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RECENT DEVELOPMENTS IN AVIATION LITIGATION

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I. INTRODUCTION

This paper will discuss some brief updates and case overviews in aviation and space law as well as recent developments in parallel and industry-adjacent litigation that are being closely watched by the aviation bar. In particular, we will address recent case law developments across three topics that will be familiar to many aviation litigators and practitioners: (1) personal jurisdiction; (2) federal preemption; and (3) the Federal Tort Claims Act (FTCA); as well as two trends in aviation security risks that may be new: (1) malware-related litigation; and (2) litigation related to Unmanned Aerial Systems.

II. PERSONAL JURISDICTION

The Due Process Clause of the Fourteenth Amendment requires that a court possess personal jurisdiction over the parties before they can be "haled into court there."[1] Jurisdiction can either be all purpose, general jurisdiction, or more frequently in aviation litigation, specific jurisdiction.[2] The Supreme Court has offered many and varied opinions defining the scope of specific jurisdiction, most recently in *Ford Motor v. Montana Eighth Judicial District Court*,[3] discussed below.

A. Ford Motor Co. v. Montana Eighth Judicial District Court

This most recent chapter in specific personal jurisdiction jurisprudence stems from two appeals by Ford from state supreme court decisions in Montana and Minnesota, which were consolidated before the Court. In the Montana case, the plaintiff was killed when her Ford Explorer blew a tire tread, spun out, and rolled into a ditch in her home state. The Montana Supreme Court held that its state courts had specific jurisdiction over Ford to hear the plaintiff's design defect, failure to warn and negligence claims. In the Minnesota case, the in-state plaintiff was severely injured in his home state when his friend's Crown Victoria also crashed into a ditch and the airbags failed to deploy. Minnesota's courts similarly held that they possessed specific jurisdiction over Ford.[4]

Ford argued that it was not subject to specific jurisdiction in either State because there was no connection between its in-state contacts and the plaintiffs' claims. Ford asserted that this link must be causal in nature, such that Ford's forum conduct gave rise to the plaintiffs' claims, and submitted that such a link would only be present in the states where the particular

1. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291, 297 (1980).
2. Daimler AG v. Bauman, 571 U.S. 117, 118 (2014).
3. 141 S. Ct. 1017 (2021).
4. *See id.*

vehicle that caused the injury was designed, manufactured, or originally sold as new. Since only later resales and relocations by consumers brought the vehicles in question to Montana and Minnesota, Ford's position was that those states lacked specific jurisdiction.

A five justice majority opinion authored by Justice Kagan rejected Ford's specific personal jurisdiction formulation, stating that "Ford's causation-only approach finds no support in this Court's requirement of a 'connection' between a plaintiff's suit and a defendant's activities."[5] The majority unambiguously held instead that "[w]hen a company like Ford serves a market for a product in a State and that product causes injury in the State to one of its residents, the State's courts may entertain the resulting suit."[6]

The majority's decision turned on the often-restated requirement that a suit relying on specific jurisdiction must "arise out of *or relate to* the defendant's contacts with the forum."[7] The disjunctive use of "or" in the Court's precedent signaled that relationships other than just a causal relationship (i.e. "arising out of") would also be sufficient. The "or relate to" language opened the door to other "affiliation[s,]" "relationship[s,]" or "connection[s]"[8] besides causation that could link the case with the defendant's forum contacts for case-specific jurisdiction.[9]

Previous decisions confirmed this broader reading of the "arising out of or relating to" requirement of specific jurisdiction for the majority.[10] In particular, the Court held that the outcome reached in this case was predicted nearly perfectly by *World-Wide Volkswagen Corp. v. Woodson*.[11] While Ford argued that *Woodson*'s prediction was merely dicta, the majority discounted this argument, since this "dicta" had been prominently cited verbatim in multiple Supreme Court decisions since.[12] Justice Kagan also favorably cited the *Helicopteros* case, finding Ford's contacts with Montana and Minnesota bore the "strong relationship among the defendant, the

5. *Id.* at 1027 ("None of our precedents has suggested that only a strict causal relationship between the defendants' in-state activity and the litigation will do.").

6. *Id.* at 1022. This formulation was also restated by Justice Alito's concurrence as follows: "If a car manufacturer makes substantial efforts to sell vehicles in States A and B (and other States), and a defect in a vehicle first sold in State A causes injuries in an accident in State B, the manufacturer can be sued in State B." *Id.* at 1033 (Alito, J. concurring) (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297–98 (1980)).

7. *Id.* at 1026 (emphasis in original).

8. *Id.* at 1034 (Gorsuch, J., concurring).

9. *Id.* at 1026 ("The first half of that standard asks about causation; but the back half, after the "or," contemplates that some relationships will support jurisdiction without a causal showing.").

10. *See id.* at 1027.

11. 444 U.S. 286 (1980).

12. *See Ford*, 141 S. Ct. at 1027–28 (citing Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 927 (2011); Asahi Metal Indus. Co. v. Sup. Ct. of Cal., Solano Cnty., 480 U.S. 102, 110 (1987))

forum, and the litigation – the essential foundation specific jurisdiction" discussed by the Court in that case.[13]

Justice Alito concurred stating that, while he agreed with the majority's conclusion, he disagreed that "relating to" added anything more to the Court's understanding of specific jurisdiction. Instead, Justice Alito felt that "[t]hese cases can and should be decided without any alteration or refinement of our case law on specific personal jurisdiction."[14] He stated that the majority opinion parsed "'must arise out of or relate to' . . . 'as though we were dealing with language from a statute,'" which was not only inappropriate but "unnecessary and, in my view, unwise."[15] Citing *Morales v. Trans World Airlines*, *Inc.*, Justice Alito pointed out that the ordinary meaning of "relate to" was "a broad one" which would defy efforts to limit it.[16] While the majority stated that "relate to" "incorporates real limits[,]" they did not provide any indication of what those limits might be. For this reason, Justice Alito "doubt[ed] that lower courts will find that observation terribly helpful" and would have preferred to "leave the law exactly where it stood before. . . ."[17]

Rounding out the Court's decision was Justice Gorsuch, whose final concurring opinion was joined by Justice Thomas.[18] For Justice Gorsuch, the traditional conceptions of general and specific jurisdiction seemed "almost quaint in 2021, when corporations with global reach often have massive operations spread across multiple States."[19] After taking a position much like Justice Alito that the majority's new interpretation of "related to" was unnecessary to resolve this case and added little but confusion to specific jurisdiction,[20] Justice Gorsuch's concurrence reviewed the history and underlying policy rationale for the Court's personal jurisdiction jurisprudence. Justice Gorsuch found *International Shoe*'s goal of a jurisdictional test that "focused on 'traditional notions of fair play and substantial justice'" to be a "heady promise" but doubted "how far it has really taken us."[21] For instance, the idea that general jurisdiction over a corporation is based on where it is "at home" did not fit "in a world where global conglomerates boast of their many 'headquarters.'"[22] Years after *International Shoe*, "it

