

Client Alert

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U.S. Litigation Arising Out of the TAM Linhas Aéreas Flight 3054 Accident: Another Significant *Forum Non Conveniens* Setback for Plaintiffs in Federal Court

The decision by the U.S. Court of Appeals for the Eleventh Circuit in *Tazoe v. Airbus, S.A.S.*, No. 09-14847, 2011 WL 294044 (11th Cir. Feb. 1, 2011) arose from the TAM Linhas Aéreas Flight 3054 accident on July 17, 2007. Flight 3054 was a scheduled flight from Porto Alegre to São Paulo, Brazil. The accident occurred when the Airbus A320 aircraft overran the runway upon landing and crashed into a warehouse and fueling station, resulting in the death of all 187 passengers and crew on board the aircraft, as well as twelve (12) individuals on the ground. The decedents were all citizens or residents of Brazil with the exception of one U.S. citizen who resided in Florida.

The aircraft had an inoperative thrust reverser on the number two engine at the time of the accident. TAM was aware of this issue, but concluded that the aircraft could safely be flown if its pilots followed specific landing procedures. Prior to the accident, TAM had successfully operated approximately 40 flights without incident with the inoperative thrust reverser. The accident was alleged to have occurred because the flight crew did not follow the correct landing procedure.

Following the accident, the plaintiffs commenced approximately 80 lawsuits in the U.S. District Court for the Southern District of Florida seeking wrongful death damages. The plaintiffs named TAM, Airbus, Pegasus Aviation IV, Inc., International Aero Engines and Goodrich Corporation as defendants. Nearly all of these lawsuits were subsequently

consolidated by the federal district court. TAM settled with “almost all” of the plaintiffs. Seventy-six (76) plaintiffs then filed a consolidated lawsuit against the manufacturers. The manufacturing defendants subsequently moved to dismiss the litigation based on the doctrine of *forum non conveniens* (“FNC”) in favor of litigation in Brazil. The district court granted the FNC motion.

The Eleventh Circuit affirmed the FNC dismissal of all of the Brazilian and U.S. citizen decedents’ actions with the exception of a single complaint filed by Anna Finzsch on behalf of a single Brazilian decedent, which was reversed based on a procedural technicality. The Finzsch action, which had been commenced after the filing of the defendants’ FNC motion, was dismissed before the Finzsch complaint had been served on the defendants. The Eleventh Circuit reversed the dismissal of the Finzsch complaint because it generally is disfavored for a court to dismiss a lawsuit on its own initiative without affording plaintiff either notice or an opportunity to be heard. In so finding, the Eleventh Circuit noted that it is “dubious” that the Finzsch complaint will survive a renewed FNC motion.

This decision contains several significant findings. First, the FNC dismissal included not only the actions commenced on behalf of the Brazilian decedents, but also the action on behalf of the U.S. decedent. The Eleventh Circuit stated that “[a] district court must find ‘positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising any such discretion as may exist to deny a United States citizen access to the courts of this country.’” The Eleventh Circuit concluded that the district court did not abuse its discretion in finding that the defendants’ inability to compel non-party witnesses or the production of documents from those witnesses, or the inability to implead potentially liable non-

parties if the litigation remained in the U.S. far outweighed the “somewhat more deference” applied to the action because the decedent was a U.S. citizen. The defendants had listed “dozens” of Brazilian non-party witnesses that they intended to call in support of their defense, but the witnesses were outside the subpoena power of the U.S. court. The plaintiffs argued that the defendants’ “laundry list” of potential witnesses was evidence of defensive forum shopping. The Eleventh Circuit was not persuaded. It noted that the defendants might “reasonably call” eyewitnesses to the accident, government employees in charge of airport safety, TAM employees, accident investigators and other witnesses in their defense. The defendants also had represented that they intended to implead two potentially liable Brazilian entities, but could not do so if the litigation remained in the U.S. The plaintiffs argued that the defendants could seek contribution from the Brazilian entities in a separate proceeding in Brazil after trial in the U.S. if the defendants were found liable. Although the Eleventh Circuit recognized that the defendants could institute an action in Brazil for contribution against the Brazilian entities after a U.S. trial, it stated that their defense in the U.S. litigation would be less persuasive ““when aimed at a set of empty chairs”” and, as a result, if a U.S. jury were inclined to place blame at the defense table, the defendants present in the U.S. litigation would bear the brunt of any damage award.

Second, the Eleventh Circuit was not persuaded by the plaintiffs’ attempts to divert the court’s focus by arguing that their ““theories of liability against the [United States] and French defendants have very little to do with Brazil.”” The Eleventh Circuit stated that its analysis must contemplate not just the plaintiffs’ theories of liability, but also the defendants’ defenses (*i.e.*, the evidence necessary to disprove each element of the plaintiffs’ causes of action). It found that the district court reasonably concluded that “[a] significant part of the defense is likely to revolve around the location of the airport and the particular runway which was overrun, as well as the length and condition of that runway.””

Third, the Eleventh Circuit rejected the plaintiffs’ argument that the U.S. had a greater interest in “regulating and deterring defective products,” finding that potential liability arising

from at least ten (10) prior runway incursions by Airbus aircraft with an inoperative thrust reverser diluted the deterrent value. Further, because the accident occurred in a foreign country and involved many foreign decedents, the local interest in the accident was greater than that of the U.S. The Eleventh Circuit also noted that cases tried in Brazil also would have a deterrent value because the defendants could be found liable in that forum.



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