Air & Transportation Law Reporter

International Air & Transportation Safety Bar Association

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President's Message

by
Marc Warren

INSIDE THIS ISSUE

Happy New Year! I hope that everyone had a wonderful Holiday Season and came back to work with a renewed commitment to the goals and growth of our Association. To that end, I ask that you read the article by Mike Pangia published in this edition of the newsletter. Mike writes about the history, purpose, and aspirations of the IATSBA (and its predecessor, the NTSB Bar Association).

We all get busy and can forget that IATSBA is near unique among voluntary bar associations. It advocates for professionalism and collegiality, not positions, and benefits the aviation and transportation safety bar as a whole, not one group or side of the bar. If you think as I do that IATSBA is special, share that sense with others – recruit a new member. As I've written before, if everyone recruited just one new member, we would double in size.

As the year ended, Jeffrey Small resigned from the Board and Vince Lesch was elected to fill Jeffrey's unexpired term as Eastern Region Vice President. Jeffrey has been a stalwart and key member of the Board, and he will be missed. I join many others in thanking him for his years of dedicated service. Vince is a worthy successor to Jeffrey and will do a great job as a regional vice president and Board member.

I am excited that our regional activities continue, with an event planned for New Orleans in the spring. Additionally, on April 4, IATSBA will host FAA Federal Air Surgeon Dr. Mike Berry at a luncheon at the Army and Navy Club on Farragut Square in Washington. Seating is limited, so sign up on the IATSBA web-site to reserve a seat.

Thanks for your dedication to aviation and transportation safety, and for your commitment to IATSBA.

MARC WARREN is a partner and co-chair of the Aviation and Aerospace practice group at Jenner & Block, LLP. Prior to joining Jenner & Block, Marc chaired the Aviation practice group at Crowell & Moring, LLP. He served as acting chief counsel, deputy chief counsel, and deputy chief counsel for operations of the Federal Aviation Administration (FAA). Before joining the FAA, he retired after 26 years of service in U.S. Army Judge Advocate General's Corps.

Editor's Column

by
Greg Reigel

GREG REIGEL is a partner with the law firm of Shackelford, Bowen, McKinley and Norton, LLP in Dallas, Texas. He has more than two decades of experience working with airlines, charter companies, fixed base operators, airports, repair stations, pilots, mechanics, and other aviation businesses in aircraft purchase and sale transactions, regulatory compliance including hazmat and drug and alcohol testing, contract negotiation, airport grant assurances, airport leasing, aircraft related agreements, wet leasing, dry leasing, FAA certificate and civil penalty actions and general aviation and business law matters. Greg also has extensive experience teaching the next generation of aviation and legal professionals including in such courses as aviation law, aviation transactions, aviation security, business law and trial advocacy. Greg holds a commercial pilot certificate (single-engine land, single-sea and multi-engine land) with an instrument rating.

The year 2018 ended on a busy (actually a crazy) note. Whether for tax or other reasons, this last year end we had aircraft transactions closing at a frenetic pace. Fortunately for my clients buying and selling aircraft, the government shut-down did not impact the FAA Registry, which remained open for the recording of transaction documents right up until 3:30pm CST on December 31. However, for all of my fellow IATSBA members who are government employees, my thoughts are with you in wishing that this unprecedented shut-down will be over by the time you read this.

In the meantime, as we begin another year, we are also presented with an opportunity to not only reflect on 2018, but also to prioritize, plan and prepare for 2019. I encourage you to make the time to consider your core values and whether they are reflected in your current practice. If they are not, make a plan for how you want to get to where you want to be. Make this a process through which you can grow, both personally and professionally. Use this time to refresh, renew and recharge for 2019.

And to help you in that process, we give you this latest issue of the International Air & Transportation Safety Bar Association's Reporter. In this issue, Marc Warren, our current president, continues his focus on the history and benefits of our association as a platform for increasing our membership. Mike Pangia, one of our past-presidents, provides us with an explanation of how IATSBA came to be and his thoughts on the organization's current focus and direction.

Members Denny Shupe and Brittany Wakim analyze a recent 3rd Circuit case in which the court confirmed the ability of a defendant who has not yet been served to remove a case from state to federal court. Drs. Marty Ferrero and Joseph Tordella provide us with an overview of the HIMS (Human Intervention Motivational Study) program and Caron Treatment Centers' work in treating pilots with drug and alcohol addictions and helping them get back into the cockpit. Finally, I have included an article discussing a recent case highlighting the impact and importance of "as-is" language in aircraft purchase agreements.

I want to thank our contributors, both present and past, who provide our members with interesting and informative articles. Please keep the articles coming! If you are working on a case with an interesting or novel legal issue, perhaps you could use your research to write an article on that topic. Or if you recently filed a motion involving a legal issue that would be of interest or help to our members, maybe you could convert your supporting or opposition memorandum into an article?

