The Aviation Lawyer’s Operating Handbook: Leaning to Litigate, Navigate and Communicate

1 – 33 : Recent Developments in Aviation and Space Law
34 – 78: Traversing the Minefield: Overcoming Procedural Obstacles in Aviation Cases
79 – 118 : Foreign Law in Aviation Cases: Go or No Go
119-133: Dealing with Expert Witnesses: See and Avoid these Common Mistakes
134 – 155: Keeping Formation Navigating the Relationship of Insured, Insurer and Outside Counsel
156 – 162: Trial Tips from the Trenches: Things They don’t teach you in law school, about trying aviation Lawsuits
163 - 167: Plot Your Course: How to Avoid Pre-Suit
168-179: Coming in for Landing: Effective Negotiation and Mediation Strategies
180- 210: Orbital Space Debris: One Person’s Junk is not Another person’s treasure
I. Personal Jurisdiction and Jurisdictional Discovery

(a) Hinkle v. Cirrus Design Corp., 775 F. App’x 545 (11th Cir. 2019)

In Hinkle v. Cirrus Design Corp., the plaintiffs appealed the district court’s dismissal of their product liability claims against Cirrus Design Corporation arising out of the crash of a Cirrus SR22T in Hampton, South Carolina. The plaintiffs took off from Sarasota, Florida with an intended destination of Orangeburg, South Carolina. The plaintiffs alleged that as the airplane was flying near Hampton, South Carolina, the oil pressure dropped rapidly and the engine started to lose power. They further alleged that when the pilot thought he could not make an emergency landing at the nearby airport, he activated the aircraft’s emergency parachute system, resulting in alleged non-fatal injuries to the four passengers.

The Eleventh Circuit upheld the district court’s dismissal of Cirrus for lack of personal jurisdiction under the Florida long-arm statute and upheld the denial of the plaintiff’s request for jurisdictional discovery. The plaintiffs argued that Cirrus was subject to specific personal jurisdiction under four of the enumerated prongs of the Florida long-arm statute: (1) committing a tortious act in the state; (2) causing injury to persons or property within the state arising out of an act or omission by the defendant outside the state; (3) breaching a contract in the state by failing to perform acts required by the contract to be performed in the state; and (4) doing business in the state.

1 775 F. App’x 545, 547 (11th Cir. 2019). 
2 Id. 
3 Id. 
4 Id. 
5 Id. at 548.
The court rejected each of the alleged bases for jurisdiction under the long-arm statute. First, the court held that Cirrus did not commit a tortious act in Florida because the manufacture and sale of the aircraft took place outside of Florida and the plaintiffs did not allege that Cirrus “did anything fraudulent or otherwise tortious in Florida.”  

Second, the court held that the plaintiffs’ claims did not arise out of any injuries caused in Florida. Third, the court held that Cirrus did not breach a contract by failing to perform acts that were required to be performed in Florida. While Cirrus entered into a contract with one of the plaintiffs, Robert Hinkle (or his LLC for the aircraft), the plaintiffs did not allege that the sales contract required Cirrus to perform any actions in Florida or that Cirrus failed to perform actions that were required to be performed in Florida under the contract.

As to the fourth prong – doing business in the state – the court held that the fact that Cirrus engages in business in Florida was irrelevant because the plaintiffs’ causes of action did not arise out of that alleged business activity. Although Mr. Hinkle owned a home in Florida when he purchased the aircraft, he did not purchase the aircraft through Cirrus’ Florida sales representative. Instead, he went through a Cirrus sales representative located in Virginia. Further, although Mr. Hinkle purchased the aircraft through an LLC he registered in Florida, the aircraft was delivered in Minnesota. Thus, there was no evidence that any of the plaintiffs’ causes of action arose out of Cirrus’ business conducted in Florida. The court also noted that even if Mr. Hinkle purchased the aircraft because of Cirrus’ business presence in Florida, it would not mean that the plaintiffs’

---

6 Id.
7 Id.
8 Id.
9 Id. at 548-49.
10 Id. at 549.
11 Id.
12 Id.
causes of action “arise out of” that business activity.\textsuperscript{13} “This is the fundamental problem with the [plaintiffs’] arguments: no matter how involved Cirrus may be in the state of Florida, because the [plaintiffs] did not demonstrate a direct affiliation, nexus, or substantial connection between that involvement and their causes of action, specific jurisdiction is not proper.”\textsuperscript{14}

The plaintiffs did not argue on appeal for general personal jurisdiction other than to preserve such an argument if the case had been remanded for jurisdictional discovery.\textsuperscript{15} The court noted that there was no general personal jurisdiction over Cirrus in Florida because it is not incorporated in Florida and does not have its principal place of business in Florida and there was no evidence of other exceptional circumstances.\textsuperscript{16}

The court also denied the plaintiffs’ request for jurisdictional discovery “given the incidental fashion in which the request was made.”\textsuperscript{17} The court noted that the plaintiffs did not formally move for jurisdictional discovery, did not set forth what types of facts they wished to discover if given the opportunity, and only asked for jurisdictional discovery as an alternative to the granting of Cirrus’ motion to dismiss.\textsuperscript{18}

\begin{itemize}
\end{itemize}

\textit{Honda Jet Limited, LLC v. Honda Aircraft Co.} arose from alleged defects in a jet the plaintiff purchased from the defendant manufacturer, Honda Aircraft Company, LLC (“Honda”).\textsuperscript{19} In 2006, the plaintiff signed a purchase agreement with Honda for the purchase of a small twin-engine private jet (“the Jet”). The model jet that the plaintiff agreed to purchase was still in

\begin{itemize}
\item[\textsuperscript{13}] Id.
\item[\textsuperscript{14}] Id.
\item[\textsuperscript{15}] Id. at 550.
\item[\textsuperscript{16}] Id.
\item[\textsuperscript{17}] Id.
\item[\textsuperscript{18}] Id.
\item[\textsuperscript{19}] No. 3:19-cv-3030, 2019 WL 3948105 (W.D. Ark. Aug. 21, 2019).
\end{itemize}
development at the time.\textsuperscript{20} In 2017, Honda delivered the Jet to the plaintiff in North Carolina.\textsuperscript{21} The plaintiff alleged that the Jet was delivered with various defects that required extensive and expensive diagnostics and repairs.\textsuperscript{22} Honda removed the case to federal court and moved to dismiss for lack of personal jurisdiction.\textsuperscript{23}

