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General Aviation

Bank Courier's Bonanza Beechcraft 36 Crashes on Golf Course Fairway — Alabama Jury Returns Defense Verdict in Death Case. The plaintiff's decedent, age twenty-five, worked for Air Ops LLC as a charter pilot. On December 18, 2008, he transported a load of checks from Louisville to a bank in Chicago in a Bonanza Beechcraft 36. During the return from Chicago Midway to Bowman Field, engine trouble developed. Shortly before 4 a.m., when he was approximately nine miles from the runway, decedent contacted Standiford Field and declared an emergency. Thereafter, he tried to land on a golf course fairway during the dark and fog. Decedent was killed in the ensuing crash. Plaintiff subsequently filed a worker's compensation action and a civil action in Kentucky state court. That litigation was dismissed.

Plaintiff then filed a product liability action in Alabama state court against Teledyne Continental Motors, along with claims against Consolidated Fuel Systems, Inc., and Kelly Aerospace Power System Inc. The latter defendants were alleged to have overhauled the fuel pump, the metering unit and the manifold valve. Regarding Teledyne, plaintiff asserted that the engine, crankshaft and damper were defective. A failed crankshaft, plaintiff theorized, resulted in a loss of engine power and the subsequent crash. Improper tempering and/or metal fatigue were allegedly involved.

Consolidated Fuel and Kelly were dismissed. Teledyne denied liability and proceeded to trial during which Kentucky law was applied.

After two weeks of trial, the case went to the jury with a three-page verdict form. The first question was, "Are you reasonably satisfied from the evidence that the subject crankshaft was defective and unreasonably dangerous for the persons who would reasonably be expected to use it, including [decedent]?" The jury answered "No."

Although Teledyne sought costs of $64,737, the court denied travel expenses and awarded costs of $25,444.

Estate of Freeman v. Teledyne Continental Motors, et al, Mobile Co. (AL) Circuit Court No. 09-902356. R. Tucker Yance, Mobile, AL; Kirk R. Presley, Andrew S. LeRoy of Monsees, Miller, Mayer, Presley & Amick, Kansas City, MO for plaintiff. Sherri R. Ginger, William R. Lancaster, Lacey D. Smith of Ambrecht, Jackson, Mobile, AL for defendants.

ALW No. GA26909

NTSB Considers Additional Safety Alerts. At its March 8 meeting the National Transportation Safety Board considered five Safety Alerts aimed at reducing the number of general aviation accidents. Each year the NTSB investigates about 1500 GA accidents in which about 475 pilots and passengers are killed and hundreds more are seriously injured. A Safety Alert is a brief information sheet that pinpoints a particular safety issue and offers practical remedies to address the hazard.
The safety issue areas considered at the Board meeting included:

- Reduced-visual-reference accidents, including controlled flight into terrain and uncontrolled descent to the ground due to spatial disorientation;
- Aerodynamic stalls at low altitude in daylight visual weather conditions;
- Pilot inattention to indications of mechanical problems;
- Risk management for aviation maintenance technicians; and,
- Risk management for pilots.

ALW No. GA26901

Commercial Space Transportation Systems Working Group Sets Two Teleconferences. On March 5 the FAA announced that dates for two teleconferences of the Systems Working Group of the Commercial Space Transportation Advisory Committee (COMSTAC). [78 Fed.Reg..14401]. The teleconferences will take place on Thursday, March 21, 2013, and Tuesday, April 16, 2013. Both teleconferences will begin at 1:00 p.m. Eastern Time and will last approximately one hour. The presentation and call-in number will be posted at least one week in advance at http://www.ast.faa.gov/. The purpose of these two teleconferences is to assist the FAA in its development of guidelines for the safety of occupants of commercial suborbital and orbital spacecraft. The topics for the two teleconferences are as follows:

- Medical Best Practices for Crew and Space Flight Participants. The agency would like to explore industry views on medical best practices for occupant safety, to include ensuring that safety critical operations personnel and spaceflight participants are physically capable of performing safety critical tasks. It desires to discuss the following questions from a guidance perspective: a. What is the appropriate level of medical screening for safety critical operations personnel? b. What is the appropriate level of medical screening for spaceflight participants? c. Should there be medical criteria for ending a flight early due to crew or spaceflight participant illness or medical emergency? d. What type of medical kit should be recommended? e. What type of flight crew medical training should be recommended? f. How do the answers to these questions depend on whether a flight is sub-orbital or orbital?
- Communications and Commanding Best Practices for Minimum Level of Safety. Inasmuch as communications (voice, telemetry and command) have been an important element in every human spaceflight mission to date, the FAA would like to discuss the following questions from a guidance perspective: a. Should vehicle-to-ground communications be considered a critical function? b. What would be the appropriate coverage for the different phases of flight (prelaunch, ascent, orbit, entry, post-landing and aborts)? c. Should ground voice, telemetry, or commanding be allowed to serve as a part of a hazard control? d. When would intra-vehicle voice communication be recommended? e. Should a minimum threshold be set for intelligibility level? What would it be? f. When would ground monitoring of telemetry and ground control be recommended? g. What should be included in the telemetry, and how often should it update? h. Should encryption be required for critical commands?

ALW No. GA26904

Air Carriers

Southwest Flight Attendant Allegedly Caused Shoulder Injury — Florida Jury Returns Defense Verdict. Plaintiff occupied an aisle seat on Flight 766 from Tampa to Denver on February 15, 2009. As a flight attendant hurried down the aisle to answer a call light, he struck plaintiff's shoulder. When the flight landed in Denver, plaintiff was seen by paramedics. He also spoke with Southwest's concourse manager. He then traveled on to his destination, Los Angeles. Upon arrival there, plaintiff spoke with a customer service representative. Although fire department paramedics offered to provide transportation to a clinic, plaintiff declined the offer and departed the airport by taxi. He made his return flight to Tampa on February 20 and sought medical attention at a walk-in clinic about a week later. Vicodin was prescribed. Plaintiff subsequently saw another physician for physical therapy. That doctor referred him to an orthopedic surgeon, who diagnosed rotator cuff tendinitis. A second surgeon performed an arthroscopic procedure. Accord-

ing to plaintiff, the surgery was only partially successful since he was left with lingering pain.

Southwest denied liability. According to the flight attendant, he did not make contact with plaintiff. According to the defense, the injury could not have taken place as alleged. Finally, the defense argued that there were degenerative changes present in plaintiff's shoulder.

The jury deliberated two and a half hours at the conclusion of a three day trial before returning a defense verdict.

Plaintiff's Experts: William Meadows, M.D., physical therapy, Brandon, FL; Jeffery Tedder, M.D., orthopedics, Tampa, FL.

Defendant's Experts: Daniel Murphy, M.D., orthopedics, Tampa, FL; David Rosenbach, M.D., radiology, Tampa, FL.

Kevin Brown v. Southwest Airlines, U.S. District Court M.D. Florida No. 8:11-cv-01498. James Arnold, Jr., Adam Brun of Morgan & Morgan, Tampa, FL for plaintiff. Richard K. Bowers, Jeffrey M. James of Banker, Lopez, Gassler, Tampa, FL for defendant.

ALW No. AC26910

Flight Attendant Says Passenger With Medical Device Cannot Board Missoula to Minneapolis-St. Paul Flight — Device Turns Out to Be Ventilator, Not Proscribed Portable Oxygen Concentrator — Passenger Turns Out To Be Member of State Human Rights Commission — Airline Says Air Carrier Access Act Preempts Claims. This case was first reported in Issue No. 264. Readers will recall that Dustin Hankinson suffers from muscular dystrophy which forces him to use both a ventilator and a wheelchair. In light of his mobility challenges, the thirty-seven year-old commissioner with the Montana Human Rights Bureau took pains planning a scheduled visit to Washington, DC, including having his caregiver telephone Delta Connection to ensure there would be no problems leaving from Missoula International Airport. Once at MSO, Hankinson cleared security and made his way to the gate. As he prepared to board his flight, however, a flight attendant intervened. According to Hankinson, "They essentially yelled at me and told me I couldn't get on the plane." The flight attendant believed that Hankinson was carrying a prohibited Portable Oxygen Concentrator. Those devices are forbidden without a medical waiver. A Delta complaint resolution officer was summoned. The misunderstanding was corrected and Hankinson was told that he could board the flight to Minneapolis-St. Paul. Hankinson, who is also the chair of the Missoula Democratic Party, declined to do so. Instead, that same day he filed a complaint with the federal Department of Transportation alleging that Compass discriminated against him based on his disability in violation of the Air Carrier Access Act.

