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The Supreme Court Will Not Hear Airbus Helicopters, Inc.'s Argument that Federal Officer Removal Statute Applies to FAA Designees

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The United States Supreme Court ended Airbus Helicopters, Inc.'s ("AHI") bid to remove a suit against it to federal court under the federal officer removal statute (28 U.S.C. § 1442(a)(1)) when it denied AHI's Petition for Writ of Certiorari, seeking review of the Ninth Circuit's ruling remanding the matter to state court.

Airbus Helicopters, Inc. v. Riggs arose out of a 2018 helicopter crash in the Grand Canyon. AHI removed the original state court action to the District Court for the District of Nevada under the federal officer removal statute, which states that a lawsuit filed in state court may be removed to federal court if it is directed against "any officer (***or any person acting under that officer***) of the United States…relating to any act under color of such office…" 28 U.S.C. § 1442 (a)(1)) (emphasis added). AHI argued that, because it designed and manufactured the accident helicopter with authority delegated to it by the Federal Aviation Administration ("FAA") under an Organization Designation Authorization ("ODA"), it was "acting under" a federal officer in the meaning of the statute. Both the district court and the Ninth Circuit rejected AHI's argument and held that the case belonged in state court. For an in-depth discussion of the Ninth Circuit's holding, see our previous reporting on the case in the Winter 2019 Edition of Aviation Happenings, available here.

AHI sought Supreme Court review of the Ninth Circuit's opinion and in doing so asked the Court to decide "[w]hether a private party is 'acting under' a federal officer and may remove under 28 U.S.C. § 1442(a)(1), where it is carrying out duties formally and expressly delegated by the Federal Aviation Administration." Urging the Court to answer in the affirmative, AHI argued that the Ninth Circuit's ruling to the contrary conflicted with the prior Supreme Court precedent set in *Watson v. Philip Morris Cos.*, 551 U.S. 142 (2007). *Watson* held that, in order for a

private entity to be "acting under" a federal officer, there must be "evidence of some... special relationship" between the private party and a federal officer that is "distinct from the usual regulator/ regulated relationship." AHI argued that the formal delegation of authority that AHI received from the FAA constituted such a special relationship, and the Ninth Circuit's rejection of that notion conflicted with *Watson.*

AHI also identified a circuit split on the issue of whether FAA delegation supports "acting under" status, with the Eleventh Circuit holding that it does, and the Ninth and Seventh Circuits, for different reasons, holding that it does not.

But the Supreme Court denied AHI's petition, making the recent appeals court ruling rejecting ODA status as a basis for removal under the federal officer removal statute the law in the Ninth Circuit. ***Airbus Helicopters, Inc. v. Riggs,* No. 19-1158, 2020 U.S. LEXIS 3449, -- S. Ct. – (Mem.) (2020).**

Federal Appellate Court Affirms Dismissal of Purported Class Action Against Airline, Finding Airline Did Not Breach Contract of Carriage by Cancelling Flight

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The United States Court of Appeals for the Seventh Circuit affirmed the dismissal of a purported class action against Southwest Airlines Co. ("Southwest"), finding that Southwest did not breach its Contract of Carriage ("Contract") when it cancelled flights.

Plaintiff bought a Southwest ticket to fly from Phoenix to Chicago. Shortly before departure, Southwest cancelled plaintiff's flight and informed plaintiff that it might be several days before it could rebook plaintiff on a flight to Chicago.

Plaintiff brought a purported class-action suit against Southwest, alleging breach of contract and negligence. Plaintiff maintained that Southwest cancelled his and other flights because it failed to maintain a sufficient supply of de-icing fluid. The district court dismissed plaintiff's claims. Plaintiff appealed the dismissal of his breach-of-contract claim.

The Contract contained a choice-of-law provision specifying that Texas law would control any disputes. Accordingly, the Court analyzed plaintiff's breach of contract claim under Texas law. "To establish a breach-of-contract-claim under Texas law, a plaintiff must show: '(1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff resulting from that breach.'"

