Paul V. Herbers*
Elizabeth A. Vasseur-Browne**

2010 Cumulative Supplement to
Chapter 9

AVIATION LIABILITY

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*Mr. Herbers' biographical information appears on page 9–1 of the original chapter.

**Ms. Vasseur-Browne received her B.S., 2000, from Embry-Riddle Aeronautical University and J.D., 2005, from Hofstra University. She is engaged in private practice as a member of the law firm Cooling and Herbers, P.C., of Kansas City. Ms. Vasseur-Browne is a licensed pilot and a member of the National Transportation Safety Board Bar Association and serves as its Regional Vice President for the Central Region.

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I. Special Considerations

C. (§9.3) Federal Regulation and Preemption

In *Hansen v. Delta Airlines*, No. 02 C 7651, 2004 WL 524686 (N.D. Ill. Mar. 17, 2004), a carrier argued that the plaintiff's state law claims for false imprisonment, malicious prosecution, and intentional infliction of emotional distress—following being removed from a flight after reportedly uttering the word "bomb" as she was checking in—were preempted by the air carrier immunity provisions of the Aviation and Transportation Security Act, 49 U.S.C. § 44941 (specifically Amendment 1857 to the Senate version of the Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597), passed in the aftermath of the events of September 11, 2001. In examining the legislative history of the Act, the court said that Congress did not intend to shield airlines from civil liability for disclosures made in bad faith.

1. (§9.4) Federal Aviation Act Preemption

As to radio towers, see also *Leppla v. Sprintcom, Inc.*, 806 N.E.2d 1019 (Ohio App. 2004). As to light poles, see *McMahon Helicopter Services v. United States*, No. 04-74133, 2006 WL 2130625 (E.D. Mich. July 28, 2006).

Regarding the issue of preemption by the FAA of 1958 (Federal Aviation Act of 1958, 49 U.S.C. §§ 40101 *et seq.*) in product liability claims, see also *Skydive Factory, Inc. v. Maine Aviation Corp.*, 268 F. Supp. 2d 61 (D. Me. 2003).

In *Hansen v. Delta Airlines*, No. 02 C 7651, 2004 WL 524686 (N.D. Ill. Mar. 17, 2004) (discussed in §9.3 of this supplement), the carrier also requested preemption based on 49 U.S.C. § 44902(b) of the FAA of 1958. *Hansen* again denied preemption, saying that § 44902(b) does not give airline personnel absolute discretion to remove passengers purportedly for security reasons and that the decision to deny transportation to a passenger must be rationally based on a concern for safety.

The Eighth Circuit has held that the Federal Aviation Administration Authorization Act, Pub. L. No. 103-305, 108 Stat. 1569, also preempts state economic regulations regarding a carrier's rates, routes, and service. *Data Mfg., Inc. v. United Parcel Serv., Inc.*, 557 F.3d 849 (8th Cir. 2009).

2. (§9.5) Airline Deregulation Act Preemption

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Cases of passengers suing an airline for the development of DVT (deep vein thrombosis), a condition involving the formation of blood clots, allegedly related to long periods of sitting, have recognized preemption under both the ADA (Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705) and the FAA of 1958. *See*:

- *Witty v. Delta Airlines, Inc.*, 366 F.3d 380 (5th Cir. 2004)
- *In re Deep Vein Thrombosis Litig.*, Nos. MDL 04-1606 VRW, *et seq.*, 2005 WL 591241 (N.D. Cal. Mar. 11, 2005), *aff'd in part, rev'd in part, and remanded, Montalvo v. Spirit Airlines*, 508 F.3d 464 (9th Cir. 2007)
- *Miezin v. Midwest Express Airlines, Inc.*, 701 N.W.2d 626 (Wis. App. 2005)

See also §9.34 of this supplement for more on DVT. *But see McAuley v. Fed. Ins. Co.*, 500 F.3d 784 (8th Cir. 2007) (reversing and remanding district court's dismissal of case against insurer that denied benefits under an accidental death policy when the passenger's death was allegedly caused by DVT).

When New York attempted to enforce a passengers' bill of rights against the airlines, the law was preempted by the ADA. *Air Transp. Ass'n of Am. v. Cuomo*, 520 F.3d 218 (2nd Cir. 2008). But the United States Department of Transportation did respond with the adoption of a contingency plan for lengthy tarmac delays at 14 C.F.R. § 259.4.

The ADA preempted a claim against an airline when baggage handlers searched a checked bag on the tarmac. *Koutsouradis v. Delta Air Lines, Inc.*, 427 F.3d 1339 (11th Cir. 2005). Interestingly, a claim for false advertising that the airline had "more leg room throughout coach" was not preempted. *O'Callahan v. AMR Corp.*, 30 Av. Cas. (CCH) ¶ 16,399 (N.D. Ill. 2005).

E. (§9.7) Choice of Law

See *Johnson v. Avco Corp.*, No. 4:07CV1695 CDP, 2009 WL 4042747 (E.D. Mo. Nov. 20, 2009), in which the court used the most-significant-relationship test to apply Indiana law. See also *In re Air Disaster at Little Rock, Arkansas, on June 1, 1999*, 125 F. Supp. 2d 357 (E.D. Ark. 2000), regarding the importance of using extreme caution not to overlook the effects of laws in a potentially applicable jurisdiction.

