RECENT DEVELOPMENTS IN AVIATION AND SPACE LAW

Marissa N. Lefland and Darcy C. Osta

This paper provides an overview of important developments in aviation and space law from October 1, 2015, through September 30, 2016. We selected some of the most significant cases in the areas of federal preemp-

Marissa N. Lefland (mlefland@condonlaw.com) is an associate in the New York City office of Condon & Forsyth LLP. Darcy C. Osta (darcy.osta@wilsonelser.com) is an associate in the McLean, Virginia, office of Wilson, Elser, Moskowitz, Edelman & Dicker, LLP. Both are members of the TIPS Aviation and Space Law Committee.

tion; forum non conveniens; international treaties, including the Montreal Convention and EU 261; and federal jurisdiction.

I. FEDERAL PREEMPTION

A. *Federal Aviation Act*

Whether and to what extent the Federal Aviation Act (FAAct),[1] and the regulations promulgated pursuant to it, preempt state law has recently been addressed by courts in the Third and Ninth Circuits.

1. *Sikkelee v. Precision Airmotive Corp.*

In *Sikkelee v. Precision Airmotive Corp.*, the Third Circuit reversed the holding of the U.S. District Court for the Middle District of Pennsylvania, which granted partial summary judgment in favor of the appellant engine manufacturer Lycoming on the grounds that the Federal Aviation Regulations (FARs) preempt aircraft design and manufacturing claims.[2]

The case arose out of a 2005 accident wherein the plaintiff claimed that an aircraft, piloted by her husband, crashed as a result of a defect in the engine's carburetor.[3] The plaintiff filed suit against seventeen defendants, including the engine manufacturer, asserting numerous state tort law causes of action.[4] The district court, relying on the Third Circuit's holding in *Abdullah v American Airlines, Inc.*,[5] held that the plaintiff's state law claims, which were based on state law standards of care, were preempted by the FAAct, which exclusively occupied the "field of air safety."[6] The plaintiff subsequently filed an amended complaint and asserted state law causes of action premised on federal standards of care, i.e. violations of the FARs.[7]

The district court granted summary judgment in favor of Lycoming and held that "the federal standard care was established in the type certificate itself." As a result, and because the Federal Aviation Administration (FAA) had issued a type certificate for the engine at issue, the court concluded that "the federal standard of care had been satisfied as a matter of law."[8]

1. 49 U.S.C. § 40120(c).
2. 822 F.3d 680, 683 (3d Cir. 2016).
3. *Id.* at 685.
4. *Id.*
5. 181 F.3d 363 (3d Cir. 1999).
6. Sikkelee v. Precision Airmotive Corp., 822 F.3d 680, 685–86 (3d Cir. 2016). Only two claims remained against *Lycoming*, the sole defendant: defective design and failure to warn. *Id.* at 685–86.
7. *Sikkelee*, 822 F.3d at 685 (citing Sikkelee v. Precision Airmotive Corp., 45 F. Supp. 3d 431, 435 (M.D. Pa. 2014)).
8. *Id.* at 686.

The Third Circuit granted interlocutory review of the district court's decision because the district court's order "raised novel and complex questions concerning the reach of *Abdullah* and the scope of preemption in the airlines industry."[9] The issue, as framed by the court, was to determine the extent to which the FAAct preempts state law product liability design defect claims.[10] The court held that products liability claims are not preempted by federal law and such claims "may proceed using a state standard of care."[11]

In reaching its decision, the court first determined that *Abdullah* "does not govern product liability claims" because the scope of the "field of aviation safety" preemption addressed in that case was limited to "in-air operations."[12] The court further found that the catch-all federal standard of care discussed in *Abdullah* does not apply to product liability claims.[13] As a result, the FAAct preempts state standards of care only with respect to "in-air operations," but it does not preempt state standards of care that govern the design or manufacture of aircraft.[14]

Next, and consistent with its prior holding in *Elassaad v. Independent Air, Inc.*,[15] the court concluded that the presumption against preemption applies to aviation product liability claims because these claims have traditionally and consistently been governed by state law.[16] "With that presumption in mind," the court reviewed the FAAct, and the regulations promulgated pursuant to it, and concluded that Congress did not express a "clear and manifest intent to preempt aviation products liability claims."[17]

The court found that it was "significant" that the FAAct contains no express preemption provision and instead only establishes "minimum standards" for aviation safety.[18] The court also noted that the FAAct's savings clause appears to contemplate that the states would continue to exercise regulatory power over certain aspects of aviation.[19]

Similarly, the FARs contain no indication of a congressional intent to preempt state products liability law.[20] The court distinguished the regulations at issue from those addressed in *Abdullah*, noting that the regulations governing "in-flight operations" are comprehensive and specifically

9. *Id.* at 687.
10. *Id.* at 688.
11. *Id.* at 683.
12. Sikkelee v. Precision Airmotive Corp., 822 F.3d 680, 689 (3d Cir. 2016).
13. *Id.*
14. *Id.* at 709.
15. 613 F.3d 119, 127 (3d Cir. 2010).
16. *Sikkelee*, 822 F.3d at 690–93.
17. Sikkelee v. Precision Airmotive Corp., 822 F.3d 680, 696 (3d Cir. 2016).
18. *Id.* at 692.
19. *Id.* at 692–93.
20. *Id.* at 693.

prescribe rules governing the operation of aircraft. The regulations thus establish a general standard of care, whereas design and manufacturing regulations do not govern "manufacture generally" and only "establish procedures for manufacturers to obtain certain approvals and certificates from the FAA."[21] Further, the court concluded that "Congress has not created a federal standard of care for persons injured by defective airplanes; and the type certification process cannot as a categorical matter displace the need for compliance in this context with state standards of care."[22]

The court also found that the General Aviation Revitalization Act's (GARA) statute of repose would be superfluous if state law aviation products liability claims were automatically preempted.[23] GARA's text and legislative history makes clear that congressional intent was to preserve state law products liability claims.[24]

Last, the court held that the issuance of a type certificate does not "foreclose all design defect claims" and that "state tort suits using state standards of care may proceed subject only to traditional conflict preemption principles."[25] In so holding, the court recognized that there may be situations where it is impossible for a manufacturer to comply with both the type certificate specifications and a duty imposed by state law. In those cases, the state law would be conflict preempted.[26] The court declined to decide whether the plaintiff's claims were subject to conflict preemption, leaving that issue for the district court to decide on remand.[27]

2. *Escobar v. Nevada Helicopter Leasing, LLC*

In *Escobar v. Nevada Helicopter Leasing, LLC*, following the crash of a Eurocopter EC130 B4 helicopter into mountainous terrain, the plaintiff, whose husband piloted the accident aircraft, asserted state law causes of action for negligence and strict liability against both the aircraft owner and the manufacturer.[28] The aircraft owner[29] filed a motion for summary judgment, arguing that the plaintiff's state law tort claims against it were preempted by 49 U.S.C. § 44112, a provision of the FAAct that limits the liability of aircraft lessors, owners, and secured parties for personal injury,

