

**RECENT DEVELOPMENTS IN  
AVIATION LIABILITY LAW**

*AVIATION INSURANCE  
ASSOCIATION  
ANNUAL MEETING  
MAY 2014  
TAYLOR ENGLISH DUMA LLP  
ATLANTA GEORGIA*

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**MONTREAL CONVENTION**

- "The Montreal Convention is not an amendment to the Warsaw Convention. . . . [It] is an entirely new treaty that unifies and replaces the system of liability that derives from the Warsaw Convention."
- Erlich v. American Airlines, Inc.*, 360 F.3d 366 (2d Cir. 2004)
- Entered into force more than ten years ago, November 4, 2003.

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**EXCLUSIVE CAUSE OF ACTION**

- Exclusive cause of action for all international carriage of cargo, including specialized cargo and storage at carrier's warehouse.
- Vigilant Ins. Co. v. World Courier, Inc.*, 2008 WL 2332343 (S.D.N.Y. 2008).
- Exclusive cause of action for delay preempts state consumer protection statute claims.
- Matz v. Northwest Airlines*, 2008 U.S. Dist. LEXIS 38614 (E.D. Mich. 2008).
- Montreal Convention is exclusive cause of action for personal injuries in disembarking an international flight.
- Schoeffler-Miller v. Northwest Airlines, Inc.*, 2008 U.S. Dist. LEXIS 93851 (C.D. Ill. Nov. 17, 2008).

MONTREAL CONVENTION

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### EXCLUSIVE CAUSE OF ACTION

"Embarking and disembarking" requires a "tight tie" between an accident and the act of entering or departing the aircraft, and claims for intentional infliction of emotional distress and invasion of privacy that occurred during "disembarkment" where not causally related to the disembarkment itself and therefore those claims were not subject to the Montreal Convention. In this case, plaintiffs luggage had been opened and a sex toy removed and then taped to the outside of the luggage as it was delivered at the baggage claim, resulting in the claims of intentional infliction of emotional distress and invasion of privacy.

*Bridgeman v. United Continental Holdings*, 2013 U.S. App. LEXIS 22373, 2013 WL 5881120 (5<sup>th</sup> Cir. 2014)

MONTREAL CONVENTION

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### VENUE

Article 33 defines venue in the following forums:

- (1) carrier's domicile;
- (2) carrier's principal place of business;
- (3) carrier's place of business where contract was made;
- (4) place of destination; and
- (5) in actions for personal injury or death to passengers, the principal and permanent place of residence of the passenger and in which the carrier conducts operations through premises owned or leased by it.

Montreal Convention, Article 33(1)(2)

MONTREAL CONVENTION

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### VENUE

For purposes of venue, the destination depends on the ticket and not on the particular flight. In the case of round trip tickets, the "destination" is the same as the point of departure.

*Razi v. Qatar Airways*, U.S. Dist. LEXIS 14680 (S.D. Tex. 2014).

MONTREAL CONVENTION

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### LIMITATION OF ACTIONS

The Montreal Convention limitation of actions starts to run at the time the passenger arrives at the destination. Theoretically, this means that for an "accident" on a flight that has not yet caused injury, the limitation period starts to run before the injury occurs. Nevertheless, the action must be brought within 2 years of the arrival at the destination. In a case involving a death six months after the arrival at the destination, a suit brought more than 2 years from the date of arrival at the destination, but within 2 years from the death, was barred.

*Narayanan v. British Airways*, 2914 U.S. App. 5173 (9<sup>th</sup> Cir. 2014).

MONTREAL CONVENTION

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### VENUE

This case involves the tension between venue under Montreal Convention and the interest in having "localized controversies decided at home." The case arises from a 2005 crash in Venezuela of an aircraft operated by West Caribbean Airways.

All decedents were residents of either France or Martinique, and all except one French citizens. A 2006 suit filed in Florida was dismissed based on *forum non conveniens*, even though Florida was proper venue under Montreal Convention. Court based its ruling on grounds that national law applies to procedural issues and *forum non conveniens* existed long before Montreal Convention.

*In re West Caribbean Airways*, 2012 U.S. Dist. LEXIS 74149 (S.D. Fla. 2012).

MONTREAL CONVENTION

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### VENUE

Plaintiffs then filed an action in Martinique, but challenged whether Martinique was an adequate alternative forum under French procedural rules.

French Supreme Court ruled that previously filed Florida action was a proper forum and that *forum non conveniens* was not available under Montreal Convention.

Martinique case was dismissed under French procedural law and dismissal was upheld by French Supreme Court.

*In re West Caribbean Airways*, 2012 U.S. Dist. LEXIS 74149 (S.D. Fla. 2012).

MONTREAL CONVENTION

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**VENUE**

Plaintiffs then sought review of prior *forum non conveniens* dismissal under Federal rule 60(b)

Federal District Court denied request for reconsideration based on French Supreme Court ruling:

U.S. Courts not bound by foreign treaty interpretation, rather than interpretation of their own statutes or law

U.S. Courts do not “blindly” accept foreign “blocking” statutes and laws in applying *forum non conveniens*

Plaintiffs’ claim of extreme hardship rejected because other decedents had litigated claims under French law. *In re West Caribbean Airways*, 2012 U.S. Dist. LEXIS 74149 (S.D. Fla. 2012).

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MONTREAL CONVENTION

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**VENUE**

Despite French Supreme Court ruling that plaintiffs could not be “stripped of their rights” to assert an action in all of the forums available under the Montreal Convention, federal district court ruled that “to now reverse course in response to . . . plaintiffs’ persistent efforts to undo the *forum non conveniens* dismissal would sanction plaintiffs’ disrespect of the lawful orders of the United States Court and encourage other litigants to engage in similar conduct.”

*In re West Caribbean Airways*, 2012 U.S. Dist. LEXIS 74149 (S.D. Fla. 2012).

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MONTREAL CONVENTION

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**VENUE**

Eleventh Circuit affirmed on grounds non-available forum was not raised in District Court in original case and no showing that extraordinary relief under F.R.Civ.P. 60(b)(6) was not appropriate.

*Galbert v. West Caribbean Airways*, 715 F.3d 1290 (11<sup>th</sup> Cir. 2013).

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MONTREAL CONVENTION

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## ACCIDENT

Fifth Circuit rejects a *per se* rule and adopts a flexible test for determining whether an alleged refusal to provide medical care and to follow airline procedures is not "unusual and unexpected" and therefore an "accident." In this case, the aircraft was within 10 minutes of landing and considerations of safety for all passengers were sufficient justification for alleged refusal to provide medical care (oxygen to breathing but unconscious passenger, and failure to follow procedures to seek assistance from other passengers or to divert for more immediate landing.

*White v. Emirates Airlines, Inc.*, 494 Fed.Appx. 526 (5<sup>th</sup> Cir. 2012).

MONTREAL CONVENTION

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## FOREIGN SOVEREIGN IMMUNITIES ACT

Absent a statutory or treaty-based exception to the grant of immunity, foreign states, their agencies, and instrumentalities are immune from suit in federal court. The Foreign Sovereign Immunities Act grants immunity "[s]ubject to existing international agreements to which the United States is a party at the time of the enactment of this Act." The FSIA recognizes an additional exception to the general grant of immunity if "the foreign state has waived its immunity either explicitly or by implication."

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## FOREIGN SOVEREIGN IMMUNITIES ACT

Under FSIA, federal courts have exclusive jurisdiction over the entire case. In this case, Boeing was sued in Illinois state court for claims arising from crash in Poland, and filed a third party claim against LOT Polish Airline, the national airline of Poland. The federal court held that supplemental federal subject matter jurisdiction provided jurisdiction over underlying claims as well under 28 U.S.C. section 13367(a).

*Marshall v. Boeing Co.*, 940 F.Supp.2d 819 (N.D. Ill. 2013)

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**FOREIGN SOVEREIGN  
IMMUNITIES ACT**

Court held that limited period of discovery was permitted to determine if immunity applied for attachment of property of a military character, rejecting argument that discovery was inconsistent with FSIA or would unduly burden the sovereign.

*Aero Union Corp. v. Aircraft Deconstructors Int'l LLC*, 2012 U.S. Dist. LEXIS 120276 (D.Me. 2012)

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**FOREIGN SOVEREIGN  
IMMUNITIES ACT**

Bell obtained default judgment on trademark claims against Iran for sale of helicopters that closely resembled Bell Helicopters. FSIA exception did not apply since helicopters could not be sold in the U.S. and financial harm from lost sales outside U.S. did not have "direct effect" in the United States. Hence, claim against Iran was barred by FSIA.

*Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 2012 U.S. Dist. LEXIS 136559 (D.Me. 2012)

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**FOREIGN SOVEREIGN  
IMMUNITIES ACT**

Passenger injured boarding Eurail train had purchased ticket from Massachusetts company. Austria is a part owner of Eurail, but agency was disputed and court held mere part ownership did not satisfy FSIA commercial activity exception.

*Sachs v. Republic of Austria*, 695 F.3d 1021 (9th Cir. 2012), vacated and rehearing *en banc* granted by *Sachs v. Republic of Austria*, 2013 U.S. App. LEXIS 1691 (9th Cir. 2013)

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**FOREIGN SOVEREIGN IMMUNITIES ACT -  
TERRORISM EXCEPTION AND DAMAGES**

The estates of 59 September 11 victims sought damages claiming that defendants had aided and abetted attacks, but Iran and Hezbollah claimed to be sovereign. Court observed terrorism exception was "sea change" in suits against state sponsors of terrorism and allowed the claims to proceed. Damages were based on a uniform federal standard rather than state or foreign law.

*Havlish v. bin Laden (In re Terrorist Attacks on Sept. 11, 2001)*, 2012 U.S. Dist. LEXIS 110673 (S.D.NY. 2012)

FOREIGN SOVEREIGN IMMUNITIES ACT

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**FOREIGN SOVEREIGN IMMUNITIES ACT -  
TERRORISM EXCEPTION AND DAMAGES**

The widows of two former Rwandan heads of state filed suit against current Rwandan president for deaths of their spouses when their aircraft was shot down over Rwanda. The United States submitted a recommendation of immunity on behalf of current Rwandan president. Despite FSIA, American courts had traditionally applied the doctrine of sovereign immunity when requested by the executive branch. Such a request is conclusive without reference to the claims.

*Habyarimana v. Kagame*, 696 F.3d 1029 (10th Cir. 2012).

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**AIR CARRIER LIABILITY**

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**FEDERAL PREEMPTION**

Based principally on the Supreme Court decision relating to the need for uniform federal regulation of air commerce in *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), and the rule of field preemption espoused in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), the federal circuit courts of appeals have recognized that the need for uniformity in aviation safety and regulation requires that federal law apply to determine the standards for aviation safety, operation and regulation.