F. (§9.8) Special Tariffs, Statutes, or Treaties

Add the following citation to the third bulleted item in the original section:

The Montreal Agreement of 1999; 3 Av. L. Rep. (CCH) ¶ 27,950. See the discussion in §9.43 of the original chapter and this supplement.

G. (§9.9) Special Aspects of Liability Insurance Agreements

Add the following citations correspondingly to the 6th, 7th, and 14th bulleted items in the original section:

- Purpose of use of the aircraft. *Alberto-Culver Co. v. Aon Corp.*, 812 N.E.2d 369 (Ill. App. 2004) (or the commercial nature of a flight involving an interchange agreement for a corporate jet).

- Nature of the insured's business. *Old Republic Ins. Co. v. Griffin*, 402 F.3d 876 (9th Cir. 2005).

- Duty to defend. *See, e.g., Dynamic Concepts, Inc. v. Truck Ins. Exch.*, 71 Cal. Rptr. 2d 882 (Cal. App. 1998).

Add the following additional bulleted item to those in the original section:

- Exclusion for losses because of "wear and tear" to an aircraft engine. *Meridian Leasing, Inc. v. Associated Aviation Underwriters, Inc.*, 409 F.3d 342 (6th Cir. 2005) (the exclusion was considered ambiguous and unenforceable).

II. Liability of Aircraft Operators and Owners

C. (§9.12) Violations of Federal Aviation Regulations

A violation of an FAR (federal aviation regulation) does not establish negligence per se. *Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc.*, Nos. WD 61655 *et seq.*, 2004 WL 76342 (Mo. App. W.D. Jan. 20, 2004), *rev'd in part on other grounds*, 155 S.W.3d 50 (Mo. banc 2005).

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E. (§9.14) Crop Dusting or Spraying

Replace the fourth paragraph of the original section with the following paragraph:

Plaintiffs continue to attempt to use federal and state environmental laws to enjoin and seek damages from pilots performing normal activities of applying herbicides or pesticides for farmers or ranchers in the United States. In *No Spray Coalition, Inc. v. City of New York*, 252 F.3d 148 (2nd Cir. 2001), the Second Circuit upheld a district court's dismissal of claims when the Centers for Disease Control and Prevention, the United States Environmental Protection Agency, and the city and state health departments engaged in extensive spraying of malathion to eradicate the mosquito that carries the West Nile Virus. The plaintiffs then brought suit under the Clean Water

Act, 33 U.S.C. §§ 1365 *et seq. See also No Spray Coalition, Inc. v. City of New York*, No. 00 Civ. 5395 (GBD), 2005 WL 1354041 (S.D.N.Y. June 8, 2005).

F. Defenses

1. (§9.16) Comparative Fault, Contributory Negligence, and Assumption of the Risk (New Title)

Contributory negligence remains as a defense in a case involving purely economic damages but not in claims involving either personal injury or property damage. *Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc.*, Nos. WD 61655 *et seq.*, 2004 WL 76342 (Mo. App. W.D. Jan. 20, 2004), *rev'd in part on other grounds*, 155 S.W.3d 50 (Mo. banc 2005).

3. (§9.18) Intervening, Superseding Cause

Violations of FARS are not always intervening, superseding causes, according to the federal district court in *Bax Global, Inc. v. Federal Express Corp.*, No. 02-651 JRT/FLN, 2004 WL 1447940 (D. Minn. May 26, 2004). Although noting that the specific actions of the terrorists were horrific, the court in *In re September 11 Litigation*, 280 F. Supp. 2d 279 (S.D.N.Y. 2003) (citing *Kush ex rel. Marszalek v. City of Buffalo*, 449 N.E.2d 725, 729 (N.Y. App. 1983)), declined to find that the acts of the terrorists would qualify as intervening, superseding causes of the disaster, excusing the World Trade Center defendants of all liability as a matter of law.

4. (§9.19) Contractual Release or Limitation of Liability

Replace the third paragraph of the original section with the following paragraph:

But see *Roth v. LaSociete Anonyme Turbomeca France*, 120 S.W.3d 764 (Mo. App. W.D. 2003), in which the plaintiffs were allowed to maintain a claim for fraud in the inducement without repudiating the settlement agreement that was the basis of the fraud claim.

III. Liability of Air Carriers

A. (§9.21) Who Is an Air Carrier?

The FAA's (Federal Aviation Administration's) position, set out in Advisory Circular AC-120-12A, is available at:

www.airweb.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/MainFrame?OpenFrameSet

Enter "120-12A" in the Search box and click Go.

See also *Woolsey v. National Transportation Safety Board*, 993 F.2d 516 (5th Cir. 1993), for a holding that an air carrier is a common carrier if, by express statement or course of conduct, it holds itself out to the public as willing to carry, at a fixed rate, all persons applying for air transportation.

D. (§9.24) Private Air Carrier, Standard of Care

As to the standard of care for an aircraft charter operator allowing its passenger to abduct two children from the custodial parent, see *Streeter v. Rifton Management, LLC*, No. X01CV021794815, 2004 WL 3130585 (Conn. Super. Ct. Dec. 27, 2004).

