Schnader ATTORNEYS AT LAW
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$2.8 Million Verdict Upheld Against Engine Manufacturer

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A federal district Court recently denied a Rule 50(b) renewed motion for judgment as a matter of law after concluding that the jury had sufficient evidence to find engine manufacturer Continental Motors, Inc. liable to plaintiffs for nearly $2.8 million. The case, *Snider v. Sterling Airways, Inc.*, arose from the crash of a Cessna T210L in June 2010, which killed the pilot and two passengers. The cause of the crash was determined to be an engine failure resulting from a failure of one of the engine exhaust valve guides, a component in the engine's cylinder assemblies. Continental argued that 1) there was insufficient evidence to conclude that it manufactured a replacement valve guide that was installed in 2004, which implicated the General Aviation Revitalization Act ("GARA") rolling provision for that component and reset GARA's 18-year statute of repose; and 2) plaintiffs had failed to prove that a structural defect in the exhaust valve guide caused the component's failure.

In finding against Continental on the first point, the court reasoned that the replacement component bore a Continental serial number, had been manufactured by a third party but was built for Continental using Continental specifications, and that Continental inspected samples of each batch of valve guides to ensure they met those specifications. In deciding against Continental on its second argument, the court cited plaintiffs' expert testimony. Those experts concluded that the failed engine component did not possess the requisite metallurgical properties, leading to premature wear and failure, and that the post-crash fire had no effect on the composition of the component. The court noted that a reasonable jury could have accepted Continental's argument that its component was not to blame for the crash, but that the record was not "critically deficient" of evidence to support the plaintiffs' verdict. Accordingly, Continental did not meet the exacting standard for a court to grant a renewed motion for judgment as a matter of law. ***Snider v. Sterling Airways, Inc.*, No. 13-2949, 2017 U.S. Dist. LEXIS 100878 (E.D. Pa. Aug. 3, 2017).**

Aviation Group News

- Forty Schnader attorneys were selected for inclusion in the 2018 edition of *The Best Lawyers in America*, including Aviation Group members Thomas Arbogast, Richard Barkasy, Bill Janicki, Bruce Merenstein, Lisa Rodriguez, Carl Schaerf, Denny Shupe, Ralph Wellington, and Keith Whitson.
- Schnader's Aviation Group has been shortlisted for the Lawyer Monthly Legal Awards 2017 in the category of Aviation Law Firm of the Year – USA.
- **Denny Shupe** was appointed Chair of the Special Problems in the Administration of Justice Committee of the American College of Trial Lawyers for the 2017-2018 term.
- **Robert Williams** was appointed Vice-Chair of the American Bar Association's Aviation and Space Law General Committee.
- **Stephanie Short** has been appointed Vice Chair of Publications for DRI's Aviation Law Committee.
- **Jonathan Stern** was featured in an Aviation International News article, "Aircraft Insurance 2017: Key Concerns."
- **Denny Shupe** was named to the top 1% of American Registry's America's Most Honored Professionals in 2017.
- **Stephanie Short** was selected to participate in the 2017-2018 class of the Young Lawyers Division Bar Leadership Initiative Program of the Allegheny County Bar Association.
- **Barry Alexander** taught a Claims Handling class for the International Air Transport Association Cargo Claims and Complaint Handling Seminar in June.

Cook County Jury Returns Multimillion Dollar Verdict in Afghanistan Plane Crash Wrongful Death Suit

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After a 13-day trial, the jury in *Brokaw v. National Air Cargo, Inc.* lodged a $115 million verdict against National Air Cargo, Inc. The suit arose out of an April 2013 plane crash in Bagram, Afghanistan. The Boeing 747 was carrying five mine-resistant, ambush-protected vehicles ("MRAP") for the U.S. Marine Corps. Two of the MRAPs weighed 12 tons, and the other three weighed 18 tons. During take-off, the rear-most MRAP came loose from its restraints and rolled backwards and through the bulkhead, damaging the tail and flight controls. The accident was caught on film by a dash-cam. The film shows the plane stalling at a low altitude before crashing. All six people on board were killed.