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**FEDERAL PREEMPTION**

*French v. Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1989); *Goodspeed Airport LLC v. E. Haddam Inland Wetlands & Watercourses Comm'n*, 634 F.3d 206, 212 (2d Cir. 2011); *Abdullah v. American Airlines*, 181 F.3d 363 (3rd Cir. 1999); *Elassaad v. Independence Air, Inc.*, 613 F.3d 119 (3rd Cir. 2010); *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380 (5th Cir. 1999); *Greene v. B.F. Goodrich*, 409 F.3d 784 (6th Cir. 2005), *cert. denied*; *Montalvo v. Spirit Airlines*, 508 F.3d 464, 468 (9th Cir. 2007); *Martin v. Midwest Express Holdings, Inc.*, 555 F.3d 806 (9th Cir. 2009); *Gilstrap v. United Airlines, Inc.*, 709 F.3d 995 (9th Cir. 2013); *U.S. Airways, Inc. v. O'Donnell*, 627 F.3d 1318 (10th Cir. 2010).

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**FEDERAL PREEMPTION**

*Congressional Statements of Intent to Preempt the Field of Aviation*

v.

*Pervasive Federal Regulation of the Field of Aviation Evidencing Intent to Occupy the Field and to Displace State Regulation*

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### FEDERAL PREEMPTION

The Supreme Court decided that the comprehensive statutory scheme for railroad safety and design of railroad locomotives resulted in implied field preemption that precluded state regulation that impacted use of asbestos in railroad design. Once the intent to preempt the field is discerned *from comprehensive regulation*, the issue of preemption "depends upon the objects of the regulation, not the purpose of the regulation."

*Kurns v. Railroad Friction Products Corp.*, 132 S. Ct. 1261, 2012 U.S. LEXIS 1836 (2012). See also *Medco Energi U.S. v. Sea Robin Pipeline Co., LLC*, 2012 U.S. Dist. LEXIS 13359 (W.D. Pa. 2012)(if directed to same physical elements or objects, state law is preempted "however commendable or . . . different their purpose").

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### FEDERAL PREEMPTION

Unanimous Supreme Court decision that Federal Meat Inspection Act preempts California law which permitted nonambulatory animals that cannot be processed into meat within the slaughter house, to be "turned into meat" outside the regulated slaughterhouse. Despite savings clause, the full scope of federal regulation from express preemption results in field preemption, and savings clause is limited to state workplace safety regulations and local building codes.

*National Meat Assoc. v. Harris*, 132 S. Ct. 965, 2012 U.S. LEXIS 1062 (2012).

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### FEDERAL PREEMPTION

In the same term, the Supreme Court denied *certiorari* to the Fifth Circuit Court of Appeals from decision rejecting federal preemption of automotive restraint systems. The reasons were not stated, but indicate that not all state common law product liability claims are preempted in every instance in which a federal regulatory agency may have authority to regulate the design.

*Jones v. Mazda North American Operations*, 2012 U.S. LEXIS 1135 (2012), denying *cert.* to Fifth Circuit Court of Appeals.

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**FEDERAL PREEMPTION**

But, before we leave the recent Supreme Court preemption decisions, the Court decided another case this month. In *Northwest, Inc. v. Ginsberg*, 2014 U.S. LEXIS 2392 (2014) (Alito, J.), the Court upheld express federal preemption under the Airline Deregulation Act for claims against airlines relating to "rates, routes and services." In doing so, the Court did not address federal preemption of other areas of aviation safety and operation. From a historical standpoint, Justice Alito observed that before the ADA was enacted the airline industry was "regulated by both the federal government and by the states," based in part on the "savings clause," which Justice Alito referred to as a "relic" of pre-ADA law.

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**FEDERAL PREEMPTION**

*Kurns* and *National Meat Assoc.* should be considered in evaluating the continued vitality and analysis of recent aviation cases involving field preemption in aviation.

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**FEDERAL PREEMPTION**

In *Gilstrap v. United Airlines, Inc.*, 709 F.3d 995 (9<sup>th</sup> Cir. 2013), the Ninth Circuit Court of Appeals reaffirmed its preemption analysis in *Montalvo v. Spirit Airlines* and adopted what it referred to as the Third Circuit test of *Abdullah*, concluding that field preemption existed provided that Congress or the FAA had issued "pervasive" laws or regulations relating to the subject matter of the issue present in the case. This is consistent with *Kurns* and *National Meat Assoc.*, because the scope of the regulatory objects (rather than other indicia of Congressional intent to preempt the field) would be examined and would be dispositive in determining field preemption.

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**FEDERAL PREEMPTION**

In *McIntosh v. Cubcrafters, Inc.*, 2014 U.S. Dist. LEXIS 21491 (E.D. Wash. 2014), the district court concluded under *Gilstrap* that the FAA had enacted pervasive regulations relating to the design of Light Sport Aircraft ("LSA") by delegating that function to ASTM, which had promulgated detailed regulations on the "stall/spin characteristics of LSA aircraft." Thus, federal law provided "the standard of care as to design, test, and approval of the stall/spin characteristics, preempting any state standards."

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**FEDERAL PREEMPTION**

In an apparent about face from the decisions reported last year at this conference, the U.S. Dist. Ct. for the Southern District of California, in *Younan v. Rolls Royce Corp.*, having found the existence of state law failure to warn claims against the manufacturer MDHI, the court granted motions in limine excluding any evidence on state law standards based on implied federal preemption of the duty to warn under the *Gilstrap* analysis. The Court further granted motions in limine as to violations of federal regulations relating to reporting any continuing accidents to the FAA, but denied a motion in limine regarding reporting "defects" that "could result" in the occurrences specified in 49 CFR section 21.3(b).

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**FEDERAL PREEMPTION**

In *In re Air Crash Near Clarence Center, New York, on February 12, 2009*, the U.S. District Court for the Western District of New York, reaffirmed and refined its prior determination of federal preemption, by ruling that the "careless and reckless" standard of 49 CFR section 91.13 applied only to flight operations, and that claims for negligence in hiring, training, selection and supervision of pilots, while also preempted, where the subject of other applicable federal regulations.

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**FEDERAL PREEMPTION**

In *Agape Flights, Inc. v. Covington Aircraft Engines, Inc.*, 2012 U.S. Dist. LEXIS 94053 (E.D. Okla. 2012), the district court held that a claim of negligent overhaul of a component failed because the defendant “complied with all regulations and service requirements promulgated pursuant to the Federal Aviation Act of 1958,” relying on U.S. Airways, Inc. v. O’Donnell, 627 F.3d 1318 (10<sup>th</sup> Cir. 2010).

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**FEDERAL PREEMPTION**

In *Morris v. Cessna Aircraft Company*, 2011 U.S. Dist. LEXIS 137837 (N.D. Tex. 2011), the district court rejected field preemption based on lack of Congressional intent to preempt the field. Under *Kurns* and *National Meat Assoc.*, the scope of the regulatory objects (rather than other indicia of Congressional intent to preempt the field) would be examined and would be dispositive in determining field preemption.

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**FEDERAL PREEMPTION**

In *Vargas de Damian v. Bell Helicopter Textron, Inc.*, 352 S.W.3d 124 (Tex. Civ. App. 2011), the Texas Court of Appeals rejected field preemption based upon an inquiry into congressional intent. The court determined that federal certification was “not a pervasive regulatory scheme evidencing an intent . . . to preempt the field of aviation safety.” Again, under *Kurns* and *National Meat Assoc.*, the objects of the regulation are dispositive of field preemption.

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**FEDERAL PREEMPTION**

In *Lewis v Lycoming*, the U.S. District Court for the Eastern District of Pennsylvania criticized the Third Circuit's holding in *Abdullah*, and broke with the other district courts in the Third Circuit that had adhered to *Abdullah's* conclusion as to federal preemption of the field of aviation regulation of aircraft design, manufacture and certification. Instead of analyzing the objects of federal regulation or even the issue of whether the federal regulations were "pervasive" in the field at issue, the district court adopted Plaintiffs' argument that since Congress had enacted GARA, it did not intend to otherwise or further displace state tort law as to claims against aircraft manufacturers.

*Lewis v. Lycoming*, 957 F.Supp.2d 552 (E.D. Pa. 2013)

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**FEDERAL PREEMPTION**

Exclusion of FAA certification of allegedly defective part was not "plain error" that required judgment notwithstanding the verdict because FAA certification evidenced compliance with minimal federal standards and did not mitigate the manufacturer's responsibility under the theory of strict liability.

*Delacroix v. Doncasters*, 2013 Mo. App. LEXIS 42 (Mo.Ct. App. 2013).

EVIDENCE AND DISCOVERY

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**FEDERAL PREEMPTION**

Pending Kentucky (trespass), Florida (owner v. operator liability), and Georgia cases (owner v. operator liability), are examples of cases that may be impacted by the recent Supreme Court field preemption analysis.

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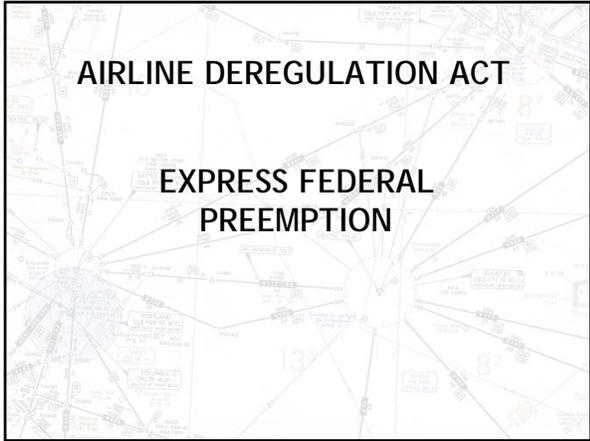
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**AIRLINE DEREGULATION ACT**

**EXPRESS FEDERAL  
PREEMPTION**

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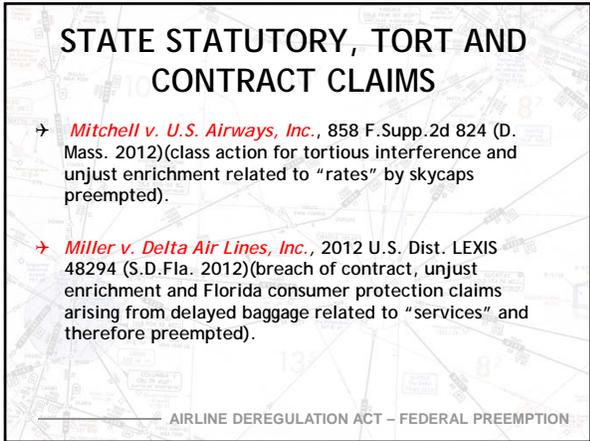
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**STATE STATUTORY, TORT AND  
CONTRACT CLAIMS**

- *Mitchell v. U.S. Airways, Inc.*, 858 F.Supp.2d 824 (D. Mass. 2012)(class action for tortious interference and unjust enrichment related to “rates” by skycaps preempted).
- *Miller v. Delta Air Lines, Inc.*, 2012 U.S. Dist. LEXIS 48294 (S.D.Fla. 2012)(breach of contract, unjust enrichment and Florida consumer protection claims arising from delayed baggage related to “services” and therefore preempted).