13. *See id.* at 1028 (internal quotation marks omitted) (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984)).
14. *Id.* at 1032 (Alito, J., concurring).
15. *See id.* at 1033.
16. *See id.* (citing Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992)).
17. *See id.* at 1033–34.
18. For those of you keeping score at home, that is only eight justices; Justice Barrett took no part in the consideration or decision of this case.
19. *See id.* at 1034 (Gorsuch, J., concurring).
20. *See id.* at 1034–36.
21. *Id.* at 1038.
22. *Id.*

seems corporations continue to receive special jurisdictional protections in the name of the Constitution. Less clear is why."[23] Specific jurisdiction, on the other hand, was "a test once aimed at keeping corporations honest about their out-of-state operations" but "now seemingly risks hauling individuals to jurisdictions where they have never set foot."[24]

After an extended discussion of a hypothetical from the majority opinion's footnote, Justice Gorsuch could not "help but wonder if we are destined to return where we began."[25] Maybe everything since *International Shoe* was merely struggling "for new words to express old ideas." Under those pre-*International Shoe* traditions, Justice Gorsuch found: "No one seriously questions that [Ford], seeking to do business, entered [these] jurisdictions through the front door. And I cannot see why, when faced with the process server, it should be allowed to escape out the back."[26] The real question was not the outcome of these cases, "but making sense of our personal jurisdiction jurisprudence and *International Shoe*'s increasingly doubtful dichotomy [between general and specific jurisdiction]." On that score, however, Gorsuch was left with "even more questions than I had at the start."[27]

All the opinions, taken together, led to a resounding and unanimous 8–0 rejection of Ford's "causation only" formulation of specific personal jurisdiction, and the majority opinion provided a strong precedent broadening specific jurisdiction beyond its prior confines. While not an aviation case itself, the *Ford* case's implications for aviation litigation will no doubt be extensive and enduring.

B. Cohen v. Continental Motors, Inc.

The plaintiff in this case was the executor of two estates whose decedents perished when their Lancair LC42-550FG aircraft crashed near Winston-Salem, North Carolina.[28] Prior to the crash, the pilot declared an emergency due to low oil pressure and engine failure, which was later confirmed as the cause of the crash.[29] The plaintiff alleged that the loss of oil pressure was in turn due to a defectively designed starter adapter and a defective service manual for the aircraft's engine, and brought suit against defendant engine manufacturer Continental Motors, Inc. ("CMI") in North Carolina.

23. *Id.*
24. *Id.*
25. *Id.* at 1039.
26. *Id.*
27. *Id.*
28. *See* Cohen v. Cont'l Motors, Inc., 864 S.E.2d 816 (N.C. Ct. App. 2021), review denied, 868 S.E.2d 859 (N.C. 2022).
29. *Id.*

After several years of discovery, CMI moved to dismiss for lack of personal jurisdiction. CMI was clearly not subject to general jurisdiction in North Carolina, since it is a Delaware corporation with its principal place of business in Alabama, and CMI further argued that specific jurisdiction was also lacking because the starter adapter in question was not manufactured, designed or sold by CMI in North Carolina.[30] Further, the starter adapter was shipped by CMI to the aircraft's original manufacturer, Lancair, in Bend, Oregon. It was only by the unilateral actions of other parties that the subject engine and starter adapter came to be in North Carolina.[31]

The trial court agreed with CMI, and granted their motion to dismiss. The trial court found that "even assuming CMI's distributor relationships and sales in North Carolina are purposeful contacts with the State . . . , those are unrelated to Plaintiff's claims against CMI in this litigation."[32]

On appeal, the North Carolina appellate court reversed and extensively cited the United States Supreme Court's recent decision in *Ford Motor Co. v. Montana Eighth Judicial District Court*.[33] The court found that the *Cohen* fact pattern was analogous to *Ford*: CMI, by its own admission, "markets to the flying public at large[;]" "sold parts in all fifty United States, which included the forum state, North Carolina[;]" and "[a]lthough CMI did not sell components to individual aircraft owners themselves, it actively maintained a business model . . . [of] independent distributors – including [one] based in North Carolina."[34] All of this led the North Carolina court to conclude that, at the time of the accident, "CMI 'serve[d] a market for a product in the forum [s]tate' of North Carolina."[35] "Applying the reasoning of *Ford* to this case: the sale of CMI's product . . . was not simply an isolated occurrence, but arose from the efforts of CMI to serve, *directly or indirectly*, the North Carolina market. Thus, it is not unreasonable to subject CMI to suit in North Carolina since its allegedly defective Starter Adapter has there been the source of injury to its owners . . . ."[36]

The *Cohen* case, therefore, "functions as an illustration—even a paradigm example—of how specific jurisdiction works" post-*Ford* and particularly how it works in aviation products liability cases.[37]

30. *Id.* at 129.
31. *Id.*
32. *Id.* at 131.
33. *Id.* at 135–38.
34. *Id.* at 139 (internal citations and quotation marks omitted).
35. *Id.* (citing *Ford*, 141 S. Ct. 1017 (slip op. at *9)).
36. *Id.* (citing *Ford*, 141 S. Ct. 1017 (slip op. at *10)) (internal citations and quotation marks omitted).
37. *Id.* (citing *Ford*, 141 S. Ct. 1017 (slip op. at *2))

C. Esquivel v. Airbus Americas, Inc.

Esquivel was a flight attendant who sued Airbus Americas, Inc. ("Airbus"), for injuries she allegedly sustained as a result of the aircraft's defectively designed air filtration system while working aboard a Spirit Airlines flight departing from Chicago. Airbus moved to dismiss for lack of personal jurisdiction in Illinois, and Esquivel cross-moved for jurisdictional discovery.[38]

The court granted Esquivel's motion for jurisdictional discovery and denied Airbus's motion to dismiss pending completion of said discovery, specifically citing the Supreme Court's recent *Ford* decision. Airbus's argument that it could not be subject to specific personal jurisdiction in Illinois because it does not manufacture the relevant aircraft models in Illinois was flatly rejected due to *Ford*'s unambiguous holding on this point.[39] Esquivel's allegations that the Defendants' airplane malfunctioned in Illinois, and caused her injury in Illinois, was sufficient to survive the pleading stage and secure jurisdictional discovery on the remaining issue post-*Ford*, namely whether Airbus cultivated a market for their product in Illinois.[40] The court noted that it "is left to guess as to whether Airbus Americas, a self-proclaimed sales and marketing subsidiary of Airbus S.A.S., markets any of its airplanes to Illinois customers through its non-Illinois employees." The court determined that a plaintiff need not conclusively prove personal jurisdiction at the motion to dismiss phase and was entitled to jurisdictional discovery if they can show that the factual record is at least ambiguous or unclear on the jurisdiction issue.[41] Accordingly, Airbus's motion to dismiss was denied without prejudice and jurisdictional discovery allowed to proceed.

