entrustment theory, despite 49 U.S.C. § 44112), there could be adverse long-term consequences for the industry: (1) insurers of foreign airlines that do not operate to or from the United States may raise their premiums significantly if an airline operates aircraft leased from U.S.-based lessors; (2) as a result, foreign airlines that lease aircraft from U.S.-based lessors may find that they are unable to obtain affordable insurance and may be driven out of business; and (3) lessors based in the United States (or in U.S. locations such as Chicago, where the courts do not enforce the lessor immunity embodied in 49 U.S.C. § 44112) may find themselves at a competitive disadvantage with lessors based elsewhere because of the increased insurance costs associated with leasing their aircraft.

Lessors should continue to insist on contractual indemnities and insurance coverage from lessee airlines. Aircraft lessors must continue to insist on ironclad contractual indemnity and insurance provisions in dealing with lessees, including foreign airlines. These indemnity and insurance provisions fully protected AAR and its investors in the Air Philippines cases.

It is important to preserve aircraft wreckage as evidence whenever

possible. Aircraft owners, lessors, operators, and insurers must be very cautious in their handling of wreckage after an aviation accident to avoid any situation that could give rise to a claim of spoliation of evidence.⁹

Lessors located in Illinois or Michigan should evaluate alternatives.¹⁰ Such lessors should consider either seeking federal or state legislative relief or relocating to more lessor-friendly jurisdictions if they or their lessees start to encounter increased insurance costs.

The settlement of the Air Philippines cases does not represent a new trend in aviation liability law for lessors in the United States. Instead, it is properly viewed as an aberration that resulted from a perfect storm of factors that occurred (and perhaps could only have occurred) in Cook County, Illinois. These factors include flawed Illinois state court case law (*Retzler*, as applied to AAR and Fleet in the *Layug* case), Chicago-area parties (*Layug*, AAR, and Fleet), no participation by the airline (other than to provide indemnity at the end of the day through its insurers), and the wild-card factor of an apparently serious claim for spoliation of potential evidence from the wreckage. Such a combination of factors is unlikely to

recur in the future. ■

Charles L. Coleman III is a partner in Holland & Knight's San Francisco office.

Endnotes

1. *Retzler v. Pratt & Whitney Co.*, 723 N.E.2d 345 (Ill. 1999), *review denied*, 729 N.E.2d 504 (Ill. 2000).

2. *Layug v. AAR Parts Trading, Inc.*, No. 00 L 9599, 2003 WL 25744436 (Ill. Cir. Ct., May 16, 2003).

3. *Id.*

4. *Ellis v. AAR Parts Trading, Inc.*, 828 N.E.2d 723 (Ill. 2005).

5. If 49 U.S.C. § 44112 had been applied according to its terms, then in principle, nothing about the condition of the wreckage at the time of the accident (which was many months after the inception of the lease) should have affected the lessors' liability or statutory immunity, so long as the lessors were not in "actual possession or control" of the aircraft at the time of the accident. Because of the Illinois state court decisions in *Retzler* and *Layug* that refused to apply 49 U.S.C. § 44112, however, the lessors had to defend against Illinois state law negligence claims. In that situation, having a pending claim against the defendants for alleged spoliation of the evidence (the wreckage from the aircraft) posed an apparently much more serious problem.

6. Press release, Nolan Law Group, \$165 Million Paid by American Leasing

Companies to Resolve Air Philippines Flight 541 Lawsuits, (Mar. 10, 2008), *available at* www.nolan-law.com/news/pr_03_11_08.html.

7. Press release, AAR, AAR Responds to Inquiries Concerning Settlement of Air Philippines Accident Lawsuit (Mar. 13, 2008), *available at* www.aarcorp.com/news/AARResponse031308.htm.

8. *Id.*

9. It is not clear how much control, if any, the lessors-owners and their insurers, as opposed to the Philippine governmental authorities, had over the Air Philippines wreckage. The plaintiffs' spoliation claim was premised on the assertion that the lessor defendants and/or their insurers had a significant degree of control, but that issue apparently was not addressed before the case settled. No doubt one reason for pouring concrete over the parts was to prevent their being pilfered from the accident scene and then resold for use on other aircraft.