The Court then analyzed the applicable provisions of the Contract. With respect to flight delays or cancellations, the Contract provided that Southwest would provide a refund, credit towards future travel, or transportation at no additional charge on another Southwest flight. The Contract also contained a liability-limiting clause, which provided that Southwest would "not be liable for any failure or delay in operating any flight, with or without notice for reasons of aviation safety or when advisable, in its sole discretion, due to Force Majeure Events …."

Given these terms, the Court affirmed the district court's dismissal of the breach-of-contract claim, stating "[t]he primary issue facing [plaintiff's] claim is that Southwest's cancellation of his flight is not itself a breach of the Contract, because the Contract allows Southwest to fulfill its duties to [plaintiff] by placing him on an alternate flight or refunding his fare." The Court gave significant weight to the fact that plaintiff had accepted an alternate flight from Southwest after his original flight was cancelled.

The Court also rejected plaintiff's claim that Southwest's failure to maintain a sufficient supply of de-icing fluid constituted a breach of an implied Contract term. The Court held that "having determined that Southwest did not breach the Contract by cancelling a scheduled flight, it would be strange to hold that the circumstances underlying the cancellation somehow constituted a breach of an unstated contractual duty." The Court also noted that finding a breach of an implied contractual term in this case would violate Texas contract law.

In sum, "[b]ecause Southwest fulfilled its duties under the Contract by offering [plaintiff] a later flight or a refund, the district court appropriately held that [plaintiff] failed to state a claim for breach of contract." ***Hughes v. Sw. Airlines Co.,* 961 F.3d 986 (7th Cir. 2020)**

Aviation Group News and Notes

- **Barry Alexander** and **Joseph Tiger** presented the webinar, "Covid-19 Liability in Aviation: Should We Be Concerned?" on July 28.
- **Stephen Shapiro** and **Brandy Ringer** presented the webinar, "Are You in the Right Court? Recent Developments in Personal Jurisdiction and Pre-Service Removals" on September 16.
- **Jonathan Stern** will moderate a panel discussion on "Why is That Excluded?" hosted by Aviation Insurance Association on September 30.
- **Denny Shupe** was named to *The Best Lawyers in America* for aviation law.
- **Keith Whitson** was featured in the profile, "Law That Saves Lives," in *Mt. Lebanon Magazine*. The article discusses Keith's pro bono representation of immigrants seeking asylum.
- **Gordon Woodward** earned an LL.M. in Insurance Law from the University of Connecticut School of Law. He was also the 2020 recipient of The Insurance Law Center LL.M. Award for scholarship in insurance law.

Eleventh Circuit Holds New Trial Not Warranted After Jury Found Plaintiff Ninety-Nine Percent at Fault for Injuries Sustained During Severe Turbulence

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In *Quevedo et al. v. Iberia Lineas Aereas de España Sociedad Anonima Operadora Co.*, No. 19-13514, 2020 U.S. App. LEXIS 13345 (11th Cir. Apr. 27, 2020), the Eleventh Circuit affirmed a United States District Court for the Southern District of Florida decision denying the plaintiff's motion for a new trial.

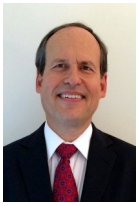
Quevedo arose from a severe turbulence encounter on an international flight that allegedly seriously injured the plaintiff. The accident occurred after bad weather shut down the plane's intended destination and forced the pilot to divert. During the diversion, one of the flight attendants performed a "fast check," which consisted of visually inspecting the seatbelts to determine whether they were fastened. Although the sleeping plaintiff's seatbelt buckle was not visible, the flight attendant believed it was fastened because both straps appeared to be tight. Minutes later, upon realizing the plaintiff's seatbelt was not fastened, the flight attendant attempted to secure it, but severe turbulence thrust both the flight attendant and the plaintiff into the cabin ceiling.

