RECENT DEVELOPMENTS IN AVIATION LAW

Laurie Alberts Salita, Anna Astrakhan, Robert Kelly, and Sara K. Kornbluh

I. Introduction 73
II. Governmental Matters 74
III. General Aviation Revitalization Act (GARA) 77
IV. Subrogation 79
V. Montreal Convention 82
VI. Preemption and ADA Compliance 83
  A. ADA Title III Found Not to Apply 84
  B. Analysis of State Law Claims and Preemption by the ACAA 85
VII. Personal Jurisdiction 86

I. INTRODUCTION

This article discusses a discrete selection of cases decided over the past year that contain relevant issues and learning points for practicing aviation attorneys. This article does not summarize all of the aviation cases decided since September 2012. Rather, the authors elected to focus upon a collection of unique and interesting cases to provide the reader with a comprehensive analysis of each selected matter. Some decisions followed traditional analysis while some did not. For example, the U.S. Court of Appeals for the

Laurie Alberts Salita is with Saltz Matkov P.C., where she concentrates her practice in tort litigation with particular emphasis on aviation, products liability, catastrophic loss, and transportation. Anna Astrakhan is an associate in the New York City office of Kreindler & Kreindler. Robert Kelly is a trial attorney for the U.S. Department of Justice Office of Aviation and Admiralty Litigation and a former federal prosecutor with the U.S. Attorney's Office for the District of Columbia. Sara K. Kornbluh is a senior associate in the New York City office of Reed Smith LLP.

Sixth Circuit chose not to depart from the "generally accepted" concept that performance of a manufacturer's federally mandated duty to publish flight and maintenance manuals is conduct undertaken in the capacity as a manufacturer for purposes of the General Aviation Revitalization Act. Similarly, the Ninth Circuit followed the seminal case *Abdullah v. American Airlines, Inc.* with respect to certain claims in a recent preemption analysis holding that federal regulations preempted an airline's required standard of care, but not remedies available to a plaintiff. Yet, the same court also determined that federal aviation regulations did not preempt emotional distress claims pertaining to how airlines treat passengers. Additionally, the US. District Court for the Northern District of Florida departed from generally accepted science associated with wake turbulence in an extremely interesting subrogation opinion. Although aviation litigation usually arises from unique circumstances, the decisions issued from U.S. courts over the last year are notable examples of their detailed and reasoned analysis of complex industry-specific facts.

II. Governmental Matters

Hartman v. United States arises from a March 2008 crash of a Cessna Citation after a collision with one or more American White Pelicans near the southeast end of Lake Overholser in Oklahoma City.[1] The jet encountered the birds at approximately 1,700 feet above ground level after departing Wiley Post Airport in Bethany, Oklahoma.[2] The collision fatally injured the pilot-in-command, causing the airplane to crash and killing the other occupants.[3]

The plaintiffs' action against the United States was brought under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b)(1), 2671–80, and alleged negligence on behalf of the Federal Aviation Administration (FAA).[4] Specifically, the plaintiffs alleged that the air traffic controller was negligent in failing to warn the pilots about one or more primary radar targets, which they alleged indicated the possible presence of birds in the vicinity of the aircraft's flight path.[5] The plaintiffs' case was dismissed when the court granted the United States' motion for summary judgment.

The court's decision focused on three essential points: (1) parties must comply with the local rules regarding the necessary elements of pleadings, (2) there was no evidence that the purported radar targets indicating the

1. Hartman v. United States, No. CIV-10-197-L, 2013 WL 501346, at *1 (W.D. Okla. Feb. 8, 2012).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*

presence of birds were visible on the controller's display, and (3) the actions were protected by the discretionary function exception to the United States' limited waiver of sovereign immunity under the FTCA.

As to the first point, the United States' motion contained a seventeen-paragraph statement of "Material Facts Which Are Not in Genuine Dispute," which detailed the facts the United States claimed were uncontested.[6] Pursuant to Local Rule 56.1(c) of the District of Oklahoma, the plaintiffs were required to file an enumerated statement of facts they contended were in dispute and provide support for such statements by reference to the record.[7] This rule required the plaintiffs to directly respond to each paragraph in the United States' statement or risk those statements being deemed admitted.[8] The court held that their failure to adhere to the local rules and provide enumerated supported responses meant the facts as laid out in the United States' statement were deemed admitted.[9]