21. *Id.* at 694.
22. Sikkelee v. Precision Airmotive Corp., 822 F.3d 680, 696 (3d Cir. 2016).
23. *Id.* at 696–97.
24. *Id.* at 696–99.
25. *Id.* at 695.
26. *Id.* at 704.
27. *Id.* at 702.
28. 2016 WL 3962805, at *1 (D. Haw. July 21, 2016). Wilson, Elser, Moskowitz, Edelman & Dicker LLP represented the aircraft owner/lessor in this matter.
29. The aircraft owner leased the helicopter to the operator pursuant to a long-term lease. *Id.* at *2.

death, or property loss on land or water when they are not "in the actual possession or control" of the aircraft at the time of the accident.[30]

The U.S. District Court for the District of Hawaii analyzed the applicability of both express and implied preemption to the plaintiff's claims.[31] The court dismissed express preemption, noting that the FAAct does not contain an express preemption clause.[32] The court then discussed implied preemption and its two subsets: field preemption and conflict preemption. The court determined that field preemption was inapplicable.[33] After reviewing the legislative history of the statute, the court concluded that conflict preemption was at issue because the state causes of action asserted by the plaintiff "interfere with the intent of Congress in enacting 49 U.S.C. § 44112 of the FAAct" to shield aircraft owners, lessors, and secured parties that did not exercise actual possession or control of the aircraft from liability.[34] In reaching its decision, the court dismissed the decisions of several state law courts that have found conflict preemption to be inapplicable to state law causes of action filed by crewmembers and passengers,[35] noting that the holdings in those cases were "inconsistent with the legislative history of 49 U.S.C. § 44112 and contrary to the holdings of the majority of courts who have considered the issue."[36]

B. *Air Carrier Access Act*

Federal and state courts in the Ninth Circuit have continued to consider the preemptive effect of regulations promulgated pursuant to the Air Car-

30. *Id.* at *1, *5; *see also* 49 U.S.C. § 44112(b).

31. *Escobar*, 2016 WL 3962805, at *5–6. Hawaii law would arguably have imposed liability on the aircraft owner, regardless of whether the owner was in actual possession or control of the helicopter at the time of the accident. *See*, *e.g.*, Stewart v. Budget Rent-a-Car Corp., 470 P.2d 240 (Haw. 1970); Acoba v. Gen. Tire, Inc., 986 P.2d 288 (Haw. 1999).

32. *Escobar*, 2016 WL 3962805, at *5 (citing Martin v. Midwest Express Holdings, Inc., 555 F.3d 806, 808 (9th Cir. 2009)).

33. Escobar v. Nev. Helicopter Leasing, LLC, 2016 WL 3962805, at *1 (D. Haw. July 21, 2016). As a result, the court also found that the Third Circuit's reasoning in *Sikkelee v. Precision Air Motive Corp.*, 822 F.3d 680 (3d Cir. 2016), did not apply. *Escobar*, 2016 WL 3962805, at *5 n.4.

34. *Escobar*, 2016 WL 3962805, at *6.

35. *See* Vreeland v. Ferrer, 71 So. 3d 70, 84–85 (Fla. 2001) (interpreting the statute's "on land or water" requirement to mean that an owner, lessor, or secured party is not exempt from liability for crewmember and passenger claims and is exempt only from claims brought by persons who were "underneath" the aircraft at the time of the accident; thus finding that the statute does not preempt state law tort causes of actions asserted by those persons onboard the aircraft at the time of the accident); Storie v. Southfield, 282 N.W.2d 417, 420–21 (Mich. Ct. App. 1979) (finding that the predecessor version of the statute did not prevent states from imposing liability on aircraft owners for injuries that occurred inside of the aircraft.)

36. *Escobar*, 2016 WL 3962805, at *10; *see also* Lu v. Star Marianas Air, Inc., 2015 WL 2265464 (D. N.M.I. May 12, 2015); *In re* Lawrence W. Inlow Accident Litig., 2001 WL 331625 (S.D. Ind. Feb. 7, 2001); Matei v. Cessna Aircraft Co., 1990 WL 43351 (N.D. Ill. Mar. 30, 1990).

rier Access Act (ACAA),[37] an amendment to the FAAct aimed at protecting and promoting the rights of disabled individuals during air travel. Appellate courts often hold that the FAA preempts state law standards of care when "the particular area of aviation commerce and safety implicated by the lawsuit is governed by pervasive federal regulations."[38] However, even where a state law standard of care for a particular cause of action is preempted, local law still governs the remaining elements of the cause of action. Thus, any remedy that may be available under the preempted cause of action remains available to a plaintiff as long as the plaintiff can prove a violation of federal law.[39]

1. *Segalman v. Southwest Airlines Co.*

The U.S. District Court for the Eastern District of California addressed the issue of remedies in *Segalman v. Southwest Airlines*.[40] In *Segalman*, the plaintiff alleged that he had traveled on a number of flights operated by the defendant and that, each time, his wheelchair was returned to him damaged because of the airline's failure to store the wheelchair in accordance with his written instructions. On one occasion, the arm and neck rests were broken, and on another, the wheelchair arrived without power.[41] On yet another occasion, the wheelchair was returned without its seatbelt, causing the plaintiff to sustain a subsequent injury.[42] The plaintiff commenced an action against the air carrier, alleging, among other things, negligence and violations of California civil rights and accessibility statutes.

In 2012, the district court dismissed the plaintiff's common law claims without leave to amend, reasoning that the ACAA pervasively regulated the stowage and transportation of wheelchairs and, therefore, preempted the plaintiff's claims.[43]

The Ninth Circuit reviewed this decision in 2015 and applied the framework it had recently set forth in *Gilstrap*.[44] First, the court agreed that the ACAA regulations pervasively govern the stowage and care of

37. Pub. Law No. 99-435 (1986) (codified at 49 U.S.C. § 41750).

38. Gilstrap v. United Air Lines, 709 F.3d 995, 1006 (9th Cir. 2013). As discussed above, the Third Circuit recently issued a decision with a similar holding in the context of a products liability action. The court observed that "[t]he Second, Ninth, and Tenth Circuits all assess the scope of the field of aviation safety by examining the pervasiveness of the regulations in a particular area rather than simply whether the area implicated by the lawsuit concerns an aspect of air safety." *See* Sikkelee v. Precision Airmotive Corp., 822 F.3d 680, 705 (3d Cir. 2016).

39. *See Gilstrap*, 709 F.3d at 1006.

40. 2016 WL 146196 (E.D. Cal. Jan. 13, 2016).

41. *See id.* at *1.

42. *See id.*

43. *See* Segalman v. Sw. Airlines Co., 913 F. Supp. 2d 941, 949 (E.D. Cal. 2012).