F. Theories of Liability

3. (§9.29) Security

In *Gordon v. Federal Bureau of Investigation*, 388 F. Supp. 2d 1028 (N.D. Cal. 2004), an FOIA (Freedom of Information Act), Pub. L. No. 89-487, 80 Stat. 250, claim against the FBI (Federal Bureau of Investigation) and the TSA (Transportation Security Administration) for disclosure of records regarding the "no fly" lists and other aviation watch lists, the court found an exemption for inter-agency or intra-agency records (the deliberative process privilege), as well as one for information compiled for law enforcement purposes, that protected both the FBI and TSA records from disclosure.

An airline had no duty to an injured passenger to preserve its passenger list, and a spoliation claim was not available. *James v. U.S. Airways, Inc.*, 375 F. Supp. 2d 1352 (M.D. Fla. 2005).

4. (§9.30) Children

When an allegedly unaccompanied minor was molested by another passenger during a flight, the court in *Garza v. Northwest Airlines, Inc.*, 305 F. Supp. 2d 777 (E.D. Mich. 2004), opined that the special program created by the air carrier, requiring unaccompanied minors to pay a special fee in exchange for the airline assuming heightened obligations for their care, created a special class of invitees over whom it assumed additional legal responsibilities. A private air charter company was held to the same standard in *Streeter v. Rifton Management, LLC*, No. X01CV021794815, 2004 WL 3130585 (Conn. Super. Ct. Dec. 27, 2004), on claims of custodial interference in an alleged abduction by the natural father of two minor children to Cairo, Egypt.

5. (§9.31) Discrimination

In *Sawyer v. Southwest Airlines Co.*, 145 Fed. Appx. 238 (10th Cir. 2005), the Tenth Circuit found no carrier liability for refusal to board African-American passengers arriving eight minutes before departure when airline policy decreed that passengers checking in fewer than ten minutes before boarding would be placed on stand-by. As to disabled passengers, see *Wright ex rel. D.W. v. American Airlines, Inc.*, 249 F.R.D. 572 (E.D. Mo. 2008).

Discrimination against Arabs or Muslims since the terrorist attacks of September 11, 2001, has been the subject of several actions, including *Dasrath v. Continental Airlines, Inc.*, 228 F. Supp. 2d 531 (D.N.J. 2002). The court noted that 49 U.S.C. § 44941 protects only the disclosures of information and not the actions taken in response to those disclosures, while 49 U.S.C. § 44902 only protects carriers removing passengers for purported safety reasons under a reasonableness standard.

7. (§9.33) Refusal to Transport

Ruta v. Delta Airlines, Inc., 322 F. Supp. 2d 391 (S.D.N.Y. 2004), concerned an allegedly disabled passenger who was removed from a flight for what Delta employees characterized as rude, disruptive, and allegedly intoxicated behavior. One of the plaintiff's claims was for violation of 42 U.S.C. § 12184 of the ADA (Americans with Disabilities Act), Pub. L. No. 95-504, 92 Stat. 1705. The court concluded that, although the claim was not

preempted by the Federal Aviation Act of 1978, 49 U.S.C. §§ 40101 *et seq.* (which speaks only to state law preemption), the terms of the ADA itself barred the claim under 42 U.S.C. § 12181(10).

See also the discussion of preemption under 42 U.S.C. §§ 44941 and 44902(b) since the terrorist attacks of September 11, 2001, in *Hansen v. Delta Airlines*, No. 02 C 7651, 2004 WL 524686 (N.D. Ill. Mar. 17, 2004) (discussed in §9.3 of this supplement).

8. (§9.34) Passengers' Health Needs

For another case dealing with airline liability for failure to respond adequately to in-flight medical emergencies, see *Swilley v. Southwest Airlines Co.*, No. B163433, 2004 WL 363386 (Cal. App. Feb. 27, 2004) (failure to provide emergency oxygen).

A developing line of cases involves claims for DVT (deep vein thrombosis). Claims against the airlines have failed because of preemption, and a claim against the aircraft manufacturer has failed because of a lack of duty. *In re Deep Vein Thrombosis Litig.*, Nos. MDL No. 04-1606 VRW *et seq.*, 2005 WL 591241 (N.D. Cal. Mar. 11, 2005), *aff'd in part, rev'd in part, and remanded, Montalvo v. Spirit Airlines*, 508 F.3d 464 (9th Cir. 2007). These claims may not be an accident under the Warsaw Convention. *See Rodriguez v. Ansett Austl. Ltd.*, 383 F.3d 914 (9th Cir. 2004), *cert. denied*, 544 U.S. 922 (2005). *But see also* §9.46 of this supplement.

9. (§9.35) Injuries by Other Passengers

An airline was not liable for an auto accident that occurred after the flight and was caused by a drunk passenger to whom the airline served alcohol. *Delta Airlines, Inc. v. Townsend*, 614 S.E.2d 745 (Ga. 2005).

