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Winter Farmscape

by Kathy Glasnap

courtesy of and thanks to the AOPA Air Safety Foundation

WINTER MEETING - RANCHO LAS PALMAS - PALM SPRINGS, CA - FEBRUARY 18-22, 2009

SUMMER MEETING - GRAND HOTEL - MACKINAC ISLAND, MI - JULY 8-12, 2009

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Publication Office
c/o Tucker Ellis & West LLP
925 EUCLID AVENUE, SUITE 1150
CLEVELAND, OHIO 44115
Telephone: (216) 592-5000
Fax: (216) 592-5009

Editorial Office
Gary W. Allen, Esq.
2100 Horne's Lake Rd.
Williamsburg, VA 23185
Telephone: (757) 345-6926 Cell: (703) 401-4580
E-mail: GWA1225@aol.com

EDITOR

Gary W. Allen . . . . Williamsburg, VA
E-mail: GWA1225@aol.com

ASSOCIATE EDITOR

Ellen L. Riddle . . . . North Royalton, OH
(440) 230-9252
E-mail: eriddle@sbcglobal.net

CONTRIBUTING EDITORS

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Cecile S. Hatfield . . . . Miami, FL
R. Christopher Julius . . . . . . Washington, D.C.
Steven A. Kirsch . . . . Washington, D.C.
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John S. Yodice . . . . Washington, D.C.

ADMINISTRATIVE OFFICE

Karen Griggs
Lawyer-Pilots Bar Association
P.O. Box 1510
Edgewater, MD 21037

OFFICERS

PRESIDENT

Susan L. Hofer
Dean and Gibson, LLP
301 S. McDowell Street, #900
Charlotte, NC 28204
Tel: 704-372-2700
Fax: 704-372-1804
shofer@deanandgibson.com

PRESIDENT-ELECT

Arthur E. Luman
Luman, Helfman, Fayer & Tucker
140 Grand Street
White Plains, NY 10601
Tel: 914-683-1800
Fax: 914-683-1897
arthurl@tsjesq.com

SECRETARY

Charles M. Finkel
Magana, Cathcart & McCarthy
1801 Avenue of the Stars, #600
Los Angeles, CA 90067
Tel: 310-553-6630
Fax: 310-407-2295
finkelaviationlaw@earthlink.net

TREASURER

Robert L. Feldman
Law Office of Robert L. Feldman
8900 SW 107th Avenue, #203
Miami, FL 33176
Tel: 305-598-4841
feldmans48@hotmail.com

EXECUTIVE DIRECTOR

Karen Griggs. . . . . (410) 571-1750
Fax . . . . (410) 571-1780
E-mail. . . . . lpba@lan2wan.com

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Or send your renewal to Karen Griggs at P.O. Box 1510 Edgewater, MD 21037.

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PRESIDENT'S MESSAGE

I have many good things to report to you, so without further ado:

A Great Brainstorm Was Had By All

I have just returned from the very successful Brainstorming session at Yodice and Associates in Washington, D.C. Prior to the meeting, we received many e-mails from members providing valuable input on wide ranging LPBA topics. At the meeting we had a full house with those who took their valuable time to attend in person as well as lots more on the conference call, including Australian Member Spencer Ferrier.

What was clear from everyone was how much they care about and enjoy this organization and are committed to see it thrive. Many comments showed we are doing a lot right, but there were also suggestions and at times divergent advocacy for different approaches on specific points. I will try to summarize some of what came out of the Brainstorm to provide you with food for thought and maybe the desire to provide more comment, although a lot of what has been communicated is still being digested. As we know though, this is the beginning of the process, which I can confidently say is off to a strong start.

It was clear that everyone enjoys the meetings. Several commented that we should try to have more meetings in conjunction with another event, as we did this past summer at Oshkosh, or that meetings in large cities, such as Chicago, would be attractive. Various proposals were made on the CLE portion of the meeting such as increasing the hours, or varying the speaker topics, or having themed programs, but generally the CLE at our meetings is as members want. The social aspect of our meetings and the camaraderie of the members (the friendships and fun times) are what sticks us together and were recognized as a hallmark of this organization and of great importance to the membership.

Another mainstay of the organization is, of course, our publication, the Journal Most all said to leave it as it is, including the current mailing of hard copies to members rather than dissemination by e-mail. The idea of e-mailing the Journal has been broached, in part, to save LPBA money. Although it does seem members want to actually hold the Journal in their hands, we are looking into actual numbers on this.

Probably the most discussion was on some fairly fundamental aspects of LPBA, such as who should be members. There were some persuasive arguments that the membership should be expanded beyond lawyers and pilots, and discussion as to what that could mean. Others called for a purer membership as being lawyers/pilots makes us unique. This discussion led to further suggestion that even the name of the organization should be changed to a more inclusive title.

The general consensus was that we could and should be doing more to get new members, We need to publicize more and to explain the benefits of membership that we all enjoy. One obvious benefit, which some felt was not communicated enough, is the networking value of LPBA. The regional vice presidents and state chairs were acknowledged as important positions as they facilitate local contact with members and it seems that these positions need to be reenergized. We are currently working on this. Also, LPBA should advertise to local bar associations, we should renew efforts to place ads and get articles placed in publications, and, of course, we need our current members, our best ambassadors, to make personal contacts to get new members. Perhaps we need to associate with other legal or aviation associations. We also discussed using a professional to facilitate membership growth. These and lots of other great ideas will be pursued.

For current members, it seemed attractive to have an auto renewal for dues. We are looking into this. Consideration was given to perhaps allowing advertisements in the Journal, getting more sponsorships for our meetings, and allowing some advertising on our web site to obtain revenue to benefit LPBA and defray costs. These methods are commonly used by other organizations. Finally, several members (mainly past presidents) recommended going back to a two year term for the President and Vice President to allow for better continuity and realization of goals, which is often difficult to do in one year.

All in all, it was a productive session. Please know that all who contributed were heard, all e-mails read, and every communication was appreciated and will be considered. The communication lines are always open. Feel free to let us know your thoughts at any time. We will be following up with more information as we consider or implement various suggestions. I would like to see these topics further explored at the Palm Springs meeting, so don't miss out. Thanks to all of you who gave us your time and comments.

E-mail Blast and Notices

While the communications via e-mail blast have been praised, it seems that our new efforts this year to get members to renew by sending dues notices by e-mail has not been as successful as hoped. We are still following up with paper dues notices. However, if for some reason you still haven't renewed, I urge you to go on line at www.lpba.org and use PayPal to renew on line. Otherwise, please forward your renewal to Karen Griggs at P.O. Box 1510, Edgewater, MD 21037.

Challenge Response: Recent Member Efforts to Get New Members

It has been good to receive e-mails from members who have recently brought in new members. I know we are all pressed for time, but I urge you to follow up with any prospects and let me know how you are doing. I still

(Continued on Page 17)

FROM THE COCKPIT

Greetings from the pine-boughed end of Flagship LPBA as once again we prepare to embark upon our flight together. First Officer Riddle is braving the cold to complete our preflight while I exercise the Captain's prerogative to stay snug and warm in the cockpit with a mug of hot cider, pretending to peruse dispatch paperwork with thoughtful mien. The fussy details of life continue even in transcendent times and circumstances, after all.

In fact, though, my thoughts are already aloft, visualizing the slumbering, snow-kissed countryside that soon will spread itself beneath the breadth of our wings and beyond as the stars twinkle overhead, their glory reflected in the sparkle of the snow. At such times, a world of economic distress, senseless violence, and political unrest seems far away, transformed by the magic of flight to the same peaceful orb of our childhood imaginings. Perhaps it looked the same to the hovering heavenly host that started the story of Christmastide, but even then the world was far from simple or benign.

Nonetheless, the message of transforming hope and goodness and peace on earth was joyfully proclaimed then and must be even more so now, when it is so sorely needed. Those of us privileged to enjoy the freedom of personal flight have a broader perspective given by hours aloft in nature's majesty, humbled by our own puny scale in matters both material and metaphysical. From such humility comes the strength that can surmount injustice, champion the oppressed, oppose the violent, and steer a safe course through turbulent times. These are always daunting tasks, but the times in which we live demand this much and more.

But for now, it is good to anticipate or reflect on the goodness of the Christmas and Hanukkah season, the time spent with family and friends, and the promise of a New Year in which once again we can enjoy the gift of a new beginning. We gain another chance to mount the skies on eagles' wings and lift the perspectives of ourselves and others to loftier heights and bolder imaginings.

May this be for you a time of joy, reflection and renewal as we ready ourselves for the New Year flights to come.

Off to the Desert!

Winter is a wonderful and invigorating season for those of us living where we get all four, but by the middle of February it can start to wear on you a little. It's good to have a nice break-point to look forward to, a respite for our personal de-icing systems and a chance to enjoy the warmth of the fellowship for which this line is rightly renowned. The 2009 Winter Meeting will succeed in spades, with the venue of Palm Springs and the Rancho Las Palmas Resort spreading a warm welcome mat for those of us lightly frostbitten and providing easy access for all our western US members. I'm especially looking forward to it because as it happens, I've never been to Palm Springs and need to rectify that logbook omission pronto.

The gatherings of our line are one of its distinctives. You'll get fine ground school, make or renew lasting friendships with similarly-minded Airplane People, and have some warm memories to carry you through to summertime and the next meeting on beautiful Mackinac Island.

Get those flight plans ready and pack for mild weather. I look forward to seeing you in Palm Springs.

Perseverance

Perhaps it is odd to lead with a section heading that is actually a virtue, but perseverance is what came to mind this fall as Marie and I visited the fabled island of Malta as part of a 28-day cruise through the eastern Mediterranean and Black Sea. I had no mental picture of this place prior to our visit, and in fact the only reference point I had for it was the sad fact that Malta was the origin of the booby-trapped boombox that blew up Pan Am 103 over Lockerbie, Scotland. Surely there had to be more to the place than that, and of course there was. And in stark contrast to the sad Lockerbie connection, there was a very proud and colorful chapter of aviation history long associated with the island.

Located as it is astride major Mediterranean sea lanes and, more recently, air routes between Europe, North Africa and Asia Minor, Malta has always had strategic importance out of proportion to its modest size. As a result, truly epic military struggles have been played out on its shores over the course of recorded history. On our cruise we learned that one of the more notable was the battle involving the Knights Hospitalier of St. John and the Ottoman Turks in 1665. The Knights, gentlemen Christian warriors drawn from the ranks of European gentry, had been forced out of their comfortable fortifications on the island of Rhodes by the Ottoman Turks in 1622 and, in 1630, were invited by Charles I of Spain to accept a perpetual lease of Malta for the payment of one falcon per year so as to continue their efforts against the Turks. After several decades of preying on Turkish shipping in the Mediterranean from their new base, the Knights foresaw the imminence of another Turkish assault and heavily fortified the island for the expected attack.

The Siege of Malta commenced in 1665 with the attack of Turkish forces numbering upwards of 40,000 under the overall command of Sultan Suleiman the Magnificent, a legendary and fierce Muslim warrior; defending the island were but 500 Knights and about 5500 soldiers, servants, citizens and mercenaries. Though the Knights were badly outnumbered, they had the advantage of extremely well fortified positions and the natural defensive advantages afforded by their island.

The two sides fought in deadly earnest; in one battle, the Turks floated the decapitated bodies of captured Maltese defenders back towards the fortifications aboard indi-

vidual wooden crosses, and the Knights responded by decapitating their Turkish prisoners and using their heads for cannonballs which they rained down upon the invaders.

Ultimately, after the loss of many thousands on both sides, the Turks reluctantly concluded that they could not breach the Knights' fortifications or break the persevering spirit of the defenders, and sailed back to Constantinople in defeat. Europe rejoiced over this victory, seeing it as the beginning of the end of centuries of Ottoman advances — which, in fact, it was. The reputation of the Knights, already legendary, grew grander still.

Roll the Hobbs meter of history forward about 375 years and Malta, now a British protectorate as strategically important as ever, was being eyed by Mussolini as an easy prize to be won once he threw his lot in with Hitler and went on the offensive. The British, recognizing the island's importance but strapped for resources in mid-1940, could not spare its first line Hurricane and Spitfire aircraft for the defense of the island. But a resourceful commander obtained four Gloster Sea Gladiator biplanes, lying in crated storage at Kalafrana, and six RAF transport pilots stationed at the Hal Far airfield volunteered to become a rudimentary fighter pilot squadron. Augmented by about 4000 troops and one of the first portable radar systems to warn of the expected Italian attacks from the air, they were the core of the island's initial defense against air attacks that began just a week after the pilots were formally organized in June, 1940. The situation was so severe that RAF ferry pilots bringing in fighter aircraft for further deployment were sometimes put to use flying patrols, even though they had absolutely no previous training or experience in aerial combat.

The humble Gladiator, an enclosed cockpit biplane with a Bristol Mercury supercharged 850hp seven-cylinder radial and fixed-pitch two-blade propeller, was out of its element in WWII air combat, since it lacked the speed and power of its more modern contemporaries. However, it was maneuverable, and it could climb steeply by virtue of its two wings, and so with the advance warning provided by the new RAF radar the Gladiators were often able to ascend above the advancing invaders and dive down upon them, inflicting unexpected losses and annoyance on the invaders.

Additionally, the pilots and mechanics determined that the necessities of war required ignoring the 30-second limitation on the use of full takeoff power, and modified the throttle assembly so that it could be accessed by a firm push forward through a detent, rather than via the activation of a small, separate control. This "fun while it lasts" modification helped somewhat, but soon resulted in a pile of trashed Mercury engines and few spare parts. The ever-ingenious mechanics, spurred on by the pilots and their need for better performance, decided to adapt the more powerful Model XV Mercury engine and its adjustable pitch three-blade propeller, intended for the heavier Blenheim aircraft, to the Gladiator's airframe. The modifications required were extensive and were developed by trial and error while they worked under repeated bombardment by the Italians. It was worth the effort, though, because the pilots found that the Gladiator on steroids could actually outrun the more modern Hurricane.

The heroic efforts of the island's airborne defenders were not going unnoticed in either London or Rome. Churchill took up their cause, repeatedly urging the deployment of more modern aircraft, and by the end of August a naval convoy had delivered a first installment of 12 Hurricanes to the beleaguered island. Many more eventually followed, with even a few Spitfires near the end. The Italians, meanwhile, believed that the Maltese had far more aircraft than they actually did. Mussolini, surprised at the resilience of the island and its people, pressed his air attacks and then the Luftwaffe joined the fray, tallying thousands of air strikes that reduced much of the island to rubble. But the small armada of Maltese aircraft, often sustained by cannibalization of sister ships, rose to the skies and denied the Axis the cakewalk they had expected.

The Gladiators, easily recognizable and beloved by the Maltese, gained a special place in the public's affection and over time the legend grew that only three of them, dubbed Faith, Hope and Charity, had provided the sole defense of the skies for the first several weeks of Mussolini's attack. In fact, there were at least five Gladiators during this time, but the names devolved onto three of the aircraft and their exploits and subsequent history were closely tracked. Group Captain George Burges, an RAF flying boat pilot who volunteered to help assemble the Gladiators out of their crates, quickly became a national hero when he achieved six kills in the first few weeks of the conflict.

A plaque in the fortress city of Valleta commemorates the award of the George Cross to the people of Malta by King George VI on April 15, 1942 "to bear witness to a heroism and devotion that will long be famous in history." Beaten down but never

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RANCHO LAS PALMAS RESORT & SPA, RANCHO MIRAGE, CALIFORNIA

FEBRUARY 18-22, 2009

LPBA REGISTRATION FORM

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I/We are interested in participating in the following events:

_____ Golf Outing 2/19

_____ Trap Shooting Event 2/20

_____ Fun Run / Walk Talk 2/21

Name: ____

Address: ____

____

Tel: __________________________ Fax: __________________________ Email: _________________________________

Arrival: February:________, via ______________________________, at _________am/pm Departing: February: ________

Accompanying me will be my spouse/guest: ____

and children (names and ages): ____

Please check here if you are a first-time attendee: ________________

Registration may be paid by check, payable to "LPBA", or by Master Card/Visa/American Express.

Card Number: ____ Exp. Date: ___________

Name as it appears on card: ____

Member Registration…………………………… $430.00
Accompanying Spouse/Adult Guest…………..…$225.00
Child, age 10-17 ………………………………… $55.00
Child, age 3-9 …………………….…………….. $20.00
Optional – Sponsorship ……………………….. $500.00

HOTEL RESERVATION DEADLINE

JANUARY 27, 2009

Hotel Information and Reservation

LPBA has reserved a block of rooms at Rancho Las Palmas Resort & Spa for $239.00 per night, single/double. There is also a resort fee charged daily, per room, of $15.00. This covers in-room high-speed internet access, entrance to the fitness center, in-room coffee and tea, daily newspaper delivery, and toll free, credit card, and local calling.

Hotel reservations may be made by calling toll free 866-423-1195. You may also go on LPBA's website, and connect to the hotel link and register online. Be sure to identify yourself with LPBA to get the reduced rate. All reservations need to be guaranteed with a one-night deposit. Their cancellation policy is 72 hours in advance without penalty.

Airport Information

Palm Springs International Airport (PSP) is 10 miles from the resort. The resort does not have shuttle service, however, rental cars are available, as well as taxi service, for approximately $35.

ADDITIONAL INFORMATION IS AVAILABLE ON LPBA'S WEBSITE: www.lpba.org

LAWYER-PILOTS BAR ASSOCIATION
RANCHO LAS PALMAS RESORT & SPA, RANCHO MIRAGE, CALIFORNIA
PROGRAM
FEBRUARY 18-22, 2009

Wednesday, February 18

3:00pm Board of Directors Meeting
6:30-8:00pm Welcome Reception & Dinner

Thursday, February 19

8:00-Noon Registration
8:00-9:00am Breakfast
9:00-9:10am ***"Welcome and Opening Remarks by the President"***
Susan L. Hofer; President, LPBA and Attorney at Law, Dean and Gibson, PLLC, Charlotte, NC
9:10-10:00am ***"The FAA and September 11th"***
Carol Might; Director of System Operations Litigation, FAA, Washington, DC
10:00-10:45am ***"Changes in Air Traffic Evidence Technologies"***
Paul Hernandez; Litigation Investigator, System Operations Litigation, FAA, Atlanta, GA
10:45-11:00am Coffee Break
11:00-12Noon ***"Controlled Flight Into Terrain"***
Charles M. Finkel; Attorney at Law, Magana, Cathcart & McCarthy, Los Angeles, CA
12:30pm Golf Outing (Optional)

Friday, February 20

8:00-Noon Registration
8:00-9:00am Breakfast
9:00-10:00am ***"Impact of September 11th on Jury Behavior"***
R. Craig Smith; Trial Consultant, Seattle, WA
10:00-11:00am ***"The FAA and the Right to Privacy with Respect to Confidential Info Given in Connection With An Application for Social Security Disability and Not Disclosed on an Airman's Medical"***
James M. Wood; Attorney at Law, Reed Smith LLP, Oakland, CA
11:00-11:15am Coffee Break
11:15-12Noon ***"Alcohol Related Enforcement Actions"***
Russell A. Klingaman; Attorney at Law, Hinshaw & Culbertson, LLP, Milwaukee, WI
1:30pm Trap Shooting Event (Optional)

Saturday, February 21

7:00am Fun/Run and Walk/Talk (Optional)
8:00-Noon Registration
8:00-9:00am Breakfast
9:00-10:00am ***"Aviation Liability Treaties"***
Warren Dean; Professor-Georgetown University Law Center and Attorney at Law, Thompson Coburn LLP, Washington, DC
10:00-11:00am ***"Ethics: Circumnavigating the Buildups"***
Gary W. Allen; Attorney at Law, Williamsburg, VA
11:00-11:15am Coffee Break
11:15-12:00pm **LPBA Membership Meeting and Regional VP Reports**
6:00-7:00pm Cocktail Reception
7:00pm Banquet - Cocktails, Dinner, Dancing and Awards Presentations

Sunday, February 22 - Checkout

RECENT DEVELOPMENTS IN AVIATION LAW

Cecile Hatfield, Esq.

Cecile Hatfield has her own aviation trial practice in Miami, Florida. She has previously served as Associate General Counsel for Piper Aircraft Corporation. Ms. Hatfield was with the United States Department of Justice for nine years as an aviation trial lawyer. She graduated from the University of Florida where she was elected to the Hall of Fame and Mortar Board and received her law degree from the University of Miami. She is a licensed pilot and ground school instructor. Ms. Hatfield is General Counsel to The Ninety-Nines, an International Organization of over 6,000 women pilots. She is a member of the International Aviation Women's Association where she is on the Board of Directors. She is the Program Chair of the 20th Annual Aviation Law and Insurance Symposium sponsored by Embry-Riddle Aeronautical University. Ms. Hatfield is Past President and member of the Board of Directors and Contributing Editor for the Lawyer-Pilots Bar Association.

