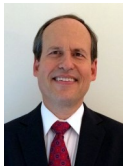


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Midair Collision Case Produces Eight Figure Judgment Following Trial



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On April 11, 2017, a Frederick County, Maryland jury returned a \$16,621,058 verdict against Midwest Air Traffic Control Services, Inc. (“Midwest ATC”) for two wrongful deaths. The two decedents were the pilots of a Robinson R-44 helicopter that collided with a Cirrus SR-22 near the traffic pattern at Frederick Municipal Airport on October 23, 2014. Midwest operated the control tower at Frederick, which opened in 2012. Schnader represented the pilot of the Cirrus, who was sued by the survivors of the two decedents and for contribution by Midwest.

There were several interesting aspects of this case. First, the main rotor of the helicopter struck the nosewheel and right wing of the Cirrus, shearing off the airplane’s right main gear at the leg and cutting off a portion of the trailing edge of the airplane’s right wing. The Cirrus pilot perceived a loss of control and deployed the airplane’s ballistic parachute at an altitude of only about 700 feet above the ground. He and his passenger walked away from the accident without serious injury after the airplane drifted down

and ended up suspended in a stand of trees. With the loss of integrity of the main rotor blades, the helicopter occupants had no such luck, and the Robinson plummeted to the ground, killing all three occupants on impact. The passenger death claim was settled by Midwest and the Cirrus pilot without litigation.

The reconstruction of the accident was particularly unusual and challenging because Frederick does not have radar. The nearest radar antenna was at Dulles International Airport, and it did not provide coverage below approximately 1,300 feet MSL. As a result, there was no recorded data for the helicopter. The Cirrus, however, was equipped with advanced avionics, and the Avidyne primary flight display recorded sufficient data to accurately reconstruct not only the flight path of the Cirrus but also the point of the collision.

The trial lasted two weeks, and the jury deliberated for approximately two days before reaching a verdict against Midwest ATC. The verdict was reduced to just over \$14 million to reflect Maryland’s cap on noneconomic damages. ***Parsons, et al. v. Midwest Air Traffic Control Services, Inc., et al., No. 10-C-15-002746 OT (Cir. Ct. Frederick Cty. amended judgment entered May 8, 2017).***

Awards and News

Schnader is pleased to announce that our Aviation Group was once again ranked among the top firms in the United States.

Chambers

For the fifth consecutive year, [Chambers and Partners USA ranked Schnader's Aviation Group](#).

Only five firms were ranked in 2017.

Chambers recognized the Group for "its capability in representing airlines, aerospace manufacturers and insurers in a range of contentious issues," adding that the group "has particular expertise in multijurisdictional cases, military air crashes, cargo claims and civil aviation disasters. Additional expertise can be found in the group's appellate practice, representing clients in aviation and related insurance matters in state and federal courts across the country." Client interviews yielded acclaim for the team's preparation, litigation skills, and strategic thinking.

In addition to the Group recognition, **Denny Shupe** and **Jonathan Stern** were recognized. Shupe was lauded as an "enormously experienced" and "strategic" lawyer with "a strong ability to engender confidence." Stern was praised as, "very, very bright and articulate. He knows the ins and outs of cases and is quite formidable in oral argument."

The Legal 500

[The Legal 500 USA recommended Schnader's Aviation Group in 2017](#), marking the sixth consecutive year of recognition by the influential publication.

According to the guide, "the aviation litigation team at Schnader Harrison Segal & Lewis LLP exhibits 'excellent business acumen and industry knowledge' and has been active in litigation stemming from aircraft accidents, particularly where [there] has been a loss of life."

The publication identified Aviation Group Chair **Robert Williams**, calling him "persistent and practical," as well as **Denny Shupe** and **Jonathan Stern**.

Now in its 11th year, the *Legal 500 USA* spotlights and ranks elite law firms by practice area. Its team of lawyers and journalists spend months each year conducting in-depth research drawing on feedback from law firms, clients and competitors to create its rankings.