The plaintiff sued the airline for damages under the Montreal Convention, claiming the airline was negligent in failing to ensure her seatbelt was fastened while she slept. The airline argued that plaintiff was contributorily negligent under Article 20 because she failed to fasten her seatbelt before falling asleep. Additionally, the airline presented evidence that the flight attendant's "fast check" during severe weather conditions was appropriate under the circumstances.

The jury returned a verdict finding that the plaintiff's damages totaled approximately $1.2 million, but that plaintiff was ninety-nine percent at fault for her injuries, and therefore could only recover one percent of the damages. The district court denied the plaintiff's motion for a new trial after concluding the jury was presented with sufficient evidence to find that plaintiff had been negligent in failing to fasten her seatbelt before falling asleep on the plane. The court noted that the jury was presented with evidence that the only two people who suffered injuries from the turbulence were the plaintiff and the flight attendant, both of whom did not have their seatbelts fastened.

The Eleventh Circuit affirmed, highlighting the fact that plaintiff was an experienced traveler who knew the importance of wearing her seatbelt. Additionally, the airline had made sure to provide all passengers with safety instructions regarding the use of seatbelts. Lastly, the flight attendant testified that his cabin check complied with the airline's policies. The Court concluded that the district court had not abused its discretion by holding that the jury's verdict was not against the weight of the evidence.

Quevedo serves to remind operator companies of the importance of having comprehensive safety policies in place, making sure that employees follow the policies, and documenting compliance with those policies when incidents or injuries occur. ***Quevedo et al. v. Iberia Lineas Aereas de España Sociedad Anonima Operadora Co.*, No. 19-13514, 2020 WL 1983191 (11th Cir. Apr. 27, 2020).**



Mind the Gap: ADA Preemption Fails to End Case Involving a Passenger's Trip-and-fall Leading to Broken Knee While Disembarking a Flight at the Gap Between the Jet Bridge and the Aircraft

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United States District Judge Gregory H. Woods recently denied summary judgment to Delta Airlines in *Ferdinand Segarra v. Delta Airlines, Inc.*, No. 1:18-cv-8135-GHW, 2020 U.S. Dist. LEXIS 103659, 2020 WL 3127879 (S.D.N.Y. June 12, 2020). The case arose from the trip and fall of a 79-year-old man exiting a Delta flight from JFK at San Juan, Puerto Rico. Delta, according to the decision, advanced four arguments for summary judgment: Puerto Rico's statute of limitations, plaintiff's inability to identify a defect that caused his fall, the open and obvious nature of the alleged defect, and ADA preemption.

With respect to the statute of limitations argument, Delta assumed the applicability of Puerto Rico's statute of limitations. The Court held that New York's statute applied because it is procedural law (procedural laws of the forum generally apply) and New York's borrowing statute does not apply against a New York resident such as Mr. Segarra.

Judge Wood rejected Delta's argument that Segarra had failed to identify what caused him to fall. He wrote that Delta's argument "convincingly paraphrase [d] a portion of Segarra's deposition" but concluded that "even the most cursory review of Segarra's deposition transcript makes obvious that Delta's summary is, at best, inaccurate—at worst, it is disconcertingly misleading." The section that the Court found so compelling, however, was Segalla's testimony that he "think[s]" his leg went "in the gap between the jet bridge and the plane…."

The Court acknowledged there is no duty under New York law to warn of an open and obvious condition. Yet, citing *Chaney v. Starbucks Corp.*, 115 F. Supp. 3d 380, 387 (S.D.N.Y. 2015), the Court held that a landowner can be liable for an inherently dangerous condition even if it is open and obvious[1]. The Court concluded that, giving plaintiff the benefit of all reasonable inferences and declining to decide an issue of fact, Delta was not entitled to summary judgment. Judge Wood also explained that there was competing evidence about the cause of the fall and that "Delta elected not to point the Court to any record evidence about the size of the gap at issue, or any evidence that the jet bridge and plane were properly aligned the day of the accident." He noted that Delta assumed the jet bridge and the airplane were properly aligned whereas "Segarra's negligence claim is premised on his theory that the jet bridge and plane were not properly connected the day of the accident."