I. AIR CARRIER CASES:

A. SUPREME COURT REFUSES REVIEW ON "PROFILING"

1. *Cerqueira v. American Airlines, Inc.,* No. 07-1495, *cert. denied* (U.S. Oct. 6, 2008)

The U.S. Supreme Court has refused to review a federal appellate court's reversal of a $400,000 award to an American Airlines passenger who claimed the carrier illegally removed him from a flight based on his perceived Middle Eastern descent.

The Supreme Court let stand a ruling by the 1st U.S. Circuit Court of Appeals that the award to John Cerqueira was improper because of problems with the trial judge's jury instructions. *Cerqueira v. American* Airlines, 520 F.3d 1 (1st Cir. Jan. 10, 2008).

According to court records, Cerqueira was seated about 10 minutes after boarding a plane at Logan Airport in Boston when two men he did not know sat next to him.

The men were speaking to each other partly in English and partly in a foreign language. They had "a color and physical appearance similar to that of Mr. Cerqueira," according to the complaint.

A flight attendant asked all three men for their boarding passes. Shortly thereafter, a state police trooper boarded and demanded that all three men deplane, the opinion says.

Cerqueira says he was not told why he was being taken off the plane and was forced to surrender his driver's license to the trooper. The police repeatedly questioned him about his "nationality," and he told them he was a U.S. citizen of Portuguese descent.

The police released the three men and brought them to the American Airlines counter. Even though the police told the men they were free to go, the ticket agent's supervisor denied Cerqueira further transportation on the airline, citing his "unusual behavior," according to the opinion.

Cerqueira sued American Airlines in the U.S. District Court for the District of Massachusetts for violation of his civil rights.

He sought damages and injunctive relief under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 1981, and a Massachusetts anti-discrimination statute, Mass. Gen. Laws ch. 272, § 98. A jury awarded him $400,000, including $270,000 in punitive damages.

American moved for a new trial, citing a lack of evidence and erroneous and prejudicial jury instructions on intentional discrimination. The trial judge denied the motion, and the airline appealed to the 1st Circuit, which reversed in a matter of first impression in the circuit.

The panel said the judge failed to instruct the jury on a 1961 law, 49 U.S.C. § 44902(a), that permits air carriers to refuse to transport passengers or property when a passenger refuses to consent to a search for weapons, explosives, or destructive substances.

The trial judge also gave instructions that were inconsistent with the law and otherwise erroneous, the panel said.

"Race or ethnic origin of a passenger may, depending on context, be relevant information in the total mix of information raising concerns that transport of a passenger 'might be' inimical to safety," the panel held.

"No properly instructed jury could return a verdict against the carrier and, therefore, the District Court should have granted American's motion for judgment notwithstanding the verdict," the appeals court held. The Supreme Court denied Cerqueira's petition for review October 6, 2008.

B. MONTREAL CONVENTION DOES NOT APPLY TO SUCCESSIVE CARRIERS

1. *Best et al. v. BWIA West Indies Airways Ltd.,* No. 06-CV-4589 (CBA), 2008 WL 4458867 (E.D. N.Y. Sept. 29, 2008)

Finding that two airlines were successive carriers and **not** contracting carriers, a New York federal judge has dismissed a passenger's lawsuit alleging she was forcibly removed from a flight without reason.

U.S. District Judge Carol B. Amon of the Eastern District of New York threw out Karen Best's suit against BWIA West Indies Airways, concluding that the Montreal Convention on international aviation did not apply to her claims.

In August, 2004, Best purchased round-trip tickets from New York to Grenada via Port of Spain, Trinidad. Although she booked her tickets with

BWIA, her itinerary put her on a BWIA flight from New York to Port of Spain in Trinidad and Tobago, and then on a flight with another carrier, LIAT, to Grenada.

Best traveled to Port of Spain on BWIA without incident, but her scheduled LIAT flight was canceled. She was placed on a subsequent flight.

Once she re-checked her baggage and boarded the flight, an unidentified man told her that the airline had made a mistake and that she would have to leave the plane, the opinion states.

A short time later, court records indicate, another man boarded the aircraft and insisted that Best disembark. She refused. Best claims she was then forcibly removed from her seat, pulled off the aircraft, down the portable staircase and onto the tarmac.

An LIAT employee helped Best off the tarmac and back onto the aircraft, where she continued on to Grenada.

Best sued BWIA under the Montreal Convention for injuries she suffered on the LIAT leg of the flight. BWIA moved for summary judgment, arguing that it was not liable under the Montreal Convention and principles of common-law agency.

Judge Amon agreed and held that the relationship between BWIA and LIAT is that of successive carriers. The Montreal Convention interprets "carrier" as the entity that actually conducts the transportation, the judge explained.

BWIA sold Best a ticket for both her travel on BWIA to Port of Spain and her flight on LIAT from Port of Spain to Grenada, the judge noted.

Best did not allege that BWIA expressly assumed liability for the LIAT portion of the trip, Judge Amon said. The Montreal Convention excludes successive carriage arrangements from coverage.

The relationships typically covered by the Montreal Convention includes code-share operations and operations where one carrier offers service using aircraft and crew leased from another.

"It is plain that the relationship between BWIA and LIAT is that of successive carriers, rather than that of actual and contracting carriers," Judge Amon said, adding that the Montreal Convention, therefore, does not apply. She also rejected Best's argument that an implied agency relationship existed between carriers.

C. COMAIR LITIGATION - PLAINTIFFS CITE PROBLEMS WITH ADVISORY JURY

1. *In re Air Crash at Lexington, Ky., on Aug. 27, 2006,* No. 5:06-CV-316-KSF, *response to petition for advisory jury filed* (E.D. Ky. June 24, 2008)

Using an advisory jury to try Comair's and Delta's claims against the U.S. government would create more problems than it would solve, the families of those who died in the 2006 runway crash have told a Kentucky federal court.

The carriers want an advisory jury to decide their claims involving the air traffic controller on duty during the crash.

Three exemplar cases are set for trial August 4, in the U.S. District Court for Eastern District of Kentucky. The trial will decide all issues, including compensatory and punitive damages, according to the airlines' motion. [The case subsequently settled–Ed.]

After the trial, the court will determine the government's liability for the actions of the sole air traffic controller.

Comair and Delta say an advisory jury would be appropriate for the trial because Kentucky law requires apportionment of fault between the parties.

The issue stems from the crash of Comair Flight 5191, bound for Atlanta when it attempted takeoff from the wrong runway at Blue Grass Airport in Lexington Aug. 27, 2006.

The plane could not gain altitude on the shorter runway, hit several trees and other obstacles, and burst into flames. Forty-nine of the 50 passengers and crew members were killed, with only the co-pilot surviving.

Comair and its co-defendants contend that the use of an advisory jury will not affect trial procedures the court previously set. The advisory jury's verdict will have no force on the court other than persuasion, the defendants say.

The plaintiffs counter that the Federal Tort Claims Act, 28 U.S.C. § 1346, gives the District Court jurisdiction over the federal government.

"The sole responsibility for determining the government's liability is borne by the court, and an advisory jury's role can be only to provide advice for the judge's consideration," the plaintiffs say. "Thus, it is not surprising that a number of courts have declined to empanel advisory juries in FTCA cases, noting that to do so creates more problems than it solves."

An advisory jury is not needed to obtain a fair and accurate verdict, the plaintiffs add, arguing that the use of such a jury would not simplify the trial. Such a jury would not protect against the risk of conflicting verdicts, they argue, saying it would create the potential for such a disagreement.

Evidence with respect to the United States' liability should be presented at trial, in front of the jury, and the jury should be instructed that the District Court will determine any portion of the government's liability, the plaintiffs say.

The jury simply will determine the non-government defendants' liability and assess damages, after which the court will determine any liability attributed to the United States, they add.

2. COMAIR JUDGE BARS NTSB SAFETY RECOMMENDATIONS FROM EVIDENCE

In re Air Crash at Lexington, Ky., on Aug. 27, 2006,

No. 5:06-CV-316-KSF, 2008 WL 2796875 (E.D. Ky. July 18, 2008)

A Kentucky federal judge has refused to allow the National Transportation Safety Board's safety recommendations to be entered as evidence in a crash case because they are encompassed in a report that is inadmissible in a civil action under federal law.

Senior U.S. District Judge Karl S. Forester of the Eastern District of Kentucky issued the ruling in the lawsuits stemming from the crash of Comair Flight 5191, which crashed after attempting to take off from the wrong runway at the Blue Grass Airport in Lexington.

Federal law, specifically 49 U.S.C. § 1154(b), prohibits the use of NTSB reports in civil litigation other than for factual accident reports.

The federal government argued that the safety recommendations the NTSB issued are barred by Section 1154 because they contain the Board's determinations and conclusions.

In support of its argument the government submitted a letter from the general counsel of the NTSB saying the Board opposes the use of any of its safety recommendations in civil actions for damages.

The plaintiffs countered that the definition of "Board accident report" did not include safety recommendations. They argued that two of the safety recommendations the United States sought to exclude predated the crash of Comair Flight 5191. Some of the recommendations, like cross-checking the heading indicator to the assigned runway before takeoff, are relevant evidence that put carriers on notice about the safety hazard presented by wrong-runway takeoffs.

Judge Forester rejected the plaintiffs' argument and granted the government's motion to exclude the recommendations. He said he gave significant weight to the letter from the NTSB's general counsel about the Board's long-standing position that safety recommendations are covered by the statutory prohibition against the use or admission of agency reports.

While the plaintiffs are correct that the regulation does not explicitly include safety recommendations in its definition of "Board accident report," the statutory language reflects an intent to encompass more than just the probable cause determinations, Judge Forester explained.

"Admitting reports of the NTSB with safety recommendations that are directly related to issues between the parties would surely 'exert an undue influence on litigation,'" Judge Forester held.

From the standpoint of entangling the agency in civil suits, the judge said, there is little difference between introducing safety recommendations or probable-cause reports.

3. KENTUCKY FEDERAL JUDGE WON'T DISMISS CLAIMS AGAINST U.S. IN COMAIR SUITS

***In re Air Crash at Lexington, Ky., on Aug. 27, 2006,* No. 5:06-CV-316-KSF, 2008 WL 2673830 (E.D. Ky. June 23, 2008)**

The Kentucky federal judge overseeing the consolidated action over the 2006 crash of Comair Flight 5191 has allowed the airline to proceed with cross-claims against the United States. [The cases subsequently settled–Ed.]

Senior U.S. District Judge Karl S. Forester of the Eastern District of Kentucky rejected the government's motion to dismiss the airline's claims.

In each of the passenger cases Comair filed third-party complaints against the United States for indemnity, contribution or apportionment of damages. The airline says the government is liable for the allegedly negligent actions of the air traffic controller on duty at the time of the crash.

Some plaintiffs amended their complaints to add claims against the federal government, and Comair filed cross-claims in those suits. The 19 plaintiffs affected by the court's most recent order filed separate actions against the United States, and the District Court later consolidated those actions with the plaintiffs' suits against Comair.

The government moved to dismiss Comair's cross-claims on the ground that the consolidation of a single plaintiff's case against Comair with that same plaintiff's case against the United States would not merge the cases into a single cause of action.

The government and Comair were not parties in the same cause of action and, therefore, no cross-claim is authorized under the Federal Rules of Civil Procedure, the United States argued.

Judge Forester disagreed, noting that all the case-management orders said the suits in the master file are consolidated for pretrial purposes. "It is the opinion of this court that the effect of these consolidation orders was to merge the cases into one," the judge said.

The government did not claim that its rights were affected or that any prejudice flows from the consolidation and merger of the cases, the judge added.

Further, the United States did not object when Comair later moved to file cross-claims in those suits, Judge Forester ruled. "It would be prejudicial and unjust to Comair to be denied its cross-claims in some passenger plaintiff cases at this late date," the judge ruled.

D. TERRORIST ATTACKS

SEPTEMBER 11 JUDGE TOSSES SETTLEMENTS OVER EXCESSIVE FEES

***In re Sept. 11 Litigation*, No. 21 MC 101, 2008 WL 2874642 (S.D. N.Y. July 24, 2008)**

The New York federal judge presiding over litigation stemming from the Sept. 11 terrorist attacks has tossed out four settlement agreements, finding the plaintiffs' attorney fees excessive.

U.S. District Judge Alvin K. Hellerstein of the Southern District of New York rejected law firm Azrael, Gann & Franz's push to get a higher percentage of the settlement amounts as a contingent fee award than other law firms received in previous cases that settled.

In his order Judge Hellerstein explained the history of the Sept. 11 litigation, including the enactment of the Air Transportation Safety and System Stabilization Act to limit the liability of airlines and other aviation defendants to their insurance coverage.

Plaintiffs could file claims through the Victim Compensation Fund established by Congress to compensate families who lost loved ones in the terrorist attacks, the judge noted. Otherwise they could proceed with their claims in court.

The majority of cases have since settled, with contingent fees to attorneys ranging from 15 percent to 20 percent based on special court dispensation based on the amount of work done by a firm.

The Azrael firm handled four of the settlements and requested permission to charge a 25 percent contingent fee.

Judge Hellerstein denied the request, saying it seemed that the firm rode on the coattails of others and waited until other attorneys did most of the work before entering into any meaningful settlement discussions on behalf of their clients.

Those deals ended up bringing larger amounts for the four plaintiffs than in the cases that already had settled, according to the opinion.

Judge Hellerstein said that while he previously approved the settlement, he did so without being aware of the considerations that now impelled him to disapprove them.

An award of the magnitude requested by the law firm would "reflect a very large windfall" and surpass fairness and reasonableness, he said.

By allowing his previous approval to stand in the midst of additional information, Judge Hellerstein said, he would be compromising the assurances he gave to earlier settlers that all plaintiffs would be treated equally.

"The wounds of Sept. 11 will not easily be assuaged," he added. "But neither should they be exacerbated by rich rewards of fees and benign indifference to unreasonably large awards."

E. N.Y. FEDERAL JUDGE DISMISSES BRAZILIAN AIRLINE SUIT ON FORUM ISSUES
In re Air Crash Near Peixoto de Azevedo, Brazil,
No. 07-md-1844 (BMC)(JO),
order issued
(E.D.N.Y. July 2, 2008)

A New York federal judge has dismissed a suit stemming from the midair collision of an executive jet and a Brazilian airline airplane over the Amazon rainforest on forum issues.

U.S. District Judge Brian M. Cogan of the Eastern District of New York granted the dismissal request by ExcelAire and Honeywell International, who argued that New York was not the appropriate forum for the suit and that the plaintiffs brought the case there only because of the perceived "habitual generosity" of U.S. juries.

The lawsuit involved an executive jet on its maiden voyage from Brazil to ExcelAire Service Inc.'s New York headquarters when the accident occurred.

The flight plan directed the aircraft to fly at 37,000 feet until passing over Brasilia, at which point it was to turn northwest and descend to 36,000 feet. Some 300 miles later it was to ascend to 38,000 feet and maintain that altitude until its descent for a scheduled stop in Manaus, Brazil, the complaint states.

At the same time, a Boeing 737-800 operated by Brazilian commercial carrier Gol Linhas Inteligentes was flying at 37,000 feet en route from Manaus to Brasilia.

Both planes' flight plans were in keeping with rules dictating that planes flying west maintain even-numbered altitudes and that planes traveling east fly at odd-numbered altitudes, which provides for at least 1,000 feet of separation, according to the plaintiffs.

At the time of the collision the ExcelAire pilots were incorrectly flying at 37,000 feet, the complaint states. The planes collided, causing the Gol Linhas aircraft to plunge into the Amazon rainforest, killing all 148 passengers and six crew members. The ExcelAire jet landed safely without injury to the five people on board.

The families of those killed in the collision alleged pilot error and a defective transponder caused the September 2006 crash.

The transponder transmits a plane's altitude and identification information to other aircraft and operates its automatic collision avoidance system. When a transponder stops working, air traffic controllers no longer can determine the plane's altitude.

Seeking dismissal, the defendants said Brazil was an available and adequate alternative forum because most of the evidence, documents and witnesses are there and the plaintiffs all are Brazilian residents.

The plaintiffs countered that the central issues involve pilot negligence and the ExcelAire plane's allegedly defective transponder. They added that the crash investigation is the multinational effort involving the National Transportation Safety Board, the Federal Aviation Administration and several other groups.

Therefore, Brazil will not accept the case because the factual basis of the claims did not arise in that country, according to the plaintiffs, who said the evidence related to their claims is located in the United States.

Plaintiffs also contended that the only eyewitnesses to the midair collision were the ExcelAire pilots and the plane's five passengers, most of whom live in New York.

Judge Cogan sided with the defendants and conditionally dismissed the suit. He said there was no question that the ExcelAire pilots' testimony is crucial to the cases, but the testimony of the Brazilian air traffic control officers who directed the planes right before the crash might be equally important.

Looking at private and public interest factors, Judge Cogan said litigation in Brazil is proceeding, with numerous cases already settled, and that any delay in that forum is minimal.

The parties in the U.S. may not be able to compel testimony and evidence from Brazilian entities, the judge said. If these cases are litigated in Brazil, the parties will likely have access to all Brazilian entities and witnesses and evidence under their control, because unwilling witnesses and evidence in Brazil can be compelled by the Brazilian courts, Judge Cogan said.

The parties also will have the same access to all U.S. parties, witnesses and evidence that they would in the U.S. because the defendants agreed to it as a condition of dismissal, the judge continued.

In addition, the wreckage is located in Brazil, as is the evidence from air traffic controllers, the cockpit voice recorders, transponders, and damages evidence, Judge Cogan held.

Brazil's interest in resolving the controversy is obvious, the judge said, noting that the crash of Gol Flight 1907 was the largest aviation accident in Brazil's history. A Brazilian forum therefore is "significantly preferable," according to the court.

II. GOVERNMENT LITIGATION:

A. FEDERAL TORT CLAIMS ACT

1. Weather Briefings

a. *Zinn et al. v. United States,*
No. 1:08-cv-22056-DLG,
complaint filed
(S.D. Fla. July 21, 2008)

The family of a Cessna pilot who fatally crashed after flying into a thunderstorm has sued the U.S. government in Florida federal court, alleging the negligence of air traffic controllers was to blame for the crash.

Frederick and Randi Zinn say the controllers, employees of the Federal Aviation Administration, were responsible for Michael Zinn's death in October 2005.

According to the complaint, Zinn was piloting a 1978 Cessna P337H from Boca Raton, Fla., to Myrtle

Beach, S.C., when he ran into a line of thunderstorms.

Palm Beach controllers cleared Zinn to climb to 9,000 feet and deviate to the east around weather buildups. After being handed off to Miami controllers, he was approved to deviate again and go to a higher altitude, the complaint says.

Zinn then was handed off to another Miami controller, who cleared him to 11,000 feet, and he later made three separate transmissions for assistance, according to the suit.

None of the transmissions was acknowledged because the controller was involved in a coordination call, which normally is done by an associate controller, the plaintiffs say.

Zinn contacted the controller again, saying he was encountering extreme precipitation and seeking a diversion. Less than two minutes later controllers heard him yelling for help before the plane crashed, the suit says.

The plaintiffs allege the air traffic controllers' negligence caused the crash and the government failed to observe and provide accurate, complete and current weather-related information.

In addition the defendant failed to issue a safety alert to the aircraft and provide instructions on safe, alternative flight routes so that Zinn could avoid the bad weather, according to the complaint.

b. *Daggett v. United States,* No. 5:08-CV-253, *answer filed* (M.D. Fla. Sept. 2, 2008)

The U.S. government has told a Florida federal court that it bears no responsibility for the fatal crash of a Piper aircraft that encountered thunderstorms, adding that the pilot's negligence caused the accident.

The federal government filed its answer and affirmative defenses in the lawsuit brought in the U.S. District Court for the Middle District of Florida by Barbara Daggett, who lost her husband, son and daughter in the June 2006 crash.

According to court filings, Milton Daggett and his daughter, Karla, were passengers in a Piper PA-24-220T plane piloted by Milton's son, Walter. Both Milton and Walter Daggett were experienced pilots who had flown commercially, according to the complaint.

They were on their way from Greensboro, N.C., to Sanford, Maine, when they encountered adverse weather conditions.

Barbara Daggett, a Florida resident, argues in her suit that air traffic control in Wilkes-Barre, Pa., notified Walter of a storm brewing in the area but failed to provide a radar vector so they could avoid the weather system.

As the aircraft rapidly descended and the pilot needed assistance, Wilkes-Barre air traffic control allegedly handed off the plane to Boston control.

Shortly thereafter, witnesses reported debris falling from the sky, according to the complaint. All three onboard the Piper were killed.

Daggett says the controllers failed to follow federal aviation regulations and FAA procedures. She also says air traffic control routed the plane into the worst part of the storm even though other options were available.