Additional Awards and Group News:

- **Barry Alexander, Robert Williams, Denny Shupe, William Janicki, and Jonathan Stern** are included in the [Expert Guides for Aviation Lawyers 2017](#). Those selected have been nominated by in-house counsel or peers as among the top aviation attorneys in the world.
- **Denny Shupe** has been named to Lawyers Worldwide Award Magazine's *Innovative Lawyers 2017*.
- **Barry Alexander** received the 2017 International Advisory Experts Award for Litigation Lawyer of the Year in New York.
- Global Law Experts named Schnader its 2017 Aviation Litigation Law Firm of the Year in New York.
- **Lee Schmeer** accepted an invitation to join the board of the Military Assistance Project.
- **Jonathan Stern** and **Robert Williams** spoke at the Aviation Insurance Association Annual Conference in San Diego, California on the topics of inadequate liability limits and cybersecurity.
- **Barry Alexander, Robert Williams, Denny Shupe, and Jonathan Stern** presented a Continuing Education program in Dallas on May 24 on the topics of cybersecurity, personal jurisdiction, passenger discrimination claims, and federal preemption.
- **Lee Schmeer** will be flying a C-17 for the [Smithsonian Family Day](#) on June 17. He also flew in support of a multinational fighter exercise, Frisian Flag 2017, in Iceland and the Netherlands in March, and a [humanitarian mission](#) to Haiti in May.

Supreme Court Strengthens Due Process Constraints on Personal Jurisdiction Set Out in *Daimler*



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On May 30, 2017, the U.S. Supreme Court handed down a decision further strengthening the “Due Process” considerations to general personal jurisdiction over foreign corporations.

BNSF v. Tyrrell involved two separate appeals to the U.S. Supreme Court regarding general personal jurisdiction of Montana State courts over foreign corporations based on business operations in the forum state. Plaintiffs brought the actions against BNSF under the Federal Employers’ Liability Act (FELA), 45 U.S.C. § 51 *et seq.*, which makes railroads liable to their employees for on the job injuries. The injured workers did not reside in Montana, nor were they injured there.

The Montana Supreme Court held that Montana courts could exercise general personal jurisdiction over BNSF because the railroad both “d[id] business” in the State within the meaning of 45 U.S.C. § 56 and was “found within” the State within the compass of Mont. Rule Civ. Proc. 4(b)(1). The due process limits articulated in *Daimler AG v. Bauman*, the court added, did not control because *Daimler* did not involve a FELA claim or a railroad defendant.

The Supreme Court reversed, holding that Montana could not, consistent with due process, exercise jurisdiction over a railroad in a FELA action, pursuant to its statute allowing for personal jurisdiction over persons found within Montana, where the railroad was not incorporated in Montana, did not maintain its principal place of business there, and was not so heavily engaged in activity in Montana as to render it essentially at home in Montana, given that, although it had over 2,000 miles of railroad track and more than 2,000 employees in Montana, it also operated in many other places.

The Fourteenth Amendment’s Due Process Clause does not permit a State to hale an out-of-state corporation before its courts when the corporation is not at home in the State and the episode-in-suit occurred elsewhere. The Fourteenth Amendment due process constraint on state jurisdiction over out

-of-state corporations described in *Daimler AG v. Bauman* applies to all state-court assertions of general jurisdiction over nonresident defendants. The constraint does not vary with the type of claim asserted or business enterprise sued.

Pursuant to *Daimler*, a court may assert general jurisdiction over foreign corporations to hear any and all claims against them when their affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State. The paradigm forums in which a corporate defendant is at home are the corporation’s place of incorporation and its principal place of business. But the exercise of general jurisdiction is not limited to these forums. In an exceptional case, a corporate defendant’s operations in another forum may be so substantial and of such a nature as to render the corporation at home in that State. The inquiry calls for an appraisal of a corporation’s activities in their entirety, and a corporation that operates in many places, such as BNSF, can scarcely be deemed at home in all of them. ***BNSF Ry. Co. v. Tyrrell, 2017 U.S. LEXIS 3395 (U.S. May 30, 2017).***

Proposal to Privatize the U.S. Air Traffic Control System



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United States Congressman Bill Shuster, a Republican representative from Pennsylvania and Chairman of the House Infrastructure and Transportation Committee, introduced legislation to privatize our nation’s air traffic control system last year. Congressman Shuster’s proposal, Aviation Innovation, Reform and Reauthorization Act (H.R. 4441), would have transitioned oversight of the air traffic control system to an independent, non-profit corporation. His proposal did not garner bipartisan support, and the Senate reauthorized the Federal Aviation Act, without amendment, until September 1, 2017. However, the recent support of certain major airlines, some industry associations, the controller’s union, and President Trump may produce a different result this year.