As to the second point, the court held that there was no evidence that the controller's display indicated the presence of birds in the plane's flight path. In coming to this point, the court engaged in a lengthy explanation of how radar targets were collected, processed, and displayed. The court also discussed FAA protocols for the use of controller display settings. The court found that while there were primary radar targets that could have been indicative of birds or other obstructions, those targets were not displayed in the "correlated mode" utilized by the controller's standard terminal automation replacement system (STARS) display.[10]

The correlated mode is an additional level of filtering by STARS to remove "tentative" or "not established" primary radar targets from controllers' displays to assist them in performing their duties.[11] This would remove certain primary targets that might otherwise clutter the display, including, in this case, the approximately eight returns that the plaintiffs claimed were indicative of bird activity. Controllers are trained to use only the correlated mode, and the FAA's standard operating procedures encourage the use of only that mode.[12] In the present case, the controller was using the correlated mode. Thus, the purported targets related to bird activity were not displayed.[13] Referencing the failure of the plaintiffs to provide contrary evidence, the court held that their contention that the

6. *Id.* at *2.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at *6.
11. *Id.* at *4.
12. *Id.*
13. *Id.*

bird activity was displayed on the controller's equipment was not supported, and, thus, the controller had no way of knowing that information, much less a requirement to disseminate it.[14]

As to the final point, the court held that (1) "[t]he type of radar equipment the FAA uses to provide air traffic control services"; (2) "the mode in which the equipment is operated"; (3) "the information displayed on the air traffic controller's radar screen"; and (4) "the training given to air traffic controllers regarding the use of the equipment" were policy decisions that are shielded from judicial review by the discretionary function exception to the FTCA.[15] While the plaintiffs contended their claims were based on discrete actions taken by the controller and not overarching policy decisions, the court held the discretionary function exception applicable in situations including those involving "day-to-day" operational decisions like the controller's actions.[16]

In addition to filing suit against the United States for the March 2008 accident, the plaintiffs also filed suit against the Oklahoma City Airports Trust and the City of Oklahoma City,[17] alleging that the city was liable because it failed to implement a wildlife mitigation plan for Wiley Post.[18] The city filed a motion for summary judgment, which the court granted.

Following the same reasoning as detailed above, the court deemed the city's statement of uncontested facts admitted. As such, the court found that Wiley Post, as a general aviation airport, was not required to create a wildlife hazard assessment or a wildlife hazard management plan.[19] Further, the court found no evidence indicating the presence of a wildlife threat at Wiley Post.[20] Any threat of birds was localized to Lake Overholser and not deemed a threat to aircraft, especially those at 1,700 feet above ground level.[21]

The court held that given the altitude of the strike and the migratory nature of the American White Pelican, there is not necessarily a connection between the lake and the birds.[22] Regardless, the city issued an appropriate notice to airmen alerting pilots to the possibility of wildlife in the area.[23] Given these undisputed facts, the court held that the plaintiffs'

14. *Id.* at *5. The court also held, referencing the Aeronautical Information Manual, that the provision of information related to bird activity is not a primary duty for the controller and is to be disseminated at the controller's discretion, depending on workload. *Id.*
15. *Id.* at *7.
16. *Id.*
17. Hartman v. United States, 923 F. Supp. 2d 1287 (W.D. Okla. 2013).
18. *Id.* at 1297.
19. *Id.* at 1291–93.
20. *Id.* at 1292–93.
21. *Id.* at 1293–94.
22. *Id.* at 1294.
23. *Id.*

arguments as to proximate causation were based simply on speculation.[24] As such, the court held that summary judgment was appropriate.

These decisions demonstrate the importance of detailed investigation and fact finding as well as the need for clear, effective communication of facts to the court.

III. General Aviation Revitalization Act (GARA)

In *Crouch v. Honeywell International, Inc.*, the Sixth Circuit examined: (1) whether a manufacturer that publishes an overhaul manual for a general aviation engine under the mandatory Federal Aviation Regulations (FARs) is acting in "its capacity as a manufacturer" for purposes of the General Aviation Revitalization Act (GARA), (2) whether an overhaul manual constitutes a "part" under GARA, and (3) whether revisions to the overhaul manual are "replacement parts" that would retrigger GARA's eighteen-year statute of repose.[25]

Crouch arose out of a 2006 general aviation accident involving a Piper Lance II single-engine aircraft with a 1978 engine, manufactured by the Lycoming Engines Division of AVCO Corporation.[26] Crouch and Hudson, injured pilot and passenger of the accident aircraft, brought suit against AVCO and others, alleging, inter alia, that the overhaul manual issued by AVCO failed to provide instruction or warning that the magneto installed in the subject engine might come loose, which they claim occurred during the accident flight.[27]

