: Vol. 27, no. 2: Table of Contents

TRANSPORTATION LAW JOURNAL

INDUSTRY LEADER IN MULTI-MODAL LAW, ECONOMICS & POLICY

# UNIVERSITY OF DENVER • COLLEGE OF LAW

## ARTICLES

Prevention of Controlled Flight into Terrain: Regulatory and Legal Aspects

An Owner's Guide to Avoiding the Pitfalls of Disputes Review Boards on Transportation Related Projects

A Carrier's Liability for Commercial Default and Default in Navigation or Management of the Vessel Ruwantissa I.R. Abeyratne

Daniel D. McMillan

Eun Sup Lee Seon Ok Kim

Gregory Peterson

David Glynn

### **COMMENTS**

The Intrinsic Flaws of Contemporary Railroad Nuisance Jurisprudence in Terms of the Public Good

Flying Hospitals: Coffee, Tea or Defibrillation?

The National Transportation Safety Board: How Should They Conduct Witness Investigations— The Need for a Privilege

Riding the Merger Wave: Strategic Alliances in the Airline Industry

INDEX

Case Name Index to Volume 26 Subject Index to Volume 26

VOLUME 27 • NUMBER 2 • SPRING 2000



Svetlana Mosin

Trowbridge Littleton



Transportation Law Journal, Vol. 27 [2000], Iss. 2, Art. 1



# UNIVERSITY OF DENVER COLLEGE OF LAW TRANSPORTATION LAW JOURNAL

The *Transportation Law Journal* is a major professional publication in the field of transportation law, and is dedicated to maintaining its position as a valuable working tool for the practicing bar, government, and the academic community. It addresses both domestic and international developments of legal, regulatory, economic and political interest in all modes of transportation—aviation/airports, motor, rail, maritime, aerospace, and pipelines, freight forwarders, and brokers.

The *Transportation Law Journal* is sponsored jointly by the Transportation Law Program of the University of Denver College of Law and the Transportation Lawyers Association, the largest bar association of its kind in the United States and Canada.

The *Transportation Law Journal* is published three times a year, summer, fall, and spring, by the students of the University of Denver College of Law. Fourth class postage paid at Lincoln, Nebraska, and at additional mailing offices.

Correspondence should be addressed to *Transportation Law Journal*, University of Denver College of Law, 7039 East 18th Avenue, Denver, Colorado 80220; (303) 871-6162. FAX: (303) 871-6165. E-mail: tlj@student.law.du.edu. Advertising rates are available on request.

Inquiries regarding submission of manuscripts for publication should be addressed to the Editor in Chief. All manuscripts are carefully considered by the Board of Editors, which reserves the right to make final publication decisions. Manuscript preparation instructions are available on request.

The opinions expressed herein do not necessarily reflect the views of the *Transportation Law Journal*, the University of Denver, or the Transportation Lawyers Association.

Cover design by Lee Corbin

#### SPECIAL ADJUNCT FACULTY

J. WADINE GEHRKE, B.A., J.D., Adjunct Professor of Clinical Law and Internship Liaison. JACQUELINE ST. JOAN, B.A., J.D., Clinical Visiting Professor and Director, Mediation Arbitration Center.

ROBERTA J. STEINHARDT, B.A., J.D., Clinical Visiting Professor. MARGARET E. WALKER, B.S., M.ED., J.D., Adjunct Professor of Clinical Law and Director, Student Law Office Civil Clinical Project.

#### ADJUNCT FACULTY

HAROLD O. BLOOMENTHAL, B.S., J.D., J.S.D., Adjunct Professor of Law.

WALTER C. BRAUER III, B.S., A.M., J.D., Adjunct Professor of Law.

WILLIAM T. DISS, B.S., J.D., Adjunct Professor of Law

THE HONORABLE WILLIAM F. DRESSEL, B.A., J.D., Adjunct Professor of Law and Judge, 8th Judicial District Court, Colorado.

DANIEL W. EDWARDS, B.A., J.D., Adjunct Professor of Law THE HONORABLE DAVID M. EBEL, B.A., J.D., Adjunct Professor of Law and Judge, Tenth Circuit Court of Appeals.

RICHARD D. GREENGARD, B.A., J.D., Adjunct Professor of Law

THE HONORABLE JOHN L. KANE, B.A., J.D., Adjunct Professor of Law and Senior Judge, United States District Court, Colorado.