AIRLINE DEREGULATION ACT – FEDERAL PREEMPTION

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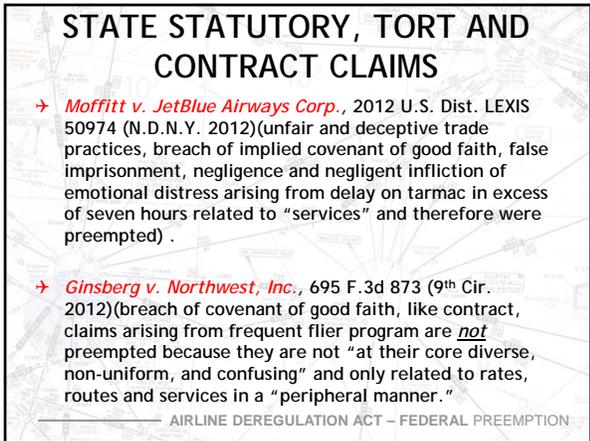
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**STATE STATUTORY, TORT AND  
CONTRACT CLAIMS**

- *Moffitt v. JetBlue Airways Corp.*, 2012 U.S. Dist. LEXIS 50974 (N.D.N.Y. 2012)(unfair and deceptive trade practices, breach of implied covenant of good faith, false imprisonment, negligence and negligent infliction of emotional distress arising from delay on tarmac in excess of seven hours related to “services” and therefore were preempted) .
- *Ginsberg v. Northwest, Inc.*, 695 F.3d 873 (9<sup>th</sup> Cir. 2012)(breach of covenant of good faith, like contract, claims arising from frequent flier program are not preempted because they are not “at their core diverse, non-uniform, and confusing” and only related to rates, routes and services in a “peripheral manner.”

AIRLINE DEREGULATION ACT – FEDERAL PREEMPTION

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### STATE STATUTORY, TORT AND CONTRACT CLAIMS

→ *Newman v. Spirit Airlines, Inc.*, 2012 WL 3134422 (N.D. Ill. 2012)(Illinois district court declined to follow *Ginsberg* in every case, because plaintiff alleged no specific contractual undertaking and therefore a claim for breach of implied covenant of good faith was related only to the price of the ticket and therefore to “rates” and was expressly preempted as an attempt to enforce state law and not a voluntary undertaking.)

AIRLINE DEREGULATION ACT – FEDERAL PREEMPTION

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### STATE STATUTORY, TORT AND CONTRACT CLAIMS

→ *Holmes v. Delta Air Lines, Inc.*, 2012 U.S. Dist. LEXIS 8732 (N.D. Ill. 2012)(slip and fall on a metal ladder was not preempted because Congress did not intend to preempt personal injury claims in ADA. Also Court found no conflict with federal law and no preemption of “the field of torts generally.”)

→ *Hamilton v United Airlines, Inc.*, 2012 U.S. Dist. LEXIS 179811 (N.D. Ill. 2012)(Whistleblower claims under state law for termination were only tenuously related to rates, routes and services and therefore were not expressly preempted under ADA, despite Whistleblower Amendment to ADA.)

AIRLINE DEREGULATION ACT – FEDERAL PREEMPTION

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### DISCRIMINATORY TREATMENT

*Edick v. Allegiant Air, LLC*, 2012 U.S. Dist. LEXIS 58924 (D. Nev. 2012)(Claims based upon failure to provide wheelchair assistance from parking garage to terminal were barred by Air Carrier Access Act of 1986 because parking garage was not under control of airline and no ADA obligation to provide such assistance beyond a terminal drop off point.)

AIRLINE DEREGULATION ACT – FEDERAL PREEMPTION

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**DISCRIMINATORY TREATMENT**

*O'Brien v. City of Phoenix*, 2012 U.S. Dist. LEXIS 144462 (D. Ariz. 2012) (claims of a legally blind passenger for fail when stepping off a jetway improperly aligned with the airplane did not state a federal cause of action even if preempted by ACAA and therefore removal was improper. The case was remanded to state court for determination of preemption. If preempted, then exclusive remedy was Department of Transportation. If not preempted, state law claims could proceed in state court.

AIRLINE DEREGULATION ACT – FEDERAL PREEMPTION

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**DISCRIMINATORY TREATMENT**

*Compass Airlines, LLC v. Mont. Dept. of Labor & Industry Hearings Bureau*, 2012 U.S. Dist. LEXIS 182438 (D. Mont. 2012)(Airline sought declaratory judgment that claims made to Montana Human Rights Bureau for alleged discrimination in boarding were preempted by ACAA. The district court held that passenger's state-based complaint of disability discrimination was preempted by ACAA, and there was no implied private cause of action for such violation.

AIRLINE DEREGULATION ACT – FEDERAL PREEMPTION

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**DISCRIMINATORY TREATMENT**

*Segalman v. Southwest Airlines*, 2012 U.S. Dist. LEXIS 153025 (E.D. Cal. 2012) (state law claims for negligence and violation of state disability laws arising from improper stowage and damage to mechanized wheelchair were preempted by ACAA because federal law provided explicit instructions on such duties)

AIRLINE DEREGULATION ACT – FEDERAL PREEMPTION

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### FAA AUTHORIZATION ACT OF 1994

- Manufacturer’s claims that motor carriers engaged in bribes and kickbacks that resulted in increased rates were preempted by the FAAA to the extent they were based on state consumer protection laws that paternalistically substituted such protections for the “rigors of the market.” However, civil claims for bribery and racketeering under state law had only tangential effects on consumer costs and fell on the “non-preemption side of the law” and were not preempted.

→ *S.C. Johnson & Sons, Inc. v. Transport Corporation of America, Inc.*, 697 F.3d 544 (7<sup>th</sup> Cir. 2012).

AIRLINE DEREGULATION ACT – FEDERAL PREEMPTION

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### 49 U.S.C. Section 44112

- Under Florida’s dangerous instrumentality doctrine, aircraft owner is vicariously liable for negligence of operator, regardless of lack of actual control or possession of the aircraft. Under 49 U.S.C. Section 44112, aircraft owners and lessors are only liable if in actual possession or control of the aircraft for injuries or damage to persons or property on the ground. Florida Supreme Court held that claims against owners and lessors for injuries of death to persons on board the aircraft without actual possession or control were not preempted by 49 U.S.C. Section 44112.

*Vreeland v. Ferrer*, 71 So.2d 70 (Fla. 2011), cert. denied sub. nom *Aerolease of America v. Ferrer*, \_\_\_ U.S. \_\_\_, \_\_\_ S.Ct. \_\_\_ (2012).

Florida’s dangerous instrumentality doctrine was also upheld in federal court in the case of *In re Air Crash Near Rio Grande, Puerto Rico*, 2012 U.S. Dist. LEXIS 46330 (S.D. Fla. 2012).

49 U.S.C. SECTION 44112 – FEDERAL PREEMPTION

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### 49 U.S.C. Section 44112

- A decision as to whether New Jersey owner liability and negligent entrustment claims were preempted by 49 U.S.C. section 44112 for death of aircraft occupants arising from mid-air collision was not required to overcome summary judgment motion because the court concluded that genuine issues of material fact existed as to whether the owner of one of the aircraft exercised actual control over the operation of the aircraft, in which case neither owner liability nor negligent entrustment doctrines would be required.

*In re Hudson River Mid-Air Collision*, 2012 U.S. Dist. LEXIS 25149 (D.N.J. 2012)

49 U.S.C. SECTION 4411– FEDERAL PREEMPTION

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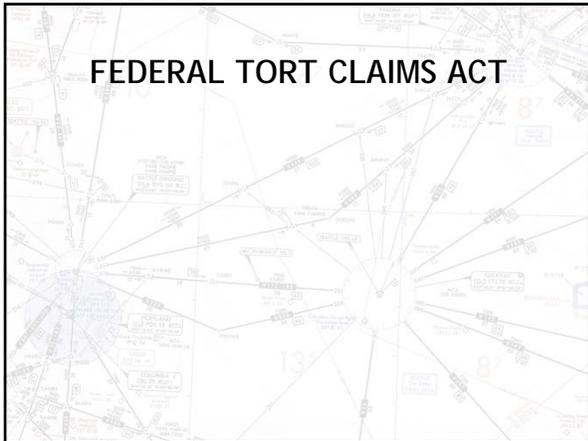
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**FEDERAL TORT CLAIMS ACT**



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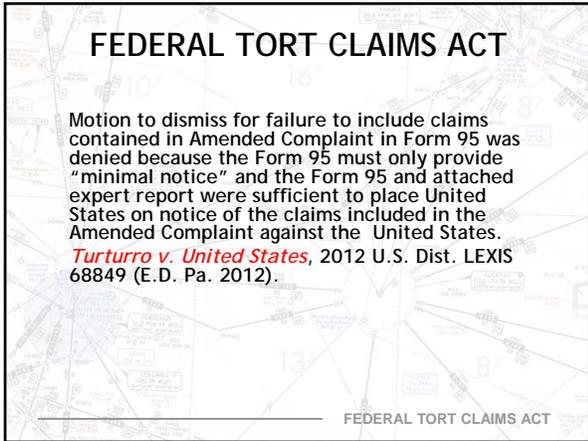
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**FEDERAL TORT CLAIMS ACT**

Motion to dismiss for failure to include claims contained in Amended Complaint in Form 95 was denied because the Form 95 must only provide "minimal notice" and the Form 95 and attached expert report were sufficient to place United States on notice of the claims included in the Amended Complaint against the United States.

*Turturro v. United States*, 2012 U.S. Dist. LEXIS 68849 (E.D. Pa. 2012).

FEDERAL TORT CLAIMS ACT



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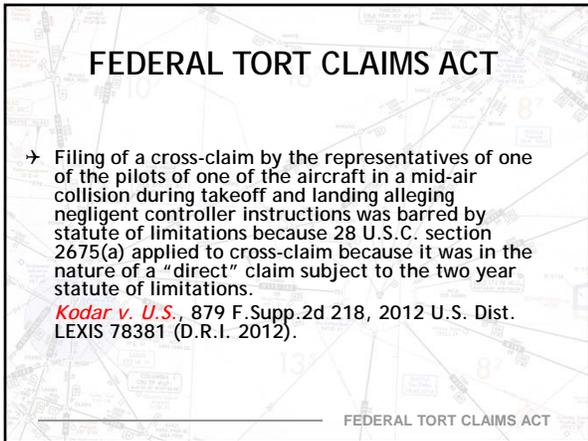
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**FEDERAL TORT CLAIMS ACT**

→ Filing of a cross-claim by the representatives of one of the pilots of one of the aircraft in a mid-air collision during takeoff and landing alleging negligent controller instructions was barred by statute of limitations because 28 U.S.C. section 2675(a) applied to cross-claim because it was in the nature of a "direct" claim subject to the two year statute of limitations.

*Kodar v. U.S.*, 879 F.Supp.2d 218, 2012 U.S. Dist. LEXIS 78381 (D.R.I. 2012).

FEDERAL TORT CLAIMS ACT



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**FEDERAL TORT CLAIMS ACT**

→ Claims mailed two years after the accident, but not received by the United States until 8 days later were barred by the two year statute of limitations . Court rejected argument that time started to run from the date of NTSB factual report and held that time started to run from the date of the accident.  
*Ressler v. U.S.*, 2012 U.S. Dist. LEXIS 134622 (D. Colo. 2012).

