

PREFLIGHT

Chairman's Message:

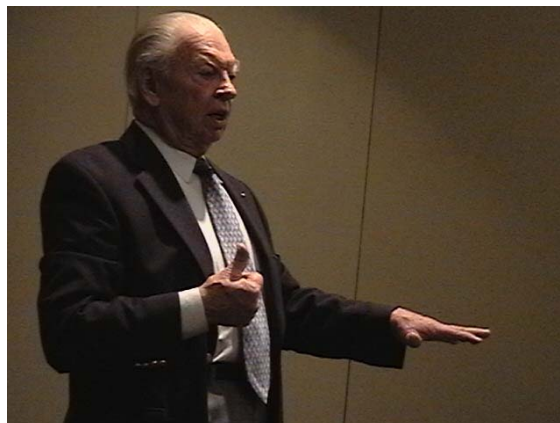
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At the time this Chairman's Message is being composed, the United States has launched its offensive in Iraq with the intention of removing Saddam Hussein and his confederates from power. It is an unfortunate reality that war has been a part of the human experience for thousands of years, and our time is no exception. Regardless of one's political or philosophical views on this subject, I know we all hope the conflict will be brief with minimal loss of human life. Hopefully, when the next Chairman's Message is dictated, the war in Iraq will be a thing of the past, and that country will be in a state

of rebuilding and on the path to becoming a constructive member of the world community. In the interim, I am sure we all have concerns for the welfare and safety of our men and women in the United States Armed Forces.

Turning to the activities of our Section, the luncheon on January 10, 2003, was a success. I believe I can report, in all honesty, that those in attendance enjoyed the comments of Bob "Punchy" Powell as he related his experiences during the Second World War as a fighter pilot with the 352nd Fighter Group. I particularly enjoyed the gun camera footage captured by the fighter planes as they flew perhaps fifty feet above the deck at high speeds. It must have been an extraordinary experience to engage in those kinds of operations and return from the mission with



Bob Powell addressing the Aviation Section at the Midyear Luncheon



Dan McClung addressing the Aviation Section at the Aviation Law Seminar

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AVIATION LAW UPDATE

By Chuck Young

The commercial aviation industry's ongoing challenges have resulted, and will continue to result, in appeals to Congress for various types of aid. But an important piece of industry-friendly legislation that will affect airlines, passengers, and those who represent them almost got lost in the shuffle of high-profile financial requests: The Multiparty, Multiforum Trial Jurisdictional Act of 2002 (the "Act"), which became law last fall to scant fanfare.

The Act was buried in a massive Justice Department appropriations bill that President Bush signed into law last November 2, and it applies to all accidents that occur 90 days after the bill was signed, or January 31, 2003. The teeth of the Act now appear at 28 U.S.C. § 1369, which gives federal courts original jurisdiction of claims arising from "a single accident" involving the deaths of 75 or more people "at a discrete location."

After the federal cases are filed, they will be consolidated under one federal judge for discovery; once discovery is completed the cases will return to the original federal district court where they were filed for resolution of liability and damages issues. In effect, the Act makes multidistrict litigation the rule for mass disaster cases of all types, and it bears some resemblance to the law Congress passed after the Sept. 11 terrorist attacks allowing

victims and their families to file lawsuits only in the U.S. District Court in Manhattan.

The Act does provide an exception for cases in which the "substantial majority of all plaintiffs" are citizens of the same state as the "primary defendants." The Act makes corporations citizens of any state in which they are incorporated or have their principal place of business. Thus, for example, if an airliner owned by Delta crashed in Georgia with mostly Georgians aboard it, then the Act would require federal district courts to abstain from hearing any cases related to the crash, sending the litigation to Georgia state courts.

That said, one could reasonably expect some wrangling over who the "primary defendants" are because the Act does not define the term. A suit against Delta in this example would almost certainly also involve various aircraft component manufacturers and service companies, and it obviously could involve numerous other parties. If Delta could take the position that it was not a "primary defendant," perhaps because it could point to one or more non-Georgia defendants with more demonstrable culpability, then it could seek to invoke the Act and consolidate cases in federal court.

According to various media accounts, prior versions of similar legislation were substantially different. Since 1990, the House had passed

more than a half dozen bills creating federal jurisdiction in cases arising from accidents that killed or seriously injured 25 or more persons. All those bills died in the Senate. Senator Patrick Leahy (D-Vt.) was reportedly instrumental in obtaining the changes that led to the Act's passage last fall, including (a) raising the threshold from 25 injuries and deaths to 75 deaths, and (b) deleting provisions allowing the district courts that heard pretrial matters to decide liability and damages as well.