III. FEDERAL PREEMPTION

Federal preemption occurs when federal law displaces or "preempts" state law. This legal concept occurs frequently in aviation cases given that federal law pervades every aspect of aviation and air travel. As the Supreme Court has stated many times before: "Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands."[42] Preemption in aviation cases

38. *See* Esquivel v. Airbus Americas, Inc., Case No. 1:20-cv-07525, 2021 WL 4395815, at *1 (N.D. Ill. May 3, 2021).

39. *See id.* at *2.

40. *See id.*

41. *See id.* (citing Andersen v. Sportmart, Inc., 179 F.R.D. 236, 241 (N.D. Ind. 1998) (additional citations omitted)).

42. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633–34(1973) (citing Nw. Airlines, Inc. v. Minnesota, 322 U.S. 292, 303 (1944) (Jackson, J., concurring))

can come in many forms, as narrow as express preemption and as broad as field preemption.[43] Below is a selection of recent aviation cases dealing with this topic and the two primary aviation statutes that trigger federal preemption: the Federal Aviation Act ("FAAct") and the Airline Deregulation Act ("ADA").

A. Syed v. Frontier Airlines, Inc.

The plaintiffs, a couple who purchased two seats on Frontier Airlines, attempted to fly with their two infants on their laps from St. Louis, Missouri to Las Vegas, Nevada. Prior to boarding, the gate agent reassigned their seats so that the couple could not sit together. After boarding, the plaintiffs were forced to deplane, and were then locked in the jet bridge alone for approximately ten minutes. [44]

The plaintiffs brought state court action against Frontier and the gate agent service contractor, asserting claims for negligence per se, negligence in the manner of removal, prima facia tort, and false imprisonment. Defendants moved for dismissal on the basis that the ADA preempts state laws and regulations "related to price, route, or service of an air carrier."[45] At issue here was whether the ADA exempted the "services" provided by the Defendant.[46]

In considering this question, the court noted that it lacked clear precedent on what an air carrier's "services" are, but adopted a broad definition of the term, deciding that the boarding process, deplaning, and the disembarking process, resolving seating disputes, as well as "the general manner of how an air carrier removes a passenger" all fall within the definition of "services" under the ADA.[47] Here, the dispute arose during the boarding process, from Frontier telling the plaintiffs where they could and could not sit, and lasted through Frontier's decision not to permit the plaintiffs to travel on the flight and their subsequent removal. The court concluded, therefore, that "when an air carrier refuses to transport a passenger or exclude a passenger from a plane, that decision directly affects service." Accordingly, the ADA preempts claims that relate to Frontier's services, and the plaintiff's claims for negligence and intentional tort were dismissed as preempted.[48]

43. *See, e.g.*, Abdullah v. Am. Airlines, Inc., 181 F.3d 363 (3d Cir. 1999) (addressing field preemption of state law standards of care in aviation safety); Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) (addressing express preemption).

44. See Syed v. Frontier Airlines, Inc., 522 F. Supp. 3d 503, 505 (E.D. Mo. 2021).

45. *Id.* at 508 (citing Pub. L. No. 95-504, 92 Stat. 175 (1978)).

46. *Id.* at 509.

47. *Id.* at 510–11.

48. *Id.* at 511–12.

The court went out of its way to note that it was not concluding "that a plaintiff [can] never state a claim against an air carrier, which the ADA did not preempt, stemming from the way the air carrier removed the plaintiff from the airplane."[49] These plaintiffs, however, had not pointed to a specific wrong, like intentional infliction of emotional distress, a personal injury, or discrimination. Instead, they asserted only negligence per se, prima facie negligence and prima facie intentional tort claims that the "general manner by which the Defendants removed them from the airplane was tortious."[50] In other words, "Plaintiffs describe—and bring suit over—the way Defendants provided their services"—which triggered preemption of their claims.[51]

The court, however, went on to decide that the plaintiffs' false imprisonment claim was not preempted by the ADA for similar reasons. Citing *Smith v. Comair, Inc.*, where the Fourth Circuit noted that if an airline holds a passenger "without a safety or security justification, a claim based on such actions would not relate to any legitimate service and would not be preempted" the court denied Frontier's motion to dismiss the false imprisonment claim.[52]

B. Day v. SkyWest Airlines, Inc.

Day traveled on a SkyWest flight from Portland, Oregon, to Dallas Fort Worth, Texas. During the flight's beverage service, the beverage cart forcefully struck Day's shoulder, causing her significant injury. Day brought claims against SkyWest for negligence and breach of contract to recover damages for economic loss, emotional trauma, physical pain and suffering, and medical expenses.[53]

SkyWest argued that Day's claims must be dismissed because they are preempted by the FAAct and the ADA.[54] The ADA's preemption clause provides that "a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or a service of an air carrier."[55] There was no dispute that SkyWest is an air carrier under the ADA, and therefore whether Day's claims were

49. *Id.* at 511 (citing Branche v. Airtran Airways, Inc., 342 F.3d 1248, 1258 (11th Cir. 2003); Farah v. Cont'l Airlines, Inc., 574 F. Supp. 2d 356, 365 (S.D.N.Y. 2008), *aff'd*, 377 F. App'x 7 (2d Cir. 2009)).

50. *Id.*

51. *Id.*

52. *Id.* at 512 (citing Smith v. Comair, Inc., 134 F.3d 254, 259 (4th Cir. 1998)).

53. Day v. SkyWest Airlines, Inc., 4:20-CV-00013-DN-PK, 2020 WL 6899501, at *1 (D. Utah Nov. 24, 2020).

54. *Id.* at *1–2.

55. *Id.* at *3 (citing 49 U.S.C. § 41713(b)(1)).

preempted by the ADA turned on whether her claims "relate to" a "service" of SkyWest.[56]

Similarly to prior cases, including *Syed*, the court noted that "service" is not a defined term in the ADA, nor has the Supreme Court explicitly defined the term.[57] Similarly, the Tenth Circuit has not specifically defined "service," but has looked favorably upon the Fifth Circuit's broad definition of "service" in *Hodges v. Delta Airlines, Inc.*,[58] which includes "provisions of food and drink."[59] Day asked the court to instead adopt the Ninth Circuit's definition of "service" from *Charas v. Trans World Airlines, Inc.*, which does not include "provision of in-flight beverages."[60] However, the Ninth Circuit's definition predated the Supreme Court decision in *Rowe v. New Hampshire Motor Trans. Ass'n*,[61] (which rejected the argument that the primary purpose of the ADA is economic regulation), and also predates the Tenth Circuit's favorable citation to the broad Fifth Circuit definition. The court, therefore, did not find the Ninth Circuit's definition persuasive. Following the Tenth Circuit's favorable reading of the broad definition of "service," this court found Day's in-flight beverage service claims expressly preempted by the ADA, and granted SkyWest's motion to dismiss.[62]

C. Jones v. Goodrich Corp.

The plaintiffs in this case were the estates of two U.S. Army pilots, who were killed in the fatal crash of an AH-6M "Mission Enhanced Little Bird" helicopter on August 8, 2011, at Fort Benning, Georgia. The plaintiffs asserted claims of strict products liability, negligence, breach of warranty, breach of contract, and fraud stemming from the crash against the manufacturers of the subject helicopter its components, alleging that the crash was caused by a failure of the helicopter's Full Authority Digital Electronic Control ("FADEC") computer.[63]

