



AVIATION LAW SECTION

STATE BAR *of* **TEXAS**

Aviation Litigation

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Today's Litigation Topics

- Common Issues in Aviation Litigation
- Damages in Wrongful Death and Personal Injury Cases
- Trying Cases in Today's Cultural Landscape

Common Issues in Aviation Litigation: Illegal Charter Flights

- An illegal charter flight usually involves an unlicensed charter operation where the operator does not have a Part 135 Charter Certificate.
- This most commonly occurs in litigation where you have an aircraft operating under Part 91 that is conducting “Dry Lease” charters.
- Part 91 operators are not permitted to operate flights for commercial purposes but frequently run afoul of Part 135 commercial rules.

Common Issues in Aviation Litigation: Illegal Charter Flights

- Under a dry lease, the compensation being paid is typically in the form of a rental payment in exchange for the lessee's own use (whether the lessee is a pilot or a passenger who has hired a pilot) of the equipment being rented, analogous to obtaining a rental car for one's ground transportation needs.
- The key distinction is that, generally speaking, wet leases must be operated under FAR Part 135, whereas a properly constructed dry lease may allow a user of the aircraft other than the registered owner to conduct its own flights of the aircraft under FAR Part 91.

Common Issues in Aviation Litigation: Illegal Charter Flights

- Scenario #1: Aircraft owner decides to “Dry Lease” their aircraft with a third party friend or acquaintance for compensation.
 - Illegal Charter?
 - Yes, if the Owner of the aircraft maintains operational control.
 - A bright line regulatory test for “operational control” is whether or not the lessor is directly or indirectly providing a flight crew. If they are, that’s a commercial operation.

Common Issues in Aviation Litigation: Illegal Charter Flights

- Scenario #2: Business owner sets up a single asset LLC to own and operate their business jet to shield liability in the event of a crash and to incentivize certain tax incentives to the business.
 - Illegal Charter?
 - Yes, this is the “Flight Company Trap” in the eyes of the FAA. A company that was created to operate the aircraft is treated as a charter company even if no monies change hands. This is transportation for hire in the eyes of the FAA and requires a Part 135 Charter Certificate.

Common Issues in Aviation Litigation: Illegal Charter Flights

- Scenario #3: **Plane owner** is going to a concert out of town and agrees to share a flight with some friends who are also going if they will pay for the pilot and expenses of the flight.
 - Illegal Charter? Yes.
 - FAR §61.113(C) permits an **owner/pilot** transporting friends or acquaintances and allows sharing of certain expenses provided that the pilot/owner shares a pro-rata share of the expenses and there is a common purpose among all the passengers and the owner.
 - Permissible Expense Sharing: Fuel, oil, airport fees, and aircraft rental fees. (e.g., not engine programs, hourly costs, or other operational costs).
- You have a common purpose, but you don't fit under the regulation because of the **pilot** hire and the way **expenses** are divided. (no pro rata split among everyone).

Common Issues in Aviation Litigation: Coverage Issues with Dry Leases

- Insurance coverage on aircraft usually have pilot warranty requirements.
- Pilot warranties can require a certain level of training and experience, type ratings, and often even require pilot approval by name from the insurance company.
- For insurance purposes, many insurance carriers consider the operation of a Part 91 aircraft under a dry lease to be a commercial operation and exclude coverage for these scenarios.

Common Issues in Aviation Litigation: Personal Jurisdiction



Don't Assume You Can Sue Where the Crash Occurred.

Common Issues in Aviation Litigation: Personal Jurisdiction

Held: No personal jurisdiction over Garmin in products liability action where alleged failure of Garmin avionics product resulted in Piper 28-R collision with a radio tower in Louisiana where product purchased and installed out of state and there was no demonstration that accident arose because of Garmin's contacts with Louisiana.

Agape Broad. Inc. v. Sampson, 2020 WL 5806616 (W.D. La. Sept. 28, 2020).

Held: Out of state corporation could be sued in another state for products liability as long as the corporation's purposeful actions in or aimed at that state are sufficiently related to the plaintiff's claim. The corporation must have targeted the forum state with its business, and its activities in the state must have a real connection to the plaintiff's claim.

Ford Motor Co. v. Montana Eighth Judicial District Court, 141 S. Ct. 1017 (2021).

Damages in Personal Injury and Wrongful Death Cases: Gregory v. Chohan

Supreme Court unsuccessfully attempts to clarify the standard for reviewing awards of non-economic damages based on a legal sufficiency issue.

Trial counsel requested that the jury “give New Prime their ‘two cents worth’” by awarding two cents for each of the 650 million miles driven by New Prime trucks in the year of the fatal accident multiplied by the three deaths and injuries sustained by the plaintiffs.

Jury arguments regarding the proper amount of non-economic damages referenced a \$71 million Boeing F-18 fighter jet and a \$186 million painting by Mark Rothko.

The jury awarded \$38.8 million—an amount “within one-half of one percent” of the \$39 million that mathematically results from counsel’s argument.

Three opinions, zero clarity

- Three recusals, six participating justices, three separate opinions.
- The case was ultimately remanded for a new trial based on the trial court's erroneous failure to designate a responsible third party, not on the damages issue.
- None of the three opinions drew the requisite five justices necessary to establish precedential authority on the damages issue.
- a "plurality opinion is not authority for determination of other cases, either in [the Supreme] Court or lower courts."
Univ. of Tex. Med. Branch at Galveston v. York, 871 S.W.2d 175 (Tex. 1994)

No consensus on any new standards

A plurality (Blacklock, Hecht, and Busby) plus Justice Bland agreed that:

- (1) There must be a rational basis, grounded in the evidence, between the injuries suffered and the amount awarded.
 - (2) “Unsubstantiated anchors” cannot provide the evidentiary basis the award.
 - (3) The jury’s award in this case was based on “passion, prejudice, or improper motive.”
- None of these holdings involve new standards or novel legal principles; they have been the law in Texas for decades.
 - Justices Blacklock, Hecht, and Busby would also have required parties to explain to the jury specifically how the amount requested relates to the evidence.
 - Justice Bland refused to join that part of the plurality opinion.
 - Justices Devine and Boyd refused to join any of it, concurring only in the decision to remand based on the RTP issue.

Trying Cases in Today's Cultural Landscape



Defining the “Cultural Landscape”

A 2019 news article read, “Most people today are distracted, disinterested, and exhausted.”

- This was **before**:
 - COVID-19 Pandemic began
 - George Floyd was murdered
 - The 2020 Election and ensuing Capital Riot
 - Markets crashed in March of 2020
 - Supply chains faltered
 - Inflation
 - A War in Ukraine
 - Upcoming Presidential Election Cycle

Jury Selection in Today's Cultural Landscape

- How Do you Identify the Distracted, Disinterested, and Exhausted Jurors who are bad for your case?
 - Focus Groups
 - Questionnaires
 - Voir Dire
 - Exercising Strikes for Cause

Considerations in Today's Cultural Landscape

- Covid 19 Impact
 - On Jurors
 - On the Process of a Trial
- Inflation
 - Damages: “Billions are the new Millions”
 - Recent Verdicts in Houston and Dallas
- Ethnic Disparities
 - The Elephant in the Room