10. *See Storie v. Southfield Leasing*, 282 N.W.2d 417 (Mich. 1979), *aff'd. sub nom. Sexton v. Ryder Truck Rental*, 320 N.W.2d 843 (Mich. 1982). In *Storie*, the court conceded that 49 U.S.C. § 1404 (predecessor to the recodified 49 U.S.C. § 44112) "shields a lessor of an airplane from tort liability for any injury or loss suffered 'on the surface of the earth'" but went on to conclude that the statute did not apply because the occupants of an aircraft that crashes onto the earth are not "on the surface of the earth"; rather, they are inside the aircraft.

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Does Your Bark Have Bite?



Who's Liable? An Analysis of Successive and Contracting Carrier Liability

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Article 39 of the convention, "Contracting Carrier—Actual Carrier," expressly excludes successive carriers from the provision:

The provisions of this Chapter apply when a person (hereinafter referred to as "the contracting carrier") as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as "the actual carrier") performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.

The history of the convention is important to understanding the purpose behind Article 39. Article 39 evolved from the Guadalajara Convention of 1961, which introduced liability where a contracting carrier does not provide any portion of the actual transportation but simply contracts with the passenger for the air travel.² The addition of Article 39 provides passengers with the ability to seek damages from more carriers. For example, in a code-share flight, a passenger purchases a ticket from one carrier (the contracting carrier), but another carrier (the actual carrier) that has no contractual relationship with the passenger performs the carriage. Under the liability regime of the Warsaw Convention, courts have held that a passenger may seek recovery only against the actual carrier, not the contracting carrier.³

Articles 40 and 41 of the Montreal Convention remedy this situation by providing the passenger with the option of seeking damages from the contracting carrier, which sold the contract for carriage, or the actual carrier, which actually transported the passenger. The presidential transmittal letter at the presentation of the Montreal Convention to the U.S. Senate further evidenced this purpose:

Articles 39–48 of the Convention define the rights of passengers and consignors in operations where all or part of the carriage is provided by an airline that is not a party to the contract of carriage (e.g., code-share operations, freight consolidators, etc.). The provisions follow the precedent set by the Guadalajara Convention. Pursuant to Article 40, when a claim arises under the Convention, a claimant may bring suit against the carrier from which the carriage was purchased or against the code-sharing carrier operating the aircraft at the time of the accident.⁴

An issue that arises from the foregoing articles is the decision as to when an airline is simply a successive carrier under Article 1(3),⁵ and when it qualifies as a contracting carrier that can be sued for acts of the operating carrier.

Legal Decisions Interpreting Articles 36 and 39

Recent decisions that have addressed articles 36 and 39 assist litigants in determining which carrier(s) may be liable for injuries or death caused by an Article 17 accident.

In *McCarthy v. American Airlines, Inc.*,⁶ the court held that the Montreal Convention provides for a new liability regime whereby a passenger has a claim against both the contracting carrier and the actual carrier and denied summary

judgment for the defendant contracting carrier. The plaintiff purchased a ticket with American Eagle Airlines Inc. to travel from Georgetown, Bahamas, to Miami. Pursuant to a contractual relationship with American Eagle, Executive Airlines Inc. operated the flight. On board the aircraft in Georgetown, a flight attendant advised the plaintiff to check his carry-on baggage planeside because it would not fit in the overhead compartment or underneath his seat. The plaintiff proceeded to the rear door of the aircraft to get the attention of the baggage handlers on the ground. The flight attendant allegedly touched the plaintiff, causing him to fall or jump out of the aircraft and sustain bodily injuries.

Because the Montreal Convention, like the Warsaw Convention, lacks a clear definition of the term *carrier*, the court analyzed both the language of Chapter V, articles 39–48, setting out the distinction between *contracting carrier* and *actual carrier*, and President Clinton's transmittal letter concerning the convention. The court found that the Montreal Convention clearly contemplated that more than one carrier—both the contracting and actual carriers—could be liable to a passenger.

In *In re West Caribbean Airways, S.A.*,⁷ the court refined the definition of a contracting carrier. The case involved the crash of a West Caribbean Airways, S.A., flight in Venezuela that was en route from Panama to Martinique. The plaintiffs sued West Caribbean as well as Newvac Corporation, a company that had entered into a charter contract with West Caribbean. Under the terms of the contract, West Caribbean leased its aircraft and crew to Newvac for certain flights. Newvac, in turn, entered into a charter agreement with Globe Trotter Agency, a travel agency that sold tickets to passengers for flights from Panama to Martinique, including the subject flight.

