

# Criminal Law News



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## **'Safe harbour' mortgage loans in the United States**

### **Sally Ramage**

We already knew that the safe harbour for qualified mortgage loans did not protect lenders from common law and statutory claims that predated the ability to repay laws. In other words, those liabilities that existed prior to ATR laws continued to apply to QM loans. However, lenders believed that by originating QM loans they were protected from ATR claims. After last week, that may not be true.

### **Reference**

Editor, 'The QM Safe Harbor just became less 'safe'', *Origination News*, 24 June 2014  
<http://www.originationnews.com>

## **Americans killed deliberately by drone**

### **Sally Ramage**

A federal appeals court has released a secret Justice Department memo that justifies a 2011 drone attack that killed Anwar al Awlaki, an American-born Islamist preacher and suspected al Qaeda leader. The Second Circuit Court of Appeals released a *redacted version* of the secret Obama administration memorandum on Monday. The memo (which starts on page 67 after the opinion) states that since the U.S. government considered al Awlaki to be an 'operational leader' of an 'enemy force' it was legal for the Central Intelligence Agency to attack him with a drone even though he was a U.S. citizen. The memo says the killing was further justified under Congressional authorization for the use of U.S. military force following the Sept. 11, 2001 hijacked-plane attacks.

The Obama administration released the memo in response to a court order following Freedom of Information lawsuits filed by the American Civil Liberties Union and *The New York Times*.

'High-level government officials have concluded, on the basis of al-Aulaqi's activities in Yemen, that al-Aulaqi is a leader of (Al Qaeda in the Arabian Peninsula) whose activities in Yemen pose a 'continued an imminent threat' of violence to United states persons and interests' the document stated

Awlaki was killed in what US officials acknowledged at the time was a CIA drone strike in Yemen on September 30, 2011, *Reuters* reported. Another American citizen, Samir Khan, was killed in the same attack, although US officials have said that Khan was not intentionally targeted.

## **Aviation Accidents predicted in the United States**

### **Sally Ramage**

According to the Federal Aviation Administration ('FAA'), air travel is expected to double from the number in 2013 by the year 2033. As air traffic increases, so the risk increases that passengers will be involved in an aviation accident.

Although air traffic is considered to be a safe means of transportation, when accidents occur there are often fatalities by the mere fact of the speed of this method of transport. The media usually bring to the public many of the smaller, less serious accidents involving commercial aircrafts, but they rarely report on accidents involving small private aircrafts.

### **Causes of Plane Crashes**

Aviation has laws relevant to that means of transport and aviation accident law covers major air carrier and general aviation accidents. General aviation includes all non-commercial aircraft:

- (i) Small planes.
- (ii) Large business jets.
- (iii) Charter flights.
- (iv) Pleasure crafts.
- (v) Helicopters.

*(vi) Hang gliders.*

The most common causes of both major carrier and general aviation accidents include:

- (i) Pilot error.
- (ii) Faulty equipment.
- (iii) Federal Aviation Administration ('FAA') regulation breaches.
- (iv) Structural or design problems.
- (v) Negligence of Flight Service Station employees.
- (vi) Negligence of Federal Air Traffic Controllers.
- (vii) Negligence in a third party's selection of a carrier.

### **The FAA and NTSB**

Two federal agencies regulate air travel and investigate every aviation accident in the United States: The National Transportation Safety Board (NTSB) and the Federal Aviation Administration (FAA). The FAA sets safety standards for pilot conduct, flight operations, and aircraft manufacturers, and enforces FAA regulations through civil penalties or criminal penalties. The NTSB is responsible for investigating every civil aircraft accident and recommends safety standards to prevent future accidents.

### **Personal Injury Claims for Aviation Accidents**

Should one decide to pursue a legal claim after an aviation accident in the United States, the legally responsible parties can vary depending on the cause of the accident. The owner and operator of an aircraft certainly may be liable. Manufacturers or maintenance suppliers may be liable in certain circumstances. The federal government may bear some liability for an aircraft accident.