In response, the federal government argued that Walter Daggett's negligence or the negligence of others caused the crash.

2. 11th Circuit Agrees That No-Sue Agreement Bars Plane Maintenance Suit

***Torjagbo v. United States, No. 07-13728,*
2008 WL 2736804 (11th Cir. July 15, 2008)**

A federal appellate court has affirmed that a pilot released the government from liability for allegedly negligent aircraft maintenance after he signed an agreement not to sue.

The 11th U.S. Circuit Court of Appeals agreed that a Florida federal court correctly dismissed the lawsuit brought by Carl Torjagbo, who was injured in a crash landing of a Cessna aircraft in February 2002.

Torjagbo worked as a flight instructor for the Patrick Air Force Base Aero Club, which provides Air Force personnel the opportunity to enjoy recreational flying and take part in aviation training programs.

He was instructing a student on the techniques of cross-country flight in February 2002 when they noticed an oil spray on the windshield. The engine surged and lost part of its power soon after, prompting Torjagbo to make an emergency landing in a field, court documents say.

The plane hit a rise in the terrain, lifted off the ground and crashed nose first, breaking Torjagbo's wrist and jaw. He filed an administrative claim with the base's claims office, alleging the engine failure and subsequent crash were caused by the negligent repair, maintenance and inspection of the plane by Air Force personnel.

The Air Force denied Torjagbo's claim and his subsequent request for reconsideration. In denying the reconsideration claim, the Air Force said Torjagbo would have to establish that improper aircraft care and maintenance by Aero Club personnel caused the accident. The Air Force said neither Torjagbo's original claim nor his reconsideration request included such evidence.

Torjagbo's subsequent claim under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), against the government was thwarted when the U.S. District Court for the Middle District of Florida dismissed his suit.

The trial court said Torjagbo's attempt to amend his administrative claims to include allegations of air traffic controller negligence fell outside the limitations period for bringing new claims.

More importantly, the evidence supported the conclusion that the plaintiff executed an enforceable covenant not to sue that released the government from liability, even for its own alleged negligence, according to the court.

The court was not persuaded by Torjagbo's arguments that he did not remember signing the document and that the signature was forged.

The 11th Circuit affirmed the ruling, noting that Torjagbo admitted during the administrative grievance process that he signed the covenant. The plaintiff failed to raise a genuine issue of fact on the authenticity of his signature, the panel said.

By signing the covenant, Torjagbo clearly and unequivocally waived his right to bring his negligence action for physical injuries he incurred while serving as a flight instructor, the panel ruled.

B. AIR TRAFFIC CONTROL

1. Ky. Crash Suit Centers On Alleged Negligence Of Air Traffic Control

Osborne et al. v. United States,
No. 08-cv-00153, *complaint filed*
(E.D. Ky. Aug. 5, 2008)

Poor briefing by an air traffic controller was the cause of the fatal crash of a Beech aircraft on approach to a runway in Pike County, Ky., according to a federal court lawsuit against the U.S. government.

Martin Osborne, executor of the estates of the pilot and passengers who died in the October 2005 crash, says the controller failed to provide the correct arrival instructions so that the plane could properly approach the airport.

The crash of the Beechcraft A36 Bonanza killed pilot Herman Lester and his wife and son, according to the complaint, filed in the U.S. District Court for the Eastern District of Kentucky.

Herman was flying from Paducah, Ky., to Hatcher Field in Pike County. According to court records, the flight proceeded uneventfully until the aircraft reached the Pikeville area, where Herman contacted air traffic control for assistance in approaching the airport.

The controller, an employee of the Federal Aviation Administration, also failed to retain the aircraft on his frequency and properly monitor it, Osborne contends.

Plaintiff adds that the controller had a duty to place Herman at an altitude and distance that would allow the aircraft to properly intercept the final approach course to the airport.

2. California Family Awarded Nearly $5 Million Over Midair Collision

Bailey et al. v. United States,
No. 2:06-1191-FMC-VBK, *order issued*
(C.D. Cal. Aug. 1, 2008)

A California federal court has awarded the family of a deceased helicopter pilot nearly $5 million in damages against the federal government for the collision of two aircraft, which the plaintiffs blamed on the negligence of an air traffic controller.

The U.S. District Court for the Central District of California awarded the money to the family of Robert Bailey, who was killed in November 2003 when his helicopter collided in midair with another helicopter almost directly in front of the control tower at the Torrance Municipal Airport.

The Torrance Airport houses Robinson Helicopter and is the site for helicopter operation and training, in addition to other aircraft operations.

According to court records, Bailey was an occupant in a Robinson R-44 helicopter that collided with another Robinson copter piloted by Gavin Heyworth, a certified flight instructor.

An air traffic controller was guiding Heyworth to land but at some point changed his plan to land the pilot on a different runway without crossing the airport's midfield. The controller, however, did not communicate the change in plan to Heyworth, the opinion says.

The District Court held that Heyworth reasonably interpreted the subsequent clearance to land in conjunction with the prior plan to cross the midfield.

Heyworth's aircraft collided with Bailey's soon thereafter. Bailey and the other occupant of his helicopter were killed. Heyworth was seriously injured.

The court found that, based on their positioning, the pilots could not have seen one another before the crash. The District Court found the government liable for the crash.

The air traffic controller, employed by the Federal Aviation Administration, failed to properly separate the two aircraft, did not issue a safety alert to the pilots, failed to scan the runways, and failed to issue clear and concise instructions, according to the court.

Heyworth, the court continued, did not violate any federal aviation rules or regulations in the path he took in complying with the clearance to land.

Based on the government's liability, the District Court awarded Bailey's family more than $268,000 in economic damages that included lost earnings and lost household services.

The court went on to award $4.5 million in noneconomic damages to Bailey's family for loss of love, companionship, affection, society and moral support.

C. Wake Turbulence

Sandra Cahill et al. v. United States,
No, 8:05-CV-2379-T-24MSS
2008 WL 1711519 (M.D. Fla.)

Following a two week bench trial conducted in February 2008, Judge Susan Bucklew entered her final Findings of Fact and Conclusions of Law ruling in favor of the United States.

The case arose out of an airplane crash in Memphis, Tennessee. The pilot, Dr. Cahill, and his front seat passenger, John Murphy, were killed in the crash, his two rear-seat passengers, Charles Lomel and Edward Brown, survived with serious injuries.

The case involved a substantial amount of damages. Dr. Cahill was a prominent high-earning neurosurgeon and founder and Chairman of the University of South Florida Department of Neurosurgery in Tampa, Florida. His passengers were also high-net-worth individuals employed in the medical industry.

Plaintiffs claimed that the crash occurred due to wake turbulence, and that the air traffic controllers in the Memphis Tower failed to maintain the required four-mile spacing between the accident aircraft and the regional jet that had landed previously.

At trial, counsel for the United States successfully persuaded the Court that the overwhelming weight of expert and scientific evidence demonstrated that any wake turbulence created by the preceding regional jet would have completely dissipated and could not have affected the flight path of the accident aircraft.

Although the Court found that the air traffic controllers breached their duty by failing to maintain the required separation between aircraft, the Court found there was no causal link between the actions of the controllers and the accident itself.

The wake turbulence issues involved FAA policies and the integrity of standardized separation requirements — safety standards that impact the entire aviation industry.

III. AVIATION PRODUCTS LIABILITY CASES:

A. General Aviation Revitalization Act (GARA)

1. *Moyer et al. v. Teledyne Continental Motors Inc. et al.,*
No. 1402 EDA 2007, 2008 WL 3854350
(Pa. Super. Ct. Aug. 20, 2008)

A service bulletin for an aircraft component is not the same as a flight manual, a Pennsylvania state appellate court has ruled, finding that the General Aviation Revitalization Act bars claims against a crankcase maker and servicer.

A divided Pennsylvania Superior Court upheld the dismissal of a lawsuit brought by the estates of Ronald and Judy Moyer, who were killed in January 2003 when their single-engine Beech V35B airplane crashed into some trees during an emergency landing on a small island in the Delaware River.

Ronald Moyer, who was piloting the aircraft, had reported a partial loss of engine power and was unable to reach the local airport as directed by air traffic control.

The decedents' survivors claimed the accident was caused by the failure of a repair weld in the crankcase, which was a replacement part for the cracked original.

Teledyne Continental Motors Inc. made the aircraft engine, Piedmont Hawthorne Aviation Inc. overhauled the crankcase and Divco Inc. supplied the replacement crankcase, according to court records.

Divco was dismissed from the suit three years ago for lack of personal jurisdiction. Afterward, the trial court ruled in favor of the defendants on various grounds.

In particular the trial court ruled that the General Aviation Revitalization Act of 1994 barred the plaintiffs' claims.

GARA bars suits against aircraft manufacturers brought more than 18 years after the aircraft was delivered to the initial purchaser.

The Pennsylvania Superior Court affirmed, rejecting the plaintiffs' claims that a service bulletin issued by Teledyne in 1990 that contained crankcase inspection criteria constituted a replacement part under GARA.

Flight manuals, which are required by federal regulation, have been ruled a "part" under GARA, the appellate court stated. However, there is no authority for the proposition that a service bulletin is the equivalent of a manual.

"Given the continual issuance of service bulletins on a variety of topics, if the statute of repose were triggered every time a service bulletin was issued, the intent of GARA . . . would be eviscerated," the panel said.

In addition the plaintiffs failed to show that the weld in their case was done pursuant to a service bulletin they claimed was erroneous.

The panel also upheld summary judgment to Piedmont despite the plaintiffs' claims that it did not repair the crankcase in a way that would satisfy Federal Aviation Administration airworthiness standards.

The evidence shows that engine overhauls by Piedmont were done in accordance with Teledyne instructions and revealed crankcase cracks, the appellate court found. Divco repaired the cracks in both cases, and the crankcases were then returned to Piedmont, which reassembled the engine following Teledyne's instructions.

Finally, the court upheld the lower court's decision that it lacked jurisdiction over Divco despite what the plaintiffs called a highly interactive Website and consistent sales to Pennsylvania.

The site does not accommodate sales or orders, the number of annual customers in Pennsylvania is fewer than 20, it has no suppliers, and it never has had offices, bank accounts or conducted repairs or overhauls in the commonwealth, the court noted.

2. *Johnson et al. v. Precision Airmotive LLC et al.,*
No. 4:07-CV-1695, 2008 WL 2570825
(E.D. Mo. June 26, 2008)

A Missouri federal judge has denied as premature a summary judgment motion brought under the General Aviation Revitalization Act by the companies involved in the manufacture, maintenance and repair of various parts of a crashed Piper airplane.

U.S. District Judge Catherine D. Perry of the Eastern District of Missouri also said defendant Precision Airmotive's request to tailor discovery to just the GARA issue would be too difficult and costly.

The judge issued the ruling in a suit brought by lead plaintiff Kari Johnson and several others who represent the estates of four passengers who died in the crash of a Piper 32-300 airplane in Wabash, Indiana.

They allege strict liability and negligence against Precision Airmotive and 16 other defendants that manufactured or serviced different plane parts.

The manufacturing defendants, AlliedSignal Inc., Avco Corp., Bendix Corp., Honeywell Inc., Honeywell International Inc., and Textron Inc., said they should not have to submit to discovery if, under GARA, they cannot be held liable for the plaintiffs' injuries.

They added that requiring them to participate in discovery would nullify the protections afforded by GARA and undermine its purpose.

Judge Perry rejected the argument, holding that GARA says nothing about discovery, does not establish any procedure for litigating airplane crash cases and does not restrict the types of evidence discoverable by Plaintiffs.

"GARA merely sets forth a defense to liability in cases where the relevant airplane parts are more than 18 years old," the judge said, adding that the plaintiffs should not be denied discovery merely because the defendants filed a motion for summary judgment under GARA.

The judge also rejected the defendants' request to limit any discovery to GARA issues.

Under the statute the 18-year limitations period for original parts would be easy to calculate, but the time calculation would be different for every part subsequently added or replaced, Judge Perry said.

"It is logical to conclude that substantial discovery will be needed to determine which specific aircraft components are the alleged cause of the crash," she wrote. "Such discovery will narrow the GARA issues raised with respect to each airplane component." Judge Perry said the plane was more than 29 years old when the accident occurred and had a long service record.

Discovery is needed to determine what was done to the aircraft, when it was done and which parties made the parts that are less than 18 years old. The judge denied the defendants' motion for summary judgment on the GARA issue.

3. *Slate et al. v. United Technologies Corp. et al.,*

No: B197395, 2008 WL 2780877
(Cal. Ct. App., 2nd Dist. July 18, 2008)

Sikorsky Aircraft Co. may be liable as a designer for changes to a faulty helicopter component that caused a 2003 crash, a California appellate court has ruled, finding that the statute of repose protecting aircraft manufacturers does not apply.

The California 2nd District Court of Appeals reversed a lower court's ruling that the General Aviation Revitalization Act barred Karim Slate's claims over injuries he sustained in a July 2003 helicopter crash.

According to the opinion, Slate was piloting a Sikorsky S58ET helicopter owned by his employer, Aris Helicopter Ltd., when it crashed.

Sikorsky built the helicopter for the Navy in 1962, the opinion states. It designed the aircraft's intermediate gearbox and input bevel pinion, or IBP, in the 1950s.

Aris purchased the helicopter in 1986 and removed the helicopter's intermediate gearbox five years later and replaced the IBP.

The replacement IBP, built by Fenn Manufacturing, had been changed in accordance with directions Sikorsky issued to the owners of S58ETs, according to court records.

After the crash Slate sued Sikorsky and former parent United Technologies Corp. in California state court, alleging his injuries were caused by the defective design and manufacture of the aircraft's gearbox.

Sikorsky did not deny that the IBP caused the accident, but it moved for summary judgment on the grounds that GARA barred the plaintiff's claims.

The law bars suits against aircraft manufacturers brought more than 18 years after the aircraft was delivered to the initial purchaser.

The trial court agreed, saying GARA provided the helicopter maker with a complete defense. The undisputed evidence showed that Sikorsky manufactured and delivered the helicopter to its first purchaser 41 years before the accident and that Sikorsky did not build the IBP that caused the crash, the court found.

The appellate court reversed, saying Sikorsky may still be liable as a designer even though it did not actually manufacture the IBP.

The defendant offered no authority holding that a designer of a product cannot be held liable for injuries proximately caused by a defect in its design, the appellate court stated.

Sikorsky's directive about changes in the IBP constituted a redesign of its original IBP that restarted the 18-year statute of repose under GARA, the court ruled.

The redesigned IBP was installed on the subject helicopter before the statute of repose expired, and GARA therefore did not bar Slate's claims, the appellate court held.

B. Jurisdiction

1. *Pease et al. v. Kelly Aerospace Inc.,*
No. 2:07-cv-340-ID, 2008 WL 4406348
(M.D. Ala. Aug. 4, 2008)

An Alabama federal judge has refused to budge on his previous finding that he had no jurisdiction over a California aeronautics repair facility in a suit stemming from the crash of a Piper aircraft.

Senior U.S. District Judge Ira DeMent of the Middle District of Alabama also rejected the request by plaintiff David Pease to transfer his suit to a California federal court rather than dismiss the California-based Main Turbo from his suit.

Pease, an Ohio resident, took his Piper airplane to Air Tolin Inc. in Cincinnati for maintenance and repair of the engine's turbocharger. Air Tolin sent the turbocharger to Main Turbo, a family-owned repair business in California, for an overhaul. Most of the parts used by Main Turbo in the overhaul were purchased from a distributor in Dallas.

After the requested repair in California, Main Turbo sent the turbocharger back to Air Tolin, which installed it on Pease's Piper.

Shortly thereafter, in June 2005, Pease was flying his plane when the engine failed and the aircraft crashed. Pease was seriously injured in the accident.

In April 2007 Pease sued Main Turbo and several other defendants, including the Alabama-based turbocharger manufacturer Kelly Aerospace Inc., and Lycoming Engines, which designed and manufactured the engine in Pease's plane.

Pease's claims against Main Turbo are for negligence and wantonness stemming from the defendant's overhaul of the Piper's turbocharger.

Main Turbo asked the District Court to dismiss the claims for lack of personal jurisdiction. The company maintained that it did not have systematic and continuous contacts with Alabama to warrant jurisdiction.

Judge DeMent agreed and dismissed Main Turbo. In doing so he noted that the alleged faulty work was done by Main Turbo thousands of miles from Alabama. The judge added that there was no evidence the turbocharger entered Alabama after Main Turbo completed the repairs.

Main Turbo shipped the turbocharger to Ohio and the accident occurred in Tennessee and injured an Ohio resident, the District Court noted.

Moreover, Judge DeMent said Main Turbo did not enter into any contract or even communicate with any Alabama entity or person for the repair work of the subject turbocharger or for the purchase of the repair parts.

Pease asked the District Court to reconsider its ruling or transfer the suit to California, where Main Turbo is based.

Judge DeMent said the plaintiff did not present any new evidence to warrant reconsideration. Also, Pease raised the transfer option for the first time in his reconsideration motion. Therefore, the request was untimely, according to the District Court.

2. *In re Cessna 208 Series Aircraft Products Liability Litigation,*
No. 05-md-1721-KHV; *Melo-Ferrer v. Cessna Aircraft Co.,*
No. 07-CV-2511-KHV, *opposition to dismissal filed* (D. Kan. July 7, 2008)

A passenger injured during the 2005 crash landing of a Cessna in Bolivia is sparring with the aircraft maker's finance lessor over whether a Kansas federal court should dismiss claims against it.

Carlos Melo-Ferrer says the U.S. District Court for the District of Kansas has jurisdiction over Cessna Finance Corp., because it provides

aircraft financing throughout the country. CFC counters that there is no nexus between the accident and Maryland, where Melo-Ferrer filed his original suit.

The dispute stems from the January 2005 accident involving a Cessna Grand Caravan 208B airplane in Bolivia. According to court records, the plane was en route from La Paz, Bolivia, to Sucre, Bolivia, at the time of the accident.

The plaintiff, an Argentinean citizen living and working in Bolivia, suffered injuries when the plane had to execute an emergency landing on the side of a mountain, court records say.

Melo-Ferrer received several months of medical treatment in Bolivia and Brazil and then moved to Maryland, where he sued the aircraft maker.

The Judicial Panel on Multidistrict Litigation consolidated the suit with several others in the Kansas federal court since they all involve crashes of Cessna 208B Caravans and raise fact issues about the plane and its deicing equipment. Cessna is based in Wichita, Kansas, where the planes were designed and constructed.

Melo-Ferrer says the Maryland court has jurisdiction over CFC because the company purposely availed itself of the privilege of doing business in that state.

Maryland has an interest in protecting its residents against the tortuous conduct of a nonresident defendant, according to the plaintiff.

CFC argues in response that Melo-Ferrer fails to state a viable claim. The defendant says its role as a finance lessor means it does not have any of the legal duties of which the plaintiff's claims for negligence and breach of contract depend.

In addition, the company says, jurisdiction in Maryland is not proper because there is no evidence that CFC regularly solicited business in the state through its Website.

IV. AVIATION INSURANCE LITIGATION:

A. Insurance Coverage

1. Insurer Says Airline's Failure to Plead Case Bars Accident Claim

***Westchester Fire Insurance Co. et al. v. Mendez*, No. 07-17383, *Appellee's brief filed* (9th Cir. Apr. 15, 2008)**

Westchester Fire Insurance Co. argues in a 9th Circuit appellee brief that because Northwest Airlines did not plead its claim as a third-party intervener, it is not entitled to coverage in an aircraft accident case involving a maintenance company.

A Nevada federal court's ruling that the insurer has no duty to defend or indemnify the maintenance company "is procedurally proper and substantively correct," Westchester says.

According to the briefs in the case, Phil Mendez owned and operated Professional Aircraft Line Service, (PALS) a maintenance company located in Las Vegas' McCarran International Airport.

In May 2000 Northwest hired PALS to perform emergency maintenance and service work. The contract required PALS to have general liability insurance, which Mendez obtained from Westchester.

A PALS employee was moving a Northwest Airbus A320 plane to a staging area Feb. 6, 2002, when it hit a light pole, sustaining substantial damage.

Northwest sought payment under the Westchester policy. When the insurer did not respond, the Minneapolis-based airline sued Mendez in Minnesota state court.

The defendant failed to appear, according to the airline. Northwest then told Westchester that Mendez was in default and asked the insurer to pay the damages claim.

Westchester refused, citing Mendez's failure to appear for depositions or otherwise take part in the case. Northwest eventually obtained a $10.6 million default judgment against Mendez in the Minnesota court.

In 2005 Westchester sued Mendez in the U.S. District Court for the District of Nevada, seeking a declaration that it had no duty to defend or indemnify him because of his conduct in the Northwest case.

In March 2006 Northwest moved to intervene and sought summary judgment, citing its "direct economic interest" in the outcome of the declaratory judgment action.