As an initial matter, the court held that it did not have general personal jurisdiction over Honda because the defendant did not have its principal place of business in Arkansas, was not incorporated in Arkansas, and there were no exceptional circumstances establishing general personal jurisdiction over it in Arkansas.\textsuperscript{24}

The court held that there was no specific personal jurisdiction over Honda because the plaintiff’s causes of action did not arise out of any actions Honda took in Arkansas. The court noted that (1) the original sale of the Jet took place in Kansas and North Carolina; (2) various amendments to the purchase agreement invoked the laws of North Carolina; (3) all communications between the parties during the eleven intervening years between purchase and delivery of the Jet were mailed to Kansas addresses; and (4) the Jet was manufactured in North Carolina and delivered to the plaintiff in North Carolina.\textsuperscript{25} The only connection the lawsuit had to Arkansas was the residence of the plaintiff’s owner.\textsuperscript{26} Such a connection to the forum was insufficient to confer personal jurisdiction over Honda because the plaintiff cannot be the only link between the defendant and the forum.\textsuperscript{27}

\begin{itemize}
\item \textsuperscript{20} \textit{Id.} at *1.
\item \textsuperscript{21} \textit{Id.}
\item \textsuperscript{22} \textit{Id.}
\item \textsuperscript{23} \textit{Id.}
\item \textsuperscript{24} \textit{Id.} at *2.
\item \textsuperscript{25} \textit{Id.} at *3.
\item \textsuperscript{26} \textit{Id.} (citing Walden v. Fiore, 571 U.S. 277, 285 (2014)).
\item \textsuperscript{27} \textit{Id.}
\end{itemize}
The plaintiff pointed to three additional contacts between Honda and Arkansas to support its *prima facie* showing of personal jurisdiction. The plaintiff alleged that another Arkansas resident owned the same model aircraft and that Honda personnel traveled to Arkansas to make repairs on another owner’s aircraft. The court rejected that argument on the basis that those facts had no relevance to the issues in the plaintiff’s complaint.\(^{28}\) The plaintiff also pointed to Honda’s actions contracting with an Iowa-based third party to travel to Arkansas and make repairs to the Jet and Honda once provided a pilot to fly the Jet from North Carolina to Arkansas after repairs were made to the Jet in North Carolina. The court held that those contacts were also insufficient to make a showing of specific jurisdiction because none of them caused the harm that formed the basis of the plaintiff’s allegations.\(^{29}\) The court noted that the plaintiff was not suing Honda for making repairs to the Jet; the plaintiff was suing for damages resulting from alleged manufacturing and design defects by Honda in North Carolina.\(^{30}\)

The court also denied the plaintiff’s request for jurisdictional discovery.\(^{31}\) The plaintiff requested that it have the opportunity to conduct limited jurisdictional discovery if the court was inclined to grant the defendant’s motion. In denying the request, the court reasoned that the plaintiff did not explain what such jurisdictional evidence might be and, in light of the available facts, the court could not imagine any relevant facts that would be uncovered during jurisdictional discovery.\(^{32}\) The court mentioned in *dicta* that it had the power to transfer the case to another district in which the case could have been brought if doing so would be in the interest of justice and suggested that the Middle District of North Carolina (where the defendant manufactured the

\(^{28}\) *Id.* at *3*.

\(^{29}\) *Id.*

\(^{30}\) *Id.* at *3-4*.

\(^{31}\) *Id.* at *5*.

\(^{32}\) *Id.*
Jet) would be an appropriate venue for such a transfer. However, because the plaintiff did not request such a transfer, the court dismissed the case without prejudice for lack of personal jurisdiction.


Olympic Air, Inc. v. Helicopter Tech. Co. concerned the crash of an MDHI Model 369D helicopter (“the Helicopter”) near Oslo, Washington. The plaintiffs alleged that one of the rotor blades failed and caused the crash. The rotor blade was manufactured by defendant Helicopter Technology Company (“HTC”) and sold by HTC in October 2012 to Olympic Air. The plaintiffs brought product liability claims against defendant MD Helicopter Inc. (“MDHI”), the Type Certificate Holder for the model 369D aircraft, based on HTC’s reliance on the rotor blade designs promulgated by MDHI and MDHI’s creation and distribution of service instructions, bulletins, and other advisories that allegedly failed to provide adequate warning to users of signs of imminent rotor blade failure. MDHI’s legal predecessor, Hughes Helicopters, manufactured the Helicopter in 1979. As the Type Certificate Holder, MDHI was required to publish safety bulletins and produce manuals and has the right to produce and sell the product line. MDHI moved to dismiss for lack of personal jurisdiction.

As an initial matter, the court held that the plaintiffs could not impute the actions of MDHI’s predecessor corporations for purposes of personal jurisdiction. The court noted that to

---

33 Id.
34 Id.
36 Id. at *1.
37 Id.
38 Id.
39 Id. at *2.
40 Id.
41 Id.
establish personal jurisdiction, the plaintiffs’ claim must arise out of or relate to MDHI’s forum-related activities. Thus, the plaintiffs’ allegations concerning the manufacture of the Helicopter by MDHI’s predecessors and the plaintiffs’ stream of commerce arguments were irrelevant to the court’s jurisdictional analysis.42

Regarding MDHI’s activities in the forum, the plaintiffs pointed to the fact that MDHI processes warranty claims for customers in Washington either directly or through their distributors and service centers. The court rejected this argument on the basis that the plaintiffs’ claim did not arise out of MDHI’s processing of any warranty claims.43 The plaintiffs also argued that MDHI purposefully availed itself of the privilege of doing business in the State of Washington by selling products and replacement parts in the forum, directly and through distributors. The court rejected this argument as the plaintiffs conceded that the rotor blade at issue was manufactured by HTC and sold by HTC to Olympic Air in October 2012 and the plaintiffs’ claims did not arise out of MDHI’s sale of products and replacement parts in the State of Washington.44

The plaintiffs further argued that MDHI was subject to specific personal jurisdiction in Washington because it issued instructions, guidelines, warnings, cautions, and service information concerning the use of the subject model helicopter and component parts, including the subject main rotor blade to Olympic Air in Washington.45 The plaintiffs pointed to the fact that since 1980, Olympic Air maintained, serviced, inspected, and operated its MDHI helicopters pursuant to the manuals and service bulletins sold directly by MDHI or its predecessors. The manuals were sent by MDHI to Olympic Air in Shelton, Washington or were available electronically via paid

42 Id.
43 Id. at *3.
44 Id.
45 Id.
access. Olympic Air relied on the manuals for servicing the Helicopter’s rotor blades. The plaintiffs also noted that MDHI mailed a service bulletin package to Olympic Air that contained a complete set of all service bulletins through February 5, 2010 and Olympic Air regularly referred to this package while servicing and maintaining the helicopter, including the allegedly defective rotor blade. In response, MDHI argued that such contacts could not be used to confer jurisdiction over it in Washington because it was obligated under federal law as a Type Certificate Holder to make the manuals and instructions available to owners and operators in order to comply with mandatory airworthiness standards and it could not control where Olympic Air was located.

