



Skywritings

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Leadership Note

From the Chair

By Mike Jones



Our Aviation Law Committee has taken off and is still climbing as we work our way into 2020. Thanks to all of our energetic volunteers, and particularly to the authors for this edition of *Skywritings*, and of course our Publication Chair Stephanie Short and Publication Vice Chair Jeff Clement. In this edition we have timely and relevant input on Big Data, Cost Sharing in GA and a case out of Oklahoma federal court that may prove useful against some of the regular suspects we deal with as experts across the “v.” in aviation litigation. There are plenty more opportunities to write for future editions of *Skywritings* and our annual contributions to *For The Defense*, so if you’d like the opportunity, please contact Stephanie, Jeff, or me.

One our committee’s initiatives this year is to develop and produce a series of podcasts in 2020. We have a subcommittee formed and it is busy identifying topics, subjects to interview and arranging the logistics with DRI staff. Be on the lookout for those starting to roll out in the coming months. The idea is to create a library of free, on-demand, easy-to-absorb, brief discussions with interesting people in the aviation field who can share their insights and experiences, whether legal-related or not. Ideas on topics and speakers from the entire committee membership are welcome, as the point of this is to provide content of interest to all of you.

The 2020 annual meeting is going to be called the **DRI 2020 Summit**, and it will be in Washington DC in October.

Put that on your calendars now, and be aware that this time all of the CLE sessions will be co-presented by three substantive committees. We have been paired with Products and ADR, which should be a good combination. We are working on topics now and look forward to a very interesting presentation. If you are interested in helping with our contribution toward that, please contact our programming chair Matt Berard or his vice chair David Krueger.

I am enjoying my time in the left seat so far and am delighted that we have so many involved and active members. We are one of the smallest DRI substantive committees by numbers, but we all know aviation is a small but tight-knit community, which is how we draw so much of our strength. Thank you all for being a part of our group, and for making our flight possible.

Michael G. Jones is a partner at the law firm of Martin, Pringle, Oliver, Wallace & Bauer, and focuses his practice on aviation law, products liability, and commercial litigation. He represents aviation clients, including Beechcraft Corporation and its predecessors, and now Textron Aviation Inc., in products liability actions and a variety of commercial litigation matters in federal and state courts throughout the United States. In addition to serving as chair of the DRI Aviation Law Committee, Mike is the DRI Product Liability Committee’s Aviation Specialized Litigation Group Chair.

Feature Articles

The “Big Data Duty to Warn”

How Heightened Constructive Knowledge Impacts Potential Tort Liability

By Paul Bowles and Jean Cunningham



The use of Big Data is transforming the aviation industry by providing more efficient, real-time problem solving and prevention. Treasure troves of information

enable companies and industry experts to utilize Big Data Analytics to evaluate trends and anticipate potential short comings of aircraft and their parts. However, Big Data’s expansive intelligence may impose a heightened standard of constructive knowledge giving rise to the duty to warn

where it otherwise did not previously exist. Accordingly, the use of Big Data Analytics may become a double-edged sword: it can increase productivity, efficiency, and preventative measures while exposing companies to new frontiers of liability with respect to monitoring the data. This article explains the potential legal issues that may arise when relying on Big Data Analytics, particularly in terms of a company's duty to warn, and provides general guidance on best practices to implement in view of the limited caselaw directly addressing the topic. Ultimately, companies should work to defend against the possibility that someone who suffers an injury due to a product could gain an advantage in proving that a manufacturer or seller knew, or should have known, of potential dangers in their product because of Big Data.

Understanding Big Data Analytics

Big Data is generally defined as “datasets that are so large, diverse, and/or complex, that conventional technologies cannot adequately capture, store, or analyze them.”¹

Big data can be “divided into four phases: (1) collection; (2) compilation and consolidation; (3) data mining and analytics; and (4) use.”² Within phase three comes the emergence and development of Artificial Intelligence (“AI”) and other programs to capture meaningful trends, information, and action points to further a company's business. Thus presents the concept of Big Data Analytics.