Westchester argued that any default judgment against Mendez barred Northwest from further participation in the Nevada action.

The District Court allowed the airline to intervene. However, the court denied Northwest's summary judgment motion in November, finding that it exceeded the scope of the case. The court said Northwest had based its motion on "a third-party-beneficiary theory of liability, which involves a direct claim against Westchester."

The court also entered a default judgment against Mendez for failure to participate in the litigation and found that Westchester had no duty to defend or indemnify him in the Minnesota case.

In its opening brief to the 9th Circuit Court of Appeals Northwest says the District Court failed to recognize the airline's "independent standing to defend against Westchester's request for declaratory relief after Mendez's default."

Northwest also argued that the circuit's precedent prohibits a default judgment against one defendant in a case with multiple "similarly situated parties," citing *In re First T.D. & Investment*, 253 F.3d 520 (9th Cir. 2001).

The airline has asked the Ninth Circuit to vacate the default judgment and remand the case with instructions for the District Court to enter a default judgment against Mendez but consider the merits of the coverage case.

Westchester's appellee brief states "the peculiar procedural posture of this case, in which the party arguing for insurance coverage did not plead its claim, distinguishes those cases holding generally that an injured third party has standing to litigate coverage."

The issue here is not whether Northwest has standing, Westchester argues, but whether it is entitled to relief without pleading a claim or a defense.

The airline's failure to plead also means it is bound by the default judgment, the insurer contends. "There is no potential for an inconsistent judgment in favor of Northwest because Northwest cannot possibly obtain indemnity from the defaulting insured," the brief states.

B. Costs Award Is Inappropriate in Chopper Suit

***In re AIG Aviation Inc. et al.*, No. 04-08-00454-CV, 2008 WL**

4163184 (Tex. App. Sept. 10, 2008)

A trial court overstepped its boundaries when it awarded court costs to a helicopter owner in a crash suit several years after final judgment in the case, a Texas appellate court has ruled.

The Texas Court of Appeals issued the decision in a lawsuit stemming from the crash of an aircraft owned by Holt Helicopters.

Holt filed a property insurance claim after the crash but AIG Aviation Inc. denied the claim after investigating the cause of the accident.

The denial prompted Holt to sue the insurer for breach of contract, wrongful denial of its insurance claim and violation of the Insurance Code.

A Texas state trial court ruled in Holt's favor, finding coverage under the policy unless AIG proved a causal connection between the pilot's lack of required flight time and the crash.

The remaining issues went to a jury, which returned a verdict for Holt. The trial court entered a final judgment for Holt in February 2005 and awarded the company damages, attorney fees and court costs.

In April 2008 Holt filed a motion for determination of costs seeking to recover the expenses to prosecute the case and make the company "whole" under the Texas Insurance Code and the Deceptive Trade Practices Act.

The trial court accepted Holt's request, awarding it nearly $46,000 in court costs in May.

AIG challenged the order, arguing that the award was void because the trial court lacked plenary power.

The appellate court agreed, noting that the trial court had only 30 days to alter its original judgment.

"Here, Holt clearly sought and obtained $45,786.70 in 'costs of court' outside of the trial court's plenary power — over three years after the trial court signed its final judgment," the appellate court held.

C. Third Circuit Revives Lawyer's Suit Over Right to Defense

***Wolk et al. v. Westport Insurance Corp.*, No. 07-1486, 2008 WL 1962277 (3d Cir. May 7, 2008)**

A federal court should not have dismissed an attorney's lawsuit challenging his insurer's refusal to defend him against accusations of fraud arising from his legal representation in a plane crash case, the Third Circuit has ruled.

A genuine factual dispute may exist about whether the insurer owed the lawyer a defense against the accusations, the court found, because a state appellate court ordered an evidentiary hearing in the underlying suit to determine whether both the attorney and his client had committed fraud in inducing a settlement of the case.

The Third Circuit held that the U.S. District Court for the Eastern District of Pennsylvania improperly resolved the coverage dispute without giving the parties a chance to present affidavits and other relevant information.

The controversy stemmed from attorney Arthur Alan Wolk's representation of Albert D. Eigen, the personal representative of three people killed in an airplane crash. Eigen filed a product liability lawsuit in state court against parts manufacturer Precision Airmotive Corp.

The case settled during trial. However, a state appellate court later ordered an evidentiary hearing in the case after Precision alleged that Eigen and Wolk fraudulently induced the settlement by concealing the fact that the pilot had his own insurance policy covering his operation of the airplane.

In ordering the hearing the court stated that Precision had presented "strong *prima facie* evidence" that Eigen and Wolk, had provided false discovery responses.

Wolk asked his professional liability insurer, Westport Insurance Co., to provide him with a defense against Precision's fraud allegations.

Westport refused, saying no actual claim was ever made against Wolk. According to the insurer, Precision's claim of fraud did not trigger its duty to defend Wolk because the claim was raised in Eigen's underlying case against Eigen, not Wolk.

Wolk sued Westport in the Eastern District of Pennsylvania, alleging it breached the insurance policy and acted in bad faith by refusing to defend him against Precision's claim.

Westport moved to dismiss. Without giving the parties an opportunity to present any affidavits or conduct discovery, the court dismissed the suit on the basis that nothing more than notice of a possibility of a claim had been made against Wolk.

The Third Circuit Court of Appeals overturned the District Court's order. The court found that the District Court erred in dismissing the case without allowing the parties to submit pertinent information on the question of whether Westport owed Wolk a defense.

Furthermore, the Third Circuit held the lower court's error was not harmless because it may have overlooked the fact that the state appellate court had ordered an evidentiary hearing to determine whether Wolk and Eigen had committed fraud to induce a settlement.

The Third Circuit therefore sent the case back to the District Court for further proceedings.

PRESIDENT'S MESSAGE

(Continued from page 3)

think that this is one of the most effective ways to bring new members on board, which has been recently confirmed via comments received for the brainstorming session when many members related that it was the personal contacts that got them to join.

PALM SPRINGS

It won't be that much longer and we will be together in beautiful Palm Springs, California. The dates are February 18 – 22, 2009. I know the holidays will overtake us all, but please don't forget to save this time on your calendar. There are not many places where you can enjoy both palm trees and mountains at the same time. Check out the web site of Rancho Las Palmas Resort and Spa (get there through www.lpba.org) and picture yourself in this peaceful, exotic, and fun location. It will give you something to look forward to in the bleak days of February. See you there.

— Susan Hofer

GOVERNMENT LITIGATION

Process of Elimination

Steven A. Kirsch

The author is a Trial Attorney with the Department of Justice Aviation & Admiralty Litigation Section in Washington, D.C. He also holds a commercial pilot certificate with single-engine, multi-engine and instrument ratings, and is a certified flight instructor. His views do not necessarily reflect those of the Department of Justice.

Congress has charged the National Transportation Safety Board (NTSB) with investigating all civil aircraft accidents in the United States and determining the probable cause of each one. 49 U.S.C. §§ 1131(a)(1)(A), 1132(a)(1)(A). Although NTSB probable cause reports are inadmissible as evidence in civil litigation, 49 U.S.C. § 1154(b), the full NTSB report including the Board's determination of an accident's probable cause, usually is one of the first items an aviation attorney will read for background when presented with a new case. Practitioners should nonetheless be cautioned not to equate the finding of probable cause with the legal standard of proximate cause, or assume that the Board's conclusion is prologue to the outcome of litigation. As demonstrated by the case that is the subject of this article, a trier of fact presented with admissible evidence in an adversarial proceeding will not necessarily reach the same conclusion as the NTSB.

Caution: Wake Turbulence

On July 2, 2003, at 10:05 a.m., a twin-engine Beech 58P Baron, N36TL, abruptly rolled to the left and collided inverted with the ground seconds before it was supposed to touch down for landing on Runway 36 Right at Memphis International Airport, in Memphis, Tennessee. Dr. David Cahill, an experienced pilot with more than 3,000 hours of flight time and co-owner of the Baron, was at the controls during the accident. Dr. Cahill and his front seat passenger died. His two rear-seat passengers survived with serious injuries. Two full minutes, or 120 seconds, before the Baron rolled over and crashed, an Embraer EMB-145 Regional Jet landed on Runway 36 Center. Runways 36 Center and 36 Right are parallel runways 900 feet apart.

The Baron departed Tampa, Florida approximately three hours before the crash, and Dr. Cahill piloted it uneventfully to its destination until the final few seconds. During the approach to Memphis, the communications between Dr. Cahill and the FAA air traffic controllers were routine. At 9:54 a.m., Dr. Cahill contacted the Memphis Airport Traffic Control Tower (ATCT) Arrival Final East Position and reported that the flight was at 4,000 feet above mean sea level (MSL). The controller responded that Dr. Cahill could expect an Instrument Landing System (ILS) approach to Runway 36 Right, and Dr. Cahill acknowledged. The controller subsequently cleared the Baron to descend and maintain 3,000 feet MSL. At 9:58 a.m., he instructed Dr. Cahill to reduce the Baron's speed to 170 knots, and Dr. Cahill acknowledged. At 9:58 a.m., the controller told Dr. Cahill that he would be landing four nautical miles behind a regional jet, and cautioned him about possible wake turbulence from that jet. Dr. Cahill acknowledged the cautionary instruction.

At 9:59 a.m., the controller told Dr. Cahill to reduce his speed to 160 knots, and Dr. Cahill acknowledged. At 10:00 a.m., he told Dr. Cahill to maintain 3,000 feet MSL and a speed of 160 knots until reaching the Final Approach Fix, and Dr. Cahill acknowledged. The controller again cautioned Dr. Cahill of possible wake turbulence from the preceding Embraer, and instructed him to contact the Memphis ATCT on the local control frequency. Dr. Cahill said he would comply. Dr. Cahill then contacted the tower and reported that the flight was inbound for landing on Runway 36 Right. At approximately 10:01 a.m., the controller cleared the Baron to land on Runway 36 Right, and Dr. Cahill acknowledged his landing clearance. There were no further radio communications.

A military pilot in the rear seat of an F-18 taxiing between the two parallel runways was an eyewitness to the accident. He observed the Baron over Runway 36 Right, approximately 10-15 feet above the ground, when it simultaneously and slowly rolled and yawed to the left. As the Baron rolled and yawed to the left, he saw the nose pitch up. He then observed the airplane snap roll 180 degrees to the left and pancake onto the ground on its back.

The weather was favorable for flying. Winds were out of the north/northwest at three to five miles per hour, and visibility was at least ten miles. There were scattered clouds at 3,000 feet above ground level (AGL) and broken layers of clouds at 3,800 feet AGL. The temperature was near 80 degrees Fahrenheit.

The Litigation Begins

The injured passengers as well as the personal representatives of the decedents each filed suits against the United States pursuant to the Federal Tort Claims Act (FTCA). Plaintiffs alleged that the Memphis air traffic controllers negligently failed to provide the required minimum four-mile separation between the Baron and the EMB-145 landing ahead of it. Plaintiffs alleged that this loss of separation exposed the Baron to a wake vortex from the Embraer, and that the encounter with this vortex abruptly rolled the Baron to the left, causing it to crash upside down as Dr. Cahill was attempting to land. The NTSB report supported Plaintiffs' theory of the case. The Board found that the two airplanes

did not have the horizontal separation required by the Air Traffic Control Manual and that the probable cause of the accident was "[a]n encounter with wake turbulence on approach, which resulted in the pilot's inability to maintain control and subsequent in-flight collision with the ground."

The United States denied liability, and asserted that pilot error — not wake turbulence — caused the crash. The Government contended that the pilot stalled the airplane when he tried to either (1) reposition the airplane for landing, or (2) abort the landing and go around.

The cases were consolidated and tried in February 2008 before the Honorable Susan C. Bucklew, United States District Judge for the Middle District of Florida, Tampa Division.[1] Regardless of the venue chosen, the law of the jurisdiction where the alleged negligence occurred, including its choice of law rules, governs the rights and liabilities of the parties. *Richards v. United States*, 369 U.S. 1, 11 (1962). Accordingly, the parties agreed that Tennessee law applied to the liability issues in this case.

The Invisible Hazard

All pilots learn during their flight training that wake turbulence is created by the forces that lift the airplane. High pressure air from the lower surface of the wings flows around the wingtips to the lower pressure region above the wings. A pair of counter-rotating wake vortices, which can be analogized to invisible horizontal tornadoes, are shed from the wingtips as the airplane moves forward. One characteristic of wake turbulence, or wake vortices, is that they sink or descend behind the generating aircraft. Another is that heavier aircraft create stronger wake turbulence.

Wake turbulence created by larger aircraft can pose a significant hazard to smaller aircraft. If a smaller aircraft encounters the vortex core, the rotational forces can cause the aircraft to abruptly roll in the direction of the vortex's rotation. A pilot may not have sufficient time or altitude to recover from an uncommanded roll that occurs very close to the ground, such as during takeoff or landing.

To avoid such hazards, the FAA created separation standards, which are found in the Air Traffic Control Manual, FAA Order 7110.65. Section 5-5-4(f) of FAA Order 7110.65N, the version in effect on the date of the accident, instructed air traffic controllers to separate small aircraft, such as a Baron, landing behind large aircraft, such as an Embraer Regional Jet, by four nautical miles, measured at the time the larger aircraft was over the landing threshold. Section 5-5-4(f) notes that air traffic controllers should consider parallel runways less than 2,500 feet apart as a single runway. Therefore, even though the Embraer was landing on a different runway from the Baron, the four-mile separation standard still applied.

The Plaintiffs' Evidence: Is it Sufficient?

During the trial, Plaintiffs had little difficulty proving duty and breach of duty. The court found that the controller had a duty to separate the aircraft by four miles, measured at the time the Embraer was over the landing threshold. The court also found that the controllers breached their duty to separate these airplanes. The parties disputed the exact distance between the aircraft — with Plaintiffs' radar expert claiming that the distance was 3.62 nautical miles (nm) and the United States' expert opining that it was 3.72 nm. The United States believed that this discrepancy was significant. The government's air traffic expert testified that the radar system in use at Memphis had a tolerance of just slightly more than a quarter-mile. Accordingly, to the controllers, the aircraft may very well have appeared to have the required four-mile separation.

The court, however, found it unnecessary to determine the exact distance between the two aircraft. Judge Bucklew recognized that although the evidence may have shown that the controller's radar did not have the resolution to show that separation had been lost, given the fact that at the time the Embraer crossed the landing threshold of Runway 36 Center, the Baron was less than four nautical miles behind it, Plaintiffs did show, by a greater weight of the evidence, that the controllers breached their duty to maintain the required separation.

Despite their initial success proving a breach of duty, Plaintiffs' case collapsed during their attempt to prove proximate cause. Although they had retained an expert in the field of wake turbulence, Dr. Barnes McCormick, Plaintiffs decided not to call him as a witness during trial. Instead, they attempted to demonstrate proximate cause solely through the testimony of their accident investigator, Jeffrey Edwards. The court found that Mr. Edwards, who had previous experience as an aircraft accident reconstructionist in the Navy and for McDonnell Douglas, convincingly testified that the Baron was not in an aerodynamic stall immediately before the accident, and that pilot error was not a contributing cause of the accident. He also ruled out mechanical failure. Mr. Edwards then opined that because he had eliminated these other possible causes of the accident, the cause must have been a wake turbulence encounter brought about by a loss of separation between the Baron and the Embraer.

The Court concluded that Mr. Edwards's testimony — reasoning by process of elimination that wake turbulence induced the crash — did not sustain Plaintiffs' burden of proof. The court noted that Mr. Edwards was admittedly not an expert in the field of wake turbulence — including the areas of wake decay, circulation, dissipation, and strength — and had done no studies or analyses on wake turbulence decay. Additionally, Mr. Edwards testified that he did not do any calculations in this case regarding the strength of wake turbulence created by the Embraer and its effect upon the Baron, and instead deferred to the anticipated testimony of Dr. McCormick. When Plaintiffs chose not to call Dr. McCormick, his absence left a gaping hole in the required proof.

The Government Focuses on Proximate Cause

After Plaintiffs rested, the government began to exploit the weaknesses in their case. The United States first called George Greene. Mr. Greene worked for both NASA and the FAA, specializing in wake turbulence research, for over 25 years. He developed one of the first theories for the way wakes decay in the atmosphere.

Mr. Greene opined that wake turbulence did not cause or contribute

to the accident in this case. His opinion was based, in part, on the fact that the Embraer's wake would have been generated very close to the ground, and therefore would have decayed very rapidly. Mr. Greene explained that wake vortices are rotating flows that have very high velocities, and that when they are generated near the ground, there is a lot of scrubbing of the air against the ground which generates secondary rotation in the opposite direction of the original rotation. The opposite rotations create frictional effects which reduce the strength of the vortex very quickly.

Mr. Greene further testified that, because the lifetimes of wake vortices which are created near the ground are so short, the wake vortex created by the Embraer during its landing could not have lasted 120 seconds in order to affect the flight path of the Baron during its landing. Mr. Greene opined that it was scientifically impossible for the wake vortex that was created by the Embraer on Runway 36 Center, under the meteorological conditions surrounding this accident, to have lasted two minutes and still be alive on Runway 36 Right at the time the Baron landed. The court readily credited his testimony.

The government also offered Shahar Ladecky as an expert in computer simulation and modeling, with a specialty in the use of wake turbulence models. Mr. Ladecky had worked extensively with the FAA for the Aviation Flight Standards department, and helped develop the simulation that the FAA uses in performing safety evaluations for wake turbulence. The simulation incorporates NASA's wake turbulence decay model, called the AVOSS (Aircraft Vortex Spacing System) Predictor Algorithm. It is the most widely accepted wake turbulence decay model for predicting wake decay features, and is capable of analyzing the probability of a wake encounter.

Mr. Ladecky used the simulation to determine whether the wake turbulence created by the Embraer could have lasted long enough to affect the Baron's flight path. In his analysis, Mr. Ladecky took into consideration the weight and wingspan of the Embraer, the speed at which the Embraer was flying on its final approach, the Embraer's proximity to the ground, and the atmospheric conditions that existed at the time of the accident. Mr. Ladecky opined that the results of his analysis clearly demonstrated that the wake turbulence generated by the Embraer completely dissipated more than one minute before the Baron crossed the landing threshold of Runway 36 Right. He further opined that even under the most ideal atmospheric conditions permitting wake turbulence to persist for the longest possible amount of time, the wake turbulence generated by the Embraer would have completely dissipated before the Baron crossed the landing threshold of Runway 36 Right.

The court found that the opinions of both George Greene and Shahar Ladecky were both credible and persuasive, based on their training and extensive work experience. Accordingly, the court determined that any wake turbulence created by the Embraer completely dissipated by the time the Baron landed on Runway 36 Right, and could not and did not affect the Baron's flight path.

The Court's Conclusion

The court concluded that the Memphis controllers breached their duty by failing to maintain the required four-mile separation between the Baron and the Embraer. However, the court further found that a wake turbulence encounter did not cause the accident. Because the controllers' breach of duty did not proximately cause the accident, the court entered judgment for the United States. Notably, the court also concluded that the government also failed to prove that pilot error caused the accident. This was an unusual case in which neither side could prove the cause of the crash. The case is *Cahill v. United States*, Lead Case No.: 8:05-CV-2379-T-24MSS, 2008 WL 1711519 (M.D. Fla., Apr. 10, 2008).

Endnotes

1 In an FTCA action, Plaintiffs may choose to file suit either where the negligence occurred or where they reside. 28 U.S.C. § 1402(b).

FROM THE COCKPIT

(Continued from page 5)

bowed, the RAF and the Maltese persevered through horrific conditions and overcame seemingly insurmountable odds, taking their position in history alongside the legendary Knights. At the heart of the modern story, however, were three outdated aircraft commanded by pilots who refused to concede their obsolescence and fought on in the siege's earliest stage, buoying the spirits of the population and helping ensure their eventual triumph. Theirs is a story of perseverance that warrants remembering in troubled times.

Our Route of Flight

Our route of flight today covers some interesting territory indeed. Given the state of the economy, your practice may involve more focus on bankruptcy-related matters; guest author Marvin Heileson provides a comprehensive look at drafting transactional documents and agreements so as to protect assets in bankruptcy. Cecile Hatfield gives her invaluable review of recent aviation caselaw, and Alan Armstrong checks in with additional cases of interest to the aviation practitioner. Steve Kirsch presents the compelling story of a flight gone tragically awry, while former Journal editor Jay Rosenbaum gives his thoughts on the administration of justice. Ken Stein and Michael Duffee guide us through the rights of employees in a union-free workplace. Additionally, President Susan Hofer reports on the LPBA brainstorming session she convened in Washington, and we pause to honor former President Joe Gawry's passing

All in all, I think you'll find it's going to be a very interesting flight. As is my custom this time of year, let me thank you for the honor of having served as your Captain for yet another year in the cockpit of Flagship LPBA. Your kind words, encouragement, and submission of articles have been most generous.