The district court, on a motion for reconsideration, granted AVCO's motion for summary judgment because AVCO was sued in its capacity as a manufacturer and GARA's eighteen-year period of repose barred the plaintiff's claims.[28] Following the district court's ruling on AVCO's reconsideration motion, the plaintiffs also moved for reconsideration and to amend their complaint to set forth a specific claim for misrepresentation in the overhaul manual, and, later, to supplement such motions with additional evidence relating to AVCO's subsequent instruction concerning the magneto installation.[29] The district court allowed the plaintiffs to supplement their motions, but ultimately denied both.[30]

On the plaintiffs' appeal, the Sixth Circuit held that the district court's reconsideration and grant of summary judgment in favor of AVCO was

24. *Id.* at 1297.
25. Crouch v. Honeywell Int'l, Inc., 720 F.3d 333 (6th Cir. 2013).
26. *Id.* at 336.
27. *Id.*
28. *Id.* at 337. Originally, the district court denied AVCO's summary judgment motion holding that AVCO acted as a publisher and that an overhaul manual was not a part. *Id.*
29. *Id.*
30. *Id.* at 337–38.

not erroneous.[31] In holding that AVCO was not a publisher but indeed a manufacturer, the court noted that "[a] manufacturer who *chooses* to also conduct business as a mechanic is different than a manufacturer who is *required* by federal regulations to publish maintenance and overhaul manuals for all products that it manufactures."[32] Further, the court noted that GARA § 2(b)(1) requires disclosure by manufacturers of "maintenance issues affecting airworthiness," notwithstanding statutes of repose.[33]

The court next examined and rejected the plaintiffs' argument that the overhaul manual was a "part" whose revision would restart a new eighteen-year period of repose.[34] Although a flight manual has been found by courts to be a "part,"[35] maintenance manuals and overhaul manuals have been considered "required accessories," not "parts."[36]

The Sixth Circuit also discussed the district court's refusal to consider a revision to the manual to be a "replacement part" that "would allow plaintiffs to circumvent the eighteen-year period of repose applicable to" their design claim, by re-couching it as a claim challenging the adequacy of the manual,[37] stating that

> [i]f claims for negligently *failing* to warn in manual revisions were not barred by GARA's period of repose, plaintiffs could artfully plead suits arising out of design defects as "failure to warn" claims, thereby defeating Congress's intent.[38]

Importantly, the plaintiffs could not identify any portion of any revision to the overhaul manual that had incorrect instruction (i.e., a specific defect) on which the mechanics relied that was causally related to the accident at issue.[39] Even if a manual revision could be considered a "part," for a new period of repose to be triggered, the Sixth Circuit reasoned that there must be a causal nexus between a substantial revision to the manual and the accident, such that the revision was the proximate cause of the crash.[40] The court thus rejected the argument that an "omission" should be treated as a "replacement or addition."[41]

31. *Id.* at 341.
32. *Id.* at 340 (emphasis in opinion).
33. *Id.* at 340–41.
34. *Id.* at 341.
35. *Id.* at 342 (citing Caldwell v. Enstrom Helicopter Corp., 230 F.3d 1155, 1156–58 (9th Cir. 2000)).
36. *Id.* at 341 (citing Colgan Air., Inc. v. Raytheon Aircraft Co., 507 F.3d 270, 276-77 (4th Cir. 2007) (overhaul manual); Alter v. Bell Helicopter Textron, Inc., 944 F. Supp. 531, 540–41 (S.D. Tex. 1996) (maintenance manual)).
37. *Id.*
38. *Id.* at 342 (citing Lyon v. Agusta S.P.A., 252 F.3d 1078, 1088 (9th Cir. 2001)).
39. *Id.* at 343.
40. *Id.*
41. *Id.*