On June 5, 2017, President Trump signed off on a proposal that would privatize air traffic control. His plan includes the creation of a board comprised of

thirteen members to run the privatized system. Eight board members would be appointed by the Secretary of the Department of Transportation Elaine Chao and would be comprised of two representatives each for airlines, unions, and the government, and one representative for airports and general aviation. Those eight representatives would then elect a chief executive officer and choose four more independent members. Modeled after Canada's privatized system, President Trump's proposal provides for funding by user-fees on take-offs and landings instead of passenger ticket taxes. The plan would be implemented over a three-year period, and is part of his plan to reduce infrastructure spending.

Two days after President Trump submitted his proposal to Congress, Secretary Chao testified at a hearing before the Senate Commerce, Science and Transportation Committee regarding the Administration's perspective on the reauthorization of the Federal Aviation Act. She spent the majority of her time addressing several concerns about the proposal to privatize air traffic control as part of a reauthorization of the FAA.

Proponents of privatization believe that the United States should adopt a private model in order to implement new technologies more quickly, avoid annual budget disputes, reduce the "hassle" of flying, and decrease the current strain on the Federal Aviation Administration due to increased air travel. Opponents, GAMA, HAI, NBAA, the National Air Transportation Association, and the National Association of State Aviation Officials believe that the funding structure would favor large fee generators like commercial airlines and big-city airports to the detriment of general aviation airports, which do not service commercial air travel, and farmers. There also are concerns that a system based entirely on user fees could tank if there is another economic recession or a terrorist attack that cuts air travel demand. Additionally, opponents argue that the FAA has ensured that the U.S. has the safest system in the world – what need is there to transfer management to an unknown, unproven entity?

Secretary Chao did not directly address the fee structure under a private model, though she repeatedly stated that she would work with the members of the Committee to address the concerns of General Aviation and rural communities. Additionally,

she argued that under a private system with funding and governance overseen by a non-government, non-profit entity, rural communities would actually fare better because the contract towers that are used in those areas would not be subjected to budgetary cutbacks like they are now. With respect to safety, Secretary Chao opined that a privatized system would eliminate the conflict of interest that exists with the FAA overseeing its own safety operations.

Whether this recent support will be enough to reauthorize the FAA with a privatized air traffic control system is still up in the air – and may remain there. This is, after all, a debate that has been taking place since the Clinton administration. The U.S. Government Accountability Office issued a report last year stating that any transition would take at least five to seven years in order for decisions to be made about how to transfer government assets, create a fee structure, and address any liability questions.

Air India Not Subject to Suit Arising from Bug-Infested Food



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Pro se plaintiff Chaman Popli sued Air India in the United States District Court for the Eastern District of Pennsylvania after he purchased food in Air India's first-class lounge in Delhi, India, allegedly infested with live bugs and worms. Plaintiff became ill in India, and alleged that he continued to feel nauseous throughout his flight to New York. He further alleged that Air India's flight attendants did not offer him assistance during the flight. Plaintiff initially filed suit in Pennsylvania state court, and Air India removed the case to federal court based on the Foreign Sovereign Immunities Act ("FSIA").

Air India moved to dismiss the case for lack of personal jurisdiction, and also argued that it was immune from suit by operation of the FSIA. The Court found it "apparent" that the airline was not subject to personal jurisdiction in Pennsylvania because it was not registered to do business in the state and conducted no business in Pennsylvania. Thus, it did not engage in the requisite "continuous and systematic" operations in the state to warrant general personal jurisdiction, nor was specific jurisdiction appropriate since the alleged events did not arise

out of or relate to forum-specific conduct.