The plaintiffs argued that Newvac should be characterized as a contracting carrier under the Montreal Convention because it fit the definition under Article 39. Newvac, however, contended that it could not be a contracting carrier because there were no passengers at the time it contracted with Globe Trotter, and thus it could not have entered into a contract with any passenger or anyone acting on a passenger's behalf.

Because West Caribbean staffed and operated the flight under authority from Newvac, the court declined to rigidly interpret the Montreal Convention as requiring a direct contract between

Courts will continue to interpret articles 36 and 39 to resolve the critical issue of which carrier is liable in an increasingly complex aviation industry.

Newvac and the passengers. The court held that because Newvac and Globe Trotter contemplated that the latter would secure passengers for the flight, Globe Trotter acted on the passengers' behalf. The court also declined to adopt Newvac's argument that it could not be a principal under Article 39 because the travel agency was not its agent. Interpreting *principal* as it was used in the Guadalajara Convention, the court found that the term merely clarified that carriers acting only as agents could not qualify as contracting carriers.

Accordingly, the court concluded that

Newvac made a contract of carriage as a principal with a party (Globe Trotter) acting on a passenger's behalf, while another entity (West Caribbean) actually performed the carriage under Newvac's authority. Newvac, therefore, was a contracting carrier as defined by Article 39.

Expanding on the contracting-carrier decisions of *McCarthy* and *In re West Caribbean Airways*, a recent decision in the Eastern District of New York focuses on the interplay between articles 36 and 39. *Best v. BWIA West Indies Airways Limited*⁸ is the first reported decision in the United States interpreting and clarifying the relationship between articles 36 and 39 of the Montreal Convention.

In *Best*, the plaintiffs sought damages for personal injuries sustained when Karen Best was forcibly removed from an international flight. In August 2004, Best purchased a ticket from BWIA for round-trip transportation from New York to Grenada via Port of Spain, Trinidad. The itinerary provided for Best to travel on BWIA from New York to Port of Spain and then on another carrier, LIAT, from Port of Spain to Grenada.

The flight from New York to Port of Spain was uneventful. On arrival in Port of Spain, Best disembarked the BWIA flight, collected her checked baggage, and proceeded to the LIAT counter to check in for her flight to Grenada. Although her original LIAT flight had been canceled, the airline rebooked her, and a LIAT representative escorted her to the aircraft.

On boarding the aircraft, an unidentified man boarded and advised Best that there had been a mistake and that she had to disembark. She refused. Another man (believed to be a Trinidadian customs officer) then boarded the aircraft and asked Best to disembark. Again she refused. He then forcibly removed Best from the aircraft, shoving her down the portable stairs and onto the tarmac. Without explanation, Best was then

assisted up from the tarmac and escorted back onto the aircraft.

Best and her husband commenced an action against BWIA in New York state court, alleging personal injuries to Best caused by the negligence of BWIA and a loss-of-consortium claim by Mr. Best. BWIA removed the action to federal court on the basis of the applicability of the Montreal Convention. After completion of discovery, BWIA moved for summary judgment, seeking dismissal of the plaintiffs' complaint on the basis of the language of Article 36. BWIA argued that, pursuant to Article 36(2), liability can attach only to the carrier "which performed the carriage during which the accident" occurred—in other words, LIAT.

The plaintiffs argued that BWIA was liable as a contracting carrier within the meaning of Article 39 of the Montreal Convention, which provides that both the contracting carrier and the actual carrier can be liable for injuries caused by an Article 17 accident. Plaintiffs maintained that BWIA was a contracting carrier because BWIA sold Best her ticket for international carriage that included the Port of Spain–Grenada leg on which the incident occurred.

In response, BWIA relied on the specific language of the convention. First, Article 39 provides that contracting-carrier liability does not apply in the case of successive carriage. Second, Article 1(3) specifically provides that successive carriers are those that provide carriage that the parties regard as a single operation. Because BWIA transported Best from New York to Port of Spain as part of a single operation, BWIA should be considered a successive carrier. The court agreed that BWIA was a successive carrier.

The court also agreed with BWIA's arguments that Article 39 liability typically applies to code-share arrangements and situations in which a carrier

leases the aircraft and uses the crew of another carrier to provide transportation. Article 39 does not, however, apply to successive carriers. Accordingly, the court held that Article 39 liability was not applicable because the relationship between BWIA and LIAT was one of successive carriage.

