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STAYING ABOVE WATER: THE LEGAL IMPACT OF COVID-19 ON THE CRUISE AND SHIPPING INDUSTRIES

Mac Brown¹, Joe Adamson², and Per Jansen³

I. Introduction.

The COVID-19 crisis is a terrible tragedy that has killed over 1,219,000 around the world, and sickened over forty-seven million globally, at the time this article was written.⁴ The crisis has placed unprecedented pressures on the health care industry, creating an estimated negative financial impact on the American health system of around \$202.6 billion.⁵ The resulting economic crisis has plunged millions of Americans into unemployment and stalled the national economy.⁶

The crisis has also had significant effects on the shipping and transportation industry, which is the lifeblood of the global economy. The U.S. Department of Transportation recognized that “[t]he safety of our transportation networks is vital to maintaining econom-

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⁴ See *Cntr. For Sys. Science & Eng’rg at Johns Hopkins Univ., COVID-19 Dashboard*, <https://coronavirus.jhu.edu/map.html> (last accessed Nov. 4, 2020).

⁵ *Am. Hosp. Assoc., Hospitals & Health Systems Face Unprecedented Financial Pressures Due to COVID-19*, available at <https://www.aha.org/guidesreports/2020-05-05-hospitals-and-health-systems-face-unprecedented-financial-pressures-due> (May, 2020).

⁶ Lauren Bauer et al., *The Brookings Inst., Ten Facts About COVID-19 and the U.S. Economy* (Sept. 17, 2020), available at <https://www.brookings.edu/research/ten-facts-about-covid-19-and-the-u-s-economy/>.

ic durability and the free flow of essential supplies, food, fuel, and medical equipment.”⁷ But the pandemic has reduced demand for transit services,⁸ causing containerized cargo use at ports to drop around 20 to 25 percent, with bulk cargo movements at U.S. ports facing a reduction of between 15 and 25 percent.⁹ The pandemic has “exposed vulnerabilities” in international supply chains.¹⁰ And dismally, over 400,000 sailors are currently stuck on cargo ships, unable to enter ports of call due to COVID-19 restrictions.¹¹

It is not surprising, then, that the COVID-19 crisis has had a serious legal impact on the shipping and transport industries. Some are obvious, such as force majeure clauses that carve out exemptions to contract performance for pandemics. Given “shortages of crew, [and] the closure of shipyards delaying necessary refit works and restrictive measures being implemented by certain ports in order to ensure the safety of their personnel,” litigation involving such matters could become common.¹²

Other impacts are not so obvious—for example, the application of a nearly one-hundred-year-old statute on personal injury claims arising from COVID-19 exposure on cruise ships.¹³ Indeed, the range of legal implications covers the gamut, from the nuances of personal injury cases, to employment law, consumer protection, and securities litigation. This article analyses these legal trends in the shipping and transportation industry, and particularly cruise lines. Cruise lines already may experience a 34.7 percent revenue drop in 2020 due to international travel restrictions.¹⁴ Throwing them a further anchor in the form of litigation costs and liabilities may compound the industry’s problems as more knowledge is discovered on the spread of COVID-19, and court judgments could impact the already fraught insurance market for shipping.¹⁵

II. Personal Injury and Wrongful Death Claims.

Perhaps the most obvious and pervasive legal ramifications cruise lines face are personal injury and wrongful death claims resulting from passengers contracting—or nearly contracting—COVID-19 while aboard a cruise ship. Despite the ubiquity of these claims, the scope of the risk facing the cruise ship industry is not fully understood, as no

⁷ U.S. Dep’t of Trans., Coronavirus Resources at the Department of Transportation, available at <https://www.transportation.gov/coronavirus> (last accessed Nov. 4, 2020).

⁸ Nat’l Academy of Sciences, Eng’g, & Med., *COVID-19 Trends Impacting the Future of Transportation Planning and Research*, available at <https://www.nationalacademies.org/trb/blog/covid-19-trends-impacting-the-future-of-transportation-planning-and-research> (noting reluctance of “the traveling public’s willingness to use shared mobility ...”) (last accessed Nov. 4, 2020).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Tim McDonald, BBC, *Covid: The 400,000 seafarers who can’t go home* (Oct. 31, 2020), available at <https://www.bbc.com/news/business-54549612>.

¹² Martina Farrugia, *Covid 19 and Force Majeure in the Shipping Industry* (Apr. 20, 2020), available at <https://www.lexology.com/library/detail.aspx?g=9b4ccfa2-7f83-4d3c-a60a-b0c2cbc1e64>.

¹³ Death on the High Seas Act, 41 Stat. 537, 46 U.S.C. § 761 et seq.

¹⁴ Henzy Richter, *Cruising Post-COVID-19: Lessons and Challenges for the Cruise Ship Industry* (June 24, 2020), available at <https://www.sustainalytics.com/esg-blog/cruising-post-covid-19-lessons-and-challenges-for-the-cruise-ship-industry/>.

¹⁵ Jon Sindreu, Wall St. J., *Shipping’s Latest Problem: Rising Insurance Costs* (March 28, 2019), available at <https://www.wsj.com/articles/shippings-latest-problem-rising-insurance-costs-11553779777>.

government or international regulatory agency is comprehensively and publicly tracking cases of COVID-19 linked to cruise ships.¹⁶ Based on research by the Miami Herald,¹⁷ however, there have been at least 3908 cases of COVID-19 aboard 87 different ships that resulted in 111 deaths.¹⁸ If the cruise ship operators or employees negligently caused their passengers to suffer an increased risk of contracting COVID-19, they could face significant liability, especially in the form of wrongful death suits.

There are a number of different factors that impact how severe the exposure to the cruise lines could be, which we discuss below. First, where a personal injury or wrongful death claim is brought could greatly impact the potential damages available to a plaintiff. As a result, most, if not all, major cruise lines include forum-selection clauses on their tickets. The first part of this section discusses those forum-selection clauses and their effectiveness in prescribing the litigation forum. Second, two century-old statutes—the Death on the High Seas Act and the Limitation of Liability Act—could impact the quantum of damages available to cruise-line passenger. The second part of this section discusses these statutes and how they operate to proscribe the damages available to injured cruise-ship passengers. Third, when maritime law applies, as it must in all instances where the injured plaintiff contracted COVID-19 on navigable waters, certain traditional causes of action and remedies may not be available to plaintiffs. The third part of this section discusses recent court decisions determining the contours of those remedies.

A. Forum Selection Clauses

1. Admiralty and Maritime Jurisdiction Generally

Federal district courts have original jurisdiction, “exclusive of the States,” of any civil case falling within admiralty or maritime jurisdiction, “exclusive of the States,” but “saving to suitors in all cases remedies to which they are otherwise entitled.”¹⁹ The Supreme Court has interpreted this so-called “saving-to-suitors” clause to bar state courts from considering “those maritime causes of action begun and carried on as proceedings in rem,” but “leave[s] state courts ‘competent’ to adjudicate maritime causes of action in proceedings ‘in personam.’”²⁰ “Therefore, a plaintiff with in personam maritime claims has three choices: He may file suit in federal court under the federal court’s admiralty jurisdiction, in federal court under diversity jurisdiction if the parties are diverse and the amount in controversy is satisfied, or in state court.”²¹

¹⁶ <https://www.miamiherald.com/news/business/tourism-cruises/article241914096.html>

¹⁷ The Miami Herald states that it has “compil[ed] information from governments, media outlets, non-governmental organizations, and companies” in creating a COVID-19 database that tracks all confirmed cases of COVID-19 and COVID-19 deaths. *Id.*

¹⁸ *Id.* The Miami Herald further notes that “[t]he data tracking infections and deaths presented here likely represent an undercount.” *Id.*

¹⁹ 28 U.S.C. § 1333(1).