The FSIA also shielded Air India from suit. The FSIA provides presumptive immunity from suit for foreign states and their agencies or instrumentalities (Air India is owned by the Indian government). One of the exceptions to FSIA immunity arises when the foreign entity engages in commercial activity that occurs in the United States or causes a direct effect in the United States. Here, the Court reasoned that plaintiff purchased the contaminated food in India, and that injuries sustained while abroad that continued to effect plaintiff upon returning to the United States were not sufficient to implicate the commercial activity exception to FSIA. ***Popli v. Air India Airline*, No. 17-337, 2017 U.S. Dist. LEXIS 68786 (E.D. Pa. May 5, 2017).**

Eleventh Circuit Affirms That Air Traffic Controller Not Responsible For In-Flight Breakup



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Knous v. United States involved an appeal to the 11th Circuit Court of Appeals arising from the crash of a Beechcraft Bonanza near Rienzi, Mississippi on October 26, 2010. The pilot, James Judson, and his wife and sole passenger, Elizabeth Judson, were killed in the crash. The appellants brought an action under the Federal Tort Claims Act, 28 U.S.C. 1346(b) (“FTCA”), alleging that the crash resulted from an in-flight breakup of the aircraft after it approached and entered a line of extreme precipitation. In their complaint, plaintiffs alleged that the air traffic controller at Memphis Center breached his duty of care in providing air traffic control services by failing to report to the pilot weather that he observed on his radar scope and to vector the pilot away from the weather.

After a seven day bench trial, the trial court concluded, as a matter of law, that the air traffic controller had no duty to report weather that he observed on his radar scope in addition to weather reported by pilots (PIREPs), and found that the air traffic controller acted reasonably under the circumstances. In addition, the trial court found the factual evidence did not demonstrate that weather caused the in-flight breakup of the plane. On appeal, the appellants argued that (1) the trial court

misinterpreted the legal duty owed by air traffic controllers; and (2) the trial court erred in concluding that the appellants failed to prove that weather caused the in-flight breakup.

The 11th Circuit affirmed the trial court after reviewing the court’s factual findings for “clear error” and reviewing its findings of law *de novo*. Under this standard of review, the court stated that it would “find the district court committed clear error if after assessing the evidence, we are left with a definite and firm conviction that a mistake has been committed.” This is a very hard standard to overcome on appeal and the appellants were unable to do so here.

Cases such as these turn on complicated factual scenarios that are examined in the context of state law standards of care (as required by the FTCA) and in the context of federal regulations governing the conduct of air traffic controllers. Under the FTCA, the United States is subject to tort liability “in the same manner and to the same extent that a private individual would be under the law of the place where the tort occurred.” There was no dispute here that the pilot flew into an area of extreme precipitation. The court observed that pilots and air traffic controllers “have a concurrent duty” to exercise due care to avoid accidents. What was in dispute here was whether the air traffic controller had to tell the pilot what the controller was seeing on his radar scope, and whether it was proven that a severe weather encounter caused the in-flight breakup. The appellate court said no in response to both questions.

In reaching this conclusion, the appellate court agreed with the trial court that the FAA Air Traffic Control Manual requires controllers to provide pilots with “pertinent information on observed/reported weather.” Both courts found that this duty of care is satisfied by an air traffic controller providing a pilot either with observed or with reported weather. In making this finding, the court cited extensively to observed weather reports that were provided by the air traffic controller to the pilot, and found that the controller satisfied his duty of care by providing these reports, particularly under circumstances where the pilot was aware of adverse weather forecasts, and where the controller was very busy handling other air traffic in his sector and consequently had to prioritize his activities.

With respect to the cause of the in-flight breakup,

the appellate court affirmed the trial court's finding that the air traffic controller's conduct did not cause the accident because it was not "clearly erroneous."

The Court noted that even though evidence was presented at trial that extreme precipitation can cause extreme turbulence, there was no evidence presented that the airplane actually experienced extreme turbulence before it broke apart. Further, the Court found that the appellant's expert did not testify about whether the wide scatter of the wreckage on the ground following the breakup was possible in a pilot-induced accident or in an accident caused by a factor other than weather. The Court also found that the government's experts successfully challenged the appellants' experts' testimony about the strength of the updrafts in tall convective cells, and whether such updrafts caused this plane to break apart. This case demonstrates the large hurdles to be overcome due to the deferential standard of review when cases such as these are appealed, and the importance of developing an appropriate factual record at the trial court. ***Knous v. United States*, No. 16-11968, 2017 WL 1192192 (11th Cir. Mar. 31, 2017).**

Registration to Do Business in New York Insufficient to Support Personal Jurisdiction



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In *Mischel v. Safe Haven Enterps.*, an attorney commenced litigation to recover compensation for work, labor and services performed on behalf of defendant Safe Haven Enterprises, LLC and separately on behalf of each of the individual defendants. The defendants filed a motion to dismiss the complaint based on a lack of personal jurisdiction.