The suit was brought by the estates of the captain, the first officer, and an off-duty pilot also on board. Evidence was presented that National Air Cargo loaded and restrained the MRAPs but that an insufficient number of restraints were used. National Air Cargo used 24 straps for the 12-ton vehicles and 26 straps for the 18-ton vehicles. But at trial it was suggested that 60 straps were required to properly restrain the smaller MRAPs. Additionally, the straps used by National Air Cargo were worn-out and some were expired. Finally, plaintiff's counsel argued that the 747 could safely hold, at most, a single 12-ton MRAP.

The jury awarded $54 million to the estate of the captain, Brad Hesler, which was reduced to $47.5 million to account for 12.5% contributory negligence. The estate of the first officer, Jamie Brokaw, was awarded $43 million; and the estate of the off-duty pilot, Jeremy Lipka, was awarded $25.2 million. Each award reportedly included $5 million for the "shock and fright" experienced by the pilots before the crash.

***Brokaw v. National Air Cargo, Inc.,* Nos. 2013-L-9650, 2013-L-9651, 2014-L-8696 verdict returned (Ill. Cir. Ct., Cook Cty., June 29, 2017).**

The Next Frontier for the Aviation Industry: 3D-Printing

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As with any industry, commercial airlines have fluctuating costs that can greatly affect their profit margins. Some can be anticipated, but some are completely unexpected. This past year's low fuel costs have benefited the bottom line, but bad publicity over overbooking passengers has significantly increased airlines' monetary incentives, with some airlines offering up to $10,000 to bumped passengers!

The FAA also expects more passengers to take to the skies. At the same time, passengers are demanding higher customer service and lower fares, and the competition is fierce in a healthy airline industry.

Luckily, one advancement in the aviation sector is contributing towards lowering costs for airlines, and that's in the form of 3D-printing. 3D-printing is the process where an object is built by adding thin layers of material individually. 3D-printing has received much publicity, but usually in the context of medical devices, plastic prototypes, or as a hobby. However, additive manufacturing is the industrial version of 3D-printing and this process is slowly being introduced into aviation manufacturing. Some of the benefits of 3D-printing include:

1. Less waste: Conventional techniques require casting and welding small pieces together in a labor-intensive process with a high percent of waste. Additive printing uses less material than conventional techniques, reducing production costs.
2. Lower weight: Additive printing also makes parts lighter, resulting in fuel savings for airlines.
3. Innovative designs: Designers are able to devise new shapes that couldn't have been tried due to previous manufacturing limitations. Combinations of different metal alloys are also being tested, which may result in one whole part that may be optimized for strength in one section and heat-resistance in another.
4. Faster production: Machines can print around the clock and on demand.
5. Reduced inventory costs: Since parts can be printed and delivered on demand, the decrease in manufacturing turnaround time reduces warehouse storage costs.

All of this can add to a significant cost savings.

3D-printed parts were first limited to non-structural elements such as interior cabins or fuel nozzles, but the future is looking bright. The FAA recently approved 3D-printed titanium components for Boeing. It will be the first time a company uses 3D-printed parts in a plane that would bear the stress of an airframe during flight. As a result, Boeing expects to shave $2-3 million off each 787 Dreamliner by 2018.

If structural parts can continue to meet the FAA's rigorous certification and qualification standards, additive manufacturing will revolutionize the way complex high-performance products are made. The industry seems to agree that this trajectory is imminent, as Airbus hopes to 3D-print an entire fuselage by 2025. For any player in the aviation industry, it's important to keep an eye on this developing technology and how it can contribute to or affect your business.

Lycoming Prevails on Remand of *Sikkelee* Case from The United States Supreme Court

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Late last year we reported in this newsletter that the U.S. Supreme Court denied review of the Third Circuit's decision in this case holding that the Federal Aviation Act does not preempt the field of aircraft product liability claims. On subsequent remand to the trial court, and in a lengthy and well-reasoned 115 page opinion, Judge Brann recently granted summary judgment to Lycoming on the grounds that: (1) Lycoming is not liable for modifications by an aftermarket parts manufacturer who overhauled the accident aircraft's carburetor; and (2) plaintiff's state law strict liability and negligence claims are preempted because they conflict with federal law requirements to follow the type certificate holder's design.

Judge Brann's opinion contains a lengthy and very informative recitation and analysis of the Federal Aviation Administration's intricate framework of aviation regulations, and includes the following

noteworthy quotation from an opinion authored by the late Associate Supreme Court Justice Robert Jackson in 1944: "Planes do not wander about the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands."