10. (§9.36) Overhead Baggage

In *Allen v. Delta Airlines, Inc.*, No. CV-01-0069 (DGT), 2003 WL 21672746 (E.D.N.Y. July 3, 2003), the baggage incident occurred before the boarding was complete, so the carrier's duty to ensure safe stowage of baggage had not yet arisen.

12. (§9.38) Airline Employees

A number of cases brought by airline employees against airline employers have alleged that the employee's termination violated state whistleblower protection statutes. *Botz v. Omni Air Int'l*, 286 F.3d 488 (8th Cir. 2002) (a flight attendant's retaliatory termination claim was preempted); *see also Galati v. Am. W. Airlines, Inc.*, 69 P.3d 1011 (Ariz. App. 2003).

Since the terrorist attacks of September 11, 2001, there have also been employment-related claims against air carriers for discrimination based on national origin, race, or religion by Muslim or Middle-Eastern pilots. In *Equal Employment Opportunity Commission v. Trans States Airlines, Inc.*, 356 F. Supp. 2d 984 (E.D. Mo. 2005), the Commission and the pilot both claimed that the airline had discharged the pilot because of racial and religious discrimination. The incidents at issue took place a few days after September 11, 2001. The court awarded summary judgment to the carrier, finding an unrebutted nonpretextual reason for terminating the probationary pilot—appearing in a hotel bar wearing part of his uniform, which was in violation of the airline's rules.

I. Warsaw Convention and Montreal Agreement of 1999 (New Title)

1. (§9.43) History of Agreements

Replace the text in the original section with the following text:

The Warsaw Convention (Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 U.S.C. § 40105 (Historical and Statutory Notes)), is the result of a 1929 treaty to create a uniform law for international air transportation, and it applies to international flights between signatory countries. In 1966, the Civil Aeronautics Board recommended that the United States renounce the Warsaw Convention because the limit of liability for personal injuries and death was perceived to be too low—then 125,000 French francs, or U.S. $8,300, Warsaw Convention, art. 22, 3 Av. L. Rep. (CCH) ¶ 27,033.

The Warsaw Convention includes:

- a presumption of air carrier liability (arts. 17 and 18);
- a forum selection clause (art. 28);
- a provision for recovery of delay damages (art. 19); and
- express defenses to liability (arts. 20 and 21).

Contributory negligence is a defense under both the Warsaw Convention and the Montreal Agreement. Airlines that have not signed the Montreal Agreement are still subject to liability under the Warsaw Convention.

The Hague Protocol was signed in 1955 by certain signatories to the Warsaw Convention in an attempt to make changes to the Warsaw Convention (including doubling the limit of liability). 3 Av. L. Rep. (CCH) ¶ 27,101. The United States Congress never ratified the Hague Protocol.

In 1975, the airlines, anticipating the demise of the protection afforded by the Warsaw Convention limitation, offered to enter into a private agreement with the United States, raising the limit to $75,000 and subjecting the airlines to "absolute" liability for personal injuries and death. For purposes of these agreements, now called the Montreal Protocols, 3 Av. L. Rep. (CCH) ¶ 27,180–27,240, absolute liability means that the carrier cannot assert the defenses that are available under the Warsaw Convention—e.g., that the carrier took all necessary measures to prevent the damage or that it was impossible to prevent the damage.

By 1998, the United States and most foreign international carriers had signed and implemented the 1996 Intercarrier Agreement, a private agreement among airlines proposed by the International Air Transportation Association. 3 Av. L. Rep. (CCH) ¶ 27,951. Under these agreements, air carriers became strictly liable under Warsaw Convention Article 17 (waiving the need to prove willful misconduct) for full compensatory damages unless, under Article 20, the carrier could prove it had taken all necessary measures to avoid an accident, a nearly insurmountable burden. Additionally, the United States Senate ratified Montreal Protocol No. 4, which had the effect of binding the United States to the 1955 Hague Protocol amendments to the Warsaw Convention. 3 Av. L. Rep. (CCH) ¶ 27,350. The primary effect of this action will be with respect to cargo cases.

The Montreal Convention (Convention for the Unification of Certain Rules for International Carriage by Air of 1999, the new multilateral convention to govern the liability of airlines in international aviation accidents) was drafted in 1999 to replace the Warsaw Convention and its various related protocols and agreements. 3 Av. L. Rep. (CCH) ¶ 27,400. It establishes a unique system of airline liability radically different from the 1929 Warsaw Convention. The biggest differences between the two conventions are:

- the elimination of the damages limitations, including a requirement of proving "willful misconduct";
- the provision of a fifth jurisdiction for claims—the domicile of the passenger (over and above the four jurisdictions set out in Article 28 of the Warsaw Convention); and
- the substitution of a two-tiered compensation scheme.

Under the Montreal Convention's Article 21, strict liability prevails up to a certain limit, after which carriers may be exonerated if they can prove non-negligence or third-party fault. The United States has ratified the Montreal Convention, and it was effective in November 2003. Because the Montreal Convention uses many of the same concepts and phrases as the Warsaw Convention, much of the existing Warsaw Convention caselaw may remain unchanged. As yet, there are no cases illustrating points of difference between the Montreal Convention and the Warsaw Convention.

