RECENT DEVELOPMENTS IN AVIATION LAW

AIA CONFERENCE
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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 *Razi v. Qatar Airways*, U.S. District LEXIS 14680 (S.D. Tex. 2014), the district court held that for purposes of venue, the destination depends on the ticket and not on the particular flight. In the case of round trip tickets, the "destination" is the same as the point of departure.

In Narayanan v. British Airways, 2914 U.S. App. LEXIS 5173 (9th Cir. 2014), the Ninth Circuit Court of Appeals held that the Montreal Convention limitation of actions starts to run at the time the passenger arrives at the destination. Theoretically, this means that for an "accident" on a flight that has not yet caused injury, the limitation period starts to run before the injury occurs. Nevertheless, the action must be brought within 2 years of the arrival at the destination. In a case involving a death six months after the arrival at the destination, a suit brought more than 2 years from the date of arrival at the destination, but within 2 years from the death, was barred.

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[1] *Erlich v. American Airlines, Inc.*, 360 F.3d 366 (2d Cir. 2004), quoted in Gardner and McSharry, "The Montreal Convention: The scram jet of aviation law," Wilson, Elser, Moskowitz, Edelman & Dicker, LLP (April 2006).

[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.*

The tension between the Montreal Convention and the interest expressed by some courts in the United States in having "localized controversies decided at home" and their desire not to burden already crowded U.S. courts with litigation having no relationship to the forum and its citizens, was strongly evidenced in the most recent decision of the U.S. District Court for the Southern District of Florida in *In re West Caribbean Airways.*[4] This case presented numerous substantial legal obstacles to a *forum non conveniens* dismissal, however, the U.S. District Court for the Southern District of Florida remained focused on the absence of any relationship between the litigation and the United States.

In re West Caribbean Airways is a consolidated action on behalf of representatives or heirs of a subset of deceased passengers on an aircraft that crashed in 2005 in Venezuela. The aircraft was operated by defendant West Caribbean Airways. All of the decedents were residents of either France or Martinique, and all, with one exception, were French citizens. None of the passengers were United States citizens or residents. The only connection to the United States was the presence of two Florida corporations that had entered into a "charter contract" with West Caribbean to provide travel to the passengers.

The lawsuit was originally filed in November, 2006, pursuant to the Montreal Convention. Pursuant to the venue provisions of the Montreal Convention, the claims could be asserted in the Southern District of Florida because Florida was the principal place of business of the defendant that had arranged the air travel. The original suit was dismissed by the District Court on the basis of *forum non conveniens*, and that decision was affirmed by the Eleventh Circuit Court of Appeals in 2009.[5] That Eleventh Circuit decision conflicts with "a [more]

[4] 2012 U.S. Dist. LEXIS 74149 (S.D. Fla. 2012).

[5] *Id.* at *11-12.

recent ruling by the French Supreme Court rejecting the application of the doctrine of *forum non conveniens* in Montreal Convention cases."[6]

Following the French Supreme Court ruling, plaintiffs filed a Rule 60(b) motion for reconsideration of the prior Florida federal District Court dismissal. The U.S. District Court for the Southern District of Florida first reconsidered its original *forum non conveniens* dismissal in view of the French Supreme Court decision, and restated its opinion that the *forum non conveniens* venue defense survives the venue provisions of the Montreal Convention because Article 33 Section 4 of the Convention states that all "matters of procedure shall be governed by the law of the court handling the case."[7] Noted the court, "[b]ecause *forum non conveniens* has been firmly rooted in the procedural law of the United States since before the Montreal Convention was written, and the Convention is silent on the doctrine, the court found that the doctrine can continue to be applied to deny a plaintiff his choice of forum so long as another forum is available and can more conveniently adjudicate the claim."[8] The court noted that the plaintiffs also attacked the *forum non conveniens* dismissal of their cases on the grounds that a companion case involving the crewmembers' claims against domestic U.S. corporations involved in the manufacture, maintenance, repair, ownership and operation of the aircraft and its component parts had been allowed to proceed in the United States. The court noted that under the Montreal Convention, "[t]he airlines' fault is presumed and the only issue is damages, [whereas] the crewmembers had asserted claims under theories of negligence, willful misconduct, and strict-liability, where 'complicated issues of product defect and causation'"[9]

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[6] *Id.* at *12.

[7] *Id.* at *13.

[8] *Id.* at *13-14.

[9] *Id.* at *18.

would have to be resolved by reference to evidence most probably located in the United States. The plaintiffs had also sought to intervene in the crewmembers' cases, however, those efforts were more than four years after the crash, and therefore were too late.

In view of the District Court's continued *forum non conveniens* analysis, the most significant factor was the plaintiffs' challenge to the jurisdiction of the Martinique Court as an adequate alternative forum under the recent French Supreme Court ruling. The plaintiffs themselves had sought dismissal of their own claims in Martinique, which was granted because, under French law, "Articles 33, 45 and 46 of the Montreal Convention establish that jurisdiction is determined *solely* by the plaintiff's choice."[10] Ultimately, this issue was presented to the French Supreme Court, which agreed that the choice of forum was "at the option of the plaintiff" under the Montreal Convention, and that no national court under any internal rule of procedure "can strip the plaintiff of that right."[11] Thus, the French Supreme court declared the "current unavailability of the French venue [in Martinique]."[12]

The plaintiffs here sought relief under Rule 60(b), by contending that "a party [may seek relief] from a final order based on 'any other reason that justifies relief.'"[13] The District Court held that it had previously determined that Martinique was an available forum and had directed the parties to litigate there. The District Court did not agree with the French Supreme Court's conclusion that Montreal Convention precluded the application of the doctrine of *forum non conveniens*, and that, while comity "ordinarily requires United States courts to defer to foreign

[10] *Id.* at *21. (emphasis added).

[11] *Id.* at *25-26.

[12] *Id.* at *26.

[13] *Id.* at *30.

courts on the interpretation of their own jurisdictional statutes,"[14] the Montreal Convention is an international treaty, rather than an internal French statute. Accordingly, the French interpretation of the Montreal Convention was not binding upon U.S. courts, and conflicting decisions "merely reflect the realities of an international treaty being analyzed by various sovereign nations under their own guiding principles."[15]

Additionally, the Court noted that U.S. courts do not "blindly accept the jurisdictional rulings or laws of foreign jurisdictions that purport to render their forum unavailable."[16] The U.S. District Court noted the decisions involving blocking statutes, such as the Panamanian statute that "prevent[ed] suits brought in [Panama] as a result of a foreign judgment of *forum non conveniens*."[17] The court also noted the same result in the U.S. District Court in the Southern District of Texas in *Morales v. Ford Motor Co.*,[18] interpreting a similar Venezuelan blocking statute.

Finally, the court rejected plaintiffs' claim of extreme hardship, stating that hundreds of other plaintiffs have already litigated their cases to conclusion in Martinique without any jurisdictional impediment, and that "Martinique can assert jurisdiction over this litigation if and when plaintiffs agree to it."[19] Additionally, the court also noted that any hardship to plaintiffs had been "invited," and that plaintiffs "ran the risk that this court would not reconsider its FNC Order regardless of the consequences they would incur."[20] The court concluded that the

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[14] *Id.* at *32.

[15] *Id.* at *33.

[16] *Id.*

[17] *Id.* at *34, citing *Scott's Co. v. Hacienda Loma Linda*, 2 So. 3d 1013 (Fla. 3d DCA 2008).

[18] 313 F. Supp. 2d 672 (S.D. Tex. 2004).

[19] *Id.* at *40.

[20] *Id.*

plaintiffs were all, but one, French nationals and residents, who, under the Montreal Convention, still had the right to pursue claims in the French courts under other venue choices available under the Montreal Convention, despite the French Supreme Court's decision that the plaintiffs could not be "stripped of their rights" to assert an action in all of the forums available under the Montreal Convention. The Court noted that "to now reverse course in response to . . . plaintiffs' persistent efforts to undo the *forum non conveniens* dismissal would sanction plaintiffs' disrespect of the lawful orders of this United States Court and encourage other litigants to engage in similar conduct."[21]

The Eleventh Circuit Court of Appeals affirmed the district court on the grounds that Plaintiffs had failed to meet the requirements of Rule 60(b)(6), and did not reach the merits of the *forum non conveniens* dismissal.[22] The Eleventh Circuit ruled that Rule 60(b)(6) requires a showing of exceptional circumstances such that a failure to set aside a prior judgment by the district judge constitutes an abuse of discretion. In this case, the Eleventh Circuit held that the unavailability of an alternative forum had not been raised in response to the initial motion to dismiss, and that attempting to do so after the cases had been filed in Martinique was not a grounds for setting aside the judgment since those grounds for opposing the *forum non conveniens* dismissal motion should have been raised initially.

In *Bridgeman v.United Continental Holdings,* [23] the Fifth Circuit Court of Appeals held that "embarking and disembarking" requires a "tight tie" between an accident and the act of entering or departing the aircraft, and claims for intentional infliction of emotional distress and invasion of privacy that occurred during "disembarkment" where not causally related to the

[21] *Id.* at *48.

[22] Galbert v. West Caribbean Airways, 715 F.3d 1290 (11th Cir. 2013).

[23] 2013 U.S. App. LEXIS 22373, 2013 WL 5881120 (5TH Cir. 2014)

disembarkment itself and therefore those claims were not subject to the Montreal Convention. In this case, plaintiffs luggage had been opened and a sex toy removed and then taped to the outside of the luggage as it was delivered at the baggage claim, resulting in plaintiffs' claims of intentional infliction of emotional distress and invasion of privacy.

In *White v. Emirates Airlines, Inc.,*[24] the Fifth Circuit Court of Appeals addressed the issue of whether an alleged refusal to provide medical care and failure to follow airline procedures constituted an "accident" under the Montreal Convention. The plaintiff's decedent had been a passenger on a flight inbound to Houston, Texas. Approximately ten minutes before the scheduled landing, plaintiff's decedent was found unconscious in the lavatory. Plaintiff alleged that the flight crew continued with the landing and that oxygen and a defibrillator were not provided despite specific requests. Plaintiff alleged that the failure to do so constituted a deviation from the airlines' procedures. The Fifth Circuit first rejected the refusal to provide assistance claim because the flight attendants had assessed the situation, advised the flight crew and a decision had been made to continue the landing. Similarly, even though airline procedures included diverting the flight and seeking medical assistance from other passengers, among other things, the Fifth Circuit rejected a *per se* rule that any deviation from procedures constitutes an "accident," determining that the central issue was whether the conduct was "unusual and unexpected." Because of the imminent landing and the need to care for the safety of all passengers and crew members during the landing, the Fifth Circuit held that the alleged "failures" were not "unusual and unexpected" and therefore did not meet the requirements for an "accident" compensable under the Montreal Convention.

In *Ginena v. Alaska Airlines, Inc.,*[25]the district court denied a motion for new trial in a case involving a diversion of an airline flight due to a cabin allegedly resulting from a disruption by

[24] 493 Fed.Appx. 526 (5th Cir. 2012).

[25] 2013 U.S. Dist. LEXIS 86162, 2013 WL 3155306 (D. Nev. Jun. 19, 2013).

plaintiffs. The case had been to the Ninth Circuit Court of Appeals and a two week trial resulting in a defense verdict for Alaska Airlines. Plaintiff's argued several alleged errors in the jury instructions principally directed at the interface between the Montreal Convention and its claims for "delay" damages and the Tokyo Convention,[26] and state law defamation claims. The district court held that the Tokyo Convention instructions as to the "reasonableness" of removing the plaintiffs from the aircraft and detention by law enforcement authorities, resulting in a delay in their carriage to their ultimate destination, did not unduly focus on the reasons for their removal as opposed to the reasonableness of the further delay and detention. The district court also held that the instructions on malice were proper and rejected an argument that, in the absence of evidence that the corporation attempted to create "willful blindness" by compartmentalizing its knowledge and charging an "innocent" individual with the responsibility for speaking for the corporation, the doctrine of "collective corporate knowledge" supported an instruction that the individual responsible for the alleged defamation was charged with that knowledge for purposes of determining his individual state of mind and *scienter* in determining whether he acted with malice.

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.[27] 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."[28] The FSIA recognizes an

[26] Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 *U..S.T.* 2941, 704 U.N.T.S. 219 ("Tokyo Convention").

[27] 28 U.S.C. §§ 1330(a), 1604.

[28] 28 U.S.C. § 1604.

additional exception to the general grant of immunity if "the foreign state has waived its immunity either explicitly or by implication."[29]

In *Marshall v. Boeing Co.,*[30] the effect of the Foreign Sovereign Immunities Act (FSIA)'s exclusive forum provisions on federal subject matter jurisdiction in cases involving a foreign airline 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."[31]

In *Zhang v. Air China, Ltd.,*[32] the family of passenger who perished after Air China failed to provide him with oxygen services for a short flight brought a wrongful death suit in the United States.[33] Air China argued that the suit was barred by the Foreign Sovereign Immunities Act

[29] 28 U.S.C. § 1605(a)(1).

[30] 940 F.Supp.2d 819 (N.D. Ill. 2013).

[31] 28 U.S.C. section 1367(a).

[32] *Zhang v. Air China, Ltd.,* 866 F. Supp. 2d 1162 (N.D. Cal. 2012).

[33] *Id.* at 1164.

("FSIA").[34] However, the plaintiffs urged that Air China was subject to the FSIA's commercial activity exception.[35] The court held that a service receipt for oxygen services issued to the decedent's son in California was sufficient to establish the nexus with the United States that is required for the commercial activity exception to apply.[36]

In *Havlish v. bin Laden (In re Terrorist Attacks on Sept. 11, 2001),*[37] the estates of fifty-nine September 11th victims sought damages from the individuals and entities that carried out, or aided and abetted, the September 11th attacks.[38] Some of these defendants claimed to be sovereign, e.g. Iran and Hezbollah.[39] Regarding the FSIA exception for state sponsored terrorism, the court observed that the exception had prompted a "sea change" in suits against state sponsors of terrorism.[40] Rather than proving their entitlement to damages on the basis of state or foreign law, plaintiffs could prove their entitlement to damages on the basis of a uniform federal standard that draws from legal principles in the Restatement of Torts and other leading treatises.[41]

In *Aero Union Corp. v. Aircraft Deconstructors Int'l LLC,*[42] the issue was whether a limited period of discovery was appropriate to determine whether a military grade aircraft was

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[34] *Id.* at 1168.

[35] *Id.* at 1168.

[36] *Id.* at 1169.

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

[38] *Id.* at *92.

[39] *Id.* at *92.

[40] *Id.* at *96.

[41] *Id.* at *96-97.

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

immune to attachment pursuant to FSIA.[43] The court acknowledged that property of a military character, that is under the control of a military authority, and intended to be used for a military purpose is immune from attachment.[44] The court also recognized that there is a tension between permitting discovery to substantiate a claim that an FSIA exception applies and protecting a sovereign's legitimate claim to immunity from discovery.[45] However, the court rejected that a limited period of discovery regarding the aircraft's immune status would be inconsistent with FSIA or would overly burden the sovereign.[46]

In *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*,[47] Bell Helicopter obtained default judgment against Iran in a suit alleging trademark violations in connection with the sale of helicopters that closely resembled Bell helicopters.[48] Iran appeared and moved to vacate the default judgment.[49] The court held that the FSIA commercial activity exception did not apply because Iran's actions took place outside the United States and did not have a "direct effect" in the United States.[50] Notably, the court observed that the Iranian helicopters could not be sold in the United States, and it disagreed that financial harm to Bell flowing from international sales of the Iranian helicopters constituted a "direct effect" in the United States sufficient for application of the commercial activity exception.[51]

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[43] *Id.* at *15.

[44] *Id.* at *25.

[45] *Id.* at *26.

[46] *Id.* at *27.

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

[48] *Id.* at *2.

[49] *Id.* at *5.

[50] *Id.* at *16.

[51] *Id.* at *21-22.

In *Sachs v. Republic of Austria*,[52] which is currently set for rehearing en banc, the plaintiff sued the Austrian national railway in California after sustaining personal injuries while attempting to board a moving train in Europe.[53] The Eurail pass that the plaintiff was using had been purchased in California from a company called Rail Pass Experts based in Massachusetts.[54] The issue was whether the FSIA commercial activity exception applied, and the plaintiff's argument was that the sale of the Eurail pass in California by Rail Pass Experts could be imputed to Austria for the purposes of applying the commercial activity exception.[55] Although acknowledging that acts may sometimes be imputed to a sovereign, the court held that this was not such a case.[56] "The best [that plaintiff could] allege [was] that [Austria], as a part-owner along with thirty other owners, wielded some degree of control over Eurail Group and was aware that Eurail Group used U.S. sales agents like Rail Pass Experts."[57] This connection was too attenuated, and analogy to other cases regarding purchase of airline tickets in the United States was unavailing because agency was not a contested issue in those cases.[58]

In *Habyarimana v. Kagame*,[59] two former heads-of-state perished when an airplane that they were traveling in was shot down over Rwanda.[60] Their widows filed suit against current

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

[53] *Id.* at 1022.

[54] *Id.* at 1022.

[55] *Id.* at 1022.

[56] *Id.* at 1025.

[57] *Id.* at 1025.

[58] *Id.* at 1029.

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

[60] *Id.* at 1030.

Rwandan president Paul Kagame alleging that he gave the order to attack the plane.[61] The United States then submitted a recommendation of immunity on behalf of President Kagame.[62] The court acknowledged that FSIA has superseded many common law immunity precedents, but it emphasized that for more than a century American courts have applied the doctrine of sovereign immunity when requested to do so by the executive branch.[63] Accordingly, a determination by the executive branch that a foreign head of state is immune from suit is conclusive and the court must accept it without reference to the plaintiff's underlying claims.[64]

C. FEDERAL PREEMPTION UNDER THE FEDERAL AVIATION ACT OF 1958

The federal 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*,[65] and the rule of field preemption espoused in *Rice v. Santa Fe Elevator Corp.*,[66] 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.[67] The Ninth Circuit

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[61] *Id.* at 1031.

[62] *Id.* at 1031.

[63] *Id.* at 1032.

[64] *Id.* at 1032.

[65] 411 U.S. 624 (1973).

[66] 331 U.S. 218 (1947).

[67] *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

Court of Appeals (relying upon Third Circuit precedent) has adopted a two part test for preemption: first, separating preemption of state law with federal standards of car 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. Nevertheless, certain federal district courts have continued to reject the doctrine of implied field preemption for aircraft product liability cases.[68] As will be seen below, these efforts to limit federal uniformity in the field of aircraft design and manufacture generally rely on an effort to determine whether Congress *intended* to occupy the field of aircraft design and manufacture, and some cases also apply a presumption against such preemption because product liability law is an area that has traditionally been occupied by state law. As will be discussed below, however, two 2012 U.S. Supreme Court preemption cases have generally focused on the extent to which federal regulation occupies the field (thus indicating Congress' intent to regulate the field), and have been less concerned with the historical and traditional methods for attempting to determine Congress' subjective intent, such as whether there is a presumption against preemption or whether the field is one which state product liability law has traditionally occupied.

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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).

[68] See analysis of recent district court cases both applying and rejecting federal preemption of aviation product liability claims discussed at pages 6 through 17, below.

In *Kurns v. Railroad Friction Products Corp.*,[69] the Supreme Court considered the issue of implied field preemption for the regulation of "the design, the construction and the material of every part of the locomotive and tender and of all appurtenances." All of the justices agreed that the extensive grant of regulatory authority and scope of the federal Locomotive Inspection Act,[70] required preemption of any state court laws that might impose different standards on the design and manufacture of such equipment. Justice Kagan concurred in the result and the analysis based upon a prior Supreme Court decision recognizing the scope of the federal preemption under the Locomotive Inspection Act, and agreed that it applied to result in preemption of state common law tort claims, even though the prior decision related to state regulation. Justice Sotomayor, joined by Justice Ginsburg and Justice Breyer, also concurred in the scope of the field of federal preemption, but dissented on the grounds that a failure to warn claim would not constitute state regulation of the product design.

In rendering its decision, the Supreme Court relied upon its prior decision in *Freightliner Corp. v. Myrick*,[71] which analyzed the issue of congressional intent based upon whether "the scope of a [federal] statute indicates that Congress intended federal law to up occupy a field exclusively." To determine the scope of the regulatory authority, the Court looked to the language of the statutory grant of regulatory authority to determine whether it occupied the field of design and manufacture of these products. Satisfied that the statutory language comprehensively encompassed the design and manufacture of these products, all of the justices agreed that the scope of such regulatory authority precluded common law tort claims alleging defective design and manufacture. Applying this analysis to the Federal Aviation Act would

[69] 132 S. Ct. 1261, 2012 U.S. LEXIS 1836 (2012).

[70] 49 U.S.C. § 20701 *et seq.*

[71] 514 US. 280(1995).

result in a similar determination as to the scope of the grant of regulatory authority to the FAA.

Finally, and most importantly, both the Petitioner and the U.S. Solicitor General argued that the federal regulatory agency had not acted to regulate the "repair and maintenance of locomotives [from which the asbestos exposure claims resulted], rather than the use of locomotives on a railroad line." The Court rejected that argument, having pointed out that the scope of federal preemption [as defined by the earlier Supreme Court decision in which the states had attempted by regulation to require additional equipment not required under then existing federal regulation] depended upon the ***objects of the regulation, not the purpose of the regulation***, and that the asbestos exposure claims "'are directed to the same subject,' as the LIA." Thus, even though the common law claims relating to the use of materials containing asbestos in the design and manufacture of railroad equipment was ***not*** an area in which the Secretary of Transportation had enacted regulations, it was still within the same field and therefore the common law claims affecting the design and manufacture of the equipment were preempted. Thus, applying this reasoning to the scope of federal regulations enacted by the FAA, whether the FAA has, in fact, applied or exercised its authority to regulate any particular aspect of aircraft design would not be limit the scope of the field preemption, and any state law claim related to the design and manufacture of aircraft would still be preempted, provided that Congress had exercised its power to grant that authority to the FAA.[72]

In *National Meat Assoc. v. Harris,*[73] Justice Kagan delivered the opinion for a unanimous Court finding that the Federal Meat Inspection Act,[74] preempts "a California law dictating what

[72] *See Medco Energi U.S. v. Sea Robin Pipeline Co., LLC,* 2012 U.S. Dist. LEXIS 13359 (W.D. La. 2012)(if federal and state statutes are directed to the same physical elements or object, state law is preempted "however commendable or however different their purpose, citing *Kurns,* 132 S.Ct. at 1269).

[73] 132 S. Ct. 965, 2012 U.S. LEXIS 1062 (2012).

slaughterhouses must do with pigs that cannot walk, known in the trade is meant nonambulatory pigs." Even though the federal statute included a non-preemption provision or savings clause, the Court concluded that the express preemption clause (which defined the scope of the federal regulation), also precluded state regulation of activities which occurred outside the slaughterhouse with regard to animals that were not going to be "turned into meat." The court expansively interpreted the scope of the federal grant of authority to regulate slaughterhouses and concluded that the savings clause only applied to areas not otherwise within the scope of the express preemption clause, such as workplace safety regulations and building codes applicable slaughterhouses. This narrow interpretation of the savings clause indicates that the court is willing to recognize the full scope of federal preemption of a field in which Congress has granted broad regulatory authority to federal agencies.

In *Jones v. Mazda North American Operations,*[75] the court denied a petition for writ of *certiorari* to the Fifth Circuit Court of Appeals in a case involving federal preemption of state tort law claims relating to the design of automotive restraint systems. While the reason that the Court denied the petition for *certiorari* cannot be determined, the fact that the Fifth Circuit decision was not reviewed may indicate the Court's view that not all state common law product liability claims should be preempted in every instance in which a federal regulatory agency may have authority to consider the product design. Thus, the issue of the scope and extent of Congress' grant of regulatory authority must still be examined as to each field of federal regulation to determine whether that grant of regulatory authority is sufficiently extensive to support the conclusion that Congress intended federal regulation to occupy that field.

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[74] 21 U. S. C. §601 Section 601 *et seq.*

[75] 2012 U.S. LEXIS 1135 (2012).

Most recently, in April, 2014, in *Northwest, Inc. v. Ginsberg,*[76] the Supreme Court again specifically addressed the issue of federal preemption of the field of airline rates, routes and services under the Airline Deregulation Act. *Ginsberg* did not involve the field of aviation safety, but instead federal preemption of airline "rates, routes and services" under the express preemption provisions of the Federal Aviation Act of 1958, as amended after deregulation. Justice Alito chronicled the history of federal regulation of the airline industry, observing that in view of the savings clause which was present in the Federal Aviation Act of 1958, as originally enacted, the airline industry was regulated by both the federal government and by the states until the enactment of the express ADA preemption provisions of the Airline Deregulation Act of 1978. Of course, the savings clause still exists, but the unanswered question after *Ginsberg* is the extent to which there is any continued state "regulation" consistent with the federal regulation of the field of aviation safety, and the effect of the savings clause.[77]

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[76] 2014 U.S. LEXIS 2392 (2014) (Alito, J.)