So now sit back, relax, and lemme see if I can get this baby in the air!

— Gary W. Allen

WHY DIDN'T THE COURT ENFORCE YOUR AGREEMENT? A Business Litigator's Advice to Attorneys Drafting Transaction Documents

Enforceability of Transactional Documents In Bankruptcy

Marvin D. Heileson

Marvin D. Heileson is a retired partner at Morrison & Foerster, LLP with an extensive background in bankruptcy matters. *He gratefully acknowledges Susannah S. Cupp for her assistance in the preparation of this paper,* *and may be contacted at Heileson@ earthlink.net.* *Copyright (c) 2008 by Marvin D. Heileson. All rights reserved.*

I. INTRODUCTION

Virtually all opinions rendered in financial transactions as to the enforceability of the various transactional documents as against a party or parties thereto (usually the borrower, guarantor or other obligated parties) are expressly qualified as being subject to:

> The effect of bankruptcy, insolvency, reorganization, arrangement, moratorium or other similar laws relating to or affecting the rights of creditors generally [including, without limitation, laws relating to fraudulent transfers or conveyances, preferences and equitable subordination]

or other language to similar effect.

The purpose of this paper is to underscore the need for this bankruptcy qualification by highlighting many of the provisions of the Bankruptcy Code (11 U.S.C. 101 et. seq.; hereinafter "Bankruptcy Code") or bankruptcy doctrines that may severely affect or limit the enforceability of contractual provisions in favor of the lender or others that are contained in loan and security agreements, and in certain ancillary documents, principally guaranties and subordination and intercreditor agreements. Some of these provisions are simply unenforceable as a matter of statute or bankruptcy policy; others because they were not properly drafted in anticipation of bankruptcy. Beyond the scope of this paper, however, are the so-called "avoiding powers" of the bankruptcy trustee (which term includes, the debtor in possession — see Bankruptcy Code Section 1106 and 1107(a)), most notably the trustee's power to set aside preferences or fraudulent transfers. *See, e.g.,* Bankruptcy Code Sections 544, 547 and 548. Instead the primary focus will be on the enormous power of the bankruptcy process to fundamentally modify, or render unenforceable, the terms of loan agreements and other transactional documents.

II. PARADE OF HORRIBLES: A BRIEF SUMMARY OF THE IMPACTS ON ENFORCEABILITY INHERENT IN THE NATURE OF BANKRUPTCY AND THE REORGANIZATION PROCESS

A. Automatic Stay

While not one of the substantive provisions of the Bankruptcy Code that fundamentally impact contract rights, the injunction against acts against the debtor or its property that automatically arises under Bankruptcy Code Section 362 upon the bankruptcy filing can, as a practical matter, have a similar effect, particularly given the propensity of the courts to deny lift stay motions early in the case, depending upon the nature of the debtor and circumstances affecting it. The procedural hurdles and requirements for relief from stay can be extremely formidable, giving the debtor time to proceed with more "substantive" ways to impact enforceability, such as the debtor's ability (discussed below) to use, sell or lease property and to assume executory contracts or leases as a matter or federal law, notwithstanding the rights of creditors under applicable non-bankruptcy laws (see Bankruptcy Code Sections 363, 364 and 365). As a general proposition, the ability of a debtor to prevent a lifting of the stay requires it to provide "adequate protection" to the creditor, and the provision of "adequate protection" often involves such creditor-offensive concepts as "replacement liens" and the erosion of "equity cushions."

B. Use, Sale and Lease of Property

Bankruptcy Code Section 363 broadly empowers a debtor, with the approval of the court, to avoid contractual limitations affecting the debtor's use, sale or lease of property (usually the creditor's collateral), provided that as noted above the creditor is adequately protected by measures such as replacement liens, or in the case of sales, by the creditor's lien carrying over to the proceeds of sale. Although replacement liens are discussed in the following section C in the context of a working capital lender with liens on inventory and receivables, the possibility always exists that the replacement lien could be on an entirely different form of property, such as a fish farm (an extreme example), provided the property was found to have an equal or greater value.

Even worse, under the Chapter 11 reorganization process, it is even pos-

sible for the debtor, under its so-called "cram down" powers under Bankruptcy Code Section 1129(b)(2)(A): (i) to stretch out the loan term, (ii) to change the rate of interest, and (iii) to bifurcate a partially secured claim into a secured claim equal to the value of the security and an unsecured claim equal to the amount of the deficiency (see Bankruptcy Code Section 506(a), unless the creditor elects to be treated as a wholly-secured creditor under Bankruptcy Code Section 1111(b)). The treatment of such claims in the reorganization plan and the "cram down" process is beyond the scope and purpose of this paper. See generally *Klee, All You Ever Wanted to Know About Cram Down Under the New Bankruptcy Code,* 53 Am. Bankr. L.J. 133 (1979); 3 LAWRENCE P. KING, COLLIER ON BANKRUPTCY, Para. 1129.04 at 1129-75 to 1129-140 (15th ed. Rev. 2004).

C. Post-Petition Extensions of Credit, Etc.

Related to the rights of debtors to use, sell or lease property are other important rights and consequences of bankruptcy that fundamentally affect the rights of the creditor (most notably the enforceability of loan and other transactional documents). One such consequence is the rule that the UCC "floating lien" ceases to float once bankruptcy is filed, because Bankruptcy Code Section 552 cuts off the operation of after-acquired property clauses, but does permit security interests in the existing property to continue in proceeds, etc. of that property, such as accounts receivable arising upon the debtor's sale of liened inventory. Even in this last situation the creditor's security interest in proceeds can be limited to the extent that "the court, after notice and a hearing, and based on the equities of the case orders otherwise" (Bankruptcy Code Section 552(b)). An illustration of this "equities of the case" exception would be the court's permitting the debtor to use part of the accounts receivable collections to cover the debtor's costs in finishing and selling the inventory. Similarly, the debtor has a right to "surcharge" the secured creditor's collateral to "recover* * * the reasonable, necessary costs and expenses of preserving, or disposing of, such property [collateral] to the extent of any benefit to the [Secured Creditor]" (Bankruptcy Code Section 506(c)). Note that the surcharge right has now been held to be solely that of the bankruptcy trustee or debtor in possession. See *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 503 U.S. 1 (2000) (affirming the *en banc* decision of the 8th Circuit which had reversed the decision of the District Court permitting surcharge by a post-petition administrative creditor).

As a practical matter, however, most "floating liens" in favor of working capital lenders continue to float in bankruptcy due to the requirement that the creditor be provided with adequate protection for the debtor's continued use of its collateral. The creditor will typically be provided with replacement liens on the debtor's after acquired property and a budget will usually be worked out with the creditor to cover the debtor's operational cash needs from collateral collections. Moreover, to avoid a possible "priming lien" in favor of a new lender (which is possible under the circumstances set forth in Bankruptcy Code Section 364(c), again depending upon the existing creditor being adequately protected), as well as to obtain various "bells and whistles" to augment its position, the pre-petition revolving secured lender will often enter into new financing arrangements with the debtor — called debtor-in-possession or DIP financings — wherein the court approves the borrowing and security therefor, and the bargained for "bells and whistles" (such as surcharge limitations, "drop dead" stipulations upon debtor's default and even in some cases the cross-collateralization of pre-and post-petition indebtedness). See generally Carlson, *Postpetition Security Interests Under the Bankruptcy Code,* 48 Bus. Law. 483 (1993).

D. Anti-Assignment Clauses and Executory Contracts

The Bankruptcy Code gives a debtor the right to assume or reject an executory contract or unexpired lease, notwithstanding provisions in the contract to the contrary. Section 365(b) renders unenforceable provisions in an executory contract or unexpired lease that makes the filing of bankruptcy or insolvency a default under the contract, terminates the contract, or prohibits assignment of the contract (*ipso facto clauses*). The general requirement is that defaults must be cured before the debtor has the right to assume an executory contract; however, as noted, the Bankruptcy Code, except in certain limited circumstances discussed below, renders anti-assignment and default clauses upon the filing of bankruptcy unenforceable, thus allowing the debtor to choose to assume or reject in spite of the agreement between the parties.

Furthermore the bankruptcy courts have latitude in determining what constitutes an executory contract subject this provision. See *Creditors Comm. v. Southmark Corp*., 139 F.3d 702 (9th Cir. 1998) (holding that whether an option is an executory contract depends upon whether the option requires further performance from each party at the time the bankruptcy petition is filed); *Coleman Oil Co., Inc. v. The Circle K. Corp*., 127 F.3d 904 (9th Cir. 1997) (holding that § 365 permits a lessee to exercise a renewal option under a lease even though the lessee was in default under the lease and the lease conditions the right to exercise the option in the absence of a default).

There are two major exceptions to general rule of rending *ipso facto* clauses unenforceable. Bankruptcy Code Section 365 (c)(1) provides that if the applicable nonbankruptcy law would excuse the nondebtor party from accepting performance from or rendering to the debtor's assignee, the executory contract may not be assigned, giving recognition to the common law prohibition on assignment of personal service contracts, and recognition to certain federal laws protecting owners of intellectual property. See *Perlman v. Catapult Entm't, Inc.*, 165 F.3d 747 (9th Cir. 1999) (holding that a non-exclusive patent license can neither be assumed nor assigned without the licensor's consent); In re Golden Books Entertainment, Inc., 269 B.R. 300 (Bankr. D. Del. 2001) (holding that non-exclusive licenses of copyrights cannot be assumed and assigned without the licensor's consent). See also *Abele v. Phoenix Suns LP* (In re

Harrell), 73 F.3d 218 (9th Cir. 1996) (holding that under state law the right to buy season tickets for a basketball team is not assignable, and that therefore the trustee could not assign it under § 365). In addition, Section 365(c)(2) allows enforcement of *ipso facto* provisions in executory contracts to lend money or extend other debt financing or financial accommodation. But even then, the bankruptcy courts have latitude in determining what is a financial accommodation. See *In re Best Products*, 210 B.R. 714 (E.D. Va. 1997) (holding that a bank's private label revolving credit plan did not constitute financial accommodation under the exception from executory contract treatment).

E. Anti-Forfeiture Rules

Similar to anti-assignment provisions, anti-forfeiture provisions are also unenforceable. Bankruptcy Code Section 363(l) invalidates contract provisions that limit or deprive the debtor's ability to use and benefit from property as the result of a bankruptcy. See, e.g., *In re Pease*, 195 B.R. 431, 433 (Bankr. D. Neb. 1996) (stating that the debtor is permitted to use, sell or lease that property (or if it is a contract or lease right, then the debtor may assume the executory contract or lease interest), *notwithstanding any provision in an agreement that is conditioned on the insolvency or financial condition of the debtor or the filing of a bankruptcy case*). Congress thus explicitly chose to invalidate provisions of private agreements that deprive the debtor of the use and benefit of property upon the filing of a bankruptcy case. This provision, however, does not render restrictive covenants on property unenforceable, such as a restrictive covenant limiting who may own the property, which would effectively limit to whom the trustee can sell the property. (See 3 LAWRENCE P. KING, COLLIER ON BANKRUPTCY ¶ 363.10[1] at 363-84 (15th ed. rev. 2005)).

III. SUBSTANTIVE PROVISIONS OF THE BANKRUPTCY CODE THAT IMPACT CONTRACTUAL RIGHTS

A. Interest and Attorneys Fees

An extremely important fundamental rule is that upon the bankruptcy filing interest on unsecured or secured indebtedness ceases to accrue as a matter of law (*i.e.*, unmatured interest) except to the extent: (i) the creditor is, or becomes during the bankruptcy case, oversecured (see Bankruptcy Code Section 506(b); *In re T-H New Orleans Limited Partnership*, 116 F.3d 790 (5th Cir. 1997) (holding that a creditor whose claim becomes oversecured in the course of a bankruptcy proceeding, whether from an increase in value of the collateral or a reduction of the amount owed, is entitled to interest under § 506(b), from the moment in time when the secured party becomes oversecured)); or (ii) the debtor is solvent (see *United States v. Ron Pairs Entm't, Inc.*, 489 U.S. 235, 246 (1989)). Under Section 506(b) the same rules apply as "to any reasonable fees, costs, or charges provided for under the agreement or State statute under which [the secured creditor's] claim arose."

B. Default Interest Rate

As mentioned above oversecured creditors are entitled to postpetition interest, to the extent of their oversecurity. Section 506(b) of the Bankruptcy Code does not explicitly address the issue of the appropriate rate to be applied; therefore, whether the oversecured creditor receives the default rate or the nondefault rate is an issue over which bankruptcy courts have discretion. Generally, a creditor will receive the default rate as provided for in the contract; however, if the default rate is inequitable or is viewed as a penalty by the bankruptcy court, the pre-default rate will be applied. See I*n re Hassen Imports Partnership*, 256 B.R. 916 (9th Cir. 2000) (holding that an oversecured creditor is entitled to the default rate assuming the creditor can show the default rate is reasonable and will serve to compensate for losses, rather than as a penalty).

In determining if the default rate is reasonable, the bankruptcy court will apply equity principles. See *Southland Corp. v. Toronto-Dominion*, 160 F.3d 1054 (5th Cir. 1998) (applying equity factors such as difference between pre-default and post-default interest rates and potential harm to junior creditors if default rate is awarded); *Casa Blanca Project Lenders v. City Commerce Bank*, 196 B.R. 140 (9th Cir. 1996) (stating that equitable factors underlying an award include: (1) differential between the default and nondefault rates; (2) reasonableness of the differential; (3) the relative distribution rights of other creditors; and (4) the purpose of the higher rate).

C. Pre-Payment Penalty Fees

As noted above, in addition to interest, Section 506(b) allows an oversecured creditor to claim postpetition attorney fees, costs and charges. Most bankruptcy courts include pre-payment penalty fees under "charges" which may be included in the creditor's claim. The oversecured creditor is entitled to pre-payment penalty fees to the extent they are reasonable and valid under applicable nonbankruptcy law. See *In re Lappin Electric Co*., 245 B.R. 326 (E.D. Wash. 2000) (holding that in determining the validity of a prepayment clause, the court must look to the damages that the parties could anticipate at the time the parties contracted); Murray, Prepayment Premiums: A Bankruptcy Court Analysis of Reasonableness and Liquidated Damages, 105 Com. L.J. 217 (2000).

D. Agreements to Arbitrate

The Bankruptcy Code does not address whether arbitration provisions will be given effect upon the filing of bankruptcy, but the issue has come before the bankruptcy courts. The basic conflict is between the Arbitration Act's mandate of enforcing valid arbitration agreements and the Bankruptcy Code's objectives of centralized proceedings and efficient and unimpeded resolution of bankruptcy matters. Key to this dispute is whether the proceeding before the court is a core or non-core proceeding. Bankruptcy judges have authority to hear and determine all core proceedings; while in non-core proceedings the bankruptcy judge recommends findings of fact and law to the district court. (See 28 U.S.C. § 158). In general, bankruptcy judges are given broad discretion in determining whether to enjoin arbitration, but even in core proceedings, the bankruptcy judge does not have automatic discretion to enjoin arbitration. The bankruptcy court must

carefully determine if the underlying purpose and objectives of the Bankruptcy Code would be adversely affected, looking at the importance of bankruptcy proceedings, the need for centralized proceedings, and the need for expeditious resolution of bankruptcy matters. See generally *RDM Sports Group, Inc. v. Equitex, Inc.*, 260 B.R. 905 (Bankr. N.D. Ga. 2001); In re United States Lines, Inc., 197 F.3d 631 (2nd Cir. 1999).

E. Equitable Subordination

Bankruptcy Code Section 510(c) has now codified the power of bankruptcy courts "under principles of equitable subordination" to subordinate all or part of a creditor's claim to all or part of another claim. If the subordinated claim is secured, the court may also order that the lien be transferred to the bankruptcy estate (Bankruptcy Code Section 510(c)(2)). The court, however, is not empowered to subordinate the claim to any equity interest in the debtor.

Use of the term "principles of equitable subordination" was intended to incorporate the existing case law of equitable subordination and leave to the courts the continued development of these principles (124 Cong. Rec. H 11,095 (Sept. 28, 1978); S 17,412 (Oct. 6, 1978)). In general claims are subordinated only if the creditor is guilty of inequitable conduct and that conduct resulted in injury to other creditors or conferred an unfair advantage on such creditor. See generally *In re Lazas*, 83 F.3d 306 (9th Cir. 1996); *Allied Eastern States Maint. Corp. v. Miller,* 911 F.2d 1553 (11th Cir. 1990). However, with respect to a creditor that is an "insider" (defined in Bankruptcy Code Section 101(31)), some courts have imposed equitable subordination even in the absence of inequitable conduct by such creditor. See *In re Envirodyne Industries, Inc.*, 79 F.3d 579 (7th Cir. 1996) (holding that § 510(c)(1) authorizes courts to equitably subordinate claims to other claims on a case-by-case basis without requiring in every instance inequitable conduct on the part of the creditor claiming parity among other unsecured general creditors). In some of these cases courts have focused on the insider's responsibility for the debtor's undercapitalization. See *In re Lifschultz Fast Freight*, 132 F.3d 339 (7th Cir. 1997) (holding that in the absence of inequitable conduct, the court cannot subordinate the secured claim of an insider that made a loan to an undercapitalized company. The undercapitalization alone did not constitute "inequitable conduct.").

F. Substantive Consolidation

The bankruptcy doctrine of substantive consolidation has received great notoriety in recent years because of the enormous number of securitization and structured finance transactions that involve the creation of Special Purpose Entities ("SPEs") which are intended to be Bankruptcy Remote Vehicles ("BRVs"), as the principal borrowing or transaction party or parties. In these transactions law firms are called upon to render both "true sale" and "nonconsolidation in bankruptcy" opinions. (A full discussion of these exceedingly long, "reasoned" and highly qualified opinions is beyond the scope of this paper.)

The doctrine of substantive consolidation, which is not expressly provided for in the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure (other than a reference in Bankruptcy Code Section 302(b) with respect to estates of a husband and wife), refers to the power of a bankruptcy court to consolidate the assets and liabilities of separate but related entities, even if the related entities are not all debtors in pending bankruptcy cases. See, e.g., *Alexander v. Compton* (*In re Bonham*), 229 F.3d 750, 765 (9th Cir. 2000) (upholding bankruptcy court's order of *nunc pro tunc* substantive consolidation of debtor's estate and two non-debtor corporations' estates). When substantive consolidation is ordered by a bankruptcy court, the combined assets and liabilities of the consolidated entities are treated as though held and incurred by one entity, including the elimination of all duplicate and inter-entity claims. See, e.g., *In re Owens Corning*, 419 F.3d 195, 205 (3d Cir. 2005), *cert. denied*, 206 WL 1131887 (U.S. May 1, 2006), and *cert. denied*, 2006 WL 210392 (U.S. May 1, 2006) (citing *Genesis Health Ventures. Inc. v. Stapleton* (*In re Genesis Health Ventures, Inc.*); *Chemical Bank New York Trust Co. v. Kheel*, 369 F.2d 845, 847 (2d Cir. 1966). Essentially, the courts entirely disregard the corporate or other organizational forms, so that, for example, a lender that obtained only a pledge of the stock of the borrower's subsidiary in order to have priority in the assets of that subsidiary *vis-à-vis* other creditors of the borrower, would find itself unsecured if the borrower and parent company are consolidated. See *In re Gulfco,* 593 F.2d 921 (10th Cir. 1979); *In re Monarch Egg Corp.*, 1987 U.S. Dist. LEXIS 9997 (W.D. Mo. 1987). This risk is particularly present in cases where "upstream" pledges are given by lower tier subsidiaries of the parent borrower.

The case law concerning substantive consolidation is extensive, complex and somewhat conflicting; although most courts agree that substantive consolidation should be granted "sparingly" and in "rare case[s]" since it can work harsh inequities on the creditors of the respective entities. See *Kheel*, at 847; Bonham, at 764 ("The primary purpose of substantive consolidation is to ensure the equitable treatment of all creditors" (citation omitted)); *In re Owens Corning*, 419 F.3d 195.

The courts' analysis and application of the doctrine is very fact intensive. The older cases set forth long lists of certain factual considerations, the presence of which suggested that the interrelationships of a particular group of related entities were so obscured that they could not be disentangled or otherwise warranted consolidation of the group. See, e.g., *Stone v. Eacho* (*In re Tip Top Tailors, Inc.*), 127 F.2d 284 (4th Cir. 1942) *cert. denied*, 317 U.S. 635 (1942); *In re Vecco Construction Industries, Inc.*, 4 B.R. 407, 410 (Bankr. E.D. Va. 1980). The more recent cases emphasize to what extent the respective creditors relied on the separateness of the entities and whether consolidation would further the goals and policies of bankruptcy reorganizations, essentially balancing the harms and benefits of consolidation, including how difficult and costly would be the untangling of the "affairs of the debtors." See *Union Savings Bank v. Augie/Restivo Baking Co.* (*In re Augie/Restivo Baking Co.*), 860 F.2d

515, 519 (2d Cir. 1988). The presence of upstream pledges by members of a corporate family would seem to indicate that the creditor looked to the creditworthiness of the entire family rather than its individual members, and hence might support a holding that substantive consolidation is proper. But see *In re Owens Corning*, 419 F.3d 195.