When different versions of the Warsaw Convention apply in two countries because one has ratified the amended version and the other the unamended version, the Second Circuit has refused to find a treaty. *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301 (2nd Cir. 2000), *cert. denied*, 533 U.S. 928 (2001). See also *Royal & Sun Alliance Insurance v. American Airlines, Inc.*, 277 F. Supp. 2d 265 (S.D.N.Y. 2003), and *Avero Belgium Insurance v. American Airlines, Inc.*, 423 F.3d 73 (2nd Cir. 2005), for more on the application of various protocols and amendments to the Warsaw Convention. Whether courts will apply similar rules with the Montreal Convention and the Warsaw Convention is not known at this time. Whether a claim falls within the ambit of the Montreal Convention or the Warsaw Convention depends on the

contract of carriage and whether the contract is between states that have ratified the Montreal Convention, the Warsaw Convention, or some alternative treaty or legislation.

2. Cases Construing Agreements

b. (§9.45) Embarking and Disembarking

The Warsaw Convention applied to a passenger's personal injury from a fall while disembarking from a shuttle bus transporting passengers between connecting flights in *Girard v. American Airlines*, No. 00-CV-4559 (ERK), 2003 WL 21989978 (E.D.N.Y. Aug. 21, 2003).

c. (§9.46) Accident

Replace the text in the original section with the following text:

The Warsaw Convention permits recovery only for an "accident." The more prevalent and broad interpretation of "accident" under Warsaw Convention Article 17 was defined by the United States Supreme Court in *Air France v. Saks*, 470 U.S. 392 (1985), as "an unexpected or unusual event or happening that is external to the passenger." In *Rajcooar v. Air India Ltd.*, 89 F. Supp. 2d 324 (E.D.N.Y. 2000), failure to administer adequate medical care was not considered an accident because the plaintiff's heart attack was not external to him. But creating a new twist on the interpretation of "accident" under Article 17, the Court in *Olympic Airways v. Husain*, 540 U.S. 644 (2004), included refusals of a flight attendant to come to a passenger's aid. *Husain* involved an asthmatic passenger who died as a result of smoke inhalation when the flight attendant failed or refused to move him to another seat after he had indicated his medical condition and requested a seat change. The Court noted that injuries resulting from routine procedures could constitute an accident if those procedures were carried out in an unreasonable manner.

The definition of an "accident" under the Warsaw Convention was further refined in *Wallace v. Korean Air*, No. 98 CIV. 1039 RPP, 1999 WL 187213 (S.D.N.Y. Apr. 6, 1999), *vacated*, 214 F.3d 293 (2nd Cir. 2000), *cert. denied*, 531 U.S. 1144 (2001). The plaintiff sought compensation for a sexual assault

by a fellow passenger during a flight from South Korea to Los Angeles. The court of appeals ruled that it was an accident within the meaning of Article 17; the characteristics of air travel increased the passenger's vulnerability to assault, which occurred while lights were turned down and the assailant was unsupervised.

Clearly, under Article 17, air carriers are not liable for emotional or psychological injuries unaccompanied by physical injuries. *See E. Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991); *Brandt v. Am. Airlines*, No. C 98-2089 SI, 2000 WL 288393 (N.D. Cal. Mar. 13, 2000). More problematic is PTSD (posttraumatic stress disorder), with both physical and mental components, when accompanied by physical or bodily injury. The Eighth Circuit has held that PTSD arising out of bodily injury is not compensable. *See In re Air Crash at Little Rock Ark., on June 1, 1999*, 291 F.3d 503 (8th Cir. 2002), *cert. denied sub nom.*, 537 U.S. 974 (2002).

Industry standards require airlines to make unscheduled landings in cases of in-flight medical emergencies requiring immediate hospital care, and failure to do so may result in liability. But in *McDowell v. Continental Airlines, Inc.*, 54 F. Supp. 2d 1313 (S.D. Fla. 1999), the court reluctantly concluded—basing its decision on the Eleventh Circuit precedent in *Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998)—that the crew's failure to make an unscheduled landing was not an "accident" under Article 17 and was, therefore, not actionable under the Warsaw Convention. Furthermore, because the medical emergency occurred in-flight, the court held that, under *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999), any state law claim was preempted. But *McDowell* did not take into consideration the Supreme Court's criticism of the appellate court decision in *Tseng* for its narrow construction of the word "accident" and its emphasis on the more flexible approach of the Court in *Air France*, 470 U.S. 392.

In *Gupta v. Austrian Airlines*, 211 F. Supp. 2d 1078 (N.D. Ill. 2002), the court addressed the inconsistencies in the rulings addressing what is an "accident" under the Warsaw Convention, saying that most of the cases finding "no accident" before *Tseng* were cases in which there was also a state law claim pending, which would allow the plaintiff to proceed in

the alternative, under state law, without the limitations on liability present in the Warsaw Convention. In these cases, the plaintiffs usually argued that their injuries were not an "accident," while defendants argued that plaintiffs' injuries were an "accident" under the Warsaw Convention. Because the ruling in *Tseng* precluded any remedy but those under the Warsaw Convention for passengers injured on an international flight, the parties have switched sides, with the plaintiffs arguing that their injuries were an "accident" and the defendants claiming that they were not.