The central issue to be decided by the Supreme Court of New York for New York County was whether Safe Haven's registration to do business in New York constituted consent to personal jurisdiction. The court began its analysis by noting that "[p]rior to the Supreme Court ruling in *Daimler AG v. Bauman* (134 S Ct 746 [2014]), the courts of [New York] held that a foreign corporation is deemed to have consented to personal jurisdiction over it when it registers to do business in New York and appoints the Secretary of State to receive process for it pursuant to Business Corporation Law §§ 304 and 1304...." The court agreed, however,

with post-*Daimler* case law from the Second Circuit and New York federal district courts holding that registration to do business does not constitute consent to personal jurisdiction, and rejected the flawed analysis of two post-*Daimler* New York state court decisions following pre-*Daimler* precedent.

In reaching its decision, the court found that the New York registration statute's silence on the jurisdictional effect of registering to do business rendered any interpretation of the statute as providing such consent inconsistent with due process standards. The court also held that "the effect of finding jurisdiction by registration would be coercive," indicating that it might not enforce a New York statute that expressly required consent to personal jurisdiction as a condition of registering to do business.

Finally, the court rejected the plaintiffs' contentions that Safe Haven was doing business in New York such that it was subject to general personal jurisdiction and that Safe Haven engaged in activities relating to the claim in New York that were sufficient to subject it to specific personal jurisdiction. Although it referenced only Safe Haven in its analysis, the court dismissed the claims against all of the defendants.

Despite the court's decision in *Mischel*, the issue of whether registration to do business constitutes consent to personal jurisdiction remains one that divides state and federal courts in the United States, and ultimately will have to be decided by the United States Supreme Court. For now, however, United States courts unmistakably are continuing to narrow the circumstances under which personal jurisdiction will be found, with victories for plaintiffs being few and far between. ***Mischel v. Safe Haven Enterps., LLC*, 2017 WL 1384214 (N.Y. Sup. Ct. Jan. 11, 2017).**

Pennsylvania Appellate Court Cites *Elasaad* in Holding No Federal Preemption for Alleged Injury During Boarding



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In this case, the Pennsylvania Superior Court vacated a Philadelphia Court of Common Pleas grant of judgment on the pleadings in favor of defendant Southwest Airlines, instead holding that the Federal Aviation Act (FAAct)

does not preempt plaintiff's claims.

In her complaint, Plaintiff alleged that because of Southwest's negligence, another passenger's suitcase struck her in the head while she was boarding a Southwest flight. Southwest's response asserted various affirmative defenses, including federal preemption under the FAA. Southwest filed a motion for judgment on the pleadings arguing that the FAA preempted her claims. Plaintiff's response in opposition stated that she intended to amend her complaint to reference a standard of care under the FAA, but at no point during the trial court proceedings did she identify that standard of care or ask for leave to amend her complaint.

The trial court granted Southwest's motion and then denied plaintiff's motion for reconsideration. The trial court cited *Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999), as support of its holding that plaintiff's negligence claims were preempted. In doing so, the trial court stated that while plaintiff could have cured her failure to include an applicable federal standard by identifying one in an amended complaint, she had failed to amend.

On appeal, the Superior Court noted that "whether the FAA preempts claims of negligence relating to boarding an aircraft is an issue of first impression in this Court." The court looked to *Elasad v. Independence Air, Inc.*, 613 F.3d 119 (3d Cir. 2010), which held that federal preemption did not apply to a passenger allegedly injured during disembarking, in deciding that federal preemption did not apply because plaintiff's injury did not occur "in the course of the operation of the aircraft." ***Okeke-Henry, C. v. Southwest Airlines Co.*, No. 1410 EDA 2016, 2017 Pa. Super. LEXIS 250 (Pa. Super. Ct. Apr. 13, 2017).**

New Jersey Federal Court Holds That Admiralty Alone Does Not Create Removal Jurisdiction



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In a case arising from an aviation accident, the United States District Court for the District of New Jersey recently held that admiralty alone is not a sufficient basis to remove a case to federal court. In *Glazer v. Honeywell International Inc.*, a pilot lost consciousness

after the cabin pressurization system in his Socata TBM 900 failed. The aircraft eventually ran out of fuel and crashed into the ocean near Jamaica.

