RECENT DEVELOPMENTS IN AVIATION LAW

AVIATION INSURANCE ASSOCIATION
May 2016

Donald R. Andersen
Taylor English & Duma LLC
Atlanta, Georgia
404-291-3429
dandersen@taylorenglish.com

TABLE OF CONTENTS

Page

A. MONTREAL CONVENTION

"The Montreal Convention is not an amendment to the Warsaw Convention. Rather, the Montreal Convention is an entirely new treaty that unifies and replaces the system of liability that derives from the Warsaw Convention."[1] The Convention "applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft by an air transport undertaking."[2] The Convention was ratified by the United States on November 4, 2003.[3]

In *Kenneth Glassman-Blanco v. Delta Airlines, Inc.*, [4], the plaintiff, a passenger on an international flight from Tel Aviv to New York claimed that he had been the subject of accusations of smoking in the aircraft lavatory, physical assault when he failed to respond to the instructions of the flight crew and injury as he was removed from the airplane upon its arrival at JFK Airport in New York. The lawsuit had alleged common law tort claims for negligence, assault, battery, false arrest, false imprisonment and violations of his civil rights. Plaintiff sought both compensatory and punitive damages. The Court held that all of these claims were preempted by the Montreal Convention (the "Convention"). Rather than dismissing the claims, the Court evaluated whether any of the alleged claims could be re-plead as claims under the Convention. The Court concluded that the claims for false accusations were not "accidents" resulting in physical injury and therefore were not "accidents" as defined under the Convention, but that the claims for intentional physical assault were "accidents" because they were not within

[1] *Erlich v. American Airlines, Inc.*, 360 F.3d 366 (2d Cir. 2004).
[2] Convention for the Unification of Certain Rules for International Carriage by Air, 28 May 1999, (entered into force November 4, 2003), reprinted in S. Treaty Doc. No. 106-45, at 27 (2000), 2242 U.N.T.S. 350 ("Montreal Convention"), Art. 1, available at http://www.state.gov/e/eb/rls/othr/ata/114157.htm.
[3] *Id.*
[4] 2016 U.S. Dist.LEXIS (E.D.N.Y. 2016).

the normal and expected operation of the aircraft. The Court also rejected Delta's argument that it was immune from claims for assault because the Tokyo Convention authorized such conduct as needed to avoid jeopardizing the safety of the aircraft. The Court concluded that based on the allegations and the plaintiff's prior deposition testimony, genuine issues of fact existed as to whether plaintiff was reasonably restrained or beaten as he claimed. Finally, the Court rejected the claim that plaintiff's injury in being removed from the plane at JFK fell within the scope of an "accident" under the Convention and also noted that plaintiff was removed by law enforcement personnel and not by airline employees. Accordingly, the Court granted leave to amend the Complaint to allege a claim under the Montreal Convention for any damages incurred if unreasonable force had been used by the flight crew in securing his cooperation during the flight.

B. 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.[5] 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."[6] 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."[7]

In *Marshall v. Boeing Co.,*[8] the effect of the Foreign Sovereign Immunities Act (FSIA)'s exclusive forum provisions on federal subject matter jurisdiction in cases involving a foreign airline

[5] 28 U.S.C. §§ 1330(a), 1604.

[6] 28 U.S.C. § 1604.

[7] 28 U.S.C. § 1605(a)(1).

[8] 940 F.Supp.2d 819 (N.D. Ill. 2013).

entitled to the protection of the FSIA was demonstrated. Boeing was sued in Illinois state court related to an accident in Poland. Boeing asserted a third party claim against the Polish national airline, LOT. LOT removed the case to federal court under the forum provisions of the FSIA. Plaintiffs sought to sever the third party claims from the main underlying claims and to remand the underlying claims to state court. The district court determined that the claims were not severable and refused to remand the case. The district court emphasized that the exclusive forum provision of the FSIA did not simply provide a basis for federal question jurisdiction, which might have supported remand, but require that state law claims against foreign sovereigns be determined in federal court and is an independent basis for original jurisdiction in federal court. Finally, the original underlying claims were subject to supplemental jurisdiction because the claims "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."[9]

In *Thornton v. M7 Aerospace LP, et al.*[10],the Seventh Circuit Court of Appeals, held that adding a third party defendant state airline, ASA, after six years of litigation in Illinois state court allowed the case to be removed to federal court. The third party defendant sought dismissal on the grounds that the statute of limitations had expired. The Court held that under the Illinois "discovery" rule, a genuine issue of fact precluded dismissal. The plaintiffs also sought remand on the grounds that the third party joinder was a fraudulent joinder. The Court held that unless there was no possibility of recovery against the third-party defendant, its joinder could not be disregarded under the fraudulent joinder doctrine.

[9] 28 U.S.C. section 1367(a).

[10] 796 F.3d 757, *; 2015 U.S. App. LEXIS 13759 (7th Cir. 2015).

C. FEDERAL PREEMPTION UNDER THE FEDERAL AVIATION ACT OF 1958

Both federal and state courts have continued to expand the application of the doctrine of implied field preemption to cases involving aviation safety and regulation. 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*,[11] and the rule of field preemption espoused in *Rice v. Santa Fe Elevator Corp.,*[12] 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. The First, Second, Third, Fifth, Sixth, Ninth and Tenth Circuit Courts of Appeals have expressly concluded that Congress has preempted all or parts of the field of air transportation and aviation safety.[13] The Seventh Circuit has opined on several occasions in dicta that implied conflict (and possibly field) preemption exists as to any state law that attempts to regulate aircraft operations and aviation safety, but the procedural posture of those cases – most involving attempts to secure "complete preemption" federal question jurisdiction - allowed the Seventh Circuit to reject the "complete preemption" federal question jurisdictional arguments without actually deciding the issues of implied field or conflict preemption.[14] The Ninth Circuit Court of Appeals (relying upon Third Circuit precedent)

---

[11] 411 U.S. 624 (1973).

[12] 331 U.S. 218 (1947).

[13] *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); *U.S. Airways, Inc. v. O'Donnell*, 627 F.3d 1318 (10th Cir. 2010). See also *Township of Tinicum v. City of Philadelphia*, 737 F.Supp. 2d 367 (E.D. Pa. 2010).

[14] *Vorhees v. Naper Aero Club, Inc.*, 272 F.3d 398, 405 (7th Cir. 2001). *See also Yang v. Boeing Co.*, 2013 U.S. Dist. LEXIS 175699 (N.D. Ill. 2013) ("federal aviation law preempts state law

has adopted a two part test for preemption: first, separating preemption of state law with federal standards of care from the preservation of state law remedies, and, two, determining whether pervasive standards exist under federal law before concluding that the field of state law standards of care have been preempted. In the past year, this has provided an effective basis for determining the extent of federal field preemption, thereby eliminating the need to evaluate each preemption issue under a conflict preemption analysis.

The federal circuit and district courts continued to consider the issue of federal field preemption of aviation safety. Most notably, the Ninth Circuit Court of Appeals refined its analysis first announced in *Martin v. Midwest Express Holdings, Inc.*,[15] in the subsequent decision in *Gilstrap v. United Airlines, Inc.*[16] In *Gilstrap*, the Ninth Circuit Court of Appeals considered the issue of federal preemption under the Air Carrier Assistance Act ("ACAA"),[17] and whether the ACAA preempted any common law remedies for discrimination against persons with handicaps. Before deciding that issue, the Ninth Circuit "reviewed" its prior decisions relating to field preemption of aviation safety, including *Martin.* First, the Ninth Circuit emphasized that under *Martin*, the entire field of aviation safety was not preempted, to preempt "all state law personal injury claims," but that the extent of the preemption depended upon whether there were "pervasive regulations" in the specific area of aviation safety. The Ninth

---

only to the extent that the two conflict"), *citing Vorhees*, supra. *See also Al Gasim Obied Ibrahim Mohammad v. Airbus, S.A.S.*, 2009 U.S. Dist. LEXIS 105540 (N.D. Ill. 2009)("Within the context of domestic aviation disasters the [Seventh Circuit's] position is clear: state courts *may apply federal aviation standards* to resolve state law tort claims without triggering federal question jurisdiction."), *also citing, among others, Vorhees*, supra.

[15] 555 F.3d 806 (9th Cir. 2009).

[16] 709 F.3d 995 (9th Cir. 2013).

[17] 49 U.S.C. section 41705.

Circuit then continued by reviewing the Third Circuit analysis in *Abdullah*,[18] which distinguishes between federal preemption of "standards of care and remedies, -- i.e., whether we would agree that it may sometimes be possible for state remedies to survive FAA preemption even where the state standard of care has been preempted."[19] The Ninth Circuit expressly adopted *Abdullah's* "division of the FAA's field preemptive effect into two components: state standards of care, which may be field pre-empted by pervasive regulations, and state remedies, which may survive, even if the standard of care is so preempted."[20]

Within the Ninth Circuit, the rule announced in *Gilstrap* has been applied by both federal and state courts in a variety of cases involving the standard of care for aviation safety. In the U.S. District Court for the Eastern District of Washington in an aviation product liability case. In *McIntosh v. Cub Crafters, Inc.*,[21] the U.S. District Court for the Eastern District of Washington, addressed the sufficiency of a federal preemption affirmative defense to product liability claims alleging that the defendant designer and manufacturer of Cub Crafters Model CC11-160 Carbon Cub (federal registration number N143FJ), a Light Sport Aircraft ("LSA"), was negligent "in failing to properly design, test, and approve the stall/spin characteristics of the accident aircraft."[22] The district court analyzed the extent of the federal regulations relating to the design

[18] 181 F.3d 363.

[19] 709 F.3d at 1005.

[20] *Id.* at 1006.

[21] 2014 U.S. Dist. LEXIS 21491 (E.D. Wash. 2014).

[22] *Id.* at *10-11. Notably, the federal regulation of Light Sport Aircraft ("LSA") is arguably less direct than the regulation of the design of other aircraft because the FAA has delegated the development of those regulations to the American Society for Testing and Materials ("ASTM"), which has enacted the specific standards and procedures relating to design and testing of LSA aircraft. The ASTM has a very active group dedicated to the development and continuing review of those standards and procedures, including standards and procedures directed to such flight characteristics. The district court specifically noted that the FAA regulations delegating that authority were intended to " '[i]ncrease safety in the light-sport aircraft community by closing

of such aircraft, and particularly their flight characteristics, and held that the FAA regulations "pervasively regulate the stall/spin characteristics of light sport aircraft. Accordingly, based upon field preemption, federal law exclusively establishes the standard of care as to the design, test, and approval of the stall/spin characteristics, preempting any state standards." [23]

The Washington Court of Appeals subsequently independently evaluated the federal field preemption issue in *Estate of Becker v. Forward Technology, Industries, Inc.*[24] The appellate court reviewed the preemption issue de novo, noting first that in the Ninth Circuit, the "key consideration [of the scope of preemption] is whether the area at issue is pervasively regulated." Specifically, the appeal addressed not the issue of preemption for the type certificated engine or the carburetor manufactured under a PMA, but the issue of preemption for the contractor that welded the components of the float used in the carburetor.

As stated by the court:

> This appeal raises the narrow question whether the FAA and regulations adopted by the Federal Aviation Administration pervasively regulate the area of aircraft fuel systems, thereby preempting any state standard of care for defects in the assembly and welding of the carburetor float as to claims against FTI, a noncertificated contractor.[fn. omitted] We conclude the FAA and related regulations pervasively regulate the "area" of an **[***3]** airplane engine's fuel system, including carburetors and their component parts.

---

gaps in existing regulations,' and to '[p]rovide for the manufacture of light-sport aircraft that are safe for their intended operations.'" *Id.* While indirect regulation, these regulations demonstrate the FAA's recognition of its pervasive role in the regulation of the design and testing of aircraft, such that it sought to fulfill that objective in the case of LSA aircraft by delegating that federal responsibility and federal function to a competent organization, in this case, the American Society for Testing and Materials, which it was satisfied would meet that responsibility and perform that function competently. Notably, the FAA did not "delegate" that function to the states or to any state regulatory bodies or agencies, because there are none since that responsibility and function has long been recognized as an exclusive federal responsibility and function.

[23] *Id.* at *12.

[24] 192 Wn. App. 65; 365 P.3d 1273, 2015 Wash. App. LEXIS 3071,CCH Prod. Liab. Rep. P19,759

> Therefore, implied field preemption bars the state tort standards of care alleged against FTI. Because Becker cites no compelling authority for an applicable parallel federal standard of care, the claims against FTI fail.

FTI had sought summary judgment arguing that federal law impliedly preempted the field and therefore any state law standard of care and that FTI was not liable under Washington state's product liability statute because it was not a seller or manufacturer. FTI did not contend that there was any federal standard regulating the method of welding and therefore it did not claim conflict preemption. Citing *Gilstrap v. United Airlines*,[25] the court first determined whether the FAA had pervasively regulated the field at issue. The court stated the following:

> We conclude the specific area at issue here is the engine's fuel system, which includes the carburetor and its component parts. We also conclude **airplane** engine fuel systems are pervasively [***13] regulated. Unlike *Martin* [supra], where federal regulations had "nothing to say about handrails, or even stairs at all,"[fn. omitted] there are many federal regulations focused on performance and safety standards for engine fuel systems, including the carburetor and its component parts. These regulations include:
> • 14 C.F.R. § 33.35(a) ("The fuel system of the engine must be designed and constructed to supply an appropriate mixture of fuel to the cylinders throughout **[*77]** the complete operating range of the engine under all flight and atmospheric conditions.").
>
> • 14 C.F.R. § 23.951(a) ("Each fuel system must be constructed and arranged to ensure fuel flow at a rate and pressure **[**1279]** established for proper engine and auxiliary power unit functioning under each likely operating condition, including any maneuver for which certification is requested and during which the engine or auxiliary power unit is permitted to be in operation.").
>
> • 14 C.F.R. § 23.955(a) ("The ability of the fuel system to provide fuel at the rates specified in this section and at a pressure sufficient for proper engine operation must be shown in the attitude that is most critical with respect to fuel feed and quantity of unusable fuel. These conditions may be simulated in a suitable mockup.").
>
> • 14 C.F.R. § 23.1093(a)(1)-(2) ("Each reciprocating **[***14]** engine air induction system must have means to prevent and eliminate icing. Unless this is done by other means, it must be shown that, in air free of visible moisture at a temperature of 30° F—(1) Each airplane with sea level engines using conventional venturi carburetors has a

[25] *Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995, 1006-07 (9th Cir. 2013).

preheater that can provide a heat rise of 90° F. with the engines at 75 percent of maximum continuous power; [and] (2) Each airplane with altitude engines using conventional venturi carburetors has a preheater that can provide a heat rise of 120° F. with the engines at 75 percent of maximum continuous power.").