²⁰ *Madruga v. Superior Court of State of Cal. in & for San Diego Cty.*, 346 U.S. 556, 560-61 (1954).

²¹ *Ghotra by Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050, 1054 (9th Cir. 1997).

2. Forum-Selection Clauses on Cruise Tickets are Generally Enforceable

A relevant example of a forum selection clause on a cruise ticket reads:

All claims or disputes involving Emotional Harm, bodily injury, illness to or death of any Guest whatsoever, including without limitation those arising out of or relating to this Passage Contract or Your Cruise, shall be litigated in and before the United States District Courts for the Central District of California in Los Angeles, or as to those lawsuits over which the Federal Courts of the United States lack subject matter jurisdiction, before a court located in Los Angeles County, California, U.S.A., to the exclusion of the courts of any other country, state, city, municipality, county or locale. You consent to jurisdiction and waive any objection that may be available to any such action being brought in such courts.²²

Federal law governs the enforceability of a forum selection clause.²³ Federal law presumes a contractual forum selection clause is valid and places the burden on the party seeking to overturn the forum selection clause to prove otherwise.²⁴

3. Forum-Selection Clauses Generally List a U.S. District Court as the Exclusive Forum for Adjudication of a Plaintiff's Claims

Cruise ship tickets generally identify a federal district court as the exclusive forum for adjudication of a passenger's claim.²⁵ Indeed, it's no secret that "many, if not most, defendants—particularly corporate defendants—would prefer to litigate in federal court rather than state court."²⁶

As shown above, however, forum-selection clauses list a backup state court if federal jurisdiction does not exist. One argument plaintiffs sometimes make in an effort to get around the forum-selection clause is to file suit in the backup state court identified in the forum-selection clause and argue that the saving-to-suitors clause—which allows plaintiffs to file maritime personal-injury suits in state court—mandates remand to state court when a defendant cruise ship removes to federal court.²⁷

One federal court recently rejected this argument, holding that the protections afforded by the saving-to-suitors clause are procedural in nature, and a party can waive

²² *Maa v. Carnival Corp. & PLC*, 2020 WL 5633425, at *3 (C.D. Cal. 2020).

²³ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 590 (1991).

²⁴ See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *Shute*, 499 U.S. at 590-595.

²⁵ E.g., *Maa*, 2020 WL 5633425, at *3 (identifying Central District of California as the forum for litigation); *Korman v. Princess Cruise Lines, Ltd.*, 32 Cal. App. 5th 206, 219-220 (same).

²⁶ <https://www.law.com/njljournal/2020/03/05/removal-to-federal-court-and-the-forum-defendant-rule-congress-enters-snap-removal-thicket/?slreturn=20201004231430>

²⁷ E.g., *Maa*, 2020 WL 5633425, at *4-5.

procedural defects under the removal statute.²⁸ Cruise ship passengers typically waive the saving-to-suitors clause protections because they agree to litigate their claims in federal court so long as subject matter jurisdiction exists. And when they waive these protections in a valid-forum selection clause, the plaintiffs have waived their right to seek remand of maritime cases.²⁹ Suits brought by cruise passengers in state court are also subject to dismissal on forum non conveniens grounds.³⁰

B. The Death on the High Seas Act and the Limitation of Liability Act

1. DOHSA

The Death on the High Seas Act (“DOHSA”)³¹ applies to any wrongful death claim (with a potential exception, discussed below in footnote 37) premised on any wrongful act or negligence that occurred on the “high seas beyond 3 nautical miles from the shore of the United States.”³² Recovery under DOHSA is limited to “fair compensation for the pecuniary loss sustained by the individuals for whose benefit the action is brought.”³³ It is well-settled that DOHSA preempts conflicting state law wrongful-death statutes and makes itself the exclusive remedy.³⁴

The location where a cruise passenger contracted COVID-19 will, therefore, be incredibly important in any wrongful death litigation. DOHSA applies where “the site of an accident [is] on the high seas” regardless of where “death actually occurs or where the wrongful act causing the accident may have originated.”³⁵ Courts in COVID-19 litigation have found that the “site of the accident” for COVID-19 purposes is where the passenger contracted COVID-19.³⁶ Thus, if a cruise passenger contracts COVID-19 three or more

²⁸ *Id.* at *4 (citing *Kelton Arms Condo. Owners Ass’n v. Homestead Ins.*, 346 F.3d 1190, 1192 (9th Cir. 2003); *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1069 (9th Cir. 2001)).

²⁹ *Id.* at *4.

³⁰ *E.g., Korman v. Princess Cruise Lines, Ltd.*, 32 Cal. App. 5th 206, 223 (2019) (affirming dismissal of action brought by a passenger who was injured on a Princess cruise ship for forum non conveniens based on forum-selection clause); *Lischinskaya v. Carnival Corp.*, 56 A.D.3d 116, 121 (N.Y. App. Div. 2008) (“[T]he Saving to Suitors Clause does not bar dismissal of the plaintiff’s claim on the basis of the forum selection clause to which she agreed.”).

³¹ 46 U.S.C. § 30301 *et seq.*

³² 46 U.S.C. § 30302.

³³ 46 U.S.C. § 30303.

³⁴ *See Ford v. Wooten*, 681 F.2d 712, 716 (11th Cir. 1982) (“Where a cause of action exists for wrongful death under DOHSA, no additional action exists under general maritime law for wrongful death.”); *Offshore Logistics, Inc., v. Tallentire*, 477 U.S. 207, 231, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986) (after examining the legislative history and text of DOHSA, held that damages provided in DOHSA could not be supplemented under state law).

³⁵ *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1348 (9th Cir. 1987), *opinion modified on reh’g*, 866 F.2d 318 (9th Cir. 1989).

³⁶ *See Wong v. Carnival Corporation & PLC*, No. 2:20-cv-04727-RGK-SK, Dkt. 35 at 7 (C.D. Cal. Sept. 4, 2020) (“[T]he relevant site would be the place where [the deceased passenger] contracted COVID-19.”); *Maa*, 2020 WL 5633425, at *8 (same).

nautical miles from U.S. shores and subsequently dies, DOHSA will apply to any wrongful death suit. But if a passenger contracts COVID-19 less than three nautical miles offshore, state wrongful death law will apply.³⁷

2. The Limitation of Liability Act

Under the Limitation of Liability Act (the “Limitation Act”), the liability for the owner of a vessel for any claim or liability “shall not exceed the value of the vessel and pending freight,” so long as the liabilities arise from any “act, matter, or thing” done without “the privity or knowledge of the owner.”³⁸ The Limitation Act creates a form of action peculiar to the admiralty and maritime context, allowing the owner of a vessel to file a petition in federal court seeking total exoneration or limitation of liability for “damages caused by the negligence of his captain or crew.”³⁹ Thus, “[i]nstead of being vicariously liable for the full extent of any [damages] caused by the negligence of the captain or crew employed to operate the ship, the owner’s liability is limited to the value of the ship unless the owner himself had ‘privity or knowledge’ of the negligent acts.”⁴⁰

If a vessel owner initiates a limitation-of-liability proceeding, the court—sitting in admiralty, without a jury—conducts a *concursum*⁴¹ proceeding, during which the court determines whether there was negligence, whether the negligence was without the privity and knowledge of the owner, and, if limitation is granted, how the limitation fund should be disbursed.⁴² Specifically, a court sitting in *concursum* undertakes a two-part analysis.