[77] To some extent, one might argue that Justice Alito recognized that federal regulation of the airline industry and express preemption under the Airline Deregulation Act ("ADA") is distinguishable from the general federal regulation of aviation safety for all aviation activities, and that aviation safety might be a field in which both federal and state regulation co-exist. Justice Alito rejected Ginsberg's argument that under the Court's decision in *Spietsma v. Mercury Marine*, 537 U.S. 51,123 S.Ct. 518, 154 L.Ed.2d 466 (2002), the co-existence of an express preemption provision, and the preservation of common law torts based on the savings clause in the Boat Safety Act, 46 U.S.C. section 4306, supported the view that common law actions were not preempted by the ADA's express preemption provisions. However, Justice Alito rejected that analogy by distinguishing the limited nature of the express preemption clause in the Boat Safety Act to "a [state] law or regulation," and also based on the history of the enactment of the FAA provisions as discussed above. Justice Alito concluded that the express provisions of the ADA preemption clause, enacted years after the savings clause in the FAA (which he referred to as a "relic" of pre-ADA law), were not intended to be so limited, and that the prior Supreme Court decisions interpreting the express preemption provisions of the ADA (and the scope of the FAA saving clause) further demonstrated the broad scope of express preemption under the ADA. Thus, Justice Alito was unwilling to apply an analogy of "boat" regulation to "airplane" regulation and preemption based merely on that similarity of the vehicles, and conducted a more intense analysis both of the federal interest and scope of regulation of each of those activities, and the legislative history of the specific provisions of the

The federal circuit and district courts have continued in the last year to consider the issue of federal field preemption of aviation safety. Most notably, the Ninth Circuit Court of Appeals has refined its analysis first announced in *Martin v. Midwest Express Holdings, Inc.*,[78] in the recent decision in *Gilstrap v. United Airlines, Inc.*[79] In *Gilstrap,* the Ninth Circuit Court of Appeals considered the issue of federal preemption under the Air Carrier Assistance Act ("ACAA"),[80] 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 Circuit then continued by reviewing the Third Circuit analysis in *Abdullah*,[81] 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."[82] The Ninth Circuit expressly adopted *Abdullah's* "division of the FAA's field preemptive effect into two components: state

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Boat Safety Act and the Federal Aviation Act. As noted in the decisions finding field preemption for aviation safety, both the federal interest and the scope of regulation of aviation safety provide the fundamental support for applying implied federal preemption to the field of aviation safety, particularly as to those aspects of aviation safety in which the FAA has issued "pervasive" regulations.

[78] 555 F.3d 806 (9th Cir. 2009).

[79] 709 F.3d 995 (9th Cir. 2013).

[80] 49 U.S.C. section 41705.

[81] 181 F.3d 363.

[82] 709 F.3d at 1005.

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."[83]

Within the Ninth Circuit, the rule announced in *Gilstrap* was most recently effectively applied by the U.S. District Court for the Eastern District of Washington in an aviation product liability case. In *McIntosh v. Cub Crafters, Inc.*,[84] the district court 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."[85] The district court analyzed the extent of the federal regulations relating to the design of such aircraft, and particularly their flight characteristics, and held that the FAA regulations were "pervasively regulate the stall/spin characteristics of light sport aircraft. Accordingly, based upon field

[83] *Id.* at 1006.

[84] 2014 U.S. Dist. LEXIS 21491 (E.D. Wash. 2014).

[85] *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 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.

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." [86]

District Courts in the Second Circuit and Third Circuit also addressed the scope of federal field preemption of aviation safety. Reaffirming its prior ruling in the same case on different issues of aviation safety, the U.S. District Court for the Western District of New York in *In re Air Crash Disaster Near Clarence Center, New York, on February 12, 2009,*[87] held that federal law impliedly preempts the field of aviation safety and that claims against the operator of the flight for negligence in hiring, training, selection and supervision of pilots were preempted by federal law and that a federal standard of care applied. The district court held that the standard of care against "careless and reckless" operation under 49 C.F.R. section 91.13 applied only to aircraft operations and that other regulations applicable to pilot and flight crew hiring, training, selection and supervision would establish the standard of care for those claims.

The U.S. District Court for the Eastern District of Pennsylvania addressed the issue of federal field preemption of product liability claims in *Lewis v. Lycoming.*[88] In *Lewis,* District Judge Bartles rejected the application of federal field preemption to aviation product liability claims, despite the Third Circuit's decision that the field of aviation safety was preempted by federal law, and in conflict with prior decisions of other district courts in the Third Circuit that had held that such aviation product liability claims were preempted. While criticizing the broad preemption language in the *Abdullah* decision as *dicta*, Judge Bartles did not look to the extent to which federal regulation in the field of aviation safety was pervasive, and more specifically, the federal regulation of the field of aircraft design, certification and manufacture, as had the Third

[86] *Id.* at *12.

[87] 2013 WL 596 (W.D.N.Y. Nov. 8, 2013).

[88] 957 F.Supp.2d 552, 2013 WL 3761179 (E.D. Pa. July 17, 2013).

Circuit in its analysis of the applicable federal aviation regulations in *Abdullah*. Instead, Judge Bartles, like other district courts that have rejected federal preemption of the field of aircraft design and manufacture, focused on Congress' legislative intent, without regard to the extent to which the FAA has actually enacted federal regulations governing this field, concluding that Congress did not intend to preempt the field of aviation safety in the Federal Aviation Act of 1958, because of certain statements in the legislative history of the later General Aviation Revitalization Act was intended to be a limited federal incursion into state product liability law. Based on this analysis of Congressional intent, Judge Bartles held that the Federal Aviation Act of 1958 did not preempt the field of aircraft (and component) design, certification and manufacture because the only relief that Congress had intended to provide the manufacturers of general aviation aircraft and components was the eighteen year statute of repose in GARA. As set forth above, the most recent U.S. Supreme Court decisions on federal field preemption have focused on the extent of the regulation authorized by Congress in determining whether the regulation is pervasive and leaves room for state regulation in the same field, and therefore Judge Bartles analysis, like the analysis of other federal district judges that have rejected federal field preemption of aviation law, fails to address the real issue on which such federal field preemption must be decided.[89]

[89] Arguably, the Ninth Circuit analysis in *Gilstrap* comes the closest to conforming to the Supreme Court analysis applied in its most recent cases, however, even the Ninth Circuit examines the extent to which the FAA has actually enacted pervasive regulations, whereas in *Kurns*, the Supreme Court's focus was on the extent to which pervasive regulations were authorized, even if not actually enacted. Thus, the Ninth Circuit analysis in most cases will result in a finding of federal preemption of aircraft design and certification, but in some instances, like those in the Ninth Circuit's decision in *Martin* , the Ninth Circuit preserves state law standards of care, whereas a broader field preemption approach like that applied in the Third Circuit district court cases would find the applicable federal standard for safe design and manufacture of aircraft.

Prior to the U.S. Supreme Court decisions in *Kurns* and *National Meat Assoc.*, two Texas decisions, one a federal court decision and the other a Texas State Court of Appeals decision, rejected federal preemption of the field of aircraft product liability claims. In *Morris v. Cessna Aircraft Company,*[90] the court rejected a claim of field preemption with regard to the design of the Cessna 208 and its "capacity to operate in 'icing conditions.'" In an extensive opinion, the district court attempted to determine Congress' intent by reviewing the legislative history of the Federal Aviation Act, express preemption under other federal statutes relating to aviation, including the General Aviation Revitalization Act ("GARA"), and prior Fifth U.S. Circuit Court of Appeals authority finding field preemption "in a specific area of aviation safety." The court also analyzed federal preemption decisions from other federal circuits and concluded that those decisions did not require or support a finding of preemption of product liability claims based on aircraft design. Notably, while extensive, the court's opinion attempted to determine the intent of Congress by looking at many factors other than the scope of the federal regulatory authority granted to the FAA. The court minimized that grant of authority by stating that Congress only indicated that the FAA may enact regulations, rather than requiring the FAA to issue regulations. Nevertheless, under the analysis in the subsequent Supreme Court decision in *Kurns*, the primary focus should be on the scope of the specific federal regulatory grant to regulate aircraft design, rather than other factors, indicating Congress's intent to preempt other areas of air safety, either expressly or implied.

In the second Texas case, *Vargas de Damian v. Bell Helicopter Textron, Inc.*,[91] the Texas Court of Appeals rejected a claim of federal field preemption, again starting its analysis by stating that the inquiry was to determine Congress's intent with regard to its regulation of the

[90] 2011 U.S. Dist. LEXIS 137837 (N.D. Tex. 2011).

[91] 352 S.W.3d 124 (Tex. Civ. App. 2011).

field of aircraft design and airworthiness. Relying upon a prior Texas federal district court opinion (also relied upon by the court in the *Morris* case discussed above), *Monroe v. Cessna Aircraft Company*,[92] the court concluded that the aircraft certification process "does not in and of itself constitute a pervasive regulatory scheme evidencing an intent by Congress to preempt the field of aviation safety." The Texas Court of Appeals, just as the U.S. District Court in *Morris*, analyzed the prior Fifth Circuit preemption authority and also the preemption authority in other federal circuits, and concluded that these decisions did not support preemption of state law in defective design claims. Again, the principal focus on the extent of federal regulation in the more recent Supreme Court *Kurns* decision calls into question the analysis of the Texas Court of Appeals in this case because the grant of regulatory authority to the FAA is extremely comprehensive, and certainly as comprehensive as the grant of authority relating to the design of locomotives in the Locomotive Inspection Act.

In *Agape Flights, Inc. v. Covington Aircraft Engines*, 2012 U.S. Dist. LEXIS 94053. (E.D. Okla. 2012), the district court held, among other things, that claims made against the overhauler of a component were preempted because the standard of care is established by federal law and the component overhauler had met all the applicable FAA regulations related to overhaul of the component. The district court relied upon the Tenth Circuit decision in *U.S. Airways, Inc. v. O'Donnell*, 637 F.3d 1318 (10th Cir. 2010).

[92] 417 F. Supp. 2d 824 (E.D. Tex. 2006).

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

In *Mitchell v. US Airways, Inc.*,[93] a class action was brought on behalf of skycaps working at airports throughout the United States for the airline. The skycaps traditionally received most of their compensation from tips given to them by airline passengers.[94] The airline began charging a fee per bag for curbside check-in, which was retained by the airline; thus, the skycaps' compensation began dropping, as customers thought the charge was mandatory gratuity.[95] The complaint alleged that the airlines: (1) did not adequately notify the passengers that the charge was not a gratuity and (2) the airline intentionally and improperly misled the passengers to think the charge was a mandatory tip by requiring the fee to be paid in cash and collected by the skycaps.[96]

The airline moved to dismiss the state-based claims, arguing that the preemptive clause of the Airline Deregulation Act ("ADA") precluded the skycaps' statutory and common law claims for relief. The skycaps argued that their common law claims of tortious interference and unjust enrichment were outside the reach of ADA preemption, as they asserted that the ADA precluded only positive enactments by the states, not common law damage actions.[97]

After analyzing the legislative history and jurisprudence of the ADA, the court looked at whether the common law claims were "related to a price, route, or service of an air carrier."[98] The court turned to *DiFiore v. American Airlines, Inc.*[99] for guidance, a class action based on

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[93] 858 F. Supp. 2d 137 (D. Mass. 2012).

[94] *Id.* at 148.

[95] *Id.*

[96] *Id.*

[97] *Id.* at 148-149.

[98] *Id.* at 155.

[99] 646 F.3d 81 (1st Cir. 2011).

facts nearly identical, except claiming a violation of the Massachusetts Tip Law and seeking further relief under the state common law. As the tortious interference and unjust enrichment claims would have the same prohibited effect as the Massachusetts Tip Law claim in *DiFiore*, the court held that they should be precluded to the same extent.[100]

Finally, the skycaps argued that their claim fit within the carved-out exception to preemption for breach of contract actions under the Supreme Court's decision in *Am. Airlines v. Wolens*.[101] In *Wolens*, the Supreme Court held that breach of contract claims against airlines were not preempted by the ADA, provided that courts were only enforcing airline's self-imposed obligations.[102] The skycaps argued that their quasi-contract claim of unjust enrichment should be allowed to go forward under the *Wolens* exception.[103] The court noted that a claim for unjust enrichment is, by its very nature, not a breach of contract claim; thus the unjust enrichment claims were not within the *Wolens'* exception.[104] Thus, the court held that the skycaps' claims of tortious interference and unjust enrichment were preempted by the ADA, as the claims were related to a price, route, or service of an air carrier.

In *Miller v. Delta Air Lines, Inc.*,[105] the plaintiff filed suit against the airline for damages resulting from her baggage being delayed. The plaintiff alleged three state-based claims: (1) breach of contract, (2) unjust enrichment, and (3) violation of Florida's consumer protection laws.[106] The airline filed a motion to dismiss each of the three counts.[107]

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[100] *Id.* at 157-158.

[101] *Id.* at 158; 513 U.S. 219 (1995).

[102] *Id.* at 158 (citing 513 U.S. at 232-233).

[103] *Id.* at 158.

[104] *Id.* at 158-159.

[105] 2012 U.S. Dist. LEXIS 48294 (S.D. Fl. 2012).

[106] *Id.* at *3.

The airline argued that the plaintiff's claims were preempted by the ADA because they impermissibly attempted to regulate the "services" of an airline, specifically, the way the airline handled checked baggage and passenger claims related to checked baggage.[108]

The court chose to follow *Hodges v. Delta Air Lines, Inc.*[109] in adopting a broad definition of "service" as it was used in the ADA preemption clause.[110] The plaintiff argued that her claims did not deal with "services" provided by the airline, but instead arose from the airline's failure to inform customers of their right to reimbursement for delayed baggage. The plaintiff argued that her claims should survive under the exception for "court enforcement of contract terms set by the parties themselves."[111] The plaintiff's claims, however, went far beyond the obligations stipulated by the airline in its contract.[112] Plaintiff's claims rested on allegations that "relate[d] to the heart of services that an airline provides."[113]

The court held that permitting the claim to move forward would sanction regulation of the manner in which airline's advertise their reimbursement services and interfere with the provision of baggage handling services to their passengers.[114] Thus, the claims would offend the stated purpose of the ADA and were preempted.[115]

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[107] *Id.*

[108] *Id.* at *4.

[109] 44 F.3d 334, 336 (5th Cir. 1995).

[110] *Id.* at *6.

[111] *Id.* at *7 (quoting *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 222 (1995)).

[112] *Id.* at *7-*8.

[113] *Id.* at *8 (quoting *Koutsouradis v. Delta Air Lines Inc.*, 427 F.3d 1339, 1344 n.2 (11th Cir. 2005)).

[114] *Id.* at *8.

[115] *Id.*

In *Moffitt v. JetBlue Airways Corp.*,[116] plaintiffs filed suit asserting claims under New York state law, including unfair and deceptive trade practices, breaching the implied covenant of good faith, false imprisonment, negligence, and negligent infliction of emotional distress, against an airline after certain flights were diverted due to heavy winter storm conditions. The claims were based on the contention that the airline unlawfully confined the plaintiffs as passengers on the tarmac for a period in excess of seven hours.[117] The airline moved to dismiss the action on the basis that the state law claims were expressly preempted by the ADA and the Federal Aviation Act ("FAA").[118]

The court went through each of the claims and analyzed whether they were preempted by federal law. First, the deceptive business practices claim sought to impose obligations upon the airline to provide certain services during ground delays.[119] The court found that the action was preempted by the ADA, as enforcing the state law would have the "force and effect of law related to a price, route, or service of an air carrier . . . ."[120] Next, the breach of implied covenant claim was found to be "functionally indistinguishable" from the deceptive practice claim and was found to also be expressly preempted by the ADA.[121] Finally, the court analyzed the tort claims, stating that each related to prices, routes, or services, as the claims were all premised upon complaint of the plaintiffs' treatment while detained on the tarmac.[122]

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[116] 2012 U.S. Dist. LEXIS 50974 (N.D. N.Y. 2012).

[117] *Id.* at *1.

[118] *Id.* at *1-*2.

[119] *Id.* at *13.

[120] *Id.* at *14 (citation omitted).

[121] *Id.* at *16-*17.

[122] *Id.* at *20.

Thus, the court found that all of the tort claims were expressly preempted by the ADA, and, notably, also concluded that Congress has occupied the field of on-ground safety of airplanes and air passengers, and therefore the claims were also impliedly preempted by the FAA.[123]

In *Ginsberg v. Northwest, Inc.*,[124] the plaintiff was enrolled, and eventually expelled, in a frequent flier program offered by the defendant airline. Plaintiff filed suit asserting (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) negligent misrepresentation; and (4) intentional misrepresentation.[125] The lower court dismissed claims (2) through (4), holding that the ADA preempted them "because they relate[d] to airline prices and services."[126] The plaintiff appealed the district court's conclusion that the ADA preempted a claim for breach of the implied covenant of good faith and fair dealing.[127]

The Ninth Circuit first analyzed Congress' intent and the history of enacting the ADA.[128] The court next analyzed existing Supreme Court and Ninth Circuit precedent, particularly focusing on *American Airlines, Inc. v. Wolens*[129] and the carve-out from preemption of state common law contract claims.[130]

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[123] *Id.* at *26.

[124] 695 F.3d 873 (9th Cir. 2012).

[125] *Id.* at 875.

[126] *Id.*

[127] *Id.*

[128] *Id.* at 876.

[129] 513 U.S. 219 (1995).

[130] *Id.* at 879.

The Ninth Circuit concluded that a claim for breach of the implied covenant of good faith and fair dealing does not interfere with the ADA's deregulation mandate.[131] In *Wolens*, the Court noted that state-law based contract claims would not frustrate the ADA's manifest purpose: "[b]ecause contract law is not at its core 'diverse, nonuniform, and confusing,' we see no large risk of nonuniform adjudication inherent in 'state-court enforcement of the terms of a uniform agreement prepared by an airline and entered into with its passengers nationwide."[132] The airline was free to invest in a frequent flier program, but it must also comply with its contractual obligations, pursuant to the covenant of good faith and fair dealing.[133]

Finally, the court held that the breach of covenant of good faith and fair dealing did not relate to either prices or services under the ADA.[134] The Ninth Circuit found the district court to have used an overly broad definition of what related to "prices" and an inconsistent use of the "relating to" language.[135]

Thus, the Ninth Circuit stated that nothing in the ADA's language, history, or regulations suggested that Congress intended to displace state common law contract claims that did not affect deregulation in more than a "peripheral . . . manner."[136] Thus, the Ninth Circuit concluded that a claim for breach of the implied covenant of good faith and fair dealing was not preempted by the ADA.[137]

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[131] *Id.* at 880.

[132] *Id.* (citations omitted).

[133] *Id.*

[134] *Id.* at 880-881.

[135] *Id.* at 881.

[136] *Id.* (citations omitted).

[137] *Id.* at 881-882.

In *Newman v. Spirit Airlines, Inc.*,[138] the plaintiff sued an airline for state-based consumer fraud claims, breach of contract, and unjust enrichment on the airline's decision to charge a two dollar fee on all airline purchases. The airline removed the case and moved to dismiss the case as preempted by the ADA.[139] The court analyzed ADA preemption jurisprudence and noted that a claim was preempted if it (1) related to airline prices, routes, or services; and (2) was derived from the enactment or enforcement of state law.[140]

The plaintiff's complaint failed to identify any contractual obligation that the airline breached.[141] The plaintiff argued that she could state a claim for breach of the implied covenant of good faith and fair dealing, relying on *Ginsberg v. Northwest, Inc.* (discussed above), as such claims were not preempted by the ADA.[142] The court, however, declined to follow *Ginsberg* to the extent that a claim for breach of the implied covenant of good faith and fair dealing was *never* preempted by the ADA.[143]

Under Illinois law, there was no independent contractual claim for breach of contract; thus, any attempt to enforce the implied covenant was an attempt to enforce state law, not a voluntary undertaking.[144] The court held that a claim for breach of the implied covenant of good

[138] 2012 WL 3134422 (N.D. Ill. 2012).

[139] *Id.* at *1.

[140] *Id.* at *2 (citation omitted).

[141] *Id.* at *3.

[142] *Id.*

[143] *Id.* at *4.

[144] *Id.*

faith can be preempted by the ADA.[145] As the claim related to the price of the ticket, the claim was preempted by the ADA.[146]

In *Holmes v. United Airlines, Inc.*,[147] the plaintiff sued the airline for negligence, as she slipped and fell from a metal ladder, causing several injuries. The airlines argued that the plaintiff's state law claims were preempted by the FAA and the ADA.[148] The court analyzed ADA jurisprudence and held that given the nature of the negligence claim, it did not relate to airplane prices, routes, and services.[149] A negligence claim based on a slip and fall is not related to the airlines' economic, contractual decisions, prices, or issues concerning deplaning.[150] Courts have typically recognized that personal injury negligence claims against airlines are governed by state law.[151] Thus, the court found that Congress did not expressly preempt personal injury negligence claims against airlines regarding the use of metal ladders to deplane.[152]

The court also analyzed whether there was implied or "conflict" preemption.[153] Conflict preemption occurs where it is impossible for a private party to comply with both state and federal requirements or where the state law stands as an obstacle to the execution of the full purposes and objectives of Congress.[154] The court held that conflict preemption was inapplicable, as a

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[145] *Id.*

[146] *Id.*

[147] 2012 U.S. Dist. LEXIS 8732 (N.D. Ill. 2012).

[148] *Id.* at *6.

[149] *Id.* at *11-*12.

[150] *Id.*

[151] *Id.* at *12-*13.

[152] *Id.* at *14.

[153] *Id.* at *14-*15.

[154] *Id.* at *15 (citations omitted).

state common law negligence claim did not stand as an obstacle to the objectives of Congress in enacting the FAA and the ADA.[155] The court also held that Congress did not intend the FAA to occupy the field of torts exclusively; thus, complete preemption did not apply either.[156]

In *Hamilton v. United Airlines, Inc.*,[157] plaintiff argued that the airline had no lawful reason for his termination and brought claims under the state whistleblower act and state-based claims; the case was then removed to federal court. The plaintiff argued that removal was improper because the state-based claims were not preempted, as they were not related to the airline's prices, routes, or services.[158] Further, the plaintiff argued that the Whistleblower Protection Program ("WPP") amendment to the ADA did not expand the statute's preemptive force to include all whistleblowing claims relating to air safety.[159]

The airline argued that the ADA expressly preempted the plaintiff's state law claims because (1) they related to the airline's safety obligations, rates, routes, and services; and (2) resolution of the claims requires of examination of the airline's policies with federal law and regulations.[160] Further, the airline argued that the WPP amendment bolstered the inference for preemption and provided an exclusive federal remedy for the plaintiff's claims.[161]

The court held that the claims were not preempted by the ADA's preemption language.[162] After analyzing existing ADA jurisprudence, the court held that the claims were too tenuously

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[155] *Id.* at *16.

[156] *Id.* at *15-*16.

[157] 2012 U.S. Dist. LEXIS 179811 (N.D. Ill. 2012).

[158] *Id.* at *2.

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.* at *17.

related to any price, route or service provided by the airline.[163] Next, the court held that the legislative record did not indicate a "clear and manifest" intent to preempt all state laws as they relate to air safety whistleblowing through the WPP.[164] Thus, the court held that the WPP did not expand the ADA's preemption scope.[165]

E. FEDERAL PREEMPTION – OTHER FEDERAL STATUTES

1. Air Carrier Access Act of 1986 – Discrimination in Boarding

In *Edick v. Allegiant Air, LLC*,[166] the plaintiff's husband fell and hit his head as he was entering the airport terminal at McCarran International Airport. The airline moved for summary judgment, arguing that all of the plaintiff's claims were preempted by federal law.[167] The plaintiff's claims focused on two alleged breaches of duty by the airline: (1) the airline's failure to provide wheelchair access and (2) the airline's failure to accept the plaintiff's baggage under its check-in category.

The airline argued that the plaintiff's wheelchair-related claim was preempted by the Air Carrier Access Act of 1986 ("ACAA").[168] Federal regulations require wheelchair assistance for passengers only when boarding or deplaning, when connecting with flights between terminals, and when moving from the terminal entrance or vehicle drop-off point to the gate. The incident involved the failure to provide wheelchair assistance from a parking garage to the check-in counter.[169] Pursuant to the ACAA, an air carrier's obligation to provide wheelchair assistance

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[163] *Id.*

[164] *Id.* at *28.

[165] *Id.* at *29.

[166] 2012 U.S. Dist. LEXIS 58924 (D. Nev. 2012).

[167] *Id.* at *5.

[168] *Id.* at *6.