The defendants moved for summary judgment, and then Judge Eginton, the senior United States District Court judge who had heard the case for over seven years, also requested, *sua sponte*, additional briefing on the issue of field preemption—an argument not raised by the defendants' motion. The Army had required certain aspects of the helicopter—including the engine and any modifications to the FADEC—to comply with Federal

56. *Id.*
57. *Id.*
58. 44 F.3d 334, 336 (5th Cir. 1995) (en banc).
59. *Day,* 2020 WL 6899501, at *4 (citing Arapahoe Cnty. Pub. Airport Auth. v. F.A.A., 242 F.3d 1213, 1221–22 (10th Cir. 2001)).
60. *Id.* at *4 (citing Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1261 (9th Cir. 1998)).
61. 552 U.S. 364, 374 (2008).
62. *Id.* at *5.
63. Jones v. Goodrich Corp., 422 F. Supp. 3d 518, 520 (D. Conn. 2019) (hereinafter *Jones* I).

Aviation Administration ("FAA") requirements and certifications. Based in large part on this fact, the court found that the preempted field of air safety under the FAAct includes aviation design defect claims and therefore preempts the plaintiffs' claims.[64] Additionally, the court relied on the Second Circuit's decisions in *Tweed* and *Goodspeed*, which recognized federal preemption of the entire field of air safety in relation to claims regarding runway length and environmental laws requiring permits for tree removal on wetlands, respectively.[65] Ultimately, Judge Eglinton found that Second Circuit precedent supported field preemption of the plaintiffs' state law claims, based on the extensive federal design and certification standards that had been established for components directly affecting airworthiness, and granted summary judgment in the defendants' favor.[66]

Only seven days after signing the order granting summary judgment, however, Judge Eginton passed away. The case was then transferred to the Judge Janet Bond Arterton, who entered judgment in favor of defendants pursuant to Judge Eginton's ruling, and heard the plaintiffs' motion to alter or amend the judgment pursuant to F.R.C.P. 59(e).

In their Rule 59(e) motion to amend or modify, the plaintiffs identified four clear legal errors in the order granting summary judgment: (1) holding that the preempted field of aviation safety includes product liability claims relating to design defects; (2) holding that preemption required the elimination of all liability, as opposed to the substitution of federal standards of care for state ones; (3) holding that preemption extends to manufacturing defect claims; and (4) inappropriately reaching the question of field preemption.[67] The new court, however, noted that reconsideration under Rule 59(e) is "particularly improper where the moving party 'attempt[s] to relitigate' before a newly assigned judge any 'arguments rejected or ruled irrelevant' by the prior judge."[68] After reviewing each of the plaintiffs' "clear error" arguments, the new judge found that each "amount[ed] only to a disagreement with Judge Eginton's reasoning and conclusion[,]" and denied the plaintiffs' motion for reconsideration.[69]

The plaintiffs have since appealed to Second Circuit, where the case remains ongoing.[70] The plaintiffs' appellate arguments, similarly to the arguments in the trial court, rely heavily on the Third Circuit's decision

64. *Id.* at 523 (citing Fawemimo v. American Airlines, Inc., 751 F. App'x 16 (2d Cir. 2018)).

65. *Id.* at 521–24 (citing Tweed-New Haven Airport Authority v. Tong, 930 F.3d 65, 74 (2d Cir. 2019); Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Comm'n, 634 F.3d 206 (2d Cir. 2011).

66. *Id.* at 525–26.

67. Jones v. Goodrich Corp., Case No. 3:12cv1297 (JBA), 2020 WL 4558967, at *2 (D. Conn. Aug 7, 2020) (slip op.) (hereinafter *Jones II*).

68. *Id.* (internal citations omitted).

69. *Id.* at *5.

70. *See* Jones v. Goodrich Pump & Engine Control Sys., Inc., No. 20-2951 (2d Cir.).

in *Sikkelee v. Precision Airmotive Corp.*,[71] which held that state law products liability claims were not field preempted by federal law on aviation safety, and urge the Second Circuit to adopt a similar approach. The defendants argue that the trial court was merely applying well established Second Circuit precedent, and urge the Second Circuit to uphold the trial court's ruling. Briefing is complete and oral argument has yet to be scheduled.

IV. GOVERNMENT LIABILITY—FEDERAL TORT CLAIMS ACT AND THE DISCRETIONARY FUNCTION EXCEPTION

The majority of aviation related claims against the United States arise under the Federal Tort Claims Act ("FTCA").[72] The FTCA is a limited waiver of sovereign immunity that allows plaintiffs to sue for money damages for damage to property, personal injury or death caused by the negligence of a government employee acting in the scope of his employment.[73] Under the FTCA, the entire law, including the choice-of-law rules, of the state where the alleged negligent act or omission occurred governs the rights and liabilities of the parties.[74]

One of the most significant defenses in FTCA litigation is the discretionary function exception. The discretionary function exception provides that the FTCA's waiver of sovereign immunity does not apply to "[a]ny claim . . . based upon the exercise or performance or the failure to perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[75] The exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals."[76]

Courts apply to a two-prong test to determine whether the challenged conduct falls under the exception.[77] First, courts determine whether the act

71. 822 F.3d 680 (3d Cir. 2016*), cert. denied sub nom.* Avco Corp. v. Sikkelee, 140 S. Ct. 860 (2020). It is worth noting that *Avco Corp. v. Sikkelee*, 140 S. Ct. 860 (2020), is not the most recent decision in the *Sikkelee* line of cases, nor is it the most recent Third Circuit decision, which was Sikkelee v. Precision Airmotive Corp., 907 F.3d 701 (3d Cir. 2018). Rather, *Avco Corp. v. Sikkelee* was remanded on February 4, 2021 (after *Jones* was decided), and plaintiff and defendant subsequently filed several motions, which were decided on March 1, 2021, in Sikkelee v. Precision Airmotive Corp., 522 F. Supp. 3d 120 (M.D. Pa. 2021).

72. 28 U.S.C. §§ 1346(b), 2671–2680.

73. *Id.*

74. Richardson v. United States, 369 U.S. 1, 11 (1962); 28 U.S.C. § 1346(b)(1).

75. 28 U.S.C. § 2680(a).

76. United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 808 (1984).

77. Berkovitz v. United States, 486 U.S. 531, 536 (1988).

is "discretionary in nature," *i.e.*, whether it involves an "element of judgment or choice."[78] Under the first step, courts determine whether a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow."[79] Second, courts consider whether the discretion "is of the kind that the discretionary function exception was designed to shield"—namely, "actions and decisions based on considerations of public policy."[80] This includes decisions "grounded in social, economic, and political policy."[81] The focus of the inquiry is not on the agent's subjective intent in exercising the discretion, but on "the nature of the actions taken and on whether they are susceptible to policy analysis."[82]

Below is a discussion of two cases that resulted in defense verdicts for the United States based upon the discretionary function exception.