³⁷ There are arguable exceptions to this general rule. Section 30302 states that the act applies to any death that occurs “beyond 3 nautical miles from the shore of the United States.” Section 30308(a), however, states that DOHSA “does not affect the law of a State regulating the right to recover for death.” At least three courts have addressed this conflict. See *Kipp v. Amy Slate’s Amoray Dive Center, Inc.*, 251 So.3d 941 (Fla. Dist. Ct. App. 2018); *Blome v. Aerospatiale Helicopter Corp.*, 924 F. Supp. 805 (S.D. Tex. 1996); *Brons v. Beech Aircraft Corp.*, 627 F. Supp. 230 (S.D. Fla. 1985). Two of the three, *Kipp* and *Blome* reached the conclusion that this conflict means DOHSA applies to deaths more than three nautical miles from shore except within the territorial limits of a state where it would otherwise affect the law of a State regulating the right to recover for death. 251 So.3d at 945; 924 F. Supp. at 812. *Brons*, however, held that the waters more than three nautical miles from the Florida shoreline “are not territorial waters of Florida for the purpose of precluding a DOHSA action, and that this result best effectuates congressional intent. 627 F. Supp. 230, 232. This matters for states like Florida and Texas, whose territorial waters extend more than 3 miles in some places. See *Kipp*, 251 So.3d at 943-944; *Blome*, 924 F. Supp. 808. In those states, then, under the rules in *Kipp* and *Blome*, if the act giving rise to the wrongful death occurred more than 3 nautical miles offshore but still within state territorial waters, state wrongful death law applies instead of DOHSA. But under *Brons*, the opposite is true. While resolution of this conflict is beyond the scope of this article, it could present interesting issues in litigation for cruise passengers who contracted COVID-19 while travelling through the Gulf of Mexico.

³⁸ 46 U.S.C. §§ 30505(a)–(b).

³⁹ *Tandon v. Captain’s Cove Marina of Bridgeport, Inc.*, 752 F.3d 239, 243–44 (2d Cir. 2014)).

⁴⁰ *Otal Investments Ltd. v. M/V CLARY*, 673 F.3d 108, 115 (2d Cir. 2012) (quoting *In re City of New York*, 522 F.3d 279, 283 (2d Cir. 2008)).

⁴¹ The term “concursum” derives from the French *concoure* and, going further back, from the Latin *concurrere*. The basic literal meaning is a running or assembling together—a confluence. In its legal context, a *concursum* is a proceeding to marshal all claims, or bring them into concourse, and settle all disputes in one action in order to efficiently identify each litigant’s share of a common fund. See 80 C.J.S. Shipping § 499 (2017); see also *Frederick W. Swaim, Jr., Limitation of Liability & Direct Actions: The Relevant Fund*, 7 LOY. MAR. L.J. 247, 248 n.307 (2009).

⁴² *In re Complaint of Dammers & Vanderheide & Scheepvaart Maats Christina B.V.*, 836 F.2d 750, 755 (2d Cir. 1988).

“First, the court must determine what acts of negligence caused the accident. Second, the court must determine whether the ship owner had knowledge or privity of those same acts of negligence.”⁴³ The claimant “bears the initial burden of proving negligence,” after which the burden shifts to the ship owner to “prove lack of knowledge or privity.”⁴⁴ If the petition for limitation of liability is granted, “the owner can be liable on the covered claims only up to the total value of his vessel and its pending freight; that amount will then be distributed pro rata among the proven claims.”⁴⁵

It is unlikely that a defendant cruise line would initiate a *concursum* proceeding, as the value of the cruise ship is essentially certain to be more than any wrongful death claim, especially if the claim must be brought under DOHSA. That said, if there is some form of viable class-action or other group lawsuit filed against one or more cruise lines, a cruise line may consider initiating a *concursum* proceeding. It is more likely, however, that the owner of a smaller vessel operating more than 3 nautical miles off the coast (e.g., fishing vessels) who has a non-seaman contract COVID-19 would seek the refuge of the Limitation Act.

A. Recent Court Decisions Interpreting Remedies for COVID-19 Wrongful Death and Personal Injury Claims Aboard Cruise Ships

1. Wrongful Death, DOHSA, and State Law

For pending and future wrongful death claims against cruise ships for COVID-19-induced deaths, it will matter much whether DOHSA or state law applies. In *Mobil Oil Corp. v. Higginbotham*, the Supreme Court stated that when DOHSA speaks directly to an issue, “courts are not free to ‘supplement’ Congress’ answer.”⁴⁶ The Court explained that “Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary supplements. There is a basic difference between filling a gap left by Congress’ silence and rewriting rules that Congress has affirmatively and specifically enacted.”⁴⁷ The pecuniary losses a plaintiff can recover when DOHSA applies are limited to things like loss of inheritance, counseling expenses, loss of financial support or wages of the decedent, and funeral expenses (if paid for a family member rather than the decedent’s estate).⁴⁸

⁴³ *Otal*, 673 F.3d at 115 (alterations and internal quotation marks omitted) (quoting *In re Moran Towing Corp. (“Moran I”)*, 166 F.Supp.2d 773, 775 (E.D.N.Y. 2001)).

⁴⁴ *Id.* (quoting *Moran I*, 166 F.Supp.2d at 775).

⁴⁵ *Germain*, 824 F.3d at 264 (quoting *Tandon*, 752 F.3d at 244).

⁴⁶ 436 U.S. 618, 625 (1978).

⁴⁷ *Id.* (internal citations omitted).

⁴⁸ While nonpecuniary losses in a DOHSA-governed wrongful-death case are typically unavailable, there is one notable exception. Several courts have held that DOHSA plaintiffs can recover emotional distress damages when those plaintiffs witnessed the specific, emotionally traumatizing event that caused death. *Eisenman v. Carnival Corp.*, 424 F. Supp. 3d 1303, 1306–07 (S.D. Fla. 2019); *Martins v. Royal Caribbean Cruises Ltd.*, 174 F. Supp. 3d 1345, 1353 (S.D. Fla. 2016).

On the contrary, state law generally allows plaintiffs to recover both pecuniary and non-pecuniary damages.⁴⁹ This can lead to significant disparities between verdicts in a DOHSA-governed wrongful-death case and a state-law-governed wrongful-death case.⁵¹

In a recent case, *Maa v. Carnival Corporation*, the plaintiff sued the cruise line in California state court and pleaded wrongful death and survival claims against the cruise line. The cruise ship removed to federal court, invoking its forum-selection clause, and moved to dismiss those state-law claims on the grounds that DOHSA preempted them. The Court agreed and held that “DOHSA preempts the survival claims brought on behalf of the Estate.”⁵¹

2. Negligent Infliction of Emotional Distress in the Absence of Contracting COVID-19

One of the more tenuous theories of liability brought by some plaintiffs is the claim that they suffered damages based on their “fear” of contracting COVID-19 from another passenger—even though they never contracted the illness and never suffered any symptoms themselves. A federal court in California recently ruled that this theory won’t float.⁵²

The *Weissberger* case arose out of a COVID-19 outbreak aboard a cruise ship. Even though the plaintiffs did not test positive for COVID-19 or suffer any of its symptoms, they sued the cruise line, alleging it was negligent in handling the outbreak and seeking emotional distress damages based on their fear of contracting COVID-19.

The district court dismissed these claims. Under federal maritime law, a plaintiff seeking to recover for negligent infliction of emotional distress must satisfy the federal common law “zone of danger” test adopted by the United States Supreme Court.⁵³ Under this test, recovery for emotional injury is limited to two categories of plaintiffs: (1) plaintiffs who sustain a physical impact as a result of the defendant’s negligent conduct; and (2)

⁴⁹ *E.g.*, Rev. Code Wash. § 4.20.010(1) (personal representative in wrongful death action may recover, against the person causing the death, economic and noneconomic for the benefit of statutory beneficiaries); Rev. Code Wash. § 4.20.046(1)-(2) (decedent’s causes of action survive his or her death (including for both economic and noneconomic damages) and the personal representative may maintain a cause of action for the benefit of statutory beneficiaries).