The court also rejected the plaintiffs' argument that LIAT acted as an agent of BWIA and that BWIA was, therefore, liable for occurrences during the LIAT carriage. The court concurred with BWIA's reasoning that its conditions of contract precluded such an argument. BWIA's conditions of contract provide that the carrier issuing a ticket (BWIA) for carriage on another carrier (here, LIAT) does so as its agent. In other words, BWIA was an agent for LIAT in issuing the ticket for transportation. As LIAT's agent, BWIA cannot be held responsible for the actions of its principal, LIAT.

Finally, the court held that Article 36 also precludes the existence of an implied agency relationship between BWIA and LIAT. Article 36 provides that a successive carrier may be liable for an accident that occurs during another

carrier's carriage, only "where, by express agreement, the first carrier has assumed liability for the whole journey." There was no evidence of any assumed liability.

Because BWIA was a successive carrier and did not assume any responsibility for Best's entire journey, including the LIAT flight, the court held, as a matter of law, that BWIA could not be liable for Best's injuries and dismissed the plaintiffs' complaint.

Conclusion

In today's global economy, carriers will likely rely on more code-share arrangements and charter flights. Thus, courts will continue to interpret articles 36 and 39 to resolve the critical issue of which carrier is liable in an increasingly complex aviation industry. ■

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Endnotes

1. Article 36(3) provides, "As regards baggage or cargo, the passenger or consignee will have a right of action against the first carrier, and the passenger

or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the last carrier which performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee."

2. See P. DEMPSEY & M. MILDE, *INTERNATIONAL AIR CARRIER LIABILITY: THE MONTREAL CONVENTION OF 1999*, 232-34 (2005).

3. See, e.g., *Orova v. Nw. Airlines, Inc.*, No. 03-4296-CIV, 2005 WL 281197 (E.D. Pa. Feb. 2, 2005).

4. See Letter of President Clinton Approving the Montreal Convention, Sept. 6, 2000, S. TREATY DOC. No. 106-45 (2000).

5. Article 1(3) provides: "Carriage to be performed by several successive carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation."

6. *McCarthy v. Am. Airlines, Inc.*, No. 07-61016-CIV, 2008 WL 2704515 (S.D. Fla. June 27, 2008).

7. *In re W. Caribbean Airways, S.A.*, No. 06-22748-CIV, 2007 WL 5559325 (S.D. Fla. Sept. 27, 2007).

8. *Best v. BWIA W. Indies Airways Ltd.*, No. 06-CV-4589, 2008 WL 4458867 (E.D.N.Y. Sept. 29, 2008).



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Preemption in the Ninth Circuit: *Martin v. Midwest* and the Pervasive Regulation Standard

By Will S. Skinner

In *Martin v. Midwest Express Holding, Inc.*, the Ninth Circuit Court of Appeals held that the Federal Aviation Act (Aviation Act) preempts the field of aviation safety through implied field preemption when there is pervasive regulation in a particular area.¹ The question now in the post-*Martin* era is what does “pervasive regulation” mean and how should courts apply that standard?

In 2007, the Ninth Circuit addressed the issue of preemption in the field of aviation safety in *Montalvo v. Spirit Airlines*.² In *Montalvo*, 14 plaintiffs filed suit against Spirit Airlines, and several other airlines, including American Airlines, Continental Airlines, El Al Israel Airlines, United Airlines, JetBlue Airways, America West Airlines, and US Airways, for failing to warn about the dangers of “deep vein thrombosis,” and for providing an unsafe seating configuration. The cases were consolidated in a multi-district proceeding, and the defendants filed a motion to dismiss on the grounds that the Aviation Act preempted the plaintiffs’ claims. The district court granted the motion, finding federal preemption on both claims.³ In affirming the district court’s finding of preemption on the failure to warn claim, the Ninth Circuit adopted the broad, historical approach set forth in *Abdullah v. American Airlines, Inc.*,⁴ holding that federal law generally establishes the applicable standards of care in the field of aviation safety.⁵

In its analysis, the *Montalvo* court emphasized the comprehensive regulations promulgated by the Federal Aviation Administration (FAA) to regulate aviation safety, the need for uniformity in the national airspace system,⁶ and the uniqueness of the aviation industry, stating that “[a]viation is unique among transportation industries in its relation to the federal government—it is the only one whose operations are conducted

almost wholly within federal jurisdiction, and are subject to little or no regulation by States or local authorities.”⁷ Finally, the *Montalvo* court observed that “Congress’ intent to displace state law is implicit in the pervasiveness of the federal regulations, the dominance of the federal interest in this area, and the legislative goal of