[169] *Id.* at *6-*7.

does not extend beyond the areas of the terminal it controls.[170] As the airline did not control the parking area of the airport, the court found that the plaintiff's wheelchair assistance-related claims were preempted by the ACAA.[171] Plaintiff's claims about the airline's failure to check in the plaintiffs baggage were also preempted by federal law. Thus, the court granted summary judgment on both claims.

In *O'Brien v. City of Phoenix*,[172] the plaintiff, who was legally blind, alleged that she fell and was injured when she stepped off of the airplane onto the jetway because the jetway was improperly aligned with the airplane. The plaintiff alleged state law claims of premises liability and negligence.[173] The defendants removed the action on the basis of federal question jurisdiction, asserting that the state law claims were preempted by the ACAA, which the defendants argued were the rules that exclusively govern airline standards for assisting passengers with disabilities.[174] The plaintiffs sought to remand, arguing that their state law claims were not preempted by federal law.[175]

The ACAA does not expressly provide a private cause of action and no private right of action should be implied.[176] As the court concluded that there was no private right of action under the ACAA, the plaintiff's claims could not be asserted in federal court.[177] The court remanded the case to state court to determine whether the claims were preempted. To the extent

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[170] *Id.* at *7.

[171] *Id.* at *8.

[172] 2012 U.S. Dist. LEXIS 144462 (D. Ariz. 2012).

[173] *Id.* at *1-*2.

[174] *Id.* at *2.

[175] *Id.*

[176] *Id.* at *3.

[177] *Id.* at *4-*5.

that the state court determined that the claims were preempted, the plaintiffs' remedy was with the Department of Transportation. To the extent the state court decides the claims were not preempted, the claims were properly before the state court.

In *Compass Airlines, LLC v. Mont. Dep't of Labor & Industry Hearings Bureau*,[178] a flight attendant employed by Compass Airlines denied boarding to a passenger with a disability. The passenger was preparing to board a flight when the flight attended stopped him because she thought he was bringing a prohibited item onto the flight.[179] The flight attendant was wrong on several accounts, but her actions were corrected by the compliant resolution officer.[180] The passenger was told he could board the flight, but was upset and refused to do so. The passenger then filed a complaint with the U.S. Department of Transportation, alleging a violation of the ACAA. The passenger then filed a complaint with the Montana Human Rights Bureau alleging a violation of the Montana Human Rights Act based on the same incident.[181]

Compass Airlines sought a declaratory judgment that the ACAA completely preempted the field raised by the underlying claims and has displaced all state law claims that could be sought.[182] In analyzing the Plaintiff's Motion for an Expedited Preliminary Injunction, the court analyzed preemption under the ACAA. The court noted that the Ninth Circuit had not addressed whether the ACAA impliedly preempts state law claims, but district courts within the Ninth Circuit had found so when pervasive federal regulations govern the controversy.[183] The

[178] 2012 U.S. Dist. LEXIS 182438 (D. Mont. 2012).

[179] *Id.* at *2-*3.

[180] *Id.* at *3.

[181] *Id.* at *5.

[182] *Id.* at *9.

[183] *Id.* at *10.

passenger argued that state law claims could co-exist with the ACAA as long as the state law claim used the same standard of care as that required by the ACAA.[184]

The court held that it appeared likely that a court would ultimately find that the passenger's state-based complaint of disability discrimination was preempted by the ACAA.[185] It also held that it was likely that a court would ultimately find that there was no implied right of action for violations of the ACAA's regulations as to the utilization of electronic respiratory devices by passengers during flights.[186] Finally, the court held that it appeared likely that it would find that none of the passenger's claims would survive preemption.[187]

In *Segalman v. Southwest Airlines*,[188] a passenger with cerebral palsy filed suit after his mechanized wheelchair was stored improperly and lost power during his flight, causing him to have to use an uncomfortable manual wheelchair. The airline argued that the plaintiff's claims of violation of state disability laws and common law negligence were preempted by the ACAA.[189] The court held that, as Plaintiff's claims were premised on a violation of the airline's duty to properly stow and transport the wheelchair, the claims were subject to field preemption by the ACAA.[190] The ACAA expressly provides explicit instruction on the duties of an air

[184] *Id.* at *11.

[185] *Id.* at 22.

[186] *Id.* at *22-23.

[187] *Id.* at *23.

[188] 21012 U.S. Dist. LEXIS 153025 (E.D. Cal. 2012).

[189] *Id.* at *16.

[190] *Id.* at *20.

carrier with respect to the stowage and transportation of wheelchairs.[191] Thus, the state law claims of the plaintiff were held to be preempted by the ACAA.[192]

2. FAA Authorization Act of 1994

In *S.C. Johnson & Son, Inc. v. Transport Corporation of America, Inc.,*[193] a manufacturer raised a number of state-law claims against carriers, alleging that they had conspired with a former employee of the manufacturer to exchange bribes for favorable treatment. The U.S. District Court dismissed the action as preempted by federal law pursuant to 49 U.S.C.S. § 14501(c)(1) of the Federal Aviation Authorization Act of 1994 ("FAAAA"). The manufacturer appealed.

The Seventh Circuit relied on three decisions of the Supreme Court to provide an outline of the approach to preemption: *Morales v. Trans World Airlines, Inc.;*[194] *American Airlines, Inc. v. Wolens;*[195] and *Rowe v. New Hampshire Motor Transport Ass'n.*[196][197] The Seventh Circuit also provided illustrative cases whether either the ADA or the FAAAA had concluded that there was no preemption.[198]

The manufacturer argued that its tort claims sought civil damages for the carriers' alleged criminal conduct: bribery, conspiracy, fraud, and racketeering.[199] The carriers argued that all of the allegations were complaints that the manufacturer paid too much for its services, which was

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[191] *Id.* at *20-*21.

[192] *Id.* at *21.

[193] 697 F.3d 544 (7th Cir. 2012).

[194] 504 U.S. 374, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992).

[195] 513 U.S. 219, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995).

[196] 552 U.S. 364, 128 S. Ct. 989, 169 L. Ed. 2d 933 (2008).

[197] *Id.* at 549.

[198] *Id.* at 555.

[199] *Id.* at 556.

an argument about rates and service. The Seventh Circuit decided to individually analyze each of the claims.

The court held that two of the manufacturer's theories, fraudulent misrepresentation by omission and conspiracy to commit fraud, related sufficiently to rates, routes, or services such that they must be rejected as a matter of law under the FAAAA preemption rule. Each of these claims sought to substitute a state policy, embodied in law, for the agreements that the party had reached. "State consumer protection laws often contain well-meaning but widely varying paternalistic provisions designed to protect consumers from the rigors of the market. Congress decided, however, in both the ADA and the FAAAA that it did not want (nor did it want the states) to displace the market in this way)."[200]

Next, the Seventh Circuit analyzed the two remaining claims of criminal conspiracy under Wisconsin's bribery statute and violation of Wisconsin's state equivalent to the federal racketeering statute.[201] Wisconsin's law forbidding bribery should not be characterized for FAAAA purposes in the same manner as consumer fraud and deceptive practices.[202] While the injuries incurred would have had a tangential effect on its costs, these offenses were the kind the Supreme Court has held fall on the "non-preemption side of the law."[203] Additionally, the state-based racketeering claims related too tangentially to rates, routes, and services.[204]

Thus, the Seventh Circuit held that the district court correctly found that the manufacturer's claims asserting fraudulent misrepresentation by omission and conspiracy to

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[200] *Id.*

[201] *Id.* at 557-558.

[202] *Id.* at 560.

[203] *Id.*

[204] *Id.* at 560-561.

commit fraud were preempted by the FAAAA, but reversed and remanded its decision on the state bribery and racketeering claims.[205]

3. 49 U.S.C. § 44112

In *Vreeland v. Ferrer,* [206] the Florida Supreme Court rejected the argument that the federal statute should protect owners, such as lessors, not in actual possession or control the aircraft, even as to injuries to persons within the aircraft, which occurred upon collision with the ground. A petition for *certiorari* to the U.S. Supreme Court, in which *amicus* National Aircraft Finance Association argued, among other things, for field preemption based upon those federal aviation regulations which impose the responsibility for air safety only on aircraft operators (and not own aircraft owners or lessors), and the legislative history of the statute that indicated that Congress did not intend to impose federal duties for air safety upon owners without actual possession or control of the aircraft, was denied.[207] 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.*[208]

In *In re Hudson River Mid-Air Collision,*[209] the U.S. District Court for the District of New Jersey also considered the issue of 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

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[205] *Id.* at 561.

[206] 71 So.3d 70 (Fla. 2011), *cert. denied.*

[207] Copies of the briefs are available at www.stitesaviationupdates.com

[208] 2012 U.S. Dist. LEXIS 46330 (S.D. Fla. 2012).

[209] 2012 U.S. Dist. LEXIS 25149 (D.N.J. 2012).

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 would be preempted under 49 U.S.C. § 44112.

F. 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 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."[210] The act excludes independent contractors from its definition of "employee."[211] 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.[212] 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

[210] 28 U.S.C. §1346(b).

[211] 28 U.S.C. § 2671.

[212] 28 U.S.C. § 2680(a).

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).[213] The failure to file an administrative claim is grounds for dismissal, as the filing of an administrative claim is a "jurisdictional requirement and an absolute prerequisite to maintaining a civil action against the government under the FTCA."[214] 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."[215]

In *Turturro v. United States*,[216] the 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.[217] *Turturro* stems 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

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[213] 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).

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

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

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

[217] *Id.* at *24.

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.[218] 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.[219] 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.[220]

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, 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.[221]

A different result occurred in *Kodar v. United States*.[222] The *Kodar* litigation arose out of a June 6, 2008 collision between two private airplanes, a 1986 Beechcraft A36 Bonanza, and a Piper PA-30 Twin Comanche at North Central State Airport in Smithfield, Rhode Island. The pilot of the Bonanza claimed that he was given clearance from traffic control personnel to depart Runway 5, and that traffic control personnel failed to advise him that the Comanche was in the process of approaching and landing on Runway 5. While the pilot and owners of the Bonanza

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

[219] *Id.* at *8.

[220] *Id.* at *9.

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

[222] *Kodar v. United States*, 879 F.Supp.2d. 218 (D.R.I. 2012); 2012 U.S. Dist. LEXIS 78381.

filed administrative claims against the FAA in a timely manner, the pilot of the Comanche did not file a claim against the FAA until September 16, 2011, when he filed an Answer to the Complaint by the pilot of the Bonanza and also filed a Cross-Claim against the FAA. The FAA sought to dismiss the Comanche's pilot's Cross-Claim against it, pleading that no claim had been presented to the FAA, and that the Comanche pilot had exceeded the two-year statute of limitations under the Federal Tort Claims Act.[223] In response, the Comanche's pilot argued that the requirement of an administrative complaint did not apply to cross-claims, and therefore his claim should not be dismissed. The FAA countered that while §2675 (a) does not apply to cross-claims, that provision does not waive the two-year statute of limitations.[224]

The Court held that the Comanche's pilot's Cross-Claim against the FAA was in the nature of a direct complaint pursuant to the FTCA. "As such, it does not fall under the §2675 (a) exception for cross-claims and it requires the filing of a timely administrative claim for this Court to have jurisdiction over the complaint."[225] The Court then granted the FAA's Motion for Dismissal of the Comanche pilot's claims for personal injury.[226]

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.[227] In *Ressler v. United States*,[228] 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*

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[223] 28 U.S.C. §2401 (b).

[224] *Kodar,* LEXIS at *14.

[225] *Id.* at *28.

[226] The Comanche pilot's claims for contribution and indemnity were not challenged by the FAA, as the FTCA statute of limitations with respect to those claims begins to run from the date of payment on judgment, not the date of injury. *Id.* at *13-14., fn. 4.

[227] 28 U.S.C. §2401 (b).

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

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.[229] On December 20, 2010, precisely two years after the accident, the McLean plaintiffs mailed their administrative claims to the FAA. The FAA received the claims on December 28, 2010.[230]

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.[231]

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.[232]

While reiterating the established rule that the federal courts have exclusive jurisdiction over FTCA claims, the court in *Snider v. Sterling Airways*[233] highlighting the often unanticipated and unpredictable procedural pitfalls of removal to federal court. The *Snider* case arose out of a

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[229] *Id.* at *7.

[230] *Id.* at *8.

[231] *Id.* at *9.

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

[233] *Snider v. Sterling Airways*, 2013 U.S. Dist. LEXIS 5750 (E.D. Pa. 2013).

crash of a Cessna T210L airplane during an attempted landing at William T. Piper Memorial Airport in Loch Haven, Pennsylvania.[234] The pilot of the airplane, as well as the two passengers, both employees of the United States Department of Agriculture, Forest Service, died in the crash.[235] The widow of one of the passengers brought an action in the Court of Common Pleas of Philadelphia County for damages, asserting both products liability and tort theories against Teledyne and Sterling Airways, Inc. Before service of the Complaint on any of the defendants, Teledyne removed the case to federal court. Teledyne then answered the Complaint, filed a Cross-Claim against Sterling, and filed a Third-Party Complaint against the estate of the pilot and the Forest Service.

The plaintiffs moved to remand the case to state court, arguing that even though Teledyne's removal had preceded service on any of the defendants, the court should nevertheless consider the presence of the unserved forum defendants.[236] While vigorously defending the removal itself, Teledyne also countered that even if removal was improper, the presence of the Forest Service precluded remand to state court.[237] Acknowledging the split of authority, the federal court concluded that it could not ignore the presence of unserved forum defendants if none of the defendants were formally served before removal.[238] Then, citing the long-standing rule that a court evaluates the propriety of removal based on the state of the pleadings at the time that the notice of removal was filed, the Court concluded that Teledyne's later post-removal

[234] *Id.* at *3.

[235] *Id.* at *3.

[236] *Id.* at *5. This aspect of the case is discussed under Federal Jurisdiction - Removal, *infra* at Section I.2.

[237] *Id.* at *6.

[238] *Id.* at *7-8.

Third-Party Complaint against the Forest Service did not affect the propriety of the removal.[239] The Court further held that the presence of the third-party FTCA claims at the time of the motion to remand did not independently preclude remand.[240] Finally, as to Teledyne's argument that had Teledyne asserted third-party claims in state court, the United States could have subsequently removed the matter to federal court, the Court rejected those arguments as speculative events "which have not occurred and may never occur."[241]

G. PRODUCT LIABILITY

1. Flight Training

The level of sophistication of modern aircraft has resulted in many manufacturers, sellers and lessors [and their insurers] either requiring, or at least, offering, specific training in many aircraft. The sophistication of these aircraft promises enhanced safety to pilots and passengers, as well as improved operational capability, however, the operation of the aircraft and the sophisticated systems imposes higher levels of pilot training and proficiency. While most of these cases are not true product liability cases in the sense that the manufacturer or training facility has a legal duty to provide this training, the training nevertheless is provided by contract, resulting in potential claims for breach of contract or "educational malpractice." Thus, these training cases are included in this section on product liability, even though these cases are not based on the principles of strict liability in tort that generally provides the basis for most product liability cases.

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[239] *Id.* at *6.

[240] *Id.* at *6.

[241] *Id.* at *20.

In *Newman v. Socata SAS,*[242] the U.S. District Court for the Middle District of Florida held that allegations of breach of contract and negligent failure to provide training to a pilot of specific flight characteristics of the aircraft that might result in a "torque roll" satisfied the pleading requirements of Rule12(b)(6). The federal district court agreed that "educational malpractice" claims are not cognizable under Florida law, and that the Florida courts would recast any claims based on other grounds as "educational malpractice" claims when the policies underlying the bar against such claims required. Nevertheless, the district court found that those policy considerations did not "carry over to the flight training setting, at least not on the facts of this case" because these claims do not involve either sovereign immunity or separation of powers, and also do not require "inquiry into the nuances of educational theories, policies, methods, or curricula in an effort to establish satisfactory standards."[243] Additionally, the court did not think that the difficulties of determining causation and damages often presented in educational malpractice cases were not "daunting in the context of this case."[244]

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[242] 924 F.Supp.2d 1322, 2013 U.S. Dist. LEXIS 19417 (M.D. Fla. 2013).

[243] *Id.* at 1329.

[244] *Id.* The analysis in this case and in the *In re Air Crash Disaster Near Clarence Center, New York,* decision discussed above, suggest that the standards of care for training would also be the subject of federal preemption in claims against manufacturers and flight schools, just as they are subject to federal preemption when asserted against airlines. In this case, the proper focus should be on the Pilot Operating Handbook and the continuing federal duty of manufacturers to warn of unsafe conditions unique to the specific model of aircraft that may not be of the type covered by standard pilot training and certification. *See Glorvigen* and *Taylor v. Honeywell,* discussed below, both recognizing that pilots do not have claims against others, particularly manufacturers, for damages that can be avoided during the course of occurrences for which they are properly prepared during the course of standard pilot training and certification, or for which specific warnings and/or procedures have been provided by the manufacturer in the Pilot Operating Handbook. Thus, for a claim to be cognizable under federal standards, the proper focus is on compliance with these federal requirements. If these standards have been met, then any state law claims for deficient warnings, whether in the context of flight training or otherwise, should be federally preempted.

In *Younan v. Rolls Royce Corp.*,[245] the U.S. District Court for the Southern District of California considered a motion for summary judgment filed by MD Helicopters, Inc. ("MDHI") relating to the crash of a 1994 MD600N helicopter manufactured by MDHI's predecessor, McDonnell Douglas Helicopter Systems ("MDHS"). Following the merger of in 1997 between The Boeing Company and McDonnell Douglas, MDHI purchased the MD600N product line in 1999 through an asset purchase agreement, and MDHI became the Type Certificate holder for the MD600N model helicopter. Additionally, as part of the asset purchase agreement, MDHI expressly assumed all liabilities for post-sale "causes of action [involving pre-asset sale MD600N helicopters] based on notices to customers, such as contained in maintenance manuals, service notices, etc."[246]

The helicopter involved in the accident had been purchased by the Border Patrol from Boeing in 1998. The accident occurred in 2009 during a night flight near San Clemente, California, when, as a result of an engine failure, the crew attempted an autorotation, landing the helicopter in shallow water on the beach. At the time of the autorotation, the helicopter was flying at 3,834 pounds gross weight and 1,500 feet density altitude. The pilot performed what he considered to be a "textbook autorotation" landing in one spot without any slipping or sliding, and well within the "FAA – approved limitations for handling quality and autorotation performance."[247] Nevertheless, the helicopter was substantially damaged and both crewmembers sustained injuries as a result of the landing.

Following the purchase of the MD600N model helicopters by the federal government, the General Accounting Office ("GAO") had performed a study of several incidents related to

[245] 2012 U.S. Dist. LEXIS 79318 (S.D. Cal. 2013).

[246] *Id.* at *5.

[247] *Id.* at *10.

autorotation in the MD600N helicopter. The GAO concluded that "the manner in which the MD600N handles could make autorotations more difficult, in part, because it descends faster than other helicopters . . . [B]ecause it is heavier than and has a higher descent rate, there is little room for error at the bottom of the descent."[248] As a result, following certain design changes by MDHI in the helicopter, "[i]n 2002, MDHI [also] contracted with [U.S. Customs and Border Protection "CPB")] to provide recurrent ground school and flight training in the MD600N model aircraft to CBP pilots [including the pilot of the accident aircraft]."[249] The pilot, plaintiff Younan, received flight training in an F4 model helicopter in 2008, but claimed that the "F4 handling characteristics, performance and autorotational characteristics are vastly different from an MD600N," and that the failure to "properly train [him] in the difference between a true emergency autorotation at an operational weight of a CBP aircraft (3900 lbs) and their 'variant trainer' – the F4 – at 3100 pounds, combined with the very poor autoratation recovery capacity of the 600N were the reasons for [the] crash landing [that] destroyed the aircraft and caused the injuries to the flight crew."[250]

The District Court denied the summary judgment motion, applying "professional negligence" standards to the flight training claims. The District Court did not consider whether the claims presented were "educational malpractice" claims, but concluded that the existence of expert testimony regarding the adequacy of the training was sufficient to preclude summary judgment. The District Court also found that the successor Type Certificate holder had an ongoing duty to warn, and that the liability for such training fell "within the causes of action for

[248] *Id.* at *7.

[249] *Id.* at *8.

[250] *Id.* at *12.

which MDHI [had] assumed liability from MDHS/Boeing in the 1999 asset transfer."[251] Next, in addressing a "sophisticated user defense," the District Court recognized that the plaintiff was a highly trained helicopter pilot, but nevertheless held that the plaintiff had "come forward with evidence of a genuine dispute as to whether [plaintiff] was a sophisticated user of the MD600N model helicopter." [252] Finally, the District Court held that summary judgment would be granted as to the strict liability claims because "California law does not recognize a strict liability claim for defective training." [253]

In subsequent pre-trial rulings on motions in limine, the District Court sustained motions in limine excluding any evidence or argument as to any state law failure to warn claims, based on implied federal field preemption of the duty to warn under the Ninth Circuit analysis in *Gilstrap*.[254] Additionally, the District Court sustained motions in limine as to violations of federal regulations relating to reporting certain 49 CFR sections 21.3(a) and 21.3(f), finding that the undisputed evidence showed that those obligations has been satisfied. The District Court denied, however, a motion in limine as to 49 CFR section 21.3(b) on the grounds that a manufacturer also must report any "defect" that "could cause" any one of the enumerated occurrences in that section.[255] The District Court ruled that "based upon the evidence in the record, a reasonable jury could find that there was a 'defect' in the helicopter at issue that 'could

[251] *Id.* at *20.

[252] *Id.* at *24.

[253] *Id.* at *27-28.

[254] 2013 U.S. Dist. LEXIS 65136 and 2013 U.S. Dist. LEXIS 72986.

[255] 2013 U.S. Dist. LEXIS 72986 at *2.

result' in any of the occurrences listed above [in 21.3(b)] which MDHI was required to report to the FAA pursuant to 14 C.F.R. section 21.3(b)."[256]

In *Glorvigen v. Cirrus Design Corp.*, [257]the Supreme Court of Minnesota affirmed a judgment as a matter of law in favor of Cirrus Design Corp. as to the claims of the trustees of the next of kin of the pilot and the passenger of a Cirrus SR22 aircraft as a result of an "emergency situation" involving inadvertent flight by a non-instrument rated pilot into instrument meterological conditions and the use of the SR22 autopilot in such situations. Plaintiffs claimed that the pilot, Mr. Kosak, had not received a lesson that was to be provided to him relating to recovery from such situations under "a training program for new [Cirrus SR22] owners" in order to assist them in transitioning into the SR22. The jury at the trial had found Cirus 37.5% negligent, University of North Dakota Aerospace Foundation ("UNDAF") 37.5% negligent, and pilot Prokop 25% negligent.[258] In a decision reported extensively in prior Recent Developments articles, the Minnesota Court of Appeals reversed the trial court's denial of a motion for judgment as a matter of law on the grounds that the manufacturer did not have a duty to provide transition flight training, and on the grounds that the negligence claim was barred under Minnesota law by the "educational malpractice doctrine."[259]

The Minnesota Supreme Court recognized that whether the tort claim was characterized as a product liability claim or a negligence claim, Cirrus, as a manufacturer or supplier, did not have a "duty to warn that required Cirrus to provide [the lesson at issue]."[260] The Court noted

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[256] *Id.*

[257] 816 N.W.2d 572, 2012 Minn. LEXIS 305 (Minn. 2012).

[258] *Id.* at 580, *18.

[259] *Id.*, *18-19.

[260] *Id.* at 582, *25.

that there was no claim that the written instructions contained in the Pilot Operating Handbook and the Autopilot's Operating Handbook were inaccurate or incomplete, and that "the duty to warn has never before required a supplier or manufacturer to provide training, only accurate and thorough instructions on the safe use of the product, as Cirrus has done here."[261] The Court also recognized that under "ancient learning . . . one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all,"[262] but that "a party is not responsible for damages in tort if the duty breached was " 'merely . . . imposed by contract,' and 'not imposed by law.'"[263] Since the only duty to provide the flight lesson at issue arose by contract, plaintiffs could not recover tort damages, and because no duty was present, it was not necessary for the Court to "reach the issues of educational malpractice, causation or UNDAF's liability."[264]

In *Waugh v. Morgan Stanley & Co.*,[265] the Illinois Court of Appeals concluded that a claim against a flight training company arising from the alleged generalized failure to provide training in engine out landings to a qualified and experienced multi-engine pilot experienced in another make and model of aircraft was insufficient to withstand summary judgment when there was no evidence of a failure to provide training on any particular specific characteristic of the Cessna 421B aircraft. The Illinois Court of Appeals based its holding on the "educational malpractice defense," recognizing that there are "three broad categories of educational malpractice claims: "(1) the student alleges that the school negligently failed to provide him with

[261] *Id.*, *26.

[262] *Id.* at 584, *30.