In *Grimes v. Northwest Airlines, Inc.*, No. CIV. A. 98-CV-4794, 1999 WL 562244 (E.D. Pa. July 30, 1999), an altercation between a passenger and an employee resulting in the passenger's arrest did not constitute an accident under Article 17 because the passenger's own behavior caused the arrest.

A passenger's personal injury from a fall while disembarking from a shuttle bus transporting passengers between connecting flights resulted from an "accident" within the meaning of the Warsaw Convention in *Girard v. American Airlines*, No. 00-CV-4559 (ERK), 2003 WL 21989978 (E.D.N.Y. Aug. 21, 2003).

An airline was not liable under the Warsaw Convention for injuries to a passenger who fell down after he consumed up to nine beers in-flight when the airline was unaware of his intoxication. *Padilla v. Olympic Airways*, 765 F. Supp. 835 (S.D.N.Y. 1991). The death of a passenger from choking on airline nuts was not an accident. *Scarboro v. Swissair Swiss Air Transp. Co.*, 28 Av. Cas. (CCH) ¶ 16,147 (N.D. Ga. 2002). The death of a passenger from obstructive pulmonary disease was not an accident, *Hipolito v. Nw. Airlines, Inc.*, 15 Fed. Appx. 109 (4th Cir. 2001), nor was development of DVT, *Rodriguez v. Ansett Austl. Ltd.*, 383 F.3d 914 (9th Cir. 2004), but death from a heart attack was an accident, *Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651 (S.D.N.Y. 2001), *aff'd*, *Prescod v. AMR, Inc.*, 383 F.3d 861 (9th Cir. 2004). The airlines' seizure of a passenger's carry-on bag containing a breathing device and medication after the airlines promised that the bag would travel with the passenger was an "accident" within the meaning of the Warsaw Convention. *Prescod*, 383 F.3d 861. But passenger

inconvenience from a delayed, and then canceled, flight was not compensable. *Lee v. Am. Airlines, Inc.*, No. 3:01-CV-1179-P, 2002 WL 31230803 (N.D. Tex. Sept. 30, 2002).

An airline's failure to warn of the danger of DVT is not an accident compensable under the Warsaw Convention. *Blansett v. Cont'l Airlines, Inc.*, 379 F.3d 177 (5th Cir. 2004), *cert. denied*, 543 U.S. 1022 (2004).

e. (§9.48) Willful Misconduct

Seizure of a bag containing a breathing device and medications was "willful misconduct," making the Warsaw Convention's liability limit inapplicable. *Prescod v. AMR, Inc.*, 383 F.3d 861 (9th Cir. 2004).

The loss of the plaintiff's mother's ashes was not the result of "willful misconduct," and thus the Warsaw Convention's limitation on liability applied to the action. *Simo Noboa v. Iberia Lineas Aereas De Espana*, 383 F. Supp. 2d 323 (D.P.R. 2005).

g. (§9.50) Property Claims

Loss of human remains was not willful misconduct that would render the liability limit of the Warsaw Convention inapplicable. *Simo Noboa v. Iberia Lineas Aereas De Espana*, 383 F. Supp. 2d 323 (D.P.R. 2005).

IV. Liability of United States of America

A. (§9.52) Federal Tort Claims Act

For another interpretation of the discretionary exception, see *United States v. Gaubert*, 499 U.S. 315 (1991).

B. (§9.53) Government Not Liable—Discretionary Exception

Replace the ninth and tenth bulleted items in the original section with the following two bulleted items:

- negligent certification of aircraft, *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Variq Airlines)*, 467 U.S. 797 (1984); *Waymire v. United States*, 629 F. Supp. 1396 (D. Kan. 1986); but see *Berkovitz ex rel. Berkovitz v. United States*, 486 U.S. 531 (1988), and issuance of supplemental-type certificates resulting in significant reductions of cargo capacity in the retrofitted aircraft, see *GATX/Airlog Co. v. United States*, 286 F.3d 1168 (9th Cir. 2002);

- weather forecasts and omissions of forecasts, *Williams v. United States*, 504 F. Supp. 746 (E.D. Mo. 1980); *Jackson v. United States*, 156 F.3d 230, 232 (1st Cir. 1998); but see *Budden v. United States*, 8 F.3d 1278 (8th Cir. 1993), *Webb v. United States*, 840 F. Supp. 1484 (D. Utah 1994), and *Abrisch v. United States*, 359 F. Supp. 2d 1214 (M.D. Fla. 2004), in which failure to give a complete or current weather forecast was nondiscretionary and, therefore, actionable;

Add the following three bulleted items:

- actions of private contractor air traffic controllers, *Alinsky v. United States*, 415 F.3d 639 (7th Cir. 2005);

- conducting pilot training, *Tremblay v. United States*, 261 F. Supp. 2d 730 (S.D. Tex. 2003); and

- negligent certification of flight schools and hiring, training, and supervision of pilot examiners, *Supinski v. United States*, No. 4:07-CV-963 (CEJ), 2008 WL 199546 (E.D. Mo. Jan. 22, 2008).