For its part, Compass apologized both by telephone and in writing. It also issued Hankinson and his travel companion vouchers for a free flight. It also suspended the crew members pending investigation and then terminated both flight attendants at the conclusion of the investigation. The pilot was suspended without pay for failing to intervene. Compass also created a training video, a questionnaire and a quiz to teach employees how to recognize medical devices and how to respectfully interact with passengers with disabilities. The Department of Transportation ultimately issued a warning letter to Compass.

Hankinson proceeded to file a complaint with the Montana Human Rights Bureau. Because of Hankinson's work with the Commission, which oversees the Bureau, the case was transferred to the Idaho Commission of Human Rights. That agency found grounds to believe that Hankinson was discriminated against. In October of last year the MHRB advised Compass that it would hold a hearing to evaluate whether the airline broke the law.

On November 15, Compass filed suit against the MHRB in Montana federal court, arguing the state has no authority over the airline and the court should limit further proceedings to the federal level. The airline sought both a temporary restraining order and injunctive relief.

The district court granted the TRO on December 13, after employing the four-prong test set forth in *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, (2008). It first concluded that Compass had clearly demonstrated a likelihood of success on the merits in light of the substantial regulations promulgated by the DOT regarding the use of electronic respiratory devices by passengers of commercial air carriers [including 14 C.F.R. § 382.133, which provides that "you must permit any individual with a disability to use in the passenger cabin during air transportation, a ventilator, respirator, continuous positive airway pressure machine, or an FAA-approved portable oxygen concentrator (POC). . . ."]. Such regulation, the court found, was detailed, unambiguous, and expansive. Such pervasive regulation of a subject area, the court continued, may well give rise to field preemption and federal jurisdiction to the exclusion of state law claims. Although the ACAA contains no express preemption provision, Congress might well express its intent to preempt state law by implication through the structure and purpose of its law, the court found, [citing *Montalvo v. Spirit Airlines*, 508 F.3d 464, 470 (9th Cir. 2007)].

As to the claim of possible irreparable harm should the administrative complaint be allowed to proceed, the court again sided with the airline, although it found that a much closer question existed on that issue. "Given the strength of the likelihood of Plaintiff's success and the fact that Plaintiff is currently facing a potential default judgment in the MHRB proceedings, however," the court nevertheless found that the airline had met the prong requiring it to show a likelihood of irreparable injury if the MHRB proceedings were not enjoined.

The third prong, balance of the hardships, favored the airline inasmuch as in the event a preliminary injunction was subsequently denied, Hankinson's position would be unchanged (despite a minor delay), while a default judgment against the airline, on the other hand, might present a serious hardship and a loss of the right not to have to defend. The hardship thus tipped in favor of Compass, according to the court.

With respect to the fourth prong, the public interest analysis, the court focused on the public interest that the requirements of federal law not be violated and the Supremacy Clause preserved in a case of conflicting state and federal jurisdiction. According to the court, "essentially, it is in the public interest to avoid constitutional violation. It is also in the public interest to uphold the decisions of Congress," [citing Am. *Trucking Ass'n v. City of Los Angeles*, 559 F.3d 1046, (9th Cir. 2009)]. The preliminary injunction was granted, along with the observation that, "It appears likely that this Court will ultimately find that [plaintiff's] complaint is preempted by the ACAA, there is no implied right of action for violations of the regulations as to electronic respiratory devices, and none of his claims can survive the preemption."

In compliance with the court's scheduling order, cross-motions for summary judgment were filed on February 15. In its motion, Compass argued that the Air Carrier Access Act [49 U.S.C. 41705(a)] and its implementing regulations [14 C.F.R. part 382] preempted all claims. **Compass Airlines, LLC v. Montana Human Rights Bureau of the Department of Labor and Industry, et al**, U.S. District Court D. Minnesota No. 12-105-H-CCL. Chris Mangen, Jr., Daniela E. Pavuk of Crowley Fleck, Billings, MT; Jeffrey Ellis of Quirk & Bakalor, New York, NY for Compass. Brian J. Miller of Morrison, Motl & Sherwood, Missoula, MT for Hankinson.