The court agreed with MDHI and held that MDHI did not purposefully avail itself of the privilege of conducting activities in the forum or purposefully direct its activities at the State of Washington by sending materials to Olympic Air to comply with its obligations as a Type Certificate Holder. Thus, the court did not have specific personal jurisdiction over MDHI where the only contact between MDHI and Washington was the sending of materials required by federal law because of where Olympic Air chose to be located.

II. Death on the High Seas Act (“DOHSA”)

The Death on the High Seas Act, 46 U.S.C. § 30301, et seq. (“DOHSA”) provides a statutory remedy for wrongful deaths occurring on the high seas beyond three nautical miles from the shore of the United States. DOHSA preempts all state and general maritime wrongful death actions and provides the exclusive remedy for recovery for deaths on the high seas. Pursuant to

\[\text{References:}\]

46 Id.
47 Id. at *3-4.
48 Id. at *4.
49 Id.
section 30303 of DOHSA, recovery is limited to fair compensation for the pecuniary losses sustained by the individual for whose benefit the action is brought. In general, non-pecuniary damages such as pain and suffering, mental anguish, and loss of society are not recoverable under DOHSA.\textsuperscript{52} Section 30307(b) of DOHSA provides for expanded damages available for commercial aviation accidents.\textsuperscript{53}

In \textit{Mierzwa v. Cirrus Design Corp.},\textsuperscript{54} the Minnesota district court granted the defendant aircraft manufacturer’s motion to apply DOHSA to the plaintiffs’ claims arising out of the fatal crash of a Cirrus SR22 aircraft in the territorial waters of the Bahamas. It was undisputed that the accident occurred in the territorial waters of the Bahamas and that the accident was not a commercial aviation accident.\textsuperscript{55} The plaintiffs opposed the motion on the basis that DOHSA does not apply to aircraft accidents in foreign territorial waters because the territorial waters of a foreign nation are not the “high seas” for purposes of DOHSA.\textsuperscript{56}

In holding that DOHSA applies to accidents in foreign territorial waters more than three nautical miles from the United States, the Minnesota court conducted an extensive analysis of the legislative history and various courts’ interpretation of DOHSA. The court found significant that almost all courts addressing this issue throughout the history of DOHSA have held that DOHSA covers wrongful deaths in foreign territorial waters.\textsuperscript{57} Further, the court noted that Congress chose

\textsuperscript{52} \textit{Martin}, 216 F. Supp. 3d at 1368 (citing \textit{Dooley}, 524 U.S. at 116).
\textsuperscript{53} \textit{See also} Conference Report, Wendall H. Ford Aviation Investment and Reform Act for the 21st Century at 30-31 (Statement of Sen. Specter) (Mar. 8, 2000) (describing that DOHSA provides “more equitable treatment for families of passengers involved in international aviation disasters.”).
\textsuperscript{54} 69DU-CV016-2716 (Minn. Dist. Ct. May 21, 2019).
\textsuperscript{55} \textit{Id.} at *3.
\textsuperscript{56} \textit{Id.}
not to include language exempting foreign territorial waters from DOHSA at the time the statute was amended in 2000 and 2006, thus indicating that it was in agreement with the case law applying DOHSA to accidents in those waters.\textsuperscript{58} For example, the relevant part of DOHSA, section 30302, was amended in 2006 to change the applicable boundary from “beyond a marine league from the shore of any State, or the District of Colombia, or the territorial dependencies of the United States” to its current language of “occurring on the high seas beyond 3 nautical miles from the shore of the United States.”\textsuperscript{59} Congress made no mention of foreign territorial waters in the 2006 amendment. The court also noted that if it were to follow the plaintiffs’ definition of high seas as to not include foreign territorial waters, it would render the phrase “beyond three nautical miles from the shores of the United States” superfluous.\textsuperscript{60} Further, the court held that “[d]etermining DOHSA applies to the accident in this matter in the territorial waters of the Bahamas would support Congress’ underlying purpose to provide a uniform, consistent remedy for wrongful deaths at seas while preserving the remedies existing under State laws.”\textsuperscript{61} Accordingly, the court held that DOHSA applied to the plaintiffs’ claims and preempted any remedies available to the plaintiffs under Minnesota law.\textsuperscript{62}

\textsuperscript{58} Id. at *7.

\textsuperscript{59} Id. at *8 (citing Pub. L. 109-304, § 6 (Oct. 6, 2006), 46 U.S.C. § 30302 (2006)).

\textsuperscript{60} Id. at *8.

\textsuperscript{61} Id.

\textsuperscript{62} Id.
III. **Airline Deregulation Act (“ADA”) (49 U.S.C. § 41713)**

(a) *Scarlett v. Air Methods Corp.*, 922 F.3d 1053 (10th Cir. 2019)

In *Scarlett v. Air Methods Corp.*, two groups of plaintiffs appealed the dismissal of two putative class action complaints filed against air ambulance companies as preempted by the ADA. The defendants provided air ambulance services to the plaintiffs and/or their minor children. The plaintiffs disputed their obligation to pay the full amounts charged by the defendants on the basis that the plaintiffs never agreed with the defendants on a price for their services. The plaintiffs filed suit under the Class Action Fairness Act, 28 U.S.C. § 1332(d), to determine what, if any, amounts they owed the defendants and to recover any excess payments already made to the defendants. The defendants moved to dismiss arguing that the ADA preempted all of the plaintiffs’ claims.

As an initial matter, the court held that the defendants were entitled to raise an ADA preemption defense because they provided intrastate air transportation and were therefore “air carriers” for purposes of the ADA.