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C. (§9.54) Government Liable—No Discretionary Exception

Replace the sixth bulleted item in the original section with the following bulleted item:

- failure to give a complete or current weather forecast, *Budden v. United States*, 8 F.3d 1278 (8th Cir. 1993), *amended by* 15 F.3d 1444 (8th Cir. 1994); *Abrisch v. United States*, 359 F. Supp. 2d 1214 (M.D. Fla. 2004);

D. (§9.55) Air Traffic Controller Liability

Air traffic controllers were found to be 65% at fault for failing to advise a pilot of current weather when rapidly deteriorating conditions at the airport caused the pilot to crash on approach at the Jacksonville International Airport. *Abrisch v. United States*, 359 F. Supp. 2d 1214 (M.D. Fla. 2004).

Add the following bulleted item:

- when a pilot, responding to the warning of the TCAS (Traffic Collision Avoidance System) onboard the aircraft, performed evasive maneuvers, causing the flight attendants to be thrown to the ceiling and sides of the aircraft. The plaintiffs alleged that if the controllers had issued a timely traffic advisory, the pilot would have reduced the climb rate, thereby avoiding the TCAS warning, but the plaintiffs provided no evidence that this was true. *Lakomy v. United States*, 70 Fed. Appx. 199 (5th Cir. 2003).

V. Liability of Maintenance and Repair Facilities, Aircraft and Component Manufacturers and Suppliers

B. Liability of Manufacturers, Sellers, and Distributors

1. (§9.60) Overview

A parent corporation may be liable as an "alter ego" of its subsidiary for an engine built by the subsidiary. *Simeone ex rel. Estate of Albert Francis Simeone, Jr. v. Bombardier-Rotax GmbH*, 360 F. Supp. 2d 665 (E.D. Pa. 2005).

3. (§9.62) Liabilities of Remote Sellers and Distributors

A negligence claim by a helicopter management service company against the manufacturer failed because of lack of foreseeability that such a plaintiff might be injured. *Paramount Aviation Corp. v. Agusta*, 124 Fed. Appx. 85 (3rd Cir. 2005); *see also Indem. Ins. Co. of N. Am. v. Am. Eurocopter LLC*, No. 1:03CCV949, 2005 WL 1610653 (M.D.N.C. July 8, 2005).

6. (§9.65) Damages for Economic Loss

See also *United States Aviation Underwriters, Inc. v. Pilatus Business Aircraft, Ltd.*, 358 F. Supp. 2d 1021 (D. Colo. 2005), holding an engine manufacturer liable for loss of the aircraft.

Some jurisdictions, such as California, have exceptions to the economic-loss rule, such as when a "special relationship" existed between the parties. *See Kalitta Air, LLC v. Cent. Tex. Airborne Sys., Inc.*, No. C 96-2494 CW, 2009 WL 1636036 (N.D. Cal. June 8, 2009).

D. Defenses

1. (§9.69) Contributory or Comparative Fault

Ameristar Jet Charter, Inc. v. Dodson International Parts, Inc., Nos. WD 61655 *et seq.*, 2004 WL 76342 (Mo. App. W.D. Jan. 20, 2004), *rev'd on other grounds*, 155 S.W.3d 50 (Mo. banc 2005), involved an airplane owner's claim against a hauling company for damaging the airplane. The owner's claim did not involve purely economic damages so as to entitle the hauling company to a contributory negligence instruction.

3. (§9.71) Statute of Repose—GARA

GARA (General Aviation Revitalization Act of 1994), Pub. L. No. 103-298, 108 Stat. 1552, protects foreign manufacturers. *LaHaye v. Galvin Flying Serv., Inc.*, 144 Fed. Appx. 631 (9th Cir. 2005), *cert. denied, LaHaye v. Israel Aircraft Indus.*, 547 U.S. 1019 (2006). A manufacturer's replacement part restarts the GARA 18-year period only as to that part, and not the entire system. *Sheesley v. Cessna Aircraft Co.*, Nos. 02-4185-KES *et seq.*, 2006 WL 3042793 (D.S.D. Oct. 24, 2006). A manufacturer's summary judgment motion based on GARA will not stop discovery or, likely, be determined before the conclusion of discovery. *Johnson v. Precision Airmotive, LLC*, No. 4:07CV1695 CDP, 2008 WL 2570825 (E.D. Mo. June 26, 2008).

As to GARA and flight manuals and other mailings, see *Burton v. Twin Commander Aircraft*, LLC, 221 P.3d 290 (Wash. Ct. App. 2009), and *Moyer v. Teledyne Continental Motors, Inc.*, 979 A.2d 336 (Pa. Super. Ct. 2009).

5. (§9.73) Government Contractors

In *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329 (11th Cir. 2003), the court ruled that the government contractor defense recognized in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), applies not only to procurement contracts but also to maintenance contracts.

VI. Liability of Airport Owners and Operators

B. Caselaw

1. (§9.75) Hazards to Air Transportation

In *McMahon Helicopter Services v. United States*, No. 04-74133, 2006 WL 2130625 (E.D. Mich. July 28, 2006), the court found that the airport was not liable when a helicopter struck a 65-foot light pole near a cargo ramp. The Federal Aviation Administration had approved the location of the pole in navigable airspace; therefore, the claim was preempted under the Federal Aviation Act, 49 U.S.C. §§ 106 *et seq.*

5. (§9.79) Rescue Services

In *Davis v. Lambert-St. Louis International Airport*, 193 S.W.3d 760 (Mo. banc 2006), a police officer responding to an emergency and causing a collision was negligent, but because he was performing a discretionary act, he was protected by official immunity. But the airport was not protected and was liable for his actions.