Finally, the Court was not convinced as a matter of law that ADA (providing that a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation") preemption precluded Delta's liability. The Court chose to apply the three-part test for ADA preemption of common law torts set forth in *Rombom v. United Air Lines*, 867 F. Supp. 214 (S.D.N.Y. 1994), which was written by Supreme Court Justice Sotomayor when she sat on the Southern District bench.

To be preempted under the *Rombom* test, the air carrier must show that the activity at issue implicates a "service"; plaintiff's claims directly, rather than tenuously, remotely, or peripherally, affect the airline service; and the underlying tortious conduct was reasonably necessary to the provision of the service. Judge Wood decided that the activity at issue directly implicated a service. Judge Wood, however, concluded that he could not find the third prong of the test free from genuine issues of disputed material fact.

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[1]Because of numerous courts' failures to follow *The Elements of Style's* guidance on when to use "which" and when to use "that," I had to drill down through several layers of case law to decide whether something that is open and obvious could ever be inherently dangerous. At *Nelson v. 40–01 N. Blvd. Corp.*, 95 A.D.3d 851 (N.Y. App. Div. 2d Dep't 2012) ("While a landowner has a duty to maintain its premises in a reasonably safe manner …, a landowner has no duty to protect or warn against an open and obvious condition that is not inherently dangerous …."), I found the answer and concluded that it could.

The Court found there was an unresolved dispute whether it was the gap or something in the airplane itself that caused the fall, as well as an unresolved dispute whether the airplane was properly docked at the gate and positioned adjacent to the jet bridge. In denying summary judgment, Judge Wood was notably critical of Delta. He observed that "it is entirely possible that a detailed review of the record may reveal that there is no genuine dispute of material fact …." But, he said, the detailed work necessary to marshal favorable facts and law "is Delta's job—not the Court's…. Judges are not ferrets!" Judge Wood sardonically wrote, "This is a case about Segarra's trip and fall. Delta's motion also tripped and fell …." Trial in the case currently is scheduled to begin on November 2, 2020.

Federal Officer Removal Statute Keeps Action in California District Court

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In *Kruse v Actuant Corp*., George Kruse and his wife filed a personal injury action in Los Angeles state court, alleging that Mr. Kruse developed mesothelioma because he was exposed to asbestos-containing avionics equipment while he served as an avionics electronics technician in the United States Navy and Air Force from 1955 to 1975. He was diagnosed with the disease in 2019; in their complaint, the Kruses made allegations of design defects and failure to warn, among other claims, against over two dozen military contractors and other entities, including Lockheed Martin, Boeing, General Dynamics, Rockwell Collins, AVCO Corporation, and Unisys Corporation (the "Defendants").

Lockheed Martin removed the case to federal court based on the Federal Officer Removal Statute, as set forth in 28 U.S.C. Section 1442(a)(1) (the "Statute"). Six other defendants joined Lockheed's removal, asserting the following as additional grounds for removal and subject matter jurisdiction in federal court: federal enclave doctrine; the government contractor defense; derivative sovereign immunity; and the combatant activities exception to the Federal Tort Claims Act. Consent of all of the Defendants to removal was not required under the Statute. Because the Court ruled that the action properly was removed under the Statute, it did not reach or rule on the merits of the additional asserted grounds for removal to federal court.

The Statute "authorizes removal of a civil action brought against any person acting under an officer of the United States for or relating to any act under color of such office." In order to remove an action under the Statute, "a defendant must establish: (1) that it is a person within a meaning of the statute; (2) that it can assert a colorable federal defense; and (3) that there is a causal nexus between its actions, taken pursuant to a federal officer's directions, and plaintiffs' claims." The first element was not in dispute in this case, requiring the Court only to address prongs (2) and (3) of this test. The Court began by observing that the Ninth Circuit has broadly construed the Statute in favor of removal.

