



Editor's Column

This issue of *The Air & Space Lawyer* arrives as we gather in Chicago for the Forum on Air & Space Law's Annual Conference. Chicago, of course, is a city that enjoys special significance in the history of our industry as the place where civil aviation's foundational international treaty, the Chicago Convention, was established. This year, however, we are recognizing a milestone regarding another key legal instrument: the fortieth anniversary of enactment of the Airline Deregulation Act (ADA). The ADA is more than just another piece of legislation: it was intended to fundamentally change the balance between government regulation and market forces for the U.S. airline industry. Over the past four decades, the industry has undergone huge changes: once-great airlines such as TWA and Pan Am have disappeared, while others have reorganized under bankruptcy protection. All five of the largest U.S. passenger airlines as currently constituted are the product of mergers. Today, technology drives not just airline operations, but also marketing and sales, as never before. In legal and policy circles, a fascinating debate continues as to whether the government is honoring the ADA's intent and striking the correct regulatory balance, with some (particularly airline lawyers) arguing that the DOT's economic regulation is overreaching and not producing optimal results for consumers, while others (including some consumer advocates) argue that consumers' interests require more extensive and aggressive regulation.

Our first cover article is by an author who is one of the leading proponents of the first view. Bob Kneisley, Associate General Counsel of Southwest Airlines, argues that the DOT has overreached in its economic regulation of the airline industry, stretching its post-deregulation statutory mandate beyond its intended limits. Bob contends that excessively formalistic DOT micro-regulation has actually harmed consumers, depriving them of the benefit of innovative airline products and offers that do not comport with the DOT's regulatory compliance requirements.

This issue also includes a second article on a topic relating to the ADA. Alex Simpson and Claire McKenna of the DOT focus on the ADA's preemption provision. They examine Congress's 1994 recodification of the ADA, which, although not intended to effect any material change, substantively amended the Act's preemption and definitions provisions. This has created a continuing dilemma for litigants and courts in interpreting the

crucial question of the scope of ADA preemption.

Our next article strikes a note of caution for aircraft lenders and lessors: be careful to expressly limit the scope of representations or advice you provide your clients. The authors, Edward Gross and Erich Dylus of Vedder Price, focus on a recent case in which an aircraft purchased in the United States and registered with the FAA was seized by the Brazilian government for failure to pay import taxes. Thereafter, the owner/borrower stopped making payments on the loan, which led to litigation over the outstanding amount. During the litigation, the borrower alleged negligent misrepresentation by the lender bank: that the bank had impliedly advised the borrower that registering the aircraft with the FAA would avoid the need to pay Brazilian import taxes even though the aircraft was hangared and operating in Brazil. Although the court sided with the lender on the negligent misrepresentation issue, the authors caution lenders and lessors to strictly limit their representations, particularly when dealing with businesses and high net worth customers.

For our final article, we venture into space to examine the legal framework (or lack thereof) governing on-orbit satellite servicing activities. Authors Danielle Miller and Elsbeth Magilton cast a spotlight on a rapidly developing trend in the satellite industry: to repair and upgrade satellites while remaining operational in space rather than incurring the far greater costs and inconvenience of replacing them. On-orbit satellite servicing is an expensive and risky commercial proposition, but the authors argue that the government is increasing those risks and thereby undermining these activities by its failure to establish a coherent and well-organized regulatory scheme. They describe the regulatory status quo as a patchwork of overlapping regulatory mandates involving multiple government agencies. They argue that Congress needs to legislate to address the problem with input from expert stakeholders.

As always, please contact me with comments on *The Air & Space Lawyer* and article suggestions at dheffernan@cozen.com.

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