⁵⁰ See “Top 20 Wrongful Death Verdicts in California in 2019” (listing verdicts between \$4 million and \$60 million), available at <https://topverdict.com/lists/2019/california/top-20-wrongful-death-verdicts>; “Top 20 Wrongful Death Verdicts in Florida in 2017” (listing verdicts between \$3 million and \$45.005 million), available at <https://topverdict.com/lists/2017/florida/20-wrongful-death>. While the authors could not find any similar list of DOHSA verdicts, it must be the rare case where pecuniary damages reach to multiples of millions.

⁵¹ *Maa v. Carnival Corp. & PLC*, 2020 WL 5633425, at *8-9 (C.D. Cal. 2020) (citing *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1350 (9th Cir. 1987) (“DOHSA preempts state wrongful death law.”); *Dooley v. Korean Air Lines Co.*, 524 U.S. 116, 118 (1998) (DOHSA does not permit “recovery for the decedent’s pre-death pain and suffering . . . through a survival action under general maritime law”).

⁵² *Weissberger v. Princess Cruise Lines, Ltd.*, 2020 WL 3977938 (C.D. Cal. 2020).

⁵³ *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994).

⁵⁴ *Id.* at 547-548.

plaintiffs who are placed in immediate risk of physical harm by that conduct.⁵⁴

The plaintiffs in *Weissberger* sought only to recover under the second prong of the *Gottshall* test, alleging that they experienced a “near miss” in contracting COVID-19 sufficient to justify recovery for emotional distress damages. The court rejected this argument, holding it would lead to bizarre results: a passenger who was actually exposed to COVID-19 but did not manifest symptoms would be denied recovery under the first prong, but the same passenger could recover under the second prong by experiencing a COVID-19 “near miss.” The court also made clear that public policy supports this result. Allowing the plaintiffs’ fear-based claims to proceed, the court noted, would “inevitably” lead to a “flood of trivial lawsuits, and open the door to unlimited and unpredictable liability.”

While *Weissberger* is the only court decision on this issue so far, the lesson is clear. Under federal maritime law, the *Gottshall* test is likely to sink a plaintiff’s claim for emotional distress damages where the plaintiff did not test positive for, or experience the symptoms of, COVID-19.

III. Force Majeure Clauses and Impossibility or Impracticability Under COVID-19

Force Majeure clauses are contract provisions that excuse a party’s performance due to “Acts of God” or other unforeseen events that arise during the course of a contract beyond the party’s control. Like other contract provisions, Force Majeure clauses are typically construed strictly according to their terms.⁵⁵ In many contracts, force majeure clauses may have been considered boilerplate and largely overlooked. But the exact language used in force majeure clauses can be critical to whether they can be invoked during crises such as the COVID-19 pandemic, and courts have continued to strictly construe such provisions. If a party’s contract includes a Force Majeure clause that does not specifically include a “virus,” “pandemic,” or similar triggering event, but includes a catch-all provision such as “acts of God, or any similar cause beyond a party’s control,” a court will likely require that a party relying on such a clause show that a failure to perform its obligation is due to the alleged act of God.⁵⁶ And even if a contract specifies that a pandemic or virus serves as a Force Majeure, the existence of such an event does not provide carte blanche to a party to suspend its performance.⁵⁷ Though Force Majeure provisions invoking pandemics or viruses may have been rare prior to the COVID-19 pandemic, such clauses that included “government acts or orders” that were unforeseeable at the time the contract was negotiated may be invoked where such an act or order affects a party’s performance—for example, a travel restriction, restriction on large group gatherings, or border restriction that affects a cruise or shipping itinerary.

⁵⁵ See, e.g., *In re Hitz Rest. Grp.*, 616 B.R. 374, 377 (Bankr. N.D. Ill. 2020).

⁵⁶ See, e.g., *Future Street Limited v. Big Belly Solar, LLC*, 2020 WL 4431764 at *6 (D. Mass. July 31, 2020) (rejecting Force Majeure argument: “Even assuming *arguendo* that the pandemic and effects of same are a force majeure under the Agreement, Future Street has not shown that its failure to perform its obligations under the Agreement were caused by same”).

⁵⁷ See *Hotze v. Abbott*, 2020 WL 4048505, at *1 (S.D. Tex. July 19, 2020) (enjoining invocation of Force Majeure due to “twisted readings of the governor’s orders” where the parties had “agreed to amend the force majeure clause to include the epidemic and any order from the Mayor of Houston, Governor of Texas, or President of the United States that restricts the size of gatherings at Brown for health reasons.”).

Absent a contractual Force Majeure provision, both the Restatement (Second) of Contracts and the Uniform Commercial Code include provisions related to excusing a party's performance due to unforeseen circumstances outside the party's control. For sales of goods, Uniform Commercial Code Section 2-615 excuses a seller's performance where that performance is made "impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid."⁵⁸ For contracts other than the sale of goods, the Restatement similarly excuses performance that is rendered impracticable by either the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made,⁵⁹ or by the occurrence of a governmental regulation or order that renders performance impracticable.⁶⁰ The Restatement also excuses performance by a party whose principal purpose for a contract is "substantially frustrated" without his fault by the occurrence of a superseding event the non-occurrence of which was a basic assumption on which the contract was made.⁶¹

In the context of COVID-19, whether a non-performance was made impracticable by a government act or order is usually a clearer issue than whether performance was made impracticable by the pandemic. The prevalence of government shutdowns, travel restrictions, and limits on gatherings of people served to render performance of many contracts impracticable, if not impossible, during the early stages of the pandemic. Where such orders did not apply to a contract, whether impracticability excuses a party's performance will typically be heavily fact-dependent.

As COVID-19 continues to be part of reality for contracting parties, they may no longer be able to rely on non-contractual provisions in the UCC or common law that relate to unforeseeable events. Rather, parties entering into contracts now should specify whether disruptions due to COVID-19 (or another pandemic) affect the parties' rights and responsibilities, or excuse the parties' performance. After COVID-19 first emerged in China in late December and early January, some parties included pandemics in Force Majeure clauses that were eventually cited to release parties' obligations months later as the pandemic spread worldwide.⁶²

IV. Sailor Restrictions and Import Restrictions Under COVID-19

The surge of COVID-19 cases that led many countries to close their borders and order residents into lockdown also affected seamen aboard ships at the time those orders

⁵⁸ § 2-615. Excuse by Failure of Presupposed Conditions., Unif. Commercial Code § 2-615

⁵⁹ Restatement (Second) of Contracts § 261 (1981)

⁶⁰ Restatement (Second) of Contracts § 264 (1981).

⁶¹ Restatement (Second) of Contracts § 265 (1981).