To remain in federal court under prong (2), the Defendants only needed to demonstrate a colorable federal defense to any one (not all) of plaintiff's claims. Lockheed Martin and General Dynamics offered evidence, in the form of affidavits from retired personnel, of a colorable government contractor defense to plaintiff's claims. This defense would make the contractors immune from liability under the following circumstances that were addressed by the affidavits: "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States."

To remain in federal court under prong (3), the "causal nexus" test, defendants were required to show that "(1) Defendants' actions, taken pursuant to the Navy and Air Force's directions, are 'actions under' a federal officer and (2) those actions are causally connected to Plaintiffs' alleged injuries." The Court observed that the hurdle erected by the causal connection requirement is "quite low," and that a defendant "need only show that the challenged acts occurred *because* of what they were asked to do by the Government."

The Court concluded, based on the affidavits of the retired personnel and on the plaintiffs' own complaint allegations about their injuries being caused by defective design of military avionics equipment that "released respirable asbestos fibers," that the Defendants had met their burdens under prongs (2) and (3), and that the Court therefore had subject-matter jurisdiction over the matter. As a

result, the Court denied plaintiffs' motion to remand the matter to state court.

Among other things, this case illustrates the importance of asserting all supportable grounds in removal petitions and of submitting well-developed affidavits to support the existence of a colorable federal defense. ***Kruse, et. al v Actuant Corp., et al.*, No, 19-cv-9540, 2020 U.S. Dist. LEXIS 107109 (C.D. Calif. June 18, 2020)**

Eastern District of Louisiana Rules That Duty of Care Owed by Helicopter Pilot Can Be Established Without Expert Testimony

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The United States District Court for the Eastern District of Louisiana's decision in *White v. Dynamic Industries, Inc. et al.* illustrates the importance of adhering to internal safety policies. In an accident allegedly arising out of an unsafe helicopter landing, the Court held that the pilot's testimony concerning his employer's landing policies established a standard of care against which his conduct could be evaluated, even without expert testimony on the duty of care.

On August 15, 2018, Dwight White, a rigger working on an offshore oil platform, was struck by a piece of scaffolding. A helicopter was landing at the time, and White alleged that the downdraft from the helicopter dislodged the scaffolding. White sued both Dynamic Industries, Inc. (the installer of the scaffolding) and PHI, Inc. (the owner of the helicopter). As against PHI, White alleged vicarious liability arising out of the pilot's purportedly careless and unsafe operation of the helicopter.

At deposition, the pilot testified concerning applicable landing policies. In particular, he explained that prior to landing, he would check for potential hazards or obstacles. If observed, he would make radio contact with the landing officer. If no contact could be made, he would use his own judgment to determine whether the landing could safely be executed. The pilot's testimony appears to have been the sole evidence concerning landing safety, and White did not retain an expert to testify in this regard.

Prior to the close of discovery, PHI moved for summary judgment. PHI asserted that without an expert on helicopter piloting, White could not prove what duty was owed and consequently could not prevail in his negligence claim. PHI cited to a case in which the court had ruled that a plaintiff could not establish negligence by *res ipa loquitur* because the standard of care required of a pilot is outside of the knowledge of an average layperson and consequently requires expert testimony.

The Court agreed that expert testimony is generally necessary to establish the duties owed by a professional, including a pilot. However, it held that an expert was unnecessary here and denied summary judgment. Critically, the Court held that testimony of PHI's pilot could establish the relevant standard of care. The Court further determined that a jury could find that the pilot had breached PHI's procedures or otherwise inadequately evaluated hazards in the landing area.

White illustrates the importance of adherence to internal policies. White had no evidence independently establishing a standard of care. Unlike the decision relied upon by PHI, there was evidence concerning PHI's internal procedures and the pilot's adherence thereto. The Court adopted PHI's own policies as the applicable standard of care, against which a jury could compare the pilot's actions. As such, White could prove his case even with no expert if he could demonstrate deviation from PHI's policies. ***White v. Dynamic Indus.*, No. 19-9310, 2020 U.S. Dist. LEXIS 124712 (E.D. La. July 15, 2020)**

Federal Court Says "I Can't Hear You" to 3M Company's Efforts to Invoke Government Contractor Defense to Defective Earplug Claims

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A Florida federal district court recently enforced a relatively simple proposition: a private manufacturer is not entitled to immunity from product liability claims under the government contractor defense where the manufacturer did not actually have a design contract with the federal government. 3M Company tested that proposition and lost in multidistrict litigation involving design defect and failure to warn claims over earplugs issued to members of the United States military. *In re 3M Combat Arms Earplug Products Liability Litigation*, No.

