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TransLaw

Supreme Court Rules in Favor of U.S. Department of Transportation in Privacy Act Case

Christopher Perry

On March 28, 2012, the Supreme Court issued its decision in *Federal Aviation Administration v. Cooper*, 132 S. Ct. 1441 (2012), ruling in favor of the U.S. Department of Transportation (DOT) by a 5-3 vote. In so doing, the Court limited the circumstances under which a plaintiff may recover under the Privacy Act of 1974, 5 U.S.C. § 552a. The Privacy Act establishes a Code of Fair Information Practice that governs the collection, maintenance, use, and dissemination of personally identifiable information about individuals that is maintained in federal agency records. The case is noteworthy not only for DOT, but for other federal agencies and those involved in government practice. A contrary result would have opened the federal government to liability in a broad set of cases under the Privacy Act.

Background

The case arose out of a lawsuit filed in federal district court by the respondent, Stanmore Cooper. Cooper, a private pilot since the 1960s, was diagnosed with HIV in 1985. During the relevant period, the Federal Aviation Administration (FAA) did not issue medical certificates to persons with Cooper's condition. However, in 1994, Cooper applied for and received a medical certificate from FAA without disclosing his HIV status or medication. He renewed his certificate several times over the following decade, never advising FAA of his condition. In 1995, Cooper applied for disability benefits from the Social Security Administration (SSA) on the basis of his HIV status. SSA awarded him benefits from 1995 to 1996.

In 2002, DOT and SSA began a joint criminal investigation aimed at identifying individuals who had obtained FAA flight certifications despite being medically unfit. In the course of the investigation, DOT provided SSA with a list of names and other details for 45,000 licensed pilots in Northern California. SSA cross-checked DOT's list against its own list of benefits recipients, then shared its findings, in the form of a spreadsheet, with DOT.

This joint investigation revealed that Cooper had been receiving disability benefits while holding an FAA medical certificate. FAA flight surgeons later concluded that Cooper would not have been able to obtain his certificate if his HIV status were known. Cooper admitted to investigators that he had intentionally withheld the facts of his condition from FAA. Thus, FAA revoked his pilot certificate, and Cooper pled guilty to making and delivering a false official writing, in violation of 18 U.S.C. § 1018.

Cooper then filed suit under the Privacy Act, which contains various measures that Executive Branch agencies must follow in maintaining confidential records. Under the act, an individual may bring a civil action against an agency that fails to comply with these recordkeeping requirements, and where that failure has "an adverse effect on" the individual. 5 U.S.C. § 552a(g)(1)(D). The United States is liable for "actual damages" for violations that are "intentional or willful." *Id.* § 552a(g)(4)(A).

Cooper alleged that the agencies' sharing of his records violated the recordkeeping requirements of the act and caused him emotional distress. However, Cooper did not allege any economic harm.

The district court granted summary judgment against Cooper, concluding that the government had violated the terms of the Privacy Act, but nonetheless ruling that the act does not permit recovery solely for emotional injury. 816 F. Supp. 2d 778 (N.D. Cal. 2008). The Ninth Circuit reversed, concluding that the term "actual damages" in the act includes nonpecuniary harm. 622 F.3d 1016

PRIVACY ACT *continued on page 7*

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Chair's Corner

Hector O. Huezo

I thank you for your involvement, encouragement and support. Your recommendations, questions, and ideas make us a better section. I would also like to take this opportunity to thank Lindy Knapp, U.S. Department of Transportation (DOT) deputy general counsel, who will be retiring after 38 years of federal service. Lindy, who has been an invaluable advisor to 14 DOT secretaries and 16 general counsels, has supported the Transportation and Transportation Security Law Section over the years and has been a principal reason why our section has been so successful. It is with deep appreciation for Lindy's support of our section that we say "thank you" to such a great partner.

In terms of our section's activities, our board has been quite busy. Since the new section board took over, we have sponsored several events for our membership—including our Annual Legislative Update, a half-day Aviation Security Law Forum, and a Lawyers Luncheon on Regulatory Issues and Legal Perspectives on Airline Bankruptcies. We are currently in the planning stages for two upcoming Lawyers Luncheons that will prove to be informative and fun.

We hope that you continue to support and be involved in the Section this year. Please encourage your colleagues, both within and outside of the government, to join us and become active members in the Transportation and Transportation Security Law Section. See you at one of our upcoming events soon. ❖

Letter From the Editor

Alice Koethe

Please enjoy the latest edition of *TransLaw*, the newsletter of the Transportation and Transportation Security Law Section of the Federal Bar Association. I would like to thank the section's board for all of the work they have put into our recent programs. Also, a special thank you goes to Jenny Bosak and Sherwin Valerio of the Federal Bar Association for their wonderful work on our behalf!