• 14 C.F.R. § 23.1095(a) ("If a carburetor deicing fluid system is used, it must be able to simultaneously supply each engine with a rate of fluid flow, expressed in pounds per hour, of not less than 2.5 times the square root of the maximum continuous power of the engine.").

[*78] • 14 C.F.R. § 33.67(a) ("With fuel supplied to the engine at the flow and pressure specified by the applicant, the engine must function properly under each operating condition required by this part.").

• 14 C.F.R. § 23.1099 ("Each carburetor deicing fluid system must meet the applicable requirements for the design of a fuel system.").

• 14 C.F.R. § 25.1337(c) ("If a fuel flowmeter system is installed, each metering **[***15]** component must have a means for bypassing the fuel supply if malfunction of that component severely restricts fuel flow.").

• 14 C.F.R. § 25.1337(f)(1)-(2) ("There must be means to measure fuel pressure, in each system supplying reciprocating engines, at a point downstream of any fuel pump except fuel injection pumps. In addition—(1) If necessary for the maintenance of proper fuel delivery pressure, there must be a connection to transmit the carburetor air intake static pressure to the proper pump relief valve connection; and (2) If a connection is required under paragraph (f)(1) of this section, the gauge balance lines must be independently connected to the carburetor inlet pressure to avoid erroneous readings.").

• 14 C.F.R. § 25.951(a) ("Each fuel system must be constructed and arranged to ensure a flow of fuel at a rate and pressure established for proper engine and auxiliary power unit functioning under each likely operating condition, including any maneuver for which certification is requested and during which the engine or auxiliary power unit is permitted to be in operation.").

• 14 C.F.R. § 25.951(b) ("Each fuel system must be arranged so that any air which is introduced into the system will not result in—(1) Power interruption for more than 20 seconds for reciprocating **[***16]** engines; or (2) Flameout for turbine engines.").

[*79] • 14 C.F.R. § 25.951(c) ("Each fuel system for a turbine engine must be capable of sustained operation throughout its flow and pressure range with fuel initially saturated with water at 80° F and having 0.75cc of free water per gallon added and cooled to the most critical condition for icing likely to be encountered in operation.").

These federal regulations reveal a pervasive regulation of a fuel system's delivery of the appropriate mixture of air and fuel necessary for the proper operation of the engine

under any conditions. These regulations also set performance standards that necessarily require an engine's component parts to function **[**1280]** properly. The lack of a specific regulation expressly directed to carburetor floats is of no consequence because the specific area at issue for purposes of implied field preemption is the engine's fuel system.[32]

***

Because federal regulations pervasively regulate an **airplane** engine's fuel system, including its carburetor **[***17]** and component parts, implied field preemption precludes applying a state law standard of care to Becker's claims.

In several jurisdictions, even in those areas that are pervasively regulated, "the scope of field preemption extends only to the [state] standard of care."[fn. omitted]. State **[*80]** law still governs "'the other negligence elements (breach, causation, and damages), as well as the choice and availability of remedies.'"[fn. omitted] A state remedy "may survive even if the standard of care is so preempted," provided there is an applicable "'parallel[ ]'" federal standard of care.[fn. omitted] Even if we follow the Ninth Circuit's approach that only state standards of care are subject to implied field preemption, it is elusive to determine whether there is an applicable parallel federal standard of care, especially as to a noncertificated contractor who assembles and welds parts.[fn omitted] "The FAA itself does not clearly establish a federal standard of care; the Code of Federal Regulations does, but only as applied to 'aircraft [*81] operations.'"[37] Becker provides no authority or argument that the assembly of a carburetor float is a part of airplane operations.

* * *

Therefore, on this briefing, we agree with the trial court that all of Becker's claims against FTI fail. No one disputes that Becker was able to pursue manufacturing **defect** claims against both Avco, the type certificate holder for the engine, and Precision, the PMA holder for the carburetor. But a hypothetical state remedy based on an unsupported federal standard of care does not warrant a trial as to FTI.

In *Blackwell v. Panhandle Helicopter, Inc.*,[26] the U.S. District Court for the District of Oregon considered a case involving injury to a ground handler attaching Christmas trees to a helicopter line. This case demonstrates the application of federal preemption to issues pervasively regulated by the FAA and state law standards of care in those areas of work place safety not regulated by the FAA. Plaintiff was injured when the helicopter allegedly pulled away rapidly while he was still working with the line, "flipping" him and resulting in spinal cord

[26] 94 F. Supp. 3d 120, 2015 U.S. Dist. LEXIS 25883,

injuries when he landed on the ground. The court rejected certain common law negligence claims based on the failure of the helicopter company to follow its own loading manual because it found that the areas of helicopter operation in accordance with its own flight manual and the pilot's duty not to operate the helicopter in a "careless and reckless" manner demonstrated the FAA intent to regulate the area of helicopter operation. The court stated the following:

> As to acting contrary to its own helicopter flight manual, the FAA regulations provide that "[n]o person may conduct a rotorcraft external load operation without, or contrary to, the Rotorcraft-Load Combination Flight Manual prescribed in § 133.47." 14 C.F.R. § 133.33(a). As to operating a helicopter at an unsafe speed and in an unsafe manner, the FAA provides that "rotorcraft-load combination may not be operated at airspeeds greater than those established in accordance with § 133.41 (b), (c), and (d)." 14 C.F.R. 133.45. Furthermore, the FAA provides that "[n]o person may operate an **aircraft** in a careless or reckless manner so as to endanger the life or property of another." 14 C.F.R. § 91.13.
>
> The FAA regulations in these areas demonstrate Congress's intent to preempt the field of aviation safety implicated by both compliance with an operator's flight manual and the actual operation of a helicopter. For these reasons, allegations (a) through (e), (j), and (k) are preempted as to the standard of care, or duty, that an external load helicopter operator owes to a ground worker in a tree harvesting operation. Therefore, the Court dismisses these allegations from the **[**15]** claim. However, Plaintiff is granted leave to amend his negligence claim to allege violations of the federal standard of care, if possible.
>
> Plaintiff's remaining allegations, which deal with safety procedures governing helicopter pilots and ground workers in tree harvesting, are not preempted by the FAA. . . . . Unlike the allegations dealing with the flight manual or safe helicopter speeds, there is no evidence of a pervasive regulatory scheme that demonstrates Congress's intent to preempt the field of aviation safety implicated by safety procedures governing helicopter pilots and ground workers in tree harvesting.

The District Court also evaluated several Oregon statutory negligence claims, reaching similar results with regard to implied preemption. The Court stated the following:

> The Employer Liability Law provides that an employer must use "every device, care, and precaution that is practicable to use for the protection and safety of life and limb . . . ." ORS 654.305. It imposes**[**22]** a "heightened statutory standard of care on a person or entity who either is in charge of, or responsible for, any work involving risk or danger." Woodbury v. CH2M Hill, Inc., 335 Ore. 154, 61 P.3d 918 (2003).
>
> * * *
>
> The Court's analysis mirrors the analysis of the common law negligence claim above. The Court finds that the Employer Liability Law standard of care applies to the field of aviation safety implicated by areas which are not pervasively regulated. The FAA

> standard of care applies to the field of aviation safety implicated by areas which are pervasively regulated.
>
> First, there is one allegation which does not apply to Defendant and is dismissed. Allegation (l) provides that Defendant failed to "meet each and every safety standard and regulation set forth in Oregon Administrative Rules OAR 437-004-1750..." Complaint ¶ 23. As discussed above, the Court finds that OAR 437-004-1750, the Oregon OSHA "Helicopters" rule, does not apply to Defendant and therefore the allegation is dismissed.
>
> Next, the Court finds that allegations (b) and (e) are preempted as **[**23]** to the standard of care. Allegation (b) provides that Defendant was negligent "[i]n failing to follow Defendant's own External Load Flight Manual as identified in paragraph (a)-(e)." Compl. ¶ 23. Allegation (e) provides that Defendant was negligent "[i]n operating its helicopter to harvest trees at an unsafe speed for the conditions." Id. These allegations are nearly identical to the allegations the Court found preempted in Plaintiff's common law negligence claim and are preempted as to the standard of care for the same reasons discussed above. Plaintiff is granted leave to amend these allegations of his claim to allege violations of the federal standard of care, if possible.
>
> Finally, as to the remaining allegations, (a), (c) through (d), (f) through (k), and (m), the Court finds that these allegations are not preempted. Like the common law claim allegations that the Court found were not preempted, these allegations also deal with safety procedures governing helicopter **pilots** and ground workers in tree harvesting.

The District Court granted Plaintiffs leave to amend the preempted claims to assert claims under the applicable federal regulations.

In *Webb v. Desert Bermuda Development Company*,[27] the California Court of Appeals also considered federal preemption in a case brought by a student pilot who was injured in a crash while flying with an intoxicated flight instructor. The airport (“Desert Bermuda”) did not employ the instructor, but the plaintiff alleged that the airport should have excluded him from the airport. After determining that the Federal Aviation regulations impose exclusive responsibility on the operator of the aircraft for compliance with Federal Aviation regulations relating to flying while under the influence of alcohol, the court held that those regulations preempt state law. Accordingly, the appellate court affirmed the grant of summary judgment to the airport.

[27] 2015 Unpub Cal. App. Unpub. LEXIS 9074.

In addition to the federal and state cases from the Ninth Circuit, the doctrine of implied preemption also supported other decisions involving tort claims in other parts of the country. For example, in Kentucky the Kentucky Court of Appeals recognized implied federal field preemption as a defense to state law trespass and nuisance claims asserted against fixed base operators and airport users. *Wells v. Kentucky Airmotive, Inc.*,[28] Additionally, in *Haley v. United Airlines, Inc.*,[29] the U.S. District Court for the Northern District of Illinois, while not expressly analyzing the preemption issue, nevertheless, applied the same federal rule of decision as the California court in *Bermuda Dunes*, above, in determining that the sole responsibility for compliance with FAA regulations relating to compliance with minimum equipment requirements was that of the operator (Colgan). The District Court decided that a contracting carrier (Continental Airlines, subsequently United Airlines) did not have a duty under the FAA regulations for assuring such compliance. Applying the federal regulations as one basis for its decision,[30] the District Court determined that plaintiff in that case did not have a tort claim

[28] 2014 Ky. App. Unpub. LEXIS 652 (2014)(**"**The field of aircraft safety and operation has clearly been preempted by federal regulation. The scheme of federal regulation in these areas is sufficiently comprehensive to make it reasonable to infer Congress has left no room for supplementary state regulation.")

[29] 2015 U.S. Dist. LEXIS 115185 (N.D. Ill. 2015)

[30] The District Court also applied Illinois law to determine that the contract between Colgan and Continental did not provide the level of control that would establish an Illinois common law duty to the passengers to assure that the Colgan aircraft was in a safe condition for the flight in question.

A related issue is the preemptive effect of federal statutory law that provides that owners of aircraft not having actual control of the aircraft are exempt from liability for injuries to persons or property on the ground. In *Vreeland v. Ferrer*, 71 So.3d 70 (Fla. 2011), *cert. denied*, the Florida Supreme Court rejected the argument that 49 U.S.C. § 44112 expressly preempted the Florida Dangerous Instrumentality doctrine and that the federal statute insulated owners, such as lessors, not in actual possession or control the aircraft, from liability under the Florida dangerous instrumentality doctrine, even as to injuries to persons within the aircraft - because the injuries did not occur until the collision with the ground. A petition for *certiorari* to the U.S. Supreme

against the contracting carrier for injuries allegedly resulting from a flight on board an aircraft not having a properly operating pressurization system.

The Third Circuit Court of Appeals has developed its own distinct preemption analysis under *Abdullah v. American Airlines*.[31] The application of the *Abdullah* analysis to product liability claims

---

Court was filed based on this rejected interpretation of 49 U.S.C. § 44112 as supporting an express preemption claim, and *certiorari* was denied.

Nevertheless, this issue of the liability of the owner or lessor under state law when the owner or lessor neither has possession nor actual control over the aircraft, also implicates the field preemption analysis as to the parties having a duty for the safe operation of the aircraft, as seen in *Bermuda Dunes* and *Haley*. As more fully explained in an *amicus* brief filed in support of the petition for *certiorari* to the U.S. Supreme Court, the National Aircraft Finance Association ("NAFA") argued that 49 U.S.C. § 44112 was a limited preemption provision enacted to address specific state laws enacted during the infancy of aviation imposing strict or vicarious liability on aircraft owners for damage to persons and property on the ground, and that the Florida Supreme Court decision in *Vreeland* should have been reversed instead on implied field preemption grounds related to the duties imposed exclusively on operators for the safe operation of aircraft under the Federal Aviation statutes and regulations. NAFA argued for preemption of the application of the Florida dangerous instrumentality doctrine to all aircraft owners or lessors *not in possession or control of the aircraft*, because the federal aviation regulations impose the responsibility for safe operation solely on aircraft operators (and not own aircraft owners or lessors). While the Supreme Court did not state the basis for its denial of the petition for *certiorari*, the implied field preemption argument was not raised in the Florida Supreme Court and had not been fully briefed by the parties to the petition for *certiorari*. Following *Vreeland*, the U.S. District Court for the Southern District of Florida followed the Florida Supreme Court decision in *In re Air Crash Near Rio Grande, Puerto Rico*, 2012 U.S. Dist. LEXIS 46330 (S.D. Fla. 2012).