3:19md2885, 2020 U.S. Dist. LEXIS 131951 (N.D. Fla. July 24, 2020).

Aearo Technologies, LLC (which 3M acquired in 2007) designed a multiple-flanged earplug known as the "E-A-R UltraFit" in 1989. Over the succeeding decade, Aearo revised the UltraFit by inserting a stem through its center and attaching a second earplug opposite the first. The resulting dual-ended earplug offered two different hearing protection options in a single unit; one side was a traditional, linear earplug that provided protection from steady-state noise, and the other was a non-linear filter that provided protection from loud impulse noises (such as weapons fire), while still allowing the wearer to hear low-level sounds, including human speech. Aearo prepared nearly thirty pages of design drawings and documents during that process.

Near the end of its design and development process, Aearo began to market the UltraFit to the U.S. military as the "Combat Arms Earplug" or "CAEv2." In March 1998, Aearo manufactured twenty five production samples and sent them to the Army on an unsolicited basis. In April 1999, Aearo learned that the CAEv2 was too large for the Army's current carrying case, had an increased potential for wind noise, and protruded too far to be worn with a Kevlar combat helmet. Aearo told the Army that it could shorten the CAEv2, proceeded independently to redesign the unit (including the creation of at least one new design drawing), and sent new production samples to the Army. In 2006, the government issued an indefinite procurement purchase order for the CAEv2 or its "equal" or a "double-ended swept-back triple-flange style earplug," which it continued to purchase for over a decade.

Plaintiffs claim that the CAEv2 earplugs had a propensity to loosen "imperceptibly" in some wearers' ears, which allowed harmful sound levels to pass and cause permanent damage. Among other things, they asserted design defect and failure to warn claims. In particular, they allege that the stem was too short to fit certain wearers properly and that Aearo should have warned users about proper fit. At the close of discovery plaintiffs and 3M cross-moved for summary judgement on 3M's government contractor defense.

The government contractor defense extends sovereign immunity to private manufacturers that provide products to the government under certain circumstances. The doctrine recognizes that the government is not in the business of manufacturing goods; consequently, where a private manufacturer acts at the direction of the government, sovereign immunity should be extended to the manufacturer. Otherwise, the manufacturer either will decline to provide the goods or substantially inflate their price. Application of the defense to design defect claims requires proof that: (i) the government approved reasonably precise specifications, (ii) the product conformed to those specifications, and (iii) the manufacturer warned the government about risks associated with use of the product that were known to the manufacturer but not the government. In the context of failure to warn claims, proof also is required that the government affirmatively prevented the manufacturer from issuing a warning to the end user, or otherwise imposed upon the manufacturer warning requirements that "significantly conflict[ed] with those required by state law."

The Florida district court rejected the government contractor defense on the record before it. With respect to the design defect claims, the Court found that the government had no participation in the design or development of the CAEv2 earplug. Indeed, Aearo never shared any of the design drawings and documents with the government, and no contract or purchase order was issued by the government until *after* completion of the earplugs' design. Furthermore, the government's rejection of the initial product samples because they did not fit inside existing carrying cases, had excessive wind noise and were incompatible with Kevlar helmets did *not* constitute participation in the design process because the government gave Aearo "complete freedom" and discretion as to whether and how to solve those design issues.