While reasonable minds can disagree about the Act's merits as a general proposition, the Act will surely reduce some duplicative legal efforts and save some money for both plaintiffs and defendants. What it probably will not do is save anyone time, as state cases generally progress more quickly than federal cases. In any event, the Act is likely to be only an early entry in a parade of legislation designed to aid airlines, and aviation practitioners will need to keep one eye on Washington for the next law.

Recent Cases of Interest

Since the last Aviation Law Update, courts have issued several opinions of interest to aviation practitioners. Three areas have seen significant repeat traffic: (1) Eighth Circuit cases arising from the 1999 crash of American Flight 1420 on its landing in

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Aviation Law Update (cont.)

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Little Rock, Arkansas; (2) cases raising federal preemption questions; and (3) cases discussing cognizable Warsaw Convention injuries.

The American 1420 cases have dealt primarily with damages issues, but because several passengers were returning home from a trip abroad the court has had occasion to issue two rulings related to the Warsaw Convention, one of which is of particular interest. In Lloyd v. American Airlines, Inc., 291 F.3d 503 (8th Cir. 2002), the court followed a majority view and held that a passenger can recover mental distress damages under the Warsaw Convention only if those damages flowed proximately from the physical injuries sustained — and not simply from the experience of being in a crash. The court expressly rejected cases permitting recovery for mental injuries provided only that some physical injuries, even unrelated ones, were sustained. See also Maddox v. American Airlines, Inc., 298 F.3d 694 (8th Cir. 2002) (reversing the deduction from the jury's verdict of interest on pretrial Special Drawing Rights payments in an opinion addressing other routine choice-of-law and damages issues), cert. denied, 123 S. Ct. 1273, 154 L. Ed. 2d 1026 (2003).

In other American 1420 cases that should be useful for practitioners dealing with analogous aviation accidents in which some passengers survive and go on to recount

their harrowing experiences, the Eighth Circuit has not been afraid to adjust some awards, but it has also upheld others as within the district court's discretion. Compare Rustenhaven v. American Airlines, Inc., 320 F.3d 802 (8th Cir. 2003) (remitting plaintiffs' judgments totaling \$6,242,000 by \$1,500,000 and conducting a close analysis of claims for non-economic losses and loss of consortium) with Manus v. American Airlines, Inc., 314 F.3d 968 (8th Cir. 2003) (affirming awards totaling more than \$3 million in favor of a mother and her two young daughters who survived the crash).

Recent aviation preemption cases have yielded a mixed bag of results. Two California cases rejected defendants' preemption challenges and allowed plaintiffs to assert claims. Aquino v. Asiana Airlines, Inc., 105 Cal. App. 4th 1272; 130 Cal. Rptr. 2d 223 (Cal. Ct. App. 2003) (holding that the Warsaw Convention and the Airline Deregulation Act of 1978 did not preempt the plaintiffs' claims for age and disability discrimination arising from the airline's refusal to allow them to board their ticketed international flight); Vinnick v. Delta Airlines, Inc., 93 Cal. App. 4th 859, 113 Cal. Rptr. 471 (Cal. Ct. App. 2002) (holding that the Airline Deregulation Act of 1978 did not preempt plaintiff's state law tort claims for injuries suffered from falling overhead luggage). But in

Frank v. Delta Airlines, Inc., 314 F.3d 195 (5th Cir. 2002), the court held that the Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. § 45106, preempted an aircraft mechanic's state-law claims for negligence, intentional infliction of emotional distress, and defamation arising from a drug test that yielded traces of a drug-masking agent. The simplest "bottom line" of these cases is that aviation practitioners should expansively consider federal statutes that could affect their clients' claims.

The Warsaw Convention injury cases have also gone in both directions. In Magan v. Lufthansa German Airlines, 181 F. Supp. 2d 396 (S.D.N.Y. 2002), the court held that injuries caused by "light or moderate" turbulence were not actionable under the Warsaw Convention because turbulence must be "severe" or "extreme" to constitute an "accident" within the treaty. But a defendant's analogous summary judgment motion failed in Brunk v. British Airways PLC, 195 F. Supp. 2d 130 (D.D.C. 2002), leaving open the possibility of recovery for injuries a passenger sustained when more dramatic turbulence lifted her off her feet and threw her to the airplane's floor, tearing her knee ligaments. And, in the widely discussed "economy class syndrome" case of Blansett v. Continental Airlines, Inc., 237 F. Supp. 2d.

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Aviation Law Update (cont.)

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747 (S.D. Tex. 2002), plaintiffs defeated a motion to dismiss their claims that the airline should have warned them of the possibility that blood clots could develop in passengers' lower extremities; the lead plaintiff suffered a debilitating cerebral stroke ostensibly from a clot that had formed during a Houston-to-London flight.