A. Short v. United States

Short v. United States involved a 2015 airplane crash at the Upper Loon Creek airstrip (U72) in rural Idaho.[83] The dirt and grass airstrip is owned and operated by the United States Forest Service ("USFS"). U72 offers pilots access to Idaho's famed Salmon-Challis National Forest and is carved into a narrow tree-lined valley just over a mile high in elevation. Shortly after take-off from U72, a Cessna Centurion aircraft piloted by John Short crashed, killing everyone on board.[84]

The plaintiffs, the widows and heirs of the individuals who died in the crash, alleged that trees at the north end of the runway disrupted Mr. Short's flight path and caused the crash.[85] They argued that the trees were a known hazard and the United States should have removed the trees or closed the airstrip.[86] Both parties filed dispositive motions. The United States moved to dismiss arguing that the challenged conduct—the failure to close U72 or remove the trees—fell under the discretionary function exception to the FTCA and barred the plaintiffs' causes of action.[87]

78. United States v. Gaubert, 499 U.S. 315, 322 (1991).
79. *Berkovitz*, 486 U.S. at 536.
80. *Id.* at 536–37.
81. *Varig Airlines*, 467 U.S. at 814.
82. *Gaubert*, 499 U.S. at 325.
83. Short v. United States, No. 1:18-CV-00074-BRW, 2020 WL 8672292, at *1 (D. Idaho Feb. 12, 2020), *aff'd*, 847 F. App'x 413 (9th Cir. 2021).
84. 2020 WL 8672292, at *1.
85. *Id.*
86. *Id.*
87. *Id.* In the alternative, the United States moved for summary judgment under Idaho's Recreational Use Statute. The court ultimately found that the Recreational Use Statute applied and found that the United States was not liable. This portion of the case is not detailed herein because it is outside the scope of the discretionary function exception discussion.

1. Judgment or Choice

Applying the first prong of the discretionary function test, the court determined whether the challenged conduct involved an element of judgment or choice.[88] The court noted that "[w]hether [the] conduct was negligent is irrelevant when applying the discretionary function exception. The first step only concerns whether or not the acting employee had a choice or if specific conduct or action was mandatory."[89] The United States argued that no federal statute, regulation, or agency guidance mandated cutting the trees or closing U72. It also contended that the USFS Manual did not mandate any specific course of action, but left the USFS with discretion on how to manage the trees while balancing competing missions and priorities. The plaintiffs countered that the trees were a known hazard and the failure to remove them or close U72 violated the USFS Manual because one of its sections states to operate all airfields in accordance with applicable FAA regulations.[90] The plaintiffs contended that USFS had no discretion because the trees penetrated an approach slope standard set out in Part 77 of the FARs and were therefore obstructions.[91] The plaintiffs argued that obstructions are "presumed hazards" to air navigation unless further aeronautical study concludes they are not.[92] The plaintiffs reasoned that USFS did not have discretion: because the trees were a presumed hazard under FAA regulations, and no FAA aeronautical study specifically concluded to the contrary, the USFS was required by its own manual to cut the trees or close U72.[93]

The court ruled that the first prong of the test was met. First, the court observed that the USFS manual sections at issue did not include mandatory language like "shall" or "will."[94] The court reasoned that even if the USFS manual required strict compliance with FAA regulations, closure of the airstrip under the USFS Manual, as asserted by the plaintiffs, would not be required.[95] Rather, the FAA regulations would require the USFS to commission "further aeronautical study . . . to determine if the object is a hazard to air navigation."[96] The court concluded that the subsection that requires reporting to the FAA about unusual operating conditions, including obstructed approaches, also appeared to conflict with the alleged obligation to close the airstrip.[97] The court further explained that when

88. *Id.* at *2.
89. *Id.*
90. *Id.* at *2–3.
91. *Id.* at *3.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at *4.

the applicable manual provisions are read in context, they establish that the USFS agreed to follow generally applicable FAA regulations, report obstructions like the trees, and close airfields when actual, not presumed hazards were present.[98] Ultimately, the determination of which hazards mandated removal, closure, or reporting, the court held, remained a choice or judgment for the agency, satisfying the first prong of the discretionary function test.[99]

2. Conduct Congress Intended to Shield

As to the second prong of the discretionary function test, Congress intended to shield from liability judgments involving considerations of social, economic, or political policy.[100] While the plaintiffs argued that there was no evidence that the USFS ever considered social, economic, or political policies regarding the trees, the court noted that the issue is "whether the acts or omissions that form the basis of the suit are susceptible to a policy-driven analysis, not whether they were the end product of a policy-driven analysis."[101] The court determined that the conduct at issue was the type Congress intended to shield.[102] Because the USFS allowed the public to use its back country airstrips, it acted more like a manager of a wilderness area rather than an operator of a commercial business.[103] Maintenance decisions—which typically involve considerations related to safety, financial, and other feasibility concerns—necessarily affect resource allocation, wilderness considerations, and public safety.[104] In sum, these maintenance decisions are grounded in social, economic, and political policy.[105] The decision whether to open U72 to the public for recreation required social, economic, and policy considerations. The court explained that "[m]aintenance, like cutting trees, concerns economic decisions.[106] Whether to close an airstrip likely concerns safety, social, economic, policy, and feasibility" considerations.[107] The court found that these considerations brought the United States' decision to not cut the trees or close the airstrip within the conduct Congress intended to shield.[108] The court found that the United States satisfied the two-prong test for the exception's applicability.[109] The

98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* (quoting Shansky v. United States, 164 F.3d 688, 692 (1st Cir. 1999)).
102. *Id.*
103. *Id.* (citing Gonzalez v. United States, 851 F.3d 538, 548 (5th Cir. 2017) (involving maintaining bicycle trails for public use)).
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*

Ninth Circuit unanimously held that the district court committed no error in granting the United States' motion on the basis of the discretionary function exception and affirmed.[110]

B. Mutchler v. United States

Mutchler v. United States was a case arising from a fatal airplane crash during flight training, with pilot David Mutchler and flight instructor Robert Redfern onboard.[111] The plaintiffs, Mutchler's widow and children, alleged that the FAA acted negligently regarding the issuance of the flight instructor's medical certificate and renewal of his flight instructor certificate. The court granted the United States' motion to dismiss, holding that it lacked subject matter jurisdiction to consider the plaintiffs' action because the FAA's certification activities were within the scope of the FTCA's discretionary function exception to its waiver of sovereign immunity.