The Court also declined to extend government contractor immunity to 3M for plaintiffs' failure to warn claims, simply because 3M "identified no contract, formal specification, or incorporated government publication in which the Army forbade Aearo from fulfilling any state law duty to warn or instruct about the alleged risks or dangers inherent in the use of the CAEv2 or otherwise dictated the specific warnings to be given." 3M argued that the Army specifically instructed Aearo not to include instructions *inside* the package because military audiologists would provide in-person training to each service member. The Court rejected that argument because there was no evidence that the Army precluded Aearo from affixing warnings to the *outside* of the packaging, nor did the Army's "instruction" address the type or content of permissible warnings.

Manufacturers of aerospace products for the government and military have long relied on the government contractor defense for design defect and failure to warn claims. *In re 3M Combat Arms Earplug Products Liability Litigation* serves as both a reminder and a warning. The defense remains available and viable to manufacturers, but application is dependent upon clear satisfaction of its elements.

A Federal Judge in Texas Permits Pre-service Removal by a Forum State Defendant

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A statute known as the "forum defendant rule" provides that a case falling within a district court's diversity jurisdiction "may not be removed [from state court] if any of the parties in interest properly joined ***and served*** as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b)(2) (emphasis added). Earlier this year, the Fifth Circuit held that, in a multi-defendant case, a defendant that is not a citizen of the state in which the plaintiff filed its lawsuit may remove a diversity action to federal court before the plaintiff serves any local defendant, a practice that some refer to as a "snap removal." Addressing a question left unanswered by the Fifth Circuit, the Honorable Nancy F. Atlas of the United States District Court for the Southern District of Texas recently held that a citizen of the forum state also may remove a diversity case from state to federal court before the plaintiff serves it.

In *Latex Construction Company v. Nexus Gas Transmission, LLC*, the plaintiff sued a single defendant in Texas state court for breach of contract. The plaintiff corporation was a citizen of Georgia and the defendant limited liability company was a citizen of Texas. The parties, therefore, were diverse, but the defendant was a citizen of the state in which the plaintiff filed its lawsuit (the "forum state"). The Texas state court rules required the plaintiff to serve the defendant through the Texas Secretary of State. Before it could do so, the defendant, invoking diversity jurisdiction, removed the case to federal court.

Arguing that the forum defendant rule prohibited a sole, forum-state defendant from removing a diversity action, the plaintiff moved to remand the case to state court. The District Court addressed the motion by conducting a two part analysis. First, Judge Atlas considered whether the plain language of the forum defendant rule prohibited a sole defendant who is a citizen of the state in which plaintiff filed its lawsuit from removing a case. Judge Atlas held that it did not: "[T]he plain language of [the forum defendant rule] allows defendants that have not been served with process to remove from courts in their home states suits in which they are the sole defendants."

Second, the Court considered whether allowing pre-service removal by a forum state defendant would lead to an absurd result. On that issue, Judge Atlas turned to *Texas Brine Co., L.L.C. v. American Arbitration Association*, 955 F.3d 482 (5th Cir. 2020). In *Texas Brine*, the Fifth Circuit noted that the forum defendant rule "provides[s] a bright-line rule keyed on service" and held that, in a multi-defendant case, the forum defendant rule does not prohibit a non-forum defendant from removing a diversity case to federal court before the plaintiff serves a local defendant.

Judge Atlas first observed that, according to the Fifth Circuit, "applying [the forum defendant rule] to allow snap removal by a non-forum defendant was 'at least rational' and was not an absurd result." Judge Atlas then pointed out that the *Texas Brine* Court relied upon and cited with approval cases from the Second and Third Circuits holding that forum-state defendants also may remove diversity cases pre-service. Judge Atlas concluded that "allow[ing] for removal of suits involving a single defendant who is a resident of the forum state . . . is not an absurd result." Therefore, Judge Atlas held that the forum defendant rule did not bar the defendant from removing the case and denied the plaintiff's motion to remand. ***Latex Construction Company v. Nexus Gas Transmission, LLC*, 2020 U.S. Dist. LEXIS 122244 (S.D. Tex. July 13, 2020)**

Just before going to print, Judge Starr of the United States District Court for the Northern District of Texas denied a remand motion that Schnader's Aviation Group had opposed on similar grounds. The decision is *Serafini v. Southwest Airlines Co*., No. 3:20-CV-00712-X, 2020 U.S. Dist. LEXIS 163073 (N.D. Tex. Sep. 8, 2020). Judge Starr also denied a similar motion to remand in *Baker v. Bell Textron*, No. 3:20-CV-292-X, 2020 U.S. Dist. LEXIS 167288 (N.D. Tex. Sept. 14, 2020).