### **Complex aviation litigation**

Aviation litigation is complex. Such litigation involves many potential theories of liability under state, federal, and international law. There are a number of different courts in which a trial may take place. In order to hold someone legally responsible for an aviation accident, the injured person must prove that the person responsible failed to meet an industry standard related to operation of the aircraft,

engineering, or certain regulatory issues. While the circumstances of each aviation accident are always different, generally claims for personal injury or death resulting from an aviation accident are controlled by the legal theories of negligence, product liability, or a combination of the two. Because air travel is regulated by two federal agencies, federal rules and regulations may impact a personal injury claim or the standards of care owed to the victim of an aviation accident. Pilots, airline maintenance providers, and major airlines are among those subject to negligence<sup>1</sup> claims when an aviation accident occurs. Aviation litigation involves an analysis of state, federal, and potentially international law. There are numerous issues that will affect the outcome of aircraft litigation:

- (i) The parties that may be named as defendants.
- (ii) Questions of venue.
- (iii) Aviation engineering.
- (iv) Industry standards.
- (v) Federal government rules and regulations.

If a passenger has been killed in an aircraft accident, the family should contact an attorney who is experienced in this complex legal area.

### **Product Liability**

Product liability refers to the legal responsibility placed on manufacturers and sellers of defective products. If it can be proved that a defective product somehow contributed to an aviation accident, then product liability may allow recovery against the manufacturer or seller of the defective product. While pilot error usually plays some part in aviation accidents, mechanical problems with the aircraft or its component parts may contribute to the accident or the severity of the injuries suffered. In such cases, the manufacturer of the aircraft may share the legal blame with pilots for a crash and for any deaths or injuries caused by the accident the doctrine of strict liability.

### **Strict product liability**

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<sup>1</sup> Negligence is the legal term for the failure to do (or not do) something that a reasonable person would have done under the circumstances, in order to protect others from foreseeable risks of harm.

The doctrine of strict product liability enables one to sue manufacturers in product defect cases by switching the focus to the safety of the product, rather than the conduct of the person using the product. Manufacturers in a high-risk industry must design, manufacture and warn in accordance with the foreseeable risks of using their product. A strict liability claim against a manufacturer does not require proof that negligence caused the accident. In almost all states, in the United States, a victim can hold a manufacturer or seller strictly liable if it is shown that a defect in the product was a cause of the injuries.

### **Product liability law varies from state to state**

In several US states, a manufacturer may be held strictly liable for a defective product if the product is unreasonably dangerous for use by an ordinary consumer. Many US states now use a different analysis called a risk-benefit analysis in which a manufacturer may be held strictly liable if the product fails to perform as safely as an ordinary consumer would expect when used in a reasonably foreseeable manner.<sup>2</sup>

### **Three types of Strict Product Liability**

To establish strict liability in a product liability lawsuit, the injured person must show that:

- (i) The product was defective when it left the manufacturer or distributor's control.
- (ii) The product was used in the intended manner or a reasonably foreseeable manner.
- (iii) The product caused plaintiff's injury.

Strict liability can arise as a result of a defect in design or manufacture, or a failure to warn.

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<sup>2</sup> The risk-benefit analysis test requires the jury to decide if the risk associated with the design of the product outweighs the benefits of the design. In an aviation strict liability claim, the jury will decide whether there is an alternative, mechanically feasible design for the product that could have been implemented by the manufacturer at the time it was sold.

The focus is on the *state-of-the-art* at the time of manufacture.

### **Design Defect**

A design defect is one in which a whole product line or every product from a particular model is dangerously deficient.

This is where courts apply the *unreasonably dangerous test* or a combination of the consumer expectations and *risk-benefit test* to determine if the design is defective.

### **Manufacturing Defect**

If the manufacturer fails to produce the product correctly, a manufacturing defect may exist. This means that if the finished product is substandard in comparison with identical products in that product line, the manufacturer may be held liable for causing the anomaly and failing to catch the defect before the product was sold to a consumer.<sup>3</sup>

### **Failure-to-Warn**

If manufacturers fail to provide adequate warnings or instructions for use, they can be held strictly liable for failure to warn. There are two types of warnings: General instructions that accompany the product. A good way to look at this is that the instructions are a part of the product. If the instructions are ambiguous or insufficient, the product cannot be used safely (i.e. operating limits and weight limits). Specific warnings of a danger that the manufacturer knew or should have known about at the time of sale or discovered after sale. (Examples are-emergency procedures, placards in a cockpit, warning labels on equipment.)