Although *Martin* clearly narrowed the preemptive effect of the Aviation Act, the court made clear that the Aviation Act does preempt certain claims when there is pervasive regulation by the FAA.

establishing a single, uniform system of control over air safety.”⁸

Montalvo appeared to have established a broad and all-encompassing preemption standard in the Ninth Circuit. However, in February 2009, in *Martin*, the Ninth Circuit addressed the issue whether, and to what extent, the Aviation Act preempts an airline passenger’s personal injury claims.⁹ *Martin* involved a claim by a pregnant woman who fell from an airplane’s stairs, injuring herself and her fetus. She sued the airline, Midwest Express, and the airplane’s manufacturer, Fairchild Dornier and related companies, alleging that the stairs were defectively designed because they had only one handrail. Midwest Express settled the claim for \$8 million and sought indemnity from the manufacturer. The manufacturer relied

on *Montalvo* to argue that the Aviation Act preempted the passenger’s personal injury claims and, consequently, Midwest Express’ indemnity claim.¹⁰

Martin looked to whether there was “relevant and pervasive regulations on the allegedly defective part” and found no preemption because airstairs were not pervasively regulated—only one regulation existed pertaining to airstairs.¹¹ “Airstairs are not pervasively regulated; the only regulation on airstairs is that they can’t be designed in a way that might block the emergency exits . . . Because the agency has not comprehensively regulated airstairs, the [Aviation Act] has not preempted state law claims that stairs are defective.”¹²

In *Martin*, the Ninth Circuit retreated from the broad preemptive rule established in *Montalvo* and narrowed the preemptive effect of the Aviation Act in the Ninth Circuit holding:

Montalvo, then, neither precludes all claims except those based on violations of specific federal regulations, nor requires federal courts to independently develop a standard of care when there are no relevant federal regulations. Instead, [*Montalvo*] means that when the [FAA] issues “pervasive regulations” in an area, like passenger warnings, the [Aviation Act] preempts all state law claims in that area. In areas without pervasive regulations or other grounds for preemption, the state standard of care remains applicable.¹³

Although *Martin* clearly narrowed the preemptive effect of the Aviation Act, the court made clear that the Aviation Act does preempt certain claims when there is pervasive regulation by the FAA. *Martin* did not limit its focus on the question of preemption to regulations pertaining to any particular type of claim. Instead, *Martin* noted the

lack of any regulations pertaining to the airstairs, “[t]he regulations say nothing about maintaining the stairs free of slippery substances, or fixing loose steps before the passengers catch their heels and trip.”¹⁴ Thus, *Martin* does not stand for the proposition that preemption is limited to or can *only* occur regarding certain types of claims (e.g., failure to warn claims) or exclude other claims (e.g., personal injury or product liability claims).

Martin specifically held that its conclusion “accords with the decisions of other circuits, refusing to find various defective product claims impliedly preempted by the Aviation Act *in the absence of relevant and pervasive regulations on the allegedly defective part.*”¹⁵ *Martin* cited to *Cleveland v. Piper Aircraft Corp.* (holding that a claim that a plane was defectively designed because the pilot had inadequate visibility was not preempted, although the design violated no federal regulations and was approved by the agency),¹⁶ *Public Health Trust Date County, Fl. v. Lake Aircraft, Inc.* (holding that the Aviation Act did not preempt a defective seat design claim),¹⁷ and *Green v. B.F. Goodrich Avionics Sys., Inc.* (citing to *Abdullah* to find preemption of a failure to warn claim, but applying a state law analysis to a claim that a navigational instrument was defectively manufactured)¹⁸ as examples where courts held that the Aviation Act did not preempt a defective product claim because there was no pervasive regulation of the allegedly defective part.¹⁹ *Martin* did not limit preemption to only failure to warn claims, but rather left the door open for preemption of any type of claim when the FAA has established pervasive regulation. *Martin* did not foreclose a finding, for example, that a product liability claim is preempted if the FAA has established pervasive regulation of a particular product or area.

