

**RECENT DEVELOPMENTS  
IN AVIATION CASE LAW  
AVIATION INSURANCE  
ASSOCIATION  
2016**

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**MONTREAL CONVENTION**

- *Kenneth Glassman-Blanco v. Delta Airlines, Inc.*, 2016 U.S. Dist. LEXIS 39360 (E.D.N.Y. 2016). State law claims for negligence, assault, battery, false arrest, false imprisonment, violation of civil rights were all claims are preempted by Montreal Convention. Only claims for “accident” resulting in physical injury could be re-plead under Montreal Convention.

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**AIRLINE DEREGULATION ACT**

*Xiaoyun Lu v. AirTran Airways, Inc* -Eleventh Circuit 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. 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, 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.

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**FOREIGN SOVEREIGN IMMUNITIES ACT**

- *Marshall v. Boeing Co.*, 940 F.Supp.2d 819 (N.D. Ill. 2013), third party claim against Polish state airline establishes independent basis for exclusive federal subject matter jurisdiction, and other claims arising from the same accident are subject to supplemental jurisdiction.

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**FOREIGN SOVEREIGN IMMUNITIES ACT**

- *Thornton v. M7 Aerospace LP.*, 796 F.3d 757 (7th Cir. 2015), 940 F.Supp.2d 819 (N.D. Ill. 2013), third party claim filed against foreign state airline ASA, after 6 years of litigation supported removal to federal court under FSIA independent basis for exclusive federal subject matter jurisdiction.

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**ADMIRALTY JURISDICTION**

*Lu Junhong v. Boeing*, 792 F.3d 805 (7th Cir. 2015) - Asiana accident was sufficiently related to traditional maritime activity to support exclusive federal admiralty jurisdiction and Boeing's removal to federal court, rejecting "inevitability" test for "functional" test for admiralty jurisdiction. Court also rejected federal officer removal.

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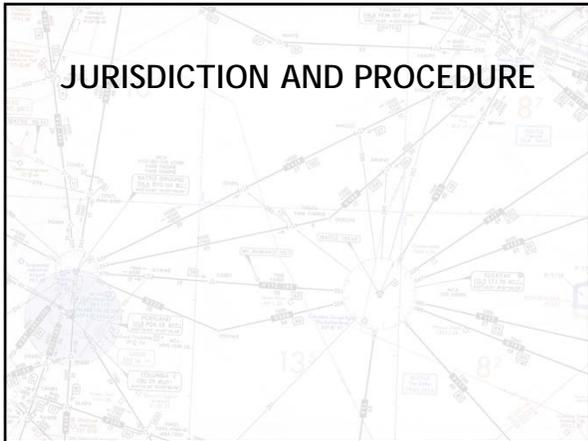
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A map of the United States with the title "PERSONAL JURISDICTION" centered at the top. Below the title is a paragraph of text and a citation. At the bottom of the map area, it says "JURISDICTION AND PROCEDURE".

→ British manufacturer was not subject to personal jurisdiction in New Jersey for injury caused by machine sold to plaintiff's New Jersey employer through U.S. distributor.

*DJ. McIntyre Machinery, Ltd. v. NiCastro, 131 S.Ct. 2780 (2011).*

JURISDICTION AND PROCEDURE

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→ Plurality opinion written by Justice Kennedy rejected exercise of any jurisdiction because no evidence of any action by British manufacturer to "invoke or benefit from the protection of the laws of New Jersey." Referred to as "sovereignty" approach to personal jurisdiction.

*DJ. McIntyre Machinery, Ltd. v. NiCastro, 131 S.Ct. 2780 (2011).*

JURISDICTION AND PROCEDURE

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### PERSONAL JURISDICTION

→ Concurring opinion written by Justice Breyer, joined by Justice Alito, argued that prior precedents that required “something more” than simply placing product into stream of commerce should provide basis for the decision whether to exercise personal jurisdiction over British manufacturer. Absence of anything more than sale of the product into New Jersey was not sufficient to support personal jurisdiction.

*DJ. McIntyre Machinery, Ltd. v. NiCastro, 131 S.Ct. 2780 (2011)*

JURISDICTION AND PROCEDURE

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### PERSONAL JURISDICTION

→ Dissenting opinion by Justice Ginsburg, joined by Justices Sotomayor and Kagan, argued that by marketing product in United States nationwide through trade shows and U.S. distributor purposefully availed itself of U.S. market. British manufacturer did not limit its marketing to limited number 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 one in which any entity’s activities were “largely home-based . . . without designs to gain substantial revenue from sales in the United States.”