FEDERAL TORT CLAIMS ACT

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**FEDERAL TORT CLAIMS ACT**

Third party complaint filed by Teledyne against Forest Service *after removal* to federal court did not provide a basis for defeating plaintiff's motion to remand based on timing of removal before service on non-diverse defendant. The district court held that the issue of remand is to be determined by the *status of the pleadings at the time of removal*, and *post-removal third party complaint under FTCA against United States did not preclude remand*. The court rejected argument that if third party complaint had been asserted before removal, then removal by the United States would have been proper, as being based on speculative events "which have not occurred and may never occur."  
*Snider v. U.S.*, 2013 U.S. Dist. LEXIS 5750 (E.D.Pa. 2013).

FEDERAL TORT CLAIMS ACT

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**PRODUCT LIABILITY**

Flight Training

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### LIABILITY OF MANUFACTURER FOR TRAINING

→ Voluntary undertaking to provide “transition training” that included use of the autopilot by non-instrument rated pilots, created a duty to provide such training and evidence that this training component was not given the pilot precluded summary judgment. The issue of liability would be based upon the “reasonably prudent designer and manufacturer” standard. The court cautioned that the negligence claim should focus on whether the training was given, and not the “general quality of the instruction” or the “nuances of educational processes and theories.” The court also denied summary judgment on the manufacturer’s defense that the training had been delegated to an independent contractor. The court granted summary judgment on all other claims that the aircraft was unsafe or defective.

*Glorigen v. Cirrus Design Corporation*, 2008 U.S. Dist. LEXIS 10899 (D.Minn. 2008).

PRODUCT LIABILITY

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### LIABILITY OF MANUFACTURER FOR TRAINING

Minnesota Supreme Court affirmed a judgment as a matter of law in favor of defendant Cirrus Design Corp. The claims at trial were based on alleged failure to provide a lesson relating to recovery from emergency situations using the autopilot. The jury found Cirrus 37.5% negligent, UNDAF 37.5% negligent and the pilot 25% negligent. The Minnesota Court of Appeals reversed the denial of a motion for judgment as a matter of law holding that Cirrus, as the manufacturer did not have a duty to provide transition training and on the grounds the negligence claim was barred under Minnesota law by the “educational malpractice doctrine.” The Minnesota Supreme Court held that, regardless of whether under product liability or negligence, the duty to warn did not require providing the lesson at issue. The written instructions in the POH and the Autopilot Operating Handbook were accurate and thorough instructions. The remaining issues were contract claims which did not support tort damages and therefore it was not necessary to reach the “educational malpractice doctrine.”

*Glorigen v. Cirrus Design Corporation*, 816 N.W.2d 572, 2012 Minn. LEXIS 305 (Minn. 2012)

PRODUCT LIABILITY

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### LIABILITY OF SUCCESSOR MANUFACTURER FOR TRAINING

MD Helicopters, Inc. (“MDHI”), the successor to McDonnell Douglas Helicopter Systems (“MDHS”), acquired the Type Certificate, and also contractually assumed MDHS liabilities for post-acquisition accidents related to causes of actions based on notices to customers. The subject helicopter was operated by the Border Patrol and, as part of a response to GAO concerns regarding operational safety, MDHI provided training to the pilot. The pilot performed a “textbook autorotation,” but the helicopter was substantially damaged and the occupants injured. The pilot sued MDHI claiming the training was not adequate because it was performed in a lighter helicopter that did not replicate the performance of the subject helicopter. The district court held that the current Type Certificate holder had an ongoing duty to warn that included the cause of action for negligent training, and that expert testimony precluded summary judgment in favor of MDHI based on the “sophisticated user” defense.

*Yaunan v. Rolls Royce Corp.*, 2012 U.S. Dist. LEXIS 79318 (S.D. Cal. 2013).

PRODUCT LIABILITY

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### LIABILITY OF SUCCESSOR MANUFACTURER FOR TRAINING

In an apparent reversal of the recognition of state law failure to warn claims, the District Court granted MDHI's motions in limine on evidence and argument as to any state law failure to warn claims, based on the implied federal preemption of the duty to warn under the Ninth Circuit *Gilstrap* analysis. Under federal law, there is a duty to inform the FAA of accidents and defects of the type specified in 49 CFR sections 21.3, and the court concluded that these were "pervasive" regulations

The District Court held that the reporting requirements of 49 CFR sections 21.3(a) and 21.3(f) were satisfied as a matter of law, but denied motions in limine on reporting "defects" that "could" (even though they did not) result in one of the occurrences under 49 U.S.C. section 21.3(b), and would allow that issue to go to the jury to determine if adequate reports were made to the FAA.

*Younan v. Rolls Royce Corp.*, 2013 U.S. Dist. LEXIS 65136 and 72986 (S.D. Cal. 2013).

PRODUCT LIABILITY

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### LIABILITY OF MANUFACTURER FOR TRAINING

In an *Newman v Socata*, 924 F.Supp.2d 1322 (M.D. Fla. 2013), the District Court acknowledged the bar for "educational malpractice" claims under Florida law, but held that the alleged failure of the manufacturer during flight training to provide warnings of possible "torque roll" in the Socata turboprop were not barred by the "educational malpractice" bar. The District Court reviewed the conflicting lines of authority from other jurisdictions on whether such claims are barred under the educational malpractice, and concluded that such claims are not barred by the educational malpractice bar, at least in this case, because the policy considerations [of sovereign immunity and the difficulty of inquiring into "nuances of educational theories, policies, methods or curricula" "don't carry over into the flight training setting," and that the difficulties to determining causation and damages were not "daunting in the context of this case."

PRODUCT LIABILITY

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### LIABILITY OF MANUFACTURER FOR TRAINING

*Should the Court have considered the adequacy of warnings in the Pilots Operating Handbook as dispositive under FAA regulations?*

*Compare Glorvigen and Younan discussed above where the courts analyzed the duty based on the adequacy of the FAA approved Pilot Operating Handbook.*

*The Eleventh Circuit Court of Appeals has not yet adopted federal preemption of the field of aviation safety, even though several district courts have questioned the continued vitality of its earlier decision in the Dade County case decided during the early 1990s, in which it declined to do so.*

*Would this have been a good case in which to present the issue to the Eleventh Circuit Court of Appeals?*

PRODUCT LIABILITY

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### LIABILITY OF MANUFACTURER FOR TRAINING

In *Taylor v. Honeywell*, 2012 U.S. Dist. LEXIS 147384 (N.D. Cal. 2012), the District Court recognized strict liability and negligence claims alleging that the Flight Management System ("FMS") had been defective resulting in a low approach in IMC conditions, necessitating a missed approach at low altitude. The flight crew briefly saw the water of San Francisco Bay below them at 315 feet before executing the missed approach. The crew diverted to another airport where they made an uneventful landing under visual conditions.

The District Court denied the claims, however, on the grounds that the "emotional distress" alleged was nothing more than what pilots are trained to do as a part of their standard instrument flight training.

Once again, does this suggest that manufacturers may defend on the grounds that they have provided the information required under the FAA regulations and then pilots are then expected as a matter of law to use that information as they are trained to do.

PRODUCT LIABILITY

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### LIABILITY OF FLIGHT SCHOOL FOR TRAINING

→ The Illinois Court of Appeals affirmed a summary judgment in favor of a flight training facility in a claim alleging a generalized failure to provide training in engine out landings to a qualified and experienced multi-engine pilot experienced in another make and model twin engine aircraft. The court based its decision on the "educational malpractice defense," following both Seventh Circuit authority that predicted that the Illinois Supreme Court would reject educational malpractice claims and other recent cases rejecting such claims from other states. Since the claims alleged that the instructor was negligent in training the pilot to fly the aircraft and therefore would require an "analysis of the educator's conduct" and therefore sounded in educational malpractice and were barred.

*Waugh v. Morgan Stanley & Co.*, 966 N.E.2d 540, 2012 Ill.App. LEXIS 133 (Ill. App. 2012).

PRODUCT LIABILITY

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### PRODUCT LIABILITY - LIABILITY AS MANUFACTURER

In *Sikkelee v. Precision Airmotive Corp.*, the Pennsylvania district court held that the engine manufacturer could be held liable under a product liability theory for alleged defects in replacement component parts. The court rejected a determination of liability based on Rest. 3d Torts, section 20 definition of a "non-manufacturing designer," but held that under Pennsylvania *Althus* test of five factors, Lycoming owed "a duty of reasonable care in the design of the accident aircraft's carburetor and the warnings associated with it.

*Sikkelee v. Precision Airmotive Corp.*, 2013 U.S. Dist. LEXIS 77698 (M.D. Pa. June 3, 2013).

GENERAL AVIATION REVITALIZATION ACT

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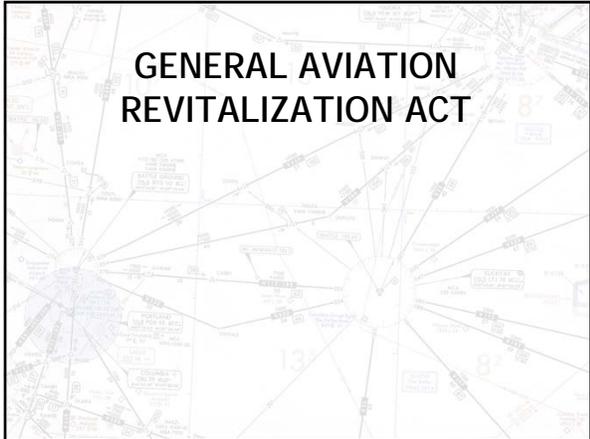
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**GENERAL AVIATION  
REVITALIZATION ACT**

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**PRODUCT LIABILITY - LIABILITY OF  
MANUFACTURER AS SELLER OF REPLACEMENT  
PARTS**

In *Garcia v. Wells Fargo Bank Northwest, N.A., Trustee*, the district court held that GARA does not bar strict liability claims against a manufacturer *as a seller*. The aircraft manufacturer sold a replacement component part to an overhaul facility to be installed in the accident aircraft. The district court held that the sale of the part was merely "incidental to the manufacture of the aircraft." Additionally, the Florida statute of repose does not bar claims against manufacturer that sells components manufactured by other manufacturers, even though claims arising from manufacture of the aircraft itself were barred by Florida statute of repose.

*Garcia v. Wells Fargo Bank Northwest, N.A.*, 2011 U.S. Dist. LEXIS 143900 (S.D.FI. 2011).

GENERAL AVIATION REVITALIZATION ACT

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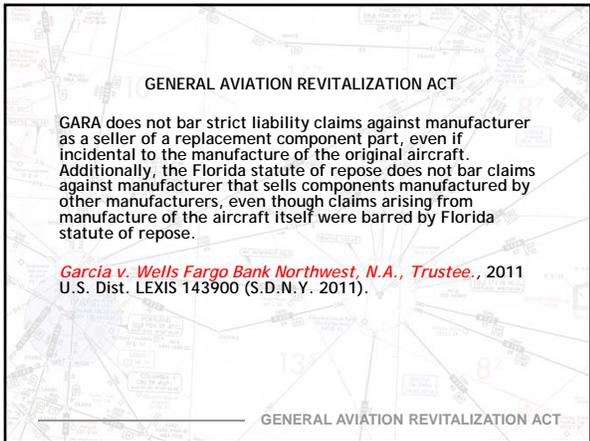
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**GENERAL AVIATION REVITALIZATION ACT**

GARA does not bar strict liability claims against manufacturer as a seller of a replacement component part, even if incidental to the manufacture of the original aircraft. Additionally, the Florida statute of repose does not bar claims against manufacturer that sells components manufactured by other manufacturers, even though claims arising from manufacture of the aircraft itself were barred by Florida statute of repose.