ALW No. AC26911

Clarification Issued Regarding New Flight, Duty and Rest Requirements Rule. On March 5 the FAA issued a clarification of its January 4, 2012 final rule [77 Fed.Reg. 330] which created 14 CFR part 117, including Subparts Q, R, and S for part 121 operations. [78 Fed.Reg. 14166]. The clarification came in response to numerous questions from various airlines. Highlights of the clarification are:

- The FAA will decide on a case-by-case basis whether interpretations under part 121 apply to part 117.
- Part 117 applies to all part 91 operations (other than part 91 Subpart K) that are directed by a part 121 certificate holder "if any segment" is conducted as a part 121 passenger flight.
- Under the definition of FDP in § 117.3, deadhead transportation that is followed by a flight segment without an intervening rest period is part of an FDP and is subject to the FDP limits in Tables B and C. All other deadhead transportation, the clarification continued is not part of an FDP and is not subject to any limits under part 117. However, if the deadhead transportation exceeds the limits of Table B, § 117.25(g) requires that the flightcrew member engaging in the deadhead transportation be provided with a compensatory rest.
- Subsections (e) and (f) of § 117.25 require that immediately prior to beginning an FDP, a flightcrew member must be provided with a 10-hour rest period that includes an 8-hour uninterrupted sleep opportunity. These subsections do not require that the 8-hour sleep opportunity take place during a **specific time** of day—they simply require that an 8-hour sleep opportunity be provided at some point during the 10-hour rest period.
- A layover facility could be a suitable accommodation if it meets the definition of suitable accommodation set out in § 117.3. A room that has multiple reclining chairs with multiple individuals resting could also be a suitable accommodation if it meets the suitable accommodation requirements of § 117.3. The FAA emphasizes that the definition of suitable accommodation in § 117.3 does not require that access to a suitable accommodation be limited so that only one person can use it at any given time.
- Subsection 117.5(d) states that "[a]s part of the dispatch or flight release, as applicable, each flightcrew member must affirmatively state he or she is fit for duty prior to commencing flight." According to the clarification, this subsection does not preclude a flightcrew member from making his/her fitness for duty statement through electronic means. However, the clarification

continued, the preamble to the final rule explains that the fitness for duty statement "must be signed by each flightcrew member." Accordingly, if a flightcrew member chooses to submit his/her fitness for duty statement through electronic means, that flightcrew member would have to electronically sign the statement.

ALW No. AC26906

Bird Ingestion Review Underway. On March 8 the FAA tasked the Aviation Rulemaking Advisory Committee with review and assessment of the standards and advisory material for bird ingestion requirements [78 Fed.Reg. 15119] as follows:

- Evaluate the core ingestion element of small and medium bird requirements to determine if the intended safety objective of the current rule is adequate. Consider the threat from large flocking bird species in this assessment. Identify any deficiencies in the current rule, and provide the FAA with recommendations for changes as appropriate.
- Evaluate large flocking bird requirements, to determine the need for new large flocking bird requirements, or advisory material, or both, for Class D engines (1.35m [2] -2.5m [2] inlet areas). Identify any deficiencies of the current rule, and provide the FAA with recommendations for changes as appropriate.
- Review and consider the following related National Transportation Safety Board (NTSB) safety recommendations when evaluating items 1 and 2 above: a. "A-10-64: Modify the 14 Code of Federal Regulations § 33.76(c) small and medium flocking bird certification test standard to require that the test be conducted using the lowest expected fan speed, instead of 100-percent fan speed, for the minimum climb rate," and b. "A-10-65: During the bird-ingestion rulemaking database (BRDB) working group's reevaluation of the current engine bird-ingestion certification regulations, specifically reevaluate the 14 Code of Federal Regulations § 33.76(d) large flocking bird certification test standards to determine whether they should: (1) Apply to engines with an inlet area of less than 3,875 square inches and (2) Include a requirement for engine core ingestion. If the BRDB working group's reevaluation determines that such requirements are needed, incorporate them into 14 CFR § 33.76(d) and require that newly certificated engines be designed and tested to these requirements."
- Define an industry led process for periodic update and review of engine bird ingestion data, such that industry and the authorities can maintain an awareness of the bird threat experienced in service.

Required completion is no later than March 31, 2015.

ALW No. AC26907

ARAC To Consider Revisions to Airplane Performance and Handling Quality Requirements. On March 8 the FAA gave notice that it has tasked the Aviation Rulemaking Advisory Committee with consideration of several areas within the airplane performance and handling qualities requirements of 14 CFR part 25 airworthiness standards and guidance for possible revision. [78 Fed.Reg. 15112]. Those areas are:

- Fly-by-wire (FBW) Flight Controls. Regulatory requirements and associated guidance material for airworthiness certification of airplane designs using FBW technology to obviate longstanding, repetitively used FBW special conditions. Specific areas include:

  a. Applicability/adaptation of Amendment 25–121 airplane performance and handling characteristics in icing conditions requirements;

  b. Design maneuver requirements;

  c. Design dive speed; d. Side stick controls;

  e. Flight envelope protection; and,

  f. Interaction of airplane systems and structure.