Finally, the court turned to the plaintiffs' appeal for leave to amend their claims against AVCO to include a misrepresentation claim that was not included in their original complaint. The original "complaint did not contain sufficiently specific" facts under § 2(b)(1) of GARA, which exempts claims from the statute of repose in cases of knowing misrepresentation, concealment, or withholding.[42] The court noted that the plaintiffs did not move for leave to amend their complaint until after they had already lost summary judgment on their claims as originally pleaded.[43] Based on the post-judgment timing of the motion to amend, the plaintiffs' motion was governed by the standard of Federal Rule of Civil Procedure 59(e) that relief would be warranted only upon a showing of: "(1) a clear error of law, (2) newly discovered evidence, (3) an intervening change in the controlling law, or (4) a need to prevent manifest injustice."[44] The district court did not find the evidence submitted by plaintiffs to be "newly discovered," and the plaintiffs had no compelling reason for failing to have previously moved for leave to amend.[45] On further review, the court found the "evidence" to be "not so incriminating" and the theory of misrepresentation presented by plaintiff to be "highly speculative."[46] The Sixth Circuit thus found the district court's denial of the motion to amend was not an abuse of discretion.

This decision thus further clarifies that (1) GARA applies to claims that implicate a manufacturer's publication of maintenance or overhaul manuals; and (2) revisions to an overhaul or maintenance manual do not automatically restart GARA's period of repose, such that plaintiffs that wish to reframe design claims as "failure to warn claims" cannot merely do so to avoid a time bar. However, the analysis conducted by the court indicated that "critical evidence" of misrepresentation or concealment of information, which can be shown to be the proximate cause of an accident, may allow a claim to survive within the § 2(b)(1) exception to GARA's period of repose.[47]

IV. SUBROGATION

The July 2008 crash of a Pilatus PC-12 during a military training mission at Hurlburt Field in northern Florida was the subject of *Arch Insurance Co. v. United States*.[48] To meet military training needs, the U.S. Air Force

42. *Id.* at 344.
43. *Id.*
44. *Id.* at 345 (citations omitted).
45. *Id.*
46. *Id.* at 347.
47. *Id.* at 346–47.
48. Arch Ins. Co. v. United States, No. 3:09-cv-395-RV-EMT, 2013 WL 3439903 (N.D. Fla. July 9, 2013). Co-author Robert Kelly served as counsel for the United States in the *Arch* matter.

(USAF) had leased the PC-12 involved in the mishap from a private company.[49] The aircraft was insured by Arch Insurance Company.[50] Following the mishap, the plane was deemed a total loss. Arch paid per the policy and brought this subrogation action.[51] In addition to the United States, Arch also sued Avenge Incorporated, another military contractor, which provided instructor pilots to the USAF for PC-12 recurrency and initial training.[52] Avenge's contract instructor pilot was the pilot-in-command, instructor pilot, and the flying pilot at the time of the mishap.[53]

The mishap occurred when the PC-12 encountered wake turbulence from an AC-130U gunship, which was performing touch-and-go landings in the pattern along with the PC-12.[54] The encounter caused the PC-12 to enter into an uncommanded roll at low altitude.[55] Although the pilots were able to regain positive control of the aircraft, they were not able to completely recover before it hit the ground.[56] Fortunately, all three individuals on board were able to walk away without serious injuries.[57]

At the outset of the case and in addition to allegations directed at the USAF co-pilot, Arch contended that the United States was negligent for a host of reasons, including allegations directed at the air traffic controller, the pilot of the AC-130U, the pilots of another PC-12 operating in the pattern, and the non-flying pilot who was merely seated in the passenger compartment of the mishap aircraft.[58] Arch's allegations against Avenge's instructor pilot revolved around his performance as pilot-in-command and his failure to avoid the wake turbulence by permitting his aircraft to descend below the flight path of the preceding AC-130U with approximately forty-six seconds' separation.

Prior to trial, Arch stipulated to dismiss its allegations against the air traffic controller. Further, at the close of Arch's case in chief, the United States was successful in obtaining a directed verdict as to Arch's claims of negligence directed at the pilots of the other PC-12 and those directed at the non-flying pilot seated in the passenger compartment.[59] The United States was also able to subsequently obtain a directed verdict in its favor regarding the allegations about the pilot of the AC-130. Therefore, the

49. *Id.* at *1, 4–5.
50. *Id.* at *5.
51. *Id.* at *1, 13.
52. *Id.* at *4.
53. *Id.* at *4–5.
54. *Id.* at *11.
55. *Id.* at *12.
56. *Id.*
57. *Id.*
58. *Id.* at *13 n.14.
59. Even though limited issues remained in the case, the court expressed opinions regarding the performance of the air traffic controller, the pilot of the AC-130U, and the other PC-12 operating in the pattern that were dicta.

only remaining allegation that proceeded to verdict against the United States was directed at the USAF co-pilot and his role in proper crew resource management. The court, however, never reached that decision.[60]