The estate of the pilot sued Honeywell, the manufacturer of components of the aircraft's pressurization system, in state court in New Jersey. Although the parties were citizens of different states, 28 U.S.C. § 1441(b)(2) prohibited Honeywell, which is headquartered in New Jersey, from invoking diversity jurisdiction to remove the case from its "home" state court. Therefore, Honeywell attempted to rely on federal question jurisdiction to remove the case to federal court. Namely, Honeywell argued that the federal court had admiralty jurisdiction under the Death on the High Seas Act, 46 U.S.C. § 30302 ("DOHSA"). The plaintiff moved to remand the case to state court.

The court began its analysis of the request to remand by noting that 28 U.S.C. § 1333, which codifies admiralty jurisdiction, contains a "savings-to-suitors" clause that creates concurrent jurisdiction between the state and federal courts for admiralty-related claims. Under the pre-2011 version of 28 USC § 1441, it was well-established that, despite this concurrent jurisdiction, admiralty claims do not create removal jurisdiction and, therefore, were not removable unless some other independent basis for removal existed.

Specifically, the pre-2011 version of 28 USC § 1441 (b) provided that:

Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. *Any other such action* shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

When admiralty-related claims were filed in state court pursuant to the grant of concurrent jurisdiction under Section 1333, they were treated as cases at law, not admiralty cases. Therefore, such cases were not categorized as actions over which federal courts had original jurisdiction, governed by the first

sentence of the pre-2011 version of Section 1441(b), but rather were considered “any other such action,” governed by the second sentence of 1441(b). Such cases were not removable, pursuant to the pre-2011 version of Section 1441(b), if any defendant was a citizen of the forum state.

In 2011, Congress amended 1441(b)(2) to provide that:

A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed 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.

Honeywell argued that this amendment “removed the antiquated requirement of an independent basis for jurisdiction” over admiralty cases. The court disagreed, holding that the 2011 amendment: (i) was procedural in nature and did not change the preexisting substantive law; and (ii) would have been more explicit had Congress intended to overturn “centuries of precedent” holding that admiralty-related claims are not removable solely on the basis of federal question jurisdiction. ***Glazer v. Honeywell International, Inc.*, No. 16-7714, 2017 U.S. Dist. LEXIS 71029 (D.N.J. May 10, 2017).**

Ninth Circuit Limits Personal Jurisdiction Over Foreign Parent Corporation



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In *Williams v. Yamaha Motor Co.*, the Ninth Circuit Court of Appeals affirmed the district court’s dismissal of a Japanese corporation, Yamaha Motor Co., Ltd. (“YMC”), for lack of personal jurisdiction, and dismissal of plaintiffs’ consumer fraud claims against Yamaha Motor Corporation, U.S.A. (“YMUS”) under FRCP 12 (b)(6).

In July 2013, plaintiff/appellant George Williams filed suit against defendants/appellees Japanese parent YMC and its U.S. subsidiary YMUS, alleging violations of federal and state warranty law and other claims. The suit was consolidated with two similar actions. Appellants purchased outboard boat motors that

YMC designed and manufactured in Japan and that YMUS imported to and marketed in California. Appellants alleged that the motors contained a design defect that caused premature corrosion in the motors’ dry exhaust system, that appellees knew of the defect prior to the sales, and that the defect posed an unreasonable safety hazard. Appellants appealed the district court’s dismissal of Japan-based YMC for lack of personal jurisdiction.

The Ninth Circuit found that YMC did not have sufficient contacts with California for general jurisdiction to be established. Appellants failed to submit evidence to support that YMC was “at home” in California. Although California was important to YMC, YMC has 109 subsidiaries in 26 different countries and YMC’s net sales in North America (including all 50 states and Canada) accounted for only approximately 17% of YMC’s total net sales.