DAVID S. KAPLAN, B.A., J.D., Adjunct Professor of Law THE HONORABLE HOWARD M. KIRSHBAUM, Justice, Supreme Court of Colorado & Adjunct Professor of Law

BRUCE MARKS, B.S., J.D., Adjunct Professor of Law THE HONORABLE DONALD W. MARSHALL, B.S., M.S.J.A., J.D., Adjunct Professor and Judge, 17th Judicial District Court, Colorado.

STEPHEN L. PEVAR, A.B., J.D., Adjunct Professor of Law

THOMAS RAGONETTI, A.B., M.R.P., J.D., Adjunct Professor of Law KAREN STEINHAUSER, B.A., J.D., Adjunct Professor of Law THE HONORABLE DANA U. WAKEFIELD, B.A., J.D., Judge, Denver Juvenile Court & Adjunct Professor of Law

MICHAEL O. WIRTH, B.S., M.A., PH.D., Chair, Mass Communications, University of Denver & Professor

BROOKE WUNNICKE, B.A., LL.B., Adjunct Professor of Law

#### LECTURERS IN LAW

STEPHEN D. ALFERS, B.A., J.D. GARRY R. APPEL, B.A., J.D. ANGELA R. ARKIN, B.A., J.D. STEVE ARMSTRONG, B.S., J.D. PATRICIA S. BANGERT, B.A., J.D. SETH J. BENEZRA, B.A., J.D. WILLIAM P. BETHKE, B.A., J.D. THEODORE A. BORRILLO, B.B.A., J.D., J.S.D. MARK H. BOSCOE, B.A., J.D. CONSTANCE E. BROOKS, B.A., J.D. LAIRD CAMPBELL, A.B., LL.B. THOMAS E. CARBONNEAU, B.A., M.A., J.D. PHILIP A. CHERNER, B.S., J.D. WILLIAM M. COHEN, B.S.M.E., J.D., LL.M. DAVID COX, B.S.B.A., M.S.B.A., J.D. DAVID R. DEMIRO, A.B., J.D. LINDA DONNELLY, B.A., J.D. JOSEPH M. EPSTEIN, B.A., J.D. THOMAS C. FOLSOM, B.S., J.D. ALAN J. GILBERT, SCB., J.D. MONICA S. GLICKMAN, B.A., J.D. HAROLD GOLZ, B.A., J.D. SETH A. GROB, B.A., J.D. J. SCOTT HAMILTON, B.A., J.D., LL.M. CAROL J. HARMON, B.A., M.A., J.D. ROBERT G. HEISERMAN, JR., B.A., J.D. NED HEPPENSTALL, B.A., J.D. GREGORY B. KANAN, B.A., J.D. Robert R. Keatinge, B.A., J.D., LL.M. GLENN E. KELLER, JR., B.S., J.D.

EUGENE KOZLOWSKI, B.A., M.A., PH.D. SCOTTY P. KROB, B.A., J.D. DAVID A. LANE, B.A., M.B.A. RICHARD W. LAUGESEN, B.A., J.D. RICK LEAMAN, B.A., M.B.A. HERRICK K. LIDSTONE, JR., A.B., J.D. DAVID LOCKWOOD, B.A., J.D. J. TRIPLETT MACKINTOSH, B.A., M.A., J.D. THE HONORABLE LAWRENCE A MANZANARES, B.A., J.D., Judge, Denver County Court DAVID MAZZARELLA, B.S., M.A., J.D., LL.M. JOAN H. MCWILLIAMS, B.S., M.S.J.A., J.D. GLENN W. MERRICK, B.A., J.D. ROBERT D. MILLER, B.S., M.D., PH.D. Richard L. Nathan, B.A., J.D. Myron H. Nordquist, B.S., J.D., J.S.D. TERRY O'NEILL, B.A., J.D. WILLIAM O'QUINN, B.S., J.D. LARRY S. POZNER, B.S., J.D. MICHAEL S. QUINN, B.A., J.D. GERALD J. RAFFERTY, B.S., J.D. MARCELINA RIVERA, B.A., J.D. GILBERT M. ROMAN, B.A., J.D. DONALD SALCITO, B.A., J.D. GORDON E. SCHIEMAN, B.S., B.A., J.D., LL.M. JAMES SERVEN, B.A., B.S., M.B.A., J.D. J. ALISON SHELTON, B.A., J.D. JOHN F. SHEPHERD, A.B., J.D. SHARI SHINK, B.S., J.D.