Mutchler owned a Beechcraft Duke aircraft.[112] To maintain his aircraft insurance coverage, Mutchler's insurer required him to complete biennial ground and flight training. Mutchler's insurer approved the use of Access Flight Training Services.[113] In March 2017, Mutchler hired Redfern, who regularly instructed pilots and had worked as an independent contractor for Access Flight from 2011 until his death.[114] On their second day of flight training, Mutchler and Redfern departed Sarasota Airport.[115] The radar data initially "showed a flight track consistent with air work performed during flight training" but following an uncontrolled descent, the Beechcraft impacted terrain and a post-crash fire followed, fatally injuring the pilot and flight instructor.[116]

The certificates at issue, a second-class medical certificate and flight instructor certificate, are regulated by the FAA.[117] The FAA delegated to aviation medical examiners— physicians designated by the Federal Air Surgeon—the role of issuing medical certificates. The plaintiffs conceded that aviation medical examiners are not federal government employees.[118] Redfern's medical examiner issued his second-class medical certificate in October 2014 and it expired more than four months before the crash.[119] Under the controlling version of FAA regulations, "[n]o person may

110. 847 F. App'x at 416. The Ninth Circuit chose not to examine the district court's alternative holding based on the recreational use statute.
111. Mutchler v. United States, 540 F. Supp. 3d 1099 (M.D. Fla. 2021).
112. *Id.* at 1102–03.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*

exercise the privileges of a medical certificate if the medical certificate has expired."[120] However, a flight instructor is not required to possess a medical certificate in all circumstances, such as when he or she is not acting as the pilot in command.[121] Although Redfern did not possess a valid medical certificate at the time of the crash, the plaintiffs argued that a number of his prior existing medical conditions, precluded the medical examiner from issuing Redfern's 2014 certificate in the first place, and required the FAA to reverse the medical examiner's certification.[122]

Also at issue was the FAA's issuance of Redfern's flight instructor certificate.[123] Flight instructor certificates are "issued by the FAA [and] are valid for [twenty-four] months from the month of issuance."[124] Once a pilot has obtained a flight instructor certificate, "there are various ways to renew said certificate."[125] For a number of years an FAA-employed aviation safety inspector renewed Redfern's flight instructor certificate.[126] Redfern's flight instructor certificate was last renewed in November 2015. Although FAA regulations allowed Redfern to be a flight instructor without holding a medical certificate, Plaintiffs argued that the aviation safety inspector negligently renewed Redfern's flight instructor certificate "for years without verifying his eligibility" under the relevant FAA regulations.[127]

1. The United States' Motion to Dismiss, and Motion for Summary Judgment, in the Alternative

The United States argued that the plaintiffs' amended complaint should be dismissed for lack of subject-matter jurisdiction because: (1) the United States cannot be liable for the negligence of either the medical examiner or Redfern because they were not government employees and (2) the United States had not waived sovereign immunity for the plaintiffs' challenge to the FAA's aeromedical and flight instructor certification activities.[128] Alternatively, the United States moved for summary judgment on the basis that the plaintiffs could not prove that the FAA caused the alleged injuries. The court found that the plaintiffs had effectively conceded that the United States cannot be held liable for the actions of either the medical examiner or Redfern because they are not federal employees.[129] As a result, the Court focused on the United States' discretionary function arguments.

120. *Id* at 1103 (citing 14 C.F.R. § 61.2(a)(5) (2009)).
121. *Id*. (citing 14 C.F.R. § 61.23(b)(5) (2013)).
122. *Id.*
123. *Id.*
124. *Id*. (citing 14 C.F.R. § 61.19(d) (2009)).
125. *Id*. (citing 14 C.F.R. § 61.197(a) (2009)).
126. *Id.*
127. *Id.*
128. *Id*. at 1103–04.
129. *Id*. at 1105.

a. *Second Class Medical Certificate*

Because the plaintiffs no longer challenged the medical examiner's conduct, and the FAA has delegated the issuance of medical certificates to aviation medical examiners, the court only needed to determine whether the FAA's role in reviewing or reversing the issuance of medical certificates fell within the discretionary-function exception. The court found that the FAA's role in reviewing or reversing the issuance of medical certificates satisfied the two-prong discretionary-function test.[130]

As to the first prong, the court found that the FAA maintains discretion to review or revoke an aviation medical examiner's issuance of a second-class medical certificate.[131] The plaintiffs did not prove that any regulation required the FAA or its employees to review or revoke any particular medical certificate.[132] Federal regulations delegate the authority of the FAA's administrator "to issue or deny medical certificates . . . to the Federal Air Surgeon."[133] In turn, those functions are delegated to aviation medical examiners.[134] However, the Federal Air Surgeon maintains the authority "to reconsider the action of an aviation medical examiner [that] is delegated to the Federal Air Surgeon.[135] In support of its motion, the United States offered the declaration of Dr. Susan Northrop, the Federal Air Surgeon, who stated: "[t]he FAA can reverse an [aviation medical examiner]'s decision to issue an airman medical certificate within 60 days if a spot-check review or other information reveals an improper issuance. . . . Although reversal is allowed by 14 C.F.R. § 67.407(c), no statute, regulation, agency policy or procedure mandates reversal of an [aviation medical examiner] issued airman medical certificate."[136] Because the regulations allow the FAA to delegate the issuance of medical certificates to medical examiners and do not impose any requirement to review or revoke any such certificate, the court found the decision to be discretionary.[137]

Applying the second prong of the discretionary-function exception test—whether the actions taken "are susceptible to policy analysis"—the court found that they were.[138] The court agreed with the United States' argument that although the FAA sets the standards for aeromedical certification, the chief responsibility for compliance rests with the pilot and medical examiners authorized to issue medical certificates.[139] The policy of

130. *Id.* at 1107–08.
131. *Id.* at 1107.
132. *Id.*
133. *Id.* (citing 14 C.F.R. § 67.407(a)).
134. *Id.* (citing 14 C.F.R. § 67407(b)).
135. *Id.* (citing 14 C.F.R. § 67.407(c)).
136. *Id.*
137. *Id.*
138. *Id.* at 1108.
139. *Id.*

maintaining discretion over the review of aviation medical examiners' issuance of medical certificates allows the FAA to maintain its costs such that it can continue to exist and promote aviation safety.[140]

The court concluded that because the FAA and its employees' decision to review or rescind an aviation medical examiner's issuance of a medical certificate is discretionary and susceptible to policy analysis, the United States had not waived sovereign immunity as to that claim.[141]

b. *Flight Instructor Certificate*

The plaintiffs alleged that the FAA and its employees acted negligently with respect to the renewals, not the issuance, of Redfern's flight instructor certificate. The renewals were issued "on the basis of acquaintance" as permitted by FAA Order 8900.1.[142] The court focused on whether the FAA's function of renewing a flight instructor certificate on the basis of acquaintance fell within the discretionary function exception.[143]

The court found that the first prong of the discretionary function test was met because the renewal an individual's flight instructor certificate on the basis of acquaintance is discretionary. Per the terms of the Order, one of the two ways in which an air safety inspector can renew an individual's flight instructor certificate on the basis of acquaintance is if the inspector "has personal knowledge" of the individual's "capabilities and qualities."[144] The Order does not prescribe a level of personal knowledge necessary to renew a flight instructor certificate on the basis of acquaintance.[145] The court noted that the plaintiffs "have pointed to no rule or regulation setting out such a directive."[146] The plaintiffs' own expert, a former FAA air safety inspector, conceded that the determination of renewing a flight instructor based on personal knowledge is subjective.[147] The court explained that the Order's language regarding the renewal of certificates is permissive.[148] Therefore, the court found that the FAA aviation safety inspectors maintain discretion as to how to renew an individual's flight instructor certificate and to what level of personal knowledge is needed to renew such a certificate on the basis of acquaintance.[149] As to the second prong, the