Aviation claims against manufacturers of aircraft or component parts require a detailed understanding of aviation, FAA rules and regulations, and specific laws related to aviation. If you have suffered injury or the death of a loved one due to an aviation accident, contact an attorney with experience in aviation litigation.<sup>4</sup>

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<sup>3</sup> Manufacturing defects include the use of substandard materials, faulty assembly, etc.

<sup>4</sup> See more at: <http://injury.findlaw.com/torts-and-personal-injuries/product-liability-and-aviation-accidents.html#sthash.u3SOy6zB.dpuf>.

### **Owner or Operator Liability**

Aircraft owners and operators are held to high standards when it comes to the legal duty of care owed to others. If carelessness or recklessness can be proven, then the owner will be held liable for the damages suffered by injured parties -- including passengers, people on the ground, and even the pilot. Even if the owner was not operating the aircraft when the accident occurred, the owner may still be held liable under a legal theory called vicarious liability. This theory is similar to the way in which employers may be legally responsible for the actions of their employees in certain situations.

### **Manufacturer Liability**

The manufacturer of an aircraft can be held liable if the victim of an accident can prove that a defect in the product (the aircraft) or a component part caused his or her injuries, under a legal theory known as strict liability. It is important to remember that liability laws differ from state to state. (More on product liability in aviation accident cases).Liability of Owner/Operator and Manufacturer - Comparative Fault In many cases, both the pilot and the manufacturer may be held liable for an aviation accident. This raises a legal issue called "comparative fault," meaning that the judge or jury during trial must determine the percentage of liability attributable to each of the defendants. For example, a pilot may be 35 percent at fault for losing control of an aircraft, but a manufacturer may be 65 percent at fault for defective landing gear. Only a few states bar recovery from a manufacturer if the pilot's negligence contributed to a crash; most states use comparative fault and distribute the blame between the two parties.

### **Liability of the Federal Government**

A primary duty of the federal government is to control all air traffic. The FAA is ultimately responsible for this enormous function. If an aviation accident involves a collision or other avoidable navigation error, a key question is whether or not the FAA and air traffic controllers did their job correctly.



### **Common Carriers**

Commercial airlines fall under the legal classification of a "common carrier," because they hold themselves out to the public as willing to carry all passengers who buy a ticket. Common air carriers are held to different (usually more stringent) standards than are private carriers. The FAA is the principle federal agency responsible for regulating air carriers -- imposing uniform standards and operating procedures, and monitoring a carrier's internal standards. An understanding of complex FAA rules and regulations is necessary in order to be successful in bringing an aviation accident claim against a common carrier such as a commercial airline.

### **Compensation after injury or death through aircraft accidents**

The typical categories of recoverable damages in a personal injury claim arising from an aviation accident include:<sup>5</sup> past and future medical expenses; lost wages and lost earning capacity; past and future pain and suffering; emotional distress; loss of consortium/association; and punitive damages.<sup>6</sup> There is a lot at stake for air carriers and their owners, which may be why most commercial aircraft carriers that crash result in an investigation report that is unable to find cause of crash.

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<sup>5</sup> Any legal claim arising from an aviation accident requires a detailed understanding of aircraft function and safety, FAA regulations, and specific rules related to aviation litigation. If you have suffered injury or the death of a loved one due to an aviation accident, contact an attorney with experience in aviation litigation cases.

<sup>6</sup> Each jurisdiction will differ as to what damages may be recovered, and what proof is required for each category. Many states also impose caps on certain categories of damages, thereby limiting a potential recovery. An experienced aviation attorney can help you choose the best jurisdiction and present the damages properly.