Editor's Column

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If you would like to submit an article but you have questions regarding topic, availability etc., please feel free to contact me. I will be happy to answer questions and help you through the process. Also, if you are aware of an upcoming event that may be of interest to our members, please send me the details so we can include the information in the newsletter.

With your contributions, the IATSBA Reporter will continue to be a valued and respected aviation law and aviation safety publication.

As always, I hope you enjoy this edition of the Reporter.

A History of IATSBA

compiled by
Mike Pangia

A HISTORY OF THE INTERNATIONAL AIR AND SAFETY BAR ASSOCIATION

This article is to express my view that IATSBA should remain a collegial association, the purpose of which is to foster better communication among the FAA, NTSB and the attorneys who defend airmen and aviation entities in enforcement and regulatory matters. The goal should be, and I believe is currently, to foster a system of fairness and effectiveness, and importantly, one that promotes aviation safely through education and respect for the system.

As a matter of background, after leaving the Justice Department and the position of head of the aviation trial unit, I served as the head of the litigation division of the FAA. I was called upon to handle many enforcement matters, particularly on appeals, and I routinely consulted with the enforcement division on many safety matters. Shortly after leaving the government, Mark McDermott called me to express his idea for a bar association of attorneys who handle enforcement cases. We called the late chief NTSB law judge William Fowler to a luncheon meeting where we presented Mark's idea. Judge Fowler not only was receptive, but also proactive in the formation of IATSBA's predecessor, the NTSB Bar Association. Mark was its first president. I was the editor of its periodic newsletter, and I was elected the second president for a period of two years during which the organization grew rapidly to just short of three hundred members.

FAA attorneys were invited and encouraged by Judge Fowler to join and add their expertise for the promotion of a better and more effective system. Unfortunately, the invitation was looked upon with reticence, and even what I perceived distrust, among the FAA attorneys in an enforcement system that was seemed fraught with a high degree of emotion, distrust and an unprofessionalism. That was actually on both sides.

Because of the poor acceptance by the FAA, we thought that a purely defense bar was the only viable alternative if the association was to have some value to its members. Then came the frontal assault. In a lead article in Flying Magazine, then the largest world-wide aviation publication, the FAA's enforcement system, with the input of the association, suffered a heavy attack that drew the prompt attention of the Administrator. Fortunately, a few people in the FAA realized that the image and effectiveness of the enforcement system needed to be changed. But, with government, changes are slow, which in all I believe is probably salutary in the long run. A government that is able to do good things fast and efficiently has the ability to do bad things fast and efficiently as well.

MICHAEL PANGIA leads the Pangia Law Group's aviation practice from the firm's Washington, DC office. Mike is a licensed commercial pilot and has a long experience with air crash disasters. Mike is a nationally recognized expert in aviation law and safety and has represented victims and their families in air crash trials nationwide for many years. When not practicing law, Mike is flying his planes, tinkering with his antique cars, and skiing.

A History of IATSBA

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The association followed up with the proposal of a system that would encourage compliance through education and remediation such as most, if not all, states have with the enforcement of driving laws. Our association, with the support of the former FAA Administrator, the late Admiral Donald Engen, submitted a proposal to the FAA. For want of a more fitting title, the proposal was entitled the Airmen's Clinic. With the exception of deliberate infractions, the proposal called for a system of identifying safety problems with the objective of education and remediation, rather than fear and the often the dubious outcome of some suspensions. The FAA's acceptance was sluggish at first, but the seed of the idea was planted through many meetings with the FAA. It has at long last evolved into the Remedial Program officially incorporated into the more effective enforcement system we have today. While I have witnessed some laxity with regard to some aviation entities, I believe that a more efficient, effective and respected safety system is an overall result.

I have noted over the years that we have gained a lot of knowledge through the collegiality that has evolved in IATSBA which elicits the respect, acceptance and valuable participation by the FAA and NTSB. While we are adversaries in the cases, we all have common goals of maintaining and continuing to have a fair, effective and most of all a respected system that is so essential in promoting safety and the continued development of aviation in this country. Differences of opinions can be expressed in other forms, and these differences can and should be promoted and discussed openly. A collegial association allows for that, and as we may be learning, division in our society does not. I strongly support the direction that IATSBA has been developing under some of the very positive leadership we have had over the years.

Snap Removal

by
J. Denny Shupe and
Brittany C. Wakim

LESS SNAP BACK AFTER A QUICK SNAP REMOVAL:THIRD CIRCUIT APPROVES SNAP REMOVALS BEFORE FORUM DEFENDANT

I. Introduction

The Third Circuit Court of Appeals, a federal court with appellate jurisdiction over the district courts of Delaware, New Jersey, Pennsylvania, and the Virgin Islands, recently held that the Forum Defendant Rule does not bar defendants from removing cases to federal court before the forum defendant is formally served.