*Garcia v. Wells Fargo Bank Northwest, N.A., Trustee.*, 2011 U.S. Dist. LEXIS 143900 (S.D.N.Y. 2011).

GENERAL AVIATION REVITALIZATION ACT

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GENERAL AVIATION REVITALIZATION ACT

Relying on the recent Washington Supreme Court decision in *Burton v. Twin Commander*, the Wisconsin Court of Appeals held that a subsequent type certificate holder is entitled to the protection of GARA, and that a maintenance manual is not a separate component. To the extent it fails to warn of an alleged latent defect, the claim is not a new claim, but is barred as a claim based on a latent defect in the component itself. Finally, the fraud exception requires a "knowing misrepresentation withholding or concealment with knowledge that the information should have been reported.

*Groschowske v. Precision Airmotive, LLC*, 340 Wis.2d 611, 813 N.W.2d 687 2012 Wis.App. LEXIS 2012 (Wis.App. 2012).

GENERAL AVIATION REVITALIZATION ACT

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GENERAL AVIATION REVITALIZATION ACT

Information regarding pilot seat slip incidents was not required information for passenger seats of Cessna 414 aircraft, and also there was no evidence of any causal relationship between the information relating to those pilot seat slip incidents and the crash involved in this case.

*Nowicki v. The Cessna Aircraft Company*, 69 So.3d 406 (Fla. 4<sup>th</sup> DCA 2011).

GENERAL AVIATION REVITALIZATION ACT

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GENERAL AVIATION REVITALIZATION ACT

Modification of the design of an existing part by providing for shot peening the part and providing that modification to an existing part resulted in a new part under GARA, however, the product claim was that the part, modified or not, was defective and therefore was in essence a claim addressed to the original part and therefore was barred by GARA, despite the modification. If the shot peening had been the cause of the failure, then GARA would not have barred that claim until 18 years after the modification.

*Slate v. Unite Technologies Corp.*, 2011 Cal.App. Unpub. LEXIS 7303 (Cal. App. 2011).

GENERAL AVIATION REVITALIZATION ACT

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**GENERAL AVIATION REVITALIZATION ACT**

The Florida Fourth District Court of Appeals held that only new replacement parts start the rolling statute of repose under GARA and under the Florida 12 year statute of repose. Newly designed and added parts do not start the rolling statute of repose as to the original product. Additionally, there was no evidence that the newly designed and added part (a strengthener to the wing spar cap) caused the accident.

*Inmon v. Air Tractor, Inc*, 74 So.3d 535 (Fla.4<sup>th</sup> DCA 2011).

GENERAL AVIATION REVITALIZATION ACT

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**GENERAL AVIATION REVITALIZATION ACT**

The Ninth Circuit Court of Appeals held that the statute of repose as to parts originally supplied with another aircraft was triggered when that aircraft was first sold to a customer, and the statute of repose did not restart when the parts were sold as used parts and placed on another aircraft. The Ninth Circuit held that the term "aircraft" included all of its constituent parts. The reference in the "rolling" provisions to new parts limited the extension of the statute of repose to new parts and did not include previously used parts.

*United States Aviation Underwriters, Inc. v. Nabtesco Corp.*, 697 F.3d 1092 (9<sup>th</sup> Cir. 2012).

GENERAL AVIATION REVITALIZATION ACT

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**JURISDICTION AND PROCEDURE**

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## PERSONAL JURISDICTION

- The U.S. Supreme Court most recently examined the test for personal jurisdiction over non-U.S. manufacturers in a case involving a machine manufactured by a British manufacturer and sold through a U.S. distributor to the plaintiff's employer in New Jersey. The Court affirmed the dismissal of the British manufacturer in a 4-2-3 decision. The plurality opinion written by Justice Kennedy held that there was no evidence of purposeful action to invoke or benefit from New Jersey law and would dismiss under the "sovereignty" rule of jurisdiction. The concurring opinion written by Justice Breyer concluded that prior precedents dictated the result, namely, Justice O'Connor's plurality opinion in *Worldwide Volkswagen*, referred to as the "stream of commerce plus" test. *J. McIntyre Machinery, Ltd. v. NiCastro*, 131 S.Ct.2780, 2011 U.S. LEXIS 4800 (2011).

JURISDICTION AND PROCEDURE

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## PERSONAL JURISDICTION

- The dissent, written by Justice Ginsberg, and joined by Justices Sotomayor and Kagan, would have found jurisdiction based on the British manufacturer's efforts to market the product throughout the United States at trade shows and through trade organizations. Justice Ginsburg concluded that the foreign manufacturer "purposefully availed itself" of the nationwide United States market, not a market in a single State or a discrete collection of States." Justice Ginsburg also contrasted the case from one in which an entity's activities "are largely home-based . . . without designs to gain substantial revenue from sales in the distant markets." Justice Ginsburg stated that when specific jurisdiction "achieves its full growth, considerations of litigational convenience and the respective situations of the parties" would determine when it is appropriate to subject a defendant to trial in the plaintiff's community."

*J. McIntyre Machinery, Ltd. v. NiCastro*, 131 S.Ct.2780, 2011 U.S. LEXIS 4800 (2011).

JURISDICTION AND PROCEDURE

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## PERSONAL JURISDICTION

### Jurisdiction over Non-US Manufacturers

- in a unanimous decision during the same term, the Supreme Court limited general jurisdiction over a foreign subsidiary of a U.S. company. In a unanimous decision written by Justice Ginsburg, the Court articulated the high standard required for a finding of general jurisdiction. Plaintiffs, the North Carolina parents of two sons who died in an automotive accident in Europe sought to assert personal jurisdiction over the European tire manufacturer. General jurisdiction had been asserted because there was no relationship between the accident and the forum. No attempts were made to market the products in North Carolina and any business activity fell far short of the "continuous and systematic business contacts" required for general jurisdiction.

*Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2011 U.S. LEXIS 4801 (2011).

JURISDICTION AND PROCEDURE

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### PERSONAL JURISDICTION

- The very fact intensive examination required under *McIntyre Machinery* and *Goodyear Dunlop Tires* has been evident in the personal jurisdiction cases decided in the federal and state courts during the past year.
- In a case involving the death of a person on the ground during a forced landing, the U.S. District Court applied *McIntyre Machinery* to determine whether jurisdiction existed over Teledyne Continental Motors, the engine manufacturer. While the opinion makes no reference to the state in which the engine was purchased, the court examined the overall sales of engines to South Carolina residents over the past ten years, the warranty support provided South Carolina customers and the extent of advertising that reached South Carolina. Considering the analysis in *Goodyear Dunlop Tire*, and noting that TCM's efforts to "serve the market for its product," were of they type absent in *Goodyear Dunlop Tire*, the court concluded that this additional evidence met the test of "purposeful" actions directed to South Carolina sufficient to support specific personal jurisdiction.

*Smith v. Teledyne Continental Motors, Inc.*, 2012 U.S. Dist. LEXIS 595 (D.S.C. 2012). JURISDICTION AND PROCEDURE

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### PERSONAL JURISDICTION

- The result in *Smith* should be compared with the result in the earlier case of *Crouch v. Honeywell Int'l, Inc.*, 682 F.Supp.2d 788 (W.D. Ky. 2010). That case also involved an accident in the forum state, but plaintiff attempted to assert general jurisdiction only, apparently believing that because the engine was not sold in that state, there was no basis for attempting to assert specific jurisdiction. The same types of factors considered under the "stream of commerce plus" analysis in *Smith*, were found insufficient to support general jurisdiction. This result demonstrates the very high standards required for general jurisdiction, just as *Smith* demonstrates the very fact intensive analysis required for personal jurisdiction under the "stream of commerce" plus analysis under *McIntyre Machinery*.

JURISDICTION AND PROCEDURE

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### PERSONAL JURISDICTION

A number of non-aviation decisions demonstrate the higher standard and fact intensive inquiry required under the "stream of commerce plus" theory. Even though a plurality of the Justices in *McIntyre Machinery* adopted the even more restrictive "sovereignty" reasoning, a majority of the Justices would only have agreed to find lack of personal jurisdiction based on the less restrictive "stream of commerce plus" reasoning and therefore that must be considered the precedent established by *McIntyre Machinery*. According to Justice Breyer, under the "stream of commerce plus" test, either a "regular course of sales" or "something more, such as special state-related design, advertising, advice, marketing or anything else" is required in addition to the fact that the accident occurred in the forum state.

*UTC Fire & Security Americas Corp., Inc. v. NCS Power, Inc.* 844 F.Supp.2d 366 (S.D.N.Y. 2012); *Ascue v. Aurora Corporation*, 2012 U.S. Dist. LEXIS 32626 (N.D. Ga. 2012); *Ainsworth v. Cargotec USA, Inc.*, 2011 U.S. Dist. LEXIS 144817 (D.Miss. 2011).

JURISDICTION AND PROCEDURE

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## PERSONAL JURISDICTION

The same reasoning that has been applied to aircraft manufacturers also has been applied to component part manufacturers that design and supply parts specifically designed for products intended to be marketed in the forum state. The purposeful activities of the product manufacturer have been found to provide the basis for concluding that the component part manufacturer also has "purposefully" conducted activities directed to the forum state. The Supreme Court has tacitly approved this analysis. During the same Term that the Court decided *McIntyre Machinery*, it vacated *certiorari* and remanded *Willemsen v. Invacare Corporation*, 132 S.Ct. 75 (2011). On remand, the Oregon Supreme Court upheld personal jurisdiction because the parts were specifically designed for a product marketed through regular and substantial sales into Oregon. *Willemsen v. Invacare Corp.*, 282 P.3d 867 (Ore. 2012). The same issue was presented to the Illinois Supreme Court in a case in which a French component manufacturer that provided parts exclusively for Agosta helicopters distributed in U.S. was held subject to personal jurisdiction. *Russell v. SNFA*, 2012 Ill.App. Lexis 754 (Ill. 2012).

JURISDICTION AND PROCEDURE

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## PERSONAL JURISDICTION

The same reasoning that has been applied to aircraft manufacturers also has been applied to component part manufacturers that design and supply parts specifically designed for products intended to be marketed in the forum state. The purposeful activities of the product manufacturer have been found to provide the basis for concluding that the component part manufacturer also has "purposefully" conducted activities directed to the forum state. The Supreme Court has tacitly approved this analysis. During the same Term that the Court decided *McIntyre Machinery*, it vacated *certiorari* and remanded *Willemsen v. Invacare Corporation*, 132 S.Ct. 75 (2011). On remand, the Oregon Supreme Court upheld personal jurisdiction because the parts were specifically designed for a product marketed through regular and substantial sales into Oregon. *Willemsen v. Invacare Corp.*, 282 P.3d 867 (Ore. 2012). The same issue is now before the Illinois Supreme Court in a case in which a French component manufacturer that provided parts exclusively for Agosta helicopters distributed in U.S. was held subject to personal jurisdiction. *Russell v. SNFA*, 2012 Ill.App. Lexis 754 (Ill. 2012).