When analyzing the question of

preemption, *Martin* focused *not* on the regulations pertaining to the specific part that was the basis for plaintiff’s claim (the lack of a handrail on one side of the airstairs), but rather on the product at issue as a whole (airstairs) and the totality of FAA regulation (or lack thereof) pertaining to that product. This is extremely significant when addressing the question of preemption and pervasive regulation. If *Martin* had

The FAA does not provide detailed blueprints as to how every component of an aircraft must be designed, manufactured, or produced.

narrowly focused on FAA regulation of handrails compared with focusing on airstairs (the product at issue), then arguably the preemptive effect of the Aviation Act would have been narrowed into non-existence for product liability claims or personal injury claims relating to a specific component or part on an aircraft. However, *Martin* did not take such a myopic view, but rather held that there was no preemption because the FAA had not established pervasive regulation of airstairs. If there had been pervasive regulation of airstairs (such as regulations governing design, maintenance or repair), then plaintiff’s personal injury claim in *Martin* would likely have been preempted, even though there was no specific FAA regulation pertaining to handrails.

As an example, FAA regulation of aircraft engines is an area that should fall under *Martin*’s pervasive regulation standard.²⁰ The FAA has established pervasive regulation of aircraft engines, including regulations applicable to design, manufacture, production, distribution, and continuing obligations with respect to reporting failures, malfunctions, or defects in aircraft engines.²¹ The FAA extensively regulates aircraft engines from start to finish,²² and then the FAA continues to regulate aircraft engines by imposing reporting and other obligations on aircraft engine manufacturers to ensure that aircraft engines comply with FAA regulations and requirements.²³ The FAA has also established specific maintenance requirements for aircraft engines.²⁴ In addition, the FAA regulates the engine manufacturer’s ability to make changes to an engine by requiring prior approval before any such changes are made to a type certified aircraft engine,²⁵ and regulates the nature and content of Instructions for Continued Airworthiness for the type certified engine.²⁶

If aircraft engines do not fall within the meaning of *Martin*’s pervasive regulation standard, then it is difficult to conceive that any aviation product would satisfy the pervasive regulation standard. In an action, for example, based on negligence or product liability pertaining to a defectively designed or manufactured aircraft engine, it would likely be the case that a party could demonstrate that there are minimal, if any, FAA regulations that are specifically applicable to the component or part of the aircraft engine that allegedly caused the accident. Although the FAA has established pervasive regulation of aircraft engines, the FAA does not provide detailed blueprints as to how every component or part of an aircraft engine must be designed, manufactured, or produced. This would be an impossible

task for the FAA given the multitude and variety of aircraft engines that are manufactured.²⁷ If the meaning of “pervasive regulation” under *Martin* was that every component or part of a product must have specific FAA regulations applicable to that component or part of the product, then few, if any, personal injury or product liability claims would ever be preempted by the Aviation Act.

The rule of law post-*Martin* in the Ninth Circuit is that the Aviation Act preempts the field of aviation safety through implied field preemption when there is pervasive regulation in a particular area.²⁸ *Martin* does not make preemption in personal injury and product liability actions an impossibility. If that was the intent, the Ninth Circuit would have stated as much, but it did not do so. Instead, although *Martin* clearly narrowed the *Montalvo* preemption standard, the Ninth Circuit made clear that the type of claim is not the issue when deciding preemption. The issue is whether the FAA has established pervasive regulation of an area or a product. If the answer is in the affirmative and there is pervasive FAA regulation, then the claims pertaining to the area or product are preempted by the Aviation Act. ■

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Endnotes

1. *Martin v. Midwest Express Holding, Inc.*, 555 F.3d 806, 811 (9th Cir. 2009).
2. 508 F.3d 464 (9th Cir. 2007).
3. *Id.* at 468. With respect to the unsafe seating configuration claim, the district court found that it was preempted by the express preemption provision contained in the ADA.
4. 181 F.3d 363 (3d Cir. 1999).
5. *Montalvo v. Spirit Airlines*, 508 F.3d at 468.
6. “If the FAA did not impliedly preempt state requirements for passenger warnings,

each state would be free to require any announcement it wished on all planes arriving in, or departing from, its soil, or to impose liability for the violation of any jury’s determination that a standard the jury deems reasonable has been violated. Such a ‘patchwork of state laws in this airspace . . . would create a crazyquilt effect.’” *Id.* at 473 (quoting *French v. Pan Am Express, Inc.*, 869 F.2d 1, 6 (1st Cir. 1989)).