## **Shale gas is in Scotland**

**Sally Ramage**

### **80 Trillion Cubic Metres of Shale Gas resources in Scotland**

The discovery that there is potentially billions of pounds worth of shale gas in Scotland was very welcome news for Scotland as it debates independence in the run-up to a referendum on the matter in September 2014. The Midland Valley of Scotland between Glasgow and Edinburgh may contain 6 billion barrels of oil, though only part of it would be practical to extract, the report said. The oil could expand the U.K.'s 3 billion barrels of proven oil reserves, which are mostly offshore of Scotland in the North Sea. The Scottish government said that the North Sea fields could provide enough oil to power the economy of an independent Scotland, but critics did not agree and claim that those reserves are declining and would leave the country vulnerable. Therefore this shale gas report is reassurance to investors who wish to explore for oil and gas onshore in Scotland.

Scotland's 80 trillion cubic meters of shale gas resources (about 2,800 trillion cubic feet) could cover the United Kingdom's gas needs for more than three decades, but represents just 6 % of Britain's potential reserves. Most of the gas resources are spread across northern England.

### **Fracking for shale gas in the UK**

The United Kingdom can attract investment in new energy sources and maintain the U.K.'s position as one of the world's great energy hubs. None of Britain's shale gas drillers have used hydraulic fracturing or fracking, the process used widely in the United States of injecting water, sand and chemicals into shale bedrock to break apart the rock and release oil and gas. Critics of shale gas say it damages the environment because of the chemicals used to extract it.

### **Legislation after government consultant on shale**

However, government has made much progress in the road to actual shale gas. On 23 May 2014, the Department of Energy and Climate Change published a consultation on proposals for securing underground access for the extraction of gas, oil or geothermal energy, and also issued the public with a factsheet about underground drilling.

### **Landowner consent bypassed for shale gas retrieval**

The government consultation will close on 15 August 2014. The aim is to simplify the current procedure for obtaining landowner consent to drill beneath private land in a move to assist the development of the shale gas and oil and deep geothermal industries.

Presently, access to underground land requires access rights to be agreed with every landowner where underground drilling is proposed, regardless of depth, on pain of trespass.

There is in place statutory process for seeking grant of access through the Courts, and this can be used with regard to shale gas, but this time-consuming process would delay exploration projects by several years. By this process one landowner could delay or induce changes to a project.

### **Suggested voluntary payment of 20,000 pounds for each pipe**

In the case of geothermal energy exploration there is no statutory access process. The government therefore resolves to obtain the right of underground access to land below 300 metres from the surface for companies involved in the exploration and production of petroleum and geothermal energy; and to establish a voluntary payment system to compensate affected communities with a lump sum of £20,000 for each unique horizontal well extending over 200 metres, accompanied by a voluntary public notification system to inform communities about the affected land and payment details. Payment under the voluntary system would be to a relevant community body rather than individual landowners.

This proposed new right of underground access does not depend on the developer having obtained all necessary planning and environmental permissions in order to commence drilling. However, companies will still need to obtain the permission

of landowners to gain surface access to drill down to 300 meters. The offer of 20,000 pounds should increase to 200,000 pounds per well drilled, as explained later in this article.