James W. Spensley, B.S., J.D. John D. Sternberg, B.A., J.D. Barry J. Swanson, B.A., Ph.D., J.D. Craig L. Truman, B.A., J.D.

LECTURERS IN LEGAL ADMINISTRATION CYNTHIA L. ACREE, B.A., M.S.J.A. TERI P. CAMPBELL, B.B.A., M.S.J.A. KIMBERLY L. CURTIS, B.S., M.S.J.A. EMERITUS LAW FACULTY

WILLIAM A. ALTONIN, A.B., J.D., LL.M.
WILLIAM M. BEANEY, A.B., LL.B., PH.D.
MURRAY BLUMENTHAL, B.M.E., M.A., PH.D.
JOHN A. CARVER, JR., A.B., LL.B., LL.D.
ALFRED J. COCO, B.A., J.D., M.L.L.
DANIEL S. HOFFMAN, B.A., LL.B.
JOHN PHILLIP LINN, A.B., M.A., J.D.

#### **ADMINISTRATIVE STAFF**

 BARBARA ALLEN, B.A., M.L.S.
 DONNA S. ELLIS, B.S., Financial Aid Director
 MARGARET FAIVER, Office Administrator, Student Services
 ANDREA FORREST, B.A., Career Counselor
 SALLY FRY, B.A., Chief Financial Officer
 SHEILA GREEN, B.A., M.A., Reference Librarian
 TANYA HAYNES, Publications and Planning Coordinator
 STEPHANIE HEAPS, Computer Center Supervisor
 HELEN JACOBSON, B.A., Career Counselor
 JOHANNA E. KELLY, A.B., Director of Development, Major Gifts

SUSAN K. MADISON, B.A., M.A.L.S., Head, Bibliographic Services

SALLY J. MARESH, B.A., M.A., J.D., Chief Operating Officer

#### STAFF AMICI UNIVERSITATIS

PHILIP E. GAUTHIER, Director of Alumni and Public Relations, University of Denver College of Law, 1972-91.

VELVIN GUIET, Bookstore Manager, University of Denver College of Law, 1974-88 Gaylord A. Virden, B.A., M.A., J.D. Arnold C. Wegher, B.M.E., LL.B., LL.M. John F. Welborn, B.A., J.D. Robert A. Zupkus, A.B., J.D.

Suzanne B. O'Neill, B.A., J.D., LL.M. Ronald L. Seigneur, B.A., M.B.A. Thaddeus J. Spack, B.A., M.A., M.S.J.A.

- THOMPSON G. MARSH, A.B., LL.B., M.A., LL.M., J.S.D.
- CHRISTOPHER MUNCH, B.S., J.D.
- EDWARD E. PRINGLE, J.D., LL.D.
- THE HONORABLE GREGORY KELLAM SCOTT, B.S., ED.M., J.D., Justice Colorado Supreme Court
- JAMES E. WALLACE, A.B., LL.B., B.D., Ph.D.
- LAURI A. MLINAR, Director of Events
- NANCY P. NONES, B.A., Administrator, International Legal Studies
- CATHERINE PABLICH, B.A., M.L.S., Head of User Services
- JOANNA PATRICK, B.A., Manager of Library Operations
- ANN POLUMBUS, B.A., M.A.T., Director of Alumni Relations
- ROBIN A. RICKER, B.S., Program Coordinator, Graduate Tax Program
- NANCY ROPER, Manager, Faculty Support Manager
- CLAUDIA L. TOMLIN, B.A., Director of Admissions
- MARY KATHLEEN WILDER, B.A., M.A., J.D., Director of Legal Writing Program

CHARLIEN E. RYAN, Assistant to Associate Dean, 1977-1991

IRMGARD K. VRAGEL, B.A., 1965, Registrar, University of Denver College of Law, 1981-87

# TRANSPORTATION LAWYERS ASSOCIATION

### **EXECUTIVE COMMITTEE MEMBERS**

### Officers

President	W. Robert Alderson
President-Elect	
First Vice President	Fritz R. Damm
Second Vice President	Robert E. McFarland
Secretary-Treasurer	Catherine Pawluch
Immediate Past President	Ann M. Pougiales

#### Representatives-at-Large

Wesley S. Chused Peter R. Corbin Francis A. Courtenay, Jr. R. Wayne Myles Kathleen C. Jeffries Brian J. Smith John R. Ruhl Michael Spurlock