7. *Id.* at 473.
8. *Id.*
9. *Martin*, 555 F.3d at 808.
10. *Id.*
11. *Id.* at 812.
12. *Id.*
13. *Id.* at 811.
14. *Id.* at 812.
15. *Id.*
16. 985 F.2d 1438, 1445 (10th Cir. 1993). In *Cleveland v. Piper Aircraft Corp.*, the plaintiff focused on the plane’s design being defective because it left a rear-seat pilot with poor forward visibility. *Id.* The single regulation cited by Piper in that case was 14 C.F.R. § 23.773(a)(1), which only required that the “plane be designed ‘so that the pilot’s view is sufficiently extensive, clear, and undistorted, for safe operation.’” 985 F.2d at 1145. No pervasive regulation of the area existed.
17. 992 F.2d 291, 292, 295 (11th Cir. 1993). In *Public Health Trust of Dade County, Fl. v. Lake Aircraft, Inc.*, although federal regulations recognized energy-absorbing features as a design option, “no provision required that aircraft seats contain an energy-absorbing device to be certified as ‘airworthy.’” 992 F.2d at 294. There was no regulation, much less pervasive regulation, that regulated whether aircraft seats must contain an energy-absorbing device.

18. 409 F.3d 784, 788–89, 794–95 (6th Cir. 2005). In *Green v. B.F. Goodrich Avionics Sys., Inc.*, there was no discussion of any regulations applicable to the vertical gyroscope in the court’s analysis or holding that plaintiff had failed to satisfy her burden to show a defect. 409 F.3d at 791–94. Moreover, in *Green*, there was no indication that the defendant asserted or the Sixth Circuit considered preemption concerning the gyroscope.

19. *Martin*, 555 F.3d at 811.
20. The manufacturer in *Martin* argued that “defective product claims are preempted by the federal certification process required for every plane design.” 555 F.3d at 811. The court held that “[t]here is no indication that the [FAA] has interpreted sections

25.601 and 21.21 as directing it to pervasively regulate every aspect of plane design.” *Id.*

21. See e.g., *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 804–07, 816–19 (1984); *GATX/Airlog Co. v. U.S.*, 286 F.3d 1168, 1171 (9th Cir. 2002) (“the FAA has prescribed a comprehensive set of rules and regulations, including a multi-step certification process, for aircraft design and production.”).

22. See e.g., *inter alia*, 49 U.S.C. § 44704(a) (type certificates, production certificates, airworthiness certificates, and design organization certificates); 14 C.F.R. § 21.21 (issue of type certificate: normal, utility, acrobatic, commuter, and transport category aircraft; manned free balloons; special classes of aircraft; aircraft engines; propellers); 14 C.F.R. Part 33, §§ 33.1–33.8 (Subpart A-general), 33.11–33.29 (Subpart B-design and construction; general), 33.31–33.39 (Subpart C-design and construction; reciprocating aircraft engines); 33.41–33.57 (Subpart D-block tests; reciprocating aircraft engines), 33.61–33.79 (Subpart E-design and construction; turbine aircraft engines), 33.81–33.99 (Subpart F-block tests; turbine aircraft engines), 33.201 (Subpart G-special requirements: turbine aircraft engines).

23. Once the FAA issues a type certificate and production certificate to an aircraft engine manufacturer, the FAA continues to monitor the safety of the certified aircraft engine. *GATX/Airlog Co.*, 286 F.3d at 1171; see 49 U.S.C. § 44709(a) (Amendments, modifications, suspensions, and revocations of certificates); 14 C.F.R. §§ Part 39, 39.1–39.27). The FAA may amend, modify, suspend, or revoke a certificate for airworthiness reasons by issuing an airworthiness directive. *Id.* (citing 49 U.S.C. § 44709(b); 14 C.F.R. §§ 21.99, 21.277, 39.11). The FAA’s airworthiness directives are legally enforceable rules that apply to aircraft engines. See 14 C.F.R. § 39.3. The FAA issues an airworthiness directive addressing an aircraft engine when the FAA finds that (a) an unsafe condition exists in the engine, and (b) the condition is likely to exist or develop in other engines of the same type design. See 14 C.F.R. § 39.5. After the FAA issues an airworthiness directive, the particular aircraft engine may only be operated in compliance with that directive. See 14 C.F.R. §§ 39.7, 39.9

24. The FAA has established detailed regulations governing the maintenance, preventive maintenance, rebuilding, and alteration of aircraft engines. See 14 C.F.R. Part 43 §§ 43.1–43.17. The FAA regulations, *inter*

alia, specify (1) the persons authorized to approve aircraft engine for return to service after maintenance, preventative maintenance, rebuilding, or alteration (see 14 C.F.R. § 43.7); (2) the content, form, and disposition of maintenance, preventive maintenance, rebuilding, and alteration records (see 14 C.F.R. §§ 43.9, 43.11, 43.12); and (3) the time and nature of inspections required (see 14 C.F.R. § 91.409); and (4) the performance rules for inspections. See 14 C.F.R. §§ 43.13, 43.15, Appendix A to Part 43.