In aviation, Big Data Analytics typically evaluates structured data (which includes equipment year, make and model) and multi-structured data (which includes log entries, sensor data, error messages, engine temperature, and other factors). This data enables companies to identify trends in product use or misuse in order to evaluate ongoing or newfound risks associated with product operation, maintenance and component life. It also produces “increased aircraft availability, faster turnaround times, fewer maintenance delays, and cost savings.”³ As those in the vanguard of the industry are well aware, OEMs, airlines, and component manufacturers have all begun to develop and utilize their own Big Data platforms. The new challenge at the forefront of this technology is understanding its

¹ Lewis Bass & Thomas Parker Redick, Prod. Liab.: Design and Mfg. Defects § 26:2 (2d ed. 2018).

² Fed. Trade Comm'n, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues* (2016), available at <https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf>

³ Lee Ann Shay & Sean Broderick, *If You're Not Using Big Data Results, Are You Behind?*, MRO-NETWORK, (Apr. 4, 2019), <https://www.mro-network.com/print/21613>.

impact on age old legal duties. With comprehensive data about a multitude of aircraft operations, maintenance issues, component wear or failure, and patterns of in-flight use or misuse that might lead to various product risks, these programs and platforms present a robust set of “intelligence” that manufacturers must carefully evaluate in the context of a duty to warn. Access to this information may create a heightened standard of care or duty to mine through data and utilize the available technology in order to mitigate risk and danger. It may also create a stricter ongoing duty to warn end-users of potential issues uncovered by Big Data Analytics after the product's sale.

The “Big Data Duty to Warn” and Heightened Constructive Knowledge

The duty to warn at the time of a product's sale is well settled: a manufacturer must provide comprehensive warnings of any and all risks that may be associated with its product at the time of sale. Foreseeability is central to this duty and relates to dangers that the manufacturer knew or should have known about. The post-sale duty to warn provides an ongoing duty to warn users of the product of any dangers that a manufacturer discovers or should have discovered *after* the sale of the product. In both instances, constructive knowledge, *i.e.*, what the manufacturer should have known, is central to the existence of this duty.

Product liability lawyers should already be intimately familiar with the Restatement (Third) of Torts §10, which states that liability for harm caused by a post-sale failure to warn exists when a “reasonable person in the [manufacturer or seller's] position” would have provided a post-sale warning about the harm caused by the product. The constructive knowledge test is central within the Restatement's four factors governing this post-sale duty to warn standard. For example, it includes asking whether the seller knows or *reasonably should know* that the product poses a substantial risk of harm to persons or property; and asking whether those to whom a warning might be provided can be identified and *may be reasonably assumed to be unaware* of the risk of harm.⁴

With these and other factors in mind, it is not difficult to imagine a situation where Big Data Analytics presents constructive knowledge during the normal course of a company's business. This could, in turn, impose a new duty on companies to mine through the data for new “red flags” that become apparent - whether for personal injury, property damage, or economic loss associated mainte-

⁴ Restatement (Third) of Torts: Product Liability §10 (1998).

nance costs, component failure rates, or readily identifiable misuses by operators.

When considering how the duty to warn is triggered, phase three (data mining and analysis) of Big Data Analytics presents the predominant scenario implicating the duty because it can—and should—increase knowledge. For example, the constructive knowledge test under the American Law of Product Liability 3d Treatise requires considering that the defendant “must be aware of all current information that may be gleaned from research, adverse reaction reports, scientific literature, and other available methods.”⁵

Accordingly, prudence dictates that, for those who use it, Big Data Analytics is an “other available method” that a defendant must consider in triggering its duty to warn. Thereafter, phase four (“use” of the data) would encompass the steps that a manufacturer must take to satisfy their duty.

Cases Considering the “Big Data Duty to Warn”

Slowly but surely, courts outside of the aviation context are considering instances involving a potential Big Data duty to warn. In the multi-district litigation, *In re Fosamax (Alendronate Sodium) Products Liability Litigation*,⁶ Plaintiffs brought suit against the manufacturer of Fosamax, an FDA approved drug for the treatment and prevention of osteoporosis, alleging that Fosamax causes atypical femur fractures (AFFs). Defendant moved to exclude plaintiff’s experts attacking, *inter alia*, whether “the proffered testimony would assist the trier of fact.”⁷ One of the plaintiff’s expert, Dr. Madigan, was asked to identify risks or dangers associated with the defendant’s product through the use of industry standard statistical analysis based on publicly available Big Data. Dr. Madigan examined the FDA’s Adverse Event Reporting System (“AERS”) database for possible associations between Fosamax and data points selected by defendant to evaluate the danger of the product in question. To accomplish this, he utilized two industry standard signal detection algorithms and a Big Data Analytics software.⁸ The use of these Big Data Analytics revealed signals of the alleged danger dating back over a decade.⁹ The court noted that these Big Data Analytics

⁵ Richard E. Keye Am. L. Prod. Liab. § 32:37 (3d Ed. 2019) (August 2019). (emphasis added).