JURISDICTION AND PROCEDURE

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## PERSONAL JURISDICTION

The mere fact of sales through a distributor was insufficient to support personal jurisdiction in *McIntyre Machinery*. This holding is consistent with a number of prior aviation manufacturer cases in which the mere fact of sales by a distributor in the jurisdiction were not sufficient to support personal jurisdiction. *D'Jamoos v. Pilatus Aircraft, Ltd.*, 566 F.3d 94 (3<sup>rd</sup> Cir. 2009); *Newman v. European Aeronautic Defense and Space Company EADS, N.V.*, 2011 U.S. Dist. LEXIS 63503 (D.Mass. 2011)(Socata).

JURISDICTION AND PROCEDURE

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### PERSONAL JURISDICTION

The Supreme Court has in two recent cases further tightened the requirements for the exercise of both specific and general personal jurisdiction under the Due Process analysis.

JURISDICTION AND PROCEDURE

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### PERSONAL JURISDICTION

In *Daimler AG v. Bauman*, 2014 U.S. LEXIS 113486 (2014), Justice Ginsburg held that the mere presence of a subsidiary in the jurisdiction was not sufficient to support general jurisdiction over a non-U.S. parent corporation. Despite substantial sales into the jurisdiction through the subsidiary, the Court held that the focus under general jurisdiction was essentially whether the non-U.S. corporation was “essentially at home” in the jurisdiction, despite the presence of other substantial business contacts with the forum jurisdiction. Justice Sotomayor concurred in the result as to this non-U.S. parent corporation, but did not agree that the general jurisdiction should be limited to the “home” jurisdiction or that “continuous and systematic” contacts would not be sufficient to establish general jurisdiction in other cases.

JURISDICTION AND PROCEDURE

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### PERSONAL JURISDICTION

Notably, in *Daimler AG v. Bauman*, 2014 U.S. LEXIS 113486 (2014), Justice Ginsburg reviewed the law of general and specific jurisdiction in significant historical and analytical detail, reiterating her earlier observation in her opinion written for a unanimous Court in *Goodyear Dunlop Tire*, that “specific jurisdiction has become the centerpiece of modern jurisdictional theory, while general jurisdiction [has played] a reduced role.”

JURISDICTION AND PROCEDURE

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## PERSONAL JURISDICTION

Subsequently, in *Walden v. Fiore*, 2014 U.S. LEXIS 1635 (2014), the Court further limited specific jurisdiction (which Justice Thomas referred to as “case-linked” jurisdiction) by holding that the mere presence of the plaintiff and the “damages” in the forum jurisdiction is not sufficient to support specific jurisdiction. Instead, proper analysis under specific jurisdiction is on “the relationship among the defendant, the forum and the litigation.” The Court noted that in prior cases in which the harm had occurred in the jurisdiction, some part of the tortious conduct also had occurred in the jurisdiction, as in publication in the jurisdiction of defamatory material.

JURISDICTION AND PROCEDURE

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## PERSONAL JURISDICTION

Thus, the question after the Court’s recent analysis in *Walden v. Fiore*, is whether specific jurisdiction requires that some part of the tortious conduct also occurred in the jurisdiction, and, under *McIntyre*, whether that is sufficient in the absence of at least the “stream of commerce” plus factors in *Asahi*. The Court’s emphasis on the relation “among the defendant, the forum and the litigation” suggests that not only is the harm in the jurisdiction insufficient, but the mere fact of the accident is also insufficient, without further analysis of the defendant’s other “case-linked,” rather than general, contacts with the forum. In other words, the issue appears to be what other case-linked purposeful contact must be present, such as direct sales into the jurisdiction or support of the specific product involved in the accident in the jurisdiction.

JURISDICTION AND PROCEDURE

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## PERSONAL JURISDICTION

Just as the mere fact of sales by a distributor, was not alone sufficient to support personal jurisdiction in *McIntyre Machinery*, the mere presence of an agent in the jurisdiction has been held sufficient to support even general jurisdiction over cases having no relationship to the forum. *Bauman v. DaimlerChrysler Corp.*, 676 F.3d 774 (9th Cir. 2011). In that case, the Ninth Circuit Court of Appeals denied a request for reconsideration in view of the subsequent *Goodyear Dunlop Tire* decision. In a dissenting opinion by seven judges of the Ninth Circuit Court of Appeals, this holding was criticized on the grounds that the mere presence of an agent in the forum with regard to unrelated claims arising from accidents outside the forum was inconsistent with the emphasis in *Goodyear Dunlop Tire* on substantial activities within the forum to support such jurisdiction. The United States also opposed jurisdiction on the grounds that it interfered with “negotiations of international agreements on the reciprocal recognition and enforcement of judgments.”

JURISDICTION AND PROCEDURE

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## PERSONAL JURISDICTION

Post-McIntyre and Goodyear Dunlop Tire Aviation Cases

*Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 723 S.E.2d 835 (S.C.App. 2012)(no personal jurisdiction even though the accident occurred in South Carolina, the aircraft was owned by an Ohio resident, maintained and serviced in Ohio, Florida and Arkansas, and defendants had never solicited or conducted business in South Carolina).

JURISDICTION AND PROCEDURE

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## PERSONAL JURISDICTION

Post-McIntyre and Goodyear Dunlop Tire Aviation Cases

Jabiru, an Australian engine manufacturer, was subject to personal jurisdiction for claims arising from death of Arizona resident who had purchased an engine through a U.S. distributor in Tennessee. Engine manufacturer showed that it did not make any direct sales in U.S., but sold only through distributors. The Arizona court of appeals concluded that the terms of the distributorship agreement which included product support were evidence of a deliberate effort to "penetrate the American market." There had been the sale of 61 Jabiru products in Arizona in year of accident, including 5 engines of the type involved in the accident. The court of appeals distinguished *McIntyre Machinery* on grounds there was no "regular ... flow" or "regular course" of sales into the forum state in that case, and that sales into Arizona were not "random" or "fortuitous" as in *McIntyre Machinery*.

*Van Heeswyk v. Jabiru Aircraft Pty., Ltd.* 229 Ariz. 412, 276 P.3d 46 (Ariz. App. 2012).

JURISDICTION AND PROCEDURE

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## PERSONAL JURISDICTION

Post-McIntyre and Goodyear Dunlop Tire Aviation Cases

The French aircraft manufacturer ATR was not subject to general jurisdiction in California, where cases against airline defendants were pending under the Montreal Convention. The fact that one per cent of sales were to California residents was insufficient because all contracts and delivery of the aircraft were in France. The court also denied further discovery as to ATR's relationship with ATR North America because the relationship had been known at the time of the jurisdictional discovery, and denied a motion to transfer to Virginia because plaintiffs provided no factual support or legal analysis for personal jurisdiction in Virginia, where ATR North America is located.

*Martinez v. Aero Caribbean*, 2012 U.S. Dist. LEXIS 56041 (N.D. Cal. 2012).

JURISDICTION AND PROCEDURE

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### PERSONAL JURISDICTION

Post-*McIntyre* and *Goodyear Dunlop Tire* Aviation Cases

The issue of personal jurisdiction over a Tanzanian balloon operator for the wrongful death of a Florida resident in Tanzania was considered. The plaintiff's decedent had arranged for the flight through a Massachusetts travel company which had no direct dealings with the Tanzanian balloon operator. The flights were arranged through the balloon operator's agent in Tanzania. Despite the fact that it derived substantial revenue from U.S. business, *the balloon operator* did not "purposefully avail itself of the benefits of doing business in any particular state" as required by the plurality opinion in *McIntyre*. The court also rejected an argument that the Tanzanian operator had ratified the business conducted on its behalf by the Massachusetts company when it accepted the ticket for the flight, again on the grounds that it did not "knowingly accept the benefits of a Massachusetts transaction." The court criticized the plurality opinion in *McIntyre* citing Professor Arthur R. Miller's lecture at NYU Law School, printed on its website.

*Weinberg v. Grand Circle Travel, LLC*, 2012 U.S. Dist. LEXIS 133554 (D. Mass. 2012).

JURISDICTION AND PROCEDURE

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### PERSONAL JURISDICTION

Post-*McIntyre* and *Goodyear Dunlop Tire* Aviation Cases

The U.S. District Court for the Northern District of Illinois applied Illinois law, which permits the exercise of personal jurisdiction over parent companies based on the actions of its subsidiaries only when the subsidiary's only purpose is "where the corporate veil can be pierced, or . . . where the subsidiary's only purpose is to conduct the business of the parent." The court concluded that despite complete ownership, overlapping management, financial controls over loans and the lack of dividends, the parent did not exercise the "unusually high degree of control" over day to day activities necessary to find it had no purpose other than conducting the business of the parent.

*Convergence Aviation Ltd. v. United Technologies Corp.*, 2012 U.S. Dist. LEXIS 26830 (N.D. Ill. 2012).

JURISDICTION AND PROCEDURE

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### REMOVAL

*Laugelle v. Bell Helicopter Textron, Inc.*, 2012 U.S. Dist. LEXIS 12907 (D. Del. 2012).

JURISDICTION AND PROCEDURE

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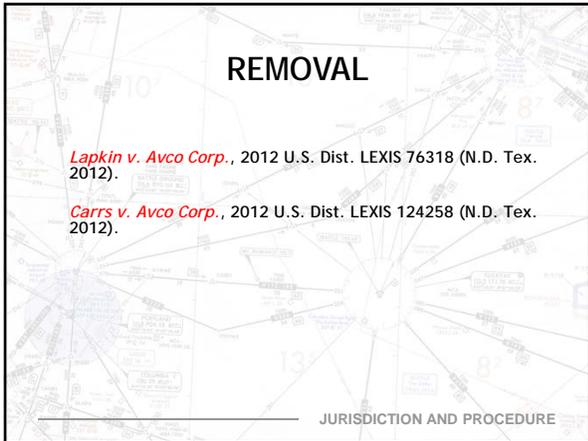
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**REMOVAL**

*Lapkin v. Avco Corp.*, 2012 U.S. Dist. LEXIS 76318 (N.D. Tex. 2012).

*Carrs v. Avco Corp.*, 2012 U.S. Dist. LEXIS 124258 (N.D. Tex. 2012).

JURISDICTION AND PROCEDURE



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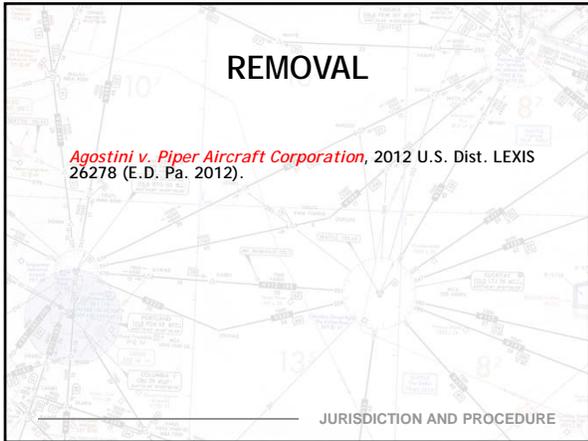
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**REMOVAL**

*Agostini v. Piper Aircraft Corporation*, 2012 U.S. Dist. LEXIS 26278 (E.D. Pa. 2012).