Finally, in the interest of space, here are citations and thumbnail parentheticals of other recent aviation cases of interest for further exploration, presented in reverse chronological order:

Dasrath v. Continental Airlines, Inc., 228 F. Supp. 2d 531 (D.N.J. 2002) (denying airline's Rule 12(b)(6) motion to dismiss state and federal discrimination claims brought by passengers of Arab descent that the airline removed from one of its flights prior to departure from Newark Airport and holding that the plaintiffs' removal was not the sort of safety measure shielded by the Warsaw Convention).

Love v. Delta Air Lines, Inc., 310 F.3d 1347 (11th Cir. 2002) (holding that the Air Carrier Access Act of 1986, 49 U.S.C. § 41705, does not create a private right of action for a disabled individual alleging violations of its provisions).

Access Now, Inc. v. Southwest Airlines Co. 227 F. Supp. 2d 1312 (S.D. Fla. 2002) (dismissing claims under the Americans With Dis-

abilities Act, 42 U.S.C. § 12101, in which plaintiffs alleged that Southwest's Internet website violated the statute because it was inaccessible to blind persons using a screen reader).

Motorola, Inc. v. Federal Express Corp., 308 F.3d 995 (9th Cir. 2002) (holding that courts have the discretion to award prejudgment interest in cases governed by the Warsaw Convention but recognizing substantial disagreement on the issue).

Raytheon E-Sys., Inc. v. Learjet, Inc., No. 62284, (Hunt County, Tex. 196th Jud. Dist. Ct. Jan. 16, 2002), appeal dismissed, No. 05-02-00250-CV, 2002 Tex. App. LEXIS 4767 (Tex. Ct. App. July 3, 2002) (awarding more than \$24 million to Raytheon for breach of contract and fraud in case arising from modifications of six Learjet aircraft for federal flight inspection program, although the case subsequently settled during appeal).

United States v. Boeing Co., 302 F.3d 637 (6th Cir. 2002) (holding that the High Value Items Clause in federal acquisition regulations does not foreclose the application of the False Claims Act as a means for the government to recover damages for loss of a military helicopter because the loss of the helicopter was actually caused by the manufacturer's initial misrepresentation that the helicopter conformed to contract requirements and because nothing in

the regulation suggested that its limitation of contractor liability covered statutory violations), reh'g en banc denied, 2003 U.S. App. LEXIS 1275 (6th Cir. Jan. 24, 2003).

Konop v. Hawaiian Airlines, Inc., 302 F.3d 868 (9th Cir. 2002) (holding that airline pilot who maintained a secure website critical of his employer, its officers, and his union did not have a claim against the airline or his co-workers for intercepting his website's content under the Wiretap Act or the Stored Communications Act, but that genuine issues of material fact precluded summary judgment on pilot's claims against the airline under the Railway Labor Act for interfering with his protected activities), cert. denied, 154 L. Ed. 2d 1028 (2003). ✖

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SOLO FLIGHT—A FAMILY TRADITION

By Mark Stuckey

At the recent Aviation Law Seminar, I came to the realization that most, if not all, members of this section are avid pilots as well as lawyers. People such as myself, who loved aircraft but didn't know an altimeter from an attitude indicator, were in short supply. After much contemplation and wallet-checking, I decided to go ahead and start taking flight lessons.

On April 4, 2003, I successfully completed my first solo flight. A couple of go-arounds were necessary due to some gusty winds, but I completed my three takeoffs and landings without putting my 172 in the ditch. By doing so, I continued a family tradition dating back to 1938 with my grandfather Savery Lewis ("S.L.") Stuckey, who founded what is now the Ruston Regional Airport (RSN) in Ruston, Louisiana.

S.L. Stuckey soloed in a J-3 Piper Cub outside Arcadia, Louisiana on March 4, 1938 under the instruction of Norman "Pop" Wise. After getting his private ticket in 1940 and his commercial and instructor ratings in 1945, S.L. began teaching students in the Ruston area. He then cleared a pasture owned by the City of Ruston, got

a lease, and spearheaded the creation of a 1,600 foot runway. After the runway was completed, Louisiana Tech commenced an aviation degree program that has continued to grow and prosper to



S.L. Stuckey with his J-3 Piper Cub in 1941

this day. The grass field grew and became the Ruston Regional Airport. S.L. Stuckey went on to teach over 1,000 students and fly more than 13,400 hours before his death in 1987.



Sam Stuckey continues the tradition, with his mother Eunice and father/instructor S.L. Stuckey in 1950

But the tradition did not stop with my grandfather. My father Savery G. Stuckey ("Sam") also caught the flying bug. Sam soloed in a Piper Cub on April 22, 1950 at RSN under his father's tu-

telage. Dad earned his private, commercial and instructor ratings by 1953, and then decided to serve his country in the United States Air Force.