The preemption issue as to owner liability under state law dangerous instrumentality and negligent entrustment doctrines was also was present in *In re Hudson River Mid-Air Collision*, 2012 U.S. Dist. LEXIS 25149 (D.N.J. 2012). Specifically, the U.S. District Court for the District of New Jersey considered the issue of express preemption under 49 U.S.C. § 44112 for claims against the owner of a Piper aircraft that was involved in a mid-air collision with a Eurocopter over the Hudson River. As in *Vreeland*, the plaintiffs' decedents were passengers on board the Eurocopter and the Piper aircraft, rather than persons on the ground. Nevertheless, the District Court held that there were genuine issues of material fact as to whether the owner exercised actual control over the operation of the aircraft, and therefore the court was not required to decide the preemption issue as to persons aboard the aircraft because if such control was present, then neither the dangerous instrumentality nor the negligent entrustment doctrines under which ownership liability was asserted could be preempted under 49 U.S.C. § 44112.

[31] 181 F.3d 363 (3rd Cir. 1999). Following *Abduallah*, but prior to the recent decision in *Sikkelee*, the U.S. district courts in the Third Circuit had previously applied federal preemption in other

was the subject of a recent decision of the Third Circuit Court of Appeals in *Sikkelee v. Precision Airmotive Corporation*.[32] The District Court, on the eve of trial, had concluded that it was encountering difficulty drafting jury instructions incorporating the federal standards, and therefore requested defendant AVCO to submit a motion for summary judgment based on its type certificate for the Lycoming engine involved in that case.[33] The district court stated in its later opinion that it requested the summary judgment motion because "an order resolving a motion for summary judgment would, in the Court's view, be conducive of interlocutory appeal by the Third Circuit under 28 U.S.C. section 1292(b)." . The District Court granted the motion for summary judgment on the issue of defect, concluding that "[t]he court will measure Lycoming's allegedly tortious conduct against the specific federal regulations that Sikkelee asserts are applicable; if there is no genuine issue as to whether Lycoming violated the specific regulations, then summary judgment in Lycoming's favor is warranted."[34] However, the district court denied the motion for summary judgment on plaintiff's claims that Lycoming violated its duty to report engine defects to the FAA.

---

product liability cases. *See Pease v. Lycoming Engines*, 2011 U.S. Dist. LEXIS (M.D. Pa. 2011)("while plaintiffs' amended complaint was inartfully drafted in setting forth *federal causes of action*, it would not be dismissed because Tennessee law provided causes of action for product liability and negligence, and the specific allegations of violations of CAR Part 13 and FAR sections 21.3 and 145.21, were sufficient to state a claim under the applicable Tennessee law and the federal standards of care applicable under *Abdullah*"); *Yellen v. Teledyne Continental Motors, Inc*., 2011 U.S. Dist. LEXIS 140338 (E.D. Pa. 2011)(federal law provided the standard of care applicable to plaintiff's product liability claims, but the district court remanded removed case because plaintiff's claims, while arising "against the backdrop of a federal aviation regulatory scheme, [nevertheless] sound in run-of-the mill state tort law.")

[32] Case No. 1-4193 (3rd Cir. April 19, 2016).

[33] 45 F.Supp.3d 431 (M.D. Pa. 2014).

[34] *Id.* at 451.

The Third Circuit Court of Appeals requested a brief from the FAA on the issue of federal preemption. A copy of that brief is attached.[35] The FAA contends that federal standards apply to state law tort actions generally, and, specifically, as to the issue of alleged design defects in products approved by the FAA, the FAA position was stated as follows:

> Defendants in this case assert that the FAA's issuance of a type certificate is dispositive of the question whether the manufacturer complied with federal standards and therefore preempts plaintiffs' design defect claims. But the question of the effect a type certificate has in a given case is governed by conflict preemption principles. It is thus only where compliance with both the type certificate and the claims made in the state tort suit "is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963); or where the claim "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Geier*, 529 U.S. at 873, that the type certificate will serve to preempt a state tort suit.
>
> Thus, ***to the extent that a plaintiff challenges an aspect of an aircraft's design that was expressly approved by the FAA*** as shown on the type certificate, accompanying operating limitations, underlying type certificate data sheet, or other form of FAA approval incorporated by reference into those materials, ***a plaintiff's state tort suit arguing for an alternative design would be preempted under conflict preemption principles***. That is because a manufacturer is bound to manufacture its aircraft or aircraft part in compliance with the type certificate. However, to the extent that the FAA has not made an affirmative determination with respect to the challenged design aspect, and the agency has left that design aspect to the manufacturer's discretion, the claim would not be preempted. In that instance, the claim would be adjudicated on the merits ***by reference to the federal standards of care found in the Federal Aviation Act and its implementing regulations***. In addition to the terms of the type certificate and accompanying materials, other agency pronouncements, including FAA orders and guidance materials, may bear substantially upon the merits of a state tort design defect claim.[36]

This position taken by the FAA would provide that express FAA approval of any aspect of a design would be conclusive. To the extent the FAA left any aspect to the discretion of the holder

---

[35] Notably, the FAA Brief cataloged the other federal circuit courts of appeals that had recognized federal preemption of the field of aviation safety, and distinguished *Public Health Trust of Dade County, Florida,* because it "relied in substantial part on the mistaken belief that an express preemption provision applicable to rates and routes indicated that there could be no implied field preemption with respect to aircraft safety." FAA Brief, pages 8- 9, and note 1.

[36] Brief of U.S. Department of Justice on behalf of Federal Aviation Administration, Sikkelee v. Precision Airmotive Corporation, Case No. 14-4193, Doc. 003112080847 ("FAA Brief"), pages 10-11 (September 21, 2015 3rd Cir)(emphasis added).

of the approval, then whether that alternative design decision would be considered based on federal standards of care derived from the Federal Aviation Act and its regulations, as to which FAA orders and guidance materials would be evidence. In specifying federal standards of care, the FAA is acknowledging federal preemption of the field of aviation safety, and, more particularly, federal decisions expressly approving designs are given preemptive effect under conflict preemption principles.

On April 19, 2013, a panel of the Third Circuit issued its decision in *Sikkelee v. Precison Aircraft Corporation,* [37] reversing the summary judgment in favor of the engine manufacturer based upon field preemption of the field of aircraft design and the issuance of the Type Certificate, and remanding the case for further proceedings based upon "traditional conflict preemption principles."[38] The court rejected the application of field preemption to the field of aircraft design based upon its analysis of the Federal Aviation Act, and its analysis of its history. The court also rejected the application of field preemption on the grounds that aviation tort law had traditionally been governed by state law, and that there is a strong presumption against field preemption in an area traditionally govern by state law. The court considered the FAA position, but stated that the opinion of an administrative agency was not entitled to deference as to the extent of preemption and would only be accorded effect based upon its persuasiveness. The court critically reviewed the FAA position and found it unpersuasive as to the pervasiveness of federal regulation of aircraft design. The court also rejected the application of Supreme Court precedents of field preemption for the design of "oil tankers and locomotives," concluding that the more analogous federal regulatory schemes were those related to automobiles and boats as to which the Supreme Court had rejected implied field preemption as to product liability cases. The

[37] Case No. 1-4193 (3rd Cir. April 19, 2016).

[38] *Id.* at 60-61.

court also reviewed the other federal appellate courts that had found implied preemption of aviation safety and concluded that none of them had ever recognized, and some had even rejected in certain cases, field preemption of the field ***of product liability***.[39] Nevertheless, the court recognized that the Supremacy Clause and recent Supreme Court decisions require the application of federal standards when required by conflict preemption. As to conflict preemption, the court agreed with the FAA position that federal decisions approving specific designs preempt the adoption of state law standards "only where compliance with both the type certificate and the claims made in the state tort suit 'is a physical impossibility[]'; or where the claim 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [40] The court stated that it had "no need [in that appellate decision] to demarcate the boundaries of those tort suits that will be preempted as a result of a conflict between state law and a given type certificate, nor which FAA documents incorporated by reference in a type certificate might give rise to such a conflict." [41] The court did note, however, that in "the case before us[,] the FAA's preapproval process for specifications embodied or incorporated into a type certificate, . . .precludes a manufacturer from making at least 'major changes' to a design aspect without further preapproval, [which] means a manufacturer may well find it impossible to simultaneously comply with both a type certificate's specifications and a separate – and perhaps more stringent – state tort duty. Thus, there may be cases where a manufacturer's compliance with both the type certificate and a state law standard of care 'is a

[39] *Id.* at 52-57. As a result of its analysis of the aviation field preemption precedents in other federal appellate courts, the court concluded that in refusing to "expand *Abdullah*" to aviation design defect cases, it was avoiding the creation of a split between the circuits on this issue. *Id.* at 60.The court did not consider any district court or state court cases applying field preemption to aviation product liability cases, particularly those in the Ninth Circuit.

[40] *Id.* at 45-49.

[41] *Id.* at 46.

physical impossibility,' [citation omitted], or would pose an obstacle to Congress's purposes and objectives. In such cases the state law claim would be conflict preempted. " [42]

The federal courts in the Eleventh Circuit have long been bound by its decision in *Public Health Trans. of Dade County, Fla. v. LakeAircraft, Inc.*, [43]holding that state law aviation product liability claims are not bound by federal preemption. But, as pointed out by at least one district court, that decision is now inconsistent with current Supreme Court preemption decisions, as well as other circuits that have recognized federal preemption of aviation safety. In *North v. Precision Automotive Corporation,* 2011 U.S. Dist. LEXIS 15443 (M.D. Fla. 2011), Judge Presnell considered federal field preemption of aviation product liability claims. Judge Presnell's analysis relied upon the objective evidence of congressional interest under the later Supreme Court decision in *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995), as well as the authority from the other federal circuits adopting federal field preemption of aviation safety, to *conclude* that the Federal Aviation Act should preempt state law product liability claims. Nevertheless, Judge Presnell held that there could be no implied federal field preemption of

[42] *Id.* at 49-50. The court noted that in its opinion the Second, Ninth and Tenth Circuits field preemption analysis was a two-tiered analysis that requires the court to make a determination as to whether a specific area was subject to pervasive federal regulations, and "[t]hus although described as field preemption, . . . define the relevant 'field' ***so narrowly as to result in an analysis that resembles conventional conflict preemption***." *Id.*at 53, note 22 (emphasis added). A comparison of the conflict analysis described by the *Sikkelee* court with the two-tiered field analysis applied by Washington Court of Appeals decision in *Estate of Becker*, *supra*, demonstrates that this is not necessarily the case. In *Becker*, the court, concluded that there were pervasive FAA regulations relating to the "area of aircraft fuel systems, thereby preempting any state standard of care for defects in the assembly and welding of the carburetor float, ... Because Becker cites no compelling authority for an applicable federal standard of care, the claims against FTI fail." Conversely, under the *Sikkilee* conflict analysis, assuming the absence of a federal regulation or specific FAA approval, the door would be opened for the application of "a state standard of care for defects in the assembly and welding of the carburetor float."

[43] 992 F.2d 291 (11th Cir. 1993).

aviation safety, and, particularly, aviation product liability claims, in the case at issue, until the Eleventh Circuit reviewed the issue again.[44]

D. AIRLINE DEREGULATION ACT ("ADA") – FEDERAL PREEMPTION

In *Xiaoyun Lu v. AirTran Airways, Inc*,[45] the Eleventh Circuit Court of Appeals considered the scope of express federal preemption of state laws affecting airline "rates, routes and services" under the Airline Deregulation Act. The Court held that plaintiff's claims that the airline employees were rude and wrongfully removed her from a flight after initially refusing to place her cell phone in "airplane" mode were either preempted as related to "service" or failed to state a claim under federal law relating to the captain's authority to remove a passenger from the aircraft. The mere allegation that the removal was wrongful and arbitrary and capricious did not allege a discriminatory intent and therefore failed to state a claim. The Court also held that a claim for breach of the covenant of good faith and fair dealing failed to state a claim for breach of contract exempted from ADA preemption, because it relied on state law beyond the express terms of the contract of carriage, which is the sole extent of the exemption from express preemption under the ADA. Finally, the Court held that various state law tort claims, while not preempted by the ADA under the preemption analysis of tort law claims followed in the Eleventh Circuit, nevertheless failed to state a claim under either Georgia or New York law.

E. **FEDERAL TORT CLAIMS ACT**

Generally, federal courts lack jurisdiction to hear claims against the United States because of sovereign immunity in the absence of a waiver of that sovereign immunity. The

[44] *But cf.* Hughes v. Crist, 377 F.3d 1258, 1268, 2004 U.S. App. LEXIS 15059, 17 Fla. L. Weekly Fed. C 783 (11th Cir. 2004)(recognizing that certain FAA regulations [§ I(E) of Appendix J to Part 121 of Title 14 of the regulations] pertaining to alcohol treatment programs expressly preempt certain conflicting state laws, but otherwise rejecting field preemption of Florida statutes pertaining to operation of aircraft under the influence of alcohol).

[45] 2015 U.S. App. LEXIS 17499 (11th Cir. 2015).

Federal Tort Claims Act, however, waives the government's sovereign immunity for "personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[46] The act excludes independent contractors from its definition of "employee."[47] Thus, under the FTCA, a determination of whether an individual may be considered a federal employee depends upon the amount of control the federal government has over the individual's physical performance. In addition, the government may be shielded under the discretionary function exception of the FTCA.[48] This exception insulates the government from liability for claims based upon a government employee's acts or omissions in performing a discretionary function or duty that involves an element of judgment or choice as long as the judgment is of the kind that the discretionary function exception was designed to shield. If the Federal Tort Claims act does not apply to an action, so as to waive the government's sovereign immunity, the claims against the government must be dismissed for lack of subject matter jurisdiction.

In order to successfully maintain an action against the United States, a claimant must first satisfy the statutory notice requirement of 28 U.S.C. §2675(a).[49] The failure to file an administrative claim has generally been considered a grounds for dismissal as a "jurisdictional

[46] 28 U.S.C. §1346(b).

[47] 28 U.S.C. § 2671.

[48] 28 U.S.C. § 2680(a).