JURISDICTION AND PROCEDURE



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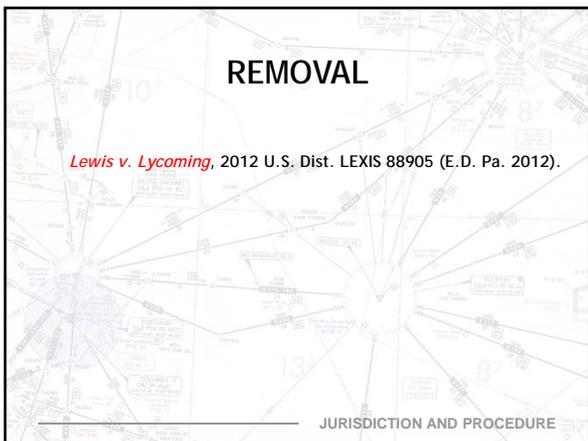
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**REMOVAL**

*Lewis v. Lycoming*, 2012 U.S. Dist. LEXIS 88905 (E.D. Pa. 2012).

JURISDICTION AND PROCEDURE



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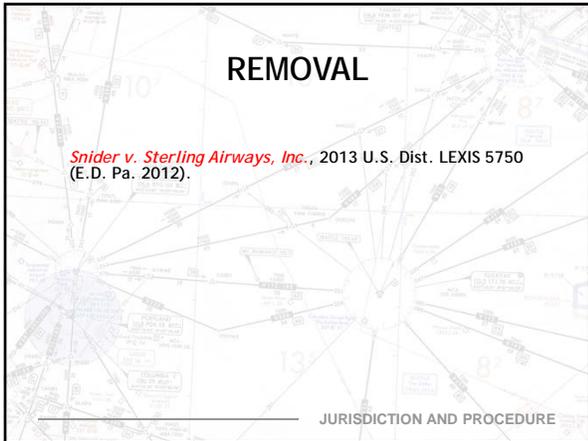
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**REMOVAL**

*Snider v. Sterling Airways, Inc.*, 2013 U.S. Dist. LEXIS 5750  
(E.D. Pa. 2012).



JURISDICTION AND PROCEDURE

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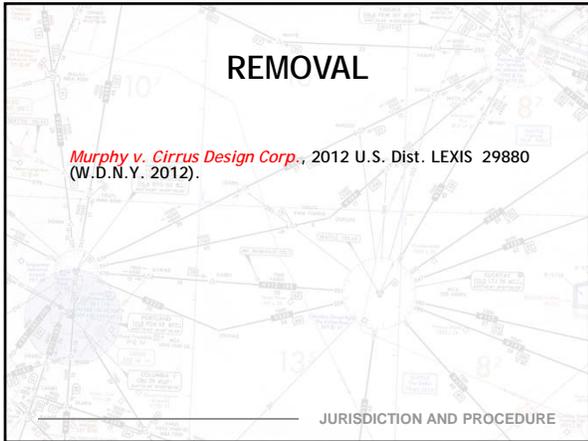
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**REMOVAL**

*Murphy v. Cirrus Design Corp.*, 2012 U.S. Dist. LEXIS 29880  
(W.D.N.Y. 2012).



JURISDICTION AND PROCEDURE

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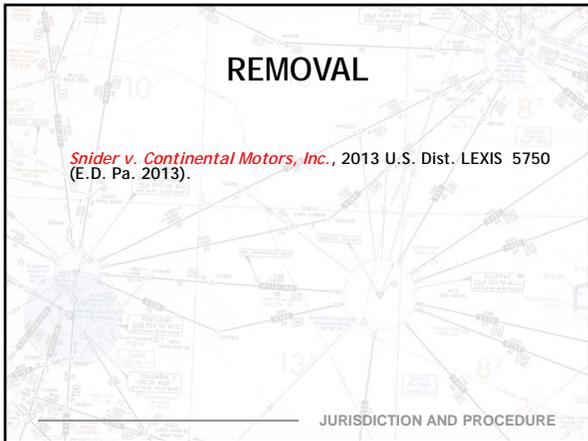
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**REMOVAL**

*Snider v. Continental Motors, Inc.*, 2013 U.S. Dist. LEXIS 5750  
(E.D. Pa. 2013).



JURISDICTION AND PROCEDURE

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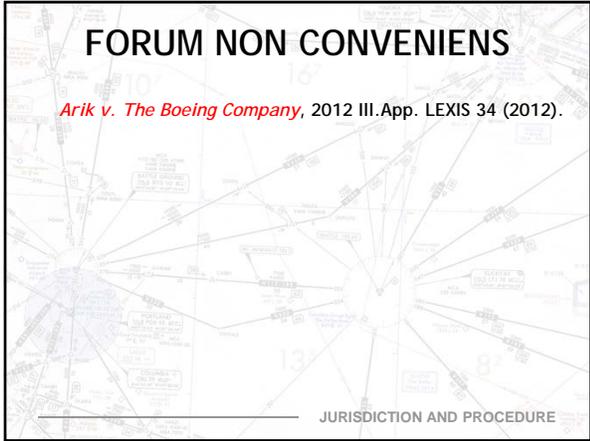
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**FORUM NON CONVENIENS**

*Arik v. The Boeing Company*, 2012 Ill.App. LEXIS 34 (2012).



JURISDICTION AND PROCEDURE

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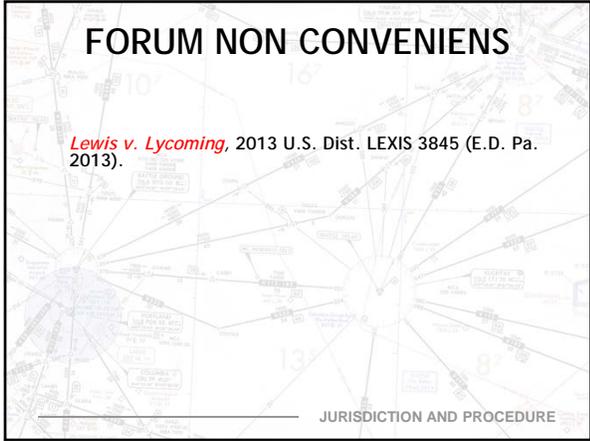
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**FORUM NON CONVENIENS**

*Lewis v. Lycoming*, 2013 U.S. Dist. LEXIS 3845 (E.D. Pa. 2013).



JURISDICTION AND PROCEDURE

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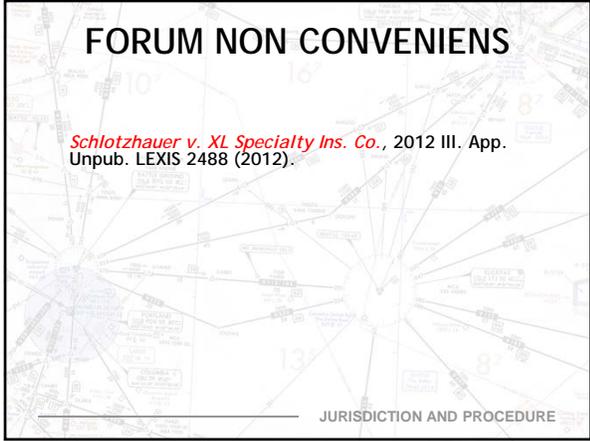
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**FORUM NON CONVENIENS**

*Schlottzauer v. XL Specialty Ins. Co.*, 2012 Ill. App. Unpub. LEXIS 2488 (2012).



JURISDICTION AND PROCEDURE

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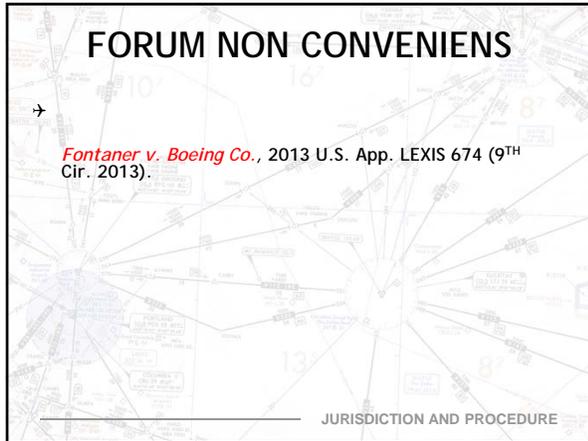
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**FORUM NON CONVENIENS**

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*Fontaner v. Boeing Co.*, 2013 U.S. App. LEXIS 674 (9<sup>TH</sup> Cir. 2013).



JURISDICTION AND PROCEDURE

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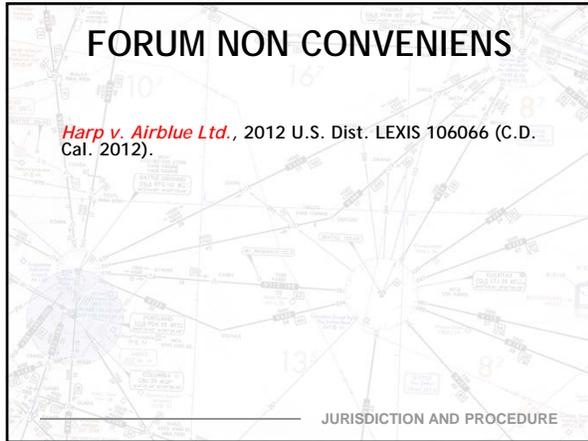
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**FORUM NON CONVENIENS**

*Harp v. Airblue Ltd.*, 2012 U.S. Dist. LEXIS 106066 (C.D. Cal. 2012).



JURISDICTION AND PROCEDURE

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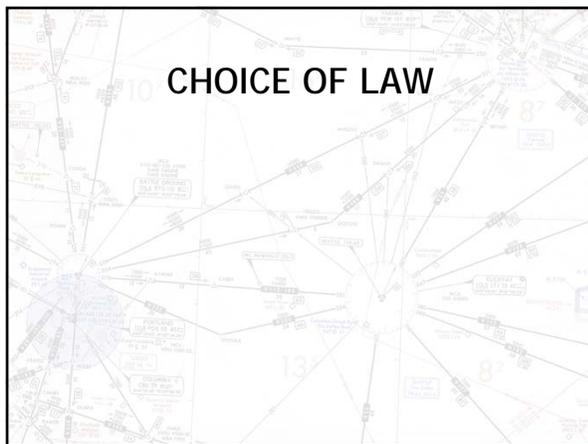
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**CHOICE OF LAW**



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**CHOICE OF LAWS**

*National Union Fire Insurance Company v. American Eurocopter Corp.*, 697 F.3d 405 (5<sup>th</sup> Cir. 2012).

CHOICE OF LAW

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**INSURANCE COVERAGE**

INSURANCE COVERAGE

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**Interpretation of Sky-Diving Exclusion**

The U.S. District Court for the Western District of Virginia considered whether an exclusion for liability to parachute jumpers "after descending from the aircraft and whilst attempting to exit the Aircraft" excluded coverage to the pilot for claims due to a mid-air collision between the jump plane and the parachutists. The court found that the term "descending from" referred to the act of parachuting and applied after exiting the aircraft and before touching down on the ground, rather than on the ground "after descending from the aircraft." *McGirk v. Certain Underwriters at Lloyd's*, 2014 U.S. Dist. LEXIS 22661 (W.D. Va. 2014).