⁶² James B. Stewart, "The Victoria's Secret Contract That Anticipated a Pandemic," *New York Times*, April 29, 2020. Available at <https://www.nytimes.com/2020/04/29/business/victorias-secret-sycamore-coronavirus.html>

went into place. The travel restrictions and lockdowns meant that many countries refused to let crew members leave their ships, even as their contracts expired and they were scheduled to disembark and return home, to be replaced by a fresh crew.⁶³ The patchwork of restrictions, mandatory quarantines, lockdowns, and limited itineraries still in place in the fall of 2020 has kept ships' crews in limbo.⁶⁴ And because of the difficulty of disembarking outgoing crews and embarking new crews, many crew members are signing on for extensions or new contracts, some of which are mandatory.⁶⁵

As of August, the Coast Guard reported more than 12,000 cruise ship crew members on ships in U.S. waters, down from more than 70,000 in May.⁶⁶ As of September, the International Transport Workers' Federation "estimated that 300,000 of the 1.2 million crew members at sea were essentially stranded on their ships."⁶⁷

Some countries and ports initially exempted ships' crews from quarantine requirements, then back-tracked on those exemptions when cases rose.⁶⁸ Cruise ship crews have likewise been stranded on board their ships, even as cruise ships remain empty of non-crew passengers.⁶⁹ Even when immigration and travel restrictions allow crews to disembark their ships, stringent requirements may further frustrate their attempts to return home. For example, the CDC enacted guidelines for the use of commercial travel for crew members disembarking from cruise ships.⁷⁰ Those guidelines require, at a minimum, 28 days without COVID or COVID-like symptoms on board the ship, plus other steps intended to mitigate the spread of pathogens.⁷¹

The initial shocks of the COVID pandemic caused a sudden drop in the volume

⁶³ Matt Apuzzo and Selam Gebrekidan, "Trapped at Sea by Covid-19 Lockdowns, Crew Members Plea for Help," *New York Times*, March 25, 2020. Available at <https://www.nytimes.com/2020/03/25/world/europe/coronavirus-ship-crews-trapped.html>

⁶⁴ Aurora Almendral, "Trapped by Pandemic, Ships' Crews Fight Exhaustion and Despair," *New York Times*, September 9, 2020. Available at <https://www.nytimes.com/2020/09/09/business/coronavirus-sailors-cargo-ships.html>

⁶⁵ Matt Apuzzo and Selam Gebrekidan, "Trapped at Sea by Covid-19 Lockdowns, Crew Members Plea for Help," *New York Times*, March 25, 2020. Available at <https://www.nytimes.com/2020/03/25/world/europe/coronavirus-ship-crews-trapped.html>

⁶⁶ *Id.*

⁶⁷ Aurora Almendral, "Trapped by Pandemic, Ships' Crews Fight Exhaustion and Despair," *New York Times*, September 9, 2020. Available at <https://www.nytimes.com/2020/09/09/business/coronavirus-sailors-cargo-ships.html>

⁶⁸ Aurora Almendral, "Trapped by Pandemic, Ships' Crews Fight Exhaustion and Despair," *New York Times*, September 9, 2020. Available at <https://www.nytimes.com/2020/09/09/business/coronavirus-sailors-cargo-ships.html>

⁶⁹ Morgan Hines, "12,000 crew members still on cruise ships in US waters months after COVID-19 pandemic shut cruising down," *USA Today*, August 8, 2020. Available at <https://www.usatoday.com/story/travel/cruises/2020/08/08/cruise-ships-us-have-12000-crew-members-amid-covid-19/5574288002/>

⁷⁰ "Technical Instructions for Mitigation of COVID-19 Among Cruise Ship Crew." Available at https://www.cdc.gov/quarantine/cruise/management/technical-instructions-for-cruise-ships.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fquarantine%2Fmanagement%2Finterim-guidance-no-sail-order.html

⁷¹ *Id.*

⁷² "COVID-19: Shipping data hints to some recovery in global trade," UNCTAD. <https://unctad.org/news/covid-19-shipping-data-hints-some-recovery-global-trade>

of ocean shipping. The drop in shipping volume continued at least into April, though began to recover in the third quarter of 2020.⁷² Shipping delays continue to occur as countries and ports that have re-opened to imports and exports tighten restrictions in response to outbreaks.⁷³

As ocean shipping continues to face headwinds due to uncertain conditions, parties relying on shipping services should carefully evaluate their contracts and the allocation of risk for delays, cancelled voyages, and other disruptions.

V. Class Action Securities Litigation Against Cruise Lines.

Cruise line executives and officers have special duties in communicating to corporate shareholders and the stock-trading public. But allegedly false or fraudulent statements on the impact of the coronavirus on specific cruise lines have placed three of those lines in hot water.

Under federal securities laws, officers and directors have a duty to provide accurate information regarding publicly traded corporations. An officer, director, or corporation that provides false or misleading information, to shareholders or to the public, may be vulnerable to a securities class action lawsuit under the federal Exchange Act.⁷⁴ Where an act or omission of a director or officer results in a fraudulent or deceitful inflation of the share price of a security, a class action may seek to recover lost value when the share price drops as a result of the discovery of the fraud.⁷⁵

To set out a claim, private plaintiffs must show “(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.”⁷⁶ Because fraud must be pled with particularity,⁷⁷ private securities class action pleadings are typically fact-intensive. The scienter element in particular means that generally, high-ranking officers of the corporation must have knowledge of the falsity of the statement, or intentionally stated false information.⁷⁸ Thus, class action claims for COVID-related misstatements will turn on what cruise line executives knew early during the pandemic, and what representations they made about the epidemic and their own policies, procedures, and actions based on that knowledge.

A set of shareholders filed suit against Norwegian Cruise Lines and two named

⁷³ See, e.g., Eric Kullsch, “COVID outbreak threatens to delay ocean, air shipments in Australia,” *Freightwaves*, August 5, 2020. Available at <https://www.freightwaves.com/news/covid-outbreak-threatens-to-delay-ocean-air-shipments-in-australia>

⁷⁴ 15 U.S.C. § 78(j)(b).

⁷⁵ 17 C.F.R. § 240.10b-5.

⁷⁶ *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 460–61, 133 S. Ct. 1184, 1192, 185 L. Ed. 2d 308 (2013).

⁷⁷ See Fed. R. Civ. P. 9(b).

⁷⁸ *S. Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 782 (9th Cir. 2008).

executives in a Florida federal court in March.⁷⁹ The plaintiffs allege that in early Norwegian issues a press release, attached to a securities filing, that the company was doing well financially despite the coronavirus, and that its financial performance would be strong over the long-term.⁸⁰ The release also discussed its procedures to protect guests and crew from the virus.⁸¹ The plaintiffs also cite a second release focusing on health and safety related to the virus.

But according to the complaint, internal instructions from Norwegian managers advised employees to tell customers to ignore risks related to the virus, falsely suggest certain cruise routes were safe from the virus, and that the company hid the financial impact of the virus.⁸²

Carnival Corporation also faces a securities suit in the same federal court.⁸³ The Carnival plaintiffs allege that Carnival represented in a securities filing that it had strong health and safety policies.⁸⁴ But a published news piece indicated that Carnival failed to protect passengers from the virus and continued to allow cruise departures despite knowing of COVID-19 on its ships.⁸⁵ Plaintiffs also allege that Carnival failed “to take timely action after being apprised of COVID-19 threats to its fleet and passengers.”⁸⁶ And quite seriously, the complaint alleges Carnival “may have misled shore officials by concealing those exhibiting COVID-19 symptoms before docking” in Australia.⁸⁷

Royal Caribbean faces the most recent suit, also pending in the United States District Court for the Southern District of Florida as well.⁸⁸ Here, the plaintiffs allege that even as the coronavirus was spreading outside of mainland China in early 2020, Caribbean underwent cancelled bookings around the world but represented to investors that its bookings were slowing down only in China.⁸⁹ Later, the virus allegedly spread on many of Caribbean’s cruise ships, leading to fatalities and personal injury suits, despite assurances to investors about Caribbean’s aggressive safety policies and representations that the virus would be contained.⁹⁰ Plaintiffs claim that over a series of later announcements offering belated cancellations and representations, Caribbean stock price dropped precipitously.⁹¹

These three cases all allege that stock buyers on the market bought cruise line stock in reliance that the prices accurately reflected the risks of COVID-19 based on truth-

⁷⁹ *Class Action Complaint for Violations of the Federal Securities Laws, Douglas v. Norwegian Cruise Lines et al.*, Case 1:20-cv-21107-RNS, Dkt. 1 (Mar. 12, 2020).