By way of brief background, the engine had been manufactured by Lycoming in 1969 and was first installed on an aircraft in 1998, after spending 29 years in storage. There was no record of the engine being returned to Lycoming after it was initially shipped in 1969. In 2004, the aircraft on which the engine was installed was struck by lightning, and without Lycoming's knowledge or approval, a third-party manufacturer overhauled the engine's carburetor, and replaced it "with an aftermarket conglomerate, pursuant to an independent, third-party PMA [parts manufacturer approval] from the FAA."

In granting summary judgment, the Court found that there was no genuine issue of material fact "as to whether plaintiff's state law claims are conflict preempted, because the FAA's regulations rendered it impossible for Lycoming to unilaterally implement what design changes Pennsylvania law allegedly required of it." The Court also found that there was no genuine dispute of material fact "as to whether the engine was defective when it left Lycoming's hands in 1969, or alternatively, as to whether Lycoming could have reasonably foreseen introduction of the alleged defect." Accordingly, the court rejected plaintiff's strict liability and negligence claims.

Following this grant of summary judgment, the Court also granted Lycoming's motion for reconsideration of the Court's previous decision that plaintiff's claims under 14 C.F.R. Sect. 21.3, *Reporting of Failures, Malfunctions, and Defects*, could proceed to trial. In granting the motion for reconsideration of the viability of the FAR 21.3 claims, the Court cited to a 2008 federal court decision from Texas which found that "[b]y its plain terms, Sect. 21.3(a) applies only to a type certificate holder that also manufactured the subject product or part that is determined to be defective." The Court reasoned that there was no dispute Lycoming was not the manufacturer of the aftermarket parts used in the 2004 overhaul of the engine. The Court also found that Sect. 21.3 excludes from liability alleged defects "caused by improper maintenance or use," for which Lycoming had no responsibility here. Finally, the Court found that "the FAA likely was aware of what the Plaintiff suggests constituted a design defect in the subject carburetor but nevertheless continued to approve Lycoming's design and a third-party PMA for years thereafter." ***Sikkelee v. AVCO Corp., et al.,* 2017 U.S. Dist. LEXIS 122619 (M.D. Pa. Aug. 3, 2017).**

Senate Introduces Cabin Air Safety Act to Address Problem of Toxic Fumes Entering Aircraft Cabins

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On July 25, 2017, Senator Richard Blumenthal (D-CT) along with Senators Diane Feinstein (D-CA) and Edward Markey (D-MA) introduced the Cabin Air Safety Act, legislation intended to protect airline passengers and crew from the harmful effects of toxic cabin air.

Senator Blumenthal's press release cited research that suggests approximately 20,000 "toxic fume events" have occurred in aircraft over the last decade. In 2015, the FAA Civil Medical Institute published a report describing potential health risks surrounding human exposure to bleed air contaminants generated during "fume events" inside pressurized aircraft. The report described how breathable air inside an aircraft cabin is a combination of recirculated air and pressurized air from the aircraft's engines, known as bleed air. Fume events may occur when oils or hydraulic fluid from failed seals in the engine compartment allows contaminates to mix with the bleed air entering the cabin. Exposure to these contaminates can lead to adverse health effects. Bleed air is used to pressurize the cabins of all Boeing and Airbus commercial aircraft, except for the Boeing 787.

In recent years, this problem has been highlighted by reports of aircraft diverting due to toxic fumes, and by lawsuits against both Boeing and Airbus alleging that the use of bleed air in the cabin is a design defect causing injury to passengers and crew. For example, in June 2015, four flight attendants sued Boeing in Cook County, Illinois over an alleged toxic fume event for negligence and design defect in the Boeing 737. In July 2017, a flight attendant sued Airbus in the U.S. District Court for the Central District of California over an alleged toxic fume event on an Airbus A380.

The Cabin Air Safety Act is designed to help the aviation industry address this potentially dangerous issue and is intended to make the cabin air in airplanes safer through the following:

- Crew Training: Mandate pilot and flight attendant training regarding toxic fumes on aircraft.
- Reporting: Mandate FAA record and monitor reports of fume events through a standard form and publically available database.
- Investigations: Ensure that thorough investigations occur after fume events.
- Monitoring: Ensure that aircraft have carbon monoxide sensors that are set to alarm based on national air quality standards.