[263] *Id.*

[264] *Id., *32.*

[265] 966 N.E.2d 540, 2012 Ill. App. LEXIS 133 (Ill. App. 2012).

adequate skills; (2) the student alleges that the school negligently diagnosed or failed to diagnose his learning or mental disabilities; or (3) the student alleges that the school negligently supervised his training."[266] Recognizing that the Seventh Circuit Court of Appeals in a different context had predicted that the Illinois Supreme Court would "refuse to recognize the tort of educational malpractice,"[267] the Illinois Court of Appeals concluded that if a claim "raises questions about the reasonableness of an educator's conduct in providing educational services, or if a claim requires an analysis of the quality of education, it is a noncognizable claim for educational malpractice."[268] In this case, the claim was that the instructor was negligent in training the pilot to fly the aircraft and therefore would require "an analysis of the educator's conduct in providing educational services."[269] Such a claim therefore "sounds in educational malpractice and is barred as a matter of law."[270]

2. Liability of Manufacturers for Design of Replacement Component Parts

In *Sikkelee v. Precision Airmotive Corp,*[271] the district court addressed on a motion for reconsideration, the liability of "non-manufacturing designer" as defined under Rest.3d Torts, section 20. The district court held that it could not predict that Pennsylvania would adopt that definition, even if it adopted other portions of the Rest.3d Torts, since state courts do not adopt a restatement in its entirety, as opposed to reviewing and adopting specific provisions. The district court reasoned that

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[266] *Id.* at 550, *18, quoting Dallas Airmotive, Inc. v. FlightSafety International, Inc., 277 S.W.2d 696, 699 (Mo.Ct.App. 2008). The court also cited the Minnesota Court of Appeals decision in Glorvigen v. Cirrus Design Corp. 796 N.W.2d 541, 552 (Minn. Ct. App. 2011), for the definition of educational malpractice claims.

[267] *Id.* at 553, *28.

[268] *Id.* at 555, *33-34.

[269] *Id.*

[270] *Id.*

[271] No. 4:07-cv-00886, 2013 U.S.Dist. LEXIS 77698, 2013 WL 2393005 (M.D. Pa. June 3, 2013).

the definition of "non-manufacturing designer" did not necessarily satisfy the requirements of Pennsylvania's adoption of Rest.2d Torts section 402A, and would not impose liability based merely on the status of a "non-manufacturing designer." Nevertheless, the district court applied the "*Althus* test,"[272] a different standard of determining whether a duty existed based on the state policy of recognizing a duty which requires an examination of five factors involving the relationship between the parties, the social utility of the defendant's conduct, the nature of the risk imposed., the consequences of imposing a duty, and the overall public interest in the proposed solution, and upheld its prior order finding that Lycoming owed "a duty of reasonable care in the design of the accident aircraft's carburetor and the warnings associated with it."

3. Liability of Manufacturers as Sellers

As will be discussed in the next Section below, in *Garcia v. Wells Fargo Bank Northwest, N.A., Trustee*,[273] the district court held that GARA does not bar strict liability claims against a manufacturer as a seller in 2006 of a part that was manufactured by a component manufacturer. The 2008 crash allegedly resulted from a defective trim actuator control unit ("ACU"), which was not manufactured by Cessna, but was sold by Cessna to an aircraft maintenance facility. The district court held that the sale of the part was merely incidental to the manufacture of the aircraft. The district court did not explain or discuss the legal basis for the claims against Cessna as a seller, but merely referred to the claims against Cessna in its capacity as the "manufacturer, designer, and seller of the subject aircraft and its subcomponent parts."

[272] *Id.* at *34-35, citing Berrier v. Simplicity Mfg., Inc. 563 F.3d 38, 61 (6th Cir. 2009).

[273] 2011 U.S. Dist. LEXIS 143900 (S.D. Fl. 2011).

4. General Aviation Revitalization Act

Under the Federal Aviation Regulations, a U.S. Type Certificate ("TC") or Parts Manufacturing Authority ("PMA") holder has a continuing duty to report defects or unsafe conditions to the Federal Aviation Administration. This obligation remains with the certificate for all products manufactured under the certificate. Thus, even a subsequent certificate holder has a duty to report information to the FAA, even for products actually manufactured by a predecessor. The scope of this duty and its impact on product liability law generally, has been most fully developed under the 18-year statute of repose enacted by Congress in the General Aviation Revitalization Act ("GARA"), because one of the exceptions to GARA is the "knowing misrepresentation, withholding or concealment" of information that is to be reported to the FAA under the continuing duty of airworthiness.

The effect of this continuing duty and the benefits of GARA to non-U.S. manufacturers is illustrated by several recent cases. First, unless a non-U.S. manufacturer's product is actually certificated under a ***United States*** TC or PMA, there is no continuing duty *on the part of the manufacturer* to report information to the FAA under U.S. law, and therefore while GARA is applicable to provide a statute of repose in such cases, there is no exception to the GARA statute of repose for any failure to report information for the reasons described below. Second, GARA generally applies to protect even non-U.S. manufacturers, regardless of whether holding U.S. or foreign type certificates, from suit after 18 years provided the other requirements of GARA are satisfied. Finally, manufacturers and sellers of component parts may restart the "rolling provisions" of GARA as to any defective component parts.

In *Ovesen v. Mitsubishi Heavy Industries, Inc.*,[274] the court held that aircraft manufactured outside the United States under a non-U.S. type certificate have the benefit of the GARA statute of repose. Nevertheless, in a key decision, the court held that such a non-U.S. manufacturer cannot be held liable under the fraud exception to GARA for failures to report subsequent airworthiness issues because the type certificate was issued in another country and there is no continuing duty to provide information ***to the U.S. Federal Aviation Administration*** (rather than a foreign authority), and therefore the exception which applies to knowing misrepresentation, concealment or withholding of information ***to the FAA*** does not apply to that non-U.S. manufacturer. The fact that the non-U.S. manufacturer subsequently obtained a U.S. type certificate which authorized the manufacture of the same identical type aircraft in the United States (which therefore created a duty to report information relating to continuing airworthiness for ***all U.S. manufactured aircraft*** under that U.S. type certificate), did not reestablish liability to the non-U.S. manufacturer once that liability was cut off under the GARA statue of repose. In other words, even if the disclosure of the same information would have been required with regard to an aircraft manufactured under the U.S. type certificate, the fact that the accident aircraft was manufactured under the non-U.S. type certificate precluded the application of the GARA fraud exception that might have applied if the failure to provide the same information to the FAA applied to an accident involving an identical model or type aircraft manufactured under the U.S. type certificate. Thus, the claim remained barred under GARA.

In *Ovesen v. Mitsubishi Heavy Industries, Ltd., and Mitsubishi Heavy Indus. of Am.*, Inc.,[275] the District Court considered a motion for reconsideration of its summary judgment in favor of Mitsubishi Heavy Industries, Ltd., and its subsidiary, Mitsubishi Heavy Industries of

[274] 2012 U.S. Dist. LEXIS 27259 (S.D.N.Y. 2012).

[275] U.S. Dist. LEXIS 64043 (S.D.N.Y. 2012),

America, Inc. based upon the General Aviation Revitalization Act ("GARA"). As set forth above, the *Ovesen* case involved the issue of whether "required information" was not disclosed to the Federal Aviation Administration, such that the GARA statute of repose would not apply under the fraud exception to GARA. Plaintiff sought reconsideration on the grounds that the District Court's conclusion that information obtained by the non-U.S. manufacturer of an aircraft manufactured under a United Kingdom Civil Aviation Authority Certificate was "required information," despite the FAA regulation which limited the obligation of a manufacturer to provide such information to those holding a *United States*-type certificate. Plaintiff also argued that providing the defendant the benefit of the GARA statute of repose, without imposing the obligations of providing such information under the FAA regulations, undermined the legislative intent of GARA to balance the obligations between providing information regarding safety and providing a statute of repose to manufacturers. The District Court rejected this argument because the cases cited by plaintiff related to unambiguous federal statutes, which controlled over administrative interpretations of the statute. In this case, the statutory term "required information" was intrinsically ambiguous, and assumed that the FAA would set the standards for "requirements." As such, the statute itself expected that the FAA would define the term "required information." Furthermore, the court concluded that it could not substitute its own judgment for that of the FAA on this issue, or on the issue of whether foreign manufacturers were not entitled to the benefit of GARA and the statute of repose.[276] Finally, the court concluded that extending the benefits of GARA to the manufacturer in this case was not contrary to its purpose to support the domestic aircraft industry, because the foreign manufacturer in this case, Mitsubishi, had sought a new type certificate to manufacture its aircraft in the United

[276] *13.

States, and it was only because of the manufacturing of the accident aircraft in the United States under that type certificate where at the present action arose. Accordingly, the court concluded that the present action fell precisely within the scope of the Congressional intent in enacting GARA.

In *Ovesen v. Mitsubishi XYZ Corporations*,[277] the Second Circuit Court of Appeals affirmed the district court's original decision and the reconsideration decision. The Second Circuit characterized the district court's analysis of the GARA "fraud exception" and the legislative history as being a "thorough" review and affirmed the district court's decisions "substantially for the reasons stated in [the district court's] well-reasoned orders. . . ."[278]

In *Garcia v. Wells Fargo Bank Northwest, N.A., Trustee*,[279] the district court held that GARA does not bar strict liability claims against a manufacturer as a seller of a part that was manufactured by a component manufacturer. Even if the sale of the replacement part was incidental to the manufacture of the original aircraft, the district court concluded that the legislative history of GARA specifically states that claims against manufacturers in other roles are not preempted by GARA. Additionally, the Florida statute of repose did not bar claims against an aircraft manufacturer that sells components made by another manufacturer within 12 years of the suit, even though the aircraft itself was first sold more than 12 years prior to the suit.

Burton v. Twin Commander Aircraft, LLC,[280] involved five wrongful death claims arising from an accident in Mexico involving an aircraft operated by the Mexican government. The Washington Supreme Court held that a successor type certificate holder (like a holder of a

[277] 519 Fed. Appx. 722 (2d Cir. 2013).

[278] *Id.* at 4.

[279] 2011 U.S. Dist. LEXIS 143900 (S.D. Fl. 2011).

[280] 254 P.3d 778, 2011 Wash. LEXIS 314 (2011).

Parts Manufacturer Authority (PMA)) is a manufacturer under GARA, because even if it does not make the airplane, it undertakes the manufacturer's duties for continuing airworthiness. Most significantly, this case demonstrates the difficulty in applying the fraud exception in the context the type certificate holders' continuing duty relating to airworthiness. The majority of the Washington Supreme Court, in an extensive opinion, held that the fraud exception requires a "state of mind" element and therefore requires knowing misrepresentation, concealment or withholding of information. Additionally, the case emphasized the importance of determining whether any information not disclosed is "required" to be disclosed, in order to apply the fraud exception under GARA. The court held that the continuing duty does not require that previously reported accidents be re-reported unless the manufacturer determines that the information is a reportable occurrence. Three justices dissented from this majority position arguing that the manufacturer should not be the one to make this determination before the duty of reporting comes into play. The Washington Supreme Court held that the overall evidence of FAA communications precluded a finding of misrepresentations, but three justices again dissented from this opinion, stating that the inference of misrepresentation was permissible because memos to the manufacturer's service centers included information regarding this prior accident, but communications to the FAA, which could have resulted in grounding of the fleet, did not include this information. Nevertheless, the majority of the Washington Supreme Court held that the information regarding the prior accident was not required information, and further that there was no evidence to support the contention that any failure to report the information was a knowing misrepresentation.

In *Groschowske v. Precision Airmotive, et al.*,[281] the court held that a successor manufacturer that holds the type certificate, and publishes a maintenance manual, does so as a manufacturer and therefore is entitled to the protection of GARA. The maintenance manual published by a manufacturer is not a separate component. The maintenance manual that fails to address a latent defect is not a new claim, but is barred just as a claim for the latent defect itself would be barred. The district court held that the fraud exception requires knowledge of the defect and a knowing misrepresentation withholding or concealment with knowledge, relying upon the recent *Burton v. Twin Commander, LLC* decision of Washington Supreme Court.

In *Nowicki v. The Cessna Aircraft Company*,[282] a passenger seat slip case involving a Cessna 414 aircraft, the Florida Fourth District Court of Appeals rejected a fraud exception claim relating to disclosure of seat slip accidents involving other Cessna aircraft, in connection with an alleged seat slip of a passenger seat in a Cessna 414 which allegedly resulted in the death of a passenger in crash. The court noted that the other Cessna seat slip incidents had involved loss of control of the aircraft when the pilot or co-pilot seats slipped on the rails, and had not involved passenger seat slip incidents or crashworthiness claims. The Florida Fourth District Court of Appeals held that the evidence regarding the other Cessna seat slip incidents was not "required" information that should have been disclosed to the FAA in connection with the Cessna 414. Furthermore, given the different circumstances involved in the loss of control cases, rather than the crashworthiness case, the Fourth District Court of Appeals held that there was no evidence of a causal relationship between the information relating to those other incidents, and the injuries in the crash involved in this case.

[281] 340 Wis. 2d 611, 813 N.W. 2d 687, 2012 Wisc. App. LEXIS 2012 (Wis. App. 2012).

[282] 69 So. 3d 406 (Fla. 4th DCA 2011).

In *Slate v. United Technologies Corporation*,[283] the California Court of Appeals held that even though a "redesign" of a part by prescribing a modification process (i.e., "shot peening the part to improve its resistance from fatigue) restarted the statute of repose under GARA, the shot peened part or process did not fail to do its job as the part would have failed "whether shot peened or not." The court held that plaintiff's argument really was that the original design was defective and that shot peening would not correct that defect. The court emphasized that the aircraft owner did not use a newer, redesigned part, which might have prevented the failure. Nevertheless, the modification, which had occurred within 18 years, was not the cause of this failure in this accident. A broader question is whether the engineering which had resulted in the modification, rather than the redesign of the part, was negligently performed, and therefore whether the modification itself was insufficient and therefore a defective part, such that the failure to provide for the newer, alternative design at that time was the cause of the accident. Of course, such a claim would basically involve redesigning the original aircraft part which had been designed more than 18 years prior to the suit, and such a duty of redesign would be barred by GARA, whereas a replacement part or a modification, if it had failed to perform in its intended manner, would not have been barred by GARA. Thus, it is only the latter instance which would survive the GARA challenge, and the failure to institute a new, alternative in design of a part originally designed and manufactured more than 18 years before suit was filed, would not give rise to a cause of action, even if the newer, alternative design could have been instituted within that 18 year period as evidenced by the facts in the case.

[283] 2011 Cal. App. Unpub. LEXIS 7303 (Cal. App. 2011).

In *Inmon v. Air Tractor, Inc.*,[284] the Florida Fourth District Court of Appeals held that only replacement parts restart the rolling statute of repose under GARA and under the Florida 12 year statute of repose. Newly designed and added parts do not start the rolling statute of repose and furthermore there was no evidence that the newly designed and added part (a strengthener to the wing spar cap) caused the accident in this case. Thus, Plaintiff's claims were barred by both GARA and the Florida 12 year statute of repose.

In *United States Aviation Underwriters, Inc. v. Nabtesco Corp.*,[285] the Ninth Circuit Court of Appeals affirmed a summary judgment in favor of Nabtesco, a manufacturer of a landing gear actuator, based upon the expiration of the GARA statute of repose. The legal issue presented to the court was whether the trigger date for the statute of repose started on the date that the landing gear actuator was first delivered in an aircraft, or whether it was triggered by the date it was subsequently installed in another aircraft, which was involved in the accident. The Ninth Circuit Court of Appeals held that GARA's definition of "aircraft" is ambiguous because it does not specifically state that the statute of repose is triggered as to both the aircraft and its constituent parts. Thus, the issue presented was whether the re-use of a part on another aircraft as a used part would re-start the GARA statute of repose, just as the component part manufacturer supplying a new part. In resolving this ambiguity, the Ninth Circuit Court of Appeals relied principally upon the legislative history of GARA, and, particularly on the use of the word new in the section of GARA pertaining only to parts under the "rolling provisions" of GARA for replacement parts. Since the "rolling provisions" only relate to new parts, the issue that the Ninth Circuit Court of Appeals believed must be resolved by the legislative history is whether used parts were intended to be omitted from GARA, or whether all component parts

[284] 74 So. 3d 534 (Fla. 4th DCA 2011).

[285] 697 F.3d 1092 (9th Cir. 2012).

were intended under GARA to be provided protection from the date upon which they were first delivered as a part of any aircraft, or as a new replacement part.

The Ninth Circuit Court of Appeals held that the intent of GARA clearly was to provide the benefits of the statute of repose not only to aircraft manufacturers, but also component part manufacturers. If an interpretation of the statute excluded protection for used parts, then the statute of repose would effectively be re-started any time that a part was removed from the aircraft which was originally installed and placed in another aircraft. Because the rolling provisions of GARA only provided a statute of repose for new parts, such a construction might lead to absence of any protection under GARA for a part that had been removed from the aircraft of which it was originally installed, and for which it would have enjoyed the 18-year statute of repose. The court specifically focused on a statement by Representative Glickman three days after the statute was enacted. Representative Glickman stated that "a used propeller which has three years left on its applicable limitation, would still have only three years if installed [on another aircraft] in its used condition." Thus, this statement indicates that the statute of repose would have started on the date that the part was first delivered as a part of an aircraft, and would have had the benefit of that statute of repose for its first 15 years, and would only have an additional three years before the statute of repose would bar any claims related to the manufacturer of the propeller. In sum, the court stated that GARA should be interpreted such that the 18-year statute of repose applies to the accident aircraft or its component parts, such that each have the benefit of the 18-year statute of limitations that "commences with the delivery date of the used part to its first purchaser."[286]

[286] GARA § 2(a)(1)(A). *1100-1101.

In *Crouch v. Honeywell Int'l, Inc.*,[287] the Sixth Circuit Court of Appeals affirmed a district court decision that an overhaul manual was an "essential element in the overall process of creating a product that satisfied Federal Aviation Administration regulations,"[288] that triggered the GARA statute of repose period. The Sixth Circuit held that even if revisions to the overhaul manual were deemed a "replacement" part under GARA, plaintiffs "neither alleged nor substantiated the existence of any affirmative deletion from or addition to the revised manual that causally contributed to the crash, [and] [a]bsent such a causal nexus between the replaced part and the complained of injuries, section 2(a)(2) of GARA did not operate to trigger a new period of repose."[289]

H. JURISDICTION AND PROCEDURE

1. Personal Jurisdiction

a. Jurisdiction Over Non-Residents Under Specific Jurisdiction

The issue of specific personal jurisdictional was again addressed by the U.S. Supreme Court in 2014. While not a product liability case, this case continues to demonstrate a limiting trend circumscribing and refining the definition of specific jurisdiction. This trend was started in a 2011 decision, to be discussed below, 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 earlier case and the most recent Supreme Court decision are discussed below. Additionally, the effects of this limiting trend and more refined personal jurisdiction analysis over aviation manufacturers has been

[287] 720 F.3d 333 (6th Cir. 2013).

[288] *Id.*

[289] *Id.*

reflected in several recent cases and continues to be a vigorously contested issue in such cases, as will be discussed below.

In *J. McIntyre Machinery, Ltd. v. NiCastro,*[290] 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 reserved 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 *Worldwide Volkswagen Corp. v. Woodson,*[291] 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

[290] 131 S. Ct. 2780, 2011 U.S. LEXIS 4800 (2011).

[291] 444 U.S. 286 (1980), and *Asahi Metal Industry Co. v. Superior Court,* 480 U.S. 286 (1987).

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 most recent 2014 decision, *Walden v. Foire*,[292] the issue of specific personal jurisdiction under the *Calder* "effects test"[293] was addressed. The Supreme Court rejected an an analysis based 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

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

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

defendant, the forum and the litigation,"'"[294] "The plaintiff [and his or her damages] cannot be the only link between the defendant and the forum."[295] 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.

In *Smith v. Teledyne Continental Motors, Inc.*,[296] the federal district court applied the principles announced in the recent U.S. Supreme Court decision in *McIntyre Machinery* to determine whether personal jurisdiction existed in South Carolina over a U.S. manufacturer, Teledyne Continental Motors ("TCM"). While this case involved a U.S. manufacturer, this case illustrates the approach to jurisdiction likely to be applied under *McIntyre Machinery* to non-U.S. manufacturers of aircraft and components. The case resulted from a fatal injury to a person on the ground who was struck by a single engine aircraft as it attempted a forced landing near Myrtle Beach, South Carolina following an engine failure just offshore. The aircraft was a homebuilt kit aircraft built by the pilot, a South Carolina resident. Significantly, the decision does not state where the engine on the accident aircraft was purchased. As will be discussed below, under the *Walden* analysis focusing on the defendant's specific contacts with the forum state in the specific case at issue, this fact certainly should be a critical part of any specific jurisdiction analysis, even under the "stream of commerce plus" analysis in effect following

[294] 134 S.Ct. at 1121 (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.

[295] 134 S.Ct. at 1122.

[296] 2012 U.S. Dist. LEXIS 595 (D.S.C. 2012).

McIntyre. Instead, the court focused exclusively on TCM's general contacts with the forum state, noting that TCM has sold at least 400 engines for a total revenue of approximately $1.6 million in South Carolina over the preceding ten years, one third of all aircraft in South Carolina have TCM engines, TCM maintains a continuous warranty program with South Carolina customers, and it advertises in South Carolina through aviation magazines. TCM also has contracts with 11 South Carolina FBOs to act as stores/service centers for TCM products, performing, among other things, warranty service on TCM engines. Rather than simply applying the "stream of commerce" theory of personal jurisdiction, the court evaluated TCM's contacts based upon the "stream of commerce plus" test that it concluded was the holding of the Supreme Court as a result of its multiple opinions in *McIntyre Machinery*. Based on its analysis under that test, the court concluded that TCM's additional contacts with South Carolina showed that TCM met the test of taking "action purposefully directed toward the forum state [South Carolina] or otherwise invoking the benefits and protections of the law of the state." As such, TCM met the requirements for purposeful conduct and traditional notions of fair play and substantial justice to support specific jurisdiction in this case, noting that TCM's efforts to serve the market in the forum state [South Carolina], were the type of efforts to "serve . . . the market for its product" which were described in *Goodyear Dunlop Tire*, to be discussed below, and that "[t]this language [from the unanimous U.S. Supreme Court in that case] fits the present case exactly." While such an analysis was a necessary prerequisite to a finding of specific personal jurisdiction under *McIntyre*, it was not a sufficient analysis in light of *Walden* for purposes of finding specific jurisdiction, and it also was not a sufficient analysis, as will be discussed below, for finding general jurisdiction under either *Goodyear* or the most recent 2014 Supreme Court

decision in *Daimler AG v. Bauman*,[297] which limited general jurisdiction to a forum in which the defendant was "at home."

The result in *Smith* should be contrasted with the decision of the U.S. District Court for the Western District of Kentucky in *Crouch v. Honeywell Int'l, Inc.*,[298] also involving personal jurisdiction over TCM for product liability claims filed in Kentucky with regard to an accident in that state. Again, the engine involved in this case was not sold in to a Kentucky resident, but the court noted that "TCM has no customers in Kentucky." In *Crouch*, the plaintiff only asserted general jurisdiction as a basis for its claims against TCM, and the district court, applying the requirements for general jurisdiction found in *Helicopteros Nacionales de Colombia. S.A. v. Hall*,[299] concluded that TCM's contacts with Kentucky in that case were "more tenuous than those that were found insufficient in *Helicopteros*." Consequently, the district court dismissed plaintiff's claims without prejudice to be refiled in another state in which personal jurisdiction could be established. The important lesson from this case is that many of the contacts that were insufficient to support general jurisdiction in *Crouch* were very similar to those that supported specific jurisdiction in the *Smith* case under the "stream of commerce plus" test, subsequently endorsed by the Supreme Court in the later *McIntyre Machinery* and *Goodyear Dunlop* cases. Even though the products in both cases may not have been sold to residents of the forum state, the facts that the accident occurred in the forum state and that there were substantial efforts to market and support the product in that particular state, were enough for the *Smith* court to find specific jurisdiction over the manufacturer when the accident involving the product occurred in that state. Again, the *Smith* decision does not say whether the engine had been sold in South

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

[298] 682 F. Supp. 2d 788 (W.D. Ky. 2010).

[299] 406 U.S. 408 (1984).

Carolina (and therefore it should not be presumed), but it appears that sales of a significant number of engines directly into that market seems to have been a key element of that court's reasoning that specific jurisdiction was appropriate.