INSURANCE COVERAGE

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### Definition of Insured

The district court considered whether the definition of insured as including the Named Insured and "all . . . joint ventures . . . over which such insured has . . . has assumed or exercised management control," included the owner/pilot of a Cirrus aircraft in which a Garmin employee had arranged for the installation of a Garmin 900 at a discount for purposes of certification of the Garmin 900 installation in that model aircraft. The court found no evidence of any actual or apparent authority on the part of the Garmin employee to form a joint venture, but even if one had been found, the claims asserted were not against the joint venture, but against the individual owner/pilot and therefore not covered.

*Certain Underwriters at Lloyds v. Garmin Int'l, Inc.*, 2013 U.S. Dist. LEXIS 98186 (D. Kans. 2013).

INSURANCE COVERAGE

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### Insurer's Standing to Sue

The Eleventh Circuit Court of Appeals considered whether Global Aerospace, Inc. had standing to sue an insured charter airline for return of settlement funds and expenses because as pooling agent it had not incurred any loss or damages. The court found that as the agent, it had standing to bring the action, and also that by contracting in its own name for the benefit of the insurance companies, it had representative standing to sue.

*Global Aerospace, Inc. v. Platinum Jet Management, Inc.*, 2012 U.S. App. 14605 (11th Cir. 2012).

INSURANCE COVERAGE

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### Duty to Defend

The First Circuit Court of Appeals considered the duty to defend a suit against an aircraft refurbishment and repair company by a customer for negligence and faulty workmanship that resulted in an aircraft window breaking in flight. The court held that even a "remote possibility of coverage" required the insurer to defend the insured. The court concluded that the window breaking in flight was an occurrence and that exclusions for repair or replacement necessitated by the insured's work, damage to the product and an impaired property exclusion did not apply because the crack occurred away from the insured's shop, the window was not the product of the insured, and the impaired property exclusion might apply to loss of use claims, but not for the damages to the window itself.

*Oxford Aviation, Inc. v. Global Aero, Inc.* 680 F.3d 85 (1st Cir. 2012).

INSURANCE COVERAGE

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## Duty to Defend

The U.S. District Court for the Southern District of Texas considered the duty to defend a pilot, who was not a U.S. citizen, for a wrongful death claim by the estate of a passenger. The pilot had arranged for a friend to set up a U.S. corporation to own the aircraft, and to register it in the United States since he could not do so as a non-U.S. citizen. The friend complied and Zurich issued a policy to the corporation, without knowledge of the pilot's involvement. The pilot contended that a defense should be provided because the corporation was his alter ego, and because he was the intended beneficiary under the policy. The court rejected these arguments on the grounds that the alter ego doctrine benefits creditors, but does not allow a corporate owner to file an action against a company that had believed it was dealing with a corporation. There was also no evidence that the contract was intended to confer a benefit on the pilot.

*Estate of Vasquez-Ortiz v. Zurich*, 2013 U.S. Dist. LEXIS 2574 (S.D. Tex. 2013).

INSURANCE COVERAGE

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## Direct Action

The First Circuit Court of Appeals considered whether a direct action could be brought under the Puerto Rico direct action statute where the complaint against the insured was based only on breach of contract. The court concluded that there can only be a direct action if there is first a covered claim against the insured. Since the only claim was a contract claim, which is not covered, there could be no direct action against the insurer.

*Lopez and Medina Corp. v. Marsh USA, Inc.*, 667 F.3d 58 (1<sup>st</sup> Cir. 2012).

INSURANCE COVERAGE

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## Subrogation

The U.S. District Court for the Southern District of New York considered the allocation of subrogation proceeds between the insured leaseholders of the twin towers destroyed on September 11, 2001 and the insurers arising from subrogation claims against the airlines. Two policy provisions addressed the allocation of subrogation proceeds, providing priority to the insureds for any recovery. The issue was whether the insureds could claim their entire losses as the basis for a division, or would only be limited to the amount of legally cognizable tort claims. The court held that only legally cognizable tort claims could be considered because that was all the insurers were able to recover under their subrogation claims and allowing the insureds to included other amounts would both result in a windfall to the insureds and defeat the purposes of the subrogation rights granted the insurers under the policies at issue.

*World Trade Ctr. Props, LLC v. Certain Underwriters at Lloyd's, Londons*, 2012 U.S. Dist. LEXIS 177132 (S.D. N.Y. 2012).

INSURANCE COVERAGE

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## Embezzlement Exclusion

The U.S. District Court for the Middle District of North Carolina considered a motion for judgment on the pleadings related to the application of the embezzlement exclusion and also counterclaims for unfair and deceptive trade practices and bad faith refusal to settle. The insured admitted authorizing a third party to remove the aircraft to Miami, but denied that it authorized the aircraft to be flown outside the U.S. where it had been partially disassembled. The district court held that there were issues of fact as to the extent of the authority granted the third party and denied the motion for judgment on the pleadings related to the embezzlement exclusion. The district court did, however, grant judgment on the pleadings as to the counterclaims under *Bell Atlantic Corp. v. Twombly*

*United States Aviation Underwriters, Inc. v. Bill Davis Racing, Inc.*, 2012 U.S. Dist. LEXIS 120111 (M.D.N.C. 2012).

INSURANCE COVERAGE

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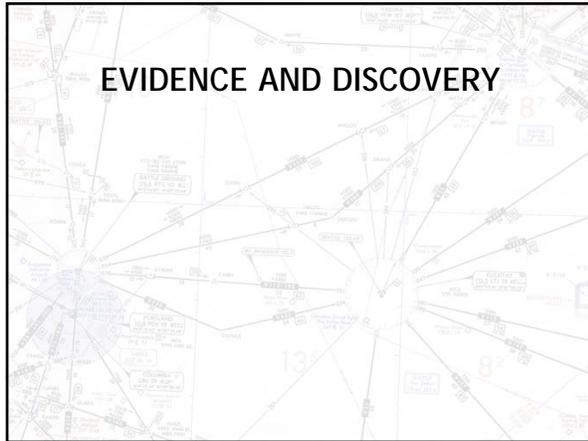
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## EVIDENCE AND DISCOVERY



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## ADMISSIBILITY OF GOVERNMENT REPORTS

Technical studies and reports, including government reports, cannot be introduced as "learned treatises." Learned treatises do not come into evidence, but may only be read to the jury.

FAA regulations are also inadmissible as evidence because it is "axiomatic that a court must determine the law applicable in a particular suit."

*Smith v. United States*, 2012 U.S. Dist. LEXIS 58623 (S.D. Ohio 2012).

EVIDENCE AND DISCOVERY

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**ADMISSIBILITY OF GOVERNMENT REPORTS**

The court held that NTSB factual reports are generally admissible if they contain factual information. However, if they contain hearsay, lack the indicia of trustworthiness, or are too prejudicial, they may be excluded. Because of hearsay dispersed throughout the reports, the court decided that it would require undue time to “weed out” the hearsay and excluded the factual report.

*Echevarria v. Caribbean Aviation Maint. Corp.*, 898 F.Supp.2d 464 (D.P.R. 2012).

EVIDENCE AND DISCOVERY

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**ADMISSIBILITY OF GOVERNMENT REPORTS**

Airworthiness Directives and Service Bulletins issued after the sale of the aircraft, but before the accident were not inadmissible as subsequent remedial measures. Service Difficulty Reports were admissible, but only for the non-hearsay purpose of notice of the engine’s alleged defective design.

*Pease v. Lycoming Engines*, 2012 U.S. Dist. LEXIS 6354 (M.D. Pa. 2012).

EVIDENCE AND DISCOVERY

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**ADMISSIBILITY OF GOVERNMENT REPORTS**

NTSB probable cause report was inadmissible based on applicable statutes and regulations, even as to the fact of when the plaintiff first received notice of the potential claims against the United States for purposes of the statute of limitations.

*Ressler v. United States*, 2012 U.S. Dist. LEXIS 134621 (D.Colo. 2012).

EVIDENCE AND DISCOVERY

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**ADMISSIBILITY OF GOVERNMENT REPORTS**

Exclusion of FAA certification of allegedly defective part was not "plain error" that required judgment notwithstanding the verdict because FAA certification evidenced compliance with minimal federal standards and did not mitigate the manufacturer's responsibility under the theory of strict liability.

*Delacroix v. Doncasters*, 2013 Mo. App. LEXIS 42 (Mo.Ct. App. 2013).

EVIDENCE AND DISCOVERY

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**ADMISSIBILITY OF EXPERT TESTIMONY**

*Leahy v. Lone Mt. Aviation, Inc.*, 2012 U.S. Dist. LEXIS 138038 (D. Nev. 2012).

EVIDENCE AND DISCOVERY

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**ADMISSIBILITY OF EXPERT TESTIMONY**

*Echevarria v. Caribbean Aviation Maint. Corp.*, 2012 U.S. Dist. LEXIS 10227 (D.P.R. 2012).

EVIDENCE AND DISCOVERY

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**ADMISSIBILITY OF EXPERT TESTIMONY**

*Ferguson v. Lear Siegler Servs.*, 2012 U.S. Dist. LEXIS 142342 (M.D. Ala. 2012).

EVIDENCE AND DISCOVERY

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**ADMISSIBILITY OF EXPERT TESTIMONY**

*Smith v. United States*, 2012 U.S. Dist. LEXIS 58623 (S.D. Ohio 2012).

EVIDENCE AND DISCOVERY

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**ADMISSIBILITY OF EXPERT TESTIMONY**

*Schaefer-Condulmari v. US Airways Group*, 2012 U.S. Dist. LEXIS 99666 (E.D. Pa. 2012).

EVIDENCE AND DISCOVERY

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**ADMISSIBILITY OF EXPERT TESTIMONY**

*Sulak v. Am. Eurocopter Corp.*, 2012 U.S. Dist. LEXIS 177965 (N.D. Tex. 2012).

EVIDENCE AND DISCOVERY

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**ADMISSIBILITY OF EXPERT TESTIMONY**

*Pease v. Lycoming Engines.*, 2012 U.S. Dist. LEXIS 6354 (M.D. Pa. 2012).

EVIDENCE AND DISCOVERY

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**ADMISSIBILITY OF OTHER ACCIDENTS**

Admissibility of other accidents requires that the *same* alleged defect be shown and exclusion of evidence of prior accident in question was proper under Federal Rule of Evidence 402 and 403.

Post-accident service bulletin is not admissible as subsequent remedial measure under Federal Rule of Evidence 407, and Airworthiness Directive incorporating the service bulletin is also not admissible as "back door" effort to circumvent the rule against admissibility of subsequent remedial measures.

Additionally, exclusion of Airworthiness Directive was also not an abuse of discretion under Federal Rule of Evidence 403.

*Lidle v. Cirrus*, 2012 U.S. App. LEXIS 25852 (2d Cir. 2012).

EVIDENCE AND DISCOVERY

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**ADMISSIBILITY OF OTHER ACCIDENTS**

*Delacroix v. Doncasters, Inc.*, 2013 Mo.App. LEXIS 42 (Mo. Ct. App. 2013).

EVIDENCE AND DISCOVERY

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