After establishing that the defendants could assert an ADA preemption defense, the court then turned its attention to whether the plaintiffs’ breached of implied contract claims (based on the allegation that the defendants charged more than the reasonable value of their services) were preempted by the ADA. One group of plaintiffs (referred to as the “Scarlett plaintiffs”) alleged that the implied contracts arose under state common law. The other group of plaintiffs (referred to as the “Cowen plaintiffs”) alleged that the implied contracts arose under federal common law. The court upheld the dismissal of the Cowen plaintiffs’ implied contract claims on the basis that,

---

63 922 F.3d 1053, 1057 (10th Cir. 2019).
64 *Id.*
65 *Id.*
66 *Id.* at 1060-61.
pursuant to *American Airlines v. Wolens*, 67 no federal common law exists to resolve the contract claims relating to airline rates.68

As to the Scarlett plaintiffs’ claims of implied contracts under state law, the court noted that the critical distinction for purposes of the preemption analysis was whether the implied contracts at issue were implied-in-law or implied-in-fact. The court held that implied-in-law contracts are “necessarily preempted for lack of mutual assent.”69 In contrast, a breach of contract claim premised on an implied-in-fact contract could survive the ADA’s preemption provision.70 The court held that if parties are permitted under the relevant state law to contract around the implied price term and if the implied price term effectuates the intentions of the parties or protects their reasonable expectations, then the claim is not preempted and the court could supply an implied price term consistent with the parties’ agreement when the implied-in-fact contract was formed.71

Applying that framework, the court upheld the district court’s dismissal of the Scarlett plaintiffs’ implied contract claim on the basis that the Scarlett plaintiffs failed to set forth any facts on appeal warranting a reversal of the district court’s fact-intensive inquiry and determination that an implied-in-fact contract was not formed.72 The court noted that “[t]he [plaintiffs’] argument is accompanied by a single citation to the record and no citation to applicable state contract law, which does not sufficiently support its argument that it adequately alleged the existence of implied-in-fact contracts.”73

---

68 *Id.* at 1064.
69 *Id.* at 1065.
70 *Id.*
71 *Id.*
72 *Id.* at 1066-67.
73 *Id.* at 1067.
Both groups of plaintiffs also sought declarations that they had no contractual obligation to pay the defendants’ bills because they never agreed on a price for the air ambulance services.\textsuperscript{74} The court held that the ADA does not prohibit a court from declaring that, because the parties never agreed on a price, no express or implied-in-fact contracts were formed.\textsuperscript{75} The court noted that to enter such a declaration a court would only need to examine whether there was the necessary mutual assent to form a contract. The court also held that the district court erred in interpreting the plaintiffs’ declaratory judgment claim narrowly – to seek only a declaration that “federal common law is applicable.”\textsuperscript{76} The court remanded this issue to the district court to examine each of the Cowen plaintiffs’ allegations under the applicable state law to determine whether an express or implied-in-fact contract was formed.\textsuperscript{77}

In \textit{dicta}, the court discussed the fact that although the ADA limits individuals’ abilities to challenge the prices charged by air ambulance companies, such individuals are not without recourse. The court explained that once an air ambulance company asserts that an individual has a contractual obligation to pay his bill, that individual can sue for declaratory relief to confirm that he is so obligated. Further, if an air ambulance company has breached a contractual duty owed to one of its patients, that patient can sue for breach of contract. The court also suggested that individuals might be protected against improper debt collection methods by the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p, or an analogous state statute and the court

\textsuperscript{74} The Scarlett plaintiffs did not discuss the declaratory judgment claim in their briefing on appeal and therefore abandoned that issue. Therefore, the court only addressed the Cowen plaintiffs’ request for declaratory relief.  
\textsuperscript{75} Id. at 1067.  
\textsuperscript{76} Id. at 1068.  
\textsuperscript{77} Id.
noted that Congress recently expanded the Department of Transportation’s authority to regulate air ambulances.\textsuperscript{78}

The court rejected the plaintiffs’ argument that the ADA, as applied to air ambulance carriers and their patients, violates the Due Process Clause of the Fifth Amendment of the U.S. Constitution. The court held that it is undisputed that since Congress deregulated the air travel industry by passing the ADA, the price of most air travel has fallen. Thus, the court reasoned “[t]hat the ADA did not cause its desired effect in all corners of the air travel industry does not render the ADA’s preemption provision irrational. At most, the high price of air ambulance services shows that the ADA is imperfect. Such a showing does not establish a substantive due process violation.”\textsuperscript{79}

Finally, the court rejected the Scarlett plaintiffs’ argument that the defendants were judicially estopped from raising the ADA-preemption provision as a defense to their contract claims because the defendants filed state-court breach of contract suits in multiple states to collect their charges and they filed proof of claim in bankruptcies and claims against estate all alleging a right to recover based on contracts and not asserting preemption.”\textsuperscript{80} The court declined to apply judicial estoppel because “we have held that judicial estoppel only applies when the position to be stopped is one of fact, not one of law.”\textsuperscript{81}

(b) \textit{Shebley v. United Cont’l Holdings, Inc., 357 F. Supp. 3d 684 (N.D. Ill. 2019)}

In \textit{Shebley v. United Cont’l Holdings, Inc.}, the plaintiffs alleged that the defendant airline discriminated against them on the basis of their perceived religion, race, color, and national origin by wrongfully removing them from their flight in violation of the Airline Deregulation Act

\textsuperscript{78} \textit{Id.} at 1069.
\textsuperscript{79} \textit{Id.} at 1070.
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} \textit{Id.} (citing BancInsure, Inc. v. FDIC, 796 F.3d 1226, 1240 (10th Cir. 2015)).
The plaintiffs alleged that while travelling from Chicago to Washington, D.C. for a family vacation, they were forced to disembark and miss their flight due to an argument with the flight crew regarding whether their youngest child could be seated in a “booster seat” on the plane. The plaintiffs alleged that the defendants discriminated against them on the basis of race in making the decision to remove them from their flight.

In Count I of the complaint, the plaintiffs asserted a claim under § 40127(a) of the ADA which prohibits an air carrier from “subject[ing] a person in air transportation to discrimination on the basis of race, color, national origin, sex, or ancestry.” The defendants argued the claim should be dismissed because there is no private cause of action under § 40127(a). The court held that although the Seventh Circuit has not addressed whether § 40127(a) authorizes a private cause of action, it agreed with the reasoning of the majority of federal courts confronted with the issue that no private right of action exists because the language of the statute focuses directly on the entity regulated, rather than the individual protected.