44. *See* Segalman v. Sw. Airlines Co., 603 F. App'x 595, 596 (9th Cir. 2015).

wheelchairs.[45] In particular, the regulations bar carriers from draining wheelchair batteries and require that carriers return wheelchairs to passengers in the same condition in which they received them. The regulations also require that the carriers follow passengers' written instructions concerning assembly and disassembly of wheelchairs for stowage.[46] In light of the pervasiveness of these regulations, state law standards of care were preempted.[47]

However, as set forth by *Gilstrap*, federal regulations do not preempt remedies that may have been available under a preempted cause of action. The Ninth Circuit vacated dismissal and remanded to the district court for consideration of whether California statutory and common law provided for remedies in circumstances in which federal regulation provides the standard of care.[48]

On remand, the defendant moved to dismiss, arguing that if the court were to find that the California statutes provided remedies in situations where federal regulation provides the standard of care, any violation of the ACAA could constitute a violation of the statute.[49] The district court disagreed, reasoning that the FAAct's savings clause demonstrated that Congress did not intend for FAA administrative enforcement schemes to bar state law remedies.[50] Nevertheless, the court determined that the complaint did not contain necessary allegations under the two statutory causes of actions and dismissed those claims with leave to re-plead.[51]

2. *Sullivan v. Alaska Air Group*

In *Sullivan v. Alaska Air Group*, the plaintiff alleged she was bitten by a Rottweiler that was traveling as another passenger's service animal on board a flight from Seattle to Spokane.[52] The plaintiff alleged that the carrier failed to protect her from a foreseeable risk posed by the dog and that it breached its heightened duty of care as a common carrier under Washington law.

Applying *Gilstrap*, the court identified a two-part test to determine whether ACAA regulations preempted the plaintiff's negligence claims: (1) identify which area of aviation safety and commerce was at issue; and (2) determine whether that area is regulated pervasively.

45. *See id.*
46. *See id.* (citing 14 C.F.R. ¶¶ 382.127, 382.129).
47. *See id.* at 596.
48. *See id.* at 596–97.
49. Segalman v. Southwest Airlines Co., 2016 WL 146196, at *3 (E.D. Cal. Jan. 13, 2016). The defendant did not move to dismiss the common law negligence claim. *See id.*
50. *See id.*
51. *See id.* at *4.
52. No. 15-02-00227-3, slip op. at 2–3 (Super. Ct., Spokane Cty., filed Feb. 29, 2016).

The court determined first that the subject matter at issue related to "airline passenger safety in regards to service animals" and second, that that the U.S. Department of Transportation (DOT) had, in fact, promulgated rules that pervasively regulated air carriers' conduct with respect to service animals. In particular, the court noted that the regulation at issue provides that an air carrier "must permit a service animal to accompany a passenger with a disability" as long as various conditions do not "preclude" the carrier from doing so, such as when the animal is too large, poses a direct threat to the health or safety of others, or would significantly disrupt cabin service.[53]

Therefore, the ACAA regulations established the standard of care that the carrier owed passengers and preempted any different or higher state law standard of care. The court determined that an air carrier's duty following the request for accommodation of a service animal is limited to the following responsibilities: (1) establish that the animal is, in fact, a service animal; and (2) determine whether factors exist the animal would be precluded from carriage.[54]

Applying the law to the facts of this case, the court observed that the dog had been wearing a harness indicating it was a service animal in accordance with the carrier's rules.[55] The court also noted that the service animal and its owner had flown on flights operated by one of the defendant carriers or its partners twelve times in the prior few years, each time without incident. Therefore, the carrier was entitled to rely on past experience to confirm the animal would not disrupt the flight.[56] Finally, the court also commented that the dog's breed was not relevant to the question of whether it was a service animal or could have been precluded from the flight.

Because the carrier established that the dog was a service animal and there had been no evidence to show that the dog posed a risk to other passengers' safety, the plaintiff could not show that the carrier had breached its duty of care. The court thus granted the carrier's motion for summary judgment.

C. *Airline Deregulation Act*

This section discusses cases addressing the Airline Deregulation Act (ADA), which provides that states "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."[57]

53. *See id.* at 4–5 (quoting 14 C.F.R. § 382.117).
54. *See id.* at 5 (citing 14 C.F.R. § 382.117).
55. *See id.* at 6. Federal regulations require carriers to accept the presence of a harness as evidence that an animal is a service animal. *See* 14 C.F.R. § 382.117(d).
56. *See id.* at 7.
57. 49 U.S.C. § 41713(b)(1) (1978).

1. *Spadoni v. United Airlines*

In *Spadoni v. United Airlines*, the plaintiff commenced a putative class action lawsuit alleging that her baggage was delayed because the airline transported her baggage on a later flight in order to transport more lucrative cargo.[58] The carrier's contract of carriage provided that the carrier would transport the baggage on the same aircraft as the passenger, unless the carrier deemed such carriage "impractical," in which case the carrier would transport the baggage on the next available flight.[59] The plaintiff acknowledged that the carrier had broad discretion under the contract to ascertain whether carriage of the baggage was practical, but failed to exercise this discretion in accordance with the implied covenant of good faith and fair dealing, which is incorporated in every contract under Illinois law. Therefore, the plaintiff claimed that the carrier was in breach of the parties' agreement.[60]

The trial court dismissed the action on the ground that the plaintiff had not alleged, and could not allege, that the carrier violated the terms of the contract absent an application of the implied covenant, which was preempted by the ADA. On appeal, the plaintiff argued that the implied covenant of good faith and fair dealing did not expand the carrier's obligations under the parties' agreement because the covenant can be expressly disavowed and further that it serves only as a construction aid.[61]

The Illinois Appellate Court disagreed. First, the court observed that the U.S. Supreme Court has held that the ADA bars states from "imposing their own substantive standards with respect to rates, routes, or services."[62] Courts may enforce only terms to which the parties contractually agreed "with no enlargement or enhancement based on state laws or policies external to the agreement."[63] The Supreme Court recently extended this line of reasoning, holding that the implied covenant of good faith and fair dealing, which is based in common law, "will escape preemption only if the law of the relevant state permits an airline to contract around those rules . . . and the airline can specify that the agreement does not incorporate the covenant."[64] If not, the covenant is a state-imposed obligation,

58. 47 N.E.3d 1152, 1154 (Ill. App. Ct. 2015), *appeal denied*, 48 N.E.3d 1097 (Ill. 2016).
59. *See id.* at 1155.
60. *See id.* The plaintiff also alleged that the carrier's failure to transport her baggage on board her flight was a breach of the contract's express terms. The trial court rejected this argument, and the appellate court affirmed. *See id.*
61. *See id.* at 1158. Notably, neither the court nor the parties were able to locate a case involving the express disavowal of the covenant. *See id.*
62. *See id.* (quoting Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 232–33).
63. *See Wolens*, 513 U.S. at 233.
64. *See* Northwest Airlines, Inc. v. Ginsberg, 134 S. Ct. 1422, 1433 (2014).

not merely a constructional aid to ascertain the parties' intent, and is encompassed and preempted by the ADA.[65]

In this case, the appellate court determined that because every contract under Illinois law contains the implied covenant, it is not an obligation that parties to a contract may voluntarily adopt and, under *Ginsberg*, "an implied covenant claim will *always* be preempted if the covenant imposed by state common law cannot be expressly disavowed."[66] Because the parties could not disavow the covenant, it was not merely a construction aid. Accordingly, the plaintiff's claim that the carrier breached the implied covenant of good faith and fair dealing was preempted by the ADA.[67]

The dissenting justice argued that, because Illinois does not recognize breach of the implied covenant as an independent cause of action, it should be characterized as a rule of construction, rather than an enlargement of contractual obligations. The dissenting justice reasoned that it is possible that the implied covenant could be waived, despite the lack of any case law so stating.[68]