Sam flew numerous aircraft in the USAF arsenal, including the T-28 Trojan, T-34 Mentor, T-33 Shooting Star, C-47 Gooneybird, T-39 Sabreliner, F-86L Sabre and RF-4C Phantom II. Sam amassed more

than 4,000 hours before his retirement from the Air Force in 1981. His many assignments included the 12th TRS at Tan Son Nhut during the Vietnam Conflict, resulting in his being awarded the Distinguished Flying Cross. Dad also served in the 32nd TRS and 10th TRW at RAF Alconbury, UK.

My own love of aircraft came at an early age, given my constant movement around the country as an Air Force brat (I was born at RAF Mildenhall while the family was stationed in the UK). I en-

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Solo Flight (cont.)

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joyed watching the aircraft on and off the airfields at Shaw, Wright Patterson and McClellan AFBs. Whenever there was an air show, Dad and I would be off to watch the Thunderbirds (or the Blue Angels, if we were desperate) and look at the historical planes that shaped America's great aviation history. I also grew especially attached to the A-10 squadron at England AFB in Alexandria, which we visited periodically after Dad retired to Baton Rouge. (Dad never did understand how I could like a plane as ugly as the Warthog).

Throughout my grammar school years, I made it a goal to read every WWII aviation book I could find in the school library. I was enthralled with the stories of the Flying Tigers, Midway and the Battle of Britain. I became fond of the P-40 Warhawk, P-38 Lightning and the SBD "Slow But Deadly" Dauntless. I was especially impressed with the Allied bombing tactics

prior to D-Day that completely threw the Germans off the scent of the real invasion site at Normandy, as well as the sheer bravery of Jimmy Doolittle's Raiders in their B-25 Mitchells over Tokyo in April 1942.

I rediscovered my interest in flying while practicing in Tommy Malone's office, where I was fortunate enough to be exposed to some tremendous aviation lawyers and experts in a variety of contexts. After moving my law practice to Macon and then going out on my own, I decided to continue the family tradition and "join the tumbling mirth of sun-split clouds" and "chase the shouting wind along." Indeed, while I was going around the pattern at MCN for my solo flight last week, I only hoped that S.L. could see his grandson at 1500 feet, lifting up my hand to him, and smiling all the way.✘

The author wishes to thank the Ruston Daily Leader and Adam Terry for the use of their research in this article.



The author continues the family tradition on April 4, 2003 with his father Sam Stuckey conducting the honors

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Chairman Alan Armstrong

Chairman's Message (cont.)

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your aircraft and your body intact. Mark Stuckey received an award in recognition of his outstanding activities as the Editor of Preflight. I have received compliments on this newsletter, and Mark is responsible for doing a tremendous job that makes me proud to serve as your Chairman.

The aviation seminar on February 7, 2003, was also a success, and special thanks go out to the following people: (1) Lisa McCrimmon [Co-Chair of the seminar], (2) Andy Scherffius [a fine trial lawyer and accomplished pilot], (3) David Boone [another great lawyer and accomplished pilot], (4) Member John Goglia of the National Transportation Safety Board, (5) Mark Stuckey [who spoke on the

Victim's Compensation Fund], (6) Robert McCormack, III [who spoke on ethics], (7) Jim Strawinski [who, on very short notice, did me a tremendous favor by agreeing to speak on issues which relate to suing the United States under the Federal Tort Claims Act], and (8) Capt. Dan McClung [former Top Gun Instructor and a great airshow pilot].

I wish to thank each and every member of this Section for your support. Our activities have been well-attended. Although our Section is small, our members are active and are generally passionate about their enthusiasm for aviation.

May our country and Iraq come to know peace and understanding in the months and years ahead after this conflict has been concluded.

Alan



“Punchy” Powell demonstrates air combat tactics

SKYNOTES

TFR AT KING'S BAY, GA

There is a TFR currently in effect prohibiting flights at or below 3000 MSL in a 2 NM radius of the King's Bay nuclear submarine base at St. Mary's, GA; www.aopa.org/whatsnew/notams.html#ga

The Flying Tigers:

An Illustrated History

Exhibit by Joel Naprstek; April 3—June 3 at Warner Robins Museum of Aviation; www.museumofaviation.org

USAF Thunderbirds

April 26 at Greenville, SC; May 3-4 at Ft. Lauderdale, FL; www.airforce.com/thunderbirds

Navy Blue Angels

April 12-13 at Vidalia Onion Festival; April 26-27 at Knoxville, TN; www.blueangels.com

1st Annual CAF Dixie Wing Swing Dinner Dance

May 10 at Falcon Field, GA; Tickets \$40; Speaker is Robert Morgan, pilot of Memphis Belle www.dixiewing.org

Incredible Age of Aviation Air Show & Balloon Festival
August 9-10 at Hampton, GA; www.flightlineairshows.com

Great Georgia Air Show 2003
September 6-7 at Falcon Field; www.wingsoverdixie.org