140. *Id.*
141. *Id.* at 1109.
142. *Id.*
143. *Id.*
144. *Id.* at 1110 (quoting FAA Order 8900.1).
145. *Id.* (citing *Zelaya v. United States*, 781 F.3d 1315, 1329 (11th Cir. 2015) ("In determining whether judgment or choice is present in the particular conduct at issue, the inquiry focuses on 'whether the controlling statute or regulation mandates that a government agent perform his or her function in a specific manner.'" (internal citiations omitted))).
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* at 1111.

court found that the renewal of flight instructor certificates is susceptible to policy analysis.[150] The court explained that the FAA must make policy determinations in allocating its limited resources in advancing its purpose of promoting air safety, and the policy decisions are grounded in public safety.[151] Because both prongs of the discretionary function exception test were met, the court found that the United States had not waived sovereign immunity as to the FAA's renewal of Redfern's flight instructor certificate, and it dismissed the claim for lack of subject-matter jurisdiction.[152]

V. TRENDS IN AVIATION SECURITY RISKS

In addition to recent developments directly in aviation litigation, stakeholders in the aviation industry are looking to parallel and industry-adjacent litigation to forecast what is trending toward the industry. We highlight two categories of these trends: (1) malware-related litigation, and (2) litigation related to Unmanned Aerial Systems.

A. *Malware-Related Litigation*

Malicious software, known as "malware," has long plagued tech-savvy industries. As in the preceding few years, 2021 saw another dramatic increase in malware attacks across industries. This included a "spear-phishing" campaign (an email scam) in May 2021 targeting aerospace and travel organizations with multiple remote access trojans (RATs) designed to deploy malware on the target computer systems.[153] While the aviation industry has largely avoided large-scale public attacks or related litigation, parallel industries have not, and we can learn from their mistakes.

1. Colonial Pipeline Example

As a prime example of the widespread impact of malware on critical infrastructure, hackers targeted the Colonial Pipeline Co., which supplies oil to 14 states and 7 major airports with 100 million gallons of fuel daily.[154]

150. *Id.*

151. *Id.*; *see also* Roundtree v. United States, 40 F.3d 1036, 1039 (9th Cir. 1994) (explaining that "[i]t is difficult to imagine a more policy-driven mission or a more policy-driven set of actions" than the FAA's "issuance and revocation of certificates."); Holbrook v. United States, 749 F. Supp. 2d 446, 454–55 (S.D. W. Va. 2010) ("The FAA inspector's judgment concerning the application of inspection standards based on safety considerations is precisely the type of policy decision the discretionary function exception is designed to protect.").

152. *Id.* at 1112.

153. Sergiu Gatlan, *Microsoft: Threat Actors Target Aviation Orgs with New Malware*, Bleeping Computer (May 12, 2021), https://www.bleepingcomputer.com/news/security/microsoft-threat-actors-target-aviation-orgs-with-new-malware.

154. Collin Eaton & Miguel Bustillo, *Colonial Pipeline Restarts Operations After Cyberattack*, Wall St. J. (May 12, 2021), https://www.wsj.com/articles/colonial-pipeline-restarts-operations-after-cyberattack-11620855846.

On April 29, 2021, hackers remotely accessed Colonial's computer network through a single compromised password on a virtual private network, which lacked a multifactor authentication tool.[155] The hackers deployed a particular type of malware called ransomware. Ransomware encrypts files on a device, rendering unusable those files—and the systems that rely on them; the hackers then demand ransom in exchange for decryption. Once hackers had encrypted significant files within Colonial Pipeline's computer system, they compromised the entire IT system and demanded payment on May 7, 2021.[156]

Because Colonial Pipeline's main computer system was connected to its computer system that controlled the pipeline, the company was concerned that the hackers could access and control fuel operations. Colonial Pipeline preemptively halted fuel operations, causing significant gasoline shortages across the East Coast, and paid the $4.4 million ransom.[157] Meanwhile, the U.S. government, concerned about its critical infrastructure and energy supply for 45% of the East Coast, provided a multi-agency response, led by the Department of Energy and including the Cybersecurity and Infrastructure Security Agency, FBI, and Departments of Transportation, Treasury, and Defense.[158] Colonial's pipeline was down for six days, until it resumed service on May 12,2021.

The fallout did not end there. Because of the shutdown, a gasoline shortage across the east coast caused long lines and higher fuel prices. On May 18, 2021, the plaintiffs filed a putative CAFA class action in the Northern District of Georgia, claiming more than $5,000,000 in damages.[159] The named plaintiff alleged he was injured by purchasing gasoline for a price "higher than it otherwise would have been but for the shutdown of the Colonial Pipeline;" the proposed nationwide class included "[a]ll entities and natural persons who purchased gasoline from May 7, 2021 through present and paid higher prices for gasoline as a result of the defendant's conduct alleged herein."[160]

The plaintiff alleged that the defendants "failed to implement and maintain reasonable security measures, procedures, and practices appropriate to

155. William Turton & Kartikay Mehrotra, *Hackers Breached Colonial Pipeline Using Compromised Password*, Bloomberg (June 4, 2021), https://www.bloomberg.com/news/articles/2021-06-04/hackers-breached-colonial-pipeline-using-compromised-password.

156. *Id.*

157. *Id.*

158. White House Press Release, FACT SHEET: The Biden-Harris Administration Has Launched an All-of-Government Effort to Address Colonial Pipeline Incident (May 11, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/05/11/fact-sheet-the-biden-harris-administration-has-launched-an-all-of-government-effort-to-address-colonial-pipeline-incident.

159. Dickerson v. CDCP Colonial Partners, L.P., Case No. 1:21-cv-02098 (N.D. Ga.), ECF No. 1 (May 18, 2021).

160. *Id.* §§ 10, 47.

the nature and scope of [the defendants' business operations]."[161] Specifically, the plaintiff alleged a breach of the defendants' duty of care, including the following acts and omissions: "(1) failing to adopt, implement, and maintain necessary and adequate security measures in order to protect its systems (and, thus, the pipeline); (2) failing to adequately monitor the security of their networks and systems; (3) failure to ensure that their systems had necessary safeguards to be protected from malicious ransomware; and, perhaps most importantly, (4) failure to ensure that they could maintain their critical fuel transmission operations even in the event of computer system failure."[162] An Amended Complaint subsequently asserted claims for negligence, unjust enrichment, public nuisance, and other statutory violations.[163]

In September 2021, Colonial Pipeline moved to dismiss the complaint, arguing federal preemption and nonjusticiability due to the Federal Energy Regulatory Commission's regulation of domestic pipelines and rates.[164] The parties have since obtained extensions on the subsequent briefing through December 2021.[165]

2. Lessons for the Aviation Industry

Colonial Pipeline is not the only company, big or small, successfully targeted by ransomware. Last year a total of $350 million was paid out for reported ransomware attacks, and the U.S. cyber insurance market responded with a 35% price rise and certain ransomware exclusions and sublimits. The aviation industry is no different. Concerns about aviation-related malware and ransomware stem from the increasing reliance of aircraft and airports on internet-based components, from avionics in e-enabled aircraft to computer-based ATC. The concern extends to company personnel computers, which can be used as a gateway into the larger infrastructure. At bottom, wherever human error might be found, such as unwittingly clicking on an unprotected attachment in an email, an entire system might be susceptible.