2. *National Federation of the Blind v. United Airlines*

In *National Federation of the Blind v. United Airlines*, the plaintiffs, three blind individuals and an advocacy group, alleged that the airline violated California antidiscrimination statutes by failing to make available automated airport kiosks that were accessible to blind travelers.[69] The airline moved to dismiss on the ground that the plaintiffs' claims were preempted by the Airline Deregulation Act because the provision of kiosks is a "service" under the ADA.[70] In the alternative, the carrier argued that the plaintiffs' claims were preempted by regulations recently promulgated pursuant to the Air Carrier Access Act (ACAA).[71]

The court first analyzed whether the plaintiffs' claims were related to "services" as defined under the framework previously established by the Ninth Circuit in *Charas v. Trans World Airlines, Inc.*[72] Under *Charas*, the term "service" should be evaluated in the "public utility sense" and refers only to the "prices, schedules, origins and destination of the point-to-point transportation of passengers, cargo, or mail."[73] In other words, "ser-

65. *See* Spadoni v. United Airlines, Inc., 47 N.E.3d 1152, 1160 (Ill. App. Ct. 2015), *appeal denied*, 48 N.E.3d 1097 (Ill. 2016).
66. *See id.* at 1159 (citing *Ginsberg*, 134 S. Ct. at 1432).
67. *See id.* at 1160.
68. *See id.* at 1165 (Harris, J., dissenting).
69. 813 F.3d 718 (9th Cir. 2012).
70. *See id.* at 726.
71. *See id.* at 723.
72. 160 F.3d 1259, 1261 (9th Cir. 1998).
73. *See id.*

vice" must relate to the provision of air transportation and does not apply to "amenities," such as in-flight beverages or handling of baggage.[74]

Applying this framework, the *National Federation* court determined that kiosks are not services related to the "provision of air transportation."[75] While kiosks "facilitate services that relate to air transportation," they are merely an amenity not to be confused with services in the "public utility sense."[76]

By linking the term "services" with prices and schedules, the Ninth Circuit acknowledged that it applies a narrower construction of the term "service" than do other courts.[77] Indeed, a number of courts have observed that the U.S. Supreme Court, in a decision interpreting a statute that borrows language from the ADA, has treated the term "service" "more expansively" than *Charas*, thereby "foreclose[ing] the *Charas* interpretation of 'service' as a term closely related to prices and routes."[78]

The *National Federation* court disagreed, reasoning that the Supreme Court did not broaden the definition of "service," but rather, defined "services" as those that related to the "'essential details of the carriage itself.'"[79] The court also reasoned that the ADA's purpose was to effect low-cost, efficient air transportation by utilizing competition and market forces. In this case, there was no argument or evidence that the plaintiff's claims would frustrate the goals of airline deregulation.[80]

The court then analyzed whether the plaintiffs' claims were preempted by the ACAA, i.e., whether federal regulations pervasively govern accessibility of airport kiosks by individuals with disabilities.[81] The district court had dismissed the action in part because a 2008 "interim" regulation, promulgated by the DOT, required carriers to provide "equivalent service" if automated airport kiosks could not be used by disabled passengers and thus preempted state law standards of care.[82]

74. *See id.*

75. *See* Nat'l Fed'n of the Blind v. United Airlines, Inc., 813 F.3d 718, 726 (9th Cir. 2012).

76. *See id.*

77. *See id.* at 727.

78. *See* Bower v. Egyptair Airlines Co., 731 F.3d 85, 94 (1st Cir. 2013) (noting that "[b]y interpreting 'service' to relate to scheduling and 'service to' certain destinations, the Charas opinion does little to distinguish 'service' from 'route'") (citing Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364, 373 (2008)); Air Transp. Ass'n of Am., Inc. v. Cuomo, 520 F.3d 218, 223 (2d Cir. 2008) (holding that a New York law requiring carriers to provide food, water, and other provisions to passengers during lengthy tarmac delays relates to an air carrier's "services" and, therefore, it was preempted by the ADA, and further commenting that *Charas* is inconsistent with the Supreme Court's interpretation of "service," which extends beyond prices, schedules, and points of origin and destination).

79. *See* Nat'l Fed'n of the Blind v. United Airlines, Inc., 813 F.3d 718, 729 (9th Cir. 2012).

80. *See Nat'l Fed'n*, 813 F.3d at 727 (quoting *Rowe*, 552 U.S. at 373).

81. *See id.* at 730.

82. *See* Nat'l Fed'n of the Blind v. United Airlines, Inc., 2011 WL 1544524, at *3 (N.D. Cal. Apr. 25, 2011) (citing Nondiscrimination on the Basis of Disability in Air Travel, 73 Fed. Reg. 27,614, 27,619 (May 13, 2008)).

The Ninth Circuit agreed, reasoning that the DOT published a final rule in 2014 addressing a wide array of issues pertaining to accessibility of airport kiosks.[83] The "exhaustive" regulation prescribes technical and design requirements for kiosk accessibility. With respect specifically to passengers with visual impairments, the rule requires that kiosks provide an option for speech output and meet certain requirements concerning the content, volume, and privacy considerations of that output.[84] The rule also requires that the operable parts of the kiosks be "tactilely discernable without activation" and that kiosks provide Braille instructions for initiating the speech mode.[85]

The court determined that these regulations, which instruct airlines "with striking precision" as to their obligations to provide accessible kiosks, pervasively govern airport kiosk accessibility, exhibiting an intention by federal lawmakers to occupy the field of kiosk accessibility.[86]

The court also rejected the plaintiffs' arguments that the regulations allow carriers to gradually increase the number of accessible kiosks.[87] The court reasoned that the DOT "made deliberate choices and devised nuanced, detailed phase-in requirements, thereby occupying the field of airport kiosk accessibility for the blind with regard to timing as well as substantively."[88]

II. FORUM NON CONVENIENS

Under the doctrine of forum non conveniens, a trial court may decline to exercise jurisdiction over an action and dismiss the action on the ground that another forum is more convenient and appropriate.[89]

In *Bochetto v. Dineling, Schreiber & Park*, the Pennsylvania Court of Common Pleas dismissed the case, finding that Portugal was the more appropriate forum for the litigation.[90] The action arose from the September 15, 2009, crash of a Model PA 34-2023 Seneca V aircraft near Castro Verde, Portugal.[91] The aircraft was engaged in a nighttime training exercise "when it broke up in flight and crashed."[92] The flight instructor and the two student pilots on board died.[93] None of the decedents was an

83. *See Nat'l Fed'n*, 813 F.3d at 733–34 (citing 14 C.F.R. § 382.57).
84. *See id.* at 734 (citing 14 C.F.R. § 382.57(c)(5)).
85. *See* Nat'l Fed'n of the Blind v. United Airlines, Inc., 813 F.3d 718, 734 (9th Cir. 2012) (citing 14 C.F.R. § 382.57(c)(5)).
86. *See id.* at 735.
87. *See id.* at 736–37.
88. *See id.*
89. *See* Piper Aircraft v. Reyno, 454 U.S. 235, 249 (1981).
90. 2016 WL 723075, at *2, *16 (Pa. Ct. Com. Pl. Jan. 14, 2016).
91. *Id.* at *2.
92. *Id.*
93. *Id.*

