

Air Pennsylvania

PBA Section on Aeronautical and Space Law Newsletter

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Chair's Message

Dear Colleagues:

I hope this Newsletter finds you well in your practice.

We have an exciting and informative newsletter that we are sure you will enjoy. Leading the way is an article by Pittsburgh practitioner Kenneth M. Weidaw III entitled "Commercial Spaceport Development." Ken has submitted articles for previous newsletters and he certainly has a cutting-edge practice. Next, Montgomery County practitioner Jeffrey S. Khan has written an interesting article entitled "Aviation Charities Do Battle." Finally, we have included several summaries of aviation law decisions of interest by Pennsylvania federal and state courts since the last issue of the newsletter.



John D. Goetz, Esq.

Be sure to reserve **April 25** on your calendar for our upcoming Section Day. Our Section will meet at **1:30 p.m.** at the Radisson Penn Harris Hotel and Convention Center in Camp Hill. We will have a presentation by John Sabel, an attorney and Airline Transport Pilot with over 22 years experience flying with U.S. Airways. John will address current issues under the FARs, especially regulations of interest to airline pilots. We know that you will find John's presentation to be informative to your practice. **Please plan to attend!**

We welcome your participation in the Section. If you would like to submit an article for our next newsletter or have suggestions on activities or on how we can improve, please e-mail me at jdgoetz@jonesday.com. Or, please direct comments or newsworthy items for our newsletter to my colleague Jerry Kalina at jjkalina@jonesday.com.

John D. Goetz

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COMMERCIAL SPACEPORT DEVELOPMENT: THE ROLE OF DOMESTIC AND INTERNATIONAL SPACE LAW AND REGULATIONS

By Kenneth M. Weidaw III*

INTRODUCTION SPACEPORTS — BACKGROUND

The term “spaceport” brings to mind a futuristic facility at which spacecraft are launched, sheltered, and maintained for travel to distant cities on planet Earth and to planets and celestial bodies in our solar system. The term came into prominence during the 1950s in various movies and science fiction books. Although functionally distinct, one also thinks of the modern airports as a companion facility. Indeed, we will see that the operations of modern international airports as well as the legal and regulatory regimes that govern them have set the international tenor for future development of the spaceport.

The United States Federal Aviation Administration (FAA) in its February 2005 report, entitled, *Suborbital Reusable Launch Vehicles and Emerging Markets*, page i, advises: “Suborbital launch activity has long been overlooked by the commercial market which for many years focused exclusively on launching satellites. Recently, however, there has been a resurgence of interest in commercial suborbital spaceflight, stimulated by the emergence of new markets, notably space tourism and new vehicles developed by entrepreneurs. With the successful claiming of the Ansari X-Prize [won in October 2004 by Mojave Aerospace Ventures – a \$10 million dollar award offered to the builders of the first privately-developed reusable suborbital vehicle capable of carrying three people to 100 kilometers (62 miles) altitude twice within two weeks], high public interest in space travel, and new vehicles under construction, entrepreneurial ventures are pushing a new industry forward at a rapid pace.” As suborbital launch vehicles are developed to travel to 100 kilometers, they will serve more than tourists. They will serve the commercial, civil and military or remote sensing markets as well. Additionally, suborbital vehicles can also serve as the first stage of an orbital launch system, carrying an expendable upper stage that could carry small spacecraft into orbit at potentially

lower costs than existing expendable launch vehicles.¹ The FAA report notes that “Should some or all of these initial suborbital markets prove viable, the impetus will be present to develop more capable reusable suborbital vehicles that can fly higher, longer distances downrange, including high speed critical cargo/packages and eventually, high speed passenger transportation.”²

“Spaceport” is not yet a recognized term by the FAA despite its use in numerous reports; instead, the term “launch site operator” is used in its regulations. Furthermore, the term “spaceport” does not appear in any of the international space law treaties and conventions; instead, some of the treaties and conventions use the term “station.” Therefore, one may surmise that when the Outer Space Treaty of 1967, Article XII, makes reference to “All stations, installations, equipment and space vehicles ... ” it relates to the future spaceports that will be constructed on the moon, Mars and other planets. Now, with the advent of commercial space transportation, “spaceport” has come into prominence especially in relation to the private, commercial launching of spacecraft to service the International Space Station (ISS) and for taking tourists into suborbital and orbital space. Considering that the United States Department of Transportation issued its first commercial launch operator’s license in 1987, and the first commercial launch occurred in 1989, the term “spaceport” has a short history.

Launch facilities throughout the world are overwhelmingly government owned, operated and controlled for use by the military and non-governmental commercial interests. Worldwide, there now exist 26 launch facilities, both government and commercial.³ Some of the existing launch sites will become the future spaceports upon which businesses and travelers rely to transport goods and personnel to remote destinations. The newest launch facilities are currently located within the United States and are being established to serve commercial interests only. We will hereafter call them “commercial spaceports.” Given the global interest in establishing new spaceports, international coordination and regulation of future space vehicle launches will prove a challenge.

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Spaceports vary with respect to the types of commercial space operations that can be supported. The types of vehicle operations that can be accommodated at a given spaceport are determined by such factors as:

- a. Destination/mission objectives (e.g. launching into low earth orbit, medium earth orbit or geosynchronous earth orbit and the preferred trajectory).
- b. Ability of the spaceport to accommodate the vehicle operational, performance and support requirements.
- c. Spaceport scheduling assurance and range turn-around time (e.g. time needed to process successive operations).
- d. Environmental constraints (e.g. noise abatement, hazard concerns).
- e. Economics (e.g. launch costs).
- f. Weather trends (i.e. the probability that weather patterns/trends will present a risk to the launch window).
- g. Traffic Flow Patterns (i.e. the constraints that must be dealt with in use of the National Aerospace System such as conflicting use flight paths).⁴