Appellants also failed to establish that YMC and YMUS were “alter egos.” The Ninth Circuit recognized that although *Daimler AG v. Bauman* invalidated the “agency” test in the context of general jurisdiction, it left the alternative “alter ego” test. To establish that a parent is an alter ego of a subsidiary, plaintiff must show: (1) there is such unity of interest and ownership that the separate personalities of the two entities no longer exist and (2) failure to disregard their separate identities would result in fraud or injustice. Appellants made almost no factual allegations about YMUS and YMC’s parent-subsidary relationship. Even if the Court assumed that YMUS’s contacts could be imputed to YMC, it was insufficient to establish general jurisdiction under *Daimler*.

Further, appellants did not allege that YMC purposefully directed any actions at California. The Ninth Circuit found that the facts here were similar to those in *Asahi Metal Indus. Co. v. Super. Ct. of Solano Cty*, where defendant knew its products would be sold and used in California and benefited economically from such sales, but exertion of personal jurisdiction over the defendant was found unreasonable. Appellees submitted un rebutted evidence that YMC did not conduct any activities within California or target California with marketing or advertising. Because the only connection appellants identified between YMC and California was through YMUS, the Court looked to whether YMUS’s connections could be attributed to YMC under the agency theory.

Although the Court recognized that *Daimler* left open whether an agency relationship would justify specific jurisdiction, it determined that such an analysis was doubtful. As appellants neither alleged nor showed that YMC had the right to substantially control YMUS's activities, the Court did not conduct such an analysis.

The Ninth Circuit continues to follow *Daimler's* limitations on personal jurisdiction by refusing to extend jurisdiction over a foreign corporation without significant forum state contacts or control over its U.S. subsidiary. ***Williams v. Yamaha Motor Co.*, 851 F.3d 1015 (9th Cir. 2017).**

FAA Moves to Identify FARs for Repeal or Replacement to Comply with Trump Executive Orders



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On April 28, 2017, the FAA issued a notice that the Aviation Rulemaking Advisory Committee ("ARAC") will review the FAA regulations in Title 14 of the Code of Federal Regulations. ARAC, an advisory committee comprised of aviation stakeholders, will identify any regulations that may be repealed, replaced or modified. ARAC is tasked with identifying regulations that:

- ◆ eliminate jobs or inhibit job growth;
- ◆ are outdated, unnecessary, or ineffective;
- ◆ impose costs that exceed benefits; or
- ◆ create a serious inconsistency or interfere with regulatory reform initiatives and policies.

The ARAC evaluation is in response to two executive orders promulgated by the Trump administration. The first, the Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs, requires that for every new regulation an agency proposes, the agency must propose the repeal of two prior regulations. The second, the Presidential Executive Order on Enforcing the Regulatory Reform Agenda, requires federal agencies to create a task force to review regulations in order to comply with the "two-for-one" executive order and to "alleviate unnecessary regulatory burdens placed on the American people." ARAC's

review will implement this mandate on behalf of the FAA.

ARAC's evaluation comes at a time when the FAA is already undergoing major reforms. Just this year the FAA has seen major structural changes with its rewrite of Part 23 small aircraft airworthiness standards and third class medical reform. FAA Administrator Michel Huerta has advised that more changes are on the horizon including further integration of drones, implementation of NextGen, and the continuation of the overhaul of aircraft and airmen certification requirements. New regulations accompanying these reforms will come with additional changes in accordance with the two-for-one rule. The upcoming ARAC report will provide important guidance to the aviation community on how FAA regulations will evolve under the two-for-one rule.

ARAC's initial report was due June 1 in time for its June 15 meeting, which is open to the public. An addendum report will be submitted to the FAA no later than August 31.

Drone Law Update



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After a period of relative inactivity during the winter months, spring has produced three significant legal developments regarding Unmanned Aerial Systems (UAS) in the United States: the civil action in federal court against the so-called Droneslayer has been dismissed, a federal appellate court struck the Federal Aviation Administration's mandatory registration requirement for recreational UAS, and the Trump administration has proposed new legislation authorizing the federal government to track, intercept, destroy and confiscate any UAS in national airspace.