In what appears to be the first ever appellate court ruling on the issue, the court in *Encompass Ins. Co. v. Stone Mansions Restaurant, Inc.,* No.: 17-1479, 2018 WL 3999885 (3d Cir. Aug. 22, 2018) has adopted a plain-meaning approach to the "properly joined and served" provision of the removal statute by holding that the Forum Defendant Rule does not prohibit a defendant from removing a case to federal court on the basis of diversity jurisdiction before the plaintiff formally serves the forum state defendant.

This decision gives a potentially valuable but time-limited option to defendants to prevail on removing a case from state court to federal court on the basis of diversity jurisdiction. This article addresses removal and diversity jurisdiction, varying approaches to statutory construction of the removal statute, and this recent decision by the Third Circuit that allows a defendant to "snap remove" a case to federal court where there is a forum defendant present that has been joined but not yet formally served.

II. Removal Rules

In a civil case in the United States, a defendant has the right to remove certain lawsuits from state court to federal court. This ability to remove is an exception to the general rule that a plaintiff has the right to litigate in a forum of its choosing. In order to preserve this right, a defendant only can remove in certain circumstances, mainly where a federal court would have had jurisdiction to hear the lawsuit if the plaintiff had chosen to file in federal court.

Removal is governed by Title 28 of the United States Code, Section 1441, et. seq. A defendant only can remove a suit where a federal court has an independent ground to exercise subject matter jurisdiction, such as federal question jurisdiction or diversity jurisdiction. A federal court has diversity jurisdiction over cases where the plaintiff is a citizen of a different state than the defendant(s) and the amount in controversy exceeds $75,000. As a general rule, if a plaintiff files a lawsuit in state court over which a federal court could exercise diversity jurisdiction, the

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Snap Removal

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removal statute permits a defendant to transfer the case to federal court.

However, the removal statute prohibits a defendant from transferring a case where it or any other defendant that the plaintiff has "properly joined and served" is a citizen of the state where plaintiff filed the lawsuit. This protection for the plaintiff, which Congress enacted in 1948, is codified in Section 1441(b)(2) and is commonly referred to as the "Forum Defendant Rule." We begin the analysis with examination of the originally articulated reasons for this Forum Defendant Rule.

When they were debating the Constitution, the Founding Fathers created the concept of diversity jurisdiction as a way to protect non-forum defendants from "hometown bias" – this is, the potential that a jury in the plaintiff's hometown would be more inclined to side with a neighbor rather than faithfully applying the law. Indeed, Alexander Hamilton, as Publius, wrote of this fear in Federalist No. 80 where he discussed the powers and limitations of the judicial branch. However, where a plaintiff sues a defendant in the defendant's hometown, this potential risk that a jury will be biased in favor of the plaintiff theoretically no longer exists. Hence, the Forum Defendant Rule is consistent with the hometown bias concern of the Founding Fathers.

While this forum defendant limitation on the ability to remove, as contemplated by the Founding Fathers and Federalist No. 80 and enacted by Congress in the 1940s, on its terms appears cut and dry, application of the Forum Defendant Rule has not been as straightforward in practice.

In their attempts to faithfully apply this rule, trial courts typically have asked three questions: What does "properly joined and served" mean? What happens when a forum defendant is properly "joined" but not yet "served"? And, does the Forum Defendant Rule bar removal if the forum defendant has not yet been served?

District courts across all of the federal circuits have issued conflicting opinions about whether a defendant may remove a diversity action to federal court before the plaintiff has formally served the forum defendant. While a definitive answer to this question could come with clarification from Congress, absent Congressional action, appellate courts have provided little to no guidance on this issue until the recent Third Circuit decision.

In what appears to be the first ever appellate court ruling on the issue, the court in *Encompass Ins. Co. v. Stone Mansions Restaurant, Inc.*, agreed with those trial courts that have adopted a plain-meaning approach to the "properly joined and served" provision of the statute. The Third Circuit held that the Forum Defendant Rule does not prohibit a defendant from quickly removing a case to federal court on the basis of diversity

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jurisdiction before the plaintiff formally serves the forum state defendant. This is referred to as "snap removal". The Third Circuit's approach, as discussed more fully below, will benefit defendants who remove state court actions to federal court before service on the forum defendant, as it will make it more likely that the action will remain in federal court after removal.

III. Conflicting District Court Approaches to Snap Removal

For many years district courts have reached conflicting conclusions as to whether snap removals are proper, depending on whether the court adopted a policy based approach or an approach that is governed by the plain language of the statute. *See, e.g., Cheung v. Bristol-Myers Squibb Co.*, 282 F. Supp. 3d 638 (S.D.N.Y. Oct. 12, 2017) (following a plain language approach); *Rizzi v. 178 Lowell St. Operating Street Operating Co., LLC*, 180 F. Supp. 3d 66 (D. Mass. Jan. 8, 2016) (following a policy based approach); *Torchlight Loan Servs., LLC v. Column Fin., Inc.*, 2013 U.S. Dist. LEXIS 104366 (S.D.N.Y. July 23, 2013) (following a policy based approach); *DTND Sierra Invs., LLC v. Bank of N.Y. Mellon Trust Co., N.A.*, 2013 U.S. Dist. LEXIS 14345 (W.D. Tex. Feb. 4, 2013) (following a plain language approach); *Hutchins v. Bayer Corp.*, 2009 U.S. Dist. LEXIS 4719 (D. Del. Jan. 23 2009) (following a plain language approach); *Vivas v. Boeing Co.*, 486 F.Supp. 2d 726 (N.D. Ill. March 12, 2007) (following a policy based approach).

