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Minimum equipment list

THE ESSENTIALS OF AN AVIATION PRODUCTS-LIABILITY CASE

Litigating any product-liability case is complex, time consuming, expensive and technical. When an aviation product is at issue, multiply those attributes by at least a factor of two. For those not familiar with the Federal Aviation Regulations or aviation product liability in general, this article will provide a discussion about issues that are common in aviation product-liability cases.

Congress never intended to preempt state products-liability law

"Aviation is unique among transportation industries in its relation to the federal government – it is the only one whose operations are conducted almost wholly within federal jurisdiction, and are subject to little or no regulation by States or local authorities. Thus, the federal government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest." (*Abdullah v. Am. Airlines, Inc.* (3d Cir. 1999) 181 F.3d 363, 368 citing S.Rep. No. 1811, 85th Cong., 2d Sess. 5 (1958).) So why is it that a defendant manufacturer does not get dismissed on a showing that it complied with all federal standards?

The answer, quite simply, is because Congress never intended the product-liability laws of each state to be preempted by federal air regulations or standards. To the contrary, Congress has made it quite clear that federal air regulations are minimum safety standards:

> The original Federal Aviation Act declared that "the Administrator of the Federal Aviation Administration shall promote safe flight of civil aircraft in air commerce by prescribing: minimum standards required in the interest of safety for appliances and for the design, material, construction, quality of work and performance of aircraft, aircraft engines and propellers; and regulations and minimum standards in the interest of safety for inspecting, servicing and

See Akbari, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2020

> overhauling aircraft, aircraft engines, propellers and appliances."

(1958 Federal Aviation Act.) (See *United States v. Varig Airlines* (1984) 467 U.S. 797, 805 ["FAA has promulgated a comprehensive set of regulations delineating the minimum safety standards with which the designers and manufacturers of aircraft must comply."] See also *In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975* (2d Cir. 1980) 635 F.2d 67, 75 ["[T]hese regulations do outline minimum standards of safety."])

Ultimate responsibility for the safety of aviation products lies with the manufacturers, not the FAA. Additionally, Congress enacted in the Federal Aviation Act a saving clause that expressly preserved state causes of action and aviation product-liability laws:

> Nothing . . . in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

(49 U.S.C. App. § 1506.)

The mere presence of a saving clause "assumes that there are some significant number of common-law liability cases to save" and "reflects a congressional determination that occasional non-uniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while simultaneously providing necessary compensation to victims." (*Geier v. American Honda Motor Co.* (2000) 529 U.S. 861, 870.) Where a statute both prescribes "minimum" standards and contains an express savings clause, as does the FAA, the saving clause "preserves those actions that seek to establish greater safety than the minimum safety achieved by federal regulation intended to provide a floor." (*Geier*, 529 U.S. at 870.)

General Aviation Revitalization Act; statute of repose

Aviation product-liability claims do have limitations, however. The General Aviation Revitalization Act of 1994 ("GARA") is a statute of repose that bars claims against manufacturers of general aviation aircraft (transport less than 20 people) if the plane or part in question was 18 or more years old, even if its failure caused the injuries. (*Butler v. Bell Helicopter Textron, Inc.* (2003) 135 Cal.App.4th 1073, 1076). Replacement parts that are less than 18 years old are exempt, and exceptions to GARA apply if:

- the manufacturer withheld or concealed information from the FAA, or misrepresented information, that is directly related to the accident's cause;
- If the accident victim is a passenger on an air ambulance flight, or otherwise in flight, to get medical treatment;
- If an otherwise-exempt aircraft killed or injured someone not aboard the aircraft (e.g., a person on the ground, struck by the aircraft); or
- In suits over a written warranty involving an otherwise-exempt aircraft.

(49 U.S.C.A. § 40101 (1994).)

The purpose of GARA is to:

> Establish a federal statute of repose to protect general aviation manufacturers from long-term liability in those instances where a particular aircraft has been in operation for a considerable number of years. A statute of repose is a legal recognition that, after an extended period of time, a product has demonstrated its safety and quality, and that it is not reasonable to hold a manufacturer legally responsible for an accident or injury occurring after that much time has elapsed.

(2 Aviation Tort and Reg. Law § 20:3: Federal legislation: The General Aviation Revitalization Act.)

Importantly, analysis of GARA's legislative history found that language from a House Report supports the conclusion that Congress did not intend for federal law to preempt state law causes of action. (*Monroe v. Cessna Aircraft Company* (E.D. Tex. 2006) 417 F.Supp.2d 824, 832.) Given the conjunction of all these exceptional considerations, the Committee was willing to take the unusual step to preempting State law in this one *extremely limited instance... "And in cases where the statue of repose has not expired State law will continue to govern fully, unfettered by Federal interference."* (*Ibid.* (Emphasis added.))