⁶ *In re Fosamax (Alendronate Sodium) Products Liability Litigation*, No. 11-5304, 08-08, 2013 WL 1558690, (S.D.N.Y. Apr. 10, 2013).

⁷ *Id.* at *1.

⁸ *Id.* at *8.

⁹ *Id.*

had become routine among the pharmaceutical industry and regulators, “provid[ing] the primary data for day-to-day safety surveillance by regulators and manufacturers worldwide.”¹⁰ With all this in mind, the court admitted Dr. Madigan’s testimony regarding plaintiff’s failure to warn claim stating that Dr. Madigan’s testimony and availability of the data for over a decade shows that the defendant “knew or should have known” that Fosamax caused certain damages, thus imposing on defendant a duty to warn of those dangers.¹¹ Regarding this constructive knowledge based upon the Big Data, the Defendant argued that “there is no reasonable standard of care that would have required Defendant to conduct data mining.”¹² The court left this question to the jury.¹³

This Fosamax opinion is consistent with the view that Big Data Analytics is an “other available method” that one must utilize in order to satisfy their duty to warn. The court instructed that “the existence of powerful data mining tools capable of uncovering an early signal of a possible harm associated with the defendant’s product created a duty to use such a tool.”¹⁴ Such duty is “a duty to mine not only your data but any data that may shed light on your product,” and thereafter, warn about it.¹⁵ This duty to mine Big Data therefore, impacts the constructive knowledge, *i.e.*, the “should know,” element of the duty to warn. As a result, constructive knowledge is perhaps no longer what is “reasonabl[y] known by humans . . . it’s what [is] knowable given a duty to use ‘powerful data mining and signal detection capabilities.’”¹⁶

Godwin v. Facebook, Inc. saw similar arguments under different circumstances, attempting to take this view of constructive knowledge and the duty to warn a step further with respect to real-time Big Data Analytics.¹⁷ Plaintiffs brought suit on behalf of a decedent who was shot and killed by a man who, moments before, had posted on Facebook that he planned to kill someone. Plaintiffs alleged that Facebook failed to warn of the assailant’s propensity for violence and such duty existed by virtue of Facebooks

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* While the Fosamax case ultimately made its way to the United States Supreme Court on the question of preemption concerning FDA control over the substance of a pharmaceutical warning, that issue is unrelated to the constructive knowledge proposition posited by the lower Court in the cited opinion.

¹⁴ David Oliver, *Digging Into the Duty to Mine Big Data*, Law360, (May 21, 2013, 12:06 p.m. Est) available at Law360.com

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ No. CV 18 891841, 2018 WL 488217 (Ohio Com. Pl.)

special relationship with the assailant which arose out of Facebook's real-time ability to cull, mine, analyze, and synthesize information collected from the assailant due to its Big Data Analytics. However, while recognizing that common law is "ever evolving" and must keep up with technological advancements, the court did not extend a "Big Data Duty to Warn" under these unique circumstances and granted Facebook's motion to dismiss.¹⁸

Conclusions and General Guidance Related to the "Big Data Duty to Warn"

Although the issue remains to be addressed specifically within the aviation context, *Fosamax* and *Facebook* illustrate why companies should expect plaintiffs who suffer aviation product liability harm to assert a "Big Data Duty to Warn" arising out of the newfound constructive knowledge presented by Big Data Analytics.

At its core, Big Data is business intelligence. Manufacturers and sellers must use this intelligence wisely in order to understand when the duty to warn will arise, and to effectively satisfy that duty once triggered. Given the complicated nature of Big Data Analytics and the nascent legal treatment on the topic, an overarching piece of advice to aviation companies is to establish a defined process around Big Data Analytics. Establishing a defined process helps to create predictability and measurability, which in turn helps to defend the key elements of the duty to warn: constructive knowledge and reasonableness in satisfying the duty.