American citizen.[94] A court appointed administrator of the decedents' estates, along with the parents of the decedents, filed a wrongful death action in the Philadelphia County Court of Common Pleas against fourteen defendants.[95] The plaintiffs did not sue the flight school or its parent corporation, both of which were responsible for maintaining the accident aircraft.[96]

In 2013, the trial court dismissed the case on forum non conveniens grounds and found that the matter should be tried in Portugal.[97] The Pennsylvania Superior Court vacated the order and remanded it to the trial court with instructions to "(1) expressly analyze the private and public factors in favor of keeping this case in the United States, and (2) take into consideration connections that this case has with the United States generally instead of just those related to Pennsylvania."[98] On remand, the trial court again dismissed the case on forum non conveniens grounds.[99]

To dismiss the case under the doctrine of forum non conveniens, the court had to first make a finding on the record that an alternate forum was available to the plaintiff.[100] If dismissing the case in favor of an alternate forum would result in the plaintiff facing jurisdictional problems, trial courts are instructed to either "'retain jurisdiction or dismiss on the condition that the defendants . . . accept service . . . when the case is brought in the new forum."[101] Here, the court found that Portugal was an available alternate forum because all of the defendants in the case had "filed of record stipulations (1) accepting service of process in a subsequent action brought in Portugal alleging the same injuries and damages as set forth within the action; (2) admitting jurisdiction in Portugal; and (3) waiving the statute of limitations defense in the subsequent action to be filed in Portugal."[102]

The court then discussed the standards applicable to an international forum non conveniens motion.[103] Although there is typically a strong presumption in favor of a plaintiff's chosen forum, the court found that a foreign plaintiff's choice is entitled to less deference.[104] This is because "the central purpose of any *forum non conveniens* inquiry is to ensure that the

94. *Id.*
95. Bochetto v. Dineling, Schreiber & Park, 2016 WL 723075, at *2 (Pa. Ct. Com. Pl. Jan. 14, 2016).
96. *Id.* at *3.
97. *Id.* at *1.
98. *Id.*
99. *Id.* at *2.
100. Bochetto v. Dineling, Schreiber & Park, 2016 WL 723075, at *8 (Pa. Com. Pl. Jan. 14, 2016).
101. *Id.* (quoting Farley v. McDonnell Douglas Truck Servs., Inc., 638 A.2d 1027, 1032 (Pa. 1994)).
102. *Id.* at *9.
103. *Id.* at *9–10.
104. *Id.* at *10–11.

trial is convenient," and "when the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable."[105]

The court then weighed the public and private factors contained in section 5322 of Pennsylvania's Judicial Code to determine whether "such 'weighty reasons' exist as would overcome the plaintiff's choice of forum."[106] The private and public factors included, among others, availability and access to sources of proof, availability of compulsory process, the cost associated with obtaining testimony from willing witnesses, enforceability of a judgment, administrative difficulties faced by the courts, jury duty, and the applicable law.[107]

Consistent with the instructions from the Pennsylvania Superior Court, the court weighed the public and private factors "in the context of their relationship to the United States as a whole," not just forum specific connections.[108] The court found that both the private and public factors weighed in favor of dismissing the action, noting that the defendants' inability to join necessary parties in an American forum,[109] and the likelihood that Portuguese law would apply, weighed heavily in favor of dismissal.[110] In addition, while it agreed that the United States has a national interest in regulating domestic manufacturers and deterring them from producing defective products, the court agreed with the Third Circuit's prior reasoning that "when other factors favor dismissal on grounds of *forum non conveniens*, general national interest in aircraft regulation is not sufficient by itself to warrant retention of jurisdiction over an action arising out of the crash of an aircraft."[111]

III. INTERNATIONAL TREATIES

A. *Montreal and Warsaw Conventions*

When transportation is "international" as defined by Article 1 of the Montreal or Warsaw Convention,[112] the provisions of the applicable

105. Bochetto v. Dineling, Schreiber & Park, 2016 WL 723075, at *10 (Pa. Com. Pl. Jan. 14, 2016).

106. *Id.* at *9.

107. *Id.* at *9–10.

108. *Id.* at *10.

109. Arguably an American court would not have been able to exercise jurisdiction over the flight school or its parent corporation.

110. Bochetto v. Dineling, Schreiber & Park, 2016 WL 723075, at *11–15 (Pa. Com. Pl. Jan. 14, 2016).

111. *Id.* at *15–16 (citing Dahl v. United Techs. Corp., 632 F.2d 1027, 1032–33 (3d Cir. 1980)).

112. The Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, ICAP Doc. No. 9740 (entered into force on November 4, 2003), *reprinted in* S. Treaty Doc. No. 106-45, 1999 WL 33292734 (2000).

Convention exclusively govern the rights and liabilities of the parties.[113] Article 17 of the Convention provides that a carrier is liable for damages sustained in the event of bodily injury or death only upon a showing that an "accident" caused the injury on board the aircraft or during the course of embarking or disembarking.[114] The U.S. Supreme Court has defined an "accident" as an "unexpected or unusual event or happening that is external to the passenger."[115]

The question of whether certain conduct or events constituted an "accident" is among the more commonly litigated issues relating to the Convention. In *Nguyen v. Korean Air Lines Co.*, the plaintiff traveled on two flights operated by a Korean air carrier from Vietnam to Texas with a stop in Korea.[116] The plaintiff was a seventy-six-year-old woman who spoke and understood only Vietnamese.[117] She made arrangements with the airline to provide her with wheelchair service once she arrived in Texas, and the carrier classified her as a wheelchair passenger.[118] Before landing, the plaintiff attempted to inquire about her wheelchair reservation with a flight attendant, but the flight attendant could not understand Vietnamese.[119] In accordance with its internal policy, flight attendants made an announcement advising wheelchair passengers to deplane last; the announcement was made in Korean and in English because the flight departed from Korea and arrived in the United States.[120] When the flight landed, the plaintiff left her seat instead of waiting with wheelchair passengers and, after deplaning, passed a collection of waiting wheelchairs.[121] The plaintiff did not request or point to a wheelchair, and the carrier's employees did not attempt to locate her to provide her with a wheelchair.[122] While she was walking toward baggage claim, the plaintiff fell and sustained injuries.[123]

The Fifth Circuit upheld the district court's determination that the carrier was not liable under the Warsaw Convention because there was

113. *See* El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155, 161 (1999). Whether the Montreal Convention or its predecessor, the Warsaw Convention, applies to a passenger's transportation depends on the routing of the transportation. The provisions of the Montreal and Warsaw Conventions discussed in this article are materially indistinguishable.

114. *See* Montreal Convention, art. 17.

115. *See* Air France v. Saks, 470 U.S. 392, 405 (1985).

116. 807 F.3d 133, 135 (5th Cir. 2015). The Warsaw Convention governed this action. Condon & Forsyth LLP represented defendant Korean Air Lines in this matter.

117. *See id.*

118. *See id.*

119. *See id.*

120. *See id.*

121. *See* Nguyen v. Korean Air Lines Co., 807 F.3d 133, 135 (5th Cir. 2015).