Recent non-aviation product liability decisions of the federal courts have also applied the "stream of commerce plus" theory as the basis for personal jurisdiction on the grounds that a plurality decision is not a binding Supreme Court precedent, and therefore as a precedent only the narrowest reasoning agreed to by a majority of the Supreme Court justices is controlling precedent.[300] Thus, since a majority of the justices only denied personal jurisdiction based on the "stream of commerce plus" theory, the federal courts are not applying the most restrictive "sovereignty" reasoning of the plurality for denying personal jurisdiction, and only denying jurisdiction if not supported by the "stream of commerce plus" theory on grounds as restrictive as those presented in *McIntyre Machinery.* As noted by Justice Breyer, the "stream of commerce plus" test may be satisfied by a "regular course of sales" of defendant's goods in the forum state, or "something more, such as special state-related design, advertising, advice, marketing or anything else."[301]

The lesson for non-U.S. manufacturers seeking to minimize jurisdictional contacts is not to sell or service products directly to all states in the United States, but only through a distributor located in a state in which jurisdiction over the non-U.S. manufacturer may be acceptable. A series of cases that exemplifies this method of doing business involves Pilatus Aircraft, Ltd.,

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[300] *UTC Fire & Security Americas Corp., Inc. v. NCS Power, Inc.*, 844 F.Supp.2d 366, 2012 U.S. Dist. Lexis 17112 (S.D.N.Y. 2012) (presence of sales agent rather than independent distributor supported "stream of commerce plus" personal jurisdiction in New York); *Askue v. Aurora Corporation*, 2012 U.S. Dist. LEXIS 32626 (N.D. Ga. 2012) (facts showing even fewer contacts than in J. McIntyre supported denial of personal jurisdiction based on "stream of commerce plus" theory); *Ainsworth v. Cargotec USA, Inc.*, 2011 U.S. Dist. LEXIS 144817 (D. Miss. 2011).

[301] 131 S.Ct. 2780, at 2791-92.

which successfully avoided jurisdiction in the State of Pennsylvania in which the crash occurred because its contacts with Pennsylvania were limited and it sold aircraft exclusively through a U.S. distributor located in Colorado, thus the case was transferred to Colorado. *D'Jamoos v. Pilatus Aircraft, Ltd.*[302] Notably, however, Pilatus Aircraft Ltd., was found to be subject to personal jurisdiction in New Hampshire in a companion case arising from the same accident, because the accident aircraft had been serviced in New Hampshire by a New Hampshire service center using allegedly defective service manuals which had been sold ***directly*** by Pilatus Aircraft, Ltd., to the New Hampshire service center. *D'Jamoos v. Atlas Aircraft Center, Inc. and Pilatus Aircraft, Ltd.*[303] Thus, to avoid jurisdictional contacts, even service publications should be distributed by the U.S. distributor, rather than the non-U.S. manufacturer. See also *Newman v. European Aeronautic Defense and Space Company EADS, N.V.*,[304] (no jurisdiction over Socata in state where accident occurred when aircraft had been sold to distributor in another jurisdiction and Socata had no contacts with accident jurisdiction).

In addition to cases involving manufacturers that distribute products into the United States, either directly or indirectly, to individual aircraft owners and operators, the issue of jurisdiction over component manufacturers that only supply products to the manufacturers of the products into which they are to be incorporated involves different issues under *McIntyre Machinery* because the component manufacturer does not distribute products through an agent or distributor. The U.S. Supreme Court did not consider that distinction, but did remand *Willemsen v. Invacare Corporation* "for further consideration in light of *J. McIntyre Mach., Ltd. v.*

[302] 566 F.3d 94 (3rd Cir. 2009).

[303] 2009 U.S. Dist. LEXIS 104306 (D.N.H. 2009).

[304] 2011 U.S. Dist. LEXIS 63503 (D. Mass. 2011).

Nacastro,[305]*" sub nom. China Terminal & Elec. Corp. v. Willemsen.*[306] On remand, the Oregon Supreme Court upheld personal jurisdiction because the component parts were specifically designed for a product marketed nationally, including regular and substantial sales into Oregon. *Willemsen v. Invacare Corp.*[307]

b. General Jurisdiction

In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 408 111 App. 3d 827, 946 N.E. 2d 1076 (2011).[308] 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 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

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[305] 564 U.S. __, 131, S. Ct. 2780 (2011).

[306] 132 S. Ct. 75 (2011).

[307] 352 Ore. 191, 282 P.3d 867. *See also Russell v. SNFA*, 965 N.E.2d 1, 2011 Ill. App. LEXIS 1330 (Ill. App. 2011), *pet. for review allowed*, 968 N.E.2d 1073, 2012 Ill. App. LEXIS 754 (Ill. 2012) (French component manufacturer subject to jurisdiction in Illinois for accident allegedly resulting from use of component part exclusively made for Agosta helicopter intended to be distributed in U.S.), and *Vibratech v. Frost*, 291 Ga. App. 133, 661 S.E. 2d 185 (2008) (component part manufacturer which supplied part exclusively for OEM engine manufacturer also subject to jurisdiction with OEM manufacturer in jurisdiction where engine had been sold).

[308] 131 S. Ct. 2846, 2011 U.S. LEXIS 4801 (2011).

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,*[309] 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.,*[310] 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.[311] 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 States, also interfered with "negotiations of international agreements on the reciprocal recognition and enforcement of judgments."[312]

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

[310] 644 F.3d 909 (9th Cir. 2011).

[311] *Bauman v. DaimlerChrysler Corp.,* 676 F.3d 774 (2011).

[312] *Id.* at 779.

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. 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.

In *Garcia v. Wells Fargo Bank Northwest, N.A., Trustee*,[313] a case against a U.S. defendant resulting from an accident in Venezuela, the Florida district court held that the U.S. defendant, a corporate trustee owner of the aircraft, was not subject to personal jurisdiction in Florida. The accident flight had no connections with Florida, and the primary argument for jurisdiction was that Wells Fargo acted as trustee for thousands of aircraft, many of which presumably operated within the State of Florida. Additionally, the State of Florida had attempted to impose taxes on the aircraft related to its purchase, and Wells Fargo had contested those taxes in Florida. Wells Fargo showed that it did not do business in Florida, and that it had no offices

[313] 2011 U.S. Dist. LEXIS 86523 (S.D. Fl. 2011).

or employees in Florida. The district court held that the alleged Florida contacts were speculative and, in any event, insufficient to establish any purposeful activity directed toward Florida with regard to the accident aircraft. The district court also distinguished this case for purposes of personal jurisdiction on the grounds that even if aircraft for which Wells Fargo acted as trustee operated in Florida, Wells Fargo had no control over the operation of those aircraft. The court also concluded that the contacts did not satisfy the requirements of due process under the U.S. Constitution, particularly the requirement that the exercise of personal jurisdiction must satisfy the requirements of "fair play and substantial justice."

Despite the high standard of continuous and systematic contacts required to establish general jurisdiction for accidents outside the United States, U.S. courts have continued to find general jurisdiction. In *Ashbury Int'l Group, Inc. v. Cadex Defence, Inc.*,[314] a patent infringement case, the district court held that the high standard was met by more than $5 million (41%) of annual sales into Virginia, which supported a finding of the requisite continuous and systemic contacts with Virginia to support a finding of general personal jurisdiction..

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

As will be discussed below, a number of aviation cases have applied the analysis of *McIntyre* and *Goodyear Dunlop Tire*, and others have been decided without reference to those cases. But, because of the further limitations and refinements of *DaimlerChryler* and *Walden,* those cases that have found either specific or general jurisdiction may have been misguided in their analysis focusing primarily on a defendant's conduct within the forum jurisdiction, without also considering whether the defendant's conduct gave rise to a tort occurring, wholly or at least in part, within the forum jurisdiction (*Walden*), or whether extensive continuous and systematic

[314] 2012 U.S. Dist. LEXIS 134878 (W.D. Va. 2012).

contacts in the forum jurisdiction, are alone sufficient to support general jurisdiction, when the defendant is actually "at home" in another jurisdiction (*DaimlerChrysler*). These two most recent 2014 Supreme Court precedents should be thoughtfully applied in evaluating the precedential value of the following post-*McIntyre* and *Goodyear Dunlop Tire* decisions because this field of personal jurisdiction continues to evolve and be limited by the Supreme Court in these recent 2014 decisions.

In *Sullivan v. Hawker Beechcraft Corp.*,[315] the South Carolina Court of Appeals affirmed the dismissal of three non-resident defendants in a case in which the plaintiff, an Ohio resident, was injured in a July 2005 plane crash in South Carolina. The airplane was owned by an Ohio resident, and was maintained and serviced in Ohio, Florida and Arkansas. Plaintiff had commenced two prior lawsuits in Ohio, however, filed this lawsuit almost three years after the crash because Ohio's two year statute of limitations had expired. The defendants seeking dismissal were all non-residents of Ohio, and filed motions to dismiss supported by affidavits asserting that their principal places of business were outside of South Carolina and that they had never solicited or conducted business in the state. They also maintained that no more than one percent of their revenue came from sales to customers located in South Carolina, no goods or services were produced or rendered in South Carolina and the defendants had never obtained a business license in South Carolina. Under the South Carolina long arm statute,[316] long arm jurisdiction exists upon a defendant causing a tortious injury within the state, only if that defendant clearly does or solicits business, or engages in a persistent course of conduct or derives substantial revenue from goods used or consumed or services rendered in the state. Plaintiff failed to submit any affidavits in response, and failed to make a timely quest for jurisdictional

[315] 397 S.C. 143, 723 S.E.2d 835 (S.C. App. 2012).

[316] S.C. Ann. § 36-2-803(A)(4).

discovery and their request "offered mere speculation and conclusory assertions, without any specific facts to support the request." The South Carolina Court of Appeals held under its "two-step" analysis, that the first step of the analysis, satisfaction of the state long arm statute, was not met, and therefore confirmed the dismissal for lack of personal jurisdiction.

In *Van Heeswyk v. Jabiru Aircraft Pty., Ltd.*,[317] the Arizona Court of Appeals considered the issue of personal jurisdiction over an Australian aircraft manufacturer that had manufactured an aircraft engine installed in Arizona on a kit aircraft manufactured by an Arizona retailer, and dealer for the manufacturer of the kit aircraft involved in the accident. The accident resulted in the death of the Arizona purchaser of the kit aircraft, when the aircraft propeller separated from the aircraft engine in flight. The Australian manufacturer submitted affidavits stating that it had no offices or employees in Arizona and did not sell its products directly to retail customers anywhere in the United States. Instead, all of its products were sold through three U.S. distributors, one of which was located in California, and the others in Tennessee and Florida. The trial court had dismissed the Australian manufacturer for lack of personal jurisdiction.

The Arizona Court of Appeals reversed, holding that based upon the factual discovery in the case which showed that a substantial number of aircraft had been sold to Arizona residents in the year in which the accident aircraft had been sold, and that the independent distributor agreements specifically required best efforts to service all markets within its territory, including Arizona, there was evidence of a deliberate effort to "penetrate the American market." There had been sale of 61 Jabiru products in Arizona, including five engines of the type involved in this accident, in 2006, the year of the accident. Quantity and targeted nature of such sales were sufficient to support the exercise as specific jurisdiction claims arising out of those sales,

[317] Ariz. 412, 276 P.3d 46 (Ariz. App. 2012).

distinguishing that case from the recent Supreme Court decision in *Goodyear Dunlop Tire Operations, SA v. Brown*,[318] and the recent decision in *Nicastro*,[319] which the court characterized as involving a single isolated sale in which there was no "regular … flow" or "regular course" of sales into the forum state. The fact that the sale of the aircraft into Arizona came from the Tennessee independent distributor whose territory did not include Arizona, rather than the California independent distributor was not considered dispositive. Indeed, the court noted that each distributor, was obligated to "provide its customers service, parts and warranty work in its territory regardless of what dealer sold the product." Similarly, the fact that the independent distributorship agreements had expired also was not dispositive, because the sales had continued indicating that the same method of marketing the products in the United States had continued and that the sale was not "random [or] fortuitous."[320] Finally, the court recognized that jurisdiction may have been proper in Tennessee where the independent distributor was located, but noted that "personal jurisdiction is not a zero-sum game; a defendant may have the requisite minimum contacts [in] more than one state with respect to a particular claim."[321] Obviously, after the *Walden* decision, the mere fact that the product caused an effect in Arizona, without a specific "contact" in Arizona related to the accident case, would not be sufficient. A remaining issue is whether the extensive contacts related to the possibility of continuing service of its products in Arizona, including this specific product at issue located in Arizona, would be a sufficient specific contact to support personal jurisdiction under *Walden.* While such a contact is initiated by the defendant, and is not a unilateral act of the plaintiff as in *Walden*, it is a very

[318] 131 S. Ct. 2846, 2855 180 L Ed. 2d 796 (2011).

[319] 131 S. Ct. 2792.

[320] *Id.* at 420 and 54.

[321] *Id.*

limited and inchoate contact that did not occur. Perhaps, if the manufacturer's distributor had actually performed work on the product that was in some way related to the accident, that specific contact might be sufficient under *Walden* to establish conduct by the defendant in the forum sufficient to establish the relationship between the defendant and the forum required by *Walden* to support specific personal jurisdiction.

In *Murphy v. Cirrus Design Corp. et al.*,[322] a New York Supreme Court division for Erie County held that the UND Aerospace Foundation was subject to personal jurisdiction in New York as a result of contacts with a New York pilot who undertook online training while at his residence in New York, received training in New York from a Cirrus trained flight training specialist, and then received flight instruction from the Foundation in Duluth, Minnesota. Relying on the fact that the online training was a prerequisite to the flight training and that a contract had been formed online when plaintiff's decedent executed an end user agreement pertaining to the online training program, the Foundation was "directly" doing business in New York. The contacts with the training to the flight training specialist was also considered an "indirect" contact that supported personal jurisdiction. Finally, the fact that there were six similar training programs in New York further supported the determination that the Foundation was "doing business in New York." Notably, the Supreme Court in *Walden* expressly stated that its decision did not apply to issues of personal jurisdiction arising from "online" contacts with the forum state. Thus, even though this Court cited neither *McIntyre* nor *Goodyear Dunlop Tire*, the exercise of personal jurisdiction in this case is not specifically governed by those earlier cases or the later *Walden* decision. Nevertheless, the exercise of personal jurisdiction in this case is a close decision in view of the U.S. Supreme Court emphasis on contacts within the state

[322] 969 N.Y.S.2d 804 (N.Y. Sup. Ct. 2013).

specifically related to the cause of action for specific or "case-linked" jurisdiction, and the court's determination that there was general jurisdiction over the Foundation is clearly inconsistent with the most recent *DaimlerChrysler* decision.

In *Raffile v. Executive Aircraft Maintenance*,[323] the New Mexico federal district court considered a case brought by a Connecticut passenger onboard an aircraft purchased in Arizona and also inspected during a pre-purchase inspection in Arizona, and owned by a resident of Nevada. The accident occurred near Las Vegas, New Mexico, on a flight from Arizona, after the purchase of the aircraft the previous day in Arizona. The New Mexico court held that there was no jurisdiction over the Arizona aircraft maintenance facility that had performed the pre-purchase inspection, and there was no personal jurisdiction over the previous owner of the aircraft, a Nevada resident. During the pendency of this action, the Arizona statute of limitations had expired, and plaintiff both opposed the dismissed defendants' motions to have their dismissals certified as Rule 54(b) final dismissals, and also filed a motion seeking to transfer the remaining case, which at that point involved only one defendant, the Arizona aircraft broker, Barron Thomas, Scottsdale, which had not opposed New Mexico jurisdiction. After extensive analysis, the court concluded that a transfer under either 28 U.S.C. § 1404(a), or more appropriately, 28 U.S.C. § 1361, which specifically addresses transfers to cure a lack of jurisdiction, supported the transfer of the case to Arizona. While the New Mexico federal district court could not predict the effect of its dismissal of the two non-resident defendants in the New Mexico action, it opined that the Arizona statute of limitations had probably been "tolled" by reason of the pendency of the Arizona action, and that by not entering a final judgment, it might assist the plaintiff in avoiding a statute of limitations defense when it attempted to amend the

[323] 831 F. Supp. 2d 1261 (D. N. M. 2012).

complaint to rejoin those defendants after the transfer to Arizona. For this reason, it could not satisfy the requirement that there be "no just reason for delay" in the entry of the Rule 54(b) final judgment, and since plaintiff did not intend to appeal the dismissal based on lack of personal jurisdiction in New Mexico, there was no other reason favoring the defendants that supported such a certification. It is clear that this court would have been in a much better position to grant a motion to transfer under 28 U.S.C. § 1361, if it had been made prior to the order of dismissal. This case again demonstrates the importance to a federal court plaintiff of not only attempting to respond to a motion to dismiss for lack of personal jurisdiction, but, also, alternatively, seeking transfer of the case to another federal court in which jurisdiction would clearly be proper, particularly if the statute of limitations might expire in that other jurisdiction as a result of the pendency of the first case and any jurisdictional motions or appeals.

In *Martinez v. Aero Caribbean,*[324] the district court granted a motion to dismiss filed by the aircraft manufacturer ATR, which is organized under the laws of France and maintains its principal place of business in Toulouse, France. In addition to the product liability claims against ATR, plaintiff also asserted claims under the Montreal Convention against airlines operating the accident aircraft. While the decision does not specifically state the location of the accident, it is obviously not in California. For this reason, the plaintiffs attempted to assert general jurisdiction over ATR in California. The district court held that sales of roughly one percent of ATR's overall sales, with the sales being complete in France, including signing the contracts and delivering the aircraft, were insufficient to support general jurisdiction. Similarly, purchases of supplies, and the operation of ATR aircraft in California by other entities did not support general jurisdiction. The court held that personal service on an officer of ATR while

[324] 2012 U.S. Dist. LEXIS 56041 (N.D. Cal. 2012).

doing business in the State of California was not sufficient to support general jurisdiction. The court also rejected an argument that further discovery should be permitted regarding ATR's relationship with ATR North America, because plaintiffs had been aware of that relationship and had failed to conduct jurisdictional discovery during the time permitted. Finally, the court denied a motion to transfer under 28 U.S.C. § 1404 as plaintiffs provided no legal analysis or factual support for their allegation that bringing the action in Virginia, where ATR North America is located, would provide jurisdiction over ATR France.

In *Weinberg v. Grand Circle Travel, LLC*,[325] the Massachusetts District Court considered personal jurisdiction over a claim against a Tanzanian balloon operator for wrongful death and injuries resulting from a balloon excursion in Tanzania which plaintiff's decedent, a Florida resident, was killed and another plaintiff, also a Florida resident, was injured. The balloon excursion had been sold to plaintiff's decedent and plaintiff through a Massachusetts company, Grand Circle Travel, LLC d/b/a Overseas Adventure Travel ("Overseas Adventure"). Overseas Adventure did not have any direct dealings with the Tanzanian balloon operator, but the Tanzanian balloon operator typically secured its business through an agent, Kibo Guides, in Tanzania. Kibo Guides contacted Tourism Services, another Tanzanian company, which then was in contact with Overseas Adventure regarding arranging for the balloon excursion. As the district court noted, the plurality decision in *McIntyre* requires that a foreign defendant purposefully avail itself of benefits of doing business in the particular state, and while it was clear that the balloon operator, Serengeti Balloons, derived substantial business from the United States generally, there was no indication that it had targeted residents of Massachusetts.

[325] 2012 U.S. Dist. LEXIS 133554 (D. Mass. 2012).

Furthermore, the activities of the other companies to reach Massachusetts residents did not directly involve any action by Serengeti Balloons.

Plaintiff also attempted to establish that Overseas Adventure was an agent of Serengeti Balloons, or that Serengeti Balloons had ratified the actions of Overseas Adventure in selling the balloon excursion to plaintiff's decedent and to plaintiff, by accepting them on the flight without any further payment. The court considered the agency question to be a close one, but concluded that there was no conduct by Serengeti Balloons that would have led plaintiff's decedent and plaintiff to conclude that Overseas Adventure was an agent for Serengeti Balloons, even though Overseas Adventure represented in its brochures that it was an agent for Serengeti Balloons. Additionally, while allowing plaintiff's decedent and plaintiff to board the balloon without additional payment, it might be argued that Serengeti Balloons was ratifying the actions of Overseas Adventure, however, the court concluded that there was simply no evidence to suggest that Serengeti Balloons knowingly accepted the benefits of a transaction initiated in Massachusetts, and, under the *McIntyre* plurality analysis, the court could not conclude that there was an agency relationship sufficient to support long-arm jurisdiction.

The district court also criticized the recent *J. McIntyre Machinery* decision, discussed above, as allowing a foreign corporate defendant to "structure its distribution system and have its products or services initially reach only one state while avoiding the jurisdiction in almost any other state to which they are then shipped by the distributor," citing a lecture by Arthur R. Miller, republished in the New York University Law School Web site. Despite the district court's reservations about what it perceived as the unfairness of denying long-arm jurisdiction over Serengeti Balloons, which obviously derives substantial benefit from booking its services to United States residents, the court held that personal jurisdiction under the Massachusetts Long-

Arm Statute could not be established and that the claims against Serengeti Balloons must be dismissed.

In *Convergence Aviation, Ltd. v. United Technologies Corp.*,[326] the U.S. District Court for the Northern District of Illinois considered the issue of jurisdiction over BBA Aviation, PLC, which owned several companies that had been involved in the repair of a Piper Malibu turboprop engine prior to its failure. Plaintiff sought to hold BBA subject to personal jurisdiction in Illinois primarily based upon its relationship with its subsidiaries. Under Illinois law, jurisdiction over a parent company for the actions of its subsidiaries can only be found "where the corporate veil can be pierced, or perhaps where all the corporate formalities are observed but the subsidiary's only purpose is to conduct the business of the parent."[327] The leading case supporting such jurisdiction is *Maunder v. DeHavilland Aircraft of Canada, Ltd.*,[328] in which the parent company was held subject to personal jurisdiction because the subsidiary's only business was to sell the parent company's parts and all of its stock was owned by the parent, the parent paid the salaries of the subsidiaries, directors and the parent guaranteed the subsidiary's lease. The subsidiary also was controlled by the parent company's vice president of sales. In this case, however, the court carefully analyzed the factors which would indicate control by the parent over the subsidiary, and concluded that the only factor which indicated control was the fact that the subsidiaries could not arrange their own financing. Otherwise, the court concluded that the holding company did not manage the "day to day activities" of the subsidiaries, and despite consolidated financial statements, overlapping officers and executives, a common trademark policy, lack of dividends, and the existence of internal controls form of policy manuals, the

[326] 2012 U.S. Dist. LEXIS 26830 (N.D. Ill. 2012).

[327] *Id.*at *7.

[328] 102 Ill. 2d 342, 466 N.E.2d 217 (1984).

parent did not exercise the "unusually high degree of control" necessary to find that the subsidiary existed for no purpose other than conducting the business of the parent. Instead, it appears that the court would have required "day to day management control" over the subsidiaries in order to find the identity required to exercise personal jurisdiction over the parent based upon the subsidiaries in Illinois.

In *In re Air Crash near Rio Grande, P.R.*[329] the District Court for the Southern District of Florida found general jurisdiction in Florida over a resident of the Virgin Islands in a case involving a crash in Puerto Rico. Without referring to *Goodyear Dunlop Tire*, the district court conducted an extensive analysis of the defendants' substantial business relations Florida, including substantial banking relationships, owing shares in at least one substantial Florida corporation and serving on the board of directors of that Florida corporation, having substantial banking and credit relations in Florida, and owning property in Florida (which he transferred to a trustee after the accident). The district court concluded that the defendant had sufficient continuous and systematic relations with the State of Florida that, under prior Florida jurisdictional precedents, general jurisdiction was established. While this analysis may have been sufficient to distinguish the case from *Goodyear Tire Dunlop*, this analysis focusing primarily on the continuous and systematic character of the contacts with the forum jurisdiction, seems to highlight the distinction between a defendant that may not be subject to jurisdiction in the forum, notwithstanding such contacts, unless there is also a determination that this Virgin Islands defendant is, in fact, "at home" in the forum. Under the majority analysis in *DaimlerChrysler*, such a further finding would be required, whereas under Justice Sotomayor's concurrence in that

[329] 2013 U.S.Dist.LEXIS 89066 (S.D. Fla. 2013).

case, the presence of those continuous and systematic contacts that historically would have been sufficient under Florida precedents, might have been sufficient alone.

2. Federal Jurisdiction – Removal

As discussed above in Section B., in *Marshall v. Boeing Co.* [330] the Foreign Sovereign Immunities Act ("FSIA") provided a basis for removal of a third party complaint by Boeing based on the "original" jurisdiction established as to the third party complaint against the Polish national airline, LOT, under FSIA, which allowed removal of the entire case independent of the rules relating to removal based on general federal question subject matter jurisdiction. As a result, the district court held that the underlying main claim against Boeing also was subject to federal supplemental subject matter jurisdiction, and a motion to sever and remand the underlying main claim was denied.