In its extensive decision after a full bench trial, the district court made only one relevant factual finding and one conclusion of law. The court found that the wake turbulence encounter began approximately 1,200 feet to 1,400 feet short of the runway threshold at an altitude of approximately 200 feet to 300 feet.[61] According to the court's interpretation, this would put the PC-12 above the AC-130U's flight path.[62] Such a conclusion was contrary to Arch's theory of the case that the encounter was caused by the PC-12 descending below the preceding aircraft's flight path with only forty-six seconds in separation. Further, Arch's pilot expert had admitted on cross-examination that, if the PC-12 had stayed above the AC-130U's flight path, they would have met the applicable standard of care, regardless of the cause of the accident.[63] As such, the court found that Arch had failed to carry its burden of proof and ruled in favor of the defendants.[64]

The court engaged in an unusually detailed and exhaustive factual analysis, holding that wake turbulence can remain a threat to aircraft for an extended period of time beyond what the FAA warns pilots about.[65] The court found in this case that the wake, which the PC-12 may have encountered, was generated over five-and-a-half minutes before and during a preceding approach by the AC-130U, even though contemporary guidance on the subject indicates that two minutes is the approximate longest time frame that wake turbulence may remain a competent threat to a small aircraft following a large one.[66]

In the alternative, the court postulated that the wake may have risen, which was contrary to the testimony of Arch's wake turbulence expert.[67] In support of these hypothetical postulations, the court relied on the testimony of Avenge's expert and specifically on the video replays of wake penetration flights he produced, which contained no independent verification.[68]

60. *Arch*, 2013 WL 3439903, at *13 n.14.
61. *Id.* at *13.
62. *Id.*
63. *Id.* at *14.
64. *Id.* at *16.
65. *Id.* at *14. The Honorable Roger Vinson, who presided over this case, graduated from the U.S. Naval Academy with a bachelor's degree in engineering. He later served as a naval aviator from approximately 1962–68.
66. *Id.*
67. *Id.* at *15. The court did not explain why it chose not to credit Arch's expert.
68. As of the time this article was written, no decision has been reached by the parties regarding an appeal of the decision.

V. MONTREAL CONVENTION

In *White v. Emirates Airlines, Inc.*, the Fifth Circuit held that a flight crew's failure to follow the airline's policies and procedures in response to a passenger's medical emergency and its refusal to accede to a passenger's request for specific medical assistance is not per se an Article 17 "accident" under the Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, 20 May 1999 (Montreal Convention).[69]

The plaintiff's mother, Carol Wilson, collapsed inside the lavatory of an Emirates flight from Dubai to Houston as the plane made its descent into Houston.[70] Five minutes later, a flight attendant found her, breathing but unresponsive.[71] The flight crew placed Wilson faceup on the floor, administered oxygen, and notified emergency personnel at the airport.[72] Ten to fifteen minutes after Wilson was initially discovered in the lavatory, the flight landed in Houston and Wilson was taken to a nearby hospital.[73] She died two days later.[74]

The plaintiffs argued that the flight crew's response constituted an Article 17 "accident" because the crew ignored the request by Wilson's son, who traveled with Wilson, to perform CPR and to use a defibrillator[75] and because the crew did not follow all of the procedures outlined in the Emirates emergency manual.[76]

In arguing that their request for medical assistance was refused, the plaintiffs relied on *Olympic Airways v. Husain*[77] and *Yahya v. Yemenia-Yemen Airways*,[78] which held that a flight crew's refusal to comply with passengers' requests for medical assistance could constitute an accident. The court found that unlike in *Husain* and *Yahya*, the failure of the Emirates crew to comply with the request to perform CPR and use a defibrillator on Wilson was "not so unexpected or unusual as to constitute an accident under Article 17."[79] The court reached this conclusion based on the facts that Wilson was breathing when the flight crew discovered her; the EMS services treating Wilson at the airport did not use a

69. White v. Emirates Airlines, Inc., 493 F. App'x 526 (5th Cir. 2012). Article 17(1) states: "The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking." S. Treaty Doc. 106-45 (2000).

70. *White*, 493 F. App'x at 527.

71. *Id.*

72. *Id.* at 528.

73. *Id.*

74. *Id.*

75. *Id.* at 530–31.

76. *Id.* at 532–33.

77. 540 U.S. 644 (2004).

78. 2009 WL 3424192 (E.D. Mich. Oct. 20, 2009).

