

Client Alert

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ATSA Immunity: Supreme Court Grants Cert to Decide Bounds for Applying Immunity Under the Aviation Transportation Security Act

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The Supreme Court granted certiorari yesterday to decide whether a court can deny immunity under the Aviation Transportation Security Act (ATSA) in a defamation case without first deciding whether an airline's report to the Transportation Security Administration (TSA) was true. *Air Wisconsin Airlines Corporation v. Hoeper*, No. 12-315, will be the first time the Supreme Court addresses the immunity conferred by ATSA, and the case could have long-lasting effects on security procedures for commercial air carriers and the aviation industry.

BACKGROUND

ATSA directs that air carriers and their employees with "information . . . about a threat to civil aviation shall provide the information promptly to the [TSA]." 49 U.S.C. § 44905(a). Failure to report can result in civil penalties. *Id.* § 46301(a)(1)(A). This policy has been aptly called "when in doubt, report." ATSA also provides air carriers immunity from civil liability for disclosure of suspicious activity, provided that the air carrier does not report information that it knows to be false or misleading. 49 U.S.C. § 44941(a)-(b).

Plaintiff William Hoeper was a commercial pilot for Air Wisconsin. Air Wisconsin required Hoeper to pass a proficiency test for piloting a new aircraft. Hoeper failed that test many times. On his final attempt at the proficiency exam, he became angry with the test administrators. Hoeper ended the test abruptly, raised his voice, and used profanity. One of the test administrators feared for his physical safety during this confrontation with Hoeper.

After Hoeper left the testing facility, Patrick Doyle, a manager at Air Wisconsin, learned about the confrontation: specifically, that Hoeper blew up and was "very angry." Doyle booked Hoeper on a flight back to his home in Colorado. Doyle never sought nor received additional information about the confrontation during the proficiency test, but he was aware that Hoeper was authorized to carry a firearm under the Federal Flight Deck Officer program.

Under the ATSA reporting mandate, and based on the information available to him, Doyle called the TSA to report Hoeper as a possible threat. Doyle informed the TSA that Hoeper was a disgruntled employee—a Federal Flight Deck Officer who might be armed, and stated that he was concerned about the whereabouts of Hoeper's weapon and about Hoeper's mental stability. In response, TSA removed Hoeper from the flight to Colorado and proceeded to search and question him regarding his firearm, which Hoeper had left at home. Hoeper was cleared by TSA officials and permitted to travel later that evening.

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PROCEEDINGS BELOW

Hoeper brought suit in Colorado state court against Air Wisconsin for defamation arising out of Doyle's statements to the TSA, alleging that Doyle's report to the TSA was false and defamatory. Air Wisconsin asserted that it was entitled to immunity as a matter of law under ATSA. After the trial court denied summary judgment on ATSA immunity due to the existence of disputed facts, a jury returned a \$1.4 million verdict in Hoeper's favor. The Colorado court of appeals affirmed.

Granting review, the Colorado Supreme Court held that ATSA immunity—like many other federal immunities—is immunity *from suit*, not just from damages. *Air Wisconsin Airlines, Corp. v. Hoeper*, ---P.3d---, 2012 WL 907764, at *4 (Colo. 2012). Accordingly, the court held that whether ATSA immunity applied should have been determined by the court as a matter of law, and not submitted to the jury. *Id.* Nonetheless, the Colorado Supreme Court did not reverse the lower court's judgment because it found this error harmless, holding "Air Wisconsin is not entitled to immunity under ATSA." *Id.* at *1, *3, *6.

The Colorado Supreme Court based this holding on its review of the factual record with deference to the jury's findings. In the court's view of the record, Doyle did not actually believe Hoeper "to be so unstable" that he might pose a threat to aircraft safety. *Id.* The court deferred to the jury's determination concerning falsity of Doyle's statements—limiting its review to "whether sufficient evidence supported" the jury determination that Doyle's statements were false. *Id.* at *10. Accordingly, the Colorado Supreme Court held that any error was harmless because ATSA simply did not confer immunity.

Justice Eid, writing for himself and two others, agreed that whether immunity applied was an issue for the court. He dissented, however, from the majority's conclusion that ATSA immunity was unavailable in this case: "The majority's conclusion . . . is contrary to federal airline safety protocols, which require the reporting of potential flight risks even when based on tentative information and evolving circumstances." *Id.* at *11 (Eid dissent). "At bottom, the majority's reasoning threatens to eviscerate ATSA immunity and undermine the federal system for reporting possible threats to airline safety to the TSA." *Id.* at *14. Accordingly, Justice Eid explained that public policy dictates that a court should not defer to the jury's finding concerning falsity, and instead should undertake an independent review of the record to determine whether ATSA immunity applies.

Justice Eid recognized that hindsight played a large role in the majority's conclusion: "It is easy for an appellate court to write a script for what Air Wisconsin should have said to the TSA after having the benefit of hours of trial testimony and ample time for appellate review and reflection." *Id.* at *15.

THE CERT. PETITION

Air Wisconsin petitioned for certiorari to the Supreme Court for review of two issues: (1) whether a court can deny ATSA immunity without deciding whether the airline's report was true; and (2) whether the First Amendment requires a reviewing court in a defamation case to make an independent examination of the record before affirming that a plaintiff met his burden of proving the statement was false.

The Supreme Court invited the Solicitor General to file a brief explaining whether the petition should be granted. In its brief to the Court, the Solicitor General recommended that the Court grant review to address ATSA immunity, recognizing that the Colorado Supreme Court's decision "may chill other air carriers from timely

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providing the government with critical information about threats to aviation safety.”

Yesterday, the Supreme Court granted review on a single question: “Whether ATSA immunity may be denied without a determination that the air carrier’s disclosure was materially false.” A decision is expected by the end of June 2014.

POLICY IMPLICATIONS

The Supreme Court’s decision will have important policy implications for aviation security and the airline industry. If the Court allows state law defamation suits based on airline reports to a federal agency to proceed to a jury without requiring that a trial court first determine whether the report was false, it will chill airlines from early reporting of potential security threats, undermining the entire purpose of ATSA’s immunity grant. The purpose of ATSA immunity is to ensure the exchange of information from airlines to federal agencies, and encourage air carriers to immediately report suspicious activity to law enforcement.

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