⁸⁰ *Id.* ¶ 18.

⁸¹ *Id.* ¶ 19.

⁸² *Id.* ¶¶ 22-28.

⁸³ *Complaint for Violation of the Federal Securities Laws, Serv. Lamp Corp. Profit Sharing Pln. v. Carnival Corp. et al.*, Case 1:20-cv-22202-XXXX, Dkt. 1 (May 27, 2020).

⁸⁴ *Id.* ¶ 27.

⁸⁵ *Id.* ¶ 40.

⁸⁶ *Id.* ¶ 41.

⁸⁷ *Id.* ¶ 44.

⁸⁸ *Class Action Complaint for Violation of the Federal Securities Laws, City of Riviera Beach Gen. Employ. Ret. Sys. v. Royal Caribbean Cruises Ltd. et al.*, Case 1:20-cv-24111-KMW, Dkt. 1 (Oct. 7, 2020).

⁸⁹ *Id.* ¶ 5.

⁹⁰ *Id.* ¶ 6. See also *infra*.

⁹¹ *Id.* ¶¶ 10-15.

ful representations of the companies, and then lost value of the stock they bought when the alleged truth of the extent of their knowledge of COVID-19 became public. The three cases also raise similar factual issues on the extent of knowledge of these businesses, as well as governments, on the early spread of the virus, and the actions taken by ship lines to limit or combat the virus.

Despite a recent order⁹² from the Centers for Disease Control and Prevention that cruise ships may run again with crew only and may take passengers when they show sufficient safety precautions, the industry is not likely to begin passenger voyages any time soon⁹³ with coronavirus resurging.⁹⁴ Regardless, cruise lines (or other stock-traded ship operators where crew may be exposed to the coronavirus) will likely be under exacting scrutiny regarding their procedures for combatting the virus. Further litigation may ensue even if they are in ship-shape.

VI. Conclusion.

Given the resurgence of the coronavirus around the world,⁹⁵ and the time it takes litigation to wind through courts (in part due to courthouse restrictions⁹⁶ caused by the coronavirus), these issues are only likely to mushroom and prevent headaches to shippers and cruise lines. Case law and decisions on these issues will have an impact on claims, particularly in the personal injury context where decisions by federal courts of appeals on the applicability of defensive maritime statutes could have binding effect on future actions.

Troubles may snowball the longer that sailors are forced to remain onboard ships and renew contracts for performance. And even short of direct appellate decisions, institutional actors like insurance firms, syndicates, investors, and ship operators are likely to start “pricing in” the costs of securities suits, force majeure issues, and protections for crew members from the coronavirus. The COVID-19 pandemic may have a negative impact on shipping for a significant time to come.

⁹² Cntr. for Disease Control & Prevention, *Framework for Conditional Sailing and Initial Phase COVID-19 Testing Requirements for Protection of Crew* (Oct. 30, 2020), available at https://www.cdc.gov/quarantine/pdf/CDC-Conditional-Sail-Order_10_30_2020-p.pdf.

⁹³ Roni C. Rabin, N.Y. Times, *Cruise Ships May Set Sail on Sunday, but Only With Crew* (Oct. 30, 2020), available at <https://www.nytimes.com/2020/10/30/health/covid-cruise-ships-cdc.html>

⁹⁴ Nick Triggle, BBC, *Covid: The second wave is here – but how bad will it be?* (Oct. 1, 2020), available at <https://www.bbc.com/news/health-54362994>.

⁹⁵ *Supra* n.94.

⁹⁶ See, e.g., U.S. Dist. Ct. for the N. Dist. of N.Y., *Response to COVID-19 (Coronavirus)* (last accessed Nov. 4, 2020), available at <https://www.nysd.uscourts.gov/covid-19-coronavirus> (collecting administrative orders impacting cases in a prominent federal court).

SAVING GENERAL-AVIATION AIRPORTS

Rebecca A. Mares¹ and Ryan D. Nichols²

Introduction—General Aviation Airports Are Essential Community Assets

General aviation, public-use airports (“General Aviation Airports”)³ are an economic engine and lifeline for many communities. There are over 5,000 General Aviation Airports in the United States, which is ten times the number of airports served by scheduled

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³ General Aviation Airports are described by the Federal Aviation Administration as: “Civilian airports that do not serve scheduled passenger service are typically known as general aviation airports. These airports usually serve private aircraft and small aircraft charter operations.” *General Aviation Airports: Part 139 Airport Certification*, FAA, U.S. DEP’T OF TRANSP., https://www.faa.gov/airports/airport_safety/part139_cert/airports-affected/general-aviation-airports/ (last visited Nov. 5, 2020). “The FAA Modernization and Reform Act of 2012 defines a general aviation airport as a public airport that is located in a state and that, as determined by the Secretary of Transportation, does not have scheduled service or has scheduled service with less than 2,500 passenger boardings each year.” FAA, U.S. DEP’T OF TRANSP., GENERAL AVIATION AIRPORTS: A NATIONAL ASSET 1 n.1 (2012), https://www.faa.gov/airports/planning_capacity/ga_study/media/2012AssetReport.pdf.

airlines, making these General Aviation Airports critical for small and rural communities.⁴ They are essential community assets, serving an important role for business aviation; serving as a hub for the transportation of food, medicine, supplies, and people to our cities, towns, and municipalities; and functioning as a training ground for the next generation of pilots, airframe and powerplant mechanics, schedulers, and dispatchers. General Aviation Airports also support disaster-relief activities, firefighting, and law-enforcement activities,⁵ and many of these airports play a strategic role in our national defense.⁶ General Aviation Airports, however, are closing rapidly across the country.⁷ This article discusses some of the compelling reasons why General Aviation Airports should be saved.

Historical Importance of General Aviation Airports

There are over 18,000 airports across the United States, making our airport network the most extensive aviation system in the world.⁸ These airports are broken down into multiple categories, ranging from large commercial airports enplaning more than 30 million passengers annually to small grass strips serving only a few aircraft each year.⁹

The airport system in the United States began development between the two World Wars, with the United States Postal Service starting its flights between Washington, D.C. and New York. This inaugural service led to “many in the aviation community ... think[ing] seriously about the possibility of developing a system which would enable the airplane to be used as a mode of transportation on the same scale as the railroad or the automobile.”¹⁰

The Air Commerce Act, passed in 1926, brought the federal government into the equation for both developing and regulating airports, and articulated the interplay between local government, federal government, and private industry.¹¹ It was the Works Progress Administration (WPA), however, that resulted in large-scale federal development and expansion of airports. The WPA, an agency created by President Franklin D. Roosevelt in 1935 as part of the New Deal, employed millions of people for purposes of carrying out public-works projects in the United States, including the development and expansion of airports. In fact, more than 800 airports were developed or expanded under the WPA,

⁴ *Economic Impact of General Aviation: Executive Summary*, ALLIANCE FOR AVIATION ACROSS AMERICA, <https://www.aviationacrossamerica.org/economic-impact/executive-summary/> (last visited Nov. 5, 2020).

⁵ *About the Alliance*, ALLIANCE FOR AVIATION ACROSS AMERICA, <https://www.aviationacrossamerica.org/about/> (last visited Nov. 5, 2020).

⁶ FAA, U.S. DEP’T OF TRANSP., REPORT TO CONGRESS: NATIONAL PLAN OF INTEGRATED AIRPORT SYSTEMS (NPIAS) 2019-2023 (2018), https://www.faa.gov/airports/planning_capacity/npias/current/historical/media/2019/NPIAS-Report-2019-2023-Narrative.pdf.

⁷ Barbara S. Peterson, *New Rallying Cry: Save the Small Airports*, N.Y. TIMES, Dec. 2, 2007, <https://www.nytimes.com/2007/12/02/nyregion/nyregionspecial2/02airportsnj.html>.