CTLA Representative-at-Large Douglas C. McTavish

#### **Past Presidents**

August W. Heckman Phineas Stevens John E. Jandera Leroy Hallman Walter N. Bieneman Alvin J. Meiklejohn, Jr. James W. Hagar William J. Lippman John A. Vuono Charles Ephraim James C. Hardman Robert D. Schuler James M. Doherty Harold D. Miller, Jr. Wilmer B. Hill Frank W. Taylor, Jr. A. Charles Tell Richard H. Champlin Michael J. Ogborn Kim D. Mann Richard P. Kissinger David R. Parker Mark J. Andrews Edward J. Kiley Alex M. Lewandowski William D. Taylor David B. Schneider James F. Flint Ann M. Pougiales

# **TRANSPORTATION LAW JOURNAL**

Spring 2000

Editor in Chief AUDREY M. SIMON

Managing Editor BRIAN K. FURGASON Business Editor JOSEPH A. GUERRIERO

Articles Editors Melinda B. Barton Steven Gahlings

Technical Editor MATTHEW J. KAVANAGH Symposium Editor Cynthia J. McNabb

Associate Editor Brett D. Chardavoyne Jon D. Gans David W. Becker, Jr.

General Editor Howard D. Hurwitz Christopher Walker Todd Irwin

### Staff

Reid Betzing Kimberly A. Bruetsch Kenneth S. Chang Vichian Ford David Glynn Liesl Gormley Kristopher Gotzmer Peggy J. Hoyt Svetlana S. Mosin Peter Muccio Michael J. Schroeder Robin White Jesse Witt Robert Thomas Zentner

Faculty Advisor PAUL STEPHEN DEMPSEY

#### : Vol. 27, no. 2: Table of Contents



UNIVERSITY of DENVER

College of Law Transportation Law Program

To Prospective Law Students:

Transportation is an enormously important industry, an essential part of the nation's infrastructure of travel, communications and commerce. Transportation is a vast industry, accounting for 16% of the Gross National Product, with networks of airlines, railroads, trucking companies, busses, pipelines, barge lines and ocean vessels linking the far corners of the nation and the world.

The evolution of public policy in transportation, moving from regulation to deregulation, has made the practice of transportation law a dynamic, challenging arena, integrating principles of law and economics. The transformation of the regulatory landscape creates new opportunities for lawyers as transportation firms transform themselves into lean and aggressive market driven companies.

Few industries offer a young lawyer such a dynamic landscape of shifting law and policy, one filled with challenge and opportunity. The pages of the *Transportation Law Journal* reflects these dynamics.

The University of Denver's Transportation Law Program is the premiere such program in the United States. If transportation law is what you want to do, the University of Denver is the place to do it. If you are a prospective law student, write me, and ask for our catalog.

Sincerely Paul Stephen Dempse Professor of Law, and Director, Transportation Law Program

1900 Olive Street, Denver, Colorado 80220 303-871-6269 The University of Denver is an equal opportunity/affirmative action institution.



# DEN VERSITY OF COLLEGE OF LAW

Transportation Law Journal 7039 E. 18th Ave. Denver, CO 80220 303.871.6162 Fax 303.871.6165

Dear Subscriber,

This issue highlights many of the extraordinary changes and concerns in the transportation industry today. With the new millenium underway, new problems and issues relating to the industry are arising in the legal and business arena. These issues facing the practitioner and the client can be unsettling and confusing.

Keeping this in mind we bring you a compilation of articles and comments, which are timely and informative. This issue crosses many boundaries from railroad nuisance jurisprudence to the use of defibrillators on board commercial aircraft. In addition, we are proud to publish two Transportation Law Journal staff in this issue, Dave Glynn and Svetlana Mosin.

I wish to thank all the staff and Board who put countless hours into this issue. We are excited to bring you Volume 27:2 of the Transportation Law Journal. Thank you for your continued support of the TLJ. We hope you enjoy this issue.

truly yours mon

Editor-in-Chief

2

# **TRANSPORTATION LAW JOURNAL**

Volume 27	2000	No.
	Copyright © 2000 by the Transportation Law Journal	

# **TABLE OF CONTENTS**

## ARTICLES

Prevention of Controlled Flight into Te	errain:	
Regulatory and Legal Aspects	Ruwantissa I.R. Abeyratne	159
An Owner's Guide to Avoiding the Pit on Transportation Related Projects		
	Daniel D. McMillan	181
A Carrier's Liability for Commercial Default and Default in Navigation or Management of the Vessel		
· · · · · · · · · · · · · · · · · · ·	Eun Sup Lee Seon Ok Kim	205
COMMENTS		
The Intrinsic Flaws of Contemporary Railroad Nuisance Jurisprudence Terms of the Public Good		
	Gregory Peterson	223
Flying Hospitals: Coffee, Tea or Defit	orillation? David Glynn	247
The National Transportation Safety Bo Witness Investigations-The Need		
	Trowbridge Littleton	255
Riding the Merger Wave: Strategic A	lliances in the Airline Industry Svetlana Mosin	271
INDEX		
Case Name Index to Volume 26		287
Subject Index to Volume 26		291