122. *See id.*

123. *See id.*

no "unexpected or unusual event" that constituted an "accident."[124] First, the court determined that the carrier did not refuse to provide a wheelchair; on the contrary, the carrier had announced that wheelchairs and attendants would be awaiting upon arrival, and wheelchairs were available to the plaintiff when she exited the aircraft.[125] Next, the court rejected the plaintiff's argument that the carrier failed to take reasonable steps to communicate with her when they knew she did not speak Korean or English, reasoning that there was no policy or industry standard requiring a carrier to accommodate the language of every passenger on a flight.[126] Finally, the court rejected the plaintiff's argument that the carrier's personnel should have discovered the plaintiff did not receive wheelchair assistance, reasoning that passengers are free to disregard wheelchair service.[127]

B. *EU 261*

Courts in the Seventh Circuit continue to issue decisions interpreting the enforceability of a regulation of the European Union commonly referred to as EU 261 or EC 261.[128] EU 261 provides for damages sustained as the result of cancelled or delayed flights into and out of the European Union.[129]

In 2015, the Seventh Circuit held that passengers cannot assert claims in U.S. courts for direct violations of EU 261, reasoning that the language of EU 261 expressly states that it may be enforced only by administrative or judicial bodies of European Union Member States.[130] In *Baumeister v. Deutsche Lufthansa*, a 2016 decision affirming dismissal of two cases seeking EU 261 damages under a theory of breach of contract, the Seventh Circuit continued to reject attempts to bring claims relating to EU 261 in a U.S. court.[131]

In the first case, the plaintiff purchased a ticket involving a segment that was to be operated by a regional partner of the marketing carrier.[132] The marketing carrier's conditions of carriage provided that, for code share service, the marketing carrier would be responsible for all obligations established under the conditions of carriage. In turn, the conditions of carriage provided that the carrier would compensate the passenger "ac-

124. *See id.* at 137
125. *See id.* at 138.
126. *See id.* at 139.
127. *See id.* at 139–40.
128. Regulation (EC) No. 261/2004 of the European Parliament and of the Counsel of 11 February 2004 (hereinafter referred to as EU 261).
129. *See id.*
130. *See* Volodarskiy v. Delta Airlines, Inc., 784 F.3d 349, 352–57 (7th Cir. 2015).
131. *See* 811 F.3d 963 (7th Cir. 2016). Condon & Forsyth LLP represented the defendants in this matter.
132. *See id.* at 965.

cording to the Regulation EC 261/2004."[133] The plaintiff sued the marketing carrier for damages under EU 261.

The district court granted summary judgment to the carrier and the Seventh Circuit affirmed, based upon the meaning of the qualifying phrase "according to the Regulation EC 261/2004." The court reasoned that the language of EU 261 provides that the obligations imposed by the regulation "should rest with the operating air carrier [which] performs or intends to perform the flight."[134] Thus, the plaintiff had a right to compensation from the operating carrier—and only the operating carrier. The court commented that "[t]here is logic" to EU 261 placing liability with the operating carrier, reasoning that delays are often caused by the operating carrier, and not the carrier that simply sold the passenger the ticket.[135]

In the second action, the plaintiffs, who purchased tickets from one carrier for transportation involving a segment that was to be operated by another carrier, were delayed.[136] The plaintiffs sued the operating carrier in a U.S. court for EU 261 damages, arguing that the operating carrier's conditions of carriage incorporated the provisions of EU 261.[137] The plaintiffs asserted that they had a contractual relationship with the operating carrier in light of having contracted with the marketing carrier—an alleged agent of the operator.

The Seventh Circuit disagreed, reasoning that the plaintiffs' contractual relationship was with the marketing carrier only.[138] The court observed that the codeshare agreement between the two carriers expressly provided that neither carrier had the authority to bind the other and that the conditions of carriage of the marketing carrier governed the transportation. The operator's conditions of carriage would apply only to those of its flights for which the operator sold tickets, which did not happen in this case.[139] Accordingly, the only way for the plaintiffs to recover from the operating carrier was to seek compensation in a European tribunal, which the plaintiffs had declined to do.

IV. FEDERAL JURISDICTION

A. *Removal*

For actions originally filed in state court, a defendant has the option of removing the case to a federal forum if the federal court would have

133. *See id.* at 966.
134. *See id.* (citing EU 261 preamble).
135. *See* Baumeister v. Deutsche Lufthansa, AG, 811 F.3d 963, 967–68 (7th Cir. 2016).
136. *See Baumeister*, 811 F.3d at 967.
137. *See id.* at 968.
138. *See id.*
139. *See id.*

had original jurisdiction pursuant to 28 U.S.C. § 1441 and the procedural requirements of 28 U.S.C. § 1446 are met. A plaintiff can seek remand to the state court by demonstrating that the requirements of the removal statute have not been strictly complied with or that the federal court lacks jurisdiction.[140]

1. *Dietz v. Avco Corp.*

In *Dietz v. Avco Corp.*, the plaintiffs successfully challenged the defendants' removal of an action pursuant to 28 U.S.C. § 1332 (diversity jurisdiction) and 28 U.S.C. § 1442 (federal officer removal jurisdiction).[141]

The case arose out of the 2013 crash of a Mooney M20J-201 aircraft in Kansas City, Missouri, which resulted in the death of the pilot and his wife.[142] The decedents' estates alleged that the aircraft crashed as a result of engine failure and filed suit in Pennsylvania state court, asserting various state tort law causes of action against a number of defendants.[143] None of the claims asserted implicated a federal question.[144] The defendants timely removed the case to the U.S. District Court for the Eastern District of Pennsylvania, asserting two bases for the federal forum: (1) diversity jurisdiction and (2) federal officer removal jurisdiction.[145] The plaintiffs moved to remand.[146]

The court found that the defendants were not entitled to removal under federal officer jurisdiction.[147] The court, relying in part on the Seventh Circuit's decision in *Lu Junhong v. Boeing*,[148] rejected the defendants' contention that Continental Motors, Inc. was acting as an officer of the Federal Aviation Administration because it performed airworthiness certifications pursuant to 49 U.S.C. § 44702(d).[149] The court agreed with the reasoning of the Seventh Circuit and its finding that certifications merely "demonstrate a person's awareness of the governing requirements and evince a belief in compliance," and "that being regulated, even when a federal agency 'directs, supervises and monitors a company's activities in considerable detail' is not enough to make a private firm a person 'act-

140. Federal courts are of limited jurisdiction and can decide cases only in accordance with the authority afforded to them by the U.S. Constitution or federal statutes. Dietz v. Avco Corp., 2016 WL 913267, at *2 (E.D. Pa. Mar. 10, 2016) (citing Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 378 (1994)).
141. *Id.* at *1.
142. *Id.*
143. *Id.*
144. *Id.*
145. Dietz v. Avco Corp., 2016 WL 913267, at *1 (E.D. Pa. Mar. 10, 2016).
146. *Id.*
147. *Id.* at *6.
148. 792 F.3d 805 (7th Cir. 2015).
149. *Dietz*, 2016 WL 913267, at *6.

ing under a federal agency."[150] The court went on to find that "Congress never intended to afford [the defendants] federal officer status through their compliance with federal laws, rules and regulations, even if the regulations are highly detailed and even if the defendants' activities are highly supervised and monitored."[151]