- Takeoff and Landing Performance. Regulatory requirements and associated guidance material for airworthiness certification in the following areas:

  a. Flight test methods used to determine maximum tailwind and crosswind capability. Additionally, for crosswind testing, better define intended operational use of demonstrated maximum steady and gusting crosswind performance.

  b. Wet runway stopping performance. Recent landing overruns on wet runways have raised questions regarding current wet runway stopping performance requirements and methods. Analyses indicate that the braking coefficient of friction in each case was significantly lower than expected for a wet runway (i.e., lower than the level specified in FAA regulations). Consideration should also be given to the scheduling of landing performance on wet porous friction course and grooved runway surfaces. Recommendations may include theneed for additional data gathering, analysis, and possible rulemaking.

  c. Go-around performance, specifically height lost in executing a go-around. While airplanes may be able to demonstrate the climb gradient capability prescribed in 14 CFR/European Aviation Safety Agency (EASA) Certification Specification (CS)

25.121, it may not be able to achieve it quickly enough, particularly when executing a go-around close to the ground.

d. Performance standards and guidance regarding landing in abnormal configurations.

e. Guidance regarding the function and use of the amber band on airspeed tapes. Manufacturers' philosophies differ regarding the meaning of the amber band in an airspeed tape display, as do U.S. and European regulatory authorities' policies regarding acceptance of target airspeeds within the amber band.

f. Guidance on piloting procedures used to evaluate airplane tail clearance during certification flight tests for takeoff performance.

g. Landing distance performance for autoland and landing distance performance using heads-up-displays (HUD). Use of autoland or HUD may invalidate landing distance performance determined for compliance to 14 CFR/ CS 25.125.

h. Steep approach landing performance. Current airplane certification standards are not harmonized among the U.S., Canadian, Brazilian, and European airworthiness authorities.

i. Narrow runway operations. Current airplane certification standards do not identify minimum runway widths for which the standards apply.

j. Reduced and derated takeoff thrust procedures. Updates to existing guidance material may be appropriate to limit the number of derates permitted for a specific airframe/engine combination.

k. Guidance material for pressure error measurement during takeoff until out of ground effect to ensure proper data reduction for calculation of takeoff distance performance.

l. Guidance material addressing the adverse effects on stall speed in ground effect.

- Handling Characteristics. Regulatory requirements and associated guidance material for airworthiness certification in the following areas:

a. Guidance material for assessing handling qualities. Advisory Circular 25–7C, ''Flight Test Guide for Certification of Transport Category Airplanes,'' provides an FAA Handling Quality Rating Method (HQRM) that is intended to provide a systematic way of determining appropriate minimum handling qualities requirements and evaluating those handling qualities for failure conditions affecting an airplane's flying qualities. The FAA handling quality rating system is not universally accepted within industry, nor is it accepted by EASA.

b. Guidance for assessing susceptibility to pilot-induced oscillations/airplane-pilot coupling (PIO/APC). Guidance provided in AC 25–7C for evaluating PIO/APC is also not well accepted by airplane manufacturers, is not harmonized with EASA, and has been superseded to some extent in recent certification programs. Modified guidance is needed to both simplify and standardize the methods for evaluating an airplane's susceptibility to PIO/APC..

ALW No. AC26905

NTSB Releases Interim Factual Report on JAL 787 Battery Fire Incident — Forum to Be Held in April. On March 7 the National Transportation Safety Board released an interim factual report and 499 pages of related documents in its ongoing investigation of the Japan Airlines 787 battery fire in Boston. NTSB Chairman Deborah A.P. Hersman announced that the Safety Board will be holding both a forum and a hearing in April to provide additional information to advance the investigation. The forum, which will be held in mid-April, will explore lithium-ion battery technology and transportation safety. The investigative hearing, to be held later in April, will focus on the design and certification of the 787 battery system. Both proceedings, which will be held at the NTSB Board Room and Conference Center in Washington, will be webcast live and will be open to the public. Additional details about each event, including dates, times, agendas and participants, will be released in the coming weeks.