There can be no debate that the Founding Fathers did not contemplate the existence of the internet back in the 1780s while debating and drafting the Constitution. Similarly, Congress did not contemplate the internet, the rise of the digital age, or electronic docket monitoring in 1948 when it enacted the Forum Defendant Rule. The ability to do snap removals is largely a product of the internet era and the rise of the use of electronic dockets. Before the advent of electronic dockets, a defendant often would not learn that it had been sued until the plaintiff served it with the complaint.

With the advent of widespread use of electronic dockets, however, defendants began to learn that a plaintiff had filed a lawsuit against it within hours or even minutes of the filing, before the plaintiff had the opportunity to serve the complaint. Defendants who learned through electronic dockets or otherwise that a plaintiff had sued them in a case where they or another defendant were a citizen of the forum state, and where plaintiff had yet to serve the forum defendant, could quickly file a snap removal.

As these snap removals occurred, district courts developed two different approaches for responding to them: (1) the policy based approach, which rejected snap removals, and (2) the plain language approach, which permitted snap removals.

IV. The Policy Based Approach

When a non-forum plaintiff sues a defendant in the defendant's home state, there is little risk that the jury will be biased in favor of the plaintiff solely because of the defendant's home in the forum. In this scenario, some courts believe that it is important, as a matter of policy, to protect the plaintiff's right to litigate in its chosen forum. *See, e.g., Hurley v. Motor Coach Indus., Inc.,* 222 F.3d 377, 380 (7th Cir. 2000). This policy based approach seeks to avoid gamesmanship and races to the court house by prohibiting a defendant from removing a case before formal service.

According to courts that follow this approach, permitting this gamesmanship and rewarding the pro-active defendant who races to remove a case before formal service would be at odds with the congressional intent behind Section 1441(b)(2) – to allow a plaintiff to litigate in its chosen forum without risk that the chosen forum will give the plaintiff an unfair hometown advantage – and would produce absurd results. For instance, these courts say it makes little sense that a forum defendant who removes a case the day before the plaintiff serves the complaint can defeat the plaintiff's choice of forum, while a forum defendant who removes the day after the plaintiff serves the complaint cannot. Additionally, some states require plaintiffs to meet certain additional requirements before they may serve their complaints, which can take additional days to complete. *See, e.g., In re Testosterone Replacement Therapy Prods. Liab. Litig*., 67 F. Supp. 3d 952, 957 (N.D. Ill. September 15, 2014). Courts that follow this policy based approach prohibit defendants from capitalizing on pre-service requirements over which plaintiffs have no control.

V. The Plain Language Approach

Other courts (including now, the Third Circuit) have followed the plain language approach. Those courts look no further than the statutory language – "properly joined and served" – as the basis to hold that the Forum Defendant Rule does not prohibit removal until the plaintiff has properly joined **and served** the forum defendant. According to courts that follow this plain language approach, an unserved defendant can be ignored for the purposes of diversity removal. *See, e.g., Rios v. Cooper Tire & Rubber Co*., 2013 U.S. Dist. LEXIS 196667 (E.D. Tex. Nov. 13, 2013). Furthermore, while it has been argued that allowing for removal prior to service of a forum defendant could allow for forum manipulation, courts following this approach have held that this concern does not override the plain language of the statute which states that the forum defendant has to be properly "joined and served". *See, e.g., Reynolds v. Pers. Representative of the Estate of Johnson*, 139 F. Supp. 3d 838 (W.D. Tex. Oct. 7, 2015).

VI. Third Circuit Adopts the Plain Language Approach in Encompass

While the Sixth Circuit arguably endorsed the plain language approach in a footnote in *McCall v. Scott*, 239 F.3d 808, 813 n.2 (6th Cir. 2001), the Third Circuit Court recently issued

the first ever federal appellate court ruling directly addressing the propriety of snap removal. The Third Circuit, adopting the plain language approach, held that the Forum Defendant Rule does not prohibit a defendant from snap removing a case to federal court on the basis of diversity before the plaintiff serves the forum defendant.