COMMERCIAL SPACEPORTS IN THE UNITED STATES

As private, commercial space interests evolve, launch facility operators do not want to compete with the military for use of the government-operated facilities with their expensive personnel and facilities infrastructure; instead, they want flexible flight schedules and minimum range fees. Presently, there are 11 licensed and operational federal and commercial spaceports in the United States. There exist as of September 22, 2006, merely six commercial spaceports licensed by the FAA to conduct launch activities. To handle the increasing number of commercial launches in the 1990s, commercial spaceports were organized in the United States: (1) the California Spaceport is co-located at Vandenberg Air Force Base (licensed in 1996); (2) the Florida Spaceport is co-located at Cape Canaveral Air Force Station (licensed in 1997); and (3) the Virginia Spaceport Center is co-located at Wallops Flight Facility on Wallops Island (licensed in 1997). More recently, spaceports have been established and licensed at: (4) the Kodiak Launch Complex on

Kodiak Island, Alaska (licensed in 1998); (5) the East Kern Airport District — for the Mojave Airport, in California (licensed in 2004); and (6) the Oklahoma Space Industry Development Authority spaceport at the Clinton-Sherman Industrial Airpark located in Burns Flat, Oklahoma (licensed in 2006).

Other states within the United States have proposed spaceports that are now in the various stages of development. New Mexico, Cecil Field near Jacksonville, Florida and Texas, Gulf Coast Regional Spaceport at Brazoria County are currently in pre-application consultation with the FAA and have begun the NEPA process; none have yet submitted a launch license application to the FAA. Legislation has recently been passed in Wisconsin for construction of a spaceport in Sheboygan, Wisconsin. The state of Alabama wants to construct a spaceport on the Gulf of Mexico. Texas currently has three proposed sites for spaceports; the sites are in Brazos, Pecos and Willacy Counties. Montana enacted legislation creating a spaceport authority to create a spaceport in Great Falls, Montana, but has not pursued its development or licensing. Utah, Nevada, South Dakota, Washington and New Jersey are each engaged in development activity that may eventually lead to the creation of spaceports.

Outside of the United States, commercial spaceports have been proposed for the United Arab Emirates, outside Dubai, Singapore and Scotland. Other nations that have emerged as major providers of suborbital launch services include: Australia, Norway, Japan, Brazil and India.⁵ The future will undoubtedly see other nations develop commercial spaceports in anticipation of future international air and orbital travel, as well as to serve commercial customers. When a lunar colony is established later in the 21st century, additional travel needs will be serviced through the multitude of both governmental-controlled and commercial spaceports.

CREATING THE COMMERCIAL SPACEPORT

Within the United States, certain states that enacted legislation to establish state spaceport authorities have created their own definition of a spaceport. Although similar, the definitions are different in each of the states. For example, Chapter 13 of the Utah Spaceport Authority Act defines a spaceport as

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follows: "Spaceport means an area of land or water which is used, or is made available for, the landing and takeoff of spacecraft, including any appurtenant areas which are used, or intended for use, for spaceport buildings, other spaceport facilities or rights-of-way, together with all spaceport buildings and facilities located thereon, ... including, parking, dining, recreational, and hotel facilities."⁶ A recent definition from the state of New Mexico defines spaceport to mean " ... an installation and related facilities used for the launching, landing, recovery, servicing and monitoring of vehicles capable of entering or returning from space."⁷ One of the early commercial spaceports in the United States, the California Spaceport, co-located on Vandenberg Air Force Base in California, defines spaceport to mean: an entity designated by the California Spaceport Authority for the operation of launch sites or reentry sites such as a city, county, special district ... whose application requires a written notice of intent to apply for a federal launch site operator's license, a copy of the "perfected application" submitted to the Department of Transportation and written notice of acceptance of the license.⁸

Given the desirability of having a spaceport located within its state, the listed state governments have enacted legislation creating spaceport authorities that will receive funds from the state to construct and operate the facility. Some of the more recent spaceport authorities, such as the New Mexico and Mojave spaceports, have secured the active involvement of certain commercial space flight companies that are involved in the development of suborbital and orbital space vehicles for commercial and tourist uses. To insure future launch business, the newest spaceports, both in the United States and internationally, will seek the involvement and monetary support — in a business alliance — of commercial launch companies and supporting service companies to participate in the continued growth of the spaceport. The spaceport authorities must construct support facilities for the launch vehicles, supporting personnel, cargo storage areas and accommodations for future passengers. One recognizes similarities in the commercial development of international airport properties and the surrounding areas and the future commercial spaceports. The lessons learned in the growth of airports over the last 50 years will, in some instances, apply to the future development of the spaceport.

However, given the hazards of launching space vehicles and having them reenter the spaceport from distant locations, spaceports will continue to be located in geographically remote areas with climates appropriate for continuous use throughout the year. We may find that the commercial airports of today will provide continuous passenger services to the spaceports where passengers will be accommodated until their launch departure date.

SPACEPORT LICENSING REGIME IN THE UNITED STATES

The FAA Office of the Associate Administrator for Commercial Space Transportation (FAA/AST) licenses and regulates United States commercial space launch and reentry activity, as well as non-federal launch and reentry sites, as authorized by Executive Order 12465 and Title 49, United States Code, Subtitle IX, Sections 70101-70119. The FAA/AST is directed to encourage, facilitate, and promote commercial space launches and reentries.⁹

AST issues launch licenses for commercial launches or orbital and suborbital rockets, and licenses the operations of non-federal launch sites or "spaceports."

AST issues two types of launch and reentry licenses: (a) a launch or reentry specific license — issued for one or more launches or reentries having the same operational parameters; and (b) a launch or reentry operator license — issued to a launch site operator that conducts launches and reentries from one site within a range of operating parameters. A spaceport operator seeks the second of the two licenses permitting multiple launches from the site. The operator's license remains in effect for two to five years from the issuance date.¹⁰

The key components of the licensing process for a spaceport operator are the following:

- a. Pre-application Consultation: Consultation with the FAA precedes the filing of an application;
- b. Policy Review and Approval: The license application is received by FAA and reviewed to determine whether there are any issues affecting United States national security or foreign policy

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interests or international obligations of the United States;

- c. Safety Review and Approval: The purpose of the safety review is to determine whether the spaceport can safely conduct its proposed operation;
- d. Environmental Review: It ensures that the proposed spaceport activities pose no unacceptable danger to the natural environment; and
- e. Compliance Monitoring: Making certain that the spaceport is operating within the regulations and terms of its license.¹¹

Commercial spaceport personnel such as launch safety specialists and commercial space transportation vehicle personnel, including mission planning, mechanics, and vehicle operators (on-board pilots), receive FAA approved training, authorization and medical qualification similar to aircraft pilots.¹² Spaceport security and passenger safety will also be a significant and continuing concerns of the international spaceport community and the FAA, not unlike those currently experienced by air travelers in the year 2006.