The 48-page interim factual report summarizes the NTSB's initial findings on the JAL battery fire investigation. The report includes details on how the maintenance personal discovered the fire and how the firefighters responded and extinguished it, findings from the examination of the battery and test results of related components, initial reports on the flight recorder data, a description of the 787 electrical power system certification plan, and a list of ongoing and planned investigative activities.

ALW No. AC26903

NPRM Addresses Harmonization of Airworthiness Standards. On March 1 the FAA announced that it is proposing to amend certain airworthiness regulations for transport category airplanes, based on recommendations from the Aviation Rulemaking Advisory Committee so as to eliminate regulatory differences between the airworthiness standards of the FAA and European Aviation Safety

Agency. [78 Fed.Reg. 13835] The proposal would not add new requirements beyond what manufacturers currently meet for EASA certification and would not affect current industry design practices. The proposal would revise the structural test requirements necessary when analysis has not been found reliable; clarify the quality control, inspection, and testing requirements for critical and noncritical castings; add control system requirements that consider structural deflection and vibration loads; expand the fuel tank structural and system requirements regarding emergency landing conditions and landing gear failure conditions; add a requirement that engine mount failure due to overload must not cause hazardous fuel spillage; and revise the inertial forces requirements for cargo compartments by removing the exclusion of compartments located below or forward of all occupants in the airplane.

Comments on the NPRM will be accepted through May 30. They should be identified by FAA docket number FAA–2013–0109 and may be submitted by any of the following methods:

• *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.

• *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

• *Fax:* Fax comments to Docket Operations at 202-493-2251.

ALW No. AC26902

Fixed Base Operators

Water Puddle on Hangar Floor Causes Back Injury — New Jersey Case Settles for $3.2 Million. The plaintiff, employed by Barnes & Noble, worked at the Jet Aviation Teterboro hangar, maintaining aircraft owned by his employer. On October 15, 2008, when he was age fifty-one, plaintiff slipped in a water puddle and fell on the hangar's concrete floor. The water resulted from the washing of a jet in the hangar. According to plaintiff, days later he began to suffer pain in his back. Ultimately, two-level decompression surgery was required. Immediately after plaintiff was cleared to return to work, Barnes & Noble eliminated his position (which paid $125,000 per year).

Plaintiff sued three entities: Jet Aviation, Dan-Cat Industrial Floor Coating and Power Scrubbing and Tenant Co. He faulted Jet Aviation for failing to have a separate area where washing could be done and for failing to warn of the danger posed by water on the urethane coated floor. He faulted the urethane coating manufacturer, Tenant, for producing a defective product. He faulted the concern which applied the urethane coating, Dan-Cat, for applying the coating by hand rather than with a spreader. According to plaintiff, hand application resulted in slippery spots. Tenant was dismissed.

Jet Aviation settled for $1.7 million. Dan-Cat settled for $1.5 million.

Donald McLean v. Jet Aviation Teterboro, L.P., et al, Middlesex Co. (NJ) Superior Court No. _____. Peter Chamas, Max Stagliano of Gill & Chamas, Woodbridge, NJ for plaintiff. Fred G. Wexler of Brown, Gavalas & Fromm, Clifton, NJ for Jet Aviation. Patrick Coyne of Zirulnik, Sherlock & DeMille, Hamilton, NJ for Dan-Coat. James Bride of Leary, Bride, Tinker & Moran, Cedar Knolls, NJ for Tenant Co.

ALW No. FB26908

Pre-Buy Inspection Fails to Disclose Twelve Screw Holes in Carry Through Spar — Mississippi Federal Court Says 'Mandate Rule' Precludes Favorable Action on Motion to Reconsider Denial of Motion to Remand. McMahan Jets purchased an aircraft from Rizo Jet under the terms of a purchase agreement. In connection with the transaction, a pre-buy inspection was done by X-Air Flight Support. Following the sale, McMahan discovered twelve screw holes in the carry through spar. According to McMahan, those screw holes compromised the strength of the spar to the point where the aircraft was not airworthy. McMahan filed suit in Mississippi state court, asserting a claim for negligence against X-Air, as well as claims for false representation against Rizo Jet and Road Link Transportation, Inc. (a Utah corporation). McMahan also sought recovery from Clifford Gottschalk on the ground that he was the chief mechanic for the aircraft prior to the sale and that he either knew or should have known that the screw holes rendered the aircraft unairworthy.