In Count II of the complaint, the plaintiffs asserted a claim pursuant to 42 U.S.C. § 1981, alleging (1) that they are members of a racial minority, (2) that the defendants intended to discriminate against them on the basis of their race, and (3) that the alleged discrimination related to the making and forming of a contract. In analyzing this issue, the court focused on whether the plaintiffs sufficiently alleged intentional racial discrimination as oppose to “a customer service
dispute” that arose from the plaintiffs’ “repeated failure to follow crewmember instructions.” The plaintiffs alleged that their family was “unfairly targeted” due to their race and that even though they followed instructions and treated the flight attendants politely, they were asked to leave the plane and were not provided with a reasonable explanation regarding how they failed to follow instructions or how they caused a flight safety issue. The court held that the plaintiffs’ allegations gave rise to a § 1983 claim because “[w]hile the link between their mistreatment and their claim of racial discrimination is somewhat conclusory at this time, the [plaintiffs] have provided sufficient factual information to put Defendants on notice of their claim, which is all they need to do at this point in the litigation.” The court also commented that the defendants could potentially obtain summary judgment on this claim if the evidence shows that they removed the plaintiffs from the flight for a non-discriminatory reason or if the plaintiffs cannot put forward enough evidence to support that the decision was based on their race.

In Count III of the complaint, the plaintiffs asserted a Title VI discrimination claim. The court held that to properly plead their claim under Title VI, the plaintiffs must plausibly allege that the defendants received “federal financial assistance” within the meaning of Title VI. The plaintiffs originally argued that the defendants received federal financial assistance under the Air Transportation Safety and Systems Stabilization Act. The defendants countered that the Act merely compensated them for losses suffered from the September 11, 2001 terrorist attacks and thus does not constitute federal financial assistance. In response, the plaintiffs sought leave to amend their complaint to state that the defendants receive “some type” of federal funding and to

---

87 Id. at 692.
88 Id.
89 Id.
90 Id. at 693.
conduct limited discovery to substantiate that allegation. The court rejected this argument, noting that receipt of federal funds does not automatically render a defendant liable under Title VI. The court held that with respect to private entities such as the defendants, Title VI liability does not apply to all of their operations and activities unless federal financial assistance was extended to the corporation as a whole. Thus, that the plaintiffs failed to allege that the defendants received federal funding for the specific flight at issue or that defendants as a whole receive federal funding.

The court also noted that even if the plaintiffs discovered that the defendants received some federal funding, they would still lack standing under Title VI because: (1) the plaintiffs did not plead that they were the intended beneficiaries of any federal financial assistance received by the defendants, as required for standing under Title VI and (2) the plaintiffs failed to allege that the defendants operated a program or activity that discriminated against them, as oppose to discriminatory actions by an employee. According to the plaintiffs, only the captain and flight attendants on board had actual knowledge of the discriminatory conduct, which was insufficient to sustain a Title VI claim against the defendants. Accordingly, the Court dismissed the Title VI claim without prejudice giving the plaintiffs an opportunity to amend their complaint to address the pleading deficiencies.

IV. Government Liability

Under the Federal Tort Claims Act (“FTCA”), the United States can be liable for damages “caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his [or her] office or employment, under circumstances where the United

---

91 Id.
92 Id. at 693-94.
93 Id. at 694.
94 Id.
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.”


In *Christopher v. United States*, the court found that a Pilot Proficiency Examiner (“PPE”) was not an employee of the Federal Aviation Administration (“FAA”) because the FAA did not control the PPE’s day-to-day activities. Robin Smith, a PPE, was authorized by the FAA to conduct pilot proficiency checks under 14 C.F.R. § 61.58. Neither Smith nor his company had a contract with the FAA, and the FAA did not pay Smith or provide him with any equipment. Smith was solely responsible for determining whether a pilot met FAA standards, and he provided the results of each check to the pilot without submitting anything to the FAA. On June 18, 2014, Smith was performing a proficiency check for two pilots, William Christopher and Kenneth Rousseau, when they unfortunately crashed. Lori Christopher, the surviving spouse of William, sued the United States under the FTCA, alleging that Smith was an employee of the FAA and that his negligence caused the crash.

The United States moved for summary judgment, arguing that Smith was not an FAA employee and, therefore, the United States could not be liable under the FTCA. The court noted

---

97 *Id.* at *1.
98 *Id.*
99 *Id.*
101 *Christopher*, 2018 WL 5923764, at *1-2.
102 *Id.* at *2*. Ms. Christopher also alleged that the FAA was negligent in certifying Smith as a PPE, but she later conceded that there was no genuine dispute on the issue.
103 *Id.*
that the relevant test in the Eleventh Circuit was the “control test,” and “a person is an employee of the Government if the Government controls and supervises the day-to-day activities of the alleged tortfeasor during the relevant time.”

Ms. Christopher did not dispute that the relationship between Smith and the FAA “lacked the classic indicia of employment.” For example, as stated above, the FAA did not pay Smith a salary or give him equipment. She also did not dispute that the FAA did not control, or have the authority to control, certain day-to-day activities, like communicating with pilots and scheduling flight checks. She instead argued that Smith was an employee “because the FAA controls, or has authority to control, how PPEs administer pilot proficiency checks.”

Ms. Christopher supported her argument with two main contentions. First, she pointed to FAA standards, specifically the FAA’s Airline Transport Pilot and Aircraft Type Rating Practical Test Standards for Airplane, and argued that the standards “mandate the tasks or maneuvers that a pilot must complete during a proficiency check.” Second, she pointed to the supervision that the FAA exerts over PPEs, that is, the FAA’s “authority to certify PPEs, to terminate a PPE’s certification, and to observe a PPE at any time,” among other things. The court rejected both contentions.

Concerning the first, the court noted that a “PPE is generally free to determine how she will actually implement the tasks and maneuvers during the check,” and “an individual does not

---

104 Id.
105 Id.
106 Id.
107 Id.
108 Id.
109 Id. at *3.
110 Id.
111 Id.
qualify as a Government employee for purposes of the FTCA simply because the individual’s work on behalf of a Federal agency requires compliance with specific regulations or standards set by the Government.’’

The court cited the Second Circuit as support for its position: “[T]he question is not whether [the individual] must comply with federal regulations and apply federal standards, but whether [his] day-to-day operations are supervised by the Federal Government.”

Concerning the second contention, the court pointed out the difference between “general oversight” and the “authority to supervise or control” daily activities, and although the FAA may oversee PPEs, it does not control their day-to-day activities. The court compared its case to *Patterson & Wilder Construction Co. v. United States*, 226 F.3d 1269 (11th Cir. 2000), where DEA agents directed “where and when [two specific] pilots would fly, . . . provided the pilots with the exact coordinates for [a] drug deal, . . . [and] arranged for a particular drug dealer to meet the pilots at [a] chosen location and time,” among other things. The court noted, “[n]o similar evidence exists in this case to suggest that the FAA dictates the day-to-day operations of PPEs. Instead, the evidence shows that the FAA provides PPEs with an objective, i.e., what tasks and maneuvers to test during a pilot proficiency check, and then leaves it to PPEs ‘to achieve that objective however they [see] fit...’ ”

Because no genuine dispute existed that the PPE was not an FAA employee, the court granted the United States’ motion for summary judgment.