6. (§9.80) Surrounding Landowners

City of Bridgeton v. City of St. Louis, 18 S.W.3d 107 (Mo. App. E.D. 2000) (discussed in the original section), held that the City of St. Louis was immune from the zoning ordinances of Bridgeton in the expansion of the Lambert-St. Louis International Airport, despite § 305.200(3), RSMo 2000. In *Biddle v. BAA Indianapolis, LLC*, 830 N.E.2d 76 (Ind. App. 2005), *aff'd in part, vacated in part*, 860 N.E.2d 570 (Ind. 2007), the court held that noise from aircraft in navigable airspace could constitute a nuisance and a compensable taking, but on appeal, the Indiana Supreme Court

held that, in this case, the noise did not constitute a taking, finding a rebuttable presumption that there is no taking when the aircraft flies within navigable airspace. *Biddle*, 860 N.E.2d at 578–80. The homeowners did not appeal on the nuisance claim. *Id.* at 574.

VII. Liability of Other Parties on Ground

C. (§9.84A) Flight Training Schools (New Section)

Missouri does not recognize educational malpractice, and allegedly negligent flight training is no basis of liability for a later accident. *Dallas Airmotive, Inc. v. Flight Safety Int'l, Inc.*, 277 S.W.3d 696 (Mo. App. W.D. 2008).

VIII. Available Resources for Factual Investigation and Problems of Proof

B. (§9.87) National Transportation Safety Board Investigations, Reports, and Testimony

The new address for General Microfilm is:

General Microfilm
623 Files Cross Road
Martinsburg, W. Va 25404
Telephone: (304) 267-5830
Fax: (304) 264-0862
E-Mail: genmicrofm@aol.com
Website: www.general-microfilm.com

Additionally, the NTSB (National Transportation Safety Board) publishes accident reports, in its Aviation Accident Database and Synopses, which are a condensed version of the factual reports and probable cause findings:

www.ntsb.gov/ntsb/query.asp

For further discussion on how the restrictions on evidentiary use of NTSB reports may be frustrated by expert testimony, see generally *Eltiste v. Ford Motor Co.*, 167 S.W.3d 742 (Mo. App. E.D. 2005).

C. (§9.88) Air Traffic Controller Accident Package

The address for the FAA (Federal Aviation Administration) Office of Accident Investigation is as follows:

Federal Aviation Administration
Office of Accident Investigation
800 Independence Ave. S.W.
Washington, D.C. 20591
Telephone: (202) 267-9612
Website: www.faa.gov/about/office_org/headquarters_offices/avs/offices/aai

Counsel can access preliminary accident and incident reports online at:

www.faa.gov/data_statistics/accident_incident/preliminary_data

FAA Order 8020.11B is available in PDF form on the FAA website. Click on the Regulations & Policies tab on the home page at www.faa.gov.

I. (§9.94) Federal Aviation Administration Pilot and Aircraft Records

See generally:

http://162.58.35.241/acdatabase/defimg.asp

J. (§9.95) Enforcement Records

The addresses and phone numbers for the Flight Standards District Offices (FSDOs) in Missouri are:

Kansas City FSDO
901 Locust, Room 403
Kansas City, MO 64106
Telephone: (816) 329-4000 and (800) 519-3269

St. Louis FSDO
10801 Pear Tree Lane
Suite 200
St. Ann, MO 63074
Telephone: (314) 890-4800 and (800) 322-8876

P. (§9.101) Airworthiness Directives

A more specific web address for the FAA Regulatory and Guidance Library is:

www.airweb.faa.gov/Regulatory_and_Guidance_Library/rgWebcomponents.nsf/HomeFrame?OpenFrameSet

Q. (§9.102) Federal Aviation Administration Publications

The Aeronautical Information Manual: Official Guide to Basic Flight Information and ATC Procedures is now available online at:

www.faa.gov/air_traffic/publications/atpubs/aim

Advisory Circulars mentioned in the original section have been updated as follows:

- Pilot's Handbook of Aeronautical Knowledge (FAA-H-8083-25A)
- Airplane Flying Handbook: FAA-H-8083-3A (supersedes Flight Training Handbook (AC-61-21A))
- Aviation Weather Services (AC 00-45G)
- Instrument Flying Handbook has been canceled

Many of the Advisory Circulars are available at:

www.faa.gov/regulations_policies/advisory_circulars

and

www.airweb.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/MainFrame?OpenFrameSet

R. (§9.103) Other Reports or Data

As noted in §9.102 of this supplement, many Advisory Circulars are available on the FAA website at:

www.faa.gov/regulations_policies/advisory_circulars

or

www.airweb.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/MainFrame?OpenFrameSet

Those not available online can be requested in writing from:

U.S. Department of Transportation
General Services Section, M-483.1
Washington, D.C. 20590
Fax: (202) 366-2795