Rizo Jet removed the case to federal court on the basis of diversity of citizenship. Plaintiff moved to remand, pointing to a forum selection clause in the purchase agreement which designated Forrest County, Mississippi as the venue for any action arising from or relating to the purchase agreement. Roadlink and Gottschalk moved to dismiss for lack of personal jurisdiction, noting that the former was a Utah corporation and the latter was a resi-

dent citizen of Utah and arguing that neither had sufficient contacts with Utah to allow for the exercise of jurisdiction.

The district court denied the remand motion on the ground that plaintiff had waived enforcement of the provision by suing those not party to the agreement, i.e., Road Link and Gottschalk. That action was affirmed by the Fifth Circuit on August 9, 2012. Eight days previously, however, plaintiff had filed a motion for relief from judgment in the district court. That motion alleged three grounds: fraud, misrepresentation and other misconduct; evidence discovered after the entry of judgment; and opinions issued close in time or subsequent to the date of the order denying the motion to remand.

The district court denied the motion to reconsider in December of last year. It found that the 'mandate rule' [*League of United Latin American Citizens, Dist. 19 v. City of Boerne*. 875 F.3d 433 (5th Cir. 2012) (quoting *Briggs v. Penn. R.R. Co.*, 334 U.S. 304 (1949)] was applicable inasmuch as the motion clearly requested reconsideration and reversal of holdings that had been affirmed on appeal. **McMahan Jets v. X-Air Flight Support**, U.S. District Court S.D. Mississippi No. 2:10-cv-175KS-MTP.

ALW No. FB26912

Airports

Second U.S. Circuit Court of Appeals Agrees That 'Public Expenditures' Doctrine Bars County's Attempt to Recover Response Costs in Connection with Continental Connection Flight 3407 Crash. As is well known, Flight 3407 departed from Newark en route to Buffalo on February 12, 2009. On descent, the flight crashed into a private residence in Clarence Center, Erie County, approximately five miles from the airport, killing all passengers and crew as well as one person in the house. The crash caused substantial damage to the neighboring properties, including both environmental cleanup expenses and damages. The county filed suit against Colgan Air, Pinnacle Airlines and Continental Airlines on March 1, 2010. It later filed an amended complaint asserting five causes of action: negligence, *res ipsa loquitur* negligence, public nuisance, liability under New York Public Health Law § 1306, and liability under New York General Business Law § 251. In an amended complaint the county claimed that it had sustained unnecessary and unprecedented property and financial damage as a direct and proximate result of defendants' wanton, reckless, negligent, and willful conduct to the extent Erie County was required to expend resources in excess of the normal provisions of police, fire, and emergency services as a result of the crash of Flight 3407. Specifically, the county claimed that it was forced to expend unprecedented monetary resources in order to provide public services including: overtime pay for police and emergency personnel; the cleanup and removal of human remains; the cleanup and removal of chemical substances originating from the aircraft; the cleanup and removal of the aircraft itself; the provision of emergency and counseling services to the surviving members of the decedents' families; and the purchase, lease, or rent of equipment necessary to respond to the crash of Flight 3407.

The district court dismissed the complaint under Rule 12(b)(6). It found that the complaint was barred by New York law on the ground that "public expenditures made in the performance of governmental functions are not recoverable," [under *Koch v. Consolidated Edison Co. Ov N.Y.*, 62 N.Y.2d 548 (1984)].

The U.S. Court of Appeals for the Second Circuit affirmed the judgment on March 4, as it agreed with the district court that "absent an exception, the free public services doctrine plainly bars the County's claims to recover public expenditures." The court rejected the county's claims that various cases arising from the September 11, 2001, terrorist attacks had "expanded the duty of an airline to pay for consequences of a crash far greater in scope than the lives of the passengers and crew killed in a crash or the value of the airplane," by pointing out that it was not the scope of the *defendants*' duties which was at issue. Rather, the court noted, the question was whether the county's recovery was barred by the public services doctrine. **County of Erie v. Colgan Air, Inc., Pinnacle Airlines Corp., and Continental Airlines, Inc.**, U.S. Court of Appeals for the Second Circuit No. 12-1600-cv. James J. Duggan of Duggan & Bentfiobil, Williamsville, NY for county. David J. Harrington of Condon & Forsyth; Oliver K. Beiersdof of Reed Smith, New York, NY; and Patrick E. Bradley of Reed Smith, Princeton, NJ for defendants.

ALW No. AP26913