



News Release

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U.S. Supreme Court to Consider Airline Security Question in *Air Wisconsin Airlines Corp. v. Hoeper*

DRI-Voice of the Defense Bar Had Petitioned for Review Last October

CHICAGO – (June 17, 2013)—In a decision that responds favorably to a DRI amicus brief supporting the petition for a writ of certiorari, the U.S. Supreme Court has agreed to review an important federal preemption issue in *Air Wisconsin Airlines Corp. v. Hoeper*.

In the wake of the September 11, 2001 terrorist attacks, Congress enacted the Aviation and Transportation Security Act (ATSA) to overhaul and improve the safety and security of the nation's aviation system. Among other changes, ATSA transferred responsibility for assessing and investigating security threats from airlines to the federal government. At the same time, however, Congress recognized that airlines and their employees are uniquely positioned to acquire some of the most useful threat information. Accordingly, air carriers are encouraged and required to report relevant threat information promptly to the Transportation Security Administration (TSA).

To help ensure disclosure of all relevant threat information, Congress provided airlines and their employees with broad immunity from lawsuits. Borrowing considerably from language in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the statute strips immunity only for statements made "with actual knowledge that the disclosure was false, inaccurate, or misleading" or "with reckless disregard as to the truth or falsity of that disclosure."

Despite all of this, the Colorado Supreme Court upheld a \$1.4 million defamation verdict against an airline that made such a report just as Congress would have wanted. The plaintiff was a pilot for Air Wisconsin, and was also a federal flight deck officer, meaning that he was allowed to carry a TSA-issued firearm. He had failed three aircraft proficiency tests, and knew a fourth failure would result in his termination. In the fourth test, the plaintiff became very angry and accused the test administrator of "railroading the situation." The test administrator reported the confrontation to an Air Wisconsin

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manager. The manager called TSA a couple of hours later and reported that the plaintiff had been terminated from his job, there was concern about his mental stability, and that he might be armed.

In a 4–3 decision, the Colorado Supreme Court held that Air Wisconsin was not entitled to immunity under the federal statute and further held that the First Amendment did not protect Air Wisconsin from a defamation judgment. The Colorado Supreme Court did not independently assess whether Air Wisconsin's statements were true; instead, it deferred to the jury verdict, even though both ATSA and the First Amendment require an independent assessment.

The Court today granted the petition for a writ of certiorari “limited to the following question: Whether ATSA immunity may be denied without a determination that the air carrier’s disclosure was materially false.”

DRI brief author Jerrold J. Ganzfried said, "This case presents pivotal federal preemption issues in the context of statutory immunity under a program designed to protect national security. In granting review, the Supreme Court has taken an important step in setting the correct standards for assuring the efficient administration of TSA's role as assessor and investigator of possible security threats.

Jerrold J. Ganzfried and brief co-author Judith R. Nemsick of Holland & Knight, Washington, D.C., and New York City, respectively, are available for interview or for expert comment through DRI’s Communications Office.

For the full text of the amicus brief, click [here](#).

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