*DJ. McIntyre Machinery, Ltd. v. NiCastro, 131 S.Ct. 2780 (2011)*

JURISDICTION AND PROCEDURE

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### PERSONAL JURISDICTION

→ Non-U.S. subsidiary of U.S. company was not subject to general personal jurisdiction in plaintiff’s home state for wrongful death occurring outside the United States, where subsidiaries’ activities with respect to forum State were limited to a small percentage of its products, and products sold through dealers in forum State were different from type of product involved in the accident resulting in the death of Plaintiff’s sons.

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

JURISDICTION AND PROCEDURE

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### Personal Jurisdiction

- *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014)(Ginsburg, J.), limited general jurisdiction to those cases in which defendant is "at home" in the forum jurisdiction and mere existence of substantial business contacts does not support general jurisdiction. Daimler was "at home" in Germany and not in California. Justice Sotomayor concurred rejecting irrelevance of substantial revenue and continuous and systematic conduct in all cases.

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### PERSONAL JURISDICTION

- Supreme Court further defines distinction between general and specific (or case-linked) jurisdiction and limits specific jurisdiction in intentional tort case in plaintiff's residence forum and injury alleged in forum, **but no case-linked conduct by defendant related to the forum.** Court held that the nexus of three elements - "the defendant, the forum and the litigation" - must exist to find specific jurisdiction.  
*Walden v. Fiore*, 134 S.Ct. 1115 (2014)(Thomas, J. for unanimous Court).

JURISDICTION AND PROCEDURE

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### PERSONAL JURISDICTION

- *Schorr and Hall v. Aero Accessories, Inc.*  
North Carolina product sold to Canadian wholesaler and engine overhauler/manufacturer which incorporated into engine shipped to Georgia not subject to specific jurisdiction in Georgia because "ultimately the Court finds . . . Contacts with Georgia do not give rise to Plaintiff's claims."

JURISDICTION AND PROCEDURE

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**Personal Jurisdiction**

→ *Broadus v. Delta Airlines, Inc.*

→ North Carolina resident injured in Georgia entitled to bring suit in North Carolina because airline sold round-trip ticket to North Carolina resident. Therefore, conduct related to the cause of action occurred in North Carolina and airline was subject to specific jurisdiction.

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**Personal Jurisdiction**

→ *Everett v. BRP-Powertrain GmbH & Co KG*

Wisconsin court did not have specific jurisdiction over three non-resident defendants resulting from Missouri crash:

BRP (Canadian corporation) owned Austrian company Powertrain, no contacts with Wisconsin

Powertrain, Austrian manufacturer of engines for light an ultra-light aircraft and unmanned aircraft - court concluded that contacts with forum were less than *J. McIntyre* and therefore no specific jurisdiction arguably under stream of commerce plus analysis

Kodiak - a wholesaler had no contacts and only basis for jurisdiction was pure stream of commerce which is insufficient

Only fourth defendant, Leaf, a Wisconsin seller of engine, was subject to jurisdiction in Wisconsin.

Denied jurisdictional discovery.

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**Personal Jurisdiction**

→ *Lubin v. Delta Airlines, Inc.*

Mississippi district court lacked jurisdiction over Bombardier for product liability action arising from passengers fall from airstairs in Boston. Bombardier's contacts with Mississippi at most showed that it had limited, passive [and unrelated] connections with Mississippi.

Denied jurisdictional discovery.

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**Personal Jurisdiction**

→ *Mullen v. Bell Helicopter Textron, Inc. (Mullen I)*

Mississippi district court lacked general jurisdiction over Rolls Royce, engine manufacturer, for crash in Mississippi because Rolls Royce's registration to do business in Mississippi did not establish a basis for general jurisdiction in Mississippi.

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**Personal Jurisdiction**

→ *Mullen v. Bell Helicopter Textron, Inc. (Mullen II)*

Georgia leasing company not subject to specific jurisdiction in Mississippi simply because it was foreseeable that the helicopter might travel through Mississippi on flight to Louisiana

No jurisdictional discovery was permitted.