Senator Blumenthal's press release further states that the "[t]he bill will further prevent horrific toxic fume events by ensuring pilots and flight attendants have the proper training and resources to respond to dangerous air quality, and by directing the FAA to investigate reports of toxic fume events." The bill is supported by advocacy groups including the Association of Flight Attendants, Allied Pilots Association, Association of Professional Flight Attendants, International Union of Teamsters, National Consumers League, Southwest Airline Pilots' Association, and International Association of Machinists and Aerospace Workers. The bill was included as part of the Senate version of the FAA Reauthorization Act. We will continue to report on this proposed legislation as the bill moves through the Senate.

Fourth Circuit Expands Government Contractor Defense in Failure to Warn Cases

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The U.S. Court of Appeals for the Fourth Circuit recently expanded the government contractor defense for product liability claims based upon a failure to warn, in *Sawyer v. Foster Wheeler, LLC*. The government's express rejection of a particular warning is not required in order to invoke the defense. Instead, all that is required is the government's exercise of discretion over the contents of the warnings.

Foster Wheeler manufactured boilers for the U.S. Navy, pursuant to precise specifications from the government. Those specifications included various technical manuals, the contents of which (including warnings) were subject to the Navy's direction and control. Foster Wheeler employees manufactured the boiler components at a company shop and sent them to the shipyard for installation on naval vessels. The action arose from the decedent's alleged exposure to asbestos while employed in Foster Wheeler's boiler fabrication shop.

Plaintiff moved to remand the case to state court, *inter alia*, on the grounds that Foster Wheeler had not established the applicability of the defense, and consequently, federal question jurisdiction was absent. The crux of her argument was that although the Navy controlled the warnings given to Navy and government personnel, it did not prohibit Foster Wheeler from warning its own employees, working in its own facility, about the danger of asbestos exposure during the manufacturing process. The district court agreed with plaintiff. It remanded the case to state court, because there was no evidence the Navy exercised any discretion over Foster Wheeler's ability to warn its own employees in its boiler shop, nor was there any evidence Foster Wheeler proposed any type of asbestos warning to the Navy, which the Navy expressly rejected.

The Court of Appeals concluded that the standard applied by the district court was too stringent, because it essentially required proof that the government regulated all possible warnings. It explained, "[The district court's] reasoning overlooks the fact that, in specifying some warnings in response to the known dangers of asbestos, the government necessarily exercised discretion in not requiring additional warnings." Instead, the elements properly applied to the government contractor defense are: (i) the government exercised discretion and approved product warnings; (ii) the contractor provided the warnings required by the government; and (iii) the contractor warned the government about dangers in the equipment's use that were known to the contractor but not to the government. The Court of Appeals reasoned, "Under this formulation, which we also now adopt, the government need not prohibit the contractor from providing additional warnings; the defense applies so long as the government dictated or approved the warnings that the contractor actually provided." ***Sawyer v. Foster Wheeler, LLC*, 860 F.3d 249 (4th Cir. 2017).**

Ticketing Agreements May Establish Personal Jurisdiction Over Airlines, But Being a "Successive Carrier" Will Not Necessarily Result in Liability

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On March 24, 2015, Germanwings Flight No. 9525 crashed into the French Alps, resulting in the death of all 144 passengers and six crewmembers. Two of the individuals who died that day were Virginia residents on a European vacation. United Airlines ("United") sold the tickets for each leg of their journey and assumed responsibility for all flights on the decedents' itinerary, but some of the decedents' flights were operated by Deutsche Lufthansa AG ("Lufthansa") and Germanwings GmbH ("Germanwings"), a wholly -owned subsidiary of Lufthansa, through ticketing agreements.

Survivors of the two Virginia decedents sued United, Lufthansa, Germanwings, and Eurowings GmbH, another wholly-owned subsidiary of Lufthansa, asserting causes of action under the Montreal Convention and Virginia state law based on the interline and codeshare agreements among the carriers. Interline agreements permit one carrier to accept another carrier's tickets and baggage on flights with more than one connection where different airlines operate each leg of the trip. Codeshare agreements give one carrier authority to sell tickets for flights operated by a different carrier.