IV. CERTAIN BANKRUPTCY ENFORCEABILITY ISSUES INVOLVING SUBORDINATION AND INTERCREDITOR AGREEMENTS

A. "Rule of Explicitness"

As discussed in Part III. A above, interest ceases to accrue on unsecured or undersecured debt once an insolvent debtor files for bankruptcy. In the case of a subordination agreement, unsecured senior debtors seek reimbursement of such non-accruing postpetition interest and postpetition fees from the distributions otherwise made payable to the junior creditor. However, if the language in the agreement defining the senior indebtedness entitled to the benefit of the subordination, is not "explicit" and does not contain specific language to alert the junior creditors of a claim to postpetition interest and fees, senior creditors may find themselves out of luck. For example, the bankruptcy court in *In re Southeast Banking Corp.* held that senior creditors are only entitled to postpetition interest if it is absolutely clear in the language of the agreement that the parties contemplated and agreed to such a result. *In re Southeast Banking Corp.*, 212 B.R. 682, 687 (S.D. Fla. 1997) (holding that the senior creditors were not entitled to postpetition interest because the indentures made no mention of postpetition interest, despite the fact that they contemplated the possibility of bankruptcy.) The court suggested the following language as creating a clear and explicit right to postpetition interest:

> Upon any distribution to creditors of the Company in a liquidation or dissolution of the Company or in bankruptcy, reorganization, insolvency, receivership, or similar proceeding relating to the Company or its property or in an assignment for the benefit of creditors or any marshalling of assets and liabilities of the Company: (1) holders of the Senior Debt shall be entitled to receive payment in full of all Obligations with respect to the Senior Debt (including interest after the commencement of any proceedings at the rate specified in the applicable Senior Debt, whether or not such interest is an allowable claim in any such proceeding) before Securityholders shall be entitled to receive any payment of any Obligations with respect to the Securities....

Id. (quoting *In re Ionosphere Clubs, Inc.*, 134 B.R. 528 (Bankr. S.D.N.Y. 1991)).

Not willing to accept their fate, the senior creditors appealed, arguing that Bankruptcy Code Section 510(a) requires bankruptcy courts to enforce subordination agreements to "the same extent that such agreement is enforceable under applicable non-bankruptcy law" and therefore, the bankruptcy court was in error when it applied the "rule of explicitness." Agreeing with the senior creditors, the Eleventh Circuit certified the question to the Court of Appeals of New York (the applicable state law). The New York Court of Appeals then adopted the same analysis as had the bankruptcy court and held that the "rule of explicitness" was the law of New York, i.e., that under New York law specific language would be required in subordination agreements in order for senior creditors to be entitled to postpetition interest. *In re Southeast Banking Corp*., 688 N.Y.S.2d 484 (1999).

These "rule of explicitness" cases have involved subordination agreements, but many practitioners have worried whether the same rule applies to guaranties. Accordingly, it is now becoming increasingly common for drafters of guarantees to insert in the definition of the "guaranteed debt" language similar to that being inserted into the definition of "senior debt" in subordination agreements. This seems particularly advisable since in substance a subordination agreement might be viewed as a form of suretyship—a third-party pledge of a receivable from a common debtor. See, e.g., California Civil Code Section 2787 which defines a suretyship relationship to be a person "who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor." See also *Sumitomo Trust & Banking Co., Los Angeles Agency v. Holly's, Inc.* (*In re Holly's, Inc.*), 140 B.R. 643 (Bankr. W.D. Mich. 1992); Heileson & Hirsch, *Private Subordination Agreements and the U.C.C.: Is Section 1-209 an Un-Wyse Solution?*, 38 B. Law. 555 (1983). In this connection because of the "suretyship" analogy, most subordination agreements also contain waivers and other provisions similar to those typically found continued in guaranties.

B. Impact of the Reorganization Process on Subordination Agreements

The essence of a contractual subordination agreement is to entitle the senior creditor to a double dividend; i.e., the right to obtain a dividend on its own claim and the right to the dividend the junior is entitled to get on its debt until the senior is paid in full. Typically, the subordination agreements will contain elaborate provisions requiring that the junior creditor's dividend be paid over to the senior creditor. However in the recent *Corestates* case, the senior creditor that waited until after the debtor's plan was confirmed before filing suit in federal district court to require the junior creditor to turn over the amount the junior had received under the confirmed plan learned that it had waited too long. See *Corestates Bank N.A. v. Huls America, Inc.*, 176 F.3d 187 (3rd Cir. 1999).

Essentially, the court, after a very complicated discussion of claim and issue preclusion, held that the senior creditor should have asserted its rights to the dividend by virtue of the subordination agreement during the confirmation process. Both creditors

were active in the case and in fact, the senior creditor had filed an objection to the plan, which was overruled and the senior creditor did not appeal. The court based its holding that the plan confirmation order was "claim preclusion" because the senior creditor could have (and therefore should have) litigated the issue in connection with the plan confirmation. The court stated:

> [W]e believe it clear that the resolution of this dispute conceivably would have impacted upon the debtor's options in crafting a plan that met with Huls's [the subordinating junior creditor's] approval and thereby affected the handling of the bankruptcy estate. If Huls had known that the $600,000 the Reorganization Plan set aside for it was not going to be there "up front," Huls might not have consented to the Plan. Indeed, we cannot overlook that Huls gave up a claim for over $3,000,000 in debt, most of which was secured, in exchange for a cash payment of $600,000. Although junior to CoreStates's, we gather that Huls's largely secured claim had real value and was not simply pie in the sky. Without Huls's consent, UCT [the bankruptcy debtor] might have had a much more difficult time having the Plan confirmed. Likewise, if CoreStates had litigated its rights under the Agreement in the bankruptcy proceeding and lost, it might have fought more strenuously against ultimate confirmation of the Plan, rather than, for example, choosing not to appeal the second confirmation order.

Id. at 204. The lesson of this case is that senior creditors should err in favor of timely asserting their rights under subordination agreements.

C. Subordination Agreement Voting Rights Provisions

Many subordination agreements include provisions that give the senior creditor the right to cast the junior creditor's vote to either accept or reject a reorganization plan in the event the debtor files bankruptcy. Whether these provisions are enforced in bankruptcy is an issue for discussion, because junior creditors argue that enforcement of the voting right provision is inconsistent with the Bankruptcy Code which grants voting rights to holders of claims. See Section 1126(a) (providing that the "holder of a claim ... may accept or reject a plan"). Thus, there is an inherent conflict between Section 510(a), providing that subordination agreements will be enforced in bankruptcy to the same extent they are enforced under nonbankruptcy law, and Section 1126(a). There are bankruptcy court decisions that uphold the enforceability of voting rights provisions primarily holding that the junior creditor has no interest in its claim until the senior creditor is paid in full. See, e.g., *In re Curtis Center Limited Partnership,* 192 B.R. 6458 (Bankr. E.D. Pa. 1996); *In re Inter Urban Broadcasting*, 1994 WL 646176 (E.D. La. 1994). However, in a more recent case, the bankruptcy court did not enforce a voting rights provision on the grounds that it would deprive the junior creditor of benefits under bankruptcy. *In re 203 North LaSalle Street Partnership*, 246 B.R. 325, 331 (Bankr. N.D. Ill. 2000) (stating that "it would defeat the purpose of the Code to allow parties to provide by contract that the provisions of the Code should not apply").

One way a senior creditor can protect itself is to enter into a subordination agreement whereby the junior creditor grants to the senior creditor a security interest in the junior claim to secure the debtor's payment obligation on the senior debt. This security interest holder is recognized as a rightful claimant in bankruptcy (see Advisory Committee Note, F.R. Bank. P. 3001). Rule 3001(e) of the Federal Rule of Bankruptcy Procedure (which governs transfers of claims other than those based on publicly traded debt security) expressly provides that an agreement that transfers claims for security that includes a voting rights provision is effective upon filing with the court (see F.R. Bank. P. 3001(e)(3)). See generally, *Resnick, Subordination Agreement Provisions Shifting Chapter 11 Voting Rights: Can the Senior Creditors Disenfranchise the Juniors?*, 118 Banking L.J. 297 (2001).

D. Clash Between Contractual and Equitable Subordination Rights

An interesting situation arises (as it did in a recent case before a bankruptcy judge in California which was settled before any decision was made) where the bankruptcy trustee attempted to have equitably subordinated to the claims of all of the debtor's creditors, claims that had already been contractually subordinated. Although no reported case was found which deals squarely with a clash between contractual and equitable subordination rights, the senior creditor ("Senior Creditor") made four arguments, next summarized, in order that it not be stripped of the rights it gained under the subordination agreement:

1. As recently stated by the 9th Circuit, the court must make three findings before equitable subordination of a claim will be ordered: (1) that the holder of the claim to be subordinated engaged in some inequitable conduct; (2) that the conduct resulted in some injury to other creditors or conferred an unfair advantage on the holder of the claim; and (3) that subordination would not be inconsistent with the provisions of the Bankruptcy Code. *In re Lazas*, 83 F.3d 306, 309 (9th Cir. 1996). Assuming *arguendo* that findings (1) and (2) could be made in this case, finding (3) clearly could not because the subordination would directly contravene section 510(a) which requires bankruptcy courts to enforce contractual subordination agreements provided only that they are "enforceable under applicable nonbankruptcy law."

2. Since equitable subordination is a doctrine based on equitable considerations, the issue in any event will turn on the court's weighing of the equities. The absence of knowledge or misconduct by the Senior Creditor will bear heavily on that determination. Moreover, the clear purpose of equitable subordination is to deny a claimant the benefit of its misconduct. That purpose would not be served by denying the Senior Creditor, an innocent creditor, the benefit of its contractual subordination agreement. (See *In re WT Grant Co.*, 699 F.2d 599, 604 n.7 (2d Cir. 1983), *cert. denied*, 104 S.Ct. 89.)
3. In exercising their equitable powers, bankruptcy courts are solicitous of and protect the property rights of innocent creditors. That is evident in the context of substantive consolidation of separate companies — a doctrine which is based on the equitable power of the bankruptcy court. The cases are clear that substantive consolidation does not deprive an innocent secured creditor of its rights in collateral (see *FDIC v. Hogan*, 593 F.2d 921 (10th Cir. 1979); *In re Tureaud*, 59 B.R. 973 (N.D. Okla. 1986) *aff'g* 45 B.R. 658), or deprive an innocent creditor of the benefit of an intercorporate guaranty (see *In re Donut Queen, Ltd.*, 41 B.R. 706, 711 (Bankr. E.D.N.Y. 1984)). Similarly, equitable subordination in this case should not deprive the Senior Creditor of its rights under the subordination agreement.
4. Since the subordination agreement can be regarded as an equitable assignment to the Senior Creditor of the loans that the subordinating debtor made to the bankruptcy debtor, any "rights" that the Trustee might obtain by means of the doctrine of equitable subordination should not, under legal principles which have been applied in analogous factual situations, affect the Senior Creditor's right to the dividend payable on the "assigned" loans. (The cases construe subordination as granting, variously, equitable assignments (see *In re Handy Andy Community Stores, Inc.*, 2 F. Supp. 97 (W.D. La. 1932)), equitable liens (see *In re Searle v. Mechanics' Loan and Trust Co.*, 249 F.942 (9th Cir. 1918)) or constructive trusts (see *In the Matter of Dodge – Freedman Poultry Company*, 148 F. Supp. 647 (D.N.H. 1956)). Specifically, under the circumstances of this case the Trustee's attempted equitable subordination of the subordinating creditor's claims because of its alleged misconduct would be the equivalent of the Trustee's assertion of a defense or offset based on that misconduct. The net effect would be the same: the subordinating debtor would recover nothing. Yet under California law, once notice of an assignment is received by the obligor, the obligor is barred from asserting a subsequent claim or offset (other than a claim in the nature of recoupment). (See California Code of Civil Procedure Section 368, California Civil Code Section 1459, and California Commercial Code Section 9404(a)(2) (applicable to certain security assignments); see also *Orbaun v. First National Bank of Cloverdale*, 215 Cal. 72 (1932).) In this case the bankruptcy debtor not only received notice of the subordinating creditor's assignment of its right to a dividend on the assigned claims, it expressly agreed to the provisions of the subordination agreement which effected the assignment.

E. "Bankruptcy Provisions" in Intercreditor Agreements

Unlike the subordination agreements discussed in sections IV. B, C and D above wherein debt is being subordinated to other debt, in the typical intercreditor agreement the creditors with liens in shared collateral agree *vis-à-vis* each other as to which has priority, *i.e.*, lien subordinations. These arrangements can range from simple fixed liens on specific items of collateral (personal property and/or real property), to more complicated transactions such as a borrower that has (i) a revolving credit lender secured by a "borrowing base" of inventory and receivables and other assets of the borrower, and (ii) a term lender secured by liens on real estate and certain other assets of the borrower. Historically, drafters of intercreditor agreements have given little thought to the intricacies of the bankruptcy reorganization process and the various notice, approval or objection rights that the respective creditors have with respect to such matters; and have not attempted to deal with the cash collateral usage, replacement lien and DIP financing concepts, which are discussed in sections II.B and C above. Two typical provisions, taken from different forms, simply provide:

> **Form 1: Effect of Bankruptcy**. This Agreement shall be and remain enforceable not withstanding any bankruptcy or other insolvency proceeding by or against Debtor.
>
> **Form 2: Effect of Bankruptcy Borrower**. This Agreement shall remain in full force and effect notwithstanding the filing of a petition for relief by or against Debtor under the United States Bankruptcy Code and shall apply with full force and effect with respect to all of the Senior Creditor Collateral acquired by Debtor, and to all additional Senior Creditor Indebtedness incurred by Debtor, subsequent to the date of said petition.

Form 2 seems to be slightly better than Form 1 for use in more complicated intercreditor arrangements, in that it at least refers to collateral acquired and indebtedness incurred after bankruptcy occurs. However, depending upon which creditor one represents and the relative bargaining power of the creditors, one should consider using forms such as Forms 3 and 4 set forth below. While these two forms attempt to anticipate and deal with the reorganization process, like the subordination agreement vot-

ing rights provisions discussed in section IV.C above, the provisions in these two forms may themselves not be fully enforceable, or may need to be timely raised, in the bankruptcy proceeding:

Form 3: [Junior Creditor's lien in shared collateral is completely subordinated to Senior Creditor's lien (heavily slanted in favor of Senior Creditor)].

Bankruptcy Financing Issues. This Agreement shall continue in full force and effect after the filing of any petition for relief by or against the Debtor under the United States Bankruptcy Code (the "Code") and all converted or succeeding cases in respect thereof (all references herein to the Debtor being deemed to apply to the Debtor as debtor-in-possession and to a trustee for the Debtor), and shall apply with full force and effect with respect to all Collateral acquired by the Debtor, and to all Senior Creditor Indebtedness and Junior Creditor Indebtedness incurred by the Debtor, subsequent to such filing. If the Debtor shall become subject to a proceeding under the Code, and if the Senior Creditor shall desire to permit the use of cash collateral by the Debtor or to provide post-petition financing from the Senior Creditor to the Debtor, Junior Creditor agrees as follows: (1) adequate notice to Junior Creditor shall be deemed or have been provided for such use of cash collateral or such post-petition financing if the Junior Creditor receives notice thereof at least three (3) Business Days prior to the earlier of (a) any hearing on a request to approve such use of cash collateral or such post-petition financing, or (b) the date of entry of an order approving the same; and (2) no objection will be raised by the Junior Creditor to any such use of cash collateral or such post-petition financing from the Senior Creditor on the grounds of a failure to provide adequate protection for the Junior Creditor's Junior Lien, provided that the Junior Creditor is granted a comparable Junior Lien on the post-petition Collateral. No objection will be raised by the Junior Creditor to the Senior Creditor's motion for relief from automatic stay in any such proceeding to foreclose on, sell or otherwise realize upon the Collateral.

Form 4: [Priority of liens in shared collateral allocated between the Creditors (neutral—with ABC being assumed to be the revolving lender with its primary liens on working capital collateral, and XYZ being assumed to be the term lender with its primary liens on fixed assets)]

Bankruptcy Issues

(a) Except as provided in this Section __, this Agreement shall continue in full force and effect after the commencement of a case under the United States Bankruptcy Code ("Code") and all converted or succeeding cases in respect thereof ("Bankruptcy Case") (all references hereinto to Debtor being deemed to apply to Debtor as debtor-in-possession and to a trustee for Debtor's estate in a Bankruptcy Case), and shall apply with full force and effect with respect to all Collateral acquired by Debtor, and to all ABC Claims and XYZ Claims incurred by Debtor, subsequent to such commencement.

(b) If Debtor shall become subject to a Bankruptcy Case, and if ABC shall desire to permit the use of cash collateral or to provide post-petition financing to Debtor, XYZ agrees as follows: (i) adequate notice to XYZ shall be deemed to have been provided for such use of cash collateral or such post-petition financing if XYZ receives notice thereof at least three (3) business days prior to the earlier of (a) any hearing on a request to approve such use of cash collateral or post-petition financing, or (b) the date of entry of an order approving the same; and (ii) no objection will be raised by XYZ to any such use of cash collateral or such post-petition financing by ABC on the grounds of a failure to provide adequate protection for XYZ's junior liens and security interests in the ABC Collateral, provided that: (y) XYZ is granted the same rights, benefits, and protections as ABC, including the same liens and security interests on the post-petition ABC Collateral, that may be granted to or for the benefit of ABC, junior only to the liens or security interests of ABC therein and (z) the aggregate principal amount of any such post-petition ABC Claims taken together with the principal amount of any pre-petition ABC Claims in existence on the date of the commencement of the Bankruptcy Case shall not exceed the greater of ________ Dollars ($_______), or such amount as shall have been approved by XYZ as "ABC Claims" and be in effect as of the date of the commencement of the Bankruptcy Case. No objection will be raised by XYZ to ABC's motion for relief from the automatic stay in any proceeding under the Bankruptcy Code to foreclose on, sell or otherwise realize upon the ABC Collateral.

(c) If Debtor shall become subject to a Bankruptcy Case, and if XYZ shall desire to permit the use of cash collateral arising out of the XYZ Collateral, ABC agrees as follows: (i) adequate notice to ABC shall be deemed to have been provided for such use of cash collateral arising out of the XYZ Collateral if ABC receives notice thereof at least three (3) business days prior to the earlier of (a) any hearing on a request to approve such use of cash collateral arising out of the XYZ Collateral, or (b) the date of entry of an order approving

(Continued on Page 33)

FLIGHT WATCH

Alan Armstrong

Airline's ASAP Reports Are Discoverable Says District Court

The case arose out of the attempt of an air carrier flight crew to depart from the wrong runway. The aircraft crashed. One of the passengers brought an action against the airline for negligence and attempted to obtain discovery of ASAP reports filed by the pilots with the airline identifying safety hazards or infractions. Among the data contained in the ASAP reports was information about runway incursions and runway events. For that reason, the plaintiff took the position that the contents of the ASAP reports were relevant and discoverable.

The airline filed a motion for protective order alleging that the ASAP reports could not be discovered. The motion was heard by a federal magistrate who was dealing with discovery issues rather than a federal district court judge. The magistrate judge found that the ASAP reports were discoverable and were not protected or privileged. The airline then took the matter up with the federal district court judge. The judge found that the airline had not carried its burden of proof and shown that the decision of the magistrate judge requiring disclosure of the ASAP reports was a clearly erroneous decision. The airline argued that if ASAP reports can be discovered in civil litigation, then the program will "wither and die." The district court judge told the airline that it should make its policy arguments to the Federal Aviation Administration or to the United States Congress. This is true because the FAA has authorized disclosure of ASAP data in air carrier negligence cases. The airline argued that 14 C.F.R. Part 193 protected disclosure of the ASAP reports, but the district court judge found that those protections only applied to federal agencies in the event ASAP report data is sought to be disclosed to the public. In this particular case, the contents of the ASAP data would not be publicly disclosed, since a confidentiality order had been entered preventing disclosure of the information to the public.

Air Crash at Lexington, Ky., Aug. 27, 2006, 545 F.Supp. 2d 618 (E.D. Ky. 2008).

Note: insofar as the author knows, this is a case of first impression, the author being unaware of any situations where ASAP reports have previously been disclosed in civil litigation. If any of the readers of Flightwatch are aware of a previous case involving this issue, please contact the author.