Given the decreased commercial satellite launches over the last few years, the FAA expends considerable time with state governments and their economic development bodies in the pre-application consultation stage. No state wishes to expend taxpayer funds on a spaceport that cannot attract imminent launch business. Until we see a substantial upturn in launch business, many of the states that have expressed an interest in establishing a commercial spaceport (listed above) will likely not pursue the license past the first stage.

CONCLUSION

There exists an urgent need for the spacefaring nations to convene a general convention, similar to the 1944 Chicago Convention, to address and plan a future integrated space and air traffic management system. Given the time it takes to convene such a convention and successfully complete its business, commercial spaceports will continue to evolve worldwide as well as new and improved space

vehicles to transport cargo and passengers within the current airspace system. Without the benefit of an international regulatory body to control air and space traffic, spacefaring nations may regulate the airspace above their respective nations in an uncoordinated manner. The detriment to future launch providers and their customers will become apparent within 20 years unless action is taken now. Some legal scholars have recommended that the United Nations, through its Committee on the Peaceful Uses of Outer Space (COPUOS), assume the burden of forging an international space traffic management system considering the difficulty in calling a general convention; work has begun to have the committee study the project. With many nations now engaging in launch activity, it is imperative that coordinated action be taken. Commercial space launches into suborbital and orbital space will continue to increase over the coming years. With no national or international body capable of taking on the task of coordinating and controlling integrated space and air traffic, problems will undoubtedly occur in disrupting the regular flow of aviation traffic between airports and spaceports. Such unsafe conditions will not long be tolerated by commercial aviation and space launch providers. We have the luxury of time to prepare for the future; let us not ponder the matter too long. ■

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¹ FAA, *Suborbital Reusable Launch Vehicles and Emerging Markets*, at 1 (Feb. 2005).

² *Id.* at 2

³ FAA/AST Launch Information, Vehicles & Sites: Launch Sites, http://ast.faa.gov/linfo_vsite/maps/as.cfm

⁴ FAA, *Commercial Space Transportation Concept of Operations In the National Airspace System*, Version 2.0, at 4 (May 11, 2001), available at www.faa.gov.

⁵ FAA, *Suborbital Reusable Launch Vehicles and Emerging Markets*, at 9 (Feb. 2005) available at www.faa.gov.

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⁶ Utah Spaceport Authority Act, Section 3, Utah Code Ann. § 72-13-102(2).

⁷ N.M. Stat. Ann. § 9-15-43 F (1978).

⁸ California Space Enterprise Development Act, Chapter 627 of the 2003 Statutes, Section 13999.1 (p) and Section 13999.3(a)-(c).

⁹ See http://www.faa.gov/about/office_org/headquarters_offices/ast/about

¹⁰ See http://www.faa.gov/about/office_org/headquarters_offices/ast/licenses_permits/launch_reentry/.

¹¹ *Id.* (containing links).

¹² FAA, *Commercial Space Transportation Concept of Operations In The National Airspace System*, Version 2.0, at 8 (May 11, 2001), available at www.faa.gov.

AVIATION CHARITIES DO BATTLE

By Jeffrey S. Kahn*

Charitable aviation has been mushrooming across the United States over the past two decades. Primarily through 501(c)(3) charitable organizations, thousands of pilots volunteer to help others in need and to aid their communities. The missions of these organizations are varied and include arranging flights for medical patients, disaster relief, transporting physicians to remote locations and flying decision-makers in government and industry to demonstrate the environmental impact of proposed projects.¹

Two such charitable organizations that are primarily engaged in arranging for patient transport recently did battle over intellectual property rights and claims of unfair competition in the U.S. District Court for the Northern District of Georgia.

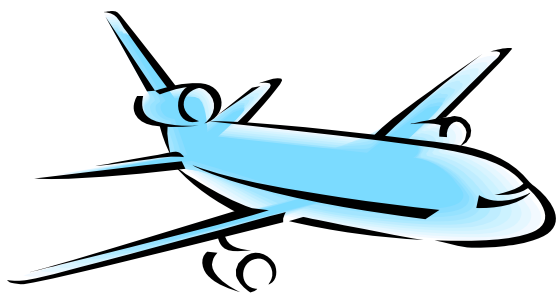
On November 20, 2006, the United States District Court for the Northern District of Georgia entered a decision in the case of *Angel Flight of Georgia (AFGA) v. Angel Flight Southeast (AFSE) and Angel Flight America (AFA)*.² In essence, the court held that AFGA had superior rights to the use of the name Angel Flight in the states in which it operates, and that AFSE had engaged in unfair competition in violation of federal and common law.

Some background is in order to understand how these aviation charities came to blows.

The majority of volunteer pilot organizations (VPOs) arrange for free air transportation of ambulatory and medically stable patients who require treatment remote from their homes. Missions are routinely linked among the organizations to allow the patients to cover greater distances.

These patients typically have chronic illnesses that require repeated visits to highly specialized facilities. Often patients are immune compromised due to their condition or treatment and cannot travel commercially even if it were practical or affordable to do so. Thus patients receive treatment that they would not otherwise be able to obtain through the equivalent of on-demand charter service and at no

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cost to them. The pilot donates the entire cost of the flight but receives enormous satisfaction in seeing the impact that his or her generosity has on patients and their families.

In times of national crisis, VPOs have adapted their mission to serve the community. Within 24 hours of the attacks on September 11, 2001, VPOs, including Volunteer Pilots Association (Pittsburgh) and Angel Flight East (Philadelphia) sponsored flights that were the only non-military flights with access to the airways. Volunteer pilots flew blood samples for testing when, with no other way to transport them, large supplies of donated blood would have gone to waste. Even after the airways re-opened, volunteer pilots transported firefighters and even search dogs to New York City.