In this issue, Christopher Perry writes about the recent Supreme Court decision in *Federal Aviation Administration v. Cooper*, 132 S. Ct. 1441 (2012). This decision addressed vital questions regarding the protections and remedies provided by the Privacy Act of 1974, which provides a detailed set of requirements for federal agencies' handling of confidential personal information. Specifically at issue was whether the definition of "actual damages," in the Privacy Act allowed for recovery based on non-economic damages.

Also in this issue, Thomas Lehrich provides a summary of the recent Aviation Security Forum held at the Transportation Security Administration's headquarters. This well-attended event provided an invaluable forum for updates on TSA policies and programs that affect air travelers in general, and the aviation industry in particular.

Finally, Section Chair-Elect Monica Hargrove discusses our March 2012 Brown Bag Lunch: Regulatory Issues and Legal Perspectives on Airline Bankruptcies. This event, which was very timely in light of the recent American Airlines bankruptcy, provided a comprehensive overview of the procedures followed by DOT and FAA in the course of airline bankruptcies. Representatives of airports also provided their perspective on the challenges faced by airports in the wake of such filings.

As always, I welcome suggestions and article ideas. Please contact me through Sherwin Valerio of the Federal Bar Association at svalerio@fedbar.org. Thank you! ❖

Recent Section Events Provide Networking and Educational Opportunities

Security Law Forum held at TSA
by Thomas Lehrich

On Feb. 28, 2012, the FBA Transportation and Transportation Security Law Section and the Transportation Security Administration (TSA) co-sponsored a legal forum on transportation security issues. The forum provided about 80 attendees the opportunity to hear about emerging issues in the transportation security arena, including TSA's Risk-Based Security (RBS) initiatives and First Amendment issues at airport checkpoints. TSA's Office of the Chief Counsel hosted the event, which was held at TSA Headquarters Town Hall in Pentagon City, Arlington, Va.

Margot Bester, principal deputy chief counsel for TSA, introduced the forum and welcomed attendees. Keynote speaker Robert Allison, federal security director (FSD) for Ronald Reagan Washington National Airport, shared his experiences with the implementation of RBS initiatives from an operational perspective. RBS reflects the belief that not all passengers pose the same level of risk, and that passenger security and convenience can be enhanced through the use of screening technology and voluntary information provision. TSA is pilot-testing a variety of new programs across the country. As Allison prepares for the implementation of the PreCheck program at Washington National Airport, he has visited different airports around the nation to observe RBS initiatives, and he shared his observations with attendees. Finally, Allison provided attendees with some general updates about area airports, and demonstrated a table overflowing with weapons and prohibited items recently confiscated by TSA at Washington National Airport.

The first panel was entitled "Risk-Based Security Initiatives." Panelists included Paul Leyh, general manager of TSA Commercial Airlines Division; Chris Bidwell, Airports Council International-North America's vice-president for security and facilitation; Rachel McGlynn, TSA Office of Security Operations; Randy Harrison, managing director of security, Delta Airlines; and Richard Davis, managing director of security for United Airlines. Matthew Webb, senior counsel for TSA's Enforcement Division moderated the panel. During this panel, the panelists provided an introduction to several RBS initiatives, most notably PreCheck and Screening Passengers by Observations Techniques (SPOT). In addition, the panelists provided perspectives on the benefits and advantages of the new initiatives.

During the second panel, speakers Kimberly Walton, special counselor to the administrator and to the deputy administrator of TSA; Amy Ruggeri, deputy chief counsel for litigation in TSA's Office of Chief Counsel; and Chris Calabrese, legislative counsel for the American Civil Liberties Union, discussed Constitutional Issues at the Airport Checkpoint. Thomas Lehrich, assistant chief counsel for TSA, moderated the panel. Walton started off by discussing TSA's outreach efforts, including DHS TRIP. DHS TRIP is a one-stop shop for redress for all DHS agencies and is the point of entry for passengers who believe that they have been incorrectly denied boarding, identified for additional screening, or subjected to unfair scrutiny at customs and immigration points in the country. Calabrese discussed the possible Constitutional issues raised by development and enforcement of RBS, and added to the discussion by discussing real and hypothetical scenarios. A lively debate ensued about the tension between the First Amendment rights of individuals and the Police power of the government.