In *Encompass*, the plaintiff, an insurance company, filed an action in Pennsylvania state court for contribution under the Pennsylvania Dram Shop Law. The parties were diverse; the plaintiff was a citizen of Illinois and the defendant was a forum defendant (citizen of Pennsylvania). After the plaintiff filed the action, the attorney for the defendant agreed to accept service. Before actually accepting service, however, the defendant removed the case to federal court on the basis of diversity jurisdiction.

The plaintiff then filed a motion to remand, arguing in federal court that because the defendant was a forum defendant, it was barred from removing the case under Section 1441(b)(2). The federal district court adopted the plain language approach and denied the motion to remand to state court. The district court held that because the forum defendant removed the action before it was served, Section 1441(b)(2) did not bar the defendant from removing the case based on diversity jurisdiction. In other words, the district court held that the Forum Defendant Rule did not apply.

The plaintiff appealed. While an order denying a motion to remand is not a final order and normally would not be subject to immediate appeal, the district court at the same time also ruled against the plaintiff on the merits of the case. In ruling against plaintiff on the merits, the court issued a final order from which plaintiff could appeal all orders in the case, including the order denying the motion to remand.

In a precedential opinion on appeal, the Third Circuit adopted the plain language approach and affirmed the district court's decision. The Third Circuit held that the Forum Defendant rule **only** blocks a forum defendant from removal **after the forum defendant has been "properly joined and served."** According to the Court, the language of the statute is "unambiguous" as to this issue. The Third Circuit acknowledged criticism that following the plain language approach could result in nonsensical results. However, the Third Circuit reasoned that, because its ruling was limited to the situation where a defendant receives notice of an action before the plaintiff serves the forum defendant, its narrow holding did not "defy rationality or render the statute nonsensical or superfluous."

VII. How Does Encompass Affect Litigants Going Forward?

While the decision in *Encompass* is binding only on district courts in the Third Circuit, it is a persuasive endorsement of the plain language approach that likely will not be disturbed or resolved by

the United States Supreme Court in the near future. The Supreme Court normally grants certiorari in statutory-interpretation cases when there are conflicts between circuits at the appellate level.

Although Congress included the "joined and served" language in the removal statute seventy years ago, the Third Circuit's *Encompass* opinion in 2018 was the first appellate opinion to directly address the meaning of the language. If history is any guide, it is unlikely that another circuit court will create a conflict any time soon by both hearing a case involving the Forum Defendant Rule, and by disagreeing with the Third Circuit.

Indeed, review by a circuit court on this issue is rare for at least two reasons. First, Section 1441(d) of the removal statute prohibits appellate review when a federal district court grants a plaintiff's motion to remand back to state court. Therefore, when a district court remands a case to state court, the defendant that removed the case normally has no recourse. Second, while a plaintiff can challenge a district court's denial of its motion to remand, the plaintiff only can do so after the district court enters a final judgment.

As a practical matter, many cases resolve before final judgment. And for those cases that make it to a final judgment, the plaintiff would have to have been so aggrieved by the court's final judgment that it is willing to start its case over from scratch in state court if, on appeal, it prevails on its argument that the Forum Defendant Rule barred the defendant from removing the case in the first place.

For all of these reasons, it could be many years before another appellate court reviews this issue, and possibly even longer before an inter-circuit conflict arises, if one ever does, that would warrant review by the United States Supreme Court.

VIII. Benefits of Litigating in Federal Court

Why does this decision matter? What are the potential benefits of litigating in federal court as opposed to state court? Depending on the jurisdiction, litigating in federal court can be beneficial for a number of reasons.

For example, federal juries, because of the geographic range of federal district courts as compared to state courts, can include jurors from more economically and politically diverse areas, which could be beneficial if a defendant is sued in a traditionally plaintiff-friendly jurisdiction. Cases in federal court are subject to the Federal Rules of Civil Procedure, which have a number of favorable procedural provisions, including express limitations on the amount of discovery that the parties can conduct. Also, whether a case proceeds in state or federal court may affect whether the *Frye* approach or the *Daubert* approach to expert witness testimony admission will apply, which in some circumstances can be case determinative. *See, e.g., DeLisle*

v Crane Co., et al., No. SC16-2182, 2018 WL 5075302 (Fla. Oct. 15, 2018). Moreover, whether a case proceeds in state or federal court may affect expert witness disclosures and whether an expert can be deposed. Statistically speaking, federal courts are considered more likely to grant motions to dismiss and motions for summary judgment than are state courts. And finally, some federal courts are not as fast-moving as the state courts in their jurisdiction because federal district courts need to prioritize criminal trials over civil trials.

For all of these reasons and more, federal court may be a more favorable option for a defendant, and as a result of the Third Circuit's decision in Encompass, it may be more accessible.

IX. Conclusions

A defendant in the Third Circuit may remove a case to federal court on the basis of diversity jurisdiction even if the plaintiff has named a forum defendant, so long as the defendant removes the case before the plaintiff **formally serves** the forum defendant.

It remains to be seen whether district courts around the country that previously rejected the plain language approach to snap removals now will be persuaded to follow this approach, based on this Third Circuit decision.