Elements of an aviation product-liability case

Under traditional principles of product liability, plaintiffs in aviation-accident cases must show that the product in question was actually defective in design, manufacture or warnings, or that the defendant manufacturer was at fault in some way; that the defendant actually manufactured, sold, or installed the product; and the injury was proximately caused by the defect. (*Pickett v. RTS Helicopter* (5th Cir. 1997) 128 F.3d 925.)

Defect: Design

Aircraft, airframes, and component parts are, by their very nature, intricate. Considerable sophistication, as well as skill, is required for their safe and successful plan and design. A defect in design may result in the whole output being a potential hazard.

A manufacturer is under a *continuing duty* to improve its propeller system as the danger of the occurrence of uncontrolled overspeed and its effects was not hypothetical but was a *generally recognized danger*. (*Noel v. United Aircraft Corp.* (3d Cir. 1964) 342 F.2d 232.)

Defect: Failure to warn

A manufacturer has a duty to warn of dangers which may be unknown to operators but known or reasonably should be known by the manufacturer, and the failure to warn must be the proximate cause of the injury in order to prevail on a failure to warn theory.

Examples

There is no duty to warn of a potential risk which is equally known and appreciated by both the manufacturer and the buyer. (*Perez v. Lockheed Corp.* (5th

See Akbari, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2020

Cir. 1996) 88 F.3d 340 [Manufacturer of air cycle machine held not liable for failing to warn that the air cycle machine could leak oil and cause smoke, as it did while two employees of an aerospace technology company were exposed to smoke and fumes in the cockpit of a company-owned airplane but the employees already had prior knowledge of this condition].)

There is no duty to warn of an obvious danger. (*Argubright v. Beech Aircraft Corp*. (5th Cir. 1989) 868 F.2d 764 [risk that unlocked seat may slip and deprive pilot of control of aircraft was open and obvious].) Moreover, there may be no duty, or a reduced duty, to warn a sophisticated user such as a commercial airline, or an airplane manufacturer. (See *In re Air Crash Disaster*, 86 F.3d 498, 44 Fed. R. Evid. Serv. 1102, 34 Fed. R. Serv. 3d 1067, 1996 FED App. 0157P (6th Cir. 1996). See also *Davis v. Cessna Aircraft Corp.*, 182 Ariz. 26, 893 P.2d 26 (Az. App. 1994).)

While a manufacturer has a duty to warn pilots of load limitations, it has no duty to warn passengers. (*Stevens v. Cessna Aircraft Co.* (1981) 115 Cal.App.3d 431.) Similarly, an aircraft manufacturer has no duty to place warning signs in cabins of the aircraft to warn airline passengers of the risks of deep vein thrombosis (DVT), or steps that could be taken to reduce the risk of DVT, and has no duty to warn airlines that purchased its aircraft about the risk of deep vein thrombosis (DVT). (*In re Deep Vein Thrombosis* (N.D. Cal. 2005) 356 F. Supp. 2d 1055.)

Strict liability in tort for products actions

Generally, a person who suffers injury or damage in using a chattel delivered by the manufacturer or seller in a defective condition may not only sue for breach of express or implied warranty, or sue in negligence, but may also bring an action to enforce strict liability in tort.

Such liability for defective products is "strict" in the sense that it is unnecessary to prove the defendant's negligence and, since the liability is in "tort" the defendant cannot avail itself of the usual contract or warranty defenses which might be available in an action for breach of warranty. (Rest.2d Torts, § 402A.)

However, as in any products-liability case, the plaintiff in an aviation-accident case must establish the defendant's relationship to the product in question, the defective and unreasonably dangerous condition of the product, and the existence of a proximate causal connection between such condition and the plaintiff's injuries or damages. (*Carmical v. Bell Helicopter Textron, Inc., a Subsidiary of Textron, Inc.* (11th Cir. 1997) 117 F.3d 490, 38 Fed. R. Serv. 3d 15, 72 A.L.R.5th 747; *Delacroix v. Doncasters, Inc.* (Mo. Ct. App. E.D. 2013) 407 S.W.3d 13.)

The doctrine of strict liability in tort is available to a plaintiff under the Death on the High Seas Act, and in maritime actions. Courts have also held that the doctrine may be applied to a lessor if he or she is in the business of leasing airplanes, but, courts have held that the doctrine of strict liability does not apply to services rendered by airplane maintenance workers or repairers. (*Hoffman v. Simplot Aviation, Inc.* (1975) 97 Idaho 32, 539 P.2d 584; *Winans v. Rockwell Intern. Corp*. (5th Cir. 1983) 705 F.2d 1449, 13 Fed. R. Evid. Serv. 634.)