Monica Hargrove, chair-elect of the Transportation and Transportation Security Law Section, gave brief closing remarks thanking attendees and recognizing the panelists, TSA staff, Federal Bar Association staff, and the Transportation and Transportation Security Law Section Board Members for their work in putting on the forum. ❖

EVENTS *continued on page 6*

At the first panel on Feb. 28—(l to r) Paul Leyh, Daniel Burche, Chris Bidwell, Rachel McGlynn, Randy Harrison, and Richard Davis.

At the Lunch Program on Mar. 27—(clockwise from top) Frank J. San Martin, Eric Smith, Monica Hargrove, Lauralyn Remo, Andrea Handel, and Hector Huezo.

The FBA's Transportation and Transportation Security Law Section Invites you to its May 2012 Lawyers Luncheon:

"FAA, TSA and NTSB Chief Counsels – Roundtable on Aviation"

The panel participants will include:

- **Kathryn B. Thomson**, Chief Counsel, Federal Aviation Administration
- **Francine Kerner**, Chief Counsel, Transportation Security Administration
- **Shannon Bennett,** Assistant General Counsel, National Transportation Safety Board

Tuesday, May 22, 2012
12:00pm – 1:00 pm
Conference Room 8-9-10
1200 New Jersey Ave., SE
Washington, DC 20590

Bring your brown bag lunch—beverages and cookies are provided.

To register, please email Jenny Bosak at jbosak@fedbar.org

Limited seating – Please register early
A call in number will be provided upon registration.

EVENTS *continued from page 4*

Lawyers' Brownbag Lunch Program on Airline Bankruptcies

by Monica Hargrove

On March 27, 2012, a lawyers' brown bag lunch program entitled "Regulatory Issues and Legal Perspectives on Airline Bankruptcies" was sponsored by the section and held at the U.S. Department of Transportation. The panel participants included Lauralyn Remo, chief of the Air Carrier Fitness Division of the Office of Aviation Analysis, DOT Office of the Secretary; Andrea Handel, trial attorney with the Department of Justice Civil Division, specializing in complex trial litigation, including airline bankruptcies; Frank J. San Martin, manager of the FAA Airports Financial Assistance Division in the Office of Airports, and Eric Smith, co-chair of the Aviation Group and member of both the Litigation Services and Business Services Departments at Schnader Harrison Segal & Lewis LLP. Monica Hargrove, chair-elect of the Transportation and Transportation Security Law Section, moderated the panel.

Hector Huezo, chair of the Transportation and Transportation Security Law Section, introduced the section and the FBA to an engaged audience of approximately forty attorneys. Hargrove provided an introduction for each of the panelists, and included information regarding each panelist's role in the case of airline bankruptcies. Remo began by providing an overview of the involvement of the DOT's Office of Aviation Fitness in the case of an airline bankruptcy. The airline typically notifies the department of its intent to file, or actual filing, of a bankruptcy petition, and the department evaluates the reorganization plan and monitors the continued fitness of the bankrupt air carrier. Handel shared information on the role of DOJ in representing interests of DOT in U.S. Bankruptcy Court proceedings involving airline bankruptcies. She also provided information on the statutory authority for the DOJ's involvement in such proceedings and shared unique experiences and practical insights regarding common legal issues with the attendees.

San Martin discussed the FAA's role in ensuring that air carriers in bankruptcy comply with federal requirements regarding Passenger Facility Charge (PFC) revenues. PFC revenues provide money for airport expansion, and they are included in the cost of an airline ticket. Once an airline declares bankruptcy, PFCs must be kept in a separate account. However, that legal requirement has not always been honored, and the FAA has a role in communicating and enforcing this obligation.

Smith discussed ways in which air carrier bankruptcies can impact airports. More specifically he addressed bankrupt air carriers' alternatives with respect to assuming or rejecting their use and lease agreements with airports, the impact of a decision to reject a use and lease agreement on facility availability at airports following an airline's filing for bankruptcy, the requirements for any new airline agreements entered during the bankruptcy between the airport and airline to be approved by the bankruptcy court, and the impact of a bankrupt airline's decisions related to aircraft leases on its continued operations, as well as the industry-wide adjustment in routes and markets following a carrier's declaration of bankruptcy.

Smith also identified other agreements that could impact airports following a carrier's entry into bankruptcy, including an airport's fuel consortium agreement in which the bankrupt carrier might have been a part owner, and special facility leases which could be treated by the bankruptcy court as contracts rather than leases and impair the airport's ability to make bond payments. Smith further addressed the issue of airlines attempting to list route authorizations as assets in bankruptcy proceedings.