In order to take advantage of this potentially valuable but time-sensitive snap removal option, potential defendants should actively monitor electronic state court dockets, and quickly file notices of removal in cases where the presence of a forum defendant could bar removal after the plaintiff serves the forum defendant.

Indeed, where litigation is anticipated, it may be beneficial to have removal papers (or at least advanced shells) prepared for anticipated jurisdictions and ready to be filed, should a suit be brought in a forum against a forum defendant. This will avoid the delay in preparing removal papers from scratch—where even a few hours could make the difference in whether a snap removal will be timely and effective.

The HIMS Program

by
Marty Ferrero and
Joseph Tordella

BEGINNINGS, TODAY AND THE CARON CULTURE

Between 1990 and 2003, over 30,000 positive tests for drugs or alcohol were reported under the FAA's Drug Abatement Program. These point to a critical need in aviation: To ensure that substance use disorder is caught and treated before it becomes a deadly disaster.

As aviation attorneys, you understand the ramifications that any kind of aviation disaster has on the whole industry. When addiction is involved, the consequences extends to the individual's career, personal life, and family. For more than 40 years, the industry has sought to deal with addiction in ways that not only make aviation safer for everyone but also provide treatment for those with a substance use problem.

Beginning with HIMS

Back in the 1970s, the Airline Pilots Association started HIMS, which stands for Human Intervention Motivational Study, funded by the National Institute for Alcohol Abuse and Alcoholism, a federal agency. Through HIMS, pilots who had an alcohol or drug abuse problem had a resource for treatment and a path back to their careers under FAA Special Issuance Regulations (14 CFR 67.401). Prior to 1974, the FAA suspended or revoked a pilot's medical certification, usually permanently.

At that time, Caron Treatment Centers, then known as Chit Chat Farms, was one of HIMS's half dozen preferred treatment facilities. Having started in 1957, Caron has a well-established reputation for its approach to treatment. As we were writing this article, Dr. Tordella noted that he referred pilots to treatment at Caron as far back as 1978.

Since HIMS started, approximately 6,000 pilots have been successfully rehabilitated and have returned to their careers. Almost 90 percent of pilots in the HIMS program are successful in their sobriety. The program is designed to save both lives and careers, while not decreasing flight safety. Dr. Tordella and Caron have treated hundreds of HIMS pilots over a forty year period.

HIMS Today

The FAA insures the medical fitness of almost 400,000 pilots, a colossal undertaking. It prescribes and enforces medical standards ensuring safety to the flying public. Company representatives, peer pilots, healthcare professionals, and the FAA work together cooperatively through HIMS to provide a path to confidential treatment and adherence to safety-sensitive airline transportation system requirements. The individualized care may include monthly interviews and chemical testing for a period that is determined for each pilot. A

MARTY FERRERO, MA, CCS, LADC, ICCADC, CMAT, HIMS, is a senior clinical director at Caron Treatment Centers. He oversees the aviation professionals program, in addition to several other treatment programs. He has been in the field of addiction treatment since 1996. His clinical experience and treatment expertise includes working with pilots, healthcare professionals, and executives. He worked directly with dozens of pilots and healthcare professionals for 12 years while at Hazelden in Minnesota and Oregon.

The HIMS Program

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specially trained FAA aviation medical examiner (AME) coordinates the FAA recertification process in their role as an independent medical sponsor (IMS).

HIMS offers a cost-effective means of treating addiction that also ensures pilots can be treated and safely returned to the cockpit with no need to hide a deteriorating performance that could jeopardize the lives of their crews and passengers.

A New Partnership

There is a need to ensure that all aviation employees, from pilots and flight attendants to air traffic controllers and mechanics, have the same assurance of access to quality confidential treatment. Caron's Airline & Aviation Professionals Program incorporates the need that airline and aviation companies have to maintain safety by ensuring the trustworthiness of pilots, airline controllers, flight attendants, and others.

Under our leadership and backed by a clinical team that is HIMS trained, the program offers both comprehensive evidence-based treatment as well as the capability to meet all aviation-specific requirements and regulations, such as reporting protocols, obtaining HIPAA-compliant releases in order to adhere to The Privacy Rule, and using company checklists.

Like HIMS, Caron Treatment Centers approaches addiction from a medical/disease model and uses a clinical, multidisciplinary approach. As noted earlier, Caron has been treating addiction and related disorders since 1957. Over those years, our highly credentialed and experienced addiction specialists, medical professionals, and therapists have treated more than 75,000 patients.

Caron is at the forefront of evidence-based, specialized programs for those with substance use and abuse issues. Our treatment programs offer patients privacy, safety, and a stigma-free environment in which to take on the work of recovering from a substance use disorder.

Caron's expert medical and clinical staff has extensive experience in developing specialty programs to treat professionals from a wide range of industries including attorneys and other legal professionals, business and corporate executives, healthcare professionals, and once again airline and aviation professionals.