Lawyers who find themselves entrenched in using predictive coding and other data-mining technologies during e-discovery will surely understand the necessity of scientific process to demonstrate the key metrics of scope, accuracy, and relevance to defend that technology's use in litigation. Similarly, manufacturers should establish scientific processes around their Big Data Analytics to

underpin the defensibility of their actions in satisfying the duty to warn.

General examples of best practices to establish a process around Big Data Analytics may include, for example: (1) identifying key company stakeholders and participants involved in the Big Data Analytics process, and task them with individual responsibilities and defined roles; (2) establishing a set of constants and variables to be used for your overarching process during the application of Big Data Analytics; (3) identifying key company objectives and goals relating to your Big Data Analytics, and thinking critically about how those relate to constructive knowledge about product risks; (4) understanding your company's Big Data framework and infrastructure; and (5) implementing a system and framework to issue warnings or otherwise communicate with users before the need to do so arises. Having readily identified and primed communication channels is critical to timely and effective warnings about newly identified product risks. Ultimately, establishing a structured process and action plan will assist companies in staying ahead of the inevitable attempt of others to impose a broadened "Big Data Duty to Warn."

Paul Bowles is a partner of Fitzpatrick & Hunt, Pagano, Aubert, LLP in New York City, where he focuses his primary practice on complex product liability and commercial litigation, chiefly in the aviation and transportation industries. He represents Fortune 100 and middle-market companies in a wide variety of matters in his home jurisdictions of New York and New Jersey and across the United States. Paul's work covers the spectrum of representing manufacturers of traditional products to those involved in artificial intelligence, UAV technologies, and other sophisticated modern aviation products.

Jean Cunningham is an associate in Fitzpatrick & Hunt's midtown Manhattan office. Her practice focuses on the defense of product liability and other commercial litigation matters.

¹⁸ *Godwin v. Facebook, Inc. et. al*, No. CV-18-891841 (opinion and order).

The Current Status of Expense Sharing in General Aviation

By Carmen Weite



In 2018, Congress passed, and President Trump signed into law, the FAA Reauthorization Act of 2018. Among other things, the Act addresses the ongoing issue of permissible types of flight-sharing in general aviation. Specifically, Section 515 requires the Federal Aviation Administration (“FAA”) to issue clear guidance describing how a pilot may share flight expenses with passengers and provide examples of flights for which pilots and passengers may or may not share expenses and the methods of communication that pilots and passengers may or may not use to arrange flights for which expenses are shared.¹⁹

Section 515 was driven, at least in part, by the FAA’s regulatory guidance regarding two online general aviation flight-sharing platforms which allowed private pilots to offer available space on flights that they were intending to take, AirPooler and Flytenow.²⁰ The FAA concluded that pilots participating in online flight-sharing platforms were acting as common carriers without proper certification. In doing so, the FAA disregarded its prior regulatory analysis (under which expense sharing platforms such as AirPooler and Flytenow are arguably legal) and created confusion with regard to general aviation flight-sharing in the digital age.

Pertinent FAA Regulations

Section 61.113 of the Federal Aviation Regulations (14 C.F.R. §61.113) sets forth the privileges and limitations of a private pilot certificate. This section explains that a person who holds a private pilot certificate may not act as pilot in command of an aircraft that is carrying passengers or property for compensation or hire. Historically, the FAA has defined compensation in very broad terms. For example, if conditioned upon the pilot operating the aircraft, any reimbursement of expenses (fuel, oil, transportation, lodging, meals, etc.) would constitute compensation. In addition,

¹⁹ FAA Reauthorization Act of 2018, Pub. L. No. 115–254, tit. V, § 515, 132 Stat. 3186, 3358 (Oct. 5, 2018) (codified as 49 U.S.C. § 40101 (2018)), available at <https://www.congress.gov/115/plaws/publ254/PLAW-115publ254.pdf>.