[49] This statute provides that an "action shall not be instituted upon a claim against the United States" for damages "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied." 28 U.S.C. §2675(a).

requirement and an absolute prerequisite to maintaining a civil action against the government under the FTCA."[50] Courts have held that the purpose of the notice requirement is to "ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States."[51]

The U.S. Supreme Court has now reversed that conception in the 2014 decision in *United States v. Kwai Fun Wong,* [52], ruling that the time limit for filing an administrative claim is not jurisdictional, concluding that that there is a rebuttable presumption in favor of equitable tolling of time limitations, and that Congress can defeat that presumption by expressly providing that the time limit is jurisdictional. However, the FTCA does not include an express statement that the time limit was intended to deprive the court of jurisdiction. Accordingly, the Supreme Court held that traditional rules for tolling statutes of limitations are applicable to the FTCA.

Kwai Fun Wong has been followed in other contexts in the Eleventh Circuit. In *Willingham v. United States of America*,[53]plaintiff submitted an SF-95 form to the Veteran's Administration alleging medical malpractice at a VA facility. The form, prepared by a VA "patient advocate" did not include plaintiff's signature or a specific amount claimed. A response by the Regional Counsel advising plaintiff of the deficiencies was sent to an incorrect address, and plaintiff did not learn of the deficiencies until after the two year time limit expired. The court concluded that the deficient Form 95 was filed within the time limit, and that plaintiff's diligence in pursuing his claim, as well as his reliance on the VA "patient advocate," justified equitable tolling of the two year time limit..

---

[50] *Roma v. United States*, 344 F.3d. 352, 362 (3d Cir. 2003).

[51] *See e.g., Tucker v. U.S. Postal Service*, 676 F.2d. 954, 958 (3d Cir. 1982).

[52] 135 S.Ct. 1625, 191 L.Ed.2d 533, 2015 U.S. LEXIS 2809 (2014).

[53] 2016 U.S. Dist. LEXIS 20475 (S.D. Ga. 2016).

A similar outcome had been reached in *Turturro v. United States*,[54] prior to the *Kwai Fun Wong* decision. In *Turturro*, the district court denied the motion of the United States to dismiss the case for lack of subject matter jurisdiction, finding that the Form 95s filed by the plaintiffs properly put the United States on notice of the claims.[55] *Turturro* stemed from the death of a flight instructor and his student when they lost control and crashed their small aircraft into a parking lot while practicing touch-and-go landings at the Northeast Philadelphia Airport on May 22, 2008. Following the accident, the two estates filed separate Form 95s with the Federal Aviation Administration, alleging that the FAA controllers failed to give the small aircraft sufficient warning about and separation from a helicopter which had departed just prior to the small aircraft.[56] Plaintiffs alleged that the large helicopter generated wake vortices, rotor downwash and wake turbulence. After the FAA denied both administrative claims, the plaintiffs filed lawsuits, took depositions, and then filed second amended complaints.[57] The United States then moved to dismiss the second amended complaints for lack of subject matter jurisdiction, arguing that most of the substantive allegations in the second amended complaints were new, and were not presented to the FAA for review in the Form 95s.[58]

After noting that the Third Circuit recognized "minimal notice" to satisfy the notice requirement, the Court addressed the motion of the United States. The Court discussed the allegations found in plaintiffs' second amended complaints, and noted that plaintiffs' Form 95s,

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

[55] *Id.* at *24.

[56] *Id.* at *5-6.

[57] *Id.* at *8.

[58] *Id.* at *9.

coupled with their experts' report which was attached to the Form 95s, properly put the United States on notice of the claims included in the second amended complaints.[59]

The *Turturro* case ultimately proceeded on the theory that the air traffic controller had directed the pilot of the small AA-5 aircraft making a downwind departure to turn in the direction of a departing Agosta helicopter, and that the pilot had been startled by seeing the helicopter, causing him to pull back on the control yoke and stall the airplane resulting in the crash. The United States moved for summary judgment on the grounds that there was no evidence as to the AA-5 pilot's state of mind and that the theory was merely speculation. The district court agreed and granted summary judgment, which was affirmed by the Third Circuit Court of Appeals.[60]

As previously discussed, claims against the United States under the Federal Torts Claims Act must be presented to the United States within two years after those claims accrue.[61] In *Ressler v. United States*,[62] the federal court held that claims received by the FAA two years and eight days after the claims had accrued were untimely, and such claims were dismissed. *Ressler* stemmed from the crash of a commercial airliner in Denver, Colorado, on December 20, 2008. In *Ressler*, the McLean plaintiffs alleged that the negligence of the United States, acting through the FAA, caused the crash and the plaintiffs' injuries, as the FAA failed to provide proper wind information to the pilots of the airplane.[63] On December 20, 2010, precisely two years after the

[59] *Id.* at *23-24.

[60] 629 Fed. Appx. 313; 2015 U.S. App. LEXIS 17679 (3rd Cir. 2015).

[61] 28 U.S.C. §2401 (b).

[62] *Ressler v. United States*, 2012 U.S. Dist. LEXIS 134622 (D. Colo. 2012).

[63] *Id.* at *7.

accident, the McLean plaintiffs mailed their administrative claims to the FAA. The FAA received the claims on December 28, 2010.[64]

Defendant United States moved to dismiss the McLean claims as untimely, and in their response, the McLean plaintiffs argued that their claims did not accrue until April 20, 2009, the date that the National Transportation Safety Board released its first factual report concerning the crash. The McLean plaintiffs argued that they first learned critical facts showing the culpability of the United States at that time.[65]

Citing the pertinent case law, the federal court concluded that the McLean plaintiffs' claims accrued on the day of the crash, December 20, 2008. Since their administrative claims were not presented to the FAA until December 28, 2010, more than two years after the claims accrued, their FTCA claims were "forever barred" because their claims were not "presented in writing to the appropriate federal agency within two years after" their claims accrued.[66]

F. JURISDICTION AND PROCEDURE

1. Personal Jurisdiction

a. The Limits on Personal Jurisdiction Under Specific Jurisdiction

The most recent landmark Supreme Court decision in the field of specific personal jurisdictional in product liability cases is *J. McIntyre Machinery, Ltd. v. NiCastro*,[67] decided by the U.S. Supreme Court in 2011, in which the Supreme Court held that the exercise of personal jurisdiction over manufacturers outside the United States would violate due process and ordered that the cases against those defendants be dismissed. This case and the most recent Supreme

[64] *Id.* at *8.

[65] *Id.* at *9.

[66] *Id.* at *11; 28 U.S.C. §2401 (b).

[67] 131 S. Ct. 2780, 2011 U.S. LEXIS 4800 (2011).

Court decisions related to specific jurisdiction are discussed below. Additionally, the effects of these decisions over the personal jurisdiction analysis of claims against aviation manufacturers has been reflected in several recent cases which have forced the district courts and state trial courts to more carefully examine the facts upon which a claim of specific jurisdiction is based.

In *J. McIntyre Machinery, Ltd. v. NiCastro,*[68] the U.S. Supreme Court addressed the issue of specific personal jurisdiction over a British manufacturer sued in a personal injury action in New Jersey with regard to an accident involving a machine manufactured by the British manufacturer and sold through a U.S. distributor to plaintiff's employer in New Jersey. The New Jersey Supreme Court, noting that the British manufacturer had taken no action in New Jersey or any particular efforts to sell its products in New Jersey when it retained the U.S. distributor to sell its products in the United States, nevertheless held that personal jurisdiction was proper because it was foreseeable that the product might be sold in any state.

Three separate opinions were written, with a four justice plurality opinion written by Justice Kennedy which rejected any jurisdiction over the British manufacturer in New Jersey because there was no evidence of any intent on the part of the British manufacturer to take any purposeful action to "invoke or benefit from the protection of the laws of New Jersey." This position has been referred to as the "sovereignty" rule of jurisdiction. Justice Breyer, in a separate opinion, joined in by Justice Alito concurred in the result. Justice Breyer started from the premise that "there have been many recent changes in commerce and communication, many of which are not anticipated by our [the Supreme Court's] precedents[,] but this case does not present any of those issues." As a result, Justice Breyer concluded that prior precedents such as

[68] 131 S. Ct. 2780, 2011 U.S. LEXIS 4800 (2011).

Worldwide Volkswagen Corp. v. Woodson,[69] that required "'something more' than simply placing "a product into the stream of commerce," should provide the basis for the decision to find that the exercise of personal jurisdiction over the British manufacturer would be unconstitutional. Justice Ginsburg, joined by Justices Sotomayor and Kagan, issued a dissenting opinion and would have found personal jurisdiction based upon the British manufacturer's efforts to market its products at U.S. trade shows and through trade organizations throughout the United States. Justice Ginsburg also noted that $3 trillion dollars in foreign goods were imported into the United States in 2010, and that "[w]hen industrial accidents happen, a long-arm statute in the State where the injury occurs generally permits assertion of jurisdiction, upon giving proper notice, over the foreign manufacturer." According to Justice Ginsberg, the appropriate test is that of "reason and fairness." Justice Ginsburg concluded by noting that the British manufacturer "'purposefully availed itself' of the nationwide United States market, not a market in a single State or a discrete collection of States," and 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." Justice Ginsburg also contrasted this case from a case in which an entity's activities "are largely home-based . . . . without designs to gain substantial revenue from sales in distant markets."

In the later, 2014 decision, *Walden v. Foire*,[70]the issue of specific personal jurisdiction under the *Calder* "effects test"[71] was addressed. The Supreme Court rejected an analysis based

---

[69] 444 U.S. 286 (1980), and *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 286 (1987).

[70] ___ U.S. ____, 134 S.Ct. 1115, 188 L.Ed.2d 12, 2014 U.S. LEXIS 1635, 2014 WL 700098 (2014)(Thomas, J.)

[71] Calder v. Jones, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984).

only upon the plaintiff's contacts with the forum state and the harm suffered there, and reemphasized that the proper analysis was a consideration of the defendant's contacts with the forum state relating to the specific claim, stating that "the inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant 'focuses on the "***relationship among the defendant, the forum and the litigation***,"'"[72] "The plaintiff [and his or her damages] cannot be the only link between the defendant and the forum."[73] While not immediately apparent from the facts and issues in this case, *Walden* also reflects the Court's view of "effects" on a forum's residents for torts that occur outside the jurisdiction. This limiting view has application to analysis of personal jurisdiction over defendants in product liability cases involving plaintiffs within the forum, for accidents and torts occurring outside the forum state.

b. <u>The Demise of General Jurisdiction</u>

In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 408 111 App. 3d 827, 946 N.E. 2d 1076 (2011).[74] U.S. plaintiffs, the parents of two sons who died in an accident in France, sought to assert personal jurisdiction in their home state of North Carolina over a non-U.S. subsidiary of a U.S. corporation, for claims alleging the manufacture of a defective product by the non-U.S. subsidiary allegedly resulting in the accident. In this decision, the Supreme Court, in an opinion by Justice Ginsburg, was unanimous in holding that the attempted exercise of personal jurisdiction was unconstitutional. Because there was no relationship between North Carolina and the accident, other than the plaintiffs' residence, the North Carolina courts had upheld personal

[72] 134 S.Ct. at 1121 (emphasis added)(notably at fn. 6, Justice Thomas in writing the Court's majority opinion explains the distinctions and definitions of what the Court refers to as " 'specific' or 'case-linked' jurisdiction" and " 'general' or 'all purpose' jurisdiction." This terminology provides insight into the Court's view of the nature, origin and utility of each of these forms of personal jurisdiction.

[73] 134 S.Ct. at 1122.

[74] 131 S. Ct. 2846, 2011 U.S. LEXIS 4801 (2011).

jurisdiction over the non-U.S. subsidiary based on general jurisdiction. Justice Ginsburg noted that the non-U.S. subsidiary undertook no efforts to market its products in the United States, and that only a small percentage of its products were ultimately sold through other affiliated companies to any North Carolina residents in order to equip specialized vehicles such as "cement mixers, waste haulers, and boat and horse trailers," rather than the type of tires [bus tires] involved in the accident. The attenuated business activity of the non-U.S. subsidiary "fell far short of the 'continuous and systematic business contacts' necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the state [citing *Helicopteros*]."

In *Daimler AG v. Bauman*,[75] the Supreme Court considered an appeal from the Ninth Circuit Court of Appeals, which had held that the mere presence of a subsidiary in the jurisdiction has established general jurisdiction over a non-U.S. parent corporation. In *Bauman v. DaimlerChrysler Corp.*,[76] the Ninth Circuit U.S. Court of Appeals held that the general jurisdiction over a U.S. subsidiary that acted as the agent (although not the alter ego) of a non-U.S. parent subjected the non-U.S. parent to general jurisdiction in the United States. While *Bauman* was decided before *Goodyear Dunlop Tires*, the Ninth Circuit Court of Appeals denied a request for reconsideration based on the *Goodyear Dunlop Tires* decision.[77] A dissent from the denial of the request for reconsideration by seven circuit judges, complaining that the agency theory of personal jurisdiction is inconsistent with *Goodyear Dunlop Tires*, and noting that the United States government also opposed personal jurisdiction over a non-U.S. corporation with regard to an unrelated cause of action, simply because of the presence of an agent in the United

---

[75] ___ U.S. ___. 187 L.Ed.2d 624, 2014 U.S. LEXIS, 2014 WL 113486 (2014)(Ginsburg, J.)

[76] 644 F.3d 909 (9th Cir. 2011).

[77] *Bauman v. DaimlerChrysler Corp.*, 676 F.3d 774 (9th Cir. 2011).

States, also interfered with "negotiations of international agreements on the reciprocal recognition and enforcement of judgments."[78]

The Supreme Court accepted *certiorari* and reversed the divided Ninth Circuit decision, holding that the Ninth Circuit analysis had misapplied its prior precedents establishing general jurisdiction, and restating and refining the requirements for general jurisdiction.[79] The Supreme Court focused on whether the parent corporation was essentially "at home" in the forum jurisdiction, ruling that the mere existence of substantial business contacts with the forum jurisdiction were not sufficient to establish a basis for general jurisdiction. Finding that the German parent corporation, which did not do business directly in the forum jurisdiction, but did derive a substantial share of its revenue from the forum state, was "at home" in Germany, the Supreme Court held that the requirements of general jurisdiction were not satisfied. In a concurring opinion, Justice Sotomayor concurred with the decision, but did not agree that general jurisdiction should be limited to those entities "at home" in the forum jurisdiction or that the presence of a substantial share of non-resident's revenue, through the "continuous and systematic" conduct of a subsidiary that did business in the forum, would not be sufficient to establish general jurisdiction in all cases.

c. Recent Jurisdictional Aviation Cases

As will be discussed below, a number of aviation cases have applied the analysis of *McIntyre, Fiore*, *Goodyear Dunlop Tire*, and *DaimlerChrysler*. Those cases have evaluated whether the defendant's conduct that gave rise to a tort occurred or was specifically directed, wholly or at least in part, within or to the forum jurisdiction (*Walden*), or whether extensive

[78] *Id.* at 779.