After hurricane Katrina, VPOs from all over the nation assisted primarily by flying donated medications and supplies into the Gulf Coast and helping to relocate people from the area. These efforts, as well as others, have received national recognition.³

Angel Flight of Georgia (AFGA) was founded in 1983. The term "Angel Flight," was originated by a Nevada Group, AMSFT-Nevada⁴ in 1982. Over the years, more groups were formed across the nation and many of them adopted Angel Flight as their name.⁵ Other groups adopted names that did not include Angel Flight.⁶

Subsequent to AFGA's formation, its founder assisted in the creation of AMSFT of Central Florida which, in 1992, changed its name to Angel Flight of Florida and finally in 1997, to Angel Flight Southeast (AFSE). When AMSFT-Nevada became defunct around 1986, AMSFT-LA adopted the name Angel Flight West (AFW) and filed a federal trademark registration for a logo that included "ANGEL FLIGHT."⁷

Up through the 1990s, there was an almost unlimited spirit of cooperation and good will among the various groups. In fact, existing organizations encouraged and assisted in the formation of new groups. For example, the author was asked to assist in establishing Angel Flight East at the behest of a pilot who attempted to volunteer for Hurricane Andrew relief. It turned out that there were more than enough

volunteers for Andrew, but it was suggested that he could best help by establishing a similar volunteer organization to serve his community.

In the process of getting on our feet we found that EVERYONE involved in volunteer flying was willing to freely share ideas, procedures and even forms and documents. No one raised issues of territories or trademarks; we were all working to meet our small part of an enormous need. It was surprising but clear that the combined efforts of all of the organizations were not coming close to satisfying the public's need for services. So there was more than enough "business" to go around.

With time, organizations grew; formerly all volunteer organizations began to be professionally managed; fundraising and marketing became a priority for many organizations.

In 2000 Angel Flight America (AFA) was created as a national fund raising and marketing arm for six of the organizations operating as "Angel Flight." They remained otherwise autonomous in terms of operations and governance. Several other "Angel Flight" organizations (Georgia, East and Oklahoma) were not involved with this effort and remained independent.

Each AFA organization was given an exclusive territory for purposes of fundraising, outreach and pilot recruitment. There was no restriction on commencing or ending a flight in another's territory.

In 2002, AFW transferred its registration of the "ANGEL FLIGHT" logo in 2003 to AFA. AFA filed a federal registration of the word mark "ANGEL FLIGHT" in 2004.

Meanwhile, problems were brewing between AFSE and AFGA. Prior to the creation of AFA, the organizations had actually worked together. For a period of time AFSE was paid by AFGA to coordinate its missions. Thereafter, merger talks ensued, but were never consummated. Eventually, AFSE decided to take AFGA head on and engaged in the conduct that gave rise to AFGA's filing suit.⁸

AFGA alleged, and the District Court found that AFSE's use of the Angel Flight mark within the

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territory served by AFGA caused a likelihood of confusion. These included, *inter alia*, using “Angel Flight” in connection with its services and promotional activities, creating false rumors that AFGA had ceased operations and telling hospitals long served by AFGA that they should now deal with AFSE.

Among the instances of actual (and intended) confusion, the court found that AFSE attempted to recruit AFGA pilots and sought fuel discounts from fixed-base operators who had worked with AFGA. Organizers of the Augusta Air Show told AFGA that they could not attend the event because AFSE had already applied and stated that it would be representing “Angel Flight.” Also cited were instances of media confusion, misdirected contributions and stranded patients who assumed that AFGA was to blame, when in fact that missions were coordinated by AFSE.

From the district court’s Findings of Fact, it appears that AFSE’s offensive conduct accelerated since the lawsuit was filed.

In summary, the court ruled that:

- (1) Angel Flight of Georgia has superior rights to the use of ANGEL FLIGHT in Georgia, Alabama, Mississippi, Tennessee, North Carolina and South Carolina (Territory).
- (2) The federal trademark registration of ANGEL FLIGHT was invalid and canceled.⁹
- (3) AFSE had engaged in various unlawful activities in violation of federal and common law that caused the likelihood of confusion and actual confusion in the territory.
- (4) AFGA was entitled to an injunction, “carefully tailored to not only minimize the possibility of consumer confusion in the Territory, but also to maximize the public interest in ensuring that the good work of both parties can continue.”

The court directed the parties to collaborate on an agreed form of injunction but no agreement was reached.

On March 17, 2007, the court entered a final Order permanently enjoining AFA and AFSE from using the Angel Flight mark while conducting any activities within the Territory. The court allowed the use of a reference such as “formerly Angel Flight Southeast” for a six-month period. The injunction does not prohibit pilots from identifying themselves as Angel Flights to aviation officials and disaster relief agencies as necessary to complete missions. Appeals are likely.

Thankfully, and oblivious to these legalities, pilots nationwide continue to volunteer their time and aircraft for the sole purpose of helping those in need and are having a real impact on people’s lives every day. ■

**Jeffrey S. Kahn is an attorney in private practice concentrating on civil litigation and aviation law in Plymouth Meeting, Pennsylvania. The views expressed in this article are those of the author and are not those of his firm or clients.*

¹ The Air Care Alliance is a national group supporting the efforts of all organizations that employ pilots and aircraft for helping others in need. A listing of all members and known non-members is available on its Web site, at www.aircareall.org/listings.htm.

² Case No. 1:03-CV-3620-JTC.

³ See, e.g., National Aeronautic Association’s Public Benefit Flying Awards, available at www.naa.aero/html/awards/index.cfm?cmsid=197

⁴ Standing for American Medical Support Flight Team.

⁵ E.g., Angel Flight Oklahoma, Angel Flight West, Angel Flight Northeast (formerly New England), Angel Flight East (formerly Pennsylvania) and Angel Flight Southeast (formerly AMSFT of Central Florida and Angel Flight of Florida).