²⁰ For a detailed discussion of the FAA’s legal interpretations to AirPooler and Flytenow and the subsequent appeal to the United States Court of Appeals, see *Does Expense-Sharing Among Private Pilots Constitute “Compensation” Under Section 61.113 of The Federal Aviation Act of 1958?*, 48 CUMB. L. REV. 321 (2017–2018).

building up flight time may be considered compensation if the pilot does not have to pay the costs of operating the aircraft.²¹

Section 61.113(c) states: “A private pilot may not pay less than the pro rata share of the operating expenses of a flight with passengers, provided the expenses involve only fuel, oil, airport expenditures, or rental fees.” The FAA, in the preamble to the final rule, reasoned that a private pilot may not pay less than the pro rata share of operating expenses for the flight because “if pilots pay less, they would not just be sharing expenses but would actually be flying for compensation or hire.”²²

For decades, private pilots have relied on Section 61.113(c) to share flight expenses with their passengers. Under this section, a private pilot and his or her passengers may share expenses incident to the flight, provided that the pilot pays at least his or her pro rata share of the expenses.²³ The FAA consistently interprets Section 61.113(c) as requiring the pilot and passengers to share a bona fide common purpose for conducting the flight, reasoning that

²¹ FAA Legal Interpretation to John W. Harrington, (Oct. 23, 1997), available at [https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/regulations/interpretations/Data/interps/1997/Harrington%20-%20\(1997\)%20Legal%20Interpretation.pdf](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/regulations/interpretations/Data/interps/1997/Harrington%20-%20(1997)%20Legal%20Interpretation.pdf).

²² 62 Fed. Reg. 16220, 16263, 16266 (Apr. 4, 1997), available at <https://www.govinfo.gov/content/pkg/FR-1997-04-04/pdf/FR-1997-04-04.pdf>; see also FAA Legal Interpretation to Guy Mangiamele (Mar. 4, 2009), available at [https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/regulations/interpretations/Data/interps/2009/Mangiamele%20-%20\(2009\)%20Legal%20Interpretation.pdf](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/regulations/interpretations/Data/interps/2009/Mangiamele%20-%20(2009)%20Legal%20Interpretation.pdf) (“As noted in the preamble of the final rule, the FAA determined that a private pilot may not pay less than the pro rata share of operating expenses for the flight because ‘if pilots pay less, they would not just be sharing expenses but would actually be flying for compensation or hire.’”).

²³ See e.g., FAA Legal Interpretation to Paul Meyerhoff (June 30, 1993), available at [https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/regulations/interpretations/Data/interps/1993/Meyerhoff%20-%20\(1993\)%20Legal%20Interpretation.pdf](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/regulations/interpretations/Data/interps/1993/Meyerhoff%20-%20(1993)%20Legal%20Interpretation.pdf) (“The costs which may be shared includes only those expenses that would not have been incurred if the flight did not take place; for example, fuel and oil consumed on the flight and ramp or tie-down fees at the destination airport. These expenses would exclude such items as insurance, maintenance, or other capital costs. To be in full compliance with the regulation, the costs must be shared equally between the private pilot and his or her passengers.”).

“[a]bsent a bona fide common purpose, reimbursement for the pro rata share of operating expenses constitutes compensation for the flights.”²⁴ The FAA will conclude that no common purpose exists if the passenger dictated the destination and the pilot’s only purpose was to provide transportation to the passenger or if the pilot flies passengers to a destination where he or she has no particular business to conduct.²⁵

Based on the above FAA regulations and regulatory guidance, expense sharing is not considered compensation if: (1) the only expenses shared are expenses that would not have been incurred if the flight did not take place; (2) the pilot pays at least his or her pro rata share of the expenses; and (3) the pilot and passengers share a bona fide common purpose for conducting the flight.

Expense Sharing and the Internet

Two companies, AirPooler and Flytenow, recently attempted to expand the traditional concept of expense sharing to the Internet by creating online flight-sharing platforms which allowed private pilots to offer available space on flights that they were intending to take. These companies structured their operations to comply with Section 61.113(c) by only allowing pilots to receive a pro-rated share of flight expenses from each passenger. To confirm compliance with FAA regulations, both companies requested letters of interpretation from the FAA’s Office of Chief Counsel. In response, the FAA first reasoned that sharing flight expenses is a form of compensation that falls within “an exception to the general prohibition against private pilots acting as pilot in command for compensation or hire.”²⁶

Although commercial pilots and airline transport pilots may act as pilot in command of an aircraft carrying passengers for compensation or hire, they cannot conduct

²⁴ FAA Legal Interpretation to Mark Haberkorn (Oct. 3, 2011), available at [https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/regulations/interpretations/Data/interps/2011/Haberkorn%20-%20\(2011\)%20Legal%20Interpretation.pdf](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/regulations/interpretations/Data/interps/2011/Haberkorn%20-%20(2011)%20Legal%20Interpretation.pdf).