⁸ *History of Airports*, AVJOBS, <https://www.avjobs.com/history/airports.asp> (last visited Nov. 5, 2020).

⁹ *Id.*

¹⁰ Deborah Gwen Douglas, *The Invention of Airports: A Political, Economic and Technological History of Airports in the United States, 1919-1939*, at 1 (1996) (Ph.D. dissertation, University of Pennsylvania), <https://www.proquest.com/docview/304310374>.

¹¹ *Id.* at 4.

including some of today's most prominent commercial airports, such as LaGuardia Airport (LGA), Chicago Midway International Airport (MDW), Logan International Airport (BOS), Los Angeles International Airport (LAX), and Portland International Airport (PDX).¹² Each of these airports is responsible for serving many millions of passengers annually.¹³

The WPA was also responsible for the development or expansion of numerous General Aviation Airports, including Stinson Municipal Airport (SSF), the second oldest General Aviation Airport in continuous operation in the United States today; Hartford-Brainard Airport (HFD), one of the busiest General Aviation Airports in Connecticut; and Peter O. Knight Airport (TPF), previously Tampa's primary airport but since converted to a General Aviation Airport.¹⁴ Many General Aviation Airports created or expanded under the WPA, however, have been closed over the years, including Beltsville Airport in Beltsville, Maryland; Oxford Municipal Airport in Oxford, Mississippi; and Raleigh Municipal Airport in Raleigh, North Carolina.¹⁵

With the closure of each airport developed or expanded under the WPA, the United States loses a historical byproduct of a program that put millions back to work in critical years following the Great Depression. While some may not consider historical preservation a compelling reason in and of itself to save General Aviation Airports, historical preservation coupled with the benefits of General Aviation Airports, some of which are described below, is very much a compelling reason.

The Importance of General Aviation Airports in Serving Business Aviation

"Business aviation" refers to the use of general aviation aircraft for business purposes. General aviation aircraft are valuable business tools for a multitude of reasons, including elimination of the risk of commercial flight cancellation; the ability to freely discuss confidential information during flight; the ability to freely change travel itineraries; the ability to efficiently reach multiple cities for meetings in a single day; and, of particular relevance to this article, the ability to efficiently travel to remote locations, small towns, and rural areas that do not have commercial airline service, thereby saving valuable time of corporate executives and other individuals traveling for business purposes. To illustrate the scale of business aviation in the United States, in a recent year business aviation contributed \$150 billion to the United States' economic output and employed more than 1.2 million people.¹⁶

¹² *New Deal Category: Airports*, THE LIVING NEW DEAL, <https://livingnewdeal.org/new-deal-categories/infrastructure/airports/> (last visited Nov. 6, 2020).

¹³ *Passenger Boarding (Enplanement) and All-Cargo Data for U.S. Airports*, FAA, U.S. DEP'T OF TRANSP., https://www.faa.gov/airports/planning_capacity/passenger_allcargo_stats/passenger/ (last visited Nov. 6, 2020).

¹⁴ *New Deal Category: Airports*, THE LIVING NEW DEAL, <https://livingnewdeal.org/new-deal-categories/infrastructure/airports/> (last visited Nov. 6, 2020).

¹⁵ *Id.*

¹⁶ NATIONAL BUSINESS AVIATION ASSOCIATION, BUSINESS AVIATION FACT BOOK (2014 ed.), <https://nbaa.org/wp-content/uploads/2018/01/business-aviation-fact-book.pdf>.

As mentioned above, there are ten times the number of General Aviation Airports in the United States than those served by scheduled airlines. Due to this disparity, General Aviation Airports relieve tremendous pressure on commercial airports, as evidenced by the fact that general aviation aircraft flights account for just 4 percent of the total traffic at the busiest airports used by the commercial airlines.¹⁷ The widespread closure of General Aviation Airports, then, can create a negative domino effect felt by businesses and the ordinary commercial airline traveler alike; when General Aviation Airports close, more business aviation traffic must move to commercial airports, resulting in less efficient business travel to remote locations and wasted executive time; when more business aviation traffic moves to commercial airports, the commercial airports are forced to accept less commercial airline traffic; and when commercial airports are forced to accept less commercial airline traffic, the ordinary commercial airline traveler is presented with fewer flight options and possibly higher ticket prices.

From a business-aviation perspective, closure of General Aviation Airports affects far more than the individuals who fly in and out of such airports on general aviation aircraft: the closure of General Aviation Airports results in a loss of significant revenue to surrounding communities, and the community members may see adverse effects related to their own travel through local commercial airports.

The Importance of General Aviation Airports to the Pilot-Supply Pipeline

In recent years and particularly prior to the COVID-19 pandemic, the United States has suffered a shortage of pilots. According to the Federal Aviation Administration, there were 609,306 pilots in the United States in 2017, as compared to 609,737 in 2005.¹⁸ This lack of growth is troubling in light of the growing demand for air travel during the period. Former Boeing CEO Dennis Muilenburg was quoted in 2019 stating that the growing shortage of pilots represented “one of the biggest challenges” facing the airline industry.¹⁹ The pilot shortage similarly affected business aviation, as commercial airlines and businesses found themselves in fierce competition with one another to hire and retain pilots.

The pilot-supply pipeline is primarily served by the military and private flight-instruction providers. About 80 percent of the world’s primary flight training occurs in the United States,²⁰ and virtually all of the private flight instruction in the United States takes place at General Aviation Airports or private-use airports.²¹ As the closure of General Avi-

¹⁷ *Id.*

¹⁸ U.S. Civil Airmen Statistics, FAA, U.S. DEP’T OF TRANSP., https://www.faa.gov/data_research/aviation_data_statistics/civil_airmen_statistics/ (last visited Nov. 6, 2020).

¹⁹ Sam Meredith, *Boeing CEO Says a Global Pilot Shortage is ‘One of the Biggest Challenges’ Facing the Airline Industry*, CNBC, June 17, 2019, <https://www.cnbc.com/2019/06/17/boeing-ceo-says-global-pilot-shortage-is-one-of-the-biggest-challenges.html>.

²⁰ Steven Markhoff, *It Will Get Worse*, AVIATIONPROS.COM, August 20, 2020, <https://www.aviationpros.com/education-training/article/21144737/the-current-covid19-induced-aviation-industry-calamity-will-not-solve-the-worldwide-shortage-of-pilots-and-mechanics-it-will-get-worse>.

²¹ FAA, U.S. DEP’T OF TRANSP., GENERAL AVIATION AIRPORTS: A NATIONAL ASSET (2012), https://www.faa.gov/airports/planning_capacity/ga_study/media/2012AssetReport.pdf.

ation Airports results in the closure or relocation of any flight instruction businesses located at those airports, fewer flight instruction opportunities are available to aspiring pilots, thereby adversely affecting the pilot-supply pipeline.

While the shortage of pilots in 2020 has become somewhat allayed due to the COVID-19 pandemic, the problem will assuredly become prevalent again in the coming years. This reality underscores the importance of saving General Aviation Airports – flight instruction providers must have adequate space for facilities to train the United States' next generation of pilots.

The Importance of General Aviation Airports in Emergency Preparedness and Response

General Aviation Airports play a critical role in emergency preparedness and response, which is a key reason why numerous General Aviation Airports are included in the Federal Aviation Administration's National Plan of Integrated Airport Systems, making General Aviation Airports eligible for federal funding under the Airport Improvement Program (AIP). Wildfire preparedness and response is a textbook example of this social benefit of General Aviation Airports.