⁶ E.g., Volunteer Pilots Association (Pittsburgh), Lifeline Pilots (Peoria, IL).

⁷ Issued June 7, 1988.

⁸ Fortunately, at least to date, this scenario has not been repeated elsewhere in the country where all of the organizations have been able to co-exist, despite occasional disagreements.

⁹ The court determined that known prior use of the mark was not disclosed in the application.

SUMMARY OF RECENT DECISIONS

Since our last issue, the Pennsylvania Supreme Court and the Third Circuit have diverged in their views of whether interlocutory appeal is available when a defendant's motion based on the General Aviation Revitalization Act (GARA) statute of repose is denied. Beyond these "headline" cases, a number of decisions have been issued on topics such as the extent of federal preemption of air safety claims, the availability of personal jurisdiction over foreign manufacturers under an alter-ego theory, application of choice of law principles to cross-country flights, the availability of remedies for airline passengers in varying situations, and the effect of zoning laws on airport licensing.

Interlocutory Appeal Of Denial Of Motion To Dismiss Based On The General Aviation Revitalization Act Of 1994 (GARA), 49 U.S.C. § 40101 Note, Is Permissible In Pennsylvania

Pridgen v. Parker Hannifin Corp.,
905 A.2d 422 (Pa. 2006).

Holding: GARA statute of repose issue was separable from underlying claims and was too important to deny interlocutory review as engine manufacturer would suffer irreparable loss of defending complex litigation claim at trial without review.

Case Summary: In August 1999 a private airplane crashed on departure from the airport in North Lima, Ohio. The decedents' estate brought a product liability action in Pennsylvania naming, *inter alia*, Textron Lycoming Reciprocating Engine Division, Textron, Inc. and AVCO Corporation, the designer and manufacturer of the engine installed on the accident aircraft. Textron and AVCO filed summary judgment motions based, *inter alia*, on GARA, and argued that, because the original engine assembly was installed on the aircraft more than 18 years before the accident and because they did not manufacture or supply any of the allegedly defective parts that had been replaced within 18 years of the accident, GARA's statute of repose applied to immunize these defendants.

The Court of Common Pleas denied the motions without opinion and defendants filed interlocutory appeals, seeking to appeal under Pennsylvania's collateral order doctrine, as set out in Pa. R.A.P. 313(b). The Superior Court quashed the appeals by per curiam order and appellants sought review by the Supreme Court. After a series of remands to clarify the holdings of the lower courts, the Supreme Court reversed, holding that defendants should be afforded appellate merits review of the common pleas court's interlocutory orders.

The Supreme Court held that it was not necessary to assess a "broad range of merits issues" to decide the narrow issue of an original manufacturer's ongoing liability under GARA's rolling provision for the alleged failure of replacement parts that it did not physically manufacture, which is distinct from the merits of plaintiffs underlying products liability causes of action.

The court also recognized that, under the terms of GARA and its legislative history, Congress was concerned with exposure of covered aviation manufacturers to both liability in damages *and* associated litigation costs. These federal interests were sufficiently important to justify the intervention of appellate courts in product liability cases in furtherance of the policy of cost control. The substantial costs that defendants would incur in defending the litigation at trial on the merits comprises a sufficient loss to support allowing interlocutory appeal as of right. Therefore, the court held the collateral order doctrine applied to this GARA appeal.

The court further held that, because type certification is an essential prerequisite to manufacture in the aviation industry, claims arising from alleged breaches of duties and responsibilities arising from the type certification process must be considered to be asserted against the manufacturer in "its capacity as manufacturer" under GARA, and therefore subject to GARA's repose provisions. Additionally, the court noted that the legislative history of GARA was plain that design-defect claims were contemplated as within the scope of GARA's scheme of repose and, because such claims are the predominate form of claims asserted against manufacturers, holding otherwise would undermine the federal scheme of GARA.

The court remanded the case to the trial court for further proceeding on the misrepresentation, concealment, and withholding exception to GARA, which was not raised on appeal.

Interlocutory Appeal Of A Denial Of A Motion For Summary Judgment Based On GARA Is Not Available In The Third Circuit

Robinson v. Hartzell Propeller, Inc.,
454 F.3d 163 (3d Cir. 2006).

Holding: The federal collateral order doctrine did not apply to permit interlocutory appeal of an order denying summary judgment for a manufacturer based on GARA.

Case Summary: In August 1999, the pilot and passenger of a private aircraft suffered significant injuries when the aircraft's propeller fractured in mid-flight. Subsequently,

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they brought a products liability action against, *inter alia*, the manufacturer of the propeller, Hartzell. Hartzell brought a motion for summary judgment based on the 18 statute of repose under GARA, 49 U.S.C. § 40101 note § 2(a), which the district court denied. Hartzell appealed and asserted that the circuit court could reach the merits of the district court's decision under the federal collateral order doctrine.

The Third Circuit Court of Appeals affirmed. The court began its analysis by recognizing that the collateral order doctrine is a "narrow exception" to 28 U.S.C. § 1291, which requires a "final order" of a district court, and therefore is strictly construed. The court went on to find four primary reasons why the district court's order was not appealable under the collateral order doctrine. First, the court considered the Ninth Circuit decision in *Estate of Kennedy v. Bell Helicopter Textron*, 283 F.3d 1107 (9th Cir. 2002), but agreed with the dissenting opinion in that case that the interest protected by the GARA statute of repose is much more similar to a statute of limitations than to a grant of qualified immunity.

Next, the court found a clear difference between the immunity granted to a public official and an immunity granted to a private defendant. The societal costs of subjecting governmental entities to broad-ranging discovery, which underlies the qualified immunity doctrine, are absent from GARA's statute of repose defense. Third, the GARA statute of repose is not a pure immunity because it contains exceptions under which immunity does not attach, such as the knowing misrepresentation exception. Thus, permitting appeal would run contrary to precedent that the "finality requirement of § 1291 must not be reduced to a case-by-case determination." Finally, the district court had found a factual dispute existed relating to the § 2 exception. Jurisdiction under the collateral order doctrine should be exercised to review a pre-trial denial of immunity "only to the extent that it raises questions of law." The court found that the misrepresentation issue was intertwined with the merits of the case.