The court next found that the defendants failed to meet the procedural requirements of the removal statute.[152] Specifically, the defendants failed to comply with the unanimity rule, which requires all defendants to unanimously and expressly join or consent to the removal, in writing, within the thirty day time period set forth in 28 U.S.C. § 1446(b).[153] It was insufficient for the notice of removal to indicate that the moving defendant had received consent from a number of the co-defendants.[154] Instead, the statute requires "written evidence of consent" from each defendant. Here, the court did not receive "written evidence of consent" until well after the expiration of the thirty-day period.[155] Further, while the court recognized that unanimity is not required in situations where (1) the non-joining defendant is a nominal party, (2) "a defendant [has] been fraudulently joined, or (3) a non-resident defendant has not been served at the time the removing defendants filed their petition," the court was not persuaded that any of these exceptions applied or that the moving defendants' failure to, at a minimum, consult with three of the co-defendants that had been served at the time the notice of removal was filed, was justified.[156]

Last, the court found that the forum-defendant rule barred removal.[157] Here, three of the defendants were citizens of Pennsylvania, which was sufficient to defeat diversity jurisdiction unless the defendants could show that the forum defendants were fraudulently joined or were nominal parties.[158] Accepting as true the allegations in the complaint, which asserted that the forum defendants were involved in the design, manufacture, sale and maintenance of an engine part, and because the plaintiffs sought to recover compensatory and punitive damages specifically from

150. Dietz v. Avco Corp., 2016 WL 913267, at *5 (E.D. Pa. Mar. 10, 2016) (quoting *Lu Junhong*, 792 F.3d at 808–09)).

151. *Id.* at *6.

152. *Id.* at *6–7.

153. *Id.*; *C.f.* Bhd. Mut. Ins. Co. v. Cent. Reg'l Airport Auth., Inc., 2016 WL 3580786, at *1 (S.D. W.Va. June 28, 2016) (finding that because the removing defendant relied on federal officer jurisdiction as set forth in 28 U.S.C. § 1442 as one basis for removal, it was unnecessary to obtain the consent of the other defendants prior to removal).

154. Dietz v. Avco Corp., 2016 WL 913267, at *7 (E.D. Pa. Mar. 10, 2016).

155. *Id.*

156. *Id.* at *6–7.

157. *Id.* at *7–8.

158. *Id.* at *8.

those defendants, the court rejected the argument that the forum defendants were fraudulently joined or were nominal parties.[159]

2. *Carter v. Central Regional West Virginia Airport Authority*

In *Carter v. Central Regional West Virginia Airport Authority*, the U.S. District Court for the Southern District of West Virginia granted the plaintiffs' motion for remand, finding that: (1) "the litigant who claimed to be 'acting under' a 'federal officer' " had been dismissed from the case," (2) "the case was improperly removed under the 'federal officer' statute in the first instance, (3) there was no "exclusive federal cause of action allowing use of the doctrine of complete preemption," and (4) "all other proffered bases of federal jurisdiction [were] absent from the removal notice."[160] The case arose out of a March 12, 2015, landslide at Yeager Airport in Charleston, West Virginia, following the construction of a runway safety area (RSA) at the end of Runway 5.[161] The plaintiffs, whose home was destroyed by the landslide, filed a property damage action against the airport authority and the other companies responsible for the design and construction of the runway project.[162]

The airport authority filed a third-party complaint against a number of new defendants.[163] One of the third-party defendants filed a notice of removal pursuant to 28 U.S.C. §§ 1331, 1441, 1442, 1446 and 1367.[164] The notice stated that the third-party defendant "wished to rely on 28 U.S.C. § 1442(a) ('Federal Officer Removal Jurisdiction'), as well as 'the doctrine of complete preemption.' "[165] The airport authority then filed a notice voluntarily dismissing the third-party complaint and moved to remand.[166] The other defendants opposed the remand motion.

The court began its remand analysis by noting that case law suggests that a district court should not exercise continued jurisdiction after the federal officer departs.[167] Here, the court found no extraordinary reason that would warrant continued jurisdiction over the parties and the claims in the case, especially since only state law claims remained and all other cases arising from the same incident had already been remanded.[168]

159. *Id.* at *8–9.
160. 2016 WL 4005932, at *29 (S.D. W.Va. July 25, 2016).
161. *Id.* at *1.
162. *Id.*
163. *Id.* at *1–2.
164. *Id.* at *2.
165. Carter v. Cent. Reg'l Airport Auth., Inc., 2016 WL 4005932, at *2 (S.D. W.Va. July 25, 2016).
166. *Id.* at *3. The plaintiffs also filed a motion to remand. *Id.*
167. *Id.* at *7.
168. *Id.*

The court went on to find that, in the first instance, the third-party defendant was not entitled to remove pursuant to 28 U.S.C. § 1442(a), and as a result, the federal forum "never had jurisdiction in the first place."[169] Relying on decisions of the U.S. Supreme Court in *Watson v. Philip Morris Companies, Inc.*[170] and the Seventh Circuit in *Lu Junhong v. Boeing*,[171] the court concluded that the third-party defendant was not "acting under" the FAA simply because it had to comply with both the FAA-approved design specifications and detailed federal regulations that governed the runway project.[172] Removal pursuant to § 1442 for aviation-related work is reserved to those that can assert the government contractor defense.[173]

Turning to the other claimed bases for removal, the court determined that the doctrine of complete preemption was not applicable to the case. Complete preemption authorizes removal "'if the subject matter of a putative state law claim has been totally subsumed by federal law—such that state law cannot even treat on the subject matter" and "applies only where Congress creates an exclusive federal cause of action covering plaintiff's claim."[174] Complete preemption is applicable only if the party that initiated the lawsuit in state court is entitled to assert the exclusive federal cause of action.[175]

The court explained that, although often confused, implied preemption (field and conflict) and complete preemption are distinguishable concepts because the former is a defense to a state law claim, whereas the latter does not eliminate liability under state law; instead it "'transforms state cause of actions into claims under [a] federal statute.'"[176] Further, while complete preemption empowers litigants to remove cases, conflict and field preemption cannot serve as bases for removal.[177] In addition, there does not need to be a federal cause of action for field and conflict preemption to apply. Last, whether complete preemption is available in a case "depends on the particular person suing rather than just the area of law in question."[178]

169. *Id.*
170. 551 U.S. 142 (2007).
171. 792 F.3d 805 (7th Cir. 2015).
172. Carter v. Cent. Reg'l Airport Auth., Inc., 2016 WL 4005932, at *8–11 (S.D. W.Va. July 25, 2016) (finding that "if persons who design airplanes, and who certify portions of those designs on behalf of the FAA, are not 'acting under a federal officer' per § 1442, then the present dispute, which merely involved federal regulation and associated supervision of construction projects, will not benefit from § 1442").
173. *Id.* at *11.
174. *Id.* at *13 (quoting Lontz v. Tharp, 413 F.3d 435, 438 (4th Cir. 2005)).
175. *Id.* at *15.
176. *Id.* at *16 (citing 15-103 Moore's Federal Practice—Civil § 103.45[2]).
177. Carter v. Cent. Reg'l Airport Auth., Inc., 2016 WL 4005932, at *17 (S.D. W.Va. July 25, 2016).
178. *Id.*