Lufthansa, Germanwings, and Eurowings each moved to dismiss the action for lack of personal jurisdiction. The Court denied Lufthansa's and Germanwings' motions because each gave United the authority to sell the decedents tickets for flights that comprised the itinerary including Germanwings Flight 9525. Although Lufthansa did not operate Flight 9525, the Court found that it was "integral to the transaction and transportation schedule that ultimately brought Plaintiffs' decedents to… their carriage on Flight 9525." Additionally, Lufthansa maintains a physical presence in Virginia that permits the exercise of jurisdiction over it. The Court granted Eurowings' motion to dismiss even though it has ticketing agreements with United, however, because none of its tickets were sold to the decedents and Eurowings has no physical presence in Virginia.

Lufthansa and Eurowings also moved for summary judgment as "successive carriers" under the Montreal Convention. Under the Montreal Convention, an itinerary with multiple connections can be considered "undivided carriage" even though a different airline carrier may operate each leg of the journey. But, pursuant to the Convention's terms, a successive carrier may only be held liable for an accident on a separate leg of the itinerary if "by express agreement the first carrier assumed liability for the whole journey" or the actual carrier acted on behalf of the "contracting carrier[;] the carrier acting as the agent for the entire transaction." Here, United was the contracting carrier/first carrier and Germanwings was the actual carrier for the flight that crashed. Therefore, the court granted Lufthansa's motion holding that Lufthansa could not be held liable as a successive carrier. The Court did not reach Eurowings' motion because it had already dismissed Eurowings for lack of personal jurisdiction.

In today's international travelling context, ticketing agreements are par for the course. However, it is important to stay abreast of where those agreements may hail an airline carrier into court and for what the carrier may be held liable. ***Selke v. Germanwings GmbH*, No. 1:17-cv-00121-GBL-TCB, 2017 U.S. Dist. LEXIS 113616 (E.D. Va. July 20, 2017).**

Sixth Circuit Changes Landscape of Recovery for Emotional Damages Under Montreal Convention

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Plaintiffs, identified only as Jane and John Doe, commenced an action against Etihad Airways to recover for physical and emotional injuries allegedly sustained by Jane Doe when her hand was stuck by a hypodermic needle in the seat-back pocket. Her husband claimed for loss of consortium. The district court dismissed Jane Doe's claims on the basis that emotional injuries not caused by a bodily injury are not compensable under the Montreal Convention and dismissed the derivative loss of consortium claims because Jane Doe's claims were not compensable.

The central issue on appeal was whether Jane Doe could recover for her emotional injuries, which consisted of "'mental distress, shock, mortification, sickness and illness, outrage and embarrassment

from natural sequela of possible exposure to' various diseases" pursuant to the Montreal Convention where the emotional injuries were accompanied, but not directly caused by, a physical injury.

Etihad Airways argued that emotional injuries are recoverable only if caused by a bodily injury, which the Court noted was the position taken with regard to the Warsaw Convention by the Second Circuit Court of Appeals in *Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 368 (2d Cir. 2004), by a number of other U.S. courts and at least one foreign court. The Sixth Circuit rejected this authority, seemingly questioning whether the decisions were correct under the Warsaw Convention but in any event determining that they did not apply under the Montreal Convention, a separate treaty with a different underlying purpose – i.e., the Montreal Convention's goal, unlike the Warsaw Convention, was not to protect the airline industry.

In reviewing the Montreal Convention's text, the Court found that Article 17 of the Convention conditions recover only upon there being (1) an accident (2) that caused death or bodily injury (3) on board an aircraft, and held that where an accident causes both bodily injury and an accompanying emotional injury, the passenger may recover for the emotional injuries even where not caused directly by the physical injury.

Under the Sixth Circuit's rationale, in a case of severe turbulence, passengers who sustain bodily injury would be able to recover for their fright/fear of death while those who happened not to suffer physical injury would. Although the Sixth Circuit expressly found that this result would not be illogical, many, including this author, disagree.

It will be interesting to see how other courts address the Sixth Circuit's decision here. Based on the Sixth Circuit's decision, any passenger who sustains a bodily injury, no matter how minor, would be entitled to recover emotional distress damages. If other courts follow this decision, one can expect an increase in the number of questionable bodily injury claims arising out of incidents such as severe turbulence, where mental distress claims would be supported. It can be expected that Etihad Airways will seek Supreme Court review of this decision. Unfortunately, the likelihood of the Supreme Court hearing it, as with any case, is relatively slight. ***Jane Doe v. Etihad Airways, P.J.S.C.*, 2017 U.S. App. LEXIS 16614 (6th Cir. Aug. 30, 2017).** ✈

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