Magistrate Judge Recommends that Plaintiffs' Overreaching Claims for Sexual Assault Be Curtailed, and Rejects Attempt for Class Action

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In *Ramsay v. Frontier Inc.*, two female passengers commenced litigation to recover for sexual assaults they allegedly suffered while on board Frontier flights. The complaint asserted causes of action for (1) negligence, (2) negligent infliction of emotional distress, (3) intentional infliction of emotional distress, (4) willful and wanton conduct, and (5) injunctive/ equitable relief.

The lawsuit also was brought as a class action on behalf of all passengers who flew on Frontier on or after December 16, 2017. Though purportedly brought on behalf of all passengers, the request for class action status was based on allegations that sexual assaults have become more prevalent on commercial flights and that Frontier either had inadequate policies to protect against or handle such assaults or failed to properly enforce the policies it did have.

Frontier moved to dismiss the complaint for failure to state a claim and, alternatively, to strike the class allegations. After oral argument, the Magistrate Judge issued a Report and Recommendation recommending dismissal of all but the negligent infliction of emotional distress cause of action and striking the class allegations.

The causes of action for willful and wanton conduct and for injunctive relief were easily resolved. The former on the basis that Colorado law does not provide for such a cause of action and the latter because the plaintiffs failed to allege any immediate threat and significant risk of irreparable harm, a required element for injunctive relief. The Court alternatively found that the claims for injunctive relief would be preempted by the Airline Deregulation Act ("ADA").

The Report and Recommendation also recommended dismissal of the negligence cause of action. Though Frontier, as a common carrier, owes the highest standard of care to its passengers, the negligence cause of action failed as a matter of law because the complaint lacked any allegation from which it could be inferred that Frontier could or should have been aware that the passengers sitting next to the plaintiffs were sexual predators or otherwise posed any greater risk to the plaintiffs than the millions of other passengers who travel on commercial flights. Simply put, there was nothing from which it could be inferred that the sexual assaults resulted from Frontier's negligence.

The only cause of action found to be properly stated in the complaint was that for negligent infliction of emotional distress. This claim arose not out of the sexual assaults themselves but from the Frontier flight crew's alleged failure to take action after being advised during the flights of the assaults. The complaint specifically alleged that the plaintiffs advised the flight crew of the assaults immediately after they occurred and that the flight crew failed to take action to redress the situations. This was sufficient to state a claim for negligent infliction. The Court additionally found that this cause of action was not preempted by the ADA. The Court did, however, recommend dismissal of the intentional infliction claim, finding that there was no allegation of outrageous (as opposed to negligent) conduct sufficient to meet the higher standard for this cause of action.

Finally, the Court recommended that the class allegations be stricken, as there could be no proper basis for allowing a class involving all Frontier passengers in what amounts to a case by two plaintiffs for personal injuries caused by sexual assault. The Court went so far as to indicate that even a class limited just to Frontier passengers who suffered a sexual assault would not be permitted, as each case would have to be decided on its specific facts.

Both parties filed Objections to the Magistrate's Report and Recommendations, and the plaintiffs moved for leave to file an amended complaint. Plaintiffs' proposed amendments include allegations as to why the particular sexual assaults on the plaintiffs were foreseeable and should have been prevented, and thus might be deemed sufficient to state a claim for negligence. With that possible exception, it is very likely that the Magistrate's Report and Recommendation will be adopted by the District Court. ***Ramsey v. Frontier Inc.*, Civil Action No. 19-cv-03544-CMA-NRN, 2020 U.S. Dist. LEXIS 151176 (D. Colo. July 30, 2020).**✈

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