The speakers provided handouts to give further background on the statutory and regulatory basis for their involvement in air carrier bankruptcy issues. ❖

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Signature of Applicant ***Date***

(Signature must be included for membership to be activated)

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PRIVACY ACT *continued from page 1*

(2010). The Ninth Circuit denied the United States' petition for rehearing or rehearing en banc. Judge O'Scannlain, joined by seven other judges of the Ninth Circuit, filed a dissenting opinion. The Supreme Court granted certiorari on June 20, 2011.

Sovereign Immunity

Writing for the majority, Justice Alito began his analysis by citing the principle that a waiver of sovereign immunity must be unequivocal in the statutory text. Ambiguous statutory language must be construed in favor of immunity. Thus, the issue to be decided was whether Congress had clearly waived the government's immunity in the terms of the Privacy Act.

As the Court explained, the act made the government liable for "actual damages," but the act contained no definition of that term. Thus, the Court had to resort to other tools of statutory construction. But "actual damages" had no single, unambiguous meaning. Instead, that term had been interpreted to mean different things in different contexts—sometimes including nonpecuniary harm, and in other instances, like the Federal Tort Claims Act, including only pecuniary harm. Given the "chameleon-like quality" of the term "actual damages" in other statutes, the Court could not simply "rely on an[] all-purpose definition," and instead, devoted its attention to the concerns underlying the Privacy Act itself. 132 S. Ct. at 1450.

The Court noted that the Privacy Act "serves interests similar to those protected by defamation and privacy torts," and that Congress likely "relied upon those torts in drafting the Act." *Id.* In dealing with privacy torts, it is important to recognize the distinction between "general damages" and "special damages." General damages include emotional and reputational harm and need not be specifically proved. By contrast, special damages stem from economic harms and must be specifically proved. Under the law relating to privacy torts like slander and libel *per quod*, a plaintiff can recover general damages only if he has also proved special damages.

Applying these principles, the Court concluded that Congress had intended "actual damages" in the Privacy Act to mean special damages, so that the plaintiff would have to prove economic harm before obtaining any recovery. Congress had decided not to provide for "general damages" in the Privacy Act, so it stood to reason that Congress only meant for plaintiffs to recover special damages for violations of the act. Under this interpretation, "[u]pon showing some pecuniary harm, no matter how slight," a plaintiff "can recover the statutory minimum of $1000, presumably for any unproven harm." *Id.* at 1451.

Although it recognized that its holding would limit the recovery available to plaintiffs under the Privacy Act, the Court ruled that it was "plausible to read the statute, as the government does, to authorize only damages for economic loss." *Id.* at 1453. This plausibility was sufficient to decide the issue in light of the strictures of the sovereign immunity canon. Furthermore, Congress could reasonably decide that the government should only be liable for harm that "can be substantiated by proof of tangible economic loss." *Id.* at 1455.

Preserving Privacy Concerns

Justice Sotomayor issued a dissenting opinion, joined by Justices Ginsburg and Breyer. The dissenting justices argued that the term "actual damages" simply refers to "compensat[ion] for actual injury, and thus the term is synonymous with compensatory damages." *Id.* at 1457. It was therefore unnecessary for the Court to concern itself with the majority's process of statutory construction; the term "actual damages" had a clear and sensible meaning.

Furthermore, the dissent contended, the majority's analysis failed adequately to account for the concerns underlying the Privacy Act. The purpose was "to prevent agency conduct resulting in intangible harms to the individual." *Id.* at 1458. To adopt the majority's conclusion would be to permit an odd result: a plaintiff could recover damages of $1000 for a minor economic injury, but would obtain no recovery at all for a severe emotional injury. It would be peculiar, the dissent argued, for Congress to have intended this result for cases under the act, which will typically involve emotional harm.

Maintaining Balance

The Court reached its decision by a bare majority, and Justice Kagan took no part in the case. As the majority and dissenting opinions demonstrate, the issues involved here are important and sensitive ones. On the one hand, Congress enacted a statutory scheme with various recordkeeping requirements for Executive Brach agencies to follow, and these requirements help to limit the dissemination of personal information. On the other hand, the government has a strong interest in ensuring that it does not open itself up to liability in ways that it did not intend. Balancing these objectives is a challenging task, and one that is likely to be of continuing interest to Congress, the courts, and the Executive Branch in the years ahead. ❖