Air Show Crash Is Troublesome for Air Show Promoters, Producers and Insurance Companies

The case involved a 38 year-old pilot who crashed his experimental aircraft after stalling it on takeoff. He crashed on the runway and the aircraft quickly caught fire. Bystanders attempted to put out the fire with fire extinguishers, but the pilot could not be freed from the aircraft. Apparently, volunteer firefighters arrived within five minutes after the crash, but by the time they arrived and turned on the water hoses, the pilot was engulfed in flames. The pilot was survived by his wife and five children. Although he was retired, the pilot worked as a software consultant and had earned $100,000 in the six months prior to his death. His estimated loss of future income was valued at $5.2 million.

The wife of the deceased pilot sued the Experimental Aircraft Association chapter which hosted the event as well as its parent organization (EAA). In the action, the widow claimed there was negligence in (1) failing to adequately respond to the accident, (2) failing to provide safe and adequate fire, rescue and emergency response services, and (3) failing to provide a properly-trained fire crew with adequate equipment. The EAA and EAA chapter sponsoring the event claimed that the pilot was responsible for his own death because he stalled his aircraft and departed control to flight.

The jury found for the widow and apportioned liability at 45% for the sponsoring EAA chapter, 40% for the EAA, and 15% for a non-party. The jury awarded the widow $10.5 million including $3 million for economic loss, and $1.5 million for loss of consortium, together with $600,000 for each of the deceased pilot's five children. Because a non-party with 15% liability was not available to respond to the damages, the verdict was reduced to $8.93 million.

The case involved some notable experts. The experts for the plaintiff were Lowell Bassett, economics, Seattle, Washington; and James Nilo, airport rescue and firefighting, Richmond, Virginia. The experts for the defendants included Don Sommer, aviation and aircraft operations, Broomfield, Colorado; William Skilling, economics, Seattle, Washington; and William Partin, economics, Bellevue, Washington.

Estate of Corbitt v. Experimental Aircraft Assn., Washington, Snohomish County Superior Court., No. 03-2-05008-1, Jan. 9, 2007.

Commuter Aircraft Crash One Mile Short of Runway

The case involved the crash of a commuter aircraft attempting to land during low visibility. The aircraft struck some trees crashing one mile short of the runway. The plaintiff, Dr. Krogh was a professor of Osteopathic Medicine who incurred between $100,000 and $200,000 in past medical bills, and the amount of his future medical bills was not specified. He was diagnosed and evaluated with a

24% disability rating by Worker's Compensation and claimed lost wages which were not specified as to amount.

The Plaintiff contended that the pilots (who with eleven passengers died in the aircraft crash) violated the "sterile cockpit rule" under Federal Aviation Rules 121.542 and 135.100. It was further asserted that the pilots were likely fatigued due to their lengthy flight schedule before the crash. The Defendants denied any liability, but the case settled for a confidential amount. The Plaintiff was represented by Jerome Skinner, Esq. and Orla Brady, Esq. of Nolan Law Group in Chicago, Illinois.

Krogh v. Corp. Airlines, Inc., U.S. Dist. Ct., E.D. Mo., No. 4:05-cv-00729, Oct. 17, 2006.

DVT-INDUCED STROKE/SETTLEMENT

Ms. Menditto was a 69 year old woman who felt dizzy and experienced numbness and pain while attempting to disembark a flight. She also had paralysis on the right side of her face. She sought help from the airline crew, and she was told to sit down while the crew called for emergency transportation. The process of disembarking the aircraft continued.

After several minutes, paramedics arrived to assist the woman who is now aphasic. Ms. Menditto claimed the crew failed to tell the paramedics about her symptoms. She further claimed that as a result of the failure of the crew, the emergency personnel who attended her could not tell the emergency physician at the hospital the full extent of her symptoms. She further claimed that had the doctor been given an accurate medical history, then he could have given her medication that would have ameliorated the effects of her deep vein thrombosis-induced stroke. Ms. Menditto suffered permanent partial paralysis and spent about $50,000 in medical expenses.

She sued the airline under Article 17 of the Warsaw Convention, 49 U.S.C. §1502 (note) alleging that she was the victim of an "accident" and that the accident caused her injury. She argued that her medical problem was an unexpected event and was therefore an "accident" under the Warsaw Convention.

The airline contended that there was no "accident" under the Warsaw Convention because the deep vein thrombosis-induced stroke was internal, and it was not external to the plaintiff. The airline also claimed there was no accident because nothing abnormal or unexpected occurred during the flight that would have caused the stroke.

The case was settled for $75,000.

Menditto v. British Airways, PLC., U.S. Dist. Ct., N.D. Cal., No. 3:04-cv-04896, Apr. 12, 2007.

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Alan Armstrong is engaged in the general practice of law with an emphasis in the following areas: Aviation Matters, Personal Injury, Professional Negligence (Malpractice), Products Liability.

Phone: (770) 451-0313.
Fax: (770) 451-0317.
Email: alan@alanarmstronglaw.com/
Website Addresses:
www.alanarmstronglaw.com/
www.flyingtigersfilm.com/

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BLACK-ROBED JUSTICE

Jacob Rosenbaum

Jacob (Jay) Rosenbaum is a former president of LPBA and served as Editor of the Journal for 14 years. He is retired counsel with the law firm of Tucker Ellis & West LLP of Cleveland, Ohio, whose offices serve as publisher of the LPBA Journal. He was admitted to the New Mexico bar in 1951.

The material for this article was gathered from a book by Arie W. Paldervaart published by the New Mexico Historical Society in 1948, covering the period 1846-1912.

INTRODUCTION

With all the controversy over constitutional rights of defendants, the inordinate delays of court proceedings, the massive expense of litigation and the conduct of attorneys, a look should be taken back at some of the judicial proceedings of yesteryear that took place in the southwest (particularly New Mexico) prior to statehood and how courts and lawyers handled matters in the days of Billy the Kid and the days of the old (then new) frontier — or as our Editor would put it, "Circumnavigating the Build-Ups" before the invention of the airplane.

EXCERPTS

During efforts being made to gain admission for New Mexico as a state, an attorney's fiery disposition caused him to become a rather severe critic of a judge who happened to be this leader of the opposition party. He not only verbally attacked the judge with speeches and conversations throughout the territory but filed charges with the military governor asking for his removal from office. When the judge learned of this, he immediately sent a subtly worded challenge for a duel. The attorney accepted the challenge and the duel took place. A second rushed in to stop the duel proceedings and to induce the attorney to apologize, who then exclaimed, "I'll apologize as far as being sorry is concerned but I can't take back what I said about the judge." The judge was willing to accept this as an apology, but said that if the attorney ever insulted him on the bench he would shoot to kill.

In 1865, a judge authorized confiscation of property from confederate sympathizers. A newspaper commenting on the decision wrote, "His acts are without a parallel in our judiciary and have but one in the world, that of Lord Jeffrey during the bloody assizes. The authority for such an unwarranted usurpation of power can only exist in the mind of the learned judge for it cannot be found in the books." A petition in the legislative assembly addressed to the President of the United States seeking the judge's removal claimed an excessive partisanship for Andrew Johnson, and by having proved himself incompetent through illegal and erroneous judgments in many of his decisions, the judge was removed by President Grant.

After his death in 1877, the historian Ralph Emerson Twitchell wrote:

> All-in-all he was a fairly good man. He had his faults, but they were not glaring. He tried to do his duty as a judge and if he failed it was purely through his lack of legal knowledge and not with an intention to willful wrong any man.

When a judge involved himself in a controversy involving the Bishop of Santa Fe over the appropriation of the use of a chapel for civil proceedings, the judge announced he would have both the Bishop and his right hand man hang from the same jibbut. The morning after these indiscreet remarks, great indignation was seen through the city. A petition was circulated and signed by over a thousand residents (both Catholics and Protestants) asking for the release of the church property. A mob assembled in front of the judge's home and the judge called upon military authorities for protection. The prelate and a subordinate officer from the post stood between the mob and the judge who finally begged for mercy and promised to do justice. In the evening the judge called on the Bishop and apologized for his indiscretion and the next day in open court returned the chapel to the Bishop. The judge went to Washington, D.C., interceded with President Fillmore asking that he not be removed, but President Franklin Pierce on his inauguration terminated the judge.

Although during the Civil War there was much sentiment for the South, a judge, Kirby Benedict, appointed by President Lincoln as Chief Justice of the New Mexico Supreme Court, was such a master of satire, sarcasm and ridicule, that when it came to pronouncing sentence upon a convicted murderer in a case that showed utmost brutality, Judge Benedict issued the following historic sentence:

> JOSE MARIA MARTIN, stand up! Jose Maria Martin, you have been indicted, tried and convicted by a jury of your countrymen of the crime of murder, and the court is now about to pass upon you the dread sentence of the law. As a usual thing, Jose Maria Martin, it is a painful duty for the judge of a court of justice to pronounce upon a human being the sentence of death. There is something horrible about it, and the mind of the court naturally revolts from the performance of such a duty. Happily, however, your case is relieved of all such unpleasant features and the Court takes positive

> delight in sentencing you to death!
>
> You are a young man, Jose Maria Martin — apparently of good physical condition and robust health. Ordinarily you might have looked forward to many years of life, and the Court has no doubt you have, and have expected to die at a ripe old age; but you are about to be cut off in consequence of your own act. Jose Maria Martin, it is now springtime. In a little while the grass will be springing up green in these beautiful valleys, and on these broad mesas and mountainsides flowers will be blooming; birds will be signing their sweet carols, and nature will be putting on her most gorgeous and her most attractive robes, and life will be pleasant and men will want to stay, but none of this for you, Jose Maria Martin. The flowers will not bloom for you, Jose Maria Martin; the birds will not carol for you, Jose Maria Martin; when these things come to gladden the senses of men, you will be occupying a space about six by two beneath the sod, and the green grass and those beautiful flowers will be growing above your lovely head.

The same judge in making a charge to the grand jury made a particular point of covering the subject of gambling, giving a most definite and specific charge to investigate fully all cases of gambling brought before it. The grand jury began its work and every lawyer in attendance at that term of court was indicted for gambling, including the judge himself. As the lawyers were brought in to plead, they pleaded guilty for the most part as the easiest way out and were in each case assessed a $50 fine and costs. Finally the sheriff called Judge Benedict for gambling, who stood up and said in a loud voice “guilty — and the court assesses a fine at $50 and costs.” That settled the matter and the guilty lawyers saw no way out of making payment of their fines.

Judge Benedict also practiced law in the territory and in presenting a motion to a judge made a remark reflecting upon the intelligence of the court. The judge admonished him, “Sit down, you are drunk.” Benedict replied, “That is true, but I am surprised that your honor is enabled to make so correct a decision.” On another occasion, Benedict resumed an argument with a judge and the judge ordered the sheriff to adjourn court, stepped down from the bench, grabbed Benedict by the collar and proceeded to administer a good thrashing. Benedict apologized, the court reopened and Benedict completed his argument upon the motion.

MILITARY JUSTICE

Military rule followed the Civil War and caused much conflict between the civil and military authorities.

A judge got into a conflict with military authority and was held in the guardhouse for three days. A judge desiring to travel out of the territory was also harassed by the military. The judge expressed his resentment toward military domination of the territory and in 1864 and 1865 refused to hold a term of the district court and of the supreme court. A brigadier general threatened a U.S. Marshall with death if he attempted to serve a writ of replevin issued by the court. Because of his interference with the civil administration, the general was removed from his command.

A general who was named military governor was later appointed chief justice of the New Mexico Supreme Court. In one of his first important cases he held that Pueblo American Indians were citizens of the United States and his decision was sustained on appeal to the U.S. Supreme Court. Another chief justice had an encounter with an attorney about whom the chief justice made some slurring statements. The attorney requested a retraction. Instead of giving any sign of retraction, the judge reached for his derringer; the attorney observing this move drew his firearm and shot, killing the judge instantly. The attorney was tried for murder but was acquitted on the ground of acting in self defense.

Another chief justice held that “whipping” was not a cruel and unusual punishment for the crime of stealing mules:

> All punishment is more or less cruel, and the kind of punishment to be inflicted upon criminals to induce reformation and repress and deter the thief from a repetition of his larcenies has generally been left to the sound discretion of the law-making power. In old communities where law and order prevail, and some security exists for property in the honesty of the people, the mild remedy of imprisonment for theft is usually adopted, but in new countries without jails, with many opportunities for thieves to steal and escape with their plunder, and no secure jails in which to confine them when convicted, a pressing necessity for the adoption of the punishment of whipping for the offense of larceny exists.

When one sees the daily criticism of judges in the newspapers, it is refreshing to see the following comment from a daily newspaper about a Chief Judge Palen (no relation to the Governor of Alaska):

> The purpose of the men who secured the passage of the bill is to annoy, injure, and weaken the influence of Judge Palen . . . The action of the legislature is an insult to the judiciary, a violence to the interests of the Territory and a severe blow to the pure and untrammeled administration of the laws.

Later, a chief justice, in 1879, believed in speedy justice. On Friday morning of one week, the grand jury brought in an indictment for murder. The defendant was immediately

arrested and his trial went on in the afternoon of that same day. The trial continued Friday night until 11:30 and throughout the day Saturday. The jury returned a verdict of guilty of murder Saturday evening, with a sentence of seven years imprisonment prescribed.

Another example of speedy justice in a criminal case, the entire trial took only 2 1/2 days, and although the evidence showed an outlaw was riding his horse into hotels, stores and dining rooms, forcing merchants to perform menial services and of stirring up his drinks with a revolver, the defendant, a deputy sheriff who killed the colorful desparado[1] was acquitted of murder.

In another picturesque trial a few months later, there was an indictment of five Indians charged with stealing a flock of sheep. The Indian's testimony claimed that the sheep were wandering upon the Laguna Pueblo lands. Failing to locate their owner, the governor of the Pueblo ordered five of his braves to bring the animals into the village. At the trial, a dozen Indians appeared bedecked in full Indian costumes. A feature of the trial was a complicated language problem which required double interpreting of every question and answer first from English to Spanish and then Spanish to the Laguna language and vice versa. The defendants were convicted; the judge declined to grant a motion for new trial but imposed the least penalty possible — a fine of $10 on the governor of the Pueblo. Thereupon the attorney general obligingly nolled the cases against the other four defendants.

LANGUAGE BARRIERS

A case involved a trial of an accused murderer before a jury who did not speak English. The court provided an interpreter who immediately translated all responses and other matters before the court into Spanish for the benefit of the jury. The defendant was convicted and on appeal claimed prejudice since he spoke and understood only Spanish. The court said that no law required the jury to be English speaking and that since the proceedings were translated into Spanish by a sworn interpreter, the jury had a full understanding of the case. Another case involved a jury half of which could speak only English and one-half only Spanish. The court provided an interpreter who was sent into the jury room. Since the defendant's attorney could not prove that his client was prejudiced by having an interpreter with the jury, the court upheld a guilty verdict.

CHURCH AND STATE

Even separation of church and state came before the New Mexico court in 1875 when the legislature passed an act to incorporate the society of Jesuit Fathers of New Mexico. The governor cited legal objections, vetoed the act, and it was passed over the governor's veto. Instead of appealing to the courts, the matter was appealed to the Congress of the United States which had authority to annul acts of territorial legislatures and Congress disapproved the act in 1879.

In a case involving a private detective who had persuaded someone to commit a crime and then later testified against him, when giving jury instructions the judge commented:

> "This man Brown comes on the stand and tells you he is a detective. I want to tell you gentlemen that detectives, as a class are scoundrels, entirely unworthy of belief and this man Brown here, is the worst of the whole lot I have ever seen."

Needless to say, the jury rendered a verdict of acquittal.

The same judge presided in another case where a man was about to lose a farm and who was not represented by counsel. Seeing that the case would go against the poor man, the judge descended from the bench and began cross examining with the stinging remark that "[i]t takes 13 men to steal a poor boy's farm in New Mexico." On conclusion of the evidence, he instructed the jury to find a verdict on behalf of the defendant. The jury announced a disagreement, so the judge discharged the jury and announced a verdict on behalf of the defendant. As you can see, that judge was fearless, and in another criminal trial as he commenced proceedings, he was warned that he would not leave the trial alive if he dared sit in that criminal case. However, he opened the case and ordered the sheriff to search all of the court attendants, spectators and officers alike before proceeding with the trial. Forty-two revolvers were collected by the sheriff when the search was concluded; each person with a weapon was fined $10 for contempt and the fines were actually collected.

With Statehood in 1912 for New Mexico and Arizona, much less colorful trials and characters appeared in courts. The last case decided by the Territorial Supreme Court involved a land dispute and the court adjourned with a clean docket.

Endnotes

1 The desperado in this case was named David Crockett — no relation to the Tennessean made famous in the song.

WHY DIDN'T THE COURT ENFORCE

(Continued from page 28)

> the same; and (ii) no objection will be raised by ABC to any such use of cash collateral arising out of the XYZ Collateral by XYZ on the grounds of a failure to provide adequate protection for ABC's junior liens and security interests in the XYZ Collateral, provided that ABC is granted the same rights, benefits, and protections as XYZ, including the same liens and security interests on the post-petition XYZ Collateral, that may be granted to or for the benefit of XYZ, junior only to the liens or security interests of XYZ therein. Subject to Section __[Section of Intercreditor Agreement enabling ABC as revolving lender to use XYZ's fixed asset collateral in connection with ABC's foreclosure remedies], no objection will be raised by ABC to the XYZ's motion for relief from the automatic stay in any proceeding under the Bankruptcy Code to foreclose on, sell or otherwise realize upon the XYZ Collateral.

PROTECTED CONCERTED ACTIVITY:

RIGHTS OF EMPLOYEES IN A UNION-FREE WORKPLACE

Kenneth D. Stein and Michael W. Duffee

Kenneth D. Stein is the managing partner of the New York City office of Ford & Harrison LLP and represents management in all aspects of labor relations, fair employment practices, benefits and immigration law.

Mr. Stein received his J.D. degree from the University of Michigan Law School, and served with the NLRB for two years. He is past chair of the Committee on Labor Arbitration and Collective Bargaining of the New York State Bar Association's Labor and Employment Law Section, as well as a member of the Equal Employment Opportunity and the Development of the Law Under the NLRA Committees of the American Bar Association's Labor and Employment Law Section, and a past member of the Committee on Professional Responsibility of the New York City Bar Association.

Michael W. Duffee is a partner in the Chicago office of Ford & Harrison LLP. He represents management in all aspects of labor and employment law, and specifically in collective bargaining and NLRB litigation. He is a 1977 graduate of Northwestern University School of Law.

Imagine this. You are the CEO of a non-union company that manufactures medical equipment and supplies. Today's mail included a charge at the National Labor Relations Board ("NLRB" or "Board") asserting that a number of your disciplinary actions violated the National Labor Relations Act, as amended ("NLRA" or "Act").[1]

1. Discipline of an employee for discussing his compensation with a co-worker for violation of a rule forbidding "discussing or divulging confidential employer information with a co-worker without the need to know or a third party."
2. Termination of an employee during a union organizing campaign for abusing a fellow employee in violation of the rule stating, "Employees using abusive or foul language, or who engage in threatening, abusing, or harassing conduct directed to their co-workers or customers shall be subject to discipline up to and including termination."
3. Discipline of employees for failure to keep confidential an internal sexual harassment investigation as required by its handbook provision stating, "All investigations of sexual harassment claims are to be regarded as confidential, and employees should refrain from discussing them." The employees, following the filing of an internal complaint of sexual harassment by a female employee, had been overheard in the break room discussing the nature of her allegations and how the accused had harassed other women too.
4. Termination of an employee who had written an anonymous letter to the local newspaper complaining about the poor quality of your products and increased workload, and urging that readers purchase from your competitor until the company "gets its priorities straight." Your recent financial problems had caused you not to fill certain job vacancies and to defer purchasing expensive new equipment. When you saw the letter, you tracked down the writer and fired her.

You are shocked when your lawyer tells you that you may have violated the Act, and may be liable for reinstatement and backpay.

In today's workplace where employment-at-will is the rule, and unions represent about seven percent (7%) of the private sector workforce, employers tend not to realize that aspects of the National Labor Relations Act apply with equal force to the union-free workplace and are not limited solely to the unionized environment. Far more pressing to these employers are concerns involving federal and state equal employment laws, wage and hour laws, or wrongful discharge litigation which receive greater publicity and can add significant expense to a company's budget.

Law

Section 7 of the NLRA[2] protects employees' right to engage in concerted activity for the purposes of forming unions, engaging in collective bargaining, or for "other mutual aid or protection." Section 7 rights, *viz.*, the right to form a union and to engage in collective bargaining are relatively clear; employer interference with those rights violate Act § 8(a)(1) of the Act. However, § 7 rights, although commonly associated with unionization, also protect unorganized employees protesting working conditions, complaining about the quality of heath insurance or staffing levels, or raising job safety concerns, among other workplace issues even if there is no union in the picture.