[79] *DaimlerChrysler AG v. Bauman*, 133 S. Ct. 1995; 185 L. Ed. 2d 865; 2013 U.S. LEXIS 3163; 81 U.S.L.W. 3598 (2013).

continuous and systematic contacts in the forum jurisdiction, are alone sufficient to support general jurisdiction, when the defendant is actually "at home" in another jurisdiction (*DaimlerChrysler*).

These limiting decisions have been consistently applied to limit personal jurisdiction in aviation cases. Virtually every federal court decision has found that the developing constitutional limitations actually limit the application of state long arm statutes, primarily those based on a stream of commerce (or even stream of commerce plus) analysis, to those cases in which the defendant not only placed the product in the stream of commerce, but also had contacts with the product and the plaintiff within or directed to the forum state.

In the companion cases of *Schorr v. Aero Accessories, Inc*.[80] and *Hall v. Aero Accessories, Inc.*,[81] the U.S. District Court for the Northern District of Georgia dismissed the wrongful death claims against Aero Accessories, Inc., resulting from the deaths of pilot Hall and passenger Schorr, both residents of Georgia, in the crash of a home-built RV-7 aircraft near Gainesville, Georgia. Aero Accessories, Inc. is a North Carolina corporation that manufactures fuel pumps. The fuel pump ultimately installed on the engine of the accident aircraft had been sold to a British Columbia wholesale company, which sold it to the British Columbia home-built engine manufacturer who placed it on the engine. The engine ultimately was placed on the aircraft when it was built by Mr. Hall in Georgia. There was no connection between the sale of the fuel pump by Aero Accessories and the State of Georgia. Aero Accessories did sell other products to locations in the State of Georgia. The District Court applied a two-step analysis to determine, first, whether there was personal jurisdiction under the Georgia Long Arm Statute, and, second, whether the exercise of personal jurisdiction would comply with the requirements

[80] 2015 U.S. Dist. LEXIS 177284 (N.D. Ga. 2015).

[81] 2015 U.S. Dist. LEXIS 177285 (N.D. Ga. 2015).

of due process. The district court concluded that the requirements of O.C.G.A. § 9-10-91 would be satisfied because the product caused an injury in the State of Georgia, and Aero Accessories regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state." Nevertheless, the district court concluded that the exercise of specific personal jurisdiction would violate due process because there was not a sufficient nexus between Aero Accessories' conduct directed to the State of Georgia and cause of action because the product had not been sold to or in Georgia. The district court stated the following:

> The Court finds, however, that the size of the revenue is irrelevant because these sales and shipments were entirely distinct from the sale and shipment of the fuel pump at issue. Aero Accessories sold the fuel pump to Tempest in 2007, at a time when Tempest's incorporation and principal place of business were both in South Carolina. (Welsh Affidavit, Dkt. [67-2] **[*14]** ¶ 3.) It then shipped the fuel pump to Canada. (Id.) After the initial shipment, Aero Accessories had no contact with the fuel pump nor any knowledge of where it would be next sent. (Id.) So, even if Aero Accessories has transacted business in Georgia by way of its sales in the state, those sales are entirely unrelated to the sale of the allegedly defective fuel pump, and cannot serve as a basis for jurisdiction under subsection (1) of the Georgia long arm statute.
>
> * * *
>
> Plaintiff also claims that Aero Accessories transacted business in Georgia because it was obligated to provide "continued airworthiness instructions to owners/operators of its **products,**" including service bulletins. (Id. at 12-13.) Even if Aero Accessories is indeed subject to these obligations, they do not bear on an analysis under the "transacts any business" subsection of the long arm statute. Mere obligations are entirely distinct from purposeful acts, which is what subsection (1) of the long arm statute requires. See Diamond Crystal, 593 F.3d at 1264 ("Interpreted literally, 'transacts any business' requires that the 'nonresident defendant has purposefully done some act or consummated some transaction in [Georgia] . . . .'") (quoting Aero Toy Store, 631 S.E.2d at 737).
>
> * * *
>
> Because none of the business allegedly transacted by Aero Accessories in Georgia is related to or gave rise to this suit and because neither obligations nor omissions constitute the transaction of business, the Court finds that it cannot exercise personal jurisdiction over Aero Accessories under subsection (1) of the Georgia long arm statute.

The district court analyzed the issue of general jurisdiction, even though it had not been raised, and concluded that under the Supreme Court decision in Goodyear Dunlop case, Aero Accessories did not have sufficient contacts to be “at home” in Georgia. As to specific jurisdiction, the district court stated the following:

> Most importantly in this case, when determining whether specific jurisdiction **[*22]** exists, a court must determine whether the "controversy is related to or 'arises out of' a defendant's contacts with the forum . . . ." Helicopteros, 466 U.S. at 414 (quoting Shaffer v. Heitner, 433 U.S. 186, 204, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)).
>
> Ultimately, the Court finds that Aero Accessories' contacts with Georgia do not give rise to Plaintiff's claims. Plaintiff's cause of action against Aero Accessories arises out of the manufacture and sale of an allegedly defective fuel pump. (Compl., Dkt. [1] ¶ 26.) This fuel pump was manufactured by a North Carolina corporation, which has its only offices in North Carolina. (Henderson Affidavit, Dkt. [67-1] ¶ 2.) It was then sold to a South Carolina distributor, and shipped to Canada. (Welsh Affidavit, Dkt. [67-2] ¶ 2.) After that point, Aero Accessories had no contact with the fuel pump. (Id.) The fuel pump eventually made its way into Georgia, but not through any action on the part of Aero Accessories. See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 296, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980) (every seller of chattels does not, by selling the **product,** "appoint the chattel his agent for service of process.").

Finally, plaintiff alleged that the Federal Aviation Regulations imposed a duty to send warnings to the owner of the aircraft in Georgia. The district court rejected this argument, stating the following:

> To the extent that Plaintiff alleges that this case arises out of Aero Accessories' omissions in failing to report **defects** in accordance with Federal Aviation Regulations ("FAR"), the Court disagrees. In asserting that **[*23]** Aero Accessories breached a duty to report known **defects** with the fuel pump, Plaintiff relies on 14 C.F.R. § 21.3.[4] That regulation provides, in relevant part:
>
> > (a) The holder of a type certificate . . . a PMA, or a TSO authorization, or the licensee of a type certificate must report any failure, malfunction, or **defect** in any **product** or article manufactured by it that it determines has resulted in any of the occurrences listed in paragraph (c) of this section . . .
> >
> > (c) The following occurrences must be reported as provided in paragraphs (a) and (b) of this section . . .

> (10) An engine failure[5] . . . .
>
> 14 C.F.R. § 21.3(a), (c). Based on this regulation, Plaintiff concludes, "if Aero Accessories knew or should have known with [sic] an engine malfunction caused by a lack of fuel flow, then it had a duty to report it." (Pl.'s Not. of Filing Errata ("Filing Errata"), Dkt. [108] at 2.)
>
> Plaintiff's position is rebutted by Aero Accessories' affidavit **[*24]** of Ronald Wojnar, a former Deputy Director of the **Aircraft** Certification Service. (Dec. of Ronald T. Wojnar ("Wojnar Affidavit"), Dkt. [120-4] at 2.) First, as Mr. Wojnar's affidavit points out, Plaintiffs have not identified any specific occurrences of failures, malfunctions, or **defects** in the fuel pump required to be reported under 14 C.F.R. § 21.3. (Id. at 25.) Second, 14 C.F.R. § 21.3 does not place a duty on Aero Accessories to report to anyone an engine malfunction due to lack of fuel flow. (Id. at 26.) Instead, it only requires a report when there is an "engine failure." See 14 C.F.R. § 21.3(c)(10). Based on Mr. Wojnar's affidavit, the Court finds that 14 C.F.R. § 21.3 imposed no duty upon Aero Accessories. Without a duty to report under the FAR, no omission on the part of Aero Accessories could give rise to this action.
>
> As Aero Accessories' contacts with Georgia do not give rise to this action, the Court finds that it lacks personal jurisdiction under the Due Process Clause of the Fourteenth Amendment.

In *Broadus v. Delta Air Lines, Inc.*,[82] Plaintiff was a North Carolina resident who purchased a ticket in North Carolina for a Delta flight from Greensboro to Pensacola, with an intermediate stop in Atlanta. Delta provided wheelchair assistance to plaintiff for boarding her flight in Atlanta. Plaintiff alleged that the Delta employee providing assistance was negligent, causing serious injuries.

Delta was a Delaware corporation with its principal place of business in Atlanta, Georgia. Undeniably, it had substantial business activities in North Carolina. Nevertheless, Delta moved to dismiss for lack of personal jurisdiction.

The court began its analysis by noting that the North Carolina long-arm statute permitted jurisdiction to the full extent permitted by federal due process. It then proceeded to address

[82] 101 F.Supp. 3d 554 (M.D.N.C. 2015), 2015 U.S. Dist. LEXIS 55195.

whether Delta was subject to specific jurisdiction in North Carolina. In doing so, the court relied on the following legal principles:

1. "Specific personal jurisdiction requires 'that the relevant conduct have such a connection with the forum state that it is fair for the defendant to defend itself in that state.'" *Id.* at 559.
2. This connection requires a fact-intensive inquiry focusing on the relationship among the defendant, the forum and the litigation. *Id.*
3. The court must determine whether: (a) the defendant purposefully availed itself of the privilege of conducting activities in the forum state; (b) the claims arise out of those activities; and (c) exercising jurisdiction would be reasonable. *Id.*
4. "If the defendant has created a 'substantial connection' to the forum," then purposeful availment exists, but the connection must arise from contacts that the *defendant* creates with the forum. *Id.* at 560.

Since Delta's numerous business contacts with North Carolina indicated, and Delta did not seriously contest, purposeful availment, the court considered whether plaintiff's claims arose from Delta's North Carolina contacts.

Delta argued that plaintiff's claim did not arise out of any forum contacts because the alleged negligence and resulting injuries occurred in Georgia. In rejecting this argument, the district court quoted from a 1996 Sixth Circuit case that if a defendant's in forum contacts "are related to the operative facts of the controversy, then an action will be deemed to have arisen from those

contacts." *Id.* at 560. The district court then pointed to the Supreme Court's decision in *Walden v. Fiore,* 134 S. Ct. 1115, 1124 & 1125 (2014) quoting:

> Contrary to Delta's assertion, the "proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." Accordingly, personal jurisdiction can be appropriate where the injury "would have occurred *but for*" a defendant's contacts with the forum State. [Emphasis added; internal citations to *Walden* omitted.]

101 F.Supp.3d at 560-61.

It was "plain" to the district court that plaintiff's claims arose out of Delta's contacts with the forum because the roundtrip agreement, and the trip commencing in North Carolina, were the genesis of the dispute. *Id.* at 561. In further support of this conclusion, the court noted:

> But for Delta operating its airline business in North Carolina and picking up [plaintiff] in Greensboro, [plaintiff] would not have been injured during her layover in Atlanta. Therefore, Delta should have anticipated that, as a common carrier promising to pick [plaintiff] up in North Carolina and return her there, it could be haled into a court in North Carolina, the state of her initial departure and final arrival, for injuries it inflicted on her during the trip. [plaintiff's] injuries arose directly out of, and are closely related to, Delta's connection with North Carolina.

Id. However, the court offers no citation in support of this sweeping proposition.

Finally, the court had no problem concluding that it was not unreasonable for Delta to defend this litigation in North Carolina because all of the reasonableness factors either favored North Carolina or were neutral. *Id.*

In *Everett v. BRP-Powertrain GmbH & Co KG*, [83], the airplane that plaintiff was piloting crashed in Missouri. Plaintiff suffered multiple serious injuries including permanent paralysis below the waist. His complaint in Wisconsin district court alleged that a defective engine failed in flight causing the accident.

Plaintiff's complaint named four defendants: (1) BRP-Powertrain ("Powertrain"), the designer and manufacturer of the subject engine; (2) Bombardier Recreational Products ("BRP"), the parent/owner of Powertrain; (3) Kodiak Research Ltd., ("Kodiak") a distributor of the subject engine; and (4) Leading Edge Air Foils ("LEAF"), a Wisconsin company that sold the subject engine to plaintiff in Wisconsin. The first three defendants moved to dismiss for lack of personal jurisdiction. Because the only relevant Wisconsin contacts related solely to the non-movant Wisconsin company, the court granted the motions to dismiss and denied plaintiff's motions to amend his complaint and/or to conduct jurisdictional discovery.

The court's jurisdictional analysis preliminarily noted that plaintiff had the burden of demonstrating personal jurisdiction. *Id.* at *4. Further, since Wisconsin's long-arm statute conferred jurisdiction to the fullest extent permitted by due process, *id.* at *4-5, the court proceeded to analyze plaintiff's claim that it could exercise both general and specific jurisdiction.

BRP and Powertrain's motions

BRP was a Canadian corporation. Its only connection to the accident was that it owned Powertrain, an Austrian company in the business of designing and manufacturing engines for ultra-light and light aircraft, as well as for unmanned aerial systems. Further, Powertrain had no contacts with Wisconsin and it did not sell engine products directly to consumers or end users.

[83] 2015 U.S. Dist. LEXIS 119874 (E.D. Wis. 2015)

"Instead, Powertrain aircraft engine products are sold to independent distributor entities outside of Wisconsin and the United States. *Id.* at * 6-7.

With respect to general jurisdiction, the district court noted that in recent years, the Supreme Court has "raised the bar" for this type of jurisdiction. *Id.* at *7. In order to be subject to general jurisdiction, the defendant's contacts with the forum state must be so continuous and systematic that the defendant is essentially at home in the forum state. *Id.* Based on the facts, this was not true for either BRP or Powertrain.