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**Personal Jurisdiction**

→ *Davidson v. Honeywell Int'l, Inc.*

New York federal court lacked specific personal jurisdiction over Fairchild, a Delaware corporation with principal place of business in Maryland because none of its jurisdictional contacts were relevant to the product that allegedly caused fumes to enter cabin of aircraft flying over New York and under *J. McIntyre* and *Worldwide Volkswagen*, stream of commerce did not provide a basis for specific personal jurisdiction

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### Personal Jurisdiction

→ *Brady v Southwest Airlines Co.*

Nevada federal court did not have personal jurisdiction over B/E Aerospace, manufacturer of aircraft seat that allegedly resulted in injuries to Plaintiff when seatbelt failed while in turbulence in flight over Nevada. The Court held no general jurisdiction under *Daimler*, and fact of sales to others in Nevada did not provide a basis for specific jurisdiction as to Plaintiff's claims.  
Court denied jurisdictional discovery.

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### Personal Jurisdiction

• *Sutcliffe v. Honeywell Int'l, Inc.*

EADS CASA, aircraft manufacturer, and its alleged successor Airbus Military, both Spanish corporations, were not subject to personal jurisdiction in Arizona. None of the aircraft design or manufacturing activities by Defendants occurred in Arizona. Plaintiff alleged purchase of 954 similar engines in Arizona and millions of dollars in purchases from other Arizona suppliers. Citing *Fiore*, district court held that these contacts by Defendant were not sufficient to establish specific jurisdiction because minimum contacts "principally protects the liberty of the nonresident defendant, not the interests of the plaintiff." The court also rejected general jurisdiction because neither defendant was incorporated in Arizona, had its principal place of business in Arizona, or was "essentially at home" in Arizona.

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### Personal Jurisdiction

- *Siswanto v. Airbus*, 2015 U.S. Dist. LEXIS 1730333 (N.D.Ill. 2015) (No general jurisdiction over Airbus in United States under *Daimler* and no jurisdictional discovery)
- *Genuine Parts v CEPEC*, 2016 Del. LEXIS (Del. 2016)(No general jurisdiction over nonresident corporation based solely on registration to do business in Delaware)
- *Brown v. Lockheed Martin*, 814 F.3d 619 (2d Cir. 2016)(No general jurisdiction over nonresident corporation based solely on registration to do business in Connecticut).

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**FEDERAL TORT CLAIMS ACT**

- *United States v. Kwai Fun Wong*, 135 S.Ct. 1625, 191 L.Ed.2d 533, 2015 U.S. LEXIS 2809 (2014) (Time limit for administrative demand not jurisdictional - equitable tolling allowed).

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**FEDERAL TORT CLAIMS ACT**

- *Turturro v. United States* - Administrative demand was sufficient to place USA on "minimal notice" of claim even though USA argued it asserted a different liability theory. At trial, USA prevailed because causation was not established. Theory that pilot was "startled" by converging traffic causing loss of control was speculative.

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**FEDERAL TORT CLAIMS ACT**

- *Ressler v. United States* - mailing administrative claim two years after accident was untimely, even though received eight days after deadline. Argument that claim did not accrue until issuance of NTSB factual report was rejected.

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### NEGLIGENCE BY PILOTS AND OCCUPANTS

→ *Gilbow v. Crawford* - one of two pilots injured in crash following engine failure claimed the other pilot was pilot in command, but due to post traumatic amnesia could not recall events of the crash. The other pilot was not called as a witness and trial court directed a verdict for other pilot. Arkansas Court of Appeals affirmed directed verdict and also trial court's refusal to reopen evidence to allow Defendant to be called as a witness.

NEGLIGENCE

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### NEGLIGENCE BY PILOTS AND OCCUPANTS

→ *Perry-Krinnett v. Idaho Dept of Fish and Game* - Idaho Supreme Court reversed summary judgment for defendant whose employee had sole control of a clipboard that had fallen from helicopter and disabled tail rotor. Circumstantial evidence of employee's control of clip board was sufficient evidence of "exclusive control" and fact that clip board exited the helicopter supported conclusion of negligent failure to maintain control of it. Therefore would support liability based on *res ipsa loquiter*.

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### NEGLIGENCE BY MAINTENANCE FACILITIES

→ *Dudley-Flying Service, Inc. v. Ag-Air Maintenance Services, Inc.* - Evidence of crack in turbine blade and failure to inspect blade at recent 200 hour inspection were and experts agreed that crack could develop over certain number of cycles. Defendant's expert argued that cycles meant revolutions of the engine, meaning crack could have developed in seconds and was not evidence of causation due to fail. Additionally, even if failure to inspect was negligence or even negligence per se, issue of causation existed under defendant's theory.