In *Laugelle v. Bell Helicopter Textron, Inc.*,[331] the district court considered the motion to remand case that had been removed by defendant Bell Canada prior to service of any on the Delaware corporate defendants. The court recognized that 28 U.S.C.§ 1441(b) states that an action "shall be removable only if none of the parties in interest property joined and served as defendants is a citizen of the state in which such action is brought." Bell Canada had removed the case prior to service; however, the court noted that there was a split in authority regarding the effect of removal prior to service on resident defendants. The court noted that 28 U.S.C. § 1441(b) was intended to address the risk of "gamesmanship," where a plaintiff may name a resident party as a defendant, but then not serve that defendant. Nevertheless, the court noted that under Delaware law, service of the complaint could not proceed until the court issues a summons and the service is perfected by the sheriff or private process server. The court seemed to believe that it had been impossible for the plaintiffs to effect service of process prior to the

[330] 940 F.Supp.2d 819 (N.D.Ill. 2013).

[331] 2012 U.S. Dist. LEXIS 12907 (D. Del. 2012).

removal. Accordingly, the court concluded that it would not make removability "turn on the timing or sequence of service of process" or "blindly apply the language of Section 1441(b) [to eviscerate] the purpose of the forum defendant rule," thereby creating an opportunity for gamesmanship by the defendants. Ultimately, the court based its decision on "the Third Circuit's clear preference for remand as articulated in [prior cases], and considering the purpose of the forum defendant rule and the deference for it to plaintiff's choice of forum, the court [found] that removal under Section 1441(b) was improper."[332] The court also considered whether there was an independent basis for federal jurisdiction under Section 1441(b) for federal question jurisdiction. The Delaware District Court recognized that under Third Circuit authority, the Federal Aviation Act implicitly preempts state law in the area of aviation safety. However, the court adopted the reasoning of another District Court in concluding that "such preemption can only *be raised as a defense and is insufficient to confer federal question jurisdiction*."[333]

In *Lapkin v. Avco Corp.*,[334] the district court considered the issue of diversity subject matter jurisdiction in a case in which the plaintiff widow of the deceased pilot filed a wrongful death action in her individual and representative capacity as the personal representative of the estate of the decedent. The decedent was a resident of the State of New York, and there was complete diversity if the widow's citizenship was deemed to be that of the decedent. Under 28 U.S.C. § 1332(c)(2), the legal representative is deemed to be a citizen of the same state as the decedent. However, because plaintiff filed suit individually and as the legal representative, her individual citizenship had to be considered, and because she was a Texas citizen and one of the

[332] *Id.* at *14-15.

[333] *Id.* at *17, quoting *XL Specialty Co. v. Vill. of Schaumburg*, 2006 U.S. Dist. LEXIS 53942, 2006 WL 2054386 (N.D. Ill. 2006), at *2 (emphasis added by the District Court of Delaware).

[334] 2012 U.S. Dist. LEXIS 76318 (N.D. Tex. 2012).

defendants was also a citizen of Texas, complete diversity was lacking. Finally, the court noted that "[t]he citizenship of all parties named, served or unserved, must be considered to determine diversity." Thus, the court held that complete diversity was lacking and remanded the case to state court.

In *Carrs v. Avco Corp.*,[335] a companion to the preceding *Lapkin v. Avco Corp.* case, the district court considered the plaintiff's motion for voluntary dismissal after the district court and denied Carrs' motion to remand and granted Lapkin's motion to remand. Carrs had previously filed an action in the state court in New York, and sought voluntary dismissal of this case, now removed to federal court, when the remand was denied. Coincidentally, the remand was denied because none of the defendants had been served at the time of removal and one of the defendants was a citizen of Texas. The court held that the "joined and served" requirement precluded remand because the Texas defendant had not yet been served. Avco opposed the voluntary dismissal on the grounds that under New York comparative negligence law was not available, and it would lose the comparative negligence defense under Texas law. The court rejected this argument, concluding that comparative negligence was available in New York, but that the "real argument is that Texas's comparative negligence statute is more favorable to [Avco] than New York law." The court held that such a difference was not "legal prejudice" such as losing an affirmative defense altogether, losing a *forum non conveniens* defense, or prejudice from a dismissal at a "late stage of trial, after defendant has exerted significant time and effort." Finally, the court denied Avco's motion for attorney's fees and costs as a condition of the voluntary dismissal because the court concluded that only Avco's arguments supported the claim of forum shopping and that there was a plausible explanation for originally filing suit in Texas,

[335] 2012 U.S. Dist. LEXIS 124258 (N.D. Tex. 2012).

namely, the presence of a Texas defendant which might not be subject to jurisdiction in New York. The court therefore denied Avco its attorney's fees and costs incurred in the action.

The prior decision denying remand is *Carrs v. Avco Corp.*[336] In that decision, the Texas district court refused to read the "properly joined and served" language "completely out of the text of the statute." Furthermore, it determined that the presence of a resident, but nevertheless diverse, defendant did not deprive the court of diversity subject matter jurisdiction, and the presence of that in state diverse defendant was only a procedural bar which could be waived if not raised in a timely manner. Finally, the court concluded that Congress could revise the statute in view of the clear conflict in its interpretation, but that Congress had not done so.

In *Agostini v. Piper Aircraft Corporation,*[337] the Pennsylvania Federal District Court determined that under the recent U.S. Supreme Court decision in *Hertz Corp. v. Friend,*[338] the proper venue for suit against a corporation is either the state in which it is incorporated or the state in which it has its "nerve center." The district court rejected AVCO's argument that its nerve center was Massachusetts where its corporate headquarters was located, instead of Williamsport, Pennsylvania, where its base of operations was located. The court carefully examined the corporate structure and responsibility for day-to-day activities and concluded that the nerve center was a "place," and the only "place" where all of the corporate activities were conducted was Williamsport, Pennsylvania, and not the corporate headquarters office in Massachusetts. Indeed, the court concluded that AVCO has "not shown…any corporate activity [that] has been directed, controlled, or coordinated from Wilmington, Massachusetts." The fact that many corporate officers were "located in Massachusetts," was not relevant, because they

[336] 2012 U.S. Dist. LEXIS 24562 (2012).

[337] 2012 U.S. Dist. LEXIS 26278 (E.D. Pa. 2012).

[338] 130 S. Ct. 1181 (2010).

were not at a "place" where the corporate business was conducted. This case demonstrates the fact intensive nature of corporate citizenship under the new *Hertz Corp. v. Friend* decision. The result of this case was that the case was remanded to state court because AVCO was found to be a Pennsylvania resident, which precluded removal jurisdiction of this case filed in Pennsylvania state court.

In *Lewis v. Lycoming*,[339] another Pennsylvania district court judge considered plaintiff's motion to remand this case, which had been removed from Pennsylvania state court to district court, on the grounds that the defendant, Avco, was a citizen of Pennsylvania, and therefore removal had been improper under the resident non-removal rule. This court considered that issue independently based on the evidence in that case. Under 28 U.S.C. § 1332(c), a corporation is deemed a citizen of its state of incorporation as well as the state where it has its principal place of business. Under the U.S. Supreme Court decision in *Hertz Corp. v. Friend*,[340] a corporation can only have one principal place of business under the "nerve center" test. Avco's principal place of business had previously been determined to be Pennsylvania in the decision in *Agostini v. Piper Aircraft Corp.*,[341] however Judge Bartle in the *Lewis* case stated that it appeared "that the evidence produced by Avco in that case was much more limited than what the record shows [in the Lewis case]." Accordingly, Judge Bartle believed that he was free to reach a different conclusion. Judge Bartle concluded that the public "persona" of Avco definitely was in Pennsylvania, however, all of the corporate decisions were made by directors and officers located in Massachusetts and that Massachusetts was the "nerve center" of the corporation and therefore its principal place of business. Judge Bartle's analysis is exhaustive

[339] 2012 U.S. Dist. LEXIS 88905 (E.D. Pa. 2012).

[340] 130 S. Ct. 1181 175 L. Ed. 2d 1029 (2010).

[341] 2012 U.S. Dist. LEXIS 26278 (Ed. Pa. 2012).

and extensive, and provided the basis for concluding that there was extensive control by Avco over Lycoming. Thus, focusing on the issue of the "place" where control is located.

Plaintiffs had sought to impose the doctrine of collateral estoppel on Avco to preclude the re-litigation of the application of the "nerve center" test. *Lewis v. Lycoming*.[342] The court noted that the decision in *Agostini v. Piper Aircraft Corp.* holding that Avco's principal place of business in Pennsylvania could not be reviewed on appeal pursuant to 28 U.S.C. § 1447(d) and therefore was an unappealable order. Relying upon Restatement (Second) of Judgments,[343] the court concluded that because the prior order could not have been reviewed on appeal, the parties were not precluded from the litigation of the issue in a subsequent action. The district court noted that the Third Circuit Court of Appeals, while not having addressed specific issue of the finality of a remand order for purposes of issue and preclusion, had acknowledged that other federal and state courts had held that the remand order was not entitled to collateral estoppel effect. The district court itself also noted other jurisdictions which had reached the same conclusion as to the collateral estoppel issue. Finally, the court noted that issue preclusion should not apply to a determination of a corporation's principal place of business, because its nerve center "may change over time." As such, the determination of its principal place of business is to be determined at the time the complaint is filed, regardless of the determination of an earlier action prior to the filing of the later complaint.

In *Snider v. Sterling Airways, Inc.*,[344] the district court considered a motion to remand under the forum defendant rule based on the claim that certain "Teledyne defendants" were Pennsylvania citizens and were not fraudulently joined. The case had been removed prior to the

[342] 2012 U.S. Dist. LEXIS 64986 (E.D. Pa. 2012).

[343] § 28 (1).

[344] 2013 U.S. Dist. LEXIS 5750 (E.D. Pa. 2013).

service on the forum defendants, however, the district court recognized the split of authority regarding the application of the "joined and served" language of 28 U.S.C. § 1441(b)(2). The district court held that it would not support a "race to remove" because it did not believe that it advanced the "core purposes of diversity jurisdiction" in its judgment. The court also stated that it must strictly construe the removal statute, even though it ignored the plain meaning of the words "joined and served." The court noted that under the Supreme Court decision in *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*,[345] is the time for removal "triggered by simultaneous service of the summons and complaint…but not by mere receipt of the complaint unattended by any formal service." Thus, the court held that "[f]iling of a notice of removal prior to formal service upon any of the defendants does not permit us to ignore the presence of unserved forum Teledyne defendants for purposes of the forum defendant rule."[346] The court also considered the fraudulent joinder argument, and concluded that the pleadings of the complaint against two former Teledyne entities that had not been in the aerospace business or affiliated with the other Teledyne defendants at the time of manufacture of the product, nevertheless stated a claim because they alleged that those defendants "knew of manufacturing and design defects in the engine components ***at issue here*** while…still in the aerospace business and affiliated with the other Teledyne defendants."[347] The court also concluded that the evidentiary showing by affidavit, rather than original documents, did not satisfy the "heavy burden" to establish that, by contract, these prior Teledyne entities had been relieved of any liability. Finally, a third-party complaint had been filed against the United States, and the court rejected the argument that the third-party complaint against the United States precluded remand.

[345] 526 U.S. 344, 119 S. Ct. 1322, 143 L. Ed. 2d 448 (1999).

[346] *8.

[347] *13 (emphasis added).

The court held that remand must be determined from the plaintiff's complaint at the time of filing the complaint, not by subsequent addition of parties.

In *Schiewe v. Cessna Aircraft Company*,[348] the District Court considered the issue of remand in the presence of a claim against a resident defendant, which Cessna Aircraft Company claimed should be realigned or was fraudulent joinded. The resident defendant was the decedent's employer, and plaintiff has asserted a claim against the employer for declaratory judgment to determine the extent of its subrogation rights under Oklahoma workers compensation law. Cessna contended that there still was no basis for a declaratory judgment until a recovery had been made against Cessna, however, the District Court concluded that a concrete case and controversy existed and that the declaratory judgment was ripe for determination. Cessna also contended that that the workers compensation insurer should be aligned with the plaintiff against Cessna, however, Cessna had filed (and then voluntarily dismissed) a cross-claim against the workers compensation carrier. Based upon the workers compensation carrier's potential indemnity liability to Cessna, the District Court concluded that the plaintiff and the workers compensation carrier had conflicting interests in the apportionment of any recovery between the workers compensation carrier and plaintiff. For this reason, the District Court refused to realign the workers compensation carrier with the plaintiff. Finally, another case also was pending against Cessna and the employer and the court concluded that a judgment in the absence of the employer would likely not be adequate to settle the dispute between all the parties involved. Accordingly, the District Court granted the plaintiff's motion to remand the case to state court.

[348] 2012 U. S. Dist. LEXIS (N.D. Okla. 2012).

In *Murphy v. Cirrus Design Corp.*,[349] the District Court granted plaintiff's motion to remand a case which had been filed in New York state court arising from the crash of a Cirrus SR 22 aircraft in instrument meteorological conditions. Plaintiff asserted claims against Cirrus Design Corporation, University of North Dakota Aerospace foundation ("UNDAF"), and a New York flight instructor who was a Cirrus standardized instructor pilot. Cirrus contended that the New York flight instructor was fraudulently joined on the theory that there was no possibility, based on the pleadings, that the plaintiff could state a cause of action against the non-diverse defendant in state court. The futility of plaintiff's claim against the New York flight instructor was based on the educational malpractice defense, however, the district court pointed out that it had recently decided that issue in the case of[350] holding that a negligence flight training claim, while resembling educational malpractice, could be pled "within the strictures of a traditional negligence or malpractice action."[351] Additionally, the court held that New York law would permit such a claim to be asserted not only by the student, but also others who might be injured as a result of the negligent training. Cirrus next contended that the New York flight instructor was not subject to individual liability because the complaint alleged that he was an agent of Cirrus or UNDAF. The District Court rejected the argument that an agent could not have individual liability because at the time he was acting at "the behest of his principal."[352] The court also noted that the allegations of the complaint stated alternative theories against the defendants, "and each of them individually." As such, the District Court concluded that the complaint alleged claims for individual liability against the flight instructor, regardless of his

[349] 2012 U. S. District. LEXIS 29880 (W. D.N. Y. 2012).

[350] *In Re Air Crash Near Clarence Center, New York, on February 12, 2009 (hereinafter "Clarence Center").*

[351] *Id.* at *8.

[352] *Id.* at *10.

alleged status as an agent of the of the defendants. The District Court granted the motion to remand. The court also awarded attorneys' fees to plaintiff. In a separate opinion, *Murphy v. Cirrus Aircraft Corp.*,[353] the court reconsidered the award of attorney's fees, but held that each of the legal theories against the resident plaintiff either were supported by recent developments in New York law, and that the claims against flight instructor as an agent, as alleged in the complaint, "colorably asserted, at a minimum, a negligence claim against [the flight instructor] under New York law."[354] The request for reconsideration therefore was denied.

In two related cases, the application of the procedural requirements for removal provided the plaintiffs a basis for remand, even though both diversity of citizenship and exclusive federal jurisdiction existed.

In the first case, *Jessup v. Continental Motors, Inc.*,[355] plaintiff filed product liability claims against certain manufacturers, including Continental Motors, Inc., and certain Teledyne entities that previously had been involved in the aerospace business. Continental filed a third-party complaint against the U.S. Forest Service (rather than individual federal officers). The Forest Service answered the third-party complaint alleging that the state court lacked subject matter jurisdiction, and then removed the case to federal court under 28 USC Section 1442. Upon removal, the Forest Service moved to dismiss the case based on lack of subject matter jurisdiction under the "derivative jurisdiction doctrine." The "derivative jurisdiction doctrine" provides that the federal court upon removal under 28 USC section 1442 is limited to the jurisdiction alleged in the notice of removal to have existed in the state court. Continental Motors, Inc. and the Teledyne defendants objected to remand arguing that the "derivative

[353] 2012 U.S. Dist. LEXIS 75987 (W.D.N.Y. 2012).

[354] *Id.* at *7.

[355] 2013 U.S. Dist. LEXIS 9948 (E.D. Pa. 2013).

jurisdiction doctrine" did not apply to federal officer removal, and also that substantial federal questions rendered the exercise of federal jurisdiction proper. The District Court considered Congress' abolition of the "derivative jurisdiction doctrine" in 28 USC § 1441(f), and its refusal to do so in 28 USC § 1442, and concluded that Congress had intentionally chosen not to change the doctrine under that statute. One of the reasons cited by the District Court from the legislative history was the concern that defendants "seeking to escape a state court forum" would be encouraged to file suit against federal officers in order to cause them to remove the entire case to federal court. The District Court also rejected the argument that the existence of diversity jurisdiction over the remaining parties would preclude remand. The issue of remand depends upon *the jurisdictional allegations in the notice of removal*, and because the Forestry Service was not required to, and did not, allege any jurisdictional grounds in its 28 USC § 1442 notice of removal, the non-removing defendants could not substitute additional grounds for the omitted jurisdictional references in the Forestry Service's notice of removal. Finally, the court denied the motion for leave to amend the third-party complaint to include claims against individual federal officers because even if an additional basis for jurisdiction would exist under 28 USC § 2697 for removal of claims against federal officers, the new additional bases for jurisdiction were not present in the notice of removal and therefore did "not remedy the jurisdictional defect in the third-party claims against the Forestry Service, nor does it remedy the absence of a possible jurisdictional basis in the only operative notice of removal."[356] Thus, it is procedurally critical that any claims against federal officers be properly pled in state court, so as to establish a basis for federal officer removal under 28 USC § 2697, rather than attempting to assert those claims after removal.

[356] *Id.* at *2.

The rules of unanticipated and unintended consequences combined with the effect of timing on assertion of third-party claims, pre-removal or post-removal, against federal officers, and dictated the result in the related case of *Snider v. Continental Motors, Inc.*[357] In *Snider*, Continental Motors, Inc. removed the state court action to federal court prior to service on any of the defendants, seeking to avoid the application of the "forum defendant rule" that precludes removal if any of the "properly joined and served" defendants are citizens of the forum state. Two of the Teledyne defendants were citizens of the state of Pennsylvania, but since they had not been served, Continental Motors argued that the "forum defendant rule" did not apply. The District Court, recognizing a conflict among not only the federal circuit courts, district courts, and even the judges of that District Court, refused to apply the literal requirement that any forum defendants must have been served in order to invoke the "forum defendant rule." The court also rejected the argument that these forum defendants had been fraudulently joined, on the grounds that the allegations of the complaint governed and that those allegations stated that the forum defendants "knew of manufacturing and design defects" while still in the aerospace business. The court also rejected the argument that, Continental Motors, Inc. had assumed any liabilities of these prior aerospace Teledyne defendants because it was not clear from any documentary evidence either quoted or submitted to the court that was the case. The court stated that the Teledyne defendants had not met the "heavy burden to show that the plaintiffs did not state colorable claims against the [forum defendants]."[358] Finally, the Teledyne defendants had filed a third-party complaint against the Forestry Service, which the Teledyne defendants contended established an additional basis for federal subject matter jurisdiction. The District Court held that the "long-standing rules considering the propriety of removal based solely on the state court

[357] 2013 U.S. Dist. LEXIS 5750 (E.D. Pa. 2013).

[358] *Id.* at *14 – 15.

pleadings at the time of removal" precluded consideration of any post-removal bases for establishing subject matter jurisdiction when the complaint as it existed at the time of removal was subject to remand for failing to satisfy the procedural requirements of 28 USC section 1441. This District Court denied plaintiffs' request for attorneys' fees for the remand because the initial contention that the "forum defendants rule" was not applicable until they were served, was a matter of division among the courts and therefore the removal had been based upon substantial reasonable authority.

3. Forum Non Conveniens

In *Arik v. The Boeing Company,*[359] the Illinois Court of Appeals denied a *forum non conveniens* motion to dismiss, and upheld the exercise of jurisdiction over Boeing for a Turkish accident. The court found that the private interest factors did not favor adjudicating the case in Turkey since many U.S. witnesses were required and could not be compelled in Turkey. The court also determined that the public interest factors, including the manufacture of the aircraft by an Illinois corporation and the U.S. involvement in the investigation of the aircraft certificated under the Federal Aviation Regulations, favored the lawsuit in the United States, rather than Turkey. This case illustrates two problems for manufacturers involved in foreign accidents. First, unless there is a mass disaster, federal question subject matter jurisdiction under 28 U.S.C. § 1369 is not available and therefore plaintiffs can file these cases in state courts, and removal to federal court may be limited. Additionally, state courts, unlike federal courts, may be less inclined to dismiss a case based upon *forum non conveniens*, particularly if a manufacturer from within that state is a defendant.

[359] 2012 Ill. App. Unpub. LEXIS 34 (2012).

Some federal courts, however, like their state court counterparts, also may be unwilling to freely grant a *forum non conveniens* dismissal in favor of a resident defendant. In *Lewis v. Lycoming*,[360] Judge Bartles, after having carefully analyzed federal diversity removal jurisdiction under the *Hertz v. Friend* principal place of business analysis as to the Avco defendants in denying plaintiff's motion to remand to state court, next considered defendant's *forum non conveniens* motion. The accident involved in this case occurred in the United Kingdom and the two decedents both were British subjects and residents of the United Kingdom. Judge Bartles concluded that the United Kingdom was an adequate alternative forum, even though two defendants, Precision Airmotive, LLC and Precision Airmotive Corporation had filed voluntary petitions for Chapter 11 bankruptcy, and the action was stayed as to those defendants. The court concluded that in the absence of some indication that there would be relief from the stay, the location of these defendants in the United States did not preclude a determination that the United Kingdom was "an adequate alternative forum for all the other defendants and for the Precision defendants if the stay is lifted." Next, the court considered the deference to be provided plaintiff's choice of forum, noting that even though plaintiffs were British subjects, the question raised by the plaintiff's choice of forum is more appropriately whether an assumption should be made that the forum is not a convenient one for a non-U.S. plaintiff. The court noted that all defendants are located in the United States, and that this "demonstrates at least some convenience." Accordingly, the court would not "disturb plaintiff's choice of forum [unless] defendants…establish a strong preponderance in favor of dismissal."

In this case, plaintiff's counsel had come into possession and ownership of the wreckage and had caused it to be moved to the United States. Even though defendants argued that this had

[360] 2013 U.S. Dist. LEXIS 3845 (E. D. Pa. 2013).

been done to facilitate litigation in the United States, the District Court accepted plaintiff's contention that it was primarily to make the wreckage more accessible for inspection and testing by the parties in this litigation. The court concluded that, regardless of the reason, the wreckage was now in Delaware, and that moving it "back across the Atlantic [for use at trial] would be costly and inconvenient."[361] The court also noted that records relating to the manufacture of the products were in the United States, as were the manufacturer's employees who might be witnesses. While the court noted that there might be some evidence in the United Kingdom, particularly training records, there were no eyewitnesses to the crash, and the defendants had not established that other witnesses, such as mechanics, passengers and pilots on other prior helicopter flights, family members, flight instructors, first responders, and accident investigators, "outweighed the importance of the witnesses, documents and other evidence present in the United States." Additionally, plaintiff had shown that there were other prior manufacturers who were not parties, but who were important witnesses, and therefore it was necessary to have subpoena power over those witnesses to compel their testimony. The defendants had indicated the possibility of a third-party complaint against those who performed maintenance, trained the pilots or against certain pilots themselves. Defendants contended that the statute of limitations on any third-party claims had expired in the United Kingdom, and the court conceded that this was a practical problem that weighed in favor of the defendants. Finally, the court considered whether there would be any undue delay if the action remained in the Eastern District of Pennsylvania, but the court indicated there would be no "undue delay if this action remains before the undersigned."[362] The court also concluded that both the United Kingdom and United States had a public interest in the case, but the fact that there were 11 U.S. corporations sued for

[361] *Id.* at *10.

[362] *Id.* at *18.

product liability and negligence claims in the United States caused the United States' interest to outweigh the interest of the United Kingdom.[363] Ultimately, the District Court concluded that "[t]he unfairness of burdening citizens" of Pennsylvania was "not unrelated to this litigation," because the engine was designed and manufactured in Pennsylvania, and the other defendants have offices and facilities in Pennsylvania." Thus, the court concluded that the defendants had failed to meet their "heavy burden to establish that the 'balance of these [private and public interest] factors tips decidedly in favor of a trial in a foreign forum."

In *Schlotzhauer v. XL Specialty Ins. Co.*,[364] the Illinois Court of Appeals affirmed the denial of a *forum non conveniens* motion filed by XL Specialty with regard to a coverage issue arising from an Iowa crash, involving an Iowa helicopter operator, and a claim for wrongful death arising from the death of an Iowa resident. The only Illinois contacts with XL Specialty were the presence of a regional office in Chicago which had been opened after the filing of the lawsuit. The Illinois trial court had held that the *forum non conveniens* motion should be denied because plaintiff is entitled to their choice of forum unless there is "no practical connection" with Illinois. Defendant argued that key witnesses were available only in Iowa, and that they could not be compelled to appear in Cook County for trial. Plaintiff contended that there were five potential witnesses in Cook County and other witnesses throughout Kansas, Pennsylvania, Iowa, Connecticut and New York, and therefore there were multiple states had a connection to the litigation. The appellate court concluded that the trial court had not abused its discretion, in part,

[363] This public interest factor is often a dispositive element in the *forum non conveniens* motions. In those cases in which *forum non conveniens* motions have been denied, both the Illinois and the Pennsylvania courts have focused on public interest in assuring safe products manufactured by resident corporations, whereas many other courts have held that the public interest in providing compensation to accident victims, addressing the issues of negligence or fault by foreign residents within their own countries, and other factors, outweighed any interest that the United States might have in policing products made in the United States. *Id.* at *27.