With respect to specific jurisdiction, the plaintiff relied on a stream of commerce theory. For guidance, the district court noted:

> A forum state "does not exceed its powers under the *Due Process Clause* if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce *with the expectation* that they will be purchased by consumers in the forum state." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297-98, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980) (emphasis added). On the other hand, "foreseeability" is not the governing standard; if otherwise, "Every seller of chattels would in effect appoint the chattel its agent for service of process. His amenability to suit would travel with the chattel." *Id. at* 296.

2015 U.S. Dist. LEXIS 119874 at *8.

In response to plaintiff's argument that Powertrain "knowingly maintained an open channel through which its products *could be* sold directly to Wisconsin retailers, and that it may still be aware that its products end up in Wisconsin," *id.*, the court noted that based on *World-Wide Volkswagen*, plaintiff's position failed to satisfy due process. *Id.* at *9. The district court further noted that plaintiff's position represented the "pure stream of commerce" theory rejected in *J. McIntyre Mach., Ltd. v. Nicastro,* 131 S. Ct. 2780, 2788 (2011). 2015 U.S. Dist. LEXIS 119874 at *9. Since Powertrain had less contacts to the forum state than the defendant in

Nicastro, the district court concluded that "Powertrain did not purposefully avail itself of the American marketplace, much less the Wisconsin marketplace. *Id.* at *10

Kodiak's motion

Kodiak was a Bahamian company that distributed uncertificated engines on a wholesale basis. LEAF's purchases from Kodiak represented no more than 3-4% of Kodiak's total sales. There were no other jurisdictionally relevant Wisconsin contacts. Consequently, in light of the court's analysis of the BRP and Powertrain motions, Kodiak was not subject to general jurisdiction in Wisconsin. *Id.* at 13. Nevertheless, to supplement that analysis, the district noted that in *Daimler AG v. Bauman,* 134 S. Ct. 746, 752 (2014):

> the Supreme Court found that Daimler was not subject to jurisdiction in California despite the actions of a subsidiary dealer that had "multiple California-based facilities," and Daimler's sales in California accounted for 2.4% of sales worldwide. * * * . Kodiak's Wisconsin sales (through LEAF) are similarly small, and Kodiak has no physical presence in Wisconsin. Therefore, Kodiak is not "essentially at home" in Wisconsin.

2015 U.S. Dist. LEXIS 119874 at *13.

As to specific jurisdiction, the court again essentially relied on the analysis of the BRP and Powertrain motions to reject plaintiff's arguments. *Id.* at *13-14. Further, the court noted that even though the fact that "the engine was re-sold in Wisconsin may have been foreseeable, . . . this does not demonstrate that Kodiak purposefully availed itself of the Wisconsin marketplace" with respect to the sale by LEAF to plaintiff. *Id.* at *14.

As a last gasp, plaintiff argued that defendants should not be allowed to avoid jurisdiction by what he described as a "corporate shell game." The court rejected this argument because *World-Wide Volkswagen* expressly permitted potential defendants to structure their conduct to

limit where they might be subject to suit. It was perfectly permissible that defendants here had done so. *Id.* at *15.

Finally, the court denied plaintiff's motions to amend his complaint and/or to conduct jurisdictional discovery. As the court had previously noted,

> the proponent of jurisdiction must make a "prima facie" showing, and if the defendant submits affidavits or other evidence in opposition to the exercise of jurisdiction, the plaintiff "must go beyond the pleadings and submit affirmative evidence supporting the exercise of jurisdiction." [Plaintiff] is required to make this showing not only to defeat a motion to dismiss for lack of jurisdiction, but also to justify a request for jurisdictional discovery.

(Citations omitted.) *Id.* at *15. The court further observed that plaintiff's motions were based on a premise that he could not make out a *prima facie* case of jurisdiction without discovery. But this was backward reasoning: he had to make out a *prima facie* case of jurisdiction in order to "unlock the door to jurisdictional discovery." *Id.* at *19.

In *Lubin v. Delta Airlines, Inc.*, [84]Plaintiff was a passenger on a flight from Memphis to Boston. She suffered personal injuries while using the aircraft's "stairs" to deplane in Boston. Her amended complaint, in Mississippi federal court, asserted product liability theories against Bombardier, Inc., which manufactured the aircraft. Bombardier was a Canadian corporation with its principal place of business in Montreal. Bombardier moved to dismiss for lack of personal jurisdiction.

The court began its analysis by noting that a federal court exercising diversity jurisdiction could assert personal jurisdiction against a non-resident only if the requirements of both the state

[84] 2015 U.S. Dist. LEXIS 100402 (S.D. Miss. 2015).

long-arm statute and due process are satisfied. *Id.* at *5. Since the requirements of the former were not satisfied, the court did not address the due process issue.

Under the Mississippi long-arm statute, jurisdiction can be satisfied in three ways:

> (1) the defendant entered into a contract with the plaintiff to be performed in whole or in part in Mississippi (the contract prong); (2) the defendant committed a tort, in whole or in part, against a plaintiff in Mississippi (the tort prong); or (3) the defendant was "doing business" in Mississippi (the "doing business" prong).

Id. at *6. Plaintiff asserted that jurisdiction existed under all three prongs.

The court held that the "contract prong" was unavailable because "Bombardier was not a party to a contract with [plaintiff]." *Id.* at *7 As to the "tort prong," it is satisfied if any element of the tort, or any part of any element, occurs in the state. *Id.* at *7-8. But in this case, plaintiff was injured in Massachusetts and her argument that she underwent surgery and physical therapy in Mississippi, as well as incurring damages there, was irrelevant. Quoting *Cycles, Ltd. v. W.J. Digby, Inc.*, 889 F.2d 612, 619 (5th Cir. 1989): "'a tort occurs where and when the actual injury takes place, not at the place of the economic consequences of the injury,'" the district court held that the tort prong also was not satisfied. 2015 U.S. Dist. LEXIS 100402 at *8-9.

In order to satisfy the "doing business prong," Bombardier's presence in Mississippi must be of a continuing and substantial nature. *Id.* at *9. In order to meet this standard, plaintiff asserted the following Mississippi "business activities":

> Bombardier's aircrafts [sic] utilizes [sic] manufacturing features supplied by Eaton Aerospace, LLC, a Mississippi company; Bombardier engages in marketing and advertising in Mississippi because its aircraft was featured in a national publication to which Mississippi residents may subscribe; Bombardier increases its sales presence nationally, and, thus, most likely increased its sales presence in Mississippi; Bombardier planes are flown in and out of Mississippi regularly; and, finally, plaintiff suggests that jurisdiction is proper because Bombardier is a publicly traded company.

Id. The court found that these facts did not show a business presence in the state. Rather, they "demonstrate that Bombardier is a Canadian company, that, at most, has limited, passive connections with the State of Mississippi. *Id.* at *10.

Finally, the court denied plaintiff's request to conduct jurisdictional discovery related to Bombardier. The court relied on *Wyatt v. Kaplan*, 686 F.2d 276, 283 (5th Cir. 1982):

> "Discovery on matters of personal jurisdiction . . . need not be permitted unless the motion to dismiss raises issues of fact. When the lack of personal jurisdiction is clear, discovery would serve no purpose and should not be permitted." *Id.* at 284. In addition, discovery is not required "where the discovery sought could not have added any significant facts." *Id.*

2015 U.S. Dist. LEXIS 100402 at *11.

In *Mullen v. Bell Helicopter Textron, Inc.*, [85] "Mullen I," Plaintiff was a passenger on a Bell helicopter that crashed in Mississippi, apparently due to engine failure. He suffered catastrophic injuries as a result and alleged that defects in the engine or its components, manufactured by Rolls Royce Corporation ("Rolls Royce"), caused the accident.

Rolls Royce was a Delaware Corporation with its principal place of business in Indiana. Its only affiliation with Mississippi was that it was registered to do business there. Rolls Royce moved to dismiss for lack of personal jurisdiction. Despite the apparent paucity of Mississippi contacts, plaintiff opposed the motion solely on the basis that Rolls Royce was subject to general jurisdiction. The district court granted the motion and its discussion of controlling authority from the Fifth Circuit was both straightforward and instructive.

Relying on recent decisions from both the Supreme Court and the Fifth Circuit, the district court outlined on the following principles that supported granting the motion:

[85] 2015 U.S. Dist. LEXIS 138770.

1. General jurisdiction requires a showing of substantial, systematic and continuous contacts between the defendant and the forum state such that the defendant can be considered "at home" in the forum. *Id.* at *6.
2. "The Fifth Circuit, noting the 'reduced role' played by general jurisdiction, has warned that the general jurisdiction test is 'a difficult one to meet.'" *Id.* at *7.
3. The Fifth Circuit has recognized that apart from the principal place of business or place of incorporation, it is the exceptional case where a defendant's operations will render it subject to general jurisdiction. *Id.*
4. "Further, the acts of a subsidiary or agent within the forum state do not impute general jurisdiction to the parent. *Id.* [The record reflected that some corporate affiliates of Rolls Royce operated in Mississippi. *Id.* at *8-9.]
5. Finally, "The Fifth Circuit has held that being qualified to do business in a state 'is of no special weight' in evaluating general personal jurisdiction." *Id.* at *9.

Subsequent to the court's decision in "Mullen I" above, defendant HLW Aviation, LLC ("HLW") also moved to dismiss plaintiff's complaint for lack of personal jurisdiction. This time, in *Mullen v. Bell Helicopter Textron, Inc*[86].- "Mullen II", in response to HLW's motion, plaintiff argued the existence of specific jurisdiction because HLW purposefully directed its activities towards Mississippi residents and it delivered a product into the stream of commerce.

HLW was a Georgia LLC with its principal place of business there. In his first amended complaint, plaintiff alleged negligence on the part of HLW and that HLW was in the business of leasing, operating, maintaining and servicing helicopters, including the one involved in the

[86] , 2015 U.S. Dist. LEXIS 149792

accident. However, at the time of the accident, T&M Aviation, based in Louisiana, operated the subject aircraft under a lease with HLW.

With respect to the plaintiff's stream of commerce theory, in the Fifth Circuit, jurisdiction exists if a defendant delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state. However, "mere foreseeability or awareness" that a product will enter the forum is sufficient only if the product made its way into forum state while still in the stream of commerce. *Id.* at *5-6. Significantly, the Fifth Circuit also requires that the defendant's forum contacts must be more than random, fortuitous, attenuated or the result of the unilateral activity of a third party. *Id.* at *6.

In this case, HLW's only connection to Mississippi was that it leased the helicopter. And, the Fifth Circuit has never applied the stream of commerce theory to leased products. *Id.* at *6, citing *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 273-74 (5th Cir. 2006). Moreover, because the lease transaction had taken place before the helicopter entered Mississippi, the stream of commerce theory was unavailable. 2015 U.S. Dist. LEXIS 149792 at *6.

The district court then proceeded to examine HLW's alleged "contacts" with Mississippi. The court concluded that, in sum, plaintiff essentially was arguing that HLW should have been aware that T&M would use the helicopter in Mississippi. Citing *World-Wide Volkswagen*, the district court held that even if HLW "was informed or should have known that the helicopter would be used . . . in Mississippi . . . [or] . . . would pass through Mississippi on its way to Louisiana," this was insufficient to support jurisdiction. *Id.* at *9. In short, the court found no connection between HLW and Mississippi. *Id.*

Plaintiff's final effort to avoid dismissal was to request jurisdictional discovery. As in other cases discussed in this article, because the facts relied upon by plaintiff did not support personal jurisdiction, these same facts could not support a request for discovery. *Id.* at *11-12.

In *Davidson v. Honeywell Int'l.*[87] Plaintiffs were crewmembers on a Turbo Commander aircraft. They alleged that they suffered serious personal injuries when oil fumes and mist entered the cabin while the aircraft was in flight in New York airspace. Defendant Fairchild Controls ("Fairchild") manufactured the aircraft's air cycle machine, which plaintiffs alleged was defective. Fairchild moved to dismiss plaintiffs' claims for lack of personal jurisdiction.

Fairchild was a Delaware corporation with its principal place of business in Maryland where it designed and manufactured the air cycle machines. Fairchild never manufactured, sold or distributed this product in New York. In the three years following the subject incident, Fairchild's sales to New York customers never exceeded 3.3% of its total sales. Otherwise, Fairchild had no relevant jurisdictional contacts with New York.

The court adopted a methodical approach to the personal jurisdiction issue:

1. The first question was whether personal jurisdiction existed under state law - here, the New York long-arm statute.
2. If so, does asserting personal jurisdiction comport with due process?
3. The due process analysis consists of (a) a "minimum contacts" inquiry and (b) a "reasonableness" inquiry.
4. To establish minimum contacts for "specific" jurisdiction, the claim must arise from or relate to the defendant's contacts with the forum state; and
5. Defendant must have purposefully availed itself of the privilege of doing business in the forum state so that the defendant could foresee being haled into court there.

[87] 2015 U.S. Dist. LEXIS 40813 (S.D.N.Y. 2015)

Id. at *4-6. The court also noted the decision in *J. McIntyre Machinery, Ltd. v. Nicastro,* 131 S. Ct. 2780 (2011) where the plurality opinion concluded that placing goods into the stream of commerce does not establish purposeful availment. 2015 U.S. Dist. LEXIS 40813 at *6-7.

After apparently determining that New York's long arm statute did not supply jurisdiction, the court proceeded to analyze the issue of due process because it was dispositive. Since Fairchild's relevant conduct was not purposefully directed towards New York, jurisdiction did not exist. Further, relying on *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 295, 100 S. Ct. 559 (1980), the district court specifically rejected plaintiffs' argument that because Fairchild manufactured "parts for major aircraft manufacturers such as Boeing, it is foreseeable that a defect in one of its products would have consequences" in flights over New York. 2015 U.S. Dist. LEXIS 40813 at *8-9.

Ultimately, the court concluded that pursuant to 28 U.S.C. §1404(a), it would transfer the case to a district where the parties agreed that jurisdiction was proper. Thus, dismissal due to lack of personal jurisdiction was unnecessary. 2015 U.S. Dist. LEXIS 40813 at *9-10.