### **Industry suggested voluntary compensation system**

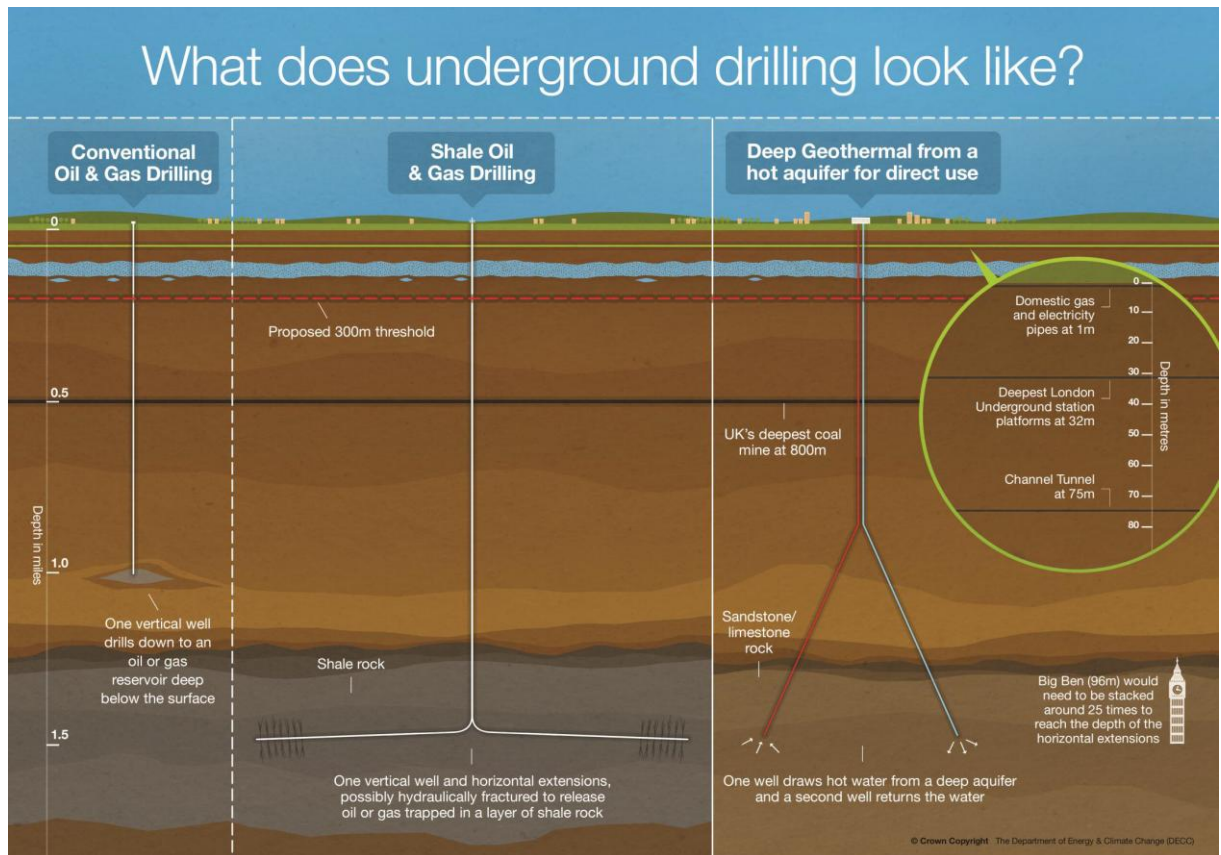
It was the gas industry that suggested this voluntary payment system. The industry suggested a payment of 20,000 pounds at a community level for *each unique lateral (horizontal) well* that extends by more than 200 metres laterally and where lateral drilling vertically coincides, payment will be made only once. The payments made will be at community level and therefore a community information system is to be set up. The community would be informed via a voluntary public notification, under which the company would outline matters such as the relevant area of underground land, coupled with details of the payment that will be made in return for the access. The compensation offered is because of the fact that most communication cables, oil and gas pipes, electricity cables and water pipes typically run only few metres underneath the surface. Even the London underground tube station system is just 32 metres (around 100ft) below the surface. Only deep coal mining some similarities to the extraction of shale gas and deep geothermal energy, and the issues met in deep coal mining during past decades have been considered when the gas industry developed its gas exploration policy. In South Wales where deep coal mining was extensive, buildings were often constructed using a floating foundation in case of soil erosion. The gas industry therefore incorporated policies for shale extraction which include industry liaising with local communities in an early stage comprehensive review of all Environment Risk Assessments (ERA). The industry declares that Industry has committed to engage with local communities prior to submitting any planning application that involves hydraulic fracturing in the case of oil and gas extraction. Geothermal developers have committed to engage with communities before drilling. Importantly, the industry says that, **prior** to a planning application being submitted; shale gas/oil companies will publish a notification and geothermal energy companies will write to the known landowners and publish a notification; to inform landowners/residents of their

intentions and provide an address for comments to be submitted .As is usual, following shale gas drilling permission submission and validation of the planning application, the planning authority will launch a period of public consultation, so this will act as a 'belt and braces' to ensure that all issues are clear and debated or objected to, as long as the community does its part in engaging with the local authority over this.

Industry has committed to engage with local communities prior to submitting any planning application that involves hydraulic fracturing in the case of oil and gas extraction. Geothermal developers have committed to engage with communities before drilling.