[364] 2012 Ill. App. unpub. LEXIS 2488 (Ill. App. 2012).

because XL Specialty "offered no affidavit from any witness expressing unwillingness to travel to Illinois and the defendant also failed to identify the county in the proposed state [which would be a more convenient forum], failed to calculate the distances between the chosen and proposed forums and the location of witnesses and other evidence and failed to provide affidavits from any witness as to the inconvenience proposed by plaintiff's chosen forum."[365] The Court of Appeals noted that, where "potential trial witnesses are scattered among several counties, including plaintiff's chosen forum, no single county enjoys a predominant connection to the litigation. The balance of factors must strongly favor transfer of the case or the plaintiff can be deprived of his chosen forum."[366]

Notwithstanding the strong preference in favor of both resident and non-resident plaintiff's choice of forum, and also the public interest of insuring the safety of products manufactured and sold in the forum state, other courts have afforded less deference to both resident and nonresident plaintiffs, where the majority of the plaintiffs were nonresidents, and the witnesses and evidence located outside the United States, even though a basis existed for finding that the U.S. jurisdiction had an interest in assuring the safety of products manufactured in the United States.

In *Fortaner v. Boeing Co.*,[367] the Ninth Circuit Court of Appeals reviewed the *forum non conveniens* dismissal of 116 consolidated lawsuits arising from the crash of a Spanair flight from Spain. 154 people were killed and 18 others were injured, none of whom were United States citizens or residents. The lawsuits all have been consolidated by the Judicial Panel on Multidistrict Litigation in the Central District of California. Boeing had filed a *forum non*

[365] *Id.* at *P35-37.

[366] *Id.* at *18.

[367] 213 U.S. App. LEXIS 674 (9th Cir. 2013).

conveniens motion to dismiss, arguing that the suit should proceed in Spain. Initially, plaintiffs argued that Spain was not an adequate forum because "civil claims could be stayed while criminal proceedings were pending."[368] However, the Spanish criminal proceedings had concluded, and therefore the court ruled that these concerns were now moot. Evaluating both the private and public interest factors, the trial court then concluded that Spanish evidence, particularly as to Boeing's claims of negligence of the flight crew and ground personnel, or, alternatively, the fault of other Spanish actors, should reduce any liability on the part of the manufacturer. Boeing denied that the accident was due to any defect in the aircraft, and was solely the result of negligence by third parties. The District Court concluded that "cockpit recordings, information about the crash, and the results of investigations by Spanish authorities 'would be more difficult to access in the United States than in Spain.'"[369] The District Court also gave greater weight to Spain's interest as the locale of the crash site, as well as relying upon docket congestion in the Central District of California, as outweighing "California's interest as the site of the airplane's manufacturer."[370]

In another case from the Central District of California, *Harp v. Airblue Ltd.*,[371] the District Court considered a *forum non conveniens* motion in a case arising of a July 2008 plane crash near Islamabad, Pakistan that killed all 152 people on board. Initially, the case had been filed on behalf of numerous non-U.S. citizen plaintiffs, however, those plaintiffs had settled, and the *forum non conveniens* motion was filed with regard to two U.S. citizens, one Austrian citizen, one Australian citizen, one Somali citizen and two British citizens. Plaintiffs contended

[368] *Id.* at *87-88.

[369] *Id.* at *89.

[370] *Id.* at *90.

[371] 2012 U.S. Dist. LEXIS 106066 (C.D. Cal. 2012).

Pakistan was not an adequate alternative forum. The court rejected generalized concerns relating to amenability of process and whether there was a satisfactory remedy under Pakistani law; claims of systematic corruption and bias in the Pakistani judicial system; lengthy delays in reaching trial, obstacles to discovery and prohibitive costs in hiring local counsel; as well as potential danger to one of the plaintiffs, a U.S. citizen whose mother was Pakistani, on the grounds that he was "extremely fearful of traveling to Pakistan given the reports of terrorism, kidnapping, and murders directed against American citizens." The District Court rejected all of these arguments as not establishing that Pakistan was not an adequate alternative forum. The court also considered the private and public interest factors, and, on the basis of *Piper Aircraft v. Reyno*,[372] even when a U.S. citizen chooses to litigate in the United States, "[The] citizen's forum choice should not be given dispositive weight."[373] The District Court stated that where the balance of convenience suggests that the trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper." *Id.* In balancing the private interests, only one of the five plaintiffs was a U.S. citizen, and that citizen was a resident of Georgia, not California.

In considering the other private interest factors, plaintiff argued that Pakistani law imposed a "strict liability regime for aviation actions," and therefore access to Pakistani evidence or witnesses was not a factor. However, plaintiff's complaint alleged only claims for negligence, and Defendant claimed that the evidence and witnesses necessary to defend itself against negligence claims were all located in Pakistan. Additionally, the court stated that "in aviation and accident cases, this private interest factor almost uniformly favors the forum where the accident occurred." Additionally, compulsory process and unwilling witnesses were also

[372] 454 U.S. at 255.

[373] *Id.* at *15.

available in Pakistan, but not in the United States, and the cost of bringing even willing witnesses to trial in the United States would certainly be greater. As for the public interest factors, the case did not involve a product liability claim, but a claim against defendant airline headquartered and having its principal place of business in Islamabad, and regulated by Pakistan's civil aviation authority, and that it had never operated flights to or from the United States. Thus, there was no public interest in California, and, given the substantial number of Pakistani citizens who died in the accident, in comparison to American citizens who died in the accident, "[t]he United States' interest in the suit pales in comparison to Pakistan's." Finally, the court noted that since Pakistani law would control, the familiarity of the Pakistani court and the federal court's lack of familiarity with Pakistani law also favored dismissal, as well as the burden on local courts and juries "unconnected to the case and the cost of resolving a dispute unrelated to the forum," stating further that "[t]here is a local interest in having localized controversies decided at home."[374]

I. CHOICE OF LAW

In *National Union Fire Insurance Company v. American Eurocopter Corp.*,[375] the Fifth Circuit Court of Appeals considered a case involving a helicopter crash in Hawaii, and contribution claims made by National Union against American Eurocopter and Eurocopter SAS. The Hawaii district court had ruled that personal jurisdiction in Hawaii was lacking over American Eurocopter, and transferred the case to the Northern District of Texas federal court. The U.S. District Court for the Northern District of Texas determined that Texas law, including Texas choice of laws, would govern because the transfer was not under 28 U.S.C. § 1404 under which the transferor court's choice of law rules would apply, but a transfer based on lack of

[374] *Id.* at *22 citing *Gulf Oil*, 330 U.S. at 508.

[375] 697 F.3d 405 (5th Cir. 2012).

personal jurisdiction and therefore the transferee court's choice of law rules would apply. The district court held that Texas law applied, and, under Texas law, there is no right of contribution where one of the alleged tortfeasors settles out of court and brings a contribution claim against other alleged tortfeasors. The Fifth Circuit Court of Appeals denied National Union's appeal with regard to the jurisdictional issues in the Hawaii district court, holding that it did not have jurisdiction over those issues, and therefore proceeded to review the district court's choice of laws analysis under the "most significant relationship" test of Restatement (Second) of Conflicts of Laws.[376] The court held that even though the accident occurred in Hawaii, the relationship between the parties was centered in Texas, based primarily upon a Texas choice of law provision in the parts supply contract between the manufacturer and the operator of the helicopter. Finally, the court held that Texas public policy strongly favored the application of Texas law because the rule against contribution for out of court settlements reflects Texas's public policy against "permit[ting] a joint tortfeasor the right to purchase a cause of action from a plaintiff to whose injury the tortfeasor contributed."

J. INSURANCE COVERAGE

In *McGirk v. Certain Underwriters at Lloyd's*,[377] the U.S. District Court for the Western District of Virginia considered the issue of liability coverage for claims made by a skydiver who was struck in mid-air by the jump plane as he descended to the ground under his parachute. At issue was whether an endorsement to the policy that the Combined Single Limit coverage excluding "Liability to Occupants and excluding Liability to and of the jumpers after descending from aircraft and whilst attempting to exit the Aircraft," excluded coverage for the pilot's liability for causing the mid-air collision with the parachutist. The parachutist, who had taken a

[376] §145, §6, §173.

[377] 2014 U.S.. Dist. LEXIS 22661 (W.D. Va. 2014).

judgment against the sky diving operator and an assignment of rights under the policy, contended first that "descending from" referred to activities other than the act of parachuting from the aircraft. The District Court held that there was no ambiguity in the policy and that "descending from" included parachuting from the aircraft. The parachutist next contended that he was injured "while" descending, rather than "after" descending, since he had not yet completed the descent and therefore the mid-air collision was not "after" the descent. The District Court also rejected this argument concluding that the act of "descending" occurred when the parachutist exited the airplane, and that everything that occurred subsequent to that event was "after descending" from the aircraft. Finally, the parachutist contended that a Georgia statute[378] that defined vehicle insurance coverage (including aircraft as a form of vehicle), as including injuries from being "struck by . . . [an] aircraft," required the policy to include liability coverage for the mid-air collision in this case. The District Court reviewed the Georgia statutes and concluded that the section at issue only defined the term vehicle insurance coverage as otherwise used under Georgia law, and that the other provisions of Georgia law did not mandate or make compulsory the issuance of such policies, except O.C.G.A. section 31-11-33(a), which required coverage as defined under O.C.G.A. section 33-7-9 for air ambulance operators. Since there was no contention that the sky diving operator was engaged in the air ambulance business, there was no provision of Georgia law that required the issuance of a policy of vehicle insurance coverage that might have incorporated that statutory definition.

In *Certain Underwriters at Lloyd's London v Garmin Int'l, Inc.*,[379] the U.S. District Court for the District of Kansas, considered the issue of liability coverage for an alleged joint venture with the Named Insured for liability asserted as a result of a crash of an aircraft equipped with

[378] O.C.G.A. section 33-7-9.

[379] 2013 U.S. Dist. LEXIS 98186 (D. Kans. 2013).

Garmin avionics. Underwriters had issued an Aviation Products and Grounding Liability Insurance Policy to Garmin International, Inc. (the "Global policy"), and certain specifically identified related entities and their subsidiaries, as the Insured on the Schedule page, and which further defined the term "Insured" in the definitions contained within the policy as "the Insureds named above and all subsidiaries, affiliated, associated, or allied companies, corporation [sic], foundations, firms, joint ventures, partnerships, or any entities entered into, acquired, or formed, . . . and over which such Insured has any ownership interest, or exerts financial control, or has assumed or exercised management control, or for which the Insured has obligation to provide insurance."

The case arose from the crash in California of a Lancair IV aircraft during a personal, sight-seeing flight following an engine failure, resulting in serious injuries to the occupants of the aircraft. The pilot was Henry Bartles and the occupants and their spouses filed suit in California against numerous defendants, including Bartles, in his individual capacity, and Garmin. Bartles had built the Lancair IV, but was assisted by a close friend, and Garmin employee, Chris Schulte. Schulte had done most of the electrical and avionics work on the aircraft. Schulte also was a project engineer for Garmin, responsible for developing and certificating the installation of the Garmin 900 in the Lancair IV aircraft. To that end, Schulte had asked Bartles if his aircraft could be used for that purpose, if Schulte arranged for the purchase of a Garmin 900 at the employee discount. Bartles agreed, and even participated in the design and construction of a special rack to be used to mount the Garmin 900 in the Lancair IV. It does not appear that the Garmin 900 or this particular installation played any role in the engine failure that resulted in the crash and the injuries for which damages were sought in the California lawsuit.

Bartles sought a defense for the California lawsuit under the Global policy, resulting in the filing of this declaratory judgment action in Kansas. Bartles contended that he was a joint venture with Garmin and therefore was entitled to a defense under the Global policy. Garmin and the Underwriters denied the existence of a joint venture, and denied that Bartles was an insured. The District Court held that the issue of whether one is an insured under Kansas law must first be determined, before turning to the issue of whether the California lawsuit included allegations for which coverage would be provided under the Global policy. The District Court conducted an extensive review of the undisputed facts, and concluded that there was no evidence that would support a finding that any joint venture existed. Moreover, even if a joint venture existed, then it would have been an insured, but not Bartles, individually, the capacity in which he was seeking coverage, and, furthermore, the California lawsuit did not seek any damages from a Garmin/Bartles joint venture. The District Court also rejected the contention that Schulte had apparent authority to form a joint venture and to bind Garmin. The District Court concluded that, in the absence of any evidence of express authority, the "management position" that might create the appearance of authority did not extend to a supervising project engineer. Finally, as to claims for coverage under certain excess policies, the District Court held that there was no basis for reaching the excess policies, since there was no judgment against any insured, and the District Court held that the term "insured," even though it meant different things under different policy coverages, was not for that reason ambiguous, and that it would need to be shown that for the same coverage, there was "genuine uncertainty [as to} which one of two meanings is the proper meaning."

In *Global Aerospace, Inc. v. Platinum Jet Management, Inc.*,[380] the Eleventh Circuit Court of Appeals, in an unpublished decision, addressed whether Global, a managing agent of a pool of three insurance companies, had standing to bring suit against a charter airline to which Global had issued a policy for declaratory judgment and the return of expenses and settlement funds that had been expended in defending the airline regarding the crash of one of its planes. After the crash, a federal grand jury indicted the airline's principals and others for violations concerning the operation of its aircraft.[381] Global sued the airline upon learning of the indictment, alleging that the airline had sought to impede Global's investigation.[382] The airline failed to timely respond to Global's complaint, and a default judgment was entered by the district court.[383] The airline moved to set aside the default judgment and moved to dismiss Global's complaint, alleging that that subject matter jurisdiction did not exist because Global had not suffered an injury in fact because as a mere agent of the pooling insurance companies it had not suffered a monetary loss.[384] The Eleventh Circuit Court of Appeals rejected the airline's argument, finding that as the pooling agent, Global had the right to direct and control the insurance claims, thus giving it standing to bring the declaratory judgment action.[385] Additionally, the court found that by contracting in its own name for the benefit of the insurance companies, Global had representative standing to sue for the benefit of the insurance companies.[386]

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[380] 2012 U.S. App. LEXIS 14605 (11th Cir. July 17, 2012).

[381] *Id.* at *2.

[382] *Id.*

[383] *Id.*

[384] *Id.* at *3-4.

[385] *Id.* at *4.

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

In *Oxford Aviation, Inc. v. Global Aero, Inc.*,[387] an aircraft refurbishing and repair company sued its insurance company for failing to defend it against a lawsuit brought by one of its customers.[388] In the underlying suit, the customer had alleged, among other claims, that the repair shop's negligence and faulty performance caused an aircraft window to break when the customer was flying the aircraft.[389] Although the District Court of the District of Maine ruled that no duty to defend existed, the First Circuit Court of Appeals reversed. In doing so, the Court first noted that under Maine law, "an insurer must defend so long as the claims in the complaint create even a remote possibility of coverage."[390] Additionally, it noted that "a complaint need only disclose a potential for liability within the coverage."[391] The Court concluded that the claims involving the cracked window in the underlying action fell within the coverage provision of the policy addressing bodily injury or property damage caused by an occurrence, since occurrence was defined to mean an accident.[392] Concluding that the window claim fell within one of the policy's coverage provisions, the Court then analyzed whether one of the policy's exclusions negated the duty to defend.[393] The insurance company argued that the policy's exclusions for "business risks" excluded coverage for the repair shop's faulty work.[394] Specifically, it pointed to the exclusions for 1) repair or replacement work necessitated by the

[387] 680 F.3d 85 (1st Cir. 2012).

[388] *Id.* at 87.

[389] *Id.* at 86-87.

[390] *Id.* at 87.

[391] *Id.*

[392] *Id.* at 88.

[393] *Id.* at 89.

[394] *Id.*

insured's work, 2) damage to a product, and 3) an impaired property exclusion.[395] The Court held that none of these exclusions applied to the crack in the window because 1) the crack occurred away from the insured's shop and thus could not be considered the shop's work, 2) the window was not the insured's product, and 3) while the impaired property exclusion could bar a claim for the loss of use of the aircraft caused by the cracked window, it could not bar a claim for damage to the window itself.[396]

[395] *Id.* at 89-90.

[396] *Id.* at 91-92.

In *Lopez and Medina Corp. v. Marsh USA, Inc.*,[397] the First Circuit Court of Appeals considered an appeal from the Federal District Court of Puerto Rico in which the plaintiff, a travel and tour company, brought a direct action against the coinsurers for a direct air carrier and indirect air carrier, for damages caused to it when the air carriers breached a charter contract.[398] The tour company brought the action based on Puerto Rico's Direct Action Statute, P.R. Laws Ann. Tit. 26 § 2003, which allows a third party to bring an action against an insurer for claims covered under an insurance policy, without having to join the insured to the dispute.[399] The First Circuit affirmed the district court's grant of summary judgment in favor of the insurers against the travel company's claims. In doing so, the Court held that to be successful under the Direct Action Statute, there had to be coverage under the policy for the alleged loss.[400] In the context of the tour company's claim, the Court held there was no coverage because its claim against the air carriers sounded in breach of contract, which was not covered under the policy.[401]

In *Estate of Vasquez-Ortiz v. Zurich*,[402] a foreign citizen asked a friend who was a U.S. citizen to set up a U.S. corporation to be the owner of the foreign citizen's airplanes so that the planes could be registered in the U.S.[403] The foreign citizen owned no part of the corporation.[404] Insurance was purchased for the aircraft from Zurich in the name of the corporation.[405] While piloting one of the airplanes that he had purchased but was owned by the corporation, the foreign

[397] 667 F.3d 58 (1st Cir. 2012).

[398] *Id.* at 59.

[399] *Id.* at 61-62.

[400] *Id.* at 66.

[401] *Id.* at 66-68.

[402] No. H-11-2413, 2013 U.S. Dist. LEXIS 2574 (S.D. Tex January 8, 2013).

[403] *Id.* at *2-4.

[404] *Id.* at *2.

[405] *Id.* at #4.

citizen was involved in a crash that took his life and the life of a passenger.[406] The estate of the passenger brought suit against the foreign citizen's estate and the corporation.[407] The foreign citizen's estate tendered the claim to Zurich and Zurich rejected the tender indicating that there was no coverage.[408] The estate then sued Zurich alleging breach of contract and breach of duty of good faith and fair dealing among other claims.[409] Zurich moved for summary judgment on the grounds that the estate lacked standing to bring the claim since the foreign citizen was not a party to the insurance contract.[410] Despite the fact that foreign citizen was not a party to the contract, the estate argued that it had standing either because the foreign citizen was an alter-ego of the corporation or because he was an intended beneficiary under the policy.[411] The Court rejected both of the estate's arguments. In rejecting the alter-ego theory, the Court found that the alter-ego claim was designed for the purpose of allowing a creditor to bring a claim against a corporate owner and was not designed to allow a corporate owner to file an action against a company that assumed in good faith that it was dealing with a corporation and not an individual.[412] In rejecting the intended beneficiary argument, the Court found no evidence that the contract was intended to confer a benefit on the foreign citizen.[413]

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[406] *Id.* at 7.

[407] *Id.* at *7.

[408] *Id.*

[409] *Id.* at *8.

[410] *Id.* at *10.

[411] *Id.* at *13, *16.

[412] *Id.* at *14.

[413] *Id.* at *19.

In *World Trade Ctr. Props, LLC v. Certain Underwriters at Lloyd's, London*,[414] lease holders of the twin towers destroyed in the September 11, 2001 terrorist attack filed suit against their insurers seeking a declaration that they were entitled to priority for sums collected by their insurers in subrogation actions filed against certain aviation defendants.[415] At issue was the language in two policy forms addressing division of amounts collected as a result of subrogation actions.[416] One of the forms provided that the net amount collected after deducting the cost of the recovery was to be distributed first to the insured "for the deductible amount retained and for any uninsured loss or damage resulting from the exhaustion of limits under this policy or primary or excess policy(ies)."[417] The second form provided that after the deduction of costs, the proceeds were to be "divided between each party instituting such proceeding in the same proportion as each party has borne the provable loss."[418] The main dispute between the parties under either form was whether the leaseholders could count their entire losses toward priority or proportion (the leaseholders' position) or whether they could count only legally recognizable tort damages (the insurers' position).[419] After reviewing the relevant language, the Court held that both forms only allowed priority or proportion to legally recognizable tort damages.[420] The Court reasoned that legally recognizable tort damages was the only category of damages that the insurers were able to seek against the aviation defendants in the subrogation action, and counting other categories of damages toward priority or proportion would create an unwarranted

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[414] 2012 U.S. Dist. LEXIS 177132 (S.D.N.Y., Nov. 27, 2012).

[415] *Id.* at *36.

[416] *Id.* at *39-42.

[417] *Id.* at *48-49.

[418] *Id.* at *53.

[419] *Id.* at 49.

[420] *Id.* at *52-54.

windfall.[421] The Court further reasoned that accepting the leaseholder's interpretation would not be in line with the business purposes sought to be achieved by the parties to the insurance policies since there would be no mitigation to the insurers as a result of bringing the subrogation action.[422]

In *United States Aviation Underwriters, Inc. v. Bill Davis Racing, Inc.*,[423] USAU filed a declaratory judgment action seeking a declaration that there was no covered loss for an aircraft that was alleged to have been stolen from its insured, Bill Davis Racing ("BDR"). BDR filed a counterclaim alleging unfair and deceptive trade practices and bad faith refusal to settle. The facts of the case establish that USAU issued an All-Clear Aircraft Policy to BDR for an Embraer turboprop aircraft.[424] Under the policy covered "occurrences" were defined as "any accident or continuous or repeated exposure to conditions which you don't expect to happen resulting in bodily injury, property damage or loss of or damage to your aircraft."[425] The policy excluded coverage for loss or damage to the aircraft caused when someone with legal right to possess the aircraft embezzled it.[426] At some point after the policy was issued, the aircraft was flown to Honduras and partially disassembled, which BDR claimed occurred without its knowledge or permission.[427] BDR submitted a claim under the policy contending that the loss of the aircraft was due to theft.[428] USAU denied coverage in part by claiming that the loss occurred as a result

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[421] *Id.* at *51.

[422] *Id.* at *53.

[423] 2012 U.S. Dist. LEXIS 120111 (M.D.N.C. Aug. 24, 2012).

[424] *Id.* at *3.

[425] *Id.* at *3-4.

[426] *Id.* at *4.

[427] *Id.*

[428] *Id.*

of embezzlement and filed a motion for judgment on the pleadings alleging that the pleadings established as a matter of law that the loss occurred as a result of embezzlement.[429] It further requested judgment on BDR's counterclaims, asserting that BDR failed to allege a sufficient basis for the claims.[430] In support of its embezzlement argument, USAU pointed to BDR's Answer in which BDR admitted that it had provided limited authorization to a company known as Renaissance Air to move the aircraft to an airport in Miami, Florida for maintenance.[431] BDR responded by arguing that it had not transferred any legal interests, rights, control, or ownership of the aircraft and that while it consented that the aircraft could be flown to Miami, it never consented for the aircraft to be flown to Honduras.[432] The court denied the motion as to the embezzlement argument, holding that the facts were sufficiently disputed to prevent the Court from determining as a matter of law that BDR had given Renaissance sufficient authority to render the taking of the aircraft an embezzlement rather than a theft.[433] The court did grant USAU's motion with respect to BDR's counterclaims, holding that BDR's general allegations regarding USAU's alleged unfair and deceptive trade practices as well as its alleged bad faith refusal to settle did not meet the pleading requirements set forth in *Bell Atlantic Corp. v. Twombly.*[434]

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[429] *Id.*

[430] *Id.* at 11.

[431] *Id.* at *12.

[432] *Id.* at *13.

[433] *Id.* at *14.

[434] 550 U.S. 544 (2007). *Id.* at *21-22.