79. *White*, 493 F. App'x at 531.

defibrillator on Wilson after examining her; and Wilson's son, who requested the CPR and a defibrillator, was not a medical professional.[80]

The Fifth Circuit likewise rejected the plaintiffs' second argument that the flight crew failed to follow Emirates' policies and procedures. The plaintiffs claimed that the crew failed to monitor Wilson's breathing and pulse rates and seek assistance from a medical professional on board.[81] The court, relying on *Blansett v. Continental Airlines*,[82] reasoned that the relevant question was "not whether Emirates failed precisely to adhere to its procedures, but rather whether any such failure constituted an 'unexpected or unusual event.'"[83] Given the context of Wilson's medical emergency, the court found that the crew's response was not unusual or unexpected.[84] The plane was in its final descent when Wilson collapsed, and the crew's response "was limited by the short time" remaining in the flight "and the need to ensure the safety of other passengers" as the plane landed.[85]

The court relied on *Blansett* in refusing to establish a bright-line rule regarding Article 17 "accidents." The *Blansett* court rejected a per se rule that a departure from an industry standard constitutes an accident, and the *White* court extended this reasoning to include departures from an airline's internal policy.[86] As with the provision of inadequate medical assistance, the court grounded its holding in specific circumstances of the case, noting that, under Supreme Court precedent in *Air France v. Saks*,[87] it was bound to apply the definition of accident "flexibly."

VI. PREEMPTION AND ADA COMPLIANCE

The aggrieved passenger in *Gilstrap v. United Airlines, Inc.* brought this action following the airline's alleged failure to provide wheelchair assistance to move her from gate to gate through a number of airports.[88] In review of the district court's dismissal of the plaintiff's claims under Federal Rule of Civil Procedure 12(b)(6), the Ninth Circuit evaluated whether, and to what extent, the Air Carrier Access Act (ACAA) preempts state law claims that implicate an airline's treatment of disabled passengers and whether an airport terminal is a "place of public accommodation" governed by Title III of the Americans with Disabilities Act (ADA).

80. *Id.*
81. *Id.* at 532.
82. 379 F.3d 177 (5th Cir. 2004).
83. *White*, 493 F. App'x at 534.
84. *Id.*
85. *Id.*
86. *Id.* at 533–34 (citing *Blansett*, 379 F.3d at 181–82).
87. 470 U.S. 392, 405 (1985).
88. Gilstrap v. United Air Lines, Inc., 709 F.3d 995 (9th Cir. 2013).

The plaintiff was disabled and had difficulty walking as the result of osteoarthritis, a displaced disc in her back, one replaced knee, and a second knee that required replacement.[89] In 2008 and 2009, she booked two trips through United and requested that the airline provide her with wheelchair assistance through the various airports.[90] She alleged that United failed to do so and treated her poorly, requiring her to wait for extended periods, stand in line, and walk.[91] She also claimed that gate agents expressed skepticism at her need for a wheelchair and unilaterally rebooked her travel.[92] The plaintiff brought various claims in federal court against United under California tort law as well as a claim under ADA Title III.[93] Although her complaint referenced the ACAA as relevant to her state law claims, she did not allege a cause of action under the ACAA.[94]

A. *ADA Title III Found Not to Apply*

The Ninth Circuit affirmed dismissal of the plaintiff's ADA claim. Title III of the ADA prohibits discrimination "on the basis of disability" in the enjoyment of any place of public accommodation, which by definition includes "a terminal, depot, or other station used for *specified public transportation*."[95] Specified public transportation is defined as "transportation by bus, rail, or any other conveyance *(other than by aircraft)*."[96] The Ninth Circuit reasoned that the statute unambiguously excludes airport terminals from the definition of "place of public accommodation."[97]

Further, although Title III applies to certain public accommodations found *within* airport terminals, including stores and restaurants,[98] the Department of Justice regulations implementing the ADA state that the "operations of any portion of any airport that are under the control of an air carrier are covered by the Air Carrier Access Act" and not the ADA.[99] Because the plaintiff's claims implicated those areas of the airports that were "under the control" of United and not any restaurants or stores, the Ninth Circuit found that the plaintiff's ADA claims were properly dismissed as not covered by Title III.[100]

89. *Id.* at 998.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 1012 (quoting 42 U.S.C. §§ 12182(a), 12181(7)(g)).
96. *Id.* at 1011 (quoting 42 U.S.C. § 12181(10) (emphasis added by court)).
97. *Id.*
98. *Id.* at 1003 (citing 42 U.S.C. § 12181(7)).
99. *Id.* at 1011 (citing 28 C.F.R. pt. 36, app. C).
100. *Id.* at 1012.