Shale oil/gas projects will probably require environmental permits and the Environmental Regulator will publish permit applications and seek public views on these. The environmental impact of proposed deep geothermal boreholes will often be assessed by the Environment Agency (in England) as part of the water abstraction licence. As part of this process the developer will engage with the local community so it will be up to the local community to read, enquire and object or request explanations and go to meetings as set up in this process.

The underground drilling has been sketched out as follows:



See the government website at

<https://www.gov.uk/government/consultations/underground-drilling-access/>

### **Statutory regulation for shale pipeline compensation may be necessary**

Government may decide to set in motion a statutory rather than a voluntary system for England, Scotland and Wales but not in Northern Ireland because petroleum and deep geothermal energy are transferred matters in Northern Ireland unless Northern Ireland agrees. The estimate is six years before bids for gas permits are possible.

### **Government consultation on access for underground drilling for Shale Gas**

According to the Department of Climate Change the consultation 'concerns the advancement of two industries that are at an early stage of development in the UK. The Government believes that shale gas and oil may have the potential to provide the UK with greater energy security, growth and jobs. Government and local authorities are also putting their support behind geothermal district heating networks as an important part of the transition to low carbon heating.' The consultation however does not involve issues of the granting of initial licence (Petroleum or Water Abstraction); planning permission from the relevant planning authority; permits from the relevant environmental regulator;; any scrutiny by the Health and Safety Executive -for Petroleum; or drilling consent from Government.

The hidden and as yet unaddressed issues in the shale gas opportunity, irrespective of the fact that its finality will result in Trillions of pounds of revenue for one or two gas companies and millions in taxes, are these:

1. The people of the UK should be offered much much more money than 20,000 pounds per gas well- they should be offered 200,000 pounds per gas well drilled due to the after-effects of the success of collecting the gas (transport increases; road wear and tear, noise, liability of explosions in the future, etc).
2. The "substance over form" way that this government is slickly treating people's protests is vacuous and ignorant because there will be misrepresentation of facts in legal and planning documents that will need an expert to notice and stop them.
- 3.\*There is design liability issues in pipelines drilled 300 metres underground. Examples are negligent misstatements; specification changes between plans shown to the lay communities and plans submitted to local authorities; revision of the gas exploration organisation's design; the use of unqualified persons in the areas of design; contract; inspection; engineering; collateral warranties;

contributory negligence; professional indemnity insurance; limitation of liability; limitation of actions in contract and in negligence and dispute resolution issues, which the writer thinks that a mere 20,000 pounds per well will not come close to addressing, as the local community in each case, needs a professional expert to assist them to understand and ensure that they are not being hoodwinked.

4.\* There is not even a full schedule of all minor earthquakes that have occurred across the United Kingdom, much less the address of any potential issue relating to Shale Fracking.

5. The present Coalition Government, on its website on "Underground Drilling Access" at

<https://www.gov.uk/government/consultations/underground-drilling-access> states that

"The Government believes that shale gas and oil may have the potential to provide the UK with greater energy security, growth and jobs."

6.\*One wonders whether the public good includes compulsory undertaking by the shale industry to employ only local people and supply them with training if necessary. The treasury revenue does not belong to John Doe in a community that one day will make millions of pounds for some investors scattered around the globe. And this is the knob of the people's protests about shale gas development: who will profit? Not the local community certainly- as the matter stands now. Pipelines being constructed will pose risks to those persons building it; to those who must maintain it and keep it clean. These risks might affect the health and safety of contractors and others working on the construction.

7. \*One wonders what horse-trade has gone on for the government to be so enthusiastic to the point of considering statute to force people to accept these pipelines. If a potential of trillions of pounds is at stake, one wonders if the government has thought to raising an extra environmental taxation from this industry player or players. One wonders if the government has considered that most of the cost of erecting these pipelines will be tax exempt as is the case at



present, this being 100% research and development costs- so the treasury will NOT gain one penny from it. The people must be told by the Government in very detained studies, exactly how much money will be raised in taxation from shale gas pipelines.

8. \* Corruption and conflict of interest is the consideration that follows.

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