K. EVIDENCE AND DISCOVERY

1. Admissibility of Government Reports

In *Smith v. United States*,[435] the surviving spouse of a man who was killed when he crashed a Piper Arrow brought suit against the United States.[436] The widow alleged that government employees had negligently maintained and inspected the aircraft, which caused her husband to become disoriented and crash after carbon monoxide accumulated in the cabin.[437] Relying on the learned treatise exception to the hearsay rule, the plaintiff attempted to introduce a variety of studies and reports as exhibits, e.g. a Federal Aviation Administration ("FAA") publication regarding engine systems failure, a Civil Aviation Authority ("CAA") publication regarding toxic gases and fumes in airplanes, and a U.S. Army Aeromedical Research Laboratory publication regarding the effect of carbon monoxide and altitude on aviator performance.[438] The court rejected this evidence with the explanation that a learned treatise may not be admitted as an exhibit; rather, it may only be read into evidence.[439] In addition, the court refused to admit a portion of a federal regulation offered by the plaintiff as an exhibit because "it is axiomatic that a court must determine the law which is applicable in a particular suit."[440]

In *Echevarria v. Caribbean Aviation Maint. Corp.*,[441] the widow and children of a pilot killed in a helicopter crash filed suit against Robinson Helicopter Co., the Caribbean Aviation

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[435] *Smith v. United States*, 2012 U.S. Dist. LEXIS 58623 (S.D. Ohio Apr. 26, 2012).

[436] *Id.* at *2.

[437] *Id.* at *2.

[438] *Id.* at *38-42.

[439] *Id.* at *38-42.

[440] *Id.* at *53.

[441] *Echevarria v. Caribbean Aviation Maint. Corp.*, 839 F. Supp. 2d 464 (D.P.R. 2012).

Maintenance, Corp., and Chartis Insurance company.[442] The parties disputed the admissibility of National Transportation Safety Board ("NTSB") Factual reports relating to the accident at issue and also NTSB reports for other past accidents.[443] The court explained that it is important to distinguish between Factual Accident Reports and Board Accident Reports because the former are generally admissible and the latter are generally not.[444] Even Factual Accident Reports may be inadmissible where they contain hearsay, lack indicia of trustworthiness, or are too prejudicial.[445] The court determined that the NTSB reports at issue were factual reports because they contained the factual background of the accident and no opinions or conclusions as to the probable cause of the accident.[446] However, the court refused to admit the reports because there was hearsay dispersed throughout them and it would have required considerable time to "weed out" the hearsay.[447] Also, the court was of the opinion that the NTSB reports relating to past accidents were potentially prejudicial to the defendant.[448]

In *Pease v. Lycoming Engines*,[449] the plaintiff suffered significant injuries when his Piper aircraft crashed.[450] After the accident, plaintiff initiated a products liability suit against Lycoming, the manufacturer of the plane's engine.[451] Lycoming moved in limine to exclude various service difficulty reports, airworthiness directives, and service bulletins offered into

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[442] *Id.* at 465.

[443] *Id.* at 465.

[444] *Id.* at 465-466.

[445] *Id.* at 466.

[446] *Id.* at 467.

[447] *Id.* at 467.

[448] *Id.* at 467.

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

[450] *Id.* at *2.

[451] *Id.* at *2-3.

evidence by the plaintiffs.[452] Regarding the airworthiness directives and service bulletins, Lycoming argued that this was evidence of subsequent remedial measures and therefore inadmissible.[453] However, the court held that measures taken after the sale of a product but before the event causing harm are not subsequent remedial measures.[454] In addition, the court held that the service difficulty reports were admissible, but only for the non-hearsay purpose of showing that Lycoming had notice of the engine's defective design.[455]

In *Ressler v. United States,*[456] the claims were based on the crash of a commercial airliner.[457] The plaintiffs alleged that the FAA's negligence caused the crash.[458] One issue in the case was whether the claims were barred by the statute of limitations.[459] To prove that the claims were not barred, the plaintiffs sought to offer the NTSB report, which they claimed contained facts that first alerted them to the cause of action.[460] The United States sought to exclude the report on the ground that it was a final report that could not be relied upon in a civil action pursuant to applicable statutes and regulations.[461] The plaintiffs' argued that the prohibition extends only to the Board's determinations and probable cause findings, not to the existence of the report itself.[462] However, the court rejected this argument and held that the

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[452] *Id.* at *6-7.

[453] *Id.* at *12-15.

[454] *Id.* at *12-15.

[455] *Id.* at *15-16.

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

[457] *Id.* at *6.

[458] *Id.* at *6.

[459] *Id.* at *6.

[460] *Id.* at *7.

[461] *Id.* at *7.

[462] *Id.* at *9.

statutory and regulatory ban prohibited the plaintiffs' proposed use of the final report, i.e. as an exhibit to their response to the United States' motion to dismiss on statute of limitations grounds.[463]

In *Delacroix v. Doncasters,* the plaintiffs asserted products liability claims in connection with the crash of a Twin Otter airplane.[464] The defendant Doncasters was the manufacturer of replacement CT-blades that had been installed on the airplane prior to the crash.[465] In a motion for judgment notwithstanding the verdict, Doncasters argued that the trial court erred in excluding evidence of FAA certification offered to prove that the CT-blades were not defective.[466] However, the appeals court held that the trial court did not commit plain error by excluding the certification evidence because compliance with minimal federal standards does not mitigate a manufacturers responsibility under the theory of strict liability.[467]

2. Admissibility of Expert Testimony

In *Leahy v. Signature Engines, Inc.*,[468] the widow of a deceased pilot that was killed in an airplane crash brought suit against a corporation that had overhauled the aircraft engine shortly before the accident.[469] The plaintiff's theory was that the overhaul was negligently performed because a breach in an engine exhaust pipe was not detected.[470] The defense theory was that a fuel system on the plane that had not been approved by the FAA leaked and caused an engine

[463] *Id.* at *9-10.

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

[465] *Id.* at *4.

[466] *Id.* at *32-35.

[467] *Id.* at *32-35.

[468] *Leahy v. Signature Engines, Inc.*, 2012 U.S. Dist. LEXIS 56968 (S.D. Ohio 2012).

[469] *Id.* at *1-2.

[470] *Id.* at *9-10.

fire that resulted in the crash.[471] Both sides moved to exclude the testimony of the other side's expert.[472] First, the defendant challenged the opinions of the plaintiff's experts on the ground that they failed to engage in sufficient testing and analysis, but the court rejected these challenges because testing was not necessarily required given the nature of the opinions offered.[473] Second, the plaintiff challenged the opinion of the defendant's expert on the ground that he failed to engage in adequate testing and analysis, and the court held that these criticisms went only to the weight and not the admissibility of the evidence.[474] Lastly, the court observed that both parties had submitted expert declarations in support of their response to the other party's motion to exclude, and it explained that an expert may not amend or alter prior opinions in response to an opposing party's challenge on the reliability of those opinions.[475] However, neither party offended this rule because an expert may explain or supplement his or her opinion with additional evidence.[476]

In *Leahy v. Lone Mt. Aviation,*[477] *Inc.*, the same widow brought suit against a different company alleging negligent performance of service on the aircraft prior to the crash.[478] The defendant later moved to exclude all of the plaintiff's expert testimony on the ground that it did not aid the trier of fact and did not meet the reliability requirements of Fed. R. Civ. P. 702.[479] However, the court observed that the defendant did not specify exact opinions that were

[471] *Id.* at *11-12.

[472] *Id.* at *14-33.

[473] *Id.* at *14-28.

[474] *Id.* at *29-33.

[475] *Id.* at *34.

[476] *Id.* at *34.

[477] 2012 U.S. Dist. LEXIS 138038 (D. Nev. 2012).

[478] *Id.* at *2.

[479] *Id.* at *8-9.

allegedly inadmissible and was not clear on the factual grounds supporting each argument.[480] Rather, the defendant cited excerpts of the depositions and NTSB reports that arguably contradicted the testimony of plaintiff's experts, pointed out a lack testing to simulate the accident, and coupled this with a request that the Court find each witness's testimony completely inadmissible.[481] Based on the foregoing, the court was not persuaded that the plaintiff's witnesses relied on insufficient facts or data, or that their testimony was the product of unreliable principals or methods, or unreliable application of the facts to those principles and methods.[482]

In *Echevarria v. Caribbean Aviation Maint. Corp.*,[483] the widow and children of a pilot killed in a helicopter crash filed suit against Robinson Helicopter Co., the Caribbean Aviation Maintenance, Corp., and Chartis Insurance company.[484] The defendant moved to exclude the testimony of plaintiff's expert witnesses.[485] First, the court rejected that plaintiff's accident reconstructionist, who was trained as an engineer and accident investigator, was not qualified to testify regarding helicopter maintenance or compliance with FAA regulations.[486] Second, because his report was grounded in his review of depositions and NTSB reports, the court rejected that the accident reconstructionist's testimony was based on unsupported speculation.[487] Third, the defendant successfully argued that plaintiff's flight instructor was not qualified to

[480] *Id.* at *8-9.

[481] *Id.* at *9-10.

[482] *Id.* at *11-12.

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

[484] *Id.* at *6-7.

[485] *Id.* at *11-12.

[486] *Id.* at *12-13.

[487] *Id.* at *13-15.

testify regarding helicopter maintenance.[488] Fourth, the court rejected that the plaintiff's metallurgist, who also had considerable experience in accident reconstruction and crash investigation, was not qualified to testify regarding helicopter maintenance.[489] Fifth, notwithstanding that he had never piloted an R-44 helicopter, the court rejected that plaintiff's pilot, who had logged over 5,000 hours of flight in 120 types of fixed wing and helicopter models, was not qualified to testify as to the piloting of the R-44 helicopter.[490] Lastly, notwithstanding that there might be some repetition, the court rejected that the testimony of plaintiff's expert witnesses was needlessly cumulative.[491]

In a second evidentiary dispute, the defendant in *Echevarria v. Caribbean Aviation Maint. Corp.*,[492] sought to preclude the plaintiff's economic experts from testifying. First, the defendant argued that the economic loss assessment was faulty because it included compensation for years after the deceased pilot would have been expected to retire, but the court held that the age of the deceased pilot's probable retirement was a question for the jury.[493] Next, the defendant argued that the proposed testimony on economic loss was faulty because it included interest on economic losses from the time the complaint was filed until the time of judgment, and the court precluded this evidence because prejudgment interest cannot be added unless the court finds that a party acted with obstinance.[494] Further, the defendant argued that the economic loss testimony was erroneous because it provided for expected salary increases and this was not

[488] *Id.* at *16-17.

[489] *Id.* at *18-19.

[490] *Id.* at *20-22.

[491] *Id.* at *22-24.

[492] *Echevarria v. Caribbean Aviation Maint. Corp.*, 841 F. Supp. 2d 588, 590 (D.P.R. 2012).

[493] *Id.* at 590.

[494] *Id.* at 590-91.

supported by the evidence.[495] The court, however, explained that the fact that the income of the deceased fluctuated over time did not necessitate a finding that his income would not have increased over time.[496] Additionally, the defendant argued that testimony concerning a planned business venture was too speculative, but the court admitted the evidence for the purpose of showing that the deceased did not plan to retire at an early age.[497] Lastly, the court held that stock owned by the deceased was passive income that should not have been calculated as lost earnings.[498]

In a third evidentiary dispute, the plaintiffs in *Echevarria v. Caribbean Aviation Maint. Corp.*,[499] sought to preclude defendants expert on maintenance and mechanics from testifying regarding matters beyond his expertise.[500] The argument was, essentially, that the defendants maintenance and mechanics expert lacked the necessary expertise to contradict the plaintiffs' metallurgy and accident reconstruction expert.[501] However, because it was satisfied that the opinions of the mechanics and maintenance expert did not go beyond hardware installation and maintenance, the court refused to preclude his testimony.[502] The court also disagreed that segments of the expert's opinion only parroted the deposition testimony of several defense mechanics.[503]

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[495] *Id.* at 591.

[496] *Id.* at 591.

[497] *Id.* at 591.

[498] *Id.* at 592.

[499] *Echevarria v. Caribbean Aviation Maint. Corp.*, 2012 U.S. Dist. LEXIS 6380 (D.P.R. 2012).

[500] *Id.* at *7.

[501] *Id.* at *9.

[502] *Id.* at *10-11.

[503] *Id.* at *11.

In a fourth evidentiary dispute, a defendant in *Echevarria v. Caribbean Aviation Maint. Corp.*,[504] sought to preclude the testimony of a co-defendant's accident reconstruction expert who proposed to testify regarding faulty helicopter maintenance provided by the first defendant's mechanics. The basis for the challenge was that the testimony was unsubstantiated, speculative, and unreliable.[505] However, the court rejected the argument that the expert's testimony was based on unsupported speculation.[506] Rather, the opinion was based on evidence in the record that had been validated by the NTSB.[507] The criticisms relating to the expert's testimony went to the weight of the evidence and not its admissibility.[508]

In a fifth evidentiary dispute, a defendant in *Echevarria v. Caribbean Aviation Maint. Corp.*,[509] again sought to preclude the testimony of a co-defendant's expert. The argument was that the expert was unqualified to testify regarding aircraft maintenance issues.[510] However, the witness had forty years of experience as a military and civilian helicopter pilot, had logged more than 20,000 hours of flight time, and supervised mechanics post-retirement.[511] Accordingly, the court rejected that the witness was unqualified to testify regarding maintenance issues, even though he did not hold an FAA Airframe and Powerplant mechanic's certificate.[512]

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[504] *Echevarria v. Caribbean Aviation Maint. Corp.*, 841 F. Supp. 2d 565, 567 (D.P.R. 2012).

[505] *Id.* at 567.

[506] *Id.* at 568-569.

[507] *Id.* at 569.

[508] *Id.* at 569.

[509] *Echevarria v. Caribbean Aviation Maint. Corp.*, 2012 U.S. Dist. LEXIS 5273 (D.P.R. 2012).

[510] *Id.* at *8.

[511] *Id.* at *11.

[512] *Id.* at *11.

In a sixth evidentiary dispute, the plaintiffs in *Echevarria v. Caribbean Aviation Maint. Corp.*,[513] sought to preclude all testimony regarding the pilot's legal status to fly pursuant to FAA regulations. The plaintiffs' argument was that the methodology employed by the expert in formulating his opinion was flawed.[514] However, the court was satisfied that the expert, who had access to the pilot's logbook and NTSB materials, was sufficiently informed to make the determination that the pilot was not in compliance with FAA regulations.[515] It was not necessary to put an official from the FAA on the stand in order to demonstrate non-compliance with FAA regulations.[516] Further, the expert, who had gained familiarity with the design of the helicopter at issue by reading the pilot's operating manual and by attending a training and safety course sponsored by the manufacturer, was sufficiently qualified to give an opinion about the crashworthiness of the helicopter.[517]

In *Ferguson v. Lear Siegler Servs.*,[518] the plaintiff sought to recover damages from the defendant helicopter manufacturer for injuries he sustained in a helicopter crash.[519] The plaintiff's theory was that an un-commanded cyclic movement occurred as a result barium that had built up in the helicopters hydraulic system.[520] To support this theory, the plaintiff offered the testimony of an aerospace engineer who investigated the crash and concluded that the barium

[513] *Echevarria v. Caribbean Aviation Maint. Corp.*, 839 F. Supp. 2d 467 (D.P.R. 2012).

[514] *Id.* at 470.

[515] *Id.* at 470.

[516] *Id.* at 471.

[517] *Id.* at 471.

[518] *Ferguson v. Lear Siegler Servs.*, 2012 U.S. Dist. LEXIS 42342 (M.D. Ala. 2012).

[519] *Id.* at *1-2.

[520] *Id.* at *3.

caused an un-commanded cyclic movement.[521] The helicopter manufacturer moved to exclude the testimony of the engineer on the ground that he was unqualified to testify regarding the effect of barium on servo actuators and that his opinions were unreliable.[522] In response, the court first held that the engineer was qualified because he had extensive knowledge of aerodynamics, servo actuators, and helicopter flight.[523] Second, while conceding that it was a close call, the court held that there was reliable scientific evidence supporting the engineer's conclusions.[524] His testimony was grounded in peer-reviewed research and his conclusions were consistent with the Army's internal investigation of the crash.[525] Further, it was permissible under the circumstances that the engineer relied heavily on studies conducted by others and did not conduct any tests on the crash helicopter's servo actuators.[526] Lastly, criticisms relating to an article that the engineer relied upon in forming his opinions went to the weight of the evidence and not its admissibility.[527]

In *Smith v. United States*,[528] the pilot of a Piper Arrow aircraft perished in a crash.[529] His surviving spouse and estate brought suit against the United States alleging negligent maintenance and inspection of the aircraft by government employees.[530] The plaintiff requested that the court

[521] *Id.* at *3-4.

[522] *Id.* at *4.

[523] *Id.* at *9-10.

[524] *Id.* at *16.

[525] *Id.* at *16.

[526] *Id.* at *21-22.

[527] *Id.* at *22.

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

[529] *Id.* at *2.

[530] *Id.* at *2.

strike the testimony of three government witnesses.[531] The testimony of the first witness was challenged because it was allegedly contradicted in part by a federal regulation, but the court held that this criticism went only to the weight of the testimony and not its admissibility.[532] The testimony of the second witness was challenged because the expert used a novel method of testing COHb blood saturation, but the court refused to strike the testimony because the methodology used by the expert had been peer reviewed and had gained general acceptance.[533] The testimony of the third witness was challenged because his claim that carboxyhemoglobin levels exceeding 18% are necessary to cause measurable impairment in a pilot was allegedly inconsistent with an FAA regulation, but the court rejected that this was a sufficient reason to exclude his testimony.[534]

In *Schaefer-Condulmari v. US Airways Group,*[535] the plaintiff brought suit after suffering an allergic reaction to a meal served aboard the defendant's airline.[536] The defense moved to exclude the testimony of two expert witnesses.[537] The testimony of the first expert was allegedly deficient because the methodology used by the expert to diagnose and rule out alternative causes for the plaintiff's PTSD was unreliable, but the court rejected the argument that inconsistency with medical practice guidelines was a sufficient reason for excluding the testimony as

[531] *Id.* at *124.

[532] *Id.* at *127-130.

[533] *Id.* at *135-136.

[534] *Id.* at *142-144.

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

[536] *Id.* at *1.

[537] *Id.* at *13.

unreliable.[538] The testimony of the second expert, an allergist, was successfully challenged because the expert lacked the expertise needed to testify about PTSD.[539]

In *Sulak v. Am. Eurocopter Corp.*,[540] a helicopter pilot and several passengers were killed in a crash while on a sightseeing flight in Hawaii.[541] The NTSB concluded that the crash occurred because of separation between the lower portion of the hydraulic system and the main rotor blade.[542] In the course of litigation, the helicopter manufacturer moved to exclude the testimony of the deceased pilot's accident reconstruction expert based on the assertion that he lacked expertise and did not employ reliable methods.[543] The expert proposed to testify that the crash was a result of the design of the rod end fitting, the lock washer, and the installation instructions provided in the helicopter maintenance manual.[544] The court rejected the argument that the expert, who held advanced degrees in physics, mechanical engineering, and aeronautical engineering, was ill qualified because he lacked helicopter design experience.[545] Also, the court rejected the argument that the expert's methodology was unreliable owing to a lack of scientific testing.[546] Rather, his opinions were based on a reasonable investigation, were the result of his engineering expertise, and provided a reasonable link between the information reviewed and the conclusions reached.[547] The court also rejected the argument that the expert's decision to

[538] *Id.* at *15.

[539] *Id.* at *15.

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

[541] *Id.* at *1-2.

[542] *Id.* at *2.

[543] *Id.* at *18.

[544] *Id.* at *21-22.

[545] *Id.* at *26.

[546] *Id.* at *28-29.

[547] *Id.* at *28-29.

discount the causative effect of an error during maintenance as a cause of the crash, made his opinion unreliable.[548]

In *Pease v. Lycoming Engines*,[549] a plaintiff who was injured in a plane crash brought suit against the manufacturer of the aircraft engine. During the litigation, the engine manufacturer sought to preclude expert testimony from four witnesses regarding the pilot's economic damages.[550] The engine manufacturer's chief argument was that the testimony regarding the pilot's economic damages was based on materials that were never produced in discovery.[551] The court agreed that the materials at issue should have been produced, but it disagreed that exclusion of the testimony was the appropriate sanction.[552] The engine manufacturer suffered only nominal prejudice, and the prejudice was ameliorated because a firm trial date had not been set.[553] Also, the court did not agree that the vocational experts had "cherry picked" favorable earnings data.[554] Further, the court rejected that testimony from a nurse regarding the pilot's expected medical and life care expenses was based on unfounded assumptions.[555] Next, the court held that testimony of the pilot's neuropsychology expert was relevant and reliable.[556] Lastly, the court held that the pilot's treating physicians should have been disclosed as experts, but they

[548] *Id.* at *29.

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

[550] *Id.* at *21-22.

[551] *Id.* at *22.

[552] *Id.* at *27.

[553] *Id.* at *27-28.

[554] *Id.* at *30-31.

[555] *Id.* at *35.

[556] *Id.* at *38.

were not required to produce expert reports and exclusion of their testimony was not an appropriate sanction for failing to disclose them.[557]

3. Admissibility of Evidence of Other Accidents

In aircraft accident cases, the general rule in both federal and state courts is that evidence of prior accidents is admissible at trial only if the prior accident occurred under the same or substantially similar circumstances as the accident at issue. Decisions in 2012 on this issue were consistent with this general rule.

In *Lidle v. Cirrus*,[558] the Second Circuit Court of Appeals affirmed the federal court in the Eastern District of New York on several evidentiary issues, including the exclusion of evidence of a prior incident. The *Lidle* case stemmed from an October 11, 2006 accident, in which a student pilot and his instructor were killed when a Cirrus Model SR20 G2 aircraft crashed into an apartment building on Manhattan's Upper East Side while attempting to avoid controlled airspace surrounding LaGuardia Airport. The *Lidle* plaintiffs claimed that the accident was caused by a rudder-aileron interconnect lockup where the Adel clamp crossed over and locked on a bungee clamp.[559] The parties presented 23 fact and expert witnesses, and extensive documentary evidence, during a one-month trial, after which a jury rendered its verdict in favor of the defendant Cirrus.[560]

One of the evidentiary rulings of the District Court challenged by plaintiffs on appeal was the exclusion of evidence of a prior incident. After noting the general rule with respect to the admission of evidence of prior incidents, the District Court concluded that plaintiffs had failed to

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[557] *Id.* at *45-47.

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

[559] *Id.* at *1.

[560] *Id.* at *2.

show that the prior incident was caused by the same purported defect in the aircraft that was advanced in the *Lidle* case.[561] The Second Circuit upheld the District Court's ruling, while noting that the District Court did admit evidence of another incident involving a Cirrus Model SR20 aircraft which the Court found sufficiently similar to the Lidle accident.[562]

Similarly, after a state trial court excluded evidence of 26 incidents because none of them were substantially similar to the accident in question, the defendant appealed the case based on the trial court's failure to grant a mistrial after the plaintiffs' counsel alluded to the other incidents. In *Delacroix v. Doncasters, Inc.*,[563] multiple plaintiffs filed claims for wrongful death after the July 29, 2006 crash of a DHC-6 Twin Otter being flown for skydiving expeditions. The accident, which took the lives of all five souls on board, occurred shortly after take-off, when the right engine failed.[564] The original compressor turbine blades in the Pratt and Whitney engine had been replaced with compressor turbine blades manufactured by the defendant Doncasters.[565] Plaintiffs' experts testified at trial that the coating used on the replacement blades was prone to cracking, and that the base metal alloy used on the replacement blades had low oxidation resistance. The experts then opined that the coating cracked, providing a pathway for the oxidation, leading to the fracture of a single compressor turbine blade and the resulting engine failure.[566]

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[561] Plaintiffs "merely alleging some problem with the flight control systems was and is not enough." *Id.* at *4.

[562] *Id.* at *5, fn. 1.

[563] *Delacroix v. Doncasters, Inc.*, 2013 Mo. App. LEXIS 42 (Mo. Ct. Appeals 2013).

[564] *Id.* at *4.

[565] *Id.* at *4.

[566] *Id.* at *5.

After a verdict in favor of plaintiffs, Doncasters appealed on several issues. Among them, Doncasters claimed that the trial court erred in denying its motion for a mistrial after plaintiffs, in violation of the trial court's ruling, alluded to other incidents that were not substantially similar to plaintiffs' theory of the Twin Otter crash.[567] After hearing testimony outside the presence of the jury, the trial court had excluded any evidence of the other incidents, finding that none of them were substantially similar.[568] Despite this ruling, during the cross-examination of one of Doncasters' experts, counsel for plaintiffs asked whether "Doncasters knows that this happens." Over the objection of counsel for Doncasters, plaintiffs' counsel asked the expert whether Doncasters "have reports of it in a catastrophic dangerous situation."[569]

After Doncasters moved for a mistrial, the jury was dismissed for the day while counsel argued the motion to the trial court.[570] On the following morning, the trial court denied the motion for mistrial, and issued a curative instruction for the jury to disregard counsel's question.[571]

On appeal, the Missouri Court of Appeals found that any prejudice that may have resulted from the alleged violation of the trial court's ruling was cured by the trial court's instruction.[572]

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[567] *Id.* at *11-12.

[568] *Id.* at *12-13.

[569] *Id.* at *13.

[570] *Id.* at *13.

[571] *Id.* at *14.

[572] *Id.* at *15.