Failure Of Product Liability Complaint To Allege A Breach Of A Federal Standard Of Safety

Duwall v. AVCO Corp.,

No. 4: CV 05-1786, 2006 U.S. Dist. LEXIS 31445 (M.D. Pa. May 19, 2006)

Holding: Upon reconsideration, the district court held that federal law preempts the entire field of air safety and therefore product liability action must be dismissed for failure to allege a breach of a federal standard of care.

Case Summary: Decedents were passengers on a flight that crashed into the side of a mountain near Chickaloon, Alaska

on September 2, 2003. AVCO and Textron, the manufacturer of the engine installed in the airplane, were named as defendants in the complaint as manufacturers. AVCO and Textron moved for a more definite statement or, in the alternative, to dismiss the complaint for failure to state claims upon which relieve may be granted. One of the arguments set forth by defendants was that the negligence, breach of warranty, and strict liability counts were defective because the complaint failed to allege a breach of duties under federal law, citing *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999).

The district court initially denied the motion because, *inter alia*, it concluded that the standard of care announced in *Abdullah* applies to the operation of an aircraft, not the manufacturing of aircraft parts. 2006 WL 224020 (M.D. Pa. Jan. 30, 2006).

Upon reconsideration of the motion, however, the district court vacated its previous order and concluded that the Third Circuit's holding in *Abdullah* was not limited to piloting or aircraft operation but rather preempted "the entire field of air safety." The court vacated its order, but, instead of granting the motion to dismiss, the court granted plaintiff's motion for voluntary dismissal.

Application Of Alter Ego Basis For Personal Jurisdiction Over Foreign Engine Manufacturer

Simeone v. Bombardier-Rotax GMBH,

360 F. Supp. 2d 665 (E.D. Pa. 2005)

Holding: Austrian-based manufacturer of plane engine was subject to personal jurisdiction in Pennsylvania as the alter ego of Bombardier, Inc.

Case Summary: The decedents were attempting to land a private airplane near York, Pa. when the plane's engine failed. During the ensuing emergency maneuvers, the plane struck power lines and crashed. Plaintiffs named Rotax, the Austrian-based manufacturer of the aircraft engine, and Bombardier, Inc. as defendants. Rotax filed a motion to dismiss for lack of personal jurisdiction. Bombardier, Inc. filed a motion for summary judgment.

The district court found that it had no specific or general jurisdiction over Rotax because it did not conduct sufficient business in Pennsylvania. The court held, though, that it had jurisdiction over Rotax because Rotax operated as the alter ego of its parent company, Bombardier, Inc. Bombardier had not moved to dismiss on jurisdictional grounds. The record demonstrated that Bombardier owned all the stock of Rotax, Bombardier's shareholders had the power to hire the

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chief executive of Rotax's management team, and the Bombardier corporate office, not Rotax's management team, made major business decisions for Rotax. Bombardier determined Rotax's budget and design, and Rotax supplied approximately 45 percent of its engines directly to Bombardier. Rotax could not even develop a new engine without prior authorization from Bombardier. Moreover, public representations by Bombardier blurred the two companies together. Therefore, the court held that assertion of jurisdiction over Rotax met the conditions of "fair play and substantial justice."

As a result of this alter ego finding, the court also denied Bombardier, Inc.'s summary judgment motion because genuine issues of fact existed regarding the extent of Bombardier's control over the allegedly defective engine.

Application Of Pennsylvania's Choice Of Law Principles To Settlement Release For Crash In Pennsylvania By Georgia Pilot

Taylor v. Mooney Aircraft Corp.,
430 F. Supp. 2d 417 (E.D. Pa. 2006)

Holding: Under a Pennsylvania choice of law analysis, decedents who were returning to Georgia from New York, and had landed in Pennsylvania on the flight to New York because of bad weather, had crashed in Pennsylvania only fortuitously, and therefore Georgia law should apply to interpretation of a settlement release executed by the executor of the estates of the decedents.

Case Summary: The pilot of a private aircraft and his family were traveling from Atlanta, Georgia to Olean, New York for Thanksgiving and landed in Bradford, Pennsylvania because of inclement weather. After the holiday, plaintiffs' family returned to Bradford to fly back to Georgia. The plane crashed shortly after take off from the Bradford Airport.

In the ensuing lawsuit, one of the defendants filed a motion for summary judgment based on two general releases executed by the former administrator of the passengers' estates in exchange for the consideration of \$50,000 paid by the insurers of the pilot and aircraft's owner. By its terms, the releases were not limited to the insurance company, but applied to "all other persons, firms, corporations, associations or partnerships" and "any and all claims, actions, causes of action, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever."

The district court applied the choice of law rules of Pennsylvania to determine what law should govern the interpretation of the release clause. The court found a false conflict of laws existed. Pennsylvania had no interest in the application of its law to the decedents' general releases

because the accident's occurrence in Pennsylvania was fortuitous. Although defendants raised facts tending to show that the pilot intentionally and voluntarily entered Pennsylvania, the court was compelled to view the facts in a light most favorable to the plaintiff. The court also found the facts of this case similar to those of *Griffith v. United Air Lines, Inc.*, 203 A.2d 796 (Pa. 1964). On the other hand, the court found that application of Georgia's interpretation of general releases (in which a party is not released unless specifically identified in the release) would advance that state's policies.

Due to the close nature of the false conflict question, the court also determined that Georgia law must be applied even if there were a true conflict between Georgia and Pennsylvania law. The court held that the issue of the release was governed by tort law, and that the site of the accident was outweighed by Georgia's interests in the events and the parties at bar. In particular, the plane had been maintained in Georgia and the decedents resided in Georgia, whereas none of the parties were Pennsylvania residents. Accordingly, Georgia law was applied to the interpretation of the releases, and the motion for summary judgment was denied.

In Passenger Suits Against Airlines, There Is No Private Right Of Action By Purchasers Of Airline Tickets Under The Air Carrier Access Act

Chippis v. Continental Airlines Inc.,
No. Civ. A 3:05-CV-2024, 2006 WL 463160
(M.D. Pa. Feb. 24, 2006).