Federal District Court Dismisses *Boggs v. Merideth*

On July 26, 2015, William Merideth used a 12-gauge shotgun to pluck John David Boggs' DJI Phantom from the sky near Louisville, Kentucky. Merideth claimed the drone was invading his privacy, by hovering over his property at low altitudes and attempting to photograph his sunbathing daughter.

After state criminal charges against Merideth were dismissed, Boggs commenced a declaratory judgment action in federal court. That action sought damages for destruction of the drone and declarations that the drone was being operated “in ‘navigable airspace’ within the exclusive jurisdiction of the United States” and “did not violate [Merideth’s] reasonable expectation of privacy.”

On March 21, 2017, however, Senior Judge Thomas B. Russell dismissed the action, finding the Court lacked subject matter jurisdiction over the issues presented therein. The opinion explains, “But even if Boggs is correct that his unmanned aircraft is subject to federal regulation... the fact remains that the FAA has not sought to enforce any such regulations in this case.... Moreover, FAA regulations, at most, would constitute ancillary issues in this case, in which the heart of Boggs’ claim is one for damage to his unmanned aircraft under Kentucky state law.” As of this publication, no appeal or motion for reconsideration has been filed. Consequently, questions as to whether federal law recognizes ownership of some reasonable portion of the airspace above private land, and where navigable airspace subject to FAA regulation begins, remain unanswered – for now.

Federal Appeals Court Strikes FAA Registration Requirement for Hobbyist UAS

As widely known and reported, the FAA in December 2015 issued an interim rule requiring registration of UAS operated both commercially and recreationally, i.e., by hobbyists. Since that time, approximately 800,000 UAS have been registered. On May 19, 2017, however, the United States Court of Appeals for the District of Columbia Circuit struck the registration requirement as it relates to recreational UAS operators or hobbyists as a violation of the FAA Modernization and Reform Act of 2012 (the “Modernization Act”).

Section 336 of the Modernization Act expressly prohibits the FAA from “promulgat[ing] any rule or regulation regarding a model aircraft.” Applying the plain meaning of that statutory language in a most literal fashion, the appeals court held, “In short, the [Modernization Act] provides that the FAA ‘may not promulgate any rule or regulation regarding a model aircraft,’ yet the FAA’s 2015 Registration Rule is a ‘rule or regulation regarding a model aircraft.’ Statutory interpretation does not get much

simpler. The Registration Rule is unlawful as applied to model aircraft.” The Court of Appeals specifically noted that Congress is free to repeal or amend the Modernization Act to authorize the FAA to regulate recreational or hobbyist UAS. We will continue to monitor legislative action for developments on this issue.

Trump Administration Proposes Legislation Authorizing Feds to Track, Hack and Destroy Any UAS in the National Airspace

The federal appeals court may have eliminated one piece of UAS regulation (i.e., recreational UAS registration, *supra*), but the Trump administration has “balanced the scale” by proposing new UAS regulation aimed at national security. President Trump has asked Congress to expand the National Defense Authorization Act to authorize federal authorities to: (i) “Detect, identify, monitor, or track, without prior consent” UAS to determine whether it poses a threat to safety or security; (ii) “Redirect, disable, disrupt control of, exercise control of, seize, or confiscate, without prior consent” any UAS that poses a threat to safety or security; (iii) “Use reasonable force to disable, disrupt, damage, or destroy” UAS that pose a threat to safety or security; and (iv) Conduct research and testing on equipment that would enable the government to accomplish the foregoing. The proposed legislation also would authorize the government’s confiscation of any UAS (and its payload) that is intercepted pursuant to the foregoing provisions.

The proposed legislation would require development of “Federal Government-wide policy prescribing roles and responsibilities” for implementation but, significantly, would operate as an express exception to existing federal laws protecting “privacy, civil rights, and civil liberties.” If enacted, this legislation likely will raise several due process issues, including the propriety of government action without first establishing probable cause, as well as government seizure of private property. As a practical matter, issues also remain as to the availability and efficacy of any technology used to redirect, disable or disrupt control of UAS. A failed attempt to intercept a suspected rogue UAS could result in unintended damage or loss by causing it to crash into the very crowd the government is attempting to protect. We will continue to monitor and report on these developments.

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