NEGLIGENCE

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### PRODUCT LIABILITY

*In re Piper Aircraft Corporation* - bankruptcy court held claims against New Piper were not barred by channeling injunction or required to be determined by Piper Product Liability Trust because claims allegedly arose solely from failure of New Piper to warn of alleged defects first discovered after confirmation of plan of reorganization. Currently on appeal to U.S. District Court.

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### PRODUCT LIABILITY - CLAIMS UNDER 14 C.F.R. SECTION 21.3

→ *Schorr and Hall v. Aero Accessories*. The duty of an STC holder is to report engine failures due to defects and misquote by plaintiff's counsel who substituted word "engine *problems*" for "engine *failures*" is sanctioned under 28 U.S.C. section 1927.

PRODUCT LIABILITY

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### INSURANCE

*Approved Pilots*

- *Corradi v. Old United Casualty Company*
- *Kirkland v. Old United Casualty Company*

INSURANCE

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## INSURANCE

### → *Compulsory Liability Insurance Coverage*

In *Northwest Airlines, Inc. v. Professional Aircraft Line Service*, the Eighth Circuit Court of Appeals considered the effect of a compulsory insurance ordinance relating to McCarran Airport in Las Vegas, Nevada. Professional Aircraft Line Service, ("PALS") performed line services for airlines at McCarran airport and was required 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." 776 F.3d 575 (8th Cir. 2015). PALS provided no notice of accident or suit. The Ninth Circuit Court of Appeals held that the compulsory insurance doctrine applied and overcame the lack of notice and failure of cooperation defenses on the facts of this case.

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## INSURANCE

### *CGL Coverage for Liability of Sponsors and Volunteer Aircraft Owners and Pilots Providing Free Flights at Sponsored Events*

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." The insureds argued that the severability provisions of the policy required that the exclusion not apply to those insureds who did not own, operate or borrow an aircraft. The court disagreed, 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. Thus, question was still whether owner and pilot were insureds under policy.

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## INSURANCE

### *Additional Insureds under Aviation Liability Coverages*

*Certain Underwriters at Lloyd's London v. Garmin International, Inc.*, 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. Owner of aircraft claimed coverage 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." No evidence any of these existed and summary judgment affirmed.

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**INSURANCE**

*Quest Aviation, Inc. v. Nationair Insurance Agencies*, 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. 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 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.

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**FEDERAL AVIATION ACT  
OF 1958**

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**Federal Preemption**

- Basic Framework for Preemption in Product Liability Cases - See Paper

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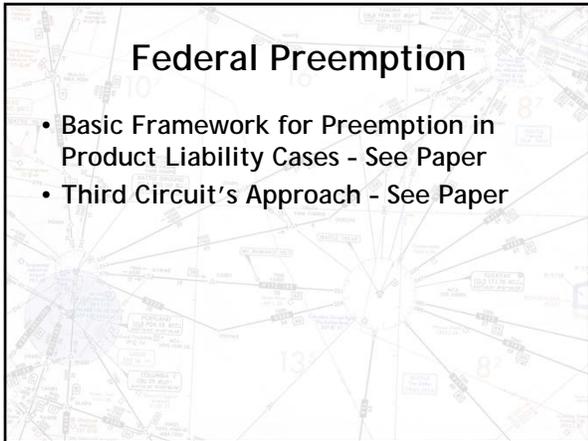
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**Federal Preemption**

- Basic Framework for Preemption in Product Liability Cases - See Paper
- Third Circuit's Approach - See Paper

A background diagram showing the structure of the United States federal court system, including the Supreme Court, the 13 federal circuit courts of appeal, and various district courts. The diagram is a network of lines connecting different court levels and jurisdictions.

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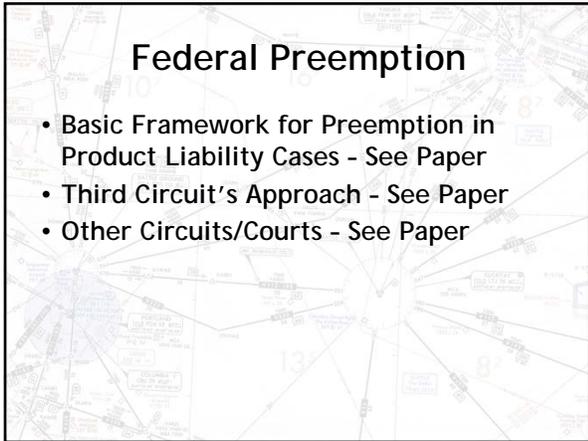
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- Basic Framework for Preemption in Product Liability Cases - See Paper
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- Other Circuits/Courts - See Paper

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