#### Administrative Officers

DANIEL L. RITCHIE, M.A., M.B.A., Chancellor WILLIAM F. ZARANKA, Ph.D., Provost, Dean of Faculty NELL JESSUP NEWTON, B.A., J.D., Dean, College of Law CRAIG WOODY, Vice Chancellor for Financial Affairs/Treasurer CAROL FARNSWORTH, Vice Chancellor for Communication KEITH M. HARRISON, B.A., J.D., Associate Dean for Academic Affairs GARY L. ALEXANDER, B.A., M.L.L., J.D., Director, Westminster Law Library ANNE STARK WALKER, J.D., Director of Career Services FACULTY DAVID W. BARNES, A.B., M.A., PH.D., J.D., Professor of Law ARTHUR BEST, A.B., J.D., Professor of Law JEROME BORISON, B.S., J.D., LL.M., Associate Professor of Law BURTON F. BRODY, B.S.C., J.D., LL.M., Professor of Law J. ROBERT BROWN, JR., B.A., M.A., PH.D., J.D., Professor of Law PENELOPE BRYAN, B.S., J.D., M.A., Professor of Law FEDERICO CHEEVER, B.A., M.A., J.D., Assistant Professor of Law ALAN K. CHEN, B.A., J.D., Assistant Professor of Law ROBERTO L. CORRADA, B.A., J.D., Professor of Law EDWARD A. DAUER, A.B., LL.B., Dean Emeritus and Professor of Law PAUL STEPHEN DEMPSEY, A.B.J., J.D., LL.M., D.C.L., Professor of Law and Director, Transportation Law Program NANCY S. EHRENREICH, B.A., J.D., LL.M., Assistant Professor of Law MARTHA M. ERTMAN, A.B., J.D., Assistant Professor of Law ROBERT M. HARDAWAY, B.A., J.D., Professor of Law KEITH M. HARRISON, B.A., J.D., Associate Professor of Law and Associate Dean for Academic Affairs JEFFREY H. HARTJE, B.A., J.D., Associate Professor of Law SHEILA K. HYATT, B.A., J.D., Professor of Law FRANCIS W. JAMISON, B.A., J.D., Professor of Law and Internship/Externship Coordinator JAN G. LAITOS, B.A., J.D., S.J.D., Professor of Law and Director, Natural Resources Program HARRY O. LAWSON, B.A., M.S., Professor of Judicial Administration Emeritus NEIL O. LITTLEFIELD, B.S., LL.B., LL.M., S.J.D., Professor of Law Emeritus LUCY A. MARSH, B.A., J.D., Professor of Law VED P. NANDA, B.A., M.A., LL.B., LL.M., Thompson G. Marsh Professor of Law and Director of the International Legal Studies Program JULIE A. NICE, B.S., B.S., J.D., Assistant Professor of Law STEPHEN L. PEPER, A.B., J.D., Professor of Law GEORGE W. PRING, B.A., J.D., Professor of Law JOHN H. REESE, B.B.A., LL.B., LL.M., S.J.D., Professor of Law PAULA R. RHODES, B.A., J.D., Associate Professor of Law Edward J. Roche, Jr., B.B.A., J.D., Professor of Law Howard I. Rosenberg, B.A., LL.B., Professor of Law JOHN T. SOMA, B.A., M.A., J.D., PH.D., Professor of Law JOYCE S. STERLING, B.A., M.A., PH.D., Professor of Law CELIA R. TAYLOR, B.A., J.D., Assistant Professor of Law MARK A. VOGEL, B.B.A., J.D., LL.M., Associate Professor of Law and Director, Graduate Tax Program TIMOTHY B. WALKER, A.B., M.A., J.D., Professor of Law JAMES L. WINOKUR, B.A., LL.B., Professor of Law ROBERT B. YEGGE, A.B., M.A., J.D., Dean Emeritus and Professor of Law EDWARD H. ZIEGLER, JR., B.A., J.D., LL.M., Professor of Law