B. *Unmanned Aerial Systems Litigation*

The current aviation industry comprises traditional aircraft and emerging technologies, from hobby drones to Vertical Take-Off and Landing ("VTOL") aircraft (together Unmanned Aerial Systems, or "UAS"). Even for traditional aircraft stakeholders, the impact of UAS industry-adjacent litigation provides insights to recent litigation trends.

161. *Id.* § 51.
162. *Id.* § 65.
163. *Id.*, ECF No. 23 (June 7, 2021).
164. *Id.*, ECF No. 44 (Sept. 20, 2021).
165. *Id.*, ECF No. 49 (Sept. 30, 2021).

1. Litigation Categories and Trends

Broadly speaking, prevalent categories of UAS-related litigation include claims related to: (1) insurance, (2) property damage, (3) privacy infringement, and (4) personal injury. But UAS-related cases arise in a myriad of specific contexts, and they often present novel and challenging legal issues. This year's slate of UAS cases put that variety on full display.

In May 2021, the Eleventh Circuit reviewed a plea conviction to a charge for violating U.S.C. § 46306(b)(6) and (c)(2): "knowingly and willfully operat[ing] and attempt[ing] to operate an aircraft eligible for registration" by the FAA, while "knowing that the aircraft was not registered and said operation related to the facilitating of a controlled substance offense," because the defendant used a drone to transport marijuana during a drug sale.[166]

In September 2021, the Court of Appeals of Georgia considered whether a court had the power to order a man to turn over his drones, which he allegedly used to stalk a lawyer outside her residence for months.[167] The court held the trial court lacked authority to order the defendant to forfeit personal property as part of a protective order.

Other cases implicate the use of drones for police, first responders, and military purposes, both domestically and abroad.[168] A Texas appellate court considered unfair competition, trade secrete misappropriation, and the right to free speech surrounding use of drones in roofing insurance.[169] A California federal court ruled on a securities claim in the commercial drone package delivery market.[170]

Drones found their way into the courtroom in race and age discrimination employment claims,[171] patent litigation regarding DJI drones,[172] forensic engineering in a construction dispute,[173] and anything-but-basic fraud claims.[174] Drone footage also provided judges with the ability to look at hard-to-access sites firsthand and assess credibility accordingly.[175]

166. United States v. Brown, 855 F. App'x 659 (Mem.) (11th Cir. 2021).

167. Sullivan v. Kubanyi, 863 S.E.2d 727 (Ga. Ct. App. 2021); *see also* Knickerbocker v. United States, 858 F. App'x 243, 244 (9th Cir. 2021) (illegally flying drones in Death Valley National Park constituted reasonable suspicion for investigative stop).

168. *See, e.g.*, Logan v. Clifford, No. 118CV01179BKSCFH, 2021 WL 4405934, at *11 (N.D.N.Y. Sept. 27, 2021).

169. Panton Inc. v. Bees360, Inc., No. 01-20-00267-CV, 2021 WL 3868773, at *1 (Tex. App. Aug. 31, 2021).

170. Lopez v. Ageagle Aerial Sys., Inc., No. 221CV01810CASEX, 2021 WL 2377343, at *2 (C.D. Cal. June 7, 2021).

171. Maxwell v. Whitley, 553 F. Supp. 3d 927 (D.N.M. 2021).

172. SZ DJI Tech. Co. v. Autel Robotics USA LLC, No. CV 16-706-LPS, 2021 WL 3403930, at *2 (D. Del. Aug. 4, 2021).

173. St. Louis Condo. Ass'n, Inc. v. Rockhill Ins. Co., 5 F.4th 1235, 1239 (11th Cir. 2021).

174. Huy Fong Foods, Inc. v. Underwood Ranches, *LP*, 66 Cal. App. 5th 1112, 1119 (2021).

175. Cutler v. Nanos, 546 F. Supp. 3d 856 (D. Ariz. 2021).

Perhaps most significantly, in April 2021, the D.C. Circuit held that the Federal Advisory Committee Act did not require subgroups of the Drone Advisory Committee, which advises the FAA, to disclose its records.[176]

2. UAS Exposure and Security Concerns

Even where litigation has not been filed, industry stakeholders remain concerned about potential UAS-related litigation exposure. One concern arises from the dramatic increase of drone strikes for private and commercial aircraft in the last few years. In just two years, the United States airspace reported 300 "close encounters" with drones, many due to operator negligence.[177] In 2017 alone, Canadian airspace saw 1,596 drone incidents.[178] That same year, near collisions tripled in the United Kingdom.[179] And the concern expands beyond a single drone encounter to "swarm technology"—i.e., a veritable drone army.

In addition to drone strikes, security advisors warn of drones being vulnerable to hijacking attempts, causing communication interruptions (such as for ATC), and allowing recorded data to be stolen during flight or a cyberattack on the control station.[180] Related concerns involve signal jamming devices interrupting authorized communications.[181]

While case law has only begun to develop in this area, aviation industry participants demonstrate an increasing desire to remain up-to-date on security measures through state-of-the-art technology, a multilayered defense system, and trusted consultants. At bottom, the liability landscape for UAS-related exposure continues to change at a rapid pace and has yet to resolve in cross-jurisdictional, uniform standards.

176. Elec. Priv. Info. Ctr. v. Drone Advisory Comm., 995 F.3d 993, 996 (D.C. Cir. 2021).

177. Brakkton Booker, *New Drone Study Finds 327 'Close Encounters' with Manned Aircraft*, NPR (Dec. 11, 2015), https://www.npr.org/sections/thetwo-way/2015/12/11/459366656/new-drone-study-finds-327-close-encounters-with-manned-aircraft.

178. Christina Caron, *After Drone Hits Plane in Canada, New Fears About Air Safety*, N.Y. Times (Oct. 17, 2017), https://www.nytimes.com/2017/10/17/world/canada/canada-drone-plane.html.

179. *Drone-Airplane Near-Collisions in the U.K. Triple in Two Years*, 911 Security (2022), https://www.911security.com/news/drone-airplane-near-collisions-in-the-u-k-triple-in-two-years.

180. *Insurance Industry Drone Use Is Flying Higher and Farther*, Deloitte (2018), https://www2.deloitte.com/us/en/pages/financial-services/articles/infocus-drone-use-by-insurance-industry-flying-higher-farther.html.

181. Jonathan Rupprecht, 7 *Big Problems with Counter Drone Technology*, Drupprecht Law P.A. (Aug. 13, 2021), https://jrupprechtlaw.com/drone-jammer-gun-defender-legal-problems.