In *Brady v. Southwest Airlines Co.*,[88] Plaintiff was a passenger on a Southwest flight that encountered turbulence on descent into Las Vegas. She alleged that during the turbulence, her seatbelt failed, her head struck the overhead bin and as a result, she suffered permanent brain injury. Defendant B/E Aerospace ("B/E") manufactured plaintiff's passenger seat. B/E filed a motion on the pleadings to dismiss for lack of personal jurisdiction. The court granted the motion and denied plaintiff's request to conduct jurisdictional discovery.

[88] , 2015 U.S. Dist. LEXIS 149792

At the outset of its analysis, the court noted that personal jurisdiction exists only if a defendant has the requisite minimum contacts with the forum state. *Id.* at *2. Further, it is the defendant, and not the plaintiff or third parties, who must create these forum contacts. *Id.* at *3. The court then addressed whether plaintiff pled either general or specific jurisdiction against B/E.

For general jurisdiction, the court noted that a defendant's activities in the forum state must be so "substantial" or "continuous and systematic," that the defendant is essentially at home in the forum (citing *Daimler AG v. Bauman*, 134 S.Ct. 746, 754 (2014)). 2016 U.S. Dist. LEXIS 7157 at *4. Significantly, for general jurisdiction purposes, and again relying on *Daimler*, a court must look "primarily" at the defendant's place of incorporation and its principal place of business. *Id.* Since B/E was a Delaware corporation with its principal place of business in Florida, and it did not hav(Se any significant business contacts with Nevada, general jurisdiction did not exist. *Id.* at *4-5. Further, on the basis of *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2851 (2011), the district court specifically rejected any attempt to assert general jurisdiction on the basis of placing items into the "stream of commerce." 2016 U.S. Dist. LEXIS 7157 at *5.

With respect to specific jurisdiction, the court emphasized at the outset that a "defendant's suit related conduct must create a substantial connection with the forum state." *Id.* at *6. The court then addressed plaintiff's claim that specific jurisdiction existed under a theory of "general purposeful availment" - *viz.*, whether B/E "reasonably expected to be haled into court in Nevada." *Id.* at * 8. Here, B/E claimed that it did not conduct any activity in Nevada. In opposition, plaintiff apparently relied solely on the fact that B/E had sold its products to others

who did business in Nevada. The court held that this did not confer specific jurisdiction. *Id.* at *9.

Finally, the court considered plaintiff's request to conduct jurisdictional discovery. It noted that

> "Where a plaintiff's claim of personal jurisdiction appears to both attenuated and based on bare allegations in the face of specific denials made by the defendants, the court need not permit even limited discovery." *Pebble Beach Co. v. Caddy,* 453 F.3d 1151, 1160 (9th Cir. 2006) (quoting *Terracom v. Valley Nat'l Bank,* 49 F.3d 555, 562 (9th Cir. 1995)).

2016 U.S. Dist. LEXIS 7157 at *9-10. Since the district court previously had ruled that plaintiff's proposed discovery was irrelevant to the jurisdictional inquiry, the request was denied. *Id.* at *10-11.

[*See also, Brady v. Southwest Airlines Co.,* 2015 U.S. Dist. LEXIS 87286, where the court dismissed the claims against another defendant in the *Brady* matter for lack of personal jurisdiction, based on very similar facts and essentially identical reasoning.]

In *Sutcliffe v. Honeywell Int'l, Inc.*,[89], the action arose from the crash in Canada of a CASA 212 twin-engine aircraft. At the time of the accident, the aircraft was owned by a Canadian company and the three crewmembers all were residents of Canada. The accident occurred following the failure of first the right engine, then the left engine. Both pilots were injured and the third crewmember was killed.

Plaintiffs brought suit in Arizona where the subject engines were manufactured and originally sold by Honeywell's predecessor. Their second amended complaint alleged that both EADS CASA and Airbus Military were manufacturers of the aircraft, but Airbus Military as the alleged successor to EADS CASA. Plaintiffs further alleged that these defendants were

[89] 2015 U.S. Dist. LEXIS 4038 (D. Ariz.2015).

negligent in multiple respects. EADS CASA and Airbus Military moved to dismiss for lack of personal jurisdiction.

EADS CASA and Airbus Military were Spanish corporations with their principal places of business in Madrid. The subject engines were not the original engines on the subject aircraft. Moreover, there was no evidence that any activity related to the design or manufacture of the aircraft occurred outside Spain. The subject aircraft originally was sold to an independent California distributor and movants stated that for the previous ten years, they and their corporate predecessors never engaged in direct sales to Arizona customers and made only limited purchases from Arizona companies. There were no other relevant jurisdictional contacts with Arizona.

In opposition to movants' jurisdictional facts, plaintiffs asserted two basic points: (1) that movants has purchased at least 954 similar engines for CASA 212 aircraft, from Honeywell or its predecessor, that were manufactured in Arizona; and (2) that the EADS/Airbus family of affiliated companies purchased millions of dollars from several Arizona suppliers.

The court began its analysis of the motion to dismiss by noting that the Arizona long-arm statute permits jurisdiction to the extent permitted by federal due process. *Id.* at *12. Further, the "minimum contacts" inquiry necessary for determining jurisdiction "'principally protects the liberty of the nonresident defendant, not the interests of the plaintiff.'" (Quoting *Walden v. Fiore*, 134 S. Ct. 1115, 1125 n.9 (2014)) 2015 U.S. Dist. LEXIS 40382 at * 13-14.

With respect to plaintiffs' claim of general jurisdiction, neither movant was incorporated or had its principal place of business in Arizona. *Id.* at *13. More important, in light of the

evidence, plaintiffs' "factual showing [was] insufficient as a matter of law to render these defendants 'essentially at home' in Arizona." *Id.* at *14.

In order to avoid this outcome, plaintiffs had argued a general jurisdiction theory "not based solely on the Arizona-related contacts of the defendants, but rather on the aggregate in-state activities of unspecified Airbus-connected entities affiliated or related to them." *Id.* The court further noted that whether this "single enterprise theory" was grounded in an agency or alter ego theory, it could not establish general jurisdiction. *Id.*

G. NEGLIGENCE BY PILOTS AND OCCUPANTS

In *Gilbow v. Crawford,*[90] the Arkansas Court of Appeals affirmed a trial court directed verdict in favor of one of two pilots who were on board a single engine aircraft that crashed following an engine failure. The plaintiff pilot Gilbow, who could not remember the crash due to his injuries, claimed that the defendant pilot Crawford was the pilot in command. Conversely, Crawford claimed that Gilbow was the pilot in command and counterclaimed against Gilbow for his injuries. Crawford presented no evidence at the trial as to the cause of the engine failure. Gilbow testified that Crawford had told him before the flight that there was sufficient fuel to make the flight and that the engine had failed in flight. Gilbow presented no evidence at the trial as to the amount of fuel on board the aircraft at the time of departure and the trial court found that there was insufficient evidence of the lack of fuel at the time of the crash. .Gilbow did not call Crawford as a witness at the trial. The Court of Appeals affirmed the trial court's directed verdict against Gilbow because plaintiff had not carried his burden of proof to show negligence on the part of Crawford or proximate cause for the crash. Following the directed verdict, Gilbow sought to re-open the evidence to call Crawford as a witness, but because no proffer was made as

[90] 2015 Ark. App. 194, 458 S.W.3d 750 (2015).

to the evidence to be presented, the Court of Appeals could not review the exercise of the trial court's discretion in refusing to re-open the evidence. Crawford non-suited his counterclaim after the trial court entered the directed verdict in his favor.

In Perry-Krinnett v. Idaho Department of Fish and Game, [91], the Idaho Supreme Court reversed a trial court grant of summary judgment in favor of the Idaho Department of Fish and Game and the State of Idaho on the grounds that the trial court had failed to properly consider the evidence, including all reasonable inferences, in favor of the non-movant, and had also granted summary judgment as a matter of law on the doctrine of *res ipsa loquiter*. The case arose from a helicopter crash in which the plaintiff's decedent, the pilot of a three seat helicopter, died in a crash of the helicopter after a clipboard on which one of the occupants, an employee of the Idaho Department of Fish and Game, was recording observations of spawning salmon, struck the trail rotor. There was no direct evidence of how the clip board left the passenger compartment, but the person using the clipboard was to have been the only person using it during the flight and the pilot had instructed that person prior to take off to retain control of the clipboard and not allow it to get out of the passenger compartment. The Idaho Supreme Court reversed the summary judgment motion holding that the circumstantial evidence was sufficient to allow the jury to conclude that the person holding the clipboard had failed to maintain control of it and allowed it to leave the cockpit, and that there was sufficient evidence to conclude that the only way that the clipboard would come out of the passenger compartment was through the negligence of the person having control of it. The Idaho Supreme Court also held that the evidence was sufficient to apply the doctrine of *res ipsa loquiter* based solely upon (1) the Fish and Game employee's

[91] 357 P.3d 850, *; 2015 Ida. LEXIS 242 (Ida. 2015)

exclusive control of the dangerous instrumentality that was the proximate cause of the crash, and (2) the likelihood based on common experience that, even if the door of the helicopter had come open, the employee could have maintained control of the clipboard.

H. MAINTENANCE NEGLIGENCE

In *Dudley-Flying Service, Inc. v. Ag-Air Maintenance Services, Inc.*, [92] the district court considered a case arising from the failure of a power turbine blade ("PT blade") of a Pratt & Whitney turboprop engine during the take off roll of an AG-Tractor aircraft, resulting in a complete power loss. The pilot was able to maintain control of the aircraft and the damage appeared to have been limited to the engine itself. Defendant Ag-Air had failed to perform required 200 hour inspections of the PT blade that failed. Plaintiff filed claims for property damage to the engine based on negligence, negligence *per* se, and violations of the Arkansas Deceptive Trade Practices Act ("ADTPA")[93]. AG-Air had admitted that the inspections were required by the applicable Federal Aviation Regulations and the applicable PWC maintenance manual, but contended that it had performed the inspections using its own maintenance manual that it erroneously believed contained the required inspections. AG-Air also contended that it could not be established that any crack in the PT blade could have been discovered on any inspection. Plaintiff sought to exclude the Defendant's expert testimony that the cracks could not have been discovered at the time of an inspection, as well as summary judgment on liability, damages and punitive damages.

First, as to the admissibility of Ag-Air's expert witness, the district court distilled the issue to being limited to whether Ag-Air's metallurgist was correct in referring to "cycles" for

[92] 2015 U.S. Dist. LEXIS 45911, (E.D. Ark. 2015)

[93] Ark. Code Ann. Section 4-88-107.

purposes of crack development and propagation to revolutions of the engine, as opposed to starting and stopping the engine. Plaintiff did not have evidence to dispute the number of cycles that could result in development of the crack at issue, but contended that Ag-Air's expert's opinion that the crack could occur and fail in less than a minute, when the inspection period was 200 hours of engine operation, was incorrect based upon accepted definitions of the term "cycle." The district court denied the motion to exclude Ag-Air's expert witness and concluded that the expert testimony would create an issue of fact as to causation.

Second, as to the issues of negligence and negligence *per se,* the district court held that the violation of the federal regulations did not, under Arkansas law, result in negligence *per se,* and that the issue of negligence was an issue ordinarily determined by the jury.[94] The district court also held that the issues of liability under a negligence theory included causation, which could not be determined on summary judgment in light of the testimony of Ag-Air's expert witness. The district court also considered the ADTPA claims, but denied summary judgment because there was an issue of fact as to whether any misrepresentations as to the sufficiency of the inspections were "knowingly" made in view of Ag-Air's testimony of mistake. Finally, the district court denied partial summary judgment on damage, compensatory and punitive damages.

I. PRODUCT LIABILITY

In *In re Piper Aircraft Corporation,* [95]the U.S. Bankruptcy Court held that claims against the current Piper Aircraft Corporation ("New Piper") could proceed on the grounds that, even

[94] The plaintiff apparently did not argue that the violation of the federal regulations could have established "negligence" for violation of federal standards under a federal preemption analysis.

[95] 2015 Bankr. LEXIS 2840; 25 Fla. L. Weekly Fed. B 283 (U.S.Bankr. S.D.Fla. 2015).

though the aircraft involved in two different accidents were manufactured and sold by the former Piper Aircraft Corporation prior to the effective date of its Chapter 11 bankruptcy plan of reorganization, the allegations were solely directed to the conduct of New Piper in failing to warn of alleged defects that had only been discovered in the intervening years twenty years after the confirmation of the Piper Aircraft Corporation bankruptcy. As described by the court, the bankruptcy plan provided a trust for product liability claims arising from the design, manufacture and sale of aircraft manufactured by the former Piper Aircraft Corporation:

> The Trust was created to address successor liability and protect the purchaser, New Piper, from incurring costs and facing liability in defending against certain claims defined as Future Claims. Any party holding a Future Claim, instead of suing New Piper as the successor entity to Old Piper, must look to the Trust for relief and follow the procedures set forth in the Trust Agreement for filing a claim. Section 8.10 of the Plan contains a channeling injunction preventing holders of Future Claims from asserting those claims against New Piper:
>
> > As of the Effective Date [of the Plan of Confirmation of the Chapter 11 Plan], all Entities shall be permanently and forever stayed, restrained, and enjoined from taking any action for the purpose of, directly or indirectly, asserting, prosecuting, proceeding, collecting, recovering, or receiving payment of, on, or with respect to any Product Liability Claims or Future Claims (other than actions brought to enforce any right or obligation under the Plan [or] the Trust Agreement...), including but not limited to...(a) commencing, conducting, or continuing in any manner, directly or indirectly, any suit, action or other proceeding... against or affecting any Protected Party, or any property of any Protected Party[.]

The bankruptcy court then referred to the terms of the trust itself between the trust and Newco, ultimately New Piper:

> > The Trust does not assume, and does not agree to indemnify Newco for, that of any Future Claim based upon Newco's failure to warn regarding an allegedly defective **product,** design, or component where, after the Effective Date, Newco either acquired, or reasonably should have acquired, information which (i) reasonably should have led Newco to warn regarding the allegedly defective **product,** design or component; and (ii) ***was not known, and reasonably could not have been known, by Old Piper prior to the Effective Date***.

(emphasis added).