²⁵ FAA Legal Interpretation to Don Bobertz (May 18, 2009), available at [https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/regulations/interpretations/data/interps/2009/bobertz%20-%20\(2009\)%20legal%20interpretation.pdf](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/regulations/interpretations/data/interps/2009/bobertz%20-%20(2009)%20legal%20interpretation.pdf).

²⁶ FAA Legal Interpretation to Rebecca Macpherson (Aug. 13, 2014), available at [https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/regulations/interpretations/data/interps/2014/macpherson-jonesday%20-%20\(2014\)%20legal%20interpretation.pdf](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/regulations/interpretations/data/interps/2014/macpherson-jonesday%20-%20(2014)%20legal%20interpretation.pdf).

a commercial operation involving common carriage without obtaining a part 119 certificate. In general, the holder of a part 119 certificate is required to comply with more stringent operating rules than those applicable to private, commercial, and airline transport pilots.²⁷ Thus, after concluding that pilots using AirPooler and Flytenow were receiving compensation, the FAA next addressed the elements of a common carrier: “(1) a holding out of a willingness to (2) transport persons or property (3) from place to place (4) for compensation or hire.”²⁸ Ultimately, the FAA concluded that pilots using AirPooler and Flytenow were “holding out to transport persons or property from place to place for compensation or hire” and, therefore, were acting as common carriers without proper certification.

The FAA’s European counterpart—the European Aviation Safety Agency (“EASA”)—has a virtually identical rule regarding a private pilot’s ability to share flight expenses with passengers.²⁹ However, in contrast to the FAA’s response to AirPooler and Flytenow, the EASA confirmed that Wingly, a similar online flight-sharing platform, was legal under existing cost-sharing regulations.³⁰

Conclusion

Previously, the “holding out” concept had no application in the analysis of expense sharing under Section 61.113(c) because, so long as the pilot paid at least his or her pro rata share of the expenses, the FAA did not consider expense sharing to be compensation. As a result of the present inconsistency among FAA regulations and regulatory guidance, it is unclear if pro rata expense sharing is a form of compensation for which Section 61.113(c) provides an exception or, is not considered compensation so long as there is a bona fide common purpose for the flight.

Based on the FAA’s recent legal interpretations, it appears that the general aviation expense sharing analysis will turn on whether the method of communication used by pilots and passengers to arrange expense-sharing flights constitutes “holding out.” In the past, the FAA allowed private pilots to post their travel plans on community bulletin boards for the purpose of finding passengers will-

²⁷ *Id.* at 2–3.

²⁸ FAA Advisory Circular No. 120-12A (“Private Carriage Versus Common Carriage of Persons or Property”), available at https://www.faa.gov/documentLibrary/media/Advisory_Circular/AC%20120-12A.pdf.

²⁹ See Commission Regulation (EU) No. 965/2012 art. 6, para. 4(a) (Oct. 5, 2012), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02012R0965-20170322>.

³⁰ EASA Letter to Emeric Waziers (March 14, 2016), available at <https://www.wingly.io/docs/easa.pdf>.

ing to share flight expenses. More recently, private pilots have been permitted to post information about potential shared-expense flights on their Facebook pages, but the FAA nonetheless cautioned that this type of advertising may be construed as holding out depending on how large the audience is.³¹ Currently, the methods of electronic communication that pilots and passengers may use to arrange flights for which expenses will be shared are not clear.

Section 515 of the FAA Reauthorization Act is an attempt to resolve the present uncertainty. New insight and guidance from the FAA should clarify which types of expense sharing flights and methods of communication

³¹ FAA Legal Interpretation to Mark Haberkorn, note 6 *supra*, at 2.

are permitted in general aviation. However, until the FAA issues the mandated guidance and examples, the current regulatory uncertainty will persist.

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Tenth Circuit Affirms Summary Judgment in Premier 390 Accident Litigation After Plaintiffs' Expert Testimony Excluded

By Denny Shupe



In a lengthy and well-reasoned unpublished opinion, the Tenth Circuit Court of Appeals recently affirmed a grant of summary judgment to the defendants in litigation arising from a Beechcraft Premier 390 accident on March 17, 2013.³² Both of the aircraft's engines inadvertently were shut down in flight; the pilot then was unable to restart the engines or lower the landing gear.