Holding: There is no private right of action under the Air Carrier Access Act of 1986, 49 U.S.C. §§ 41310, 41501, 41702, 41705 (Supp. IV 1986).

Case Summary: Plaintiff, a disabled individual requiring the use of a wheelchair, made an online ticket purchase from Continental Airlines to fly from the Wilkes-Barre/Scranton International Airport to Kansas City, Missouri. The plaintiff confirmed his travel plans with airline representatives and confirmed accessibility to the flights during the conversations. However, on the day of the flight, plaintiff was informed by the Continental agent that he would not be allowed to board the plane because Continental did not have the equipment or personnel to assist him. Plaintiff was also told he would not be permitted to travel on any Continental flight without a traveling companion. Plaintiff filed a complaint against defendants, asserting violation of the Air Carrier Access Act and a tort cause of action for intentional infliction of emotional distress.

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Defendants argued that the ACAA did not create a private right or private remedy. Although the Third Circuit had not addressed this issue, the district court noted two circuit court decisions in which the 10th and 11th Circuits agreed with their reasoning that Congress had not intended to create a private right of action in the ACAA. The court distinguished decisions by the 5th and 8th Circuits to the contrary as decided prior to the U.S. Supreme Court's decision in *Alexander v. Sandoval*, 532 U.S. 279 (2001), which held that courts should look for Congressional intent to create a private right of action in the text and structure of a statute. Because the federal question claim was being dismissed early in the litigation, the court declined to exercise supplemental jurisdiction over plaintiff's tort claim and dismissed the complaint.

Federal Preemption Of The Pennsylvania Unfair Trade Practice And Consumer Protection Law In Passenger Disputes With Airlines

Watkins v. Northwest Airlines, Inc.,
No. 677 MDA 2004, 2005 WL 318578
(Pa. Super. Ct. Jan. 24, 2005).

Holding: Airline did not breach contract when it declined to re-issue tickets that had been purchased more than a year earlier, and Pennsylvania's Unfair Trade Practice and Consumer Protection Law (UTPCPL), 73 P.S. § 201 et seq., was preempted by the federal Airline Deregulation Act (ADA), 49 U.S.C. § 41713.

Case Summary: Plaintiff purchased two round-trip tickets in September 1999 from Newark, NJ to Calgary, Canada. Plaintiff was unable to make the intended trip and, after more than a year passed, requested that the tickets be reissued for September 2001. The airline refused the request and refused to refund plaintiff's money. Plaintiff sued, asserting a breach of contract claim and that the airline's failure to disclose a material term at the time of contract formation was fraudulent and violated Pennsylvania's UTPCPL. The trial court granted the airline's motion for summary judgment, finding that the word "non-refundable" was printed clearly on the front of each ticket and on the back of the ticket was a clear warning to review the "Conditions of Contract," which conspicuously state that the ticket is good for carriage for one year from the date of issue.

Although the trial court had rejected the airlines' argument that plaintiff's claims were preempted by the ADA, the Superior Court examined this argument *sua sponte* as a matter of subject matter jurisdiction. The Superior Court looked to *American Airlines v. Wolens*, 513 U.S. 219 (1995), which held that the ADA permits state-law-based court adjudication of routine breach of contract claims, but courts are confined in

such actions to the parties' bargain and may not impose their own substantive standards with respect to rates, routes or services. Department of Transportation regulations indicate that airlines must provide direct notice of certain terms. The clear and unambiguous notice of the terms in the "Conditions of Contract" was sufficient to comport with sections 253.4 & .5 of the federal regulations. The court held that, by enforcing the terms of the parties contract, it was not enforcing or enacting any state laws, and therefore, the contract claim was not preempted by the ADA and was properly decided.

The court also addressed plaintiff's contention that the airline's failure to disclose the one-year expiration term at the time of purchase violated the UTPCPL. The court found this claim went beyond simply giving "effect to the bargains offered by the airlines and accepted by airline customers" and therefore was preempted by the ADA.

The Definition Of "Carrier" Under The Warsaw Convention

Orova v. Northwest Airlines Inc.,
No. 03-4296, 2005 WL 281197 (E.D. Pa. Feb. 2, 2005)

Holding: Under the Warsaw convention, only the airline that engaged in the actual transportation of the passenger, not the airline that merely sold a ticket, can be held liable as a "carrier."

Case Summary: Plaintiffs purchased tickets from a Northwest ticketing agent for a flight from Newark, NJ to Geneva, Switzerland and Amsterdam, The Netherlands. On a KLM Royal Dutch Airlines flight from Geneva to Amsterdam, one of the plaintiffs questioned a flight attendant concerning a man (later identified as a KLM employee) leaning over the pilot to touch the control panel. After the plane landed, the pilot accused the plaintiff of interfering with the pilot's command of the plane. When plaintiffs returned to the airport for their return flight to Newark, a flight attendant accused the plaintiffs of "causing problems" at the airport the day before, were escorted off the plane and were not allowed to re-board the flight. Plaintiffs ultimately were not allowed to fly with KLM and returned to Newark via another airline.

Northwest moved for summary judgment, arguing that it was not the proper party because plaintiffs flew with another airline. The district court agreed and held that plaintiffs did not present any theory for piercing the corporate veil, but alleged only that KLM and Northwest are closely related because of their alliance partnership, the tickets were issued on Northwest ticket stock, both airlines advertise jointly, and customer claims in the U.S. for both airlines are directed to a Northwest phone number. More important to the court

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was that the events during plaintiffs' flight and at the Amsterdam airport were exclusively the result of KLM's independent actions.

The court also found support for its holding in the Warsaw Convention. The plaintiffs' claims arose under Chapter III of the Convention, entitled "Liability of the Carrier." Although the term "carrier" is not defined in the question, the court held that term means the airline which actually transports the passengers or baggage. Plaintiffs' motion for leave to file an amended complaint were denied because plaintiffs sought to add an improper party (Air France) and because the amended complaint would be beyond the Warsaw Convention's and Pennsylvania's two year statute of limitations.