Based on these provisions, the bankruptcy court concluded that plan and the channeling injunction did not apply to claims that "was not known to the [former Piper Aircraft Corporation], and reasonably could not have been known, by [the former Piper Aircraft Corporation] prior to the Effective Date [of the confirmation order], and the allegations in these two cases ***against New Piper*** were failure to warn claims allegedly resulting solely from post-confirmation accidents and information. Furthermore, the Bankruptcy Court held that the indemnity provisions between the Trust and the New Piper did not require the Trust to indemnify New Piper against any liability for those claims.

To determine the legal issues presented by the motions to enforce the bankruptcy court injunction, the bankruptcy court accepted as true that the allegations that the defects alleged in the two lawsuits had not been, and could not reasonably have been, known to the former Piper Aircraft Corporation. If it appears that the alleged defects were known, or reasonably could have been known, then, under the bankruptcy court's reasoning, it would appear that the claims would then fall within the scope of Future Claims, and, under the bankruptcy plan of reorganization would be subject to the channeling order. Additionally, while the bankruptcy court clearly expressed its view that these new claims were not successor liability claims (which could not under any state law proceed independently against New Piper), the court was not required to affirmatively conclude that any such claims would be viable under applicable federal or state law. Specifically, the bankruptcy court did decide whether any duty that New Piper had as the holder of the Type Certificates in the aircraft to notify the FAA of any alleged defects also created a duty under federal law to notify owners or operators of any alleged defects, or whether there was any other applicable theory of state or federal law, not preempted by federal law, that imposed a duty on New Piper, as the subsequent holder of the Type Certificate, to warn them of

any alleged defects in the aircraft designed, manufactured and sold by the former Piper Aircraft Corporation. Presumably, those issues will be addressed as the claims against New Piper progress outside the bankruptcy proceedings.

J. INSURANCE

1. Approved Pilots

In *Corradi v. Old United Casualty Company*,[96] the insured sought property damage coverage for the total loss of a WACO bi-plane as a result of the crash of the aircraft following an in-flight engine failure. The Old United Casualty Company ("Old United") policy provided that the only approved pilots for the aircraft were John Corradi and his son, however, the aircraft was being flown by another pilot in an airshow at the time of the crash. Old United denied the claim based on the breach of the approved pilot conditions of the policy. Corradi filed an action in the federal court in the Eastern District of Virginia against Old United and against broker Forest River claiming that he had always purchased policies through Forest River that included an open pilot warranty and that he had been unaware of the approved pilot provisions of the Old United policy. Old United sought summary judgment and Corradi voluntarily dismissed Forest River. Corradi also claimed that the Virginia omnibus liability insurance statute,[97] applied and that the permissive pilot was entitled to statutory coverage under both the property damage and liability provisions of the policy. The district court granted summary judgment to Old United finding that the plain language of the approved pilot provision of the policy was unambiguous and that there was no coverage for the property damage because the pilot at the time of the crash was not approved under the policy. The district court also rejected the argument that the Virginia

[96] U.S. Dist. LEXIS 165050 (E.D. Va. 2015)

[97] Va. Code Section 38.2-2204. The statute applies not only to automobiles, but also to aircraft.

omnibus liability insurance statute had any application to the first party property damage coverage because by its terms it was limited to liability coverage (intended for the benefit of the public), and also an attempt to argue that the Named Insured had a liability claim against the non-approved pilot, because an insured cannot make a liability claim for damage to his own property (under an express exclusion in the Old United policy any claim for damage to the property of the Named Insured is excluded).

In *Kirkland v. Old United Casualty Company,* 2015 Ariz. App. Unpub. LEXIS 1274 (2015), the insured sought property damage coverage for damage to a reproduction of a single-seat World War II era Focke-Wolf fighter. The insured was the pilot of the aircraft which was damaged when he lost control of the aircraft on landing. The approved pilot provision of the Old United policy required a check ride by certain named individuals and 25 hours of solo flight before the insured would be approved under the policy. The FAA Letter of Authorization for a check ride in the aircraft also had expired six days before the accident. Old United denied the property damage claim. The insured filed suit against Old United claiming damages for the property damage and for bad faith. Old United filed a motion for summary judgment for failure to meet the approved pilot conditions of the policy, which was granted by the trial court. On appeal to the Arizona Court of Appeals, the insured contended that because the aircraft was a single-seat aircraft, it was not possible for a check ride to be administered and that he was just beginning the 25 hours of solo flight when the accident occurred. The Arizona Court of Appeals reviewed the FAA procedures for reviewing a candidate for a Type Certificate in a single engine aircraft which allowed the check ride to be conducted by an examiner who either observed from the ground or another aircraft. Additionally, the Arizona Court of Appeals held that the expiration of the Letter of Authorization also provided a basis for denial of coverage. Finally, the

Arizona Court of Appeals granted Old United its reasonable attorneys' fees and costs incurred in responding to the appeal based upon Arizona statutory provisions for the award of such fees and costs.

2. Compulsory Liability Insurance Coverage

In *Northwest Airlines, Inc. v. Professional Aircraft Line Service*,[98] the Eighth Circuit Court of Appeals considered the effect of a compulsory insurance ordinance relating to McCarren Airport in Las Vegas, Nevada. Professional Aircraft Line Service, ("PALS") performed line services for airlines at McCarren airport and was require to obtain a permit from Clark County, Nevada, that required a "minimum level of insurance of certain specified coverage types, none of which was hangarkeepers coverage." The airport also had an ordinance that required that each operator shall keep in force certain liability coverages, including hangarkeepers liability insurance. PALS obtained hangarkeepers coverage from Westchester Insurance Company ("Westchester") with a $5 million per occurrence and aircraft limit.

In the course of its work for Northwest, a PALS employee failed to engage the parking brake on a Northwest aircraft, and the aircraft rolled down an embankment resulting in $7 million in property damage and $3 million loss of use. Northwest filed suit against PALS in Minnesota state court and served PALS. PALS failed to forward the suit to the insurer, Westchester, and also failed to respond to the suit. Northwest obtained a default judgment for $10 million in January 2005. In December 2005, Westchester filed a declaratory judgment action in Nevada contending that there was no coverage due to PALS failure to notify it of the accident or cooperate in the defense. Northwest successfully sought to intervene. PALS again failed to "meaningfully participate" in the Nevada suit and the Nevada court held that Westchester was

[98] 776 F.3d 575 (8th Cir. 2015).

not bound to provide coverage. On appeal, the Ninth Circuit vacated the judgment, concluding that that Northwest could not be "bound by PALS's failure to defend itself [in the coverage action]."[99] Northwest subsequently filed a garnishment action against Westchester for payment of the proceeds of the PALS liability policy. The case was removed to federal court and the district court ruled in favor of Northwest reasoning that " insurance coverage could not be avoided for an insured's simple failure to satisfy the technical post-loss conditions on his statutorily mandated coverage."

The Ninth Circuit affirmed the judgment in favor of Northwest, and considered the following arguments:

First, Westchester contended that the Clark County ordinance did not require hangarkeepers liability coverage where the operator's permit did not require such coverage. The court concluded that the Clark County ordinance requiring hangarkeepers liability insurance coverage applied, despite the absence of such a requirement in PALS operating certificate, because the ordinance stated that the coverages specified were required excepting an operator unless that operator alreadywas otherwise required to provide that specific coverage, which the operator's permit did not

Second, Westchester contended that the compulsory insurance coverage doctrine did not apply to this non-automobile insurance case. The court noted that the doctrine is well-recognized in the automotive context, and that it would need to be evaluated separately in this context. Westchester argued that Northwest was not a member of the public for which such compulsory coverage is normally required, however, the court stated that Northwest was within "the

[99] Westchester Fire Ins.Co. v. Mendez, 583 F.3d 1183, 1190 (9th Cir. 2009).

protected *segment* of the public" Additionally, Westchester argued that the existence of other remedies, including contractual remedies between Northwest and PALS, precluded the operation of the compulsory insurance doctrine. The court noted that the district court had only awarded Northwest approximately $4 million, which was the amount of its lost not otherwise compensated by its own insurance.

The court also rejected various arguments that Northwest could have provided Westchester the required notice of the accident, but the Ninth Circuit concluded that there was "no indication in the record" that Northwest actually knew the identity of PALS liability insurer at the time of the accident. Additionally, it appeared that Northwest had provided notice of the accident "throughout late 2003 and early 2004" before it took the default judgment, and that it requested Westchester's coverage position and that Westchester identified only "the absence of notice *from PALS* and *PALS's* lack of cooperation" as being the only defects to coverage. According to the court, Northwest also provided Westchester with notice of the Minnesota lawsuit and the impending default judgment prior to its entry, but Westchester failed to respond. Finally, Westchester argued that PALS had only purchased the coverage to meet its contractual duty to provide such coverage, rather than a statutory duty to do so. The Ninth Circuit concluded "there is no evidence in this record indicating PALS's motive in purchasing its Westchester policy – PALS could have purchased the coverage intending to comply with the contract, the ordinance, or both."

The Ninth Circuit Court of Appeals therefore held that the compulsory insurance doctrine applied and overcame the lack of notice and failure of cooperation defenses on the facts of this case.

3. CGL Coverage for Liability of Sponsors and Volunteer Aircraft Owers and Pilots Providing Free Flights At Sponsored Events

In *Gerwin v. Damschroder,* [100] the Ohio Court of Appeals considered coverage under a primary CGL policy issued by ACE for claims against the International Association of Lions Clubs, a local Lions Club chapter, its officers and members, and the owner and pilot of an aircraft providing free rides at a pancake fly-in event. The case arose from an accident involving a Cessna 206 aircraft that resulted in the deaths of all six occupants, including the pilot.

While there were numerous issues pertaining to the primary/excess relationship and the duty of defense, the principal coverage issue related to whether the owner and pilot were insureds under the policy, and, if so, whether the exclusion for liability coverage for any aircraft owned, operated, maintenance or use of an aircraft owned or operated or loaned to "any insured." Not all of the parties seeking liability coverage fell within the scope of the exclusion themselves, but the exclusion broadly extended to the ownership, operation and use of an aircraft owned, operated or loaned to ***any*** insured. The insureds argued that the severability provisions of the policy required that the exclusions be read as though separate policies had been issued to each insured under the policy and therefore the exclusion did not apply to those insureds who did not own, operate or borrow an aircraft. The court disagreed, reviewing applicable cases involving similar exclusions, but concluding that the use of the word "any" was sufficiently broad to require application of the exclusion to all insureds, if any of the fell within the scope of the exclusion. However, it was still necessary to determine if the owner and pilot of the aircraft was an insured in the first instance for purposes of application of the exclusion. The court concluded that factual issues existed as to whether the owner and pilot of the aircraft were agents of the

[100] 2015 Ohio 3694, 2015 Ohio App LEXIS 3594

local Lions Club chapter sponsoring the event, under any theory of actual, apparent or estoppel authority. Additionally, the owner and pilot also were insureds if involved in a joint venture, which the court also concluded involved factual issues. In this peculiar manner, if the owner and pilot **were insureds**, then there would be **no coverage** for any of the insureds, including the owner and the pilot, but if the owner and pilot were **not insureds**, then the exclusion would not preclude coverage for the other insureds and **there would be coverage** for them under the policy.

Of course, as noted above, there were additional issues relating to the Lions Club Claims Service Organization and the deductible under the policy that impacted the insurer's duty to defend. ACE also provided an umbrella policy, which raised its own defense obligation issues, but in the first instance required a determination of coverage under an identical exclusion and the question of "whether the exclusion applies depends on whether [the aircraft owner and pilot] was an 'insured'"

4. Additional Insureds under Aviation Liability Coverages

In *Certain Underwriters at Lloyd's London v. Garmin International, Inc.*, [101] the Tenth Circuit Court of Appeals considered the issue of coverage for the owner and operator of a Lancair under Garmin's aviation liability insurance policy. The case arose from the crash of the Lancair by the owner and pilot, injuring himself and passenger. The owner and pilot had agreed that his aircraft could be used by Garmin to install a new Garmin system so that Garmin could obtain technical information for its installation manual. Garmin did not acquire an interest in the aircraft and the only financial consideration was the sale of the new system to the owner and

[101] 781 F.3d 1226 (10th Cir. 2015).

pilot at the reduced "employee" discount. Garmin also agreed to list the owner and operator as the supplier for the type of installation bracket that was needed to install the unit in the Lancair aircraft. The accident flight did not involve the Garmin project, but the pilot sought coverage for liability claims as an additional insured under the Garmin policy because its amended insured provision included as insureds, "joint ventures" and "partnerships" with at least one of the insured Garmin entities; however, the amended insured provision also required that in order for the coverage to apply to any such entity or person, Garmin must have "an ownership interest [in the entity], or exert financial control, or [have] assumed or exercised management control, or [be an entity or person] for which the [Garmin insured] has [an] obligation to provide insurance." The Tenth Circuit affirmed the district court's grant of summary judgment, holding that there were no genuine issues of material fact as to any of these additional requirements and that there was no coverage under the Garmin policy for Mr. Bartles related to this accident.

5. Timeliness of Declaratory Judgment by Insured Against Insurance Broker

In *Quest Aviation, Inc. v. Nationair Insurance Agencies*,[102] the district court considered a motion to dismiss filed by Nationair, an insurance broker, seeking a declaration that it had negligently failed to procure adequate liability coverage and breached its fiduciary duty by obtaining an "Aviation Commercial General Liability" $20 million umbrella policy that included an exclusion for "bodily injury caused by aircraft operated by Quest." Quest operated a Cessna 421 in an air charter business. The aircraft crashed killing three of the charter passengers on board. Nationair contended that unless and until a lack of coverage for a determined liability loss had occurred, a declaratory judgment action was premature. The District Court rejected this argument concluding that the fact of the injuries and the claims against the insured had been

[102] 2015 U.S. Dist. LEXIS 47713 (N.D.S.D. 2015).

established, and that the issue of coverage also had been established, and that one of the purposes for a declaratory judgment was to determine the rights and liabilities of the parties before a loss to its insured actually occurred. The District Court also rejected an argument that the federal court should decline to exercise its declaratory judgment jurisdiction on the grounds that there was no compelling state interest that the issue be determined in a contract action in state court.