2020 was a historic year for wildfires in the United States, with over 4,000 wildfires having burned nearly 7.7 million acres as of October 1, 2020.²² Over 4 million acres burned across California alone; in terms of acres burned, 2020 was the worst year in California's history.²³ To illustrate the critical role General Aviation Airports play in wildfire preparedness and response, the following occurred in 2020 at General Aviation Airports in Santa Clara County, California: at San Martin Airport (E16), Cal Fire set up a helitack base to station between 9 and 12 helicopters, where such helicopters were used to carry fire retardant and water, and to transport firefighter crews, equipment, and injured personnel; and at Reid-Hillview Airport (RVH), tanks were deployed for helicopter fire-retardant refueling and used by Cal Fire helicopters, allowing the department to cut travel time and therefore save more homes, land, and wildlife.²⁴

The following are some other historical examples of critical roles General Aviation Airports have played in emergency preparedness and response: Virginia Tech/Montgomery Executive Airport in Blacksburg, Virginia served as the command-and-control center for hundreds of state and federal law enforcement personnel in the weeks following the April 16, 2007 shooting at Virginia Tech; New Orleans Lakefront Airport (NEW) in New Orleans, Louisiana played a pivotal role in the evacuation efforts of individuals fol-

²² KATIE HOOVERS & LAURA A. HANSON, CONG. RSCH. SERV., IF10244, WILDFIRE STATISTICS (2020), <https://fas.org/sgp/crs/misc/IF10244.pdf>.

²³ In photos: *Wildfires Burning in the West*, CNN, Oct. 23, 2020, <https://www.cnn.com/2020/08/14/us/gallery/western-wildfires-2020/index.html>.

²⁴ Amelia Walsh, *GA Airports: Cal Fire's Greatest Arsenal*, Aircraft Owners and Pilots Association, Aug. 27, 2020, <https://www.aopa.org/news-and-media/all-news/2020/august/27/ga-airports-cal-fires-greatest-arsenal>.

lowing Hurricane Katrina in 2005; and Cotulla-LaSalle County Airport (COT) in Cotulla, Texas served as a pandemic response base for aircraft dropping dog biscuits containing a rabies vaccine in an effort to immunize coyotes spreading rabies northwards.²⁵

Notwithstanding the clear social benefit related to the role General Aviation Airports play in emergency preparedness and response, there is still a strong push to close many of these airports. For example, Reid-Hillview Airport has been the ongoing target of closure attempts, and Santa Clara County officials have voted in favor of closing the airport with the desire to use its land for housing developments.²⁶ This emphasis on development is short-sighted, as once a General Aviation Airport closes, it is difficult, if not impossible to restore general aviation service to the same area again. While Reid-Hillview Airport is contractually obligated to remain open through 2031 pursuant to “grant assurances”²⁷ accompanying federal funding accepted under the AIP, many General Aviation Airports are not subject to such contractual restrictions on closing.

Making the Case to Save General Aviation Airports

Rather than closing, General Aviation Airports should be expanded and improved to serve the population growth of the communities that surround them. Millions of Americans have relocated this year alone, with estimates as high as “about a fifth of U.S. adults,”²⁸ as Americans are “relocat[ing] out of large urban areas.”²⁹ General Aviation Airports traditionally serve these rural communities and they will become increasingly important for telecommuters who live in rural areas and need to commute into the office and attend meetings. However, much like our divided national discourse, communities continue to divide over these General Aviation Airports, with those who want to maintain or reclaim the bucolic nature of their communities struggling to accept the activity that comes with increased aviation traffic.

²⁵ James Fielding Smith, *The Roles of General Aviation Airports in Disaster Response* (2010), <http://www.smith-woolwine.com/sitebuildercontent/sitebuilderfiles/airportstudy2010.pdf>.

²⁶ *Supervisors Vote to Close Reid-Hillview Airport in San Jose After 2031*, Bay City News, @NBCBAY AREA video at 1:11, Dec. 4, 2018, <https://www.nbcbayarea.com/news/local/vote-by-supervisors-may-mean-end-of-reid-hillview-airport-in-san-jose/201675/>.

²⁷ The Federal Aviation Administration describes “grant assurances” as follows: “When airport owners or sponsors, planning agencies, or other organizations accept funds from FAA-administered airport financial assistance programs, they must agree to certain obligations (or assurances). These obligations require the recipients to maintain and operate their facilities safely and efficiently and in accordance with specified conditions. The assurances may be attached to the application or the grant for Federal assistance and become part of the final grant offer or in restrictive covenants to property deeds. The duration of these obligations depends on the type of recipient, the useful life of the facility being developed, and other conditions stipulated in the assurances.” *Grant Assurances (Obligations)*, FAA, U.S. DEP’T OF TRANSP., https://www.faa.gov/airports/aip/grant_assurances/ (last visited Nov. 6, 2020).

²⁸ D’Vera Cohn, *About a Fifth of U.S. Adults Moved Due to COVID-19 or Know Someone Who Did*, PEW RESEARCH CENTER, July 6, 2020, <https://www.pewresearch.org/fact-tank/2020/07/06/about-a-fifth-of-u-s-adults-moved-due-to-covid-19-or-know-someone-who-did/>.

²⁹ Grant Suneson, *Lack of Jobs is Among Top Reason Americans are Exiting These Cities Across the U.S.*, USA TODAY, Aug. 4, 2020, <https://www.usatoday.com/story/money/2020/08/04/cities-americans-are-abandoning-for-new-jobs-careers/112604384/>.

Those in support of General Aviation Airport closures generally cite concerns regarding noise and pollution, and sometimes the desire to use the airport's land for a new purpose is a catalyst for their lobbying efforts. On the other hand, those in support of saving General Aviation Airports generally stress their view that General Aviation Airports are essential community assets, serving an important role for business aviation; serving as a hub for the transportation of food, medicine, supplies and people to our cities, towns and municipalities; and functioning as a training ground for the next generation of pilots, airframe and powerplant mechanics, schedulers, and dispatchers.

The proponents of General Aviation Airport closures face obstacles, such as discovering that federal funds accepted under the AIP may encumber an airport. While some grant assurances are perpetual and require the Federal Aviation Administration to approve closure of the airport, others are not, and the proponents of closure may decide to let the clock run on such grant assurances, closing the airport when they expire. General Aviation Airport allies, however, are often not willing to stand idly by, choosing to educate and inform the public about the benefits of General Aviation Airports; establish lines of communication and relationships with local, state, and federal officials who make decisions regarding the closure of General Aviation Airports; and, in certain cases, engage in legal battles in the courts. While some General Aviation Airport closure battles last for years, are highly publicized, and consume millions of dollars (e.g., Santa Monica Airport on the West Coast and East Hampton Airport on the East Coast), other General Aviation Airports close quietly due to lack of funding, awareness or interest.³⁰

Conclusion

General Aviation Airports continue to serve an important transportation function. Embracing, supporting, saving, and developing General Aviation Airports is critical for subsequent generations. The increasing migration of our population from urban areas to smaller towns and municipalities further justifies the need for preserving General Aviation Airports. Moreover, continued airport activity could be coordinated with school curriculum to develop our country's next generation of pilots, airframe and powerplant mechanics, schedulers, and dispatchers, all while preserving these airports as part of our national defense infrastructure. Finally, exciting new technological developments promise quieter, more environmentally friendly aircraft, and General Aviation Airports are fertile test beds for these projects.

General Aviation Airports are important national treasures that are critical to the transportation network of the country. Although their value is not always appreciated, General Aviation Airports are integral to U.S. supply chains and aviation infrastructure. Therefore, General Aviation Airports must be protected from destruction to serve future generations.

³⁰ Cynthia Schultz, *How to UnenDANGER Your Airport*, JDA JOURNAL, Mar. 5, 2018, <https://jdasolutions.aero/blog/how-to-unendanger-your-airport/>.

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