Jurisdiction Over Bahamas Carrier Cannot Be Established Through Company Website That Is Not Directed At Pennsylvania

McNeil v. Bahamasair Holdings Ltd., Inc.,
No. 2:05CV288, 2006 WL 1699487
(W.D. Pa. Jun. 20, 2006).

Holding: Court did not have personal jurisdiction over airline where there was no evidence that it conducted flights to Pennsylvania and its Web site was not directed to generating business in Pennsylvania.

Case Summary: Plaintiff was injured when airline employees dropped him on the remaining portion of his amputated leg while attempting to assist him to his seat after he boarded a flight from Miami to Nassau, the Bahamas. Plaintiff allegedly suffered serious injuries causing, *inter alia*, a loss of circulation that contributed to the subsequent amputation of his right leg. Plaintiff filed a complaint in the western district of Pennsylvania based on diversity jurisdiction.

The district court assigned a magistrate judge to handle pretrial proceedings and subsequently adopted the magistrate's report and recommendation. Defendant filed a motion to dismiss for lack of personal jurisdiction. Plaintiffs argued the court had general jurisdiction over Bahamasair because its Web site showed flights to Pittsburgh and Philadelphia, because tickets to and from those cities can be purchased from the Web site, and because hotels and rental cars in Pennsylvania can be booked through its Web site.

The court held that it could not exercise personal jurisdiction over Bahamasair based on its Web site. A defendant's internet activities must be purposefully directed to the forum. The plaintiffs' evidence was not sufficient to establish continuous and systematic contacts with Pennsylvania. The evidence presented by plaintiffs did not show with reasonable

particularity that Bahamasair actually flies to Pittsburgh and Philadelphia, but showed only that Nassau, Pittsburgh, or Philadelphia may be selected as either cities of origin or destination cities in the first step of booking a flight; nor did the copies of the Web site pages show with reasonable particularity that tickets for Bahamasair flights can actually be purchased from its Web site. There was no evidence that Bahamasair's internet contacts with Pennsylvania were purposefully directed to that forum.

As an alternative to dismissing the case, the court granted defendant's alternative motion to transfer the case to the United States District Court for the Southern District of Florida, in part because dismissal would result in an injustice in that the Warsaw Convention's two year statute of limitations would bar plaintiffs from obtaining redress of their injuries.

A Landing Strip Need Not Be Re-Zoned As An Accessory Use To A Residential Property

Risker v. Smith Township Zoning Hearing Board,
886 A.2d 727 (Pa. Commw. Ct. 2005).

Holding: An airplane landing strip is not a permitted "accessory use" to a single-family dwelling for zoning purposes.

Case Summary: Plaintiffs sought permission to construct a 100 foot wide and 1,900 foot long grass landing strip with landing lights on part of their 45-acre property in order to operate an antique Piper Cub airplane for recreation. The landing strip would have been located on part of the property zoned C-1 Conservation, which does not permit airports or landing strips by right or as a conditional use. Plaintiffs proposed constructing the landing strip as an accessory use to the single-family dwelling located on the property. Plaintiff's permit application was denied and the Zoning Hearing Board sustained the denial. The trial court reversed the board's decision.

On appeal, the Commonwealth Court reversed, holding that the Zoning Hearing Board not only premised its decision on the basis that the proposed landing strip was not a customary accessory use, but also that the landing strip would not be subordinate and clearly incidental to the single-family dwelling. The landing strip would be greater in size than the principal use and, therefore, not "inferior" or subordinate. Moreover, the impact on surrounding property

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and neighbors was not “of minor consequence,” as plaintiff admitted that he flew over neighboring homes.

Townships Are Not Required To Enact Zoning Amendments For Benefit Of Private Airports

Baublitz v. Chanceford Township Bd. of Supervisors, 865 A.2d 975 (Pa. Commw. Ct. 2005).

Holding: Township was not required to enact a model airport hazard zoning ordinance to benefit a private citizen’s public airport.

Case Summary: Plaintiff’s late husband operated Baublitz Airport as a private airport prior to township’s adoption of a zoning ordinance in 1979, making the airport a pre-existing non-conforming use. When plaintiff’s husband applied for a public airport license from the Pennsylvania Department of Transportation, he was informed the airport did not meet DOT’s requirements (such as lack of runway length and width, improper slope and intrusion into the required air surface of land-based structures) but, due to the pre-existing non-conformity, was allowed to operate as a public airport. When plaintiff’s husband died in 2000, the license, which was in his name only, expired. Under DOT’s rules, the new

license cannot be issued until the airport is fully compliant with FAA requirements, though DOT issued a “letter of temporary operation” to plaintiff pending compliance. Plaintiff applied for and received a conditional state grant of funding for renovations to bring the airport into compliance, but DOT would not release the funds until plaintiff increased control over the runways and surrounding airspace and until the township enacted an airport hazard zoning ordinance.

Plaintiff sought to have the township amend its zoning ordinance to include airport hazard zoning. A study indicating the requested ordinance would place height restrictions on hundreds of landowners. The township did not act on the request to amend the zoning ordinance. Plaintiff then filed a mandamus action to compel the township to amend its ordinance. This lawsuit was based on the Airport Zoning Act (AZA), 74 Pa. C.S. § 5912(a). The trial court granted plaintiff’s motion for summary judgment and the township appealed.

The Commonwealth Court reversed and held that the language in Section 5912(a) of the AZA is not mandatory, but concerns a “grant of power, not a legislative mandate.” Because the township had not duty to enact the model ordinance, mandamus did not lie to compel it to do so. ■

UPCOMING EVENTS

- ✈ **April 25th, 2007, 1:30 p.m. — Section Day at the Radisson Penn Harris Hotel and Convention Center in Camp Hill. There will be a presentation entitled “Flight Time & Duty Time Limitation: A Behind the Scenes Look at Airline Pilot Scheduling” by John Sabel, Esq.**
- ✈ **June 20-22, 2007 — PBA Annual Meeting in Philadelphia. Further information will be forthcoming.**