---

112 *Id.*
113 *Id.* (citing Leone v. United States, 910 F.2d 46, 50 (2d Cir. 1990)).
114 *Id.*
115 *Id.*
116 *Id.* (citing Patterson & Wilder Const. Co. v. United States, 226 F.3d 1269, 1275 (11th Cir. 2000)).
117 *Id.* at *4.
(b) Ow v. United States, No. 17-CV-00733-SK, 2018 WL 6267842 (N.D. Cal. Sept. 21, 2018)

In Ow v. United States, the court held that the firefighter’s rule applied when a firefighter was injured while responding to the Oakland International Airport as part of training exercise.118 Mitchell Ow, the firefighter, worked for a specialized unit of the Oakland Fire Department that responded to aircraft incidents at the airport.119 The FAA employed controllers to work at the air traffic control tower on the airport.120 By letter, the fire department, FAA, and Port of Oakland (which was a division of the City of Oakland that managed the airport) agreed that, when there was a drill, the control tower was to “stop all ground traffic that [would] conflict with enroute [firefighter] vehicles responding to the emergency area.”121 Further, the letter stated that the firefighters were to monitor communications between the control tower and the aircraft during a drill.122

On June 24, 2014, Mitchell Ow was driving a fire truck at the airport as part of a drill.123 While he was driving, a jet was on the taxiway.124 The control tower advised the pilots of the jet to stop at a certain point.125 At some time, either before or after the jet had stopped, Mitchell Ow turned the fire truck, allegedly to avoid colliding with the jet, and it rolled over.126

The plaintiffs sued the United States under the FTCA, alleging that the controllers were negligent in their communications with the firefighters and the jet, thereby causing the accident.127

---

119 Id. at *1.
120 Id.
121 Id.
122 Id.
123 Id. at *2.
124 Id.
125 Id.
126 Id.
127 Id.
The United States denied liability under the firefighter’s rule and moved for summary judgment.128 Under the firefighter’s rule, the public owes a limited duty of care to public safety officers.129 The public cannot be liable for negligently causing the fire or emergency that causes injury to the public safety officer.130 Public safety officers assume the risks of their jobs, and the rule applies both to an emergency and a training.131 The rule is based on public policy.132

In California, there are three exceptions, which the court found did not apply.133 The first exception is the “independent acts” exception under common law.134 Under this exception, the public could be liable to a public safety officer if the negligence that injured the officer was independent from the negligence that caused the officer’s presence in the first place.135 The court did not find that the independent acts exception applied because the danger of colliding with a jet, the court stated, as well as the alleged negligence of the controllers was “part of the training and job,” not an independent act.136 But even if the communications of the controllers were independent acts, the court continued, Mitchell Ow could not sue the United States because of the rationale in City of Oceanside v. Superior Court, 96 Cal. Rptr. 2d 621 (Ct. App. 2000).137 In Oceanside, the court held that a lifeguard employed by one entity could not sue lifeguards employed by another public entity and the other entity when they were involved in a joint rescue operation, the rationale being that it would impair public safety because officers would be scared

---

128 Id. at *3.
129 Id.
130 Id.
131 Id.
132 Id.
133 Id. at *4.
134 Id.
135 Id.
136 Id. at *5.
137 Id.
that other officers would sue them. The court in *Ow* extended that rational to air traffic controllers, further finding that the “independent acts” exception did not apply.

The second exception fell under section 1714.9(1) of the California Civil Code. Under that section, the firefighter’s rule does not apply when “the conduct causing the injury occurs after the person knows or should have known of the presence of the peace officer, firefighter, or emergency medical personnel.” The court referred to its earlier discussion concerning the “independent acts” exception under the common law, and stated the alleged negligence of the controllers occurred “during and as part of” the training, not “after,” so the statutory exception did not apply. The court continued that, according to California Supreme Court precedent, a “person” under the statute did not include “public safety members who [were] jointly involved engaged in the discharge of their responsibilities,” like what was happening between the firefighters and controllers. The policy reasons behind the interpretation were similar to those in *Oceanside*: public safety could be compromised during joint operations and the cost spreading rational under the rule could be diminished. As such, a controller was not a “person” under the statute.

The third exception fell under section 1714.9(2) of the California Civil Code. Under that section, the firefighter’s rule does not apply when “the conduct causing injury violates a statute, ordinance, or regulation, and the conduct causing injury was itself not the event that

---

138 *Id.*
139 *Id.*
140 *Id.* at *6.*
141 *Id.*
142 *Id.*
143 *Id.* (citing Calatayud v. California, 959 P.2d 360 (Cal. 1998)).
144 *Id.*
145 *Id.*
146 *Id.*
precipitated either the response or presence of the peace offer, firefighter, or emergency medical personnel."147 The court held that the exception did not apply because the plaintiffs could not point toward statute, ordinance, or regulation that was violated.148

Because the firefighter’s rule applied without exception, the court granted the United States’ motion for summary judgment.149

V. *Forum Non Conveniens*

The *forum non conveniens* ("FNC") doctrine allows a court to decline to hear a case even though jurisdiction and venue are proper, based on the theory that the action should be tried in another judicial forum for the convenience of the litigants and the witnesses.150 The defendant has the burden of proving all elements necessary for the court to dismiss a claim on these grounds.151 To determine whether dismissal is appropriate, the court first should evaluate whether an adequate alternative forum is available. It is well-settled that the availability and adequacy of a certain forum is not contingent on whether the foreign forum offers the same remedies as the United States forum, and is not focused on the nuances of each party’s respective advantages or disadvantages if suit is brought abroad.152 Instead, the determinative factor is whether or not the parties will be deprived of all remedies or treated unfairly in a particular forum.153 If the court determines that an available and adequate forum exists, it must then balance factors relative to the convenience of the litigants ("the private interest") and the convenience of the forum ("the public interest") to determine which location is most appropriate for trial.154

147 *Id.*
148 *Id.*
149 *Id.* at *7.*
154 De Melo v. Lederle Labs., 801 F.2d 1058, 1060 (8th Cir. 1986).