Contractual limits – Product liability

Whether or not a manufacturer may effectively limit, by express contractual provision, his or her liability for negligence is determined on a case-by-case basis. (*Comind, Companhia de Seguros v. Sikorsky Aircraft Div. of United Technologies Corp*. (D. Conn. 1987) 116 F.R.D. 397, 5 U.C.C. Rep. Serv. 2d 575.) Waiver provisions that bar strict liability claims are, as a matter of law, not enforceable as they are against California public policy. (*Westlye v. Look Sports, Inc.* (1993) 17 Cal. App.4th 1715, 1743-1747.)

Manufacturers' exculpatory clauses or warranty disclaimers have been enforced in negligence cases. (See *Tokio Marine and Fire Ins. Co., Ltd. v. McDonnell Douglas Corp.* (2d Cir. 1980) 617 F.2d 936, 28 U.C.C. Rep. Serv. 402; *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co*. (9th Cir. 1987) 819 F.2d 1519, 8 Fed. R. Serv. 3d 459; *ERA Helicopters, Inc. v. Bell Helicopter Textron, Inc.* (E.D. La. 1987) 696 F. Supp. 1096.)

Manufacturers' exculpatory clauses or warranty disclaimers have been enforced in strict liability cases. (*Tokio Marine and Fire Ins. Co., Ltd. v. McDonnell Douglas Corp*. (2d Cir. 1980) 617 F.2d 936, 28 U.C.C. Rep. Serv. 402; *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.* (9th Cir. 1987) 819 F.2d 1519, 8 Fed. R. Serv. 3d 459.)

However, it has also been held that there can be no disclaimer of strict products liability. (*Comind, Companhia de Seguros v. Sikorsky Aircraft Div. of United Technologies Corp*. (D. Conn. 1987). 116 F.R.D. 397, 5 U.C.C. Rep. Serv. 2d 575.)

Evidentiary issues

Evidence of defects in other planes of the same type has been admitted to show the negligence of the manufacturer. (*Wanecke v. Northwest Airlines* (N.D. Ohio 1950) 10 F.R.D. 403 (N.D. Ohio 1950); *Plummer v. Glenn L. Martin Co*., 10 F.R.D. 395.)

Evidence of prior accidents is admissible to prove a defective condition, knowledge, or the cause of the accident provided that the circumstances of the other accident are similar and not too remote. (*O'Brien v. Cessna Aircraft Company* (2017) 298 Neb. 109, 903 N.W.2d 432 [In a pilot's products liability action against an aircraft manufacturer, the trial court did not abuse its discretion by excluding evidence of 32 prior accidents involving the aircraft; while the prior accidents involved flying in ice, sleet, or snow, most did not involve evidence that the aircraft operator had activated the deicing boots, as the pilot was alleged to have done, and the prior accidents occurred under entirely different circumstances, including different points of significance during the flights, pilots of different experience levels, different airport geography and topography, and different weather].)

See Akbari, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2020

Comparative fault

Pilot negligence is a defense used to disprove proximate cause and attempt to avoid liability for product defects. (*Rodgers v. Beechcraft Corporation* (N.D. Okla. 2017) 248 F. Supp. 3d 1158.)

Any knowledge on the plaintiff's part of the defect at issue raises a jury question as to his or her comparative negligence. (*Brinkerhoff v. Swearingen Aviation Corp*. (Alaska 1983) 663 P.2d 937.)

Government-contractor defense

Where a government contractor producing a product for the United States government complies with the government's specifications as to the design and manufacture of such product, the contractor cannot be held liable for defects in the design or manufacture of the product.

The doctrine of the "government contractor" defense applies to aviation products, and in aviation products-liability cases, military contractors have a defense to a products- liability action, whether based on strict liability, negligence or breach of warranty, when duties of care imposed by tort law conflict with their duties under a federal contract.

To invoke the government-contractor defense successfully, the contractor must establish three elements:

- that federal government approval of reasonably precise specifications exists;
- that the product conformed to those specifications;
- that the contractor warned the government about dangers in the use of the product which were known to the contractor but not to the government. (*Getz v. Boeing Co*. (9th Cir. 2011) 654 F.3d 852, 80 Fed. R. Serv. 3d 136.)

With respect to the government's approval of reasonably precise specifications, some courts have drawn a distinction between situations in which the government actively reviews and approves specifications, and those in which the government merely gives "rubber stamp" approval of a contractor's proposed design, without substantive review or evaluation. It has been held that in the latter situation, the government-contractor defense is not available, inasmuch as its purpose of protecting the government's ability to exercise discretion would not be served in such a case. (*Tate v. Boeing Helicopters* (6th Cir. 1995) 55 F.3d 1150, 1995 FED App. 0167P [noting that in cases of "rubber-stamp" approval, it is the contractor rather than the government that is exercising discretion].)

The government-contractor defense does not apply to a design or manufacturing defect claim where the government orders, by model number, a quantity of stock ("off the shelf") products that happen to be equipped with a particular feature. (*Determan v. Boeing Company* (D. Haw. 2018) 294 F. Supp. 3d 1005.)

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