B. *Analysis of State Law Claims and Preemption by the ACAA*

The Ninth Circuit also undertook an analysis of whether the ACAA preempts the plaintiff's state law claims. Because the ACAA does not contain an express preemption provision, the court investigated whether there is "a congressional intent to preempt state personal-injury lawsuits under either field or conflict preemption."[101]

In its field preemption analysis, the court reviewed the case law on preemption generally, addressing both the Federal Aviation Act's savings clause[102] and the Act's requirement that airlines maintain liability insurance.[103] The Ninth Circuit reviewed past decisions where it had held that *all* state law claims are preempted,[104] and where it had held that state law injury claims are *not* displaced,[105] as well as decisions from other circuit courts that addressed whether preemption bars state law claims within the field of aviation.[106]

Reviewing its holding in *Martin ex rel. Heckman v. Midwest Express Holdings, Inc.*,[107] the court emphasized "that where there are 'pervasive regulations in an area, like passenger warnings, the FAA preempts all state law claims in *that* area.'"[108] The Ninth Circuit also noted that the FAA governs aviation commerce and found that "the ACAA is codified under the 'economic regulation,' not the 'safety,' subpart of the FAA."[109] The Ninth Circuit followed the Third Circuit's holding in *Abdullah v. American Airlines, Inc.*,[110] which divided the FAA's field preemptive effect "into two components: state standards of care, which may be preempted by pervasive regulations, and state remedies, which may survive even if the standard of care is so preempted."[111] Following this analysis, the Ninth Circuit reasoned that if "the particular area of aviation commerce and safety implicated by the lawsuit was governed by 'pervasive [federal] regulations,'" the state standard of care would be preempted.[112]

The court next found that the ACAA's standard of care for assistance of passengers with disabilities is pervasively regulated as to providing assistance with moving through the airport and thus applicable to plaintiff's claims relating to "United's failure to provide her with assistance at all

101. *Id.* at 1003.
102. *Id.* at 1004 (citing 49 U.S.C. § 40120(c)).
103. *Id.* (citing 49 U.S.C § 41112).
104. *Id.* (citing Montalvo v. Spirit Airlines, 509 F.3d 464 (9th Cir. 2007)).
105. *Id.* (citing Chara v. Trans World Airline, Inc. 160 F.3d 1259 (9th Cir. 1998)).
106. *Id.*
107. 555 F.3d 806 (9th Cir. 2009).
108. *Gilstrap*, 709 F.3d at 1005 (citing Martin, 555 F.3d at 811).
109. *Id.* at 1005 (citing 49 U.S.C. subt. VII, pt. A, subt. II).
110. 181 F.3d 363 (3d Cir. 1999).
111. *Gilstrap*, 709 F.3d at 1006.
112. *Id.*

in traversing the air terminal before, between, and after flights."[113] The ACAA standard of care would thus "preempt any different or higher standard . . . under California tort law" as to that activity.[114] If United is found not to meet the ACAA standard of care, the plaintiff may recover under state law remedies.[115] Notably, the Ninth Circuit found that no federal regulation exists as to "how" an airline must treat its passengers.[116] The plaintiff's claims for negligent and intentional infliction of emotional distress therefore were found not to be preempted by any federal standard of care.

Turning next to a conflict preemption analysis, the Ninth Circuit evaluated United's argument and the district court's holding that the plaintiff's claims are conflict-preempted because the ACAA does not provide a private right of action.[117] The court disagreed that lack of a private right of action necessitates conflict preemption, stating, "The determination [of] whether state remedies conflict with the objectives of a federal enforcement scheme must always be tailored to the specific statutory and regulatory context at issue."[118] Based upon "[t]he FAA's savings clause and its liability insurance requirement, both of which cover the ACAA," the court held that "Congress did not intend any of the FAA administrative enforcement schemes to be exclusive of state law *remedies*."[119]

Therefore, the Ninth Circuit reversed dismissal of plaintiff's state law claims, holding: (1) ACAA standards of care apply to the plaintiff's claims as to the duty element of negligence, but that state law would apply to "the other negligence elements (breach, causation and damages) as well as the choice and availability of remedies"; and (2) claims relating to how the airline interacted with passengers with disabilities are not preempted by the ACAA.[120] The case was remanded to the district court for determination of the plaintiff's state law claims against United.