This federal court action was brought in the Northern District of Oklahoma by the two surviving passengers of the planned flight from Tulsa, OK to South Bend, IN and their spouses. The pilot and a third passenger were killed in the crash. Plaintiffs/Appellants sued Beechcraft Corporation ("Beech"), the manufacturer of the aircraft, and Hawker Beechcraft Global Customer Support ("Hawker"), which provided maintenance services for the accident aircraft. The plaintiffs alleged negligence claims against Beech and Hawker, and products liability claims against Beech.

Specifically, the plaintiffs alleged that: (1) the pilot was unable to restart the engines because the aircraft's electrical distribution bus was defective; (2) the aircraft's alternate landing gear system (needed because the engines were not restarted) was defectively designed and failed to

³² *Rodgers v. Beechcraft Corp.*, No. 17-5045, 759 Fed. Appx. 646 (10th Cir. Dec. 14, 2018).

deploy; and (3) the aircraft's flight manual contained faulty instructions for restarting the electrical generator after a dual engine shutdown, and certain "repair kit" instructions for the electrical system also allegedly were defective.

In support of their claims, plaintiffs offered the testimony of four expert witnesses: John Bloomfield, Donald Sommer, Frank Graham and Michael Haider. Beech and Hawker moved to exclude the opinions of Bloomfield, Sommer and Graham on the grounds that they were not qualified to render, or alternatively did not have an adequate basis for, most of their opinions. They moved to exclude the opinions of Haider on the grounds that he did not sufficiently prepare his expert report. They also moved the court to strike supplemental affidavits offered by the witnesses after the filing of Daubert motions by the defendants on the grounds that the affidavits' content was improper and constituted untimely supplementation.

The trial court agreed with Beech and Hawker, and excluded most of the opinions of all four experts. The Tenth Circuit found that the trial court had not abused its discretion in excluding these opinions. The trial and appellate court analysis is too detailed to address in full here. However, the following reasoning highlights are notable as you consider ways in practice to attack the opinions of opposing experts under the federal court *Daubert* analysis and the Federal Rules of Civil Procedure.

Among other reasons for excluding portions or all of the four experts' opinions, the Court noted that: (1) parties have a continuing obligation to supplement expert reports in a timely manner if the parties later learn the information initially provided is incomplete or incorrect; (2) supplementation normally must occur by the time a party's pretrial disclosures under Federal Rule 26(a)(3) are due; (3) if any expert's disclosure is "intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C)," that disclosure is due within 30 days of the other party's disclosure; (4) supplemental affidavits submitted in response to Daubert challenges that restate prior opinions, are not based on newly learned evidence, are based on testing or work done that could have been done in connection with the original expert report issuance or deposition testimony, or that supplement those opinions beyond the 30 day requirement, properly are rejected; (5) testing is not always required to support expert opinions, but an expert still must show under Federal Rule 702 that his opinions are based on sufficient facts or data and on reliable principles and methods; (6) Bloomfield was not qualified to render opinions about a design defect in the alternate landing gear because he had never designed a landing gear, and was not qualified to render aircraft flight manual opinions given that he had never drafted an aircraft instruction manual; (7) Sommer was not qualified to render alternate landing gear design opinions because he had no aircraft design experience, and while he did pull force testing for the alternate landing gear that was found to be admissible, he did not do any analysis to identify a specific design defect; (8) Sommer's experience as a "consumer" of the Beechcraft aircraft does not make him a design defect expert; and (9) Haider's report was properly excluded where his report was written by plaintiffs' counsel (and not sufficiently prepared by him), where he did not do independent research, where he offered design opinions outside his expertise, where he did not offer opinions based on the facts of this case, and where his billing records showed insufficient time was spent to analyze the information upon which he offered opinions.

After the exclusion of this expert testimony, the trial court found that there was no genuine issue of material fact that would allow a reasonable jury to find in favor of the plaintiffs on any of their theories of negligence or products liability. As a result, the trial court granted summary judgment to Beech and Hawker, and the Tenth Circuit affirmed the grant of summary judgment on appeal.

Finally, even though this is an unpublished opinion and therefore is not binding precedent (except under the doctrines of law of the case, *res judicata*, and collateral estoppel), it is very well reasoned and still can be cited as persuasive authority, consistent with federal and local rules.

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