To be protected by law, the Act generally requires "concerted" activity to involve the actions of two or more employees regarding a particular issue; the Board has ruled that actions of an individual employee can be "concerted" where the employee purports to act on behalf of other employees, see, *e.g., American Red Cross,* 322 N.L.R.B. 590 (1996)

(employee protest of employer travel requirements); *Guardian Industries*, 319 N.L.R.B. 542 (1995) (employee objections to drug testing of co-workers). This is also true where the employee has invoked a right under a union contract, *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984).

The Board is frequently called upon to determine whether employer work rules unlawfully interfere with its employees' Section 7 rights to discuss matters of mutual concern, such as wages, hours and working conditions. In *Republic Aviation v. NLRB*, 324 U.S. 793 (1945), the Supreme Court recognized a tension exists between the balancing of employee rights to self-organize or engage in activities for "mutual protection," and their employer's right to adopt rules of employee conduct in order to maintain discipline in the workplace.

The Board in *Lafayette Park Hotel*, 326 N.L.R.B. 824 (1998), held that this balance would depend upon "whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." (*Id*. at 825). If so, the employer's rules will be held facially unlawful. In *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004), this test was further refined. Even if a rule does not explicitly forbid conduct protected by Section 7, it could still be unlawful if "(1) employees would reasonably construe the language of the rule to prohibit Section 7 activity, (2) the rule was promulgated in response to union activity, or (3) the rule has been applied to restrict the exercise of Section 7 rights."[3] Although the Board has stated that under this analysis it will not give a rule an "unreasonable reading" and will "not presume improper [employer] interference with employee rights," (*id*. at 646), often in considering the validity of various work rules, the Board appears willing to read much into an employer's work rules when finding a violation. *Lafayette Park* cases tend to fall into four categories: workplace confidentiality: policies against harassing or abusive conduct; public disparagement of the employer; and access to the employer's premises by off-duty employees.

Confidentiality Rules.

Employers often adopt rules forbidding employees to discuss or divulge certain confidential employer or employee information, including employee compensation. The Board concluded years ago that any employer rule explicitly prohibiting employees from discussing each other's wages or working conditions is facially unlawful. In *Flamingo-Hilton-Laughlin*, 330 N.L.R.B. 287 (1999), the Board ruled unlawful a rule which forbade any employee from "reveal[ing] confidential information regarding our customers, fellow employees or Hotel business," reasoning it could be construed as exposing employees to discipline for talking with each other about their wages or working conditions. *See also, Northeastern Land Services, Ltd.*, 352 N.L.R.B. No. 89 (2008) (rule precluding employees from discussing compensation with "other parties" unlawful because it could be construed to forbid employee discussions with union organizers); *Double Eagle Hotel & Casino*, 341 N.L.R.B. 112 (2004), *enforced*, 414 F.3d 1249 (10th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006) (rule providing that "personal information concerning individual employees" — which specifically included salary information — "should not be discussed with members of your own group" held unlawful).

Where, however, a rule does not facially restrict employee discussion of wages or working conditions, the Board has a more difficult time in finding that the employer has violated the Act. In *Lafayette Park*, the handbook provision precluded employees from "[d]ivulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information." Rejecting the union's argument that the rule punished employee discussion of wage or compensation data, the Board found no violation reasoning that the rule appeared only to forbid disclosure of private hotel guest information, trade secrets, supplier contracts and other types of proprietary information; and the employer had a legitimate interest in maintaining the rule. However, in *Community Hospitals of Central California*, 335 N.L.R.B. 1318 (2001), *rev'd*, 335 F.3d 1079 (D.C. Cir. 2003)), the Board held that a handbook rule which precluded "disclosure of confidential information concerning patients or employees" was "unlawfully broad because it could reasonably be construed by employees to prohibit them from discussing information concerning terms and conditions of employment." (*Id*. at 1322). On appeal, the court reversed finding that a "reasonable employee would not believe that a prohibition upon disclosing information acquired in confidence 'concerning patients or employees' would prevent him from saying anything about himself or his own employment." (*Id*. at 1089).

Investigations.

Most employers, in observance of EEOC regulations concerning investigation of claims of unlawful harassment and to limit defamation claims, have implemented policies requiring employees to keep confidential the details of internal harassment investigations as well as on-going investigations of matters such as employee theft or drug use. The Board is typically loathe to sanction such broad prohibitions, recognizing that employees have a right to discuss disciplinary matters involving other employees. For example, in *Lockheed Martin Astronautics*, 330 N.L.R.B. 422, 423 (2000), the Board found that the employer's rule prohibiting employees from discussing employees medical conditions and reasons for taking reasonable accommodation was not privileged by the Americans with Disabilities Act. *See also, Koeller. Nebeker, Carlson & Haluck LLP*, 2005 NLRB GCM LEXIS 60 (2005), in which the NLRB General Counsel issued a complaint against an employer's policy precluding employees from discussing an on-going sexual harassment investigation. However, in *Desert Palace, Inc*., 336 N.L.R.B. 271 (2001) the Board reached a different result. There the employer warned two employees not to discuss the existence or details of an internal drug investigation; it later discharged them for violating that directive. Balancing the employees' right to discuss employee disciplinary matters under the Act against the employer's legitimate and substantial business justification for requiring confidentiality, it ruled the latter out-

weighed the employees' Section 7 rights, especially given the possibility of threats to witnesses and of evidence disappearing before the investigation was concluded.

Abusive and Harassing Conduct.

Rules against employees harassing or verbally abusing their co-workers often are adopted to complement rules concerning EEOC race or sex harassment investigations. Not surprisingly, the Board has had difficulties determining the permissibility of these rules. In *Lafayette Park*, the rule specified that an employee could be disciplined for "making false, vicious, profane or malicious statements . . . concerning the hotel or any of its employees." The Board concluded that punishing "false statements" would violate the employee's Section 7 rights, since only "maliciously false" statements are denied protection under the Act. In *Flamingo Hilton-Laughlin*, the rule forbidding employees from "using loud, abusive or foul language . . . and threatening, insulting, abusing, intimidating . . . employees" was overly broad and could be construed to prohibit lawful employee conduct. In *Adtranz, ABB Daimler-Benz Transportation*, 331 N.L.R.B. 291 (2000), *vacated*, 253 F.3d 19 (D.C. Cir. 2001), the Board held that an employer rule forbidding "abusive and threatening language" to anyone on company premises violated the Act, since the rule could be construed by employees to outlaw lawful union organizing activity. Further, in *Community Hospitals of Central California,* 335 N.L.R.B. 1318 (2001), *enforcement denied in part*, 335 F.3d 1079 (D. C. Cir. 2003), the Board invalidated a rule prohibiting "disrespectful conduct" by employees, reasoning that employees could construe that rule as forbidding supervisor criticism which is protected by Section 7.

The reviewing court in both *Adtranz* and *Community Hospitals* ridiculed the Board's reasoning. With respect to Adtranz's rule regarding use of "abusive and threatening language," the court concluded that under federal civil rights laws, employers are literally required to adopt zero tolerance policies regarding abusive and threatening language, and that the Board's position placed employers in the proverbial "Catch-22" position. It concluded the Board's position was "simply preposterous" and that it "defies explanation that a law enacted to facilitate collective bargaining and protect employees' right to organize prohibits employers from seeking to maintain civility in the workplace." (253 F.3d at 28). In *Community Hospitals*, the same court held that the Board's treatment of the "disrespectful conduct" rule was implausible. In context, the court found the rule did nothing more than to invalidate conduct which was insubordinate or in which the employee refused to follow proper orders, and did not chill the employees' protected activity.

Heeding the appellate court's blunt rebukes, in *Lutheran Heritage Village-Livonia* the Board upheld rules against "abusive and profane language, "verbal, mental or physical abuse" and "harassment." It stated that in reviewing a rule for consistency with Section 7, it must give the rule a "reasonable reading" and refrain from taking particular phrases out of context and presuming unlawful conduct. (*Id*. at 646). Applying that analysis, it found the rule against "abusive and profane language" was only an exercise of the employer's legitimate right to establish a civil and decent workplace. Further, absent some showing that the employer has applied them to conduct protected by Section 7, the Board concluded that the rules against "verbal, mental or physical abuse" and "harassment' would not be presumed to chill employee rights and were not invalid.

Employee Disloyalty

Some employers have adopted rules requiring loyalty from employees or policies which forbid employees from discussing workplace issues with third parties, especially the press. The Board has taken a dim view of them. For example, in *Double Eagle Hotel*, the Board struck down a part of the employer's handbook which forbade employees from "communicat[ing] any confidential or sensitive information concerning the Company or any of its employees to any non-employee without approval," reasoning that the rule could include discussion of wages or working conditions with union representatives. The Board likewise has precluded employers from punishing employees who complain about working conditions to customers, government agencies or to the press. Thus in *MVM, Inc*., 352 N.L.R.B. No. 133 (2008), the Board held unlawful the discipline of two security officers who had written a letter to the U.S. Marshal's Service, the employer's customer, complaining about the employer's work policies, since employees have a Section 7 right to raise concerns about working conditions. Such communications are protected, even if they adversely impact on the employer's business. *See also, Handicabs, Inc*., 318 N.L.R.B. 890 (1995), enforced, 95 F.3d 681 (8th Cir. 1996), *cert. denied,* 521 U.S. 1118 (1997) (contacts with customers protected); *Community Hospital of Roanoke Valley, Inc. v. NLRB*, 538 F.2d 607 (4th Cir. 1976) (nurse's public statements about hospital working conditions protected).

The right of employees to "go public" about their concerns is not without its limits, however. For example, where the concern is about the treatment of patients and not working conditions, such conduct may not be protected by the Act. *See, e.g., Orchard Park Health Care Center, Inc.*, 341 N.L.R.B. 642 (2004) (employees' calls to New York State "hot line" transmitting false complaints about patient care rather than working conditions was unprotected). Also, when the employee is publicly not complaining about working conditions but instead disparages the employer's reputation or products falsely, such conduct may be unprotected. *See, e.g., St. Luke's Episcopal–Presbyterian Hospitals, Inc. v. NLRB*, 268 F.3d 575 (8th Cir. 2001) (termination lawful where employee gave a television interview in which she falsely criticized the quality of the hospital's patient care).

The Charge Allegations

Let's now apply the law to the allegations of the charge described at the outset.

Allegation 1. Based upon *Lafayette Park*, the company could argue that

(Continued on Page 39)

In Memoriam
Joseph A. Gawrys

Resolution of the Members of the Lawyer-Pilots Bar Association

Whereas, Joe Gawrys was a member of the Lawyer-Pilots Bar Association for over 35 years;

Whereas, Joe Gawrys served as President of the LPBA from July 1, 1996, through June 30, 1997, after having served as Treasurer, Secretary, and President-Elect, and thereafter remained a member of the LPBA Board of Directors, and gladly accepted and served in multiple key positions to the benefit of the organization and its members;

Whereas, the summer meeting of the LPBA during his presidential year was held in Virginia Beach, a hometown that he treasured, and he welcomed an almost-record number of attendees to the meeting, including a visit by the Mayor of Virginia Beach;

Whereas, at every LPBA meeting they attended, Joe Gawrys and his wife Leigh were always first in welcoming new members and including them in activities and in helping them to understand the value of membership in LPBA and the value of the friendships and relationships cultured with other members of the LPBA;

Whereas, Joe Gawrys was a well respected naval aviator and commanding officer, an experienced general aviation pilot, and a recognized and respected advocate, who always gave his most to his family, friends, fellow officers, colleagues, clients, and community;

Whereas, Joe Gawrys always acted with charm, wisdom, and professional candor that served to support and further the mission of the LPBA;

Whereas, in the minds and hearts of the LBPA members who had the pleasure and privilege to know him, Joe Gawrys was a trusted friend, a wise counselor, and a gentleman in all respects;

Whereas, Joe Gawrys passed away peacefully on December 8, 2008, in the arms of his wife Leigh who was his best friend and his true love;

Whereas, the members of the LPBA wish to express their sympathies to the family of Joe Gawrys and to express their sincere gratitude for all that was given to the LBPA by Joe Gawrys during his lifetime;

The Executive Committee of the Lawyer-Pilots Bar Association, on behalf of its members, hereby resolves:

To extend its deepest sympathy to Leigh Gawrys, his beloved wife, and to the Gawrys family;

To recognize Joe Gawrys' many achievements in the LPBA;

To acknowledge the valued counsel and friendship that Joe Gawrys had with so many members of the LPBA; and

To present a print of this resolution to Leigh Gawrys, also a valued friend to the LPBA and whom we thank for sharing her husband with the LPBA for so many years.

LPBA Welcomes New Members

This column is a regular feature of the Journal and its purpose is twofold: to introduce our new members and to update our annual membership roster. To the new members listed below and hereafter, we welcome you to our membership and hope for many fruitful years of association.

Lorri E. Badolato
Alpha Flying, Inc.
115 Flightline Road
Portsmouth, NH 03801
Office: 603-501-7776
Email: lbadolato@alphaflying.com

Ms. Badolato specialized in aviation law and civil litigation, and is the in-house counsel for Alpha Flying, Inc. She is rated single engine land.

Tom Cairns
Ives, Kirwan & Dibble
660 S. Figueroa Street, #1990
Los Angeles, CA 90017
Office: 213-627-0113
Email: jtcairns@ca.rr.com

Mr. Cairns specializes in real estate law, hospitality law and aviation law. He is rated private, SEL-instrument.

David M. Caton
Meier, Bonner, Muszynski, O'Dell & Harvey, PA
37 N. Orange Avenue, #1100
Orlando, FL 32801
Office: 407-872-7774
Email: dmc@fltrialtbam.com

Mr. Caton specializes in civil defense litigation, and is a flight engineer.

Steven Cowell
Steve Cowell Unlimited, LLC
P. O. Box 370022
Denver, CO 80237
Office: 303-358-2308
Email: stevecowell.unltd@gmail.com

Mr. Cowell is an aviation litigation consultant. His ratings are: ATP B727, B737, DHC-8, Commercial SEL, FE-Turbojet, CFI/CFII/CFI-MEL, AGI, IGI.

Richard C. Devirian
Law Offices of Richard Devirian
23326 Hawthorne Boulevard, #380
Torrance, CA 90505
Office: 310-375-0099

Mr. Devirian specializes in personal injury (maritime, products and aviation). He holds private, instrument and multi ratings.

John P. Fazzini
Bountiful Lands, Inc.
101 E. Stuart Avenue
Lake Wales, FL 33853
Office: 863-676-0707
Email: fazzinihouse@aol.com

Mr. Fazzini is an associate member, having an interest in aviation safety and aviation law.

Donald Hammond
1848 W. 1st Street
San Pedro, CA 90732
Home: 310-833-5727
Email: drhinc@ca.rr.com

Mr. Hammond is a student member, currently attending the University of Southern California Law School. He is rated commercial, IFR.

Matthew Kalas
Locke, Lord, Bissell & Liddell, LLP
111 South Wacker Drive
Chicago, IL 60606
Office: 312-443-0458
Email: mkalas@lockelord.com

Mr. Kalas specializes in aviation law and products liability.

Kerry V. Kovarik
Krutch Lindell Bingham Jones & Petrie
1420 Fifth Avenue, #3150
Seattle, WA 98101
Office: 206-682-1505
Email: kerrykovarik@comcast.net

Mr. Kovarik specializes in personal injury. He is rated commercial single, multi, with instrument, and is an A&P.

Kevin Leahy
District Attorney's Office
200 E. Colonial Avenue
Elizabeth City, NC 27910
Office: 252-337-8525
Email: ncpros@aol.com

Mr. Leahy specializes in criminal law, and hold a private, ASEL rating, and commercial glider.

Donald McCune, Jr.
Anchors Smith Grimsley
909 Mar Walt Drive
Ft. Walton Beach, FL 32547
Office: 850-863-1974
Email: dmccune@asglegal.com

Mr. McCune specializes in aviation law, transportation law and employment law. He holds an ATP rating and is a flight engineer (turbojet).

Jonathan S. Morse
The Morse Law Group
2800 28th Street, #130
Santa Monica, CA 90405
Office: 310-396-0700
Email: jmorse@morselawgroup.com

Mr. Morse specializes in aviation, business and commercial law. He holds an ATP rating.

Mark Rhoades
Blank Rome LLP
130 North 18th Street
Philadelphia, PA 19103
Office: 215-569-5307
Email: rhoades@blankrome.com

Mr. Rhoades specializes in litigation, and holds a private pilot, single engine land rating.

Charles Senger
3904 Jonquil Lane
Okemos, MI 48864
Office: 517-349-9105
Email: sengerc@cooley.edu

Mr. Senger is a professor, and is SEL and CFI rated.

Mario Simoes
Attorney at Law
1240 Hazen Road
Deland, FL 32720
Office: 386-956-7899
Email: msimoes2@cfl.rr.com

Mr. Simoes is a member of the Florida Bar, and holds an ATP rating.

Vincent Stevens
Law Office of Kimberly Stevens
82 Main Street, #4
W. Springfield, MA 01089
Office: 413-306-6030
Email: vincent@stevenslawma.com

Mr. Stevens is a student member, currently attending Western New England School of Law. He is rated private, A&P.

Lawrence Stewart
Attorney at Law
P. O. Box 979
Winter Haven, FL 33882
Office: 863-679-1629
Email: stewartl@teamfocus.com

Mr. Stewart specializes in tax law and estate planning. His ratings are private, commercial, instrument, multi, sea and land.

Eugene Wahl
Eugene A. Wahl, Jr., Law Firm
2520 Rogers Avenue
Fort Smith, AR 72902
Office: 479-651-5406
Email: eawahljr@aol.com

Mr. Wahl specializes in real estate law, oil and gas law, and aviation law. His ratings are commercial, single and multi, instrument.

Dawn Wavle
Hawker Beechcraft Corporation
101 S. Webb Road
Wichita, KS 67207
Office: 316-676-5734
Email: dawn_wavle@hawkerbeechcraft.com

Ms. Wavle specializes in aviation law and manufacturing law. She is currently a student pilot.

Terence J. Whatley
Snell & Wilmer LLP
One Arizona Center
Phoenix, AZ 85004
Office: 602-382-6285
Email: twhatley@swlaw.com

Mr. Whatley specializes in litigation, and commercial law. He is rated private, ASEL.

PROTECTED CONCERTED ACTIVITY

(Continued from page 36)

the rule is lawful because it refers to "confidential employer information," meaning proprietary business information. However, since it was used to discipline an employee who was talking about his compensation, the Board likely would find the rule to be overbroad and invalid.

Allegation 2. Predicated on *Lutheran Heritage Village-Livonia*, that rule should be valid. However, the employer should be careful to apply the rule uniformly to avoid any assertion that it is singling out union organizing activity for punishment.

Allegation 3. Although the employer was within its rights to provide that sexual harassment investigations are to be kept confidential, the Board would regard as unlawful the requirement that employees are not to discuss them with each other.

Allegation 4. Although it is lawful for an employee to "go public" and to complain about working conditions to the press or to government agencies, a single employee's complaint to the press about "patient care" is unprotected because it does not constitute concerted activity. Under these circumstances, the employer acted within its rights.

Pending Legislation

It is worth noting that the *Employee Free Choice Act*, ("EFCA") now pending in Congress would radically change the NLRA. For example:

- Employees no longer would have the right to decide in an NLRB secret ballot election whether or not they wish union representation. Instead of this hallmark of the Act, employers would be required to recognize a union if it obtained union authorization cards from a majority of the employees. It would replace the secrecy and solitude of the voting booth with the peer pressure of bar or restaurant.
- There would be mandatory arbitration of the terms of a collective bargaining agreement if the parties failed to reach an accord within 120 days.
- Employers would be subject to fines of up to $20,000 for each violation of employee rights during an organizational campaign.
- Employees would receive triple (3X) backpay for unlawful discipline or termination.

Conclusion

Evolving law makes it apparent that companies need to review their policies, rules and handbooks on a regular basis to be certain that those intended to protect legitimate employer interests and should be valid, do not run afoul of the Section 7 rights of employees. Such interpretative errors can result in both backpay and orders invalidating NLRB elections. With the prospect of the EFCA becoming law, employers would be well advised to conduct a review of their personnel policies and disciplinary rules now, before they find themselves in the midst of an organizing campaign.

Endnotes

1 29 U.S.C. §151 et seq.
2 29 U.S.C. §157.
3 343 N.L.R.B. at 647.

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I hereby submit my application for membership in the LAWYER-PILOTS BAR ASSOCIATION and enclose herewith my check in the sum of $99.00* to cover the payment of dues to June 30th next**, which includes a subscription to the LPBA Journal. I do agree to abide by the by-laws and rules of the association.

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