VII. PERSONAL JURISDICTION

In *Weinberg v. Grand Circle Travel, LLC*, the U.S. District Court for the District of Massachusetts dismissed personal injury and wrongful death claims against a hot air balloon operator in Tanzania and its English affiliate (together, balloon operator) for lack of personal jurisdiction.[121]

113. *Id.* at 1007; *see* 14 C.F.R. §§ 382.91(a), 382.91(b), 382.95(a).
114. *Gilstrap*, 709 F.3d at 1007.
115. *Id.*
116. *Id.* at 1008.
117. *Id.*
118. *Id.* at 1009.
119. *Id.* at 1010 (emphasis in original).
120. *Id.*
121. Weinberg v. Grand Circle Travel, LCC, 891 F. Supp. 2d 228 (D. Mass. 2012).

The court also held that although the plaintiffs stated a prima facie case against a Massachusetts travel agent who had booked the trip via an African vendor, they had failed to state a prima facie case against the vendor itself.

Two Florida residents booked an African safari vacation with a Massachusetts travel agent.[122] The travel agent booked the tickets through an African tour operator, which made a reservation with the balloon operator.[123] The balloon operator issued a flight voucher to the African vendor but did not have direct contact with the Massachusetts travel agent.[124]

The day of the balloon flight, heavy winds caused the balloon to crash into a tree, killing one of the Florida plaintiffs and injuring the other.[125] A different balloon scheduled to fly that morning, operated by the same company, did not fly because of dangerous cross-winds.[126] The Florida residents were not advised about the canceled flight and were not informed of the risk of flying under windy conditions.[127] The balloon was flown by a trainee pilot and lacked basic safety equipment.[128] The personal representative of the decedent passenger and the injured passenger filed suit in Massachusetts.[129]

Relying on the Supreme Court's jurisdictional analysis in *McIntyre Machinery v. Nicastro*,[130] the court rejected the plaintiffs' assertion of jurisdiction based on an agency relationship over the balloon operator. The plaintiffs argued that the Massachusetts travel agent acted as the balloon operator's agent by including balloon flights in its safari package.[131] The court noted that, although the First Circuit recognizes the use of agency theory to attribute a party's in-state contacts to a foreign defendant for jurisdictional purposes, the relationship between the balloon operator and the Massachusetts travel agent did not rise to the level necessary to establish jurisdiction under the "restrictive approach" to personal jurisdiction set forth in *McIntyre*.[132]

Having failed to find an agency relationship, the court then turned to the Massachusetts Long-Arm Statute.[133] Because the balloon operator did not deal directly with the Massachusetts travel agent and instead transacted exclusively with the African vendor, the court found the operator's

122. *Id.* at 235.
123. *Id.*
124. *Id.*
125. *Id.* at 236.
126. *Id.* at 235.
127. *Id.*
128. *Id.*
129. *Id.* at 233.
130. 131 S. Ct. 2780 (2011).
131. *Weinberg*, 891 F. Supp. 2d at 241.
132. *Id.* at 243–44.
133. *Id.* at 244.

contacts with Massachusetts insufficient.[134] It found that the balloon operator did not target Massachusetts residents and did not knowingly accept the benefits of a transaction initiated in Massachusetts.[135] The court also determined that its Massachusetts activity was not continuous or systematic enough to support general jurisdiction. The court noted that it reached this ruling "regretfully."[136] It opined that "[i]t seems unfair that the [balloon operator] can reap the benefits of obtaining American business and not be subject to suit in our country."[137]

With regard to the Massachusetts travel agent, the court agreed with the plaintiffs' claim that the travel agent failed to investigate the safety record of the balloon operator.[138] The court stated that although travel agents are generally not liable for the negligence of third-party travel operators, they are liable for their own negligence.[139] The Massachusetts travel agent knew that the balloon operator "had previously had a serious wind related accident" and that it failed to take requisite safety precautions.[140]

The court concluded thus: "This [decision] demonstrates an obvious but lamentable truth—that where personal jurisdiction is limited, the parties most culpable may escape liability leaving the burden of recovery on defendants close to home—even when they are undoubtedly less culpable."[141]

134. *Id.* at 246.
135. *Id.*
136. *Id.* at 247–48.
137. *Id.* at 252.
138. *Id.* at 249.
139. *Id.* at 248–49.
140. *Id.* at 249.
141. *Id.* at 252.