25. The FAA has established procedural requirements for the approval of changes to type certificates. See 14 C.F.R. § 21.91. Changes in type design are classified as minor and major. See 14 C.F.R. § 21.93. A “minor change” is one that has no appreciable effect on the weight, balance,

structural strength, reliability, operational characteristics, or other characteristics affecting the airworthiness of the aircraft engine, and all other changes are “major changes” except as specifically limited. See 14 C.F.R. § 21.93. Both minor and major changes must be approved by the FAA. See 14 C.F.R. §§ 21.95, 21.97. In addition, after the FAA issues a production certificate, any change in the quality control system is subject to review by the FAA. See 14 C.F.R. § 21.147. An aircraft engine manufacturer must seek FAA approval prior to amending a production certificate. See 14 C.F.R. § 21.153.

26. The Instructions for Continued Airworthiness for reciprocating aircraft engines, set forth in 14 C.F.R. § 33.4 and Appendix A to Part 33, provide specific, detailed, and comprehensive requirements for continued

airworthiness for aircraft engines.

27. This is a clear distinction between a failure to warn claim and a negligence or product liability claim based on a defective product. It is feasible for the FAA to establish a specific and detailed warning to give in a specific situation, and such a warning can be used universally for that situation. When a product is involved in a claim, it is not feasible or possible for the FAA to provide a detailed blueprint as to how that product and each of its components and parts should have been designed or manufactured. This does not mean, however, that the FAA cannot establish pervasive regulations governing a particular area or product.

28. *Martin*, 555 F.3d at 811.

Subrogation Spotlight: Who Is My Client?

Continued from page 3

to counsel, as a scribe for both parties, to draft the agreement. This, too, is problematic but nonetheless routine. If counsel has managed to stay out of the negotiation process, he or she is a step ahead of many seasoned subrogation practitioners.) As such, this is the time to back off. Let the insurer and insured reach an agreement independently—assisted by different counsel if necessary. Once they reach and sign off on an agreement, you have your mandate to represent both IOT and its subrogated insurer. This sharing agreement is as essential to the claim as the subrogation receipt from which the subrogated insurer derives its rights.

The sharing agreement should address two critical questions: What is the split of costs and recovery? Who makes the final decision as to

settlement, strategy, and so on? The second question is as important as the first. No lawyer can serve two masters.⁴ Having managed to stand clear of the negotiation of the sharing agreement, how unsatisfying would it be to nonetheless immerse yourself in another ethical dilemma as you try to negotiate strategy between your two clients? Only one client can drive the bus.

In summary, counsel, the insurer, and the insured should make an early determination as to how insured and uninsured losses will be shared. Counsel should let the insurer and insured sort this out directly. Thereafter, counsel can zealously represent the interests of both in the litigation. Counsel will likely report to both the insurer and the insured, but only one will ultimately make the decisions.⁵ ■

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Endnotes

1. Of course, from the perspective of the insured and its uninsured damages, the insured is not subrogated to anyone.

2. In essence, one side will argue that the damage history affects the value of the aircraft; the other side will argue that the repair and overhaul have provided the insured with a better engine than before the accident.

3. N.Y. COMP. CODES R. & REGS. TIT. 22, § 1200.24 (DR 5-105(C)).

4. See N.Y. City Bar Ass’n Op. No. 2001-2 (2001).

5. If this is the insurer, as it typically is, it becomes like an insurance defense counsel in which the insurer controls the defense. But unlike the defense scenario, the true client is usually both the insurer and the insured. There are few ethical guidelines for this particular twist on the tripartite relationship of counsel, insurer, and insured, and many hallmarks of this relationship in the defense context (e.g., insurer controls defense and the exclusive right to settle) are not directly applicable to a subrogation action.



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