About the Airline & Aviation Professionals Program

The goal of the program is to provide the most effective, proven, holistic substance use/abuse treatment to aviation professionals as well as support for their continued sobriety after they leave treatment. Caron offers these services in ways that ensure efficiency and cost effectiveness for employers.

The heart of the program is its intensive inpatient, residential treatment. Each airline professional

JOSEPH R. TORDELLA, D.O., a senior aviation medical examiner, HIMS, oversees Caron's Airline & Aviation Professionals Program. With more than 40 years of medical certification experience in all areas of transportation, he has successfully treated hundreds of pilots. In addition to his medical expertise, he has extensive experience in the aviation industry. He served as a pilot in the Air Force for several years, worked for TWA as a pilot and flight engineer for 16 years, and for the Federal Air Marshal Service for two years.

The HIMS Program

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is assessed and evaluated. Based on the results, the clinical team develops proven addiction treatment plans tailored to the individual's specific diagnosis and needs. Caron's medical and addiction specialists rely on evidence-based treatment methods that include addiction counseling, 12-Step integration, chronic pain management if needed, cognitive behavioral therapy (CBT), dialectical behavioral therapy (DBT), and a positive peer culture.

An innovative phase system provides a clinically driven, variable length of stay (beyond the 28 day minimum recommended by the FAA), which includes detox if needed. The program also includes spirituality; health, fitness, and nutrition; and a didactic and biblio-therapeutic approach regarding substance use and abuse specific to the patient's history.

When a patient is ready to return to their lives, they return with a continuing care plan developed by their treatment team. These continuing care plans conform to HIMS treatment protocols and include AA/NA/Birds of a Feather meetings, group counseling, substance use testing, and psychiatric/psychological evaluations. Referrals for HIMS-trained psychologists and psychiatrists as well as HIMS aviation medical examiners are also included. The plan provides a 12-Step contact in the patient's home area prior to discharge and offers suggestions to aid the patient in finding a sponsor.

The plan also includes information on how to connect with Caron alumni support groups and networks, fellowship groups, and alumni activities. In addition, Caron offers deeper levels of support through specialized programs like our Extended Care Program, My First Year of Recovery, Breakthrough, and Recovery for Life services.

Caron provides support and guidance to patients for a full year after discharge. Patients and families will have the opportunity to stay connected through a combination of support and technology. Caron's Recovery Care Support hotline provides a dedicated and private means for patients and their families to get answers to questions, referrals, support, and guidance whenever they need it.

"As-Is" Disclaimers

by
Greg Reigel

DOES THE AS-IS LANGUAGE IN AN AIRCRAFT PURCHASE AGREEMENT MAKE A DIFFERENCE?

It isn't uncommon in aircraft purchase agreements to see language stating the parties are agreeing that the aircraft is being purchased "as-is" or "as-is, where-is." Oftentimes the agreement will go on to also say that the seller is not making, nor is the buyer relying upon, any representations or warranties regarding the condition of the aircraft. And it may also specifically state that the buyer is only relying upon its own investigation and evaluation of the aircraft. But what does this really mean?

Well, from the seller's perspective, the seller wants to sell the aircraft without having to worry that the buyer will claim at a later time that the aircraft has a problem for which the seller is responsible. So, the seller does not want to represent that the aircraft is in any particular condition (e.g. airworthy). When the deal closes, the aircraft is sold to the seller in its existing condition without any promises by the seller about that condition.

Here is an example of how this works: If the first annual inspection of the aircraft after the sale reveals that the aircraft is not in compliance with an airworthiness directive ("AD") that was applicable to the aircraft at the time of the sale, the buyer could claim that the aircraft was not airworthy at the time of the sale and demand that the seller pay the cost of complying with the AD. But if the purchase agreement contains "as is" language, then the chances of the buyer being able to actually force the seller to pay are low.

Not only does this "as-is" language protect the seller, but it also protects other parties involved in the sale transaction such as seller's aircraft broker. A recent case provides a nice explanation of the legal basis for this result.

Redi River Aircraft Leasing, LLC v. Jetbrokers, Inc. involved the sale of a Socata TBM 700 where the aircraft owner/seller was represented by an aircraft broker. The buyer and seller entered into an aircraft purchase agreement that included not only "as-is, where-is" language, but it also provided that the buyer was accepting the aircraft solely based upon buyer's own investigation of the aircraft.

During the buyer's pre-purchase inspection of the aircraft, the buyer discovered certain damage to the aircraft. However, the buyer accepted delivery of the aircraft in spite of the damage based upon alleged representations by the broker that the damage was repairable. After closing the buyer learned that certain parts were not repairable. Rather than sue the aircraft seller, presumably because the buyer recognized the legal impact of the "as-is" language in the purchase agreement with the seller, the buyer

"As-Is" Disclaimers

...continued

instead sued the aircraft broker alleging that the broker negligently misrepresented the aircraft.

In order to succeed on a claim of negligent misrepresentation under Texas law (the law applicable to the transaction), the buyer was required to show (1) a representation made by the broker; (2) the representation conveyed false information to buyer; (3) the broker did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the buyer suffers pecuniary loss by justifiably relying on the representation.

In response to the buyer's claim, the broker argued that the "as-is" language in the purchase agreement waived the buyer's right to be able to prove that it justifiably relied upon any alleged representations by the broker. The buyer primarily argued that the purchase agreement language did not apply because the broker was not a party to the agreement. But the Court disagreed with the buyer.

> The Court found that:
> the purchase agreement contains clear language evincing Red River's intent to be bound by a pledge to rely solely on its own investigation. And, because it appears that the parties transacted at arm's length and were of relatively equal bargaining power and sophistication, the court concludes that the language in the purchase agreement conclusively negates the reliance element of Red River's negligent misrepresentation claim.

So, even though the broker was not a party to the purchase agreement, the Court still held that the buyer was bound by the statements/obligations to which buyer agreed in the purchase agreement, even with respect to third-parties. As a result, the Court granted the broker's summary judgment motion and dismissed the buyer's claims against it.

Conclusion

"As-is" language will continue to be common in aircraft purchase agreements. Aircraft sellers and those working with them will certainly want to include and enjoy the benefit from this language. Conversely, aircraft buyers need to be aware of the scope and impact of "as-is" disclaimer language in an aircraft purchase agreement. If a buyer is unhappy with the condition of the purchased aircraft, the presence of this language in the purchase agreement will significantly limit the buyer's remedies and recourse.

Regional Meetings

SOUTHERN REGION MEETING

AT NATIONAL WWII MUSEUM, NEW ORLEANS

APRIL 23, 2019

IATSBA ROUNDTABLE ON FAA'S NEW AEROMEDICAL INITIATIVES

- A DISCUSSION WITH
FEDERAL AIR SURGEON, DR. MIKE BERRY
- LUNCHEON MEETING AT
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APRIL 4, 2019

PLEASE GO TO THE IATSBA WEBSITE FOR MORE DETAILS AND TO REGISTER

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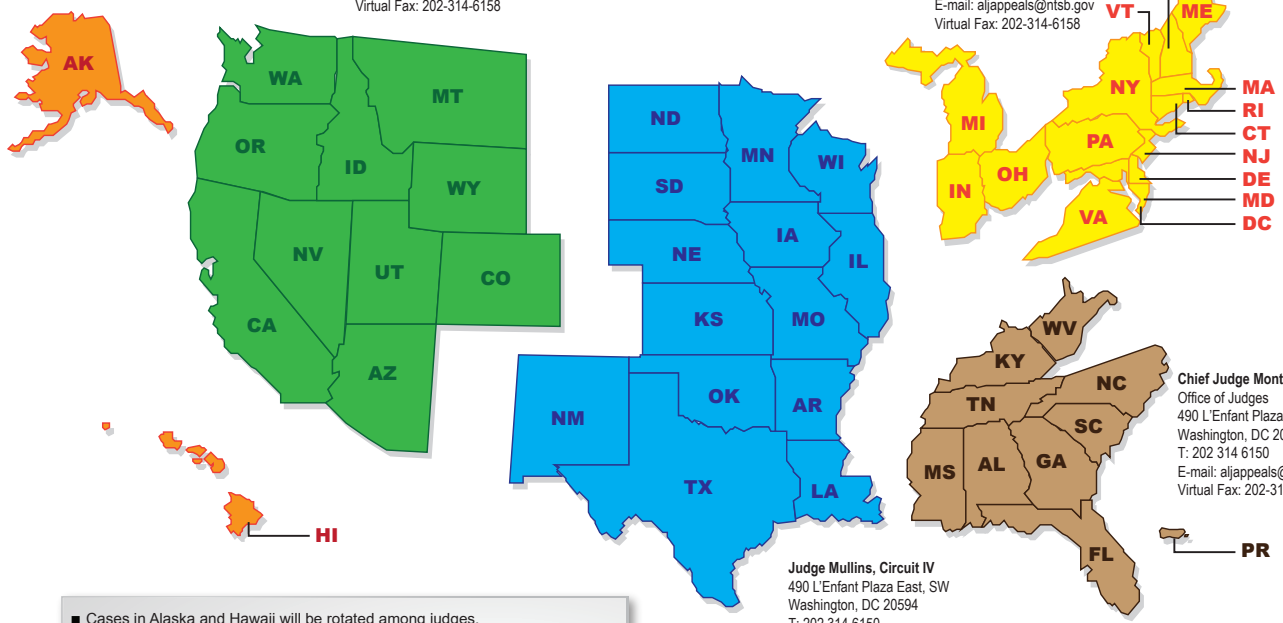

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