In this case, the defendants opposing remand were unable to direct the court to an exclusive federal cause of action that governed the parties' dispute and would justify removal under the doctrine of complete preemption. The court noted that the defendants faced an "uphill battle" and rejected the argument that the claims asserted in the litigation fell under 49 U.S.C. § 46108, which creates a private right of action to enforce "certification requirements against carriers who either operate without certifications or exceed the scope of their certifications."[179] The court further disagreed that the plaintiffs' claims related to violations of 49 U.S.C. § 41110(e), which requires an air carrier to be "fit, willing and able to provide the transportation authorized by the certificate," and were potentially actionable under 49 U.S.C. § 46108.[180] Interpreting the statute as broadly as the defendants suggested would make the statute "a font of liability for conduct 'relating to' an air carrier's certification, or for noncompliance with federal statutes or violations in violation of § 41110(e)," and would arguably create a private right of action for any alleged violation of the federal aviation laws and regulations.[181] In addition, the court found that the savings clause of the FAAct,[182] which preserves remedies "in addition to any other remedies provided by law," would have no meaning if § 46108 were construed to completely preempt state law claims.[183]

B. *Personal Jurisdiction*

In *Siswanto v. Airbus, S.A.S.*, the U.S. District Court for the Northern District of Illinois granted Airbus's Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction.[184] The case arose out of the December 28, 2014, crash of an Airbus A320-216, operated as Air Asia Flight No. 8501, which was en route from Indonesia to Singapore.[185] The accident resulted in the death of all on board—more than seventy-five persons.[186] The plaintiffs brought suit in Illinois against a number of different entities, including the aircraft manufacturer, Airbus, S.A.S., under the Multiforum Trial Jurisdiction Act of 2002 (MMTJA).[187] With respect to Airbus, the plaintiffs alleged that the accident aircraft was "defective and unreasonably dangerous when it left Airbus's control."[188]

179. *Id.* at *19–21.
180. *Id.* at *22.
181. *Id.* at *23.
182. 49 U.S.C. § 40120(c).
183. Carter v. Cent. Reg'l Airport Auth., Inc., 2016 WL 4005932, at *24 (S.D. W.Va. July 25, 2016).
184. 153 F. Supp. 3d 1024, 1026 (N.D. Ill. 2015). Condon & Forsyth LLP represented another defendant in this matter.
185. *Id.*
186. *Id.*
187. *Id.*; *see also* 28 U.S.C. § 1369.
188. *Siswanto*, 153 F. Supp. 3d at 1026.

Airbus filed a motion to dismiss for lack of personal jurisdiction because it did not have sufficient contacts with the United States that would justify exercising general jurisdiction over it.[189] In response, the plaintiffs argued that the court could exercise general jurisdiction over Airbus because of its "extensive contacts with the United States as a whole."[190] In addition, the plaintiffs argued that personal jurisdiction was established under Federal Rule of Civil Procedure 4(k)(1)(C)[191] because service of process on Airbus was proper pursuant to the provisions of 28 U.S.C. § 1697, which permits service "at any place within the United States, or anywhere outside of the United States if otherwise permitted by law" when jurisdiction is based upon the MMTJA.[192] The plaintiffs further argued that, because venue was proper, the Fifth Amendment's Due Process Clause was automatically satisfied.[193]

The court first rejected the plaintiffs' argument that service of process alone was sufficient to establish personal jurisdiction over Airbus. The court noted that "[d]espite the geographic expansion of service and, in turn, the initial scope of personal jurisdiction, Rule 4(k)(1)(C) and Section 1697 do not override the controlling constitutional limitations on this Court's exercise of general or specific jurisdiction imposed by the Fifth Amendment's Due Process Clause."[194] In other words, even though the basis of personal jurisdiction was a statute that provided for nationwide service of process, the court found that the plaintiffs still had to demonstrate that exercising jurisdiction over Airbus satisfied the minimum contacts test set forth in *International Shoe v. Washington*.[195] However, because jurisdiction was based on a nationwide service of process statute, the relevant minimum contacts to be considered were with the United States as a whole, not just with the forum state.[196]

The due process analysis required for a nationwide service of process statute is different for domestic and foreign defendants. Domestic companies "almost by definition, have minimum contacts with the United States, so that there may be general personal jurisdiction in any federal

189. Siswanto v. Airbus, S.A.S., 153 F. Supp. 3d 1024, 1027 (N.D. Ill. 2015). In support of its motion, Airbus filed a Declaration setting forth facts evidencing that, with respect to the aircraft at issue, it had no contacts with the United States. *Id.*

190. *Id.*

191. Fed. R. Civ. P. 4(K)(1)(C) provides that "Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant . . . when authorized by a federal statute."

192. *Id.*; *see also* 28 U.S.C. § 1697.

193. *Siswanto*, 153 F. Supp. 3d at 1030 (N.D. Ill. 2015).

194. Siswanto v. Airbus, S.A.S., 153 F. Supp. 3d 1024, 1030 (N.D. Ill. 2015) (citing KM Enters., Inc. v. Global Traffic Techs., Inc., 725 F.3d 718, 723, 730–31 (7th Cir. 2013).

195. 326 U.S. 310 (1945).

196. Siswanto v. Airbus, S.A.S., 153 F. Supp. 3d 1024, 1028 (N.D. Ill. 2015).

court throughout the country."[197] A foreign company, however, must have "continuous and systemic general business contacts" such that it is "essentially at home" in the United States, not just the forum state, in order for a court to exercise general jurisdiction over it.[198]

The court analyzed Airbus's contacts with the United States to determine if the "demanding" standard for general personal jurisdiction had been met. The court rejected the argument that the following four categories of contacts between Airbus and the United States warranted the court's exercise of general jurisdiction over Airbus: (1) 6.73 percent of Airbus's total aircraft sales were to customers in the United States; (2) Airbus spends 42 percent of its aircraft-related procurement in the United States; (3) Airbus's "separately incorporated" subsidiaries' contacts with the United States should be imputed to Airbus; and (4) an article indicated that another aircraft model, the A380, was certified by the FAA.[199] The identified categories of contacts "neither separately nor collectively establish the requisite basis to exercise general personal jurisdiction" over Airbus.[200]

The court then addressed the plaintiffs' argument that "when personal jurisdiction is based on a statute authorizing nationwide service, as here, the constitutionality of personal jurisdiction is 'rooted' in whether venue is proper."[201] The court confirmed that venue in the Northern District of Illinois was proper under the MMJTA because at least one of the defendants was a resident, but noted that that "does not, by itself, establish personal jurisdiction."[202] Rather, venue and personal jurisdiction are distinct concepts that must be evaluated separately.[203]

197. *Id.*
198. *Id.* (citing Abelez v. OTP Bank, 692 F.3d 638, 654–56 (7th Cir. 2012)).
199. Siswanto v. Airbus, S.A.S., 153 F. Supp. 3d 1024, 1029–30 (N.D. Ill. 2015).
200. *Id.* at 1029.
201. *Id.* at 1031.
202. *Id.*
203. *Id.*