This multi-district litigation concerned 40 lawsuits filed in various districts across the United States seeking justice for the decedents of Malaysian Airlines Flight MH370.155 After the completion of limited initial discovery, the defendants moved to dismiss on FNC grounds, alleging that the cases were better suited to be litigated in Malaysia than in the United States.156 Defendants argued that other related cases were currently pending in Malaysian courts, while Malaysia was both a signatory to the Montreal Convention and the domicile and principal place of the business of the airline. Malaysia also had a significant interest in resolving claims asserted against its national carrier as a result of one of the largest aviation disasters in the country’s history. Malaysian air traffic controllers were the last persons to have direct contact with the vanished plane’s pilot and crew, who were Malaysian citizens, and Malaysian authorities led both criminal and civil investigations following the crash.157 Plaintiffs argued that the United States was a superior forum to Malaysia since the plane was never located and Malaysian investigators could not figure out the cause of its disappearance, leading to a dearth of physical evidence in Malaysia.158 Plaintiffs instead alleged that the plane’s manufacturer, Boeing, by virtue of its status as a domestic American company, gave the United States a strong public interest in ensuring that Boeing was producing safe airplanes.159

The court sided with the defendants, agreeing that the United States would be an inconvenient forum for the litigation of MH370 claims.160 Malaysia was deemed to be an available and adequate forum based on the related cases already pending there, while both public and private

---

156 *Id.*
157 *Id.* at 39.
158 *Id.* at 35.
159 *Id.*
160 *Id.* at 37.
interests “overwhelming[ly]” weighed in favor of conducting the litigation in Malaysia since the country maintained “myriad connections” to the missing airplane and was home to “potentially vast” amounts of materials, information and witnesses. The court noted that although three plaintiffs in the MDL case had connections to the United States, and four of the related decedents were either citizens or legal residents of the country, the United States’ interest in the litigation “relatively minor,” while filing there would present complex choice of law questions. Finally, the court held that Malaysia was an available and adequate forum for the litigation of claims against Boeing since the company readily agreed to be subject to suit in the country.


This case arose out of injuries sustained by decedent Fahmy Eldeeb during a trip from Minnesota to Egypt. Mr. Eldeeb, a resident of Minnesota, had been diagnosed with terminal pancreatic cancer and was flying to his native Egypt to live out his last days. During a layover in Paris, he was denied access to a wheelchair, which caused him to miss his connecting flight. Mr. Eldeeb was re-booked on a later flight to Cairo, but was separated for a week from his checked bags containing his cancer medication. Shortly after, Mr. Eldeeb died of complications related to pancreatic cancer, which Mr. Eldeeb’s family claimed was hastened by his lack of access to a wheelchair in Paris.

Mr. Eldeeb’s family brought suit against Air France in the District of Minnesota pursuant to the Montreal Convention. Delta moved to dismiss on FNC grounds, alleging that Mr. Eldeeb’s

---

161 *Id.* at 39.
162 *Id.* at 40.
163 *Id.* at 49.
connections to Minnesota (where he resided, purchased his tickets, and boarded his departure flight) were not relevant since the case turned on events occurring solely in France. The court decided in favor of Delta, holding that France was an adequate alternative forum because Delta was amenable to suit there, the “private factors” test had been met based on the presence of witnesses and evidence in France; and the “public factors” test had been met due to France’s greater connection to, and investment in, the action. Plaintiff appealed to the Eighth Circuit but ultimately elected to dismiss the appeal.

(c) *Arias Santos v. LATAM Airlines Grp. S.A.*, No. 18-CV-10835 (PKC), 2019 WL 1745778 (S.D.N.Y. Apr. 17, 2019)

Plaintiff Yolanda Arias Santos sustained second and third-degree burns to her body when a flight attendant accidentally spilled scalding hot tea on her during a LATAM flight from New York City to Guayaquil, Ecuador. Ms. Santos brought suit in the Southern District of New York, which LATAM moved to dismiss on FNC grounds. LATAM supported its motion with facts including that that Ms. Santos is a resident and citizen of Ecuador and received medical treatment there for her burns, LATAM maintains its principal place of business in Ecuador, its crew member witnesses all reside there, and the Ecuadorian courts provide an available and adequate forum for the case to be litigated. Plaintiff responded by arguing that Ecuador was an inadequate forum for the litigation because Ecuadorian courts have restrictions on discovery and do not allow Plaintiff the right to a jury trial. Ms. Santos also alleged several relevant connections to the United States, including that she purchased her plane ticket in New York with U.S. dollars, owned

---

165 Id. at *2.
166 Id.
168 Id. at *3.
169 Id. at *4.
a U.S. credit card, and regularly saw a local primary care physician there. Additionally, she had a
B-1 Visa allowing her to travel to the United States and had come to New York to visit family
approximately 30 times in the prior 15 years.  

The court held in favor of LATAM and granted the airline’s Motion to Dismiss, citing the
competence of Ecuadorian judges and LATAM’s willingness to submit to suit there as evidence
that Ecuador was an adequate and available forum. In response to plaintiff’s arguments
regarding Ecuador’s discovery and trial practices, the court noted that “some inconvenience or the
unavailability of beneficial litigation procedures similar to those available in the federal district
courts does not render an alternative forum inadequate.” The court also held that public and
private interest factors weighed in favor of Ecuador, since most relevant evidence and witnesses
were located there and New York had no specific interest in the dispute since none of the parties
resided in the state.

VI. The Montreal Convention

If a passenger is injured or killed while traveling by air on an international itinerary, the
liability issues in any subsequent legal action will be governed by the Montreal Convention. Article 17 of the Convention imposes virtual strict liability on air carriers in the event of accidental
death or bodily injury of a passenger, mandating that “[t]he carrier is liable for damage sustained
in case of death or bodily injury of a passenger upon condition only that the accident which caused
the death or injury took place on board the aircraft or in the course of any of the operations of

170 Id. at *3.
171 Id. at *4.
172 Id. at *8 (citing Blanco v. Blanco Indus. De Venezuela, S.A., 997 F.2d 974, 982 (2d Cir.
1993)).
173 Id. at *5-6.
174 Convention for the Unification of Certain Rules of International Carriage by Air, done at
embarking or disembarking.” 175 Although the treaty itself does not define the meaning of “accident,” the Supreme Court has interpreted the term to mean an unusual or unexpected event or happening that occurs external to the passenger and does not arise from the passenger’s own internal reaction to the usual, normal and expected operation of the aircraft. 176 The Court noted that the definition should be applied flexibly, after assessing all of the circumstances surrounding a passenger’s injury or death, and that only some link in the causal chain of events need be an unusual or unexpected event external to the passenger. 177

Summary judgment in Montreal Convention actions, as with all cases tried in the district courts, is appropriate only when there exists no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. 178 The court must resolve all ambiguities and credit all factual inferences that could rationally be drawn, in favor of the party opposing summary judgment. 179 Although the movant initially bears the burden of showing that there are no genuine issues of material fact, once such a showing is made, the opposing party must produce sufficient evidence to permit a reasonable jury to return a verdict in its favor, identifying specific facts showing that there is a genuine issue for trial. 180


Plaintiff Adel Abba brought suit against British Airways after injuring one of his fingers in a trip-and-fall accident that occurred during a flight from Milwaukee to London. Plaintiff alleged

177 Id.
178 FED. R. CIV. P. 56(a).
that as he walked back to his seat from the lavatory, he encountered a flight attendant manning a beverage cart in the aircraft aisle. As he tried to navigate around the cart, the flight attendant simultaneously pushed the cart to the side in an effort to give him room to pass. Plaintiff claimed that at this point the flight attendant inadvertently pushed her cart “the wrong way,” striking him and causing him to trip and fall. An incident report created subsequent to the accident stated that plaintiff became injured when he tripped over his shoelace struck his hand on the cart. Plaintiff later testified that he had been wearing Velcro shoes during the accident flight and could not possibly have tripped in the manner alleged.\textsuperscript{181}

British Airways moved for summary judgment on grounds that plaintiff’s injuries had not been caused by an accident within the meaning of the Montreal Convention. The airline based its argument on the version of events given in the incident report, arguing that although plaintiff’s injury had been caused by an external event that could be considered unexpected and unusual, British Airways could not be held responsible for an injury caused solely by the acts of its passenger.\textsuperscript{182} The court sided with the plaintiff, emphasizing that it was of no consequence that he had intentionally acted to move past the cart, or that he believed the flight attendant’s actions were inadvertent. The fact that the flight attendant had purposely moved the beverage cart was sufficient to add the necessary “external” element to the chain of causes which led to plaintiff’s injury.\textsuperscript{183} Accordingly, the court held that British Airways could not uphold its burden under F.R.C.P. 56 and denied the airline’s motion for summary judgment.\textsuperscript{184}

\textsuperscript{182} Id. at *3.
\textsuperscript{183} Id.
\textsuperscript{184} Id. at *4.

Plaintiff Darren Sensat sustained severe injuries while boarding a flight from the Dominican Republic to the United States. Plaintiff alleged that as he climbed a set of airstairs leading from the tarmac to the plane, his foot became lodged in a large gap between the tread and riser, causing him to fall forward onto the stairs. Plaintiff elected to proceed with his flight home, but before departure asked a flight attendant to take pictures of the gap, which she did. He was later diagnosed with torn ligaments and tendons in his left foot and ankle that required surgical repair and a cast. Plaintiff brought suit against Southwest Airlines under Article 17 of the Montreal Convention.

Following discovery, the airline moved for summary judgment on grounds that the airstairs had been in a normal condition at the time of the incident and plaintiff’s fall was caused a mere “misstep,” which the airline characterized as an internal reaction to the “usual, normal, and expected operation of the airstairs.” Southwest also asserted that a passenger must show some deviation from “industry standards” or the airline’s “policies and procedures” to demonstrate the occurrence of an unusual event. Plaintiff pointed to the testimony of Southwest’s expert witness, in which the witness conceded that he had never observed any “properly configured” airstairs with a gap in the tread. The court held in favor of plaintiff, finding that he had successfully shown that “some link in the chain was an unusual or unexpected event external to the passenger.” The court pointed out that “where a physical mishap occurs that simultaneously directly injures the plaintiff…there is no need to determine exactly what act of miscalculation by the defendant led to

---

186 Id. at 820.
187 Id. at 817.
188 Id. at 821 (citing Olympic Airways v. Husain, 540 U.S. 644, 652 (2004)).
the injury, as long as there is a contemporaneous physical connection between the unexpected incident and the harm.” 189 Further, there is no requirement that a plaintiff show a violation of airline standards, policies, or procedures in order to prove the occurrence of an accident.190 In dismissing Southwest’s motion, the court concluded that a reasonable jury could find that the gap in the airstairs would be unusual and unexpected to a passenger who had no ability to foresee the hazard.191


This case arose out of injuries suffered by plaintiff Leonise Greig-Powell during a trip from St. Thomas to Trinidad.192 The journey included brief stopovers in Antigua, Guadeloupe, Dominica, Barbados and Grenada, respectively. Plaintiff, a diabetic, missed her connecting flight in Antigua due to a delay in her departure from St. Thomas. LIAT rebooked Ms. Greig-Powell on the next available flight out of Antigua. After boarding, plaintiff informed a flight attendant that she would need to arrive in Trinidad by a certain time in order to eat something before taking her medication. The flight attendant noted that there might be a delay in their arrival and offered Plaintiff the opportunity to disembark and stay overnight in Antigua, courtesy of the airline. Plaintiff declined the offer and decided to proceed with the flight. After takeoff, she again approached the flight attendant, told her that she felt unwell and asked for something to eat. She was informed that LIAT did not keep food on board its aircraft and therefore could not offer her anything. Shortly after, plaintiff fainted in the aisle and struck her head on an aircraft seat.193

189 Id. (citing Doe v. Etihad Airways, P.J.S.C., 870 F.3d 406, 425 n.14 (6th Cir. 2017)).
190 Id. at 822 (citing Phifer v. Icelandair, 652 F.3d 1222, 1224 (9th Cir. 2011)).
191 Id. at 823.
193 Id.
Plaintiff filed suit against LIAT in the District of the Virgin Islands pursuant to the Montreal Convention. After the conclusion of discovery, LIAT filed a Motion for Summary Judgment on grounds that the plaintiff had failed to allege any facts giving rise to the occurrence of an accident under Article 17. LIAT argued that the airline, as a policy, did not offer food aboard its fleet of aircraft, so the fact that plaintiff was denied something to eat was neither an unusual nor unexpected event. Moreover, plaintiff was made aware before takeoff that the plane would arrive in Trinidad later than expected and consciously declined the opportunity to deplane and get something to eat. Plaintiff argued in response that LIAT should have done more to prevent her injuries, but did not offer any new evidence in support of her claims. The court held in favor of the airline, finding that the facts merited judgment for the airline as a matter of law. Since plaintiff did not present any contradicting evidence that would have given rise to a genuine dispute of fact, she was unable to uphold her burden under Fