UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE SEPTEMBER 11 LITIGATION	:	Civil Action No. 21 MC 9 (AKH)

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF THE AVIATION DEFENDANTS TO DISMISS GROUND DAMAGE CLAIMS

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as long as it is ***consistent with***" federal law. *Id.* (emphasis added). *See also United States Dep't of Health and Human Services v. Federal Labor Relations Authority*, 858 F.2d 1278, 1283 (7th Cir. 1988) (under the Civil Service Reform Act of 1978, state law is "inconsistent [ ] with federal law" if "it expand[s] the remedies available"). Certainly the same result would apply under the strikingly similar statutory language found in the Stabilization Act.

Under the plain language of the Stabilization Act, as well as the case law interpreting the very similar language used in the Price-Anderson Act Amendments, there is no question but that federal law standards, rather than any inconsistent state law rules, govern the Ground Damage Plaintiffs' causes of action in these lawsuits.

B. Under the Federal Regulatory Scheme, the Duty of Air Carriers in the Circumstances of September 11 Extended Only to the Protection of Passengers and Crew.

The language of the Federal Aviation Act and the regulations promulgated thereunder make clear that the express purpose of the federal aviation security program before September 11 was to protect passengers and crew, rather than potential ground targets. For instance, the Federal Aviation Act mandates the promulgation of "regulations *to protect passengers and property on an aircraft* operating in air transportation or intrastate air transportation against an act of criminal violence or aircraft piracy." 49 U.S.C. § 44903(b) (emphasis added). In addition, the F.A.A. regulations setting forth the requirements for air carrier security programs specifically require that each such program "shall" "[p]rovide for the safety of *persons and property traveling in*

air transportation and intrastate air transportation against acts of criminal violence and air piracy". 14 C.F.R. § 108.7(a)(1) (emphasis added). Similarly, the regulations mandating that airport operators adopt security programs specify that the program provide "for the safety of persons and property traveling in air transportation." 14 C.F.R. § 107.3(a)(1). *See also* 14 C.F.R. § 191.7 (2001) (defining information constituting "Sensitive Security Information" except "as necessary in the interest of safety of persons traveling in air transportation").

The wording of both the statute and the applicable regulations demonstrates that the purpose of federal requirements dealing with the threat of terrorist attacks on aircraft before September 11 was to protect passengers traveling in air transportation. Nothing in the text of these provisions suggests a duty of care running to potential ground victims. Moreover, if one looks to the substantive standard of care imposed by the federal government on air carriers before September 11 – the F.A.A. "common strategy" for dealing with such attacks in progress – it is quite clear that the objective was to protect passengers and crew, not persons on the ground. As the Court is aware, certain aspects of the federal security regime in place as of September 11, 2001 may not be disclosed because they contain Sensitive Security Information ("S.S.I."). Nonetheless, it is a matter of public record, reported in the press and discussed by public officials at Congressional hearings, that the F.A.A. "common strategy" before September 11 called for cooperation with the terrorists and not, for instance, defense of the cockpit at all costs or protection of potential targets of the terrorists on the ground. The purpose of the strategy, as discussed

publicly by government officials, was to protect passengers and crew in imminent danger as a result of attacks on aircraft by persuading or tricking the terrorists to land at a convenient airport.[33]

Indeed, this week the F.A.A. publicly confirmed the essence of the "common strategy" approach for handling terrorist incidents in progress in a Notice of Proposed Rulemaking:

> Before the events of September 11, a flight crew would have responded appropriately to an airborne hijack situation by ***acceding to a hijacker's demands***, flying the

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[33] On October 3, 2001, Senator Hollings made the following statement about the nature of the in-flight security plan in effect on September 11: *"Heretofore, until September 11, the rule of the game was for the pilots to say: You want to go to Havana, Cuba? I wanted to go there, too. Let us all fly to Havana. And you ask the other hijacker: You want to go to Rio? As soon as we land in Cuba and get some fuel, we will go to Rio. They will go anywhere they want to accommodate the hijacker and get the plane on the ground at whatever place he wants to go and let law enforcement take over."* 147 Cong. Rec. S10128 (2001).

On September 18, 2002, the following testimony was given by Eleanor Hill, Staff Director, Joint Inquiry Staff to the U.S. Senate Select Committee on Intelligence:

> SEN. GRAHAM: . . . *As I understand the history, generally the taking of an airplane by hijackers has been done for either a political or an economic purpose, that in light of that the standard protocol, what a crew is supposed to do if they are subjected to hijacking is to cooperate, to acquiesce, to try to get the airplane on the ground and then start the process of negotiating with the hijackers. From your review, is that an accurate statement?*
> MS. HILL: *Yes, I think that's correct, and that was traditionally the way you would deal with a hijacking.*
> SEN. GRAHAM: *And I believe it was reflected in the way in which the first three planes that were hijacked on September 11 reacted. It was not until the information of the first three planes became known to the persons on the fourth plane that there was a resistance to the hijackers and as a result the plane crashed in Pennsylvania.*

Events Surrounding September 11th, Hearing Before the Joint Senate and House Select Intelligence Committee, 107th Cong. (2002) (emphasis added).

> aircraft to the instructed destination, and allowing the appropriate authorities to resolve the situation.

68 Fed. Reg. at 1942 (emphasis added).

The F.A.A. "common strategy" necessarily sets the substantive standard of care for terrorist attacks on aircraft, *cf. Curtin*, 183 F. Supp. 2d at 672 (in pre-Stabilization Act personal injury action, "the standard of care" was provided by "federal, not state, law"), and from the content of that standard of care, one can infer the scope of any legal duty to plaintiffs claiming injuries resulting from the attacks. In the context of what is now known to have been a calculated terrorist conspiracy to seize aircraft and turn them into weapons aimed at ground targets, the strategy of cooperation mandated by the F.A.A. common strategy was – in hindsight – inconsistent with a duty to protect potential ground victims. Indeed, it was this policy of cooperation with the terrorists that permitted the targeting of ground populations in the first place.[34] If there had been a duty, prior to September 11, to protect potential ground victims, the common strategy instructions

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[34] This point was made in a number of the Congressional hearings concerning the September 11 terror attacks. *See, e.g., Federal Aviation Security Standards: Hearing Before the Senate Commerce, Science and Transportation Committee,* 107th Cong. (2001) (statement of Paul Hudson, Executive Director, Aviation Consumer Action Project) ("Flight crews must be retrained to resist rather than cooperate with hijackers. Current training assumes that hijackers are not determined suicidal fanatics and emphasizes cooperation with hijackers so as not to unduly upset them. Clearly this training is largely misguided in light of last week and flight crews must be retrained."); *Reorganizing and Reforming the FBI: Hearing Before the Senate Judiciary Committee,* 107th Cong. (2002)(statement by Senator Durbin, Member Senate Judiciary Committee) (September 11th "came as a startling surprise to those who followed terrorist activities. And it was understandable, because our theory about hijacking for the longest time had been, 'Be submissive, be cooperative, and everything will work out.' And we came to learn on September 11th that we were just plain wrong.").

would have been to defend the cockpit at all costs or, for example, to crash-land the plane in the nearest open field or body of water if the terrorists threatened to take over the cockpit and fly the plane themselves. In fact, this is what was done in the case of United Airlines Flight 93 – not by the F.A.A.-trained crew operating according to the federal common strategy – but by the passengers themselves. Moreover, it is a matter of public knowledge that, today, immediately upon detecting a possible terrorist attack on an aircraft, the Air Force will scramble fighter jets in response to the now well-understood threat to potential victims on the ground.[35] Clearly, it is a far different world than existed prior to September 11, 2001.

In addition, before September 11, the responsibility for identifying potential threats to aviation security – and determining the measures that must be used to address those threats – was the responsibility of the F.A.A., not the responsibility of the Aviation Defendants. The Federal Aviation Act specifically assigned to the Administrator of the F.A.A., jointly with the Director of the F.B.I., the responsibility to "assess current and potential threats to the domestic air transportation system." 49 U.S.C. 44904(a). The statute further stated that the F.A.A. Administrator and the F.B.I. Director "shall decide on and carry out the most effective method for continuous analysis and monitoring of security threats to that system." *Id.* This federal responsibility for threat assessment is acknowledged in the D.O.T./F.A.A. report to Congress, which expressly states that the

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[35] Leslie Miller, *Attacks Give Way to Jet Scrambling*, AP Online, Aug. 13, 2002.

F.A.A. is "responsible" for "identifying potential threats and appropriate countermeasures."[36]

Thus, there is no question but that it was the federal government, not the Aviation Defendants, that was responsible for anticipating the threat that civil aircraft might be seized by terrorists trained in aviation and navigation and deliberately smashed into population centers on the ground. It is immaterial for purposes of this motion whether the F.A.A. discounted the possibility of such an attack on ground targets or merely regarded the threat as insufficiently probable in relation to other risks associated with attacks on civil aircraft as to warrant revision of the common strategy. What is important is that the F.A.A. did not adopt measures designed to address this threat. On the contrary, federal requirements obliged the aviation industry to cooperate with terrorists to protect passengers and crew. Unfortunately, it is that policy of cooperation that facilitated use of the planes seized on September 11 to inflict massive destruction on the ground.

Although in hindsight arguably misguided, the F.A.A. security program in place on September 11, 2001 was nonetheless binding federal policy with the force of law. *See* 14 C.F.R. 108.9(a) (2001) (mandating use of screening procedures included in A.C.S.S.P.); 14 C.F.R. 108.25 (2001) (detailing procedures for approval of required security programs); Aircraft Operator Security, 66 Fed. Reg. 37330, 37339 (July 17,

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[36] 1998 Report at 9-10. By contrast, the report states that air carriers are responsible only for "applying" such security measures "to passengers, service and flight crews, luggage, and cargo." *Id.* at 14.

2001) (once approved, A.C.S.S.P. has force of law and is to be complied with to the same extent as published regulations). Moreover, for the purposes of the Stabilization Act, any state law rules that are "inconsistent" with this federal policy can provide no basis for recovery from the Aviation Defendants. This is because the term "Federal law," as used in Section 408(b)(2), includes not just the Federal Aviation Act and other federal statutes but also regulations and other government requirements having the force of law. *See, e.g., Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 713 (1985) (Supreme Court has "held repeatedly" that state law "can be preempted by federal regulations as well as by federal statutes").

The Aviation Defendants are not arguing that the Ground Damage Claims should be dismissed because, as a factual matter, they complied with the F.AA. common strategy. Rather, defendants argue that these claims must be dismissed *as a matter of law* because the federal regulatory scheme governing aviation security did not impose a duty to protect potential ground victims from terrorist attacks.[37]

Plainly, to the extent that the federal government did not appreciate the risk of suicidal attacks on the targeted buildings or, in any event, failed to establish the types of

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[37] The secret nature of certain particulars of the F.A.A. common strategy need not prevent this Court from deciding the duty issue on a motion to dismiss. The content of the F.A.A. common strategy and other aspects of the A.C.S.S.P. is not a "fact issue," but rather a question of what the law was on September 11. Although not public, these federally required policies constituted the governing legal standards at the time of the terrorist attacks on the World Trade Center and the Pentagon.

security measures necessary to address such threats, it would be "inconsistent" with the federal security regime to find a duty on the part of the Aviation Defendants to protect persons or entities on the ground from the very threats the federal government failed to address. Indeed, even under state law, the New York Court of Appeals has refused to impose a duty on defendants to "screen out or detect potential danger signals" that were not detected by the government officials charged with anticipation of such threats. *Eiseman*, 70 N.Y.2d at 191, 518 N.Y.S.2d at 616 (holding that defendant state college did not owe a special duty to protect its students after it admitted an ex-felon who subsequently murdered two students). As the Court of Appeals noted, to do so would hold defendants "to a higher duty than society's experts in making such predictions." *Id.*

Here, "society's experts" on threat assessment and appropriate countermeasures were the federal government and the F.A.A., not the Aviation Defendants. Moreover, since the federal security scheme clearly placed the responsibility for assessing the threats to civil aviation on the federal government, not the airlines or any other private parties, the scope of any duty owed by these defendants cannot extend to damage caused by a risk that was not perceived. As the New York Court of Appeals has emphasized, "where the harm was caused by an occurrence that was not part of the risk or recognized hazard involved in the actor's conduct, the actor is not liable.... It is not enough that everyone can see now that the risk was great, if it was not apparent when the conduct occurred." *DiPonzio v. Riordan*, 89 N.Y.2d 578, 584, 586, 657 N.Y.S.2d 377, 380, 381 (1997) (internal quotation marks and citations omitted).

Ultimately, the federal regulations and state tort law principles in this area are perfectly consistent, and both lead to the same result. By focusing on the protection of passengers and crew, federal standards mirror traditional principles of tort law, which have long sought to limit the consequences of liability to a narrowly defined class of plaintiffs to whom the defendant owed a special duty, distinct from the general public or all the world. Whether one looks to the requirements and express purposes of the federal aviation security program or to these traditional tort principles, there is a clear line to be drawn between the duty to passengers traveling in air transportation and any purported duty to those on the ground. Because no such duty to protect the Ground Damage Plaintiffs can be found in either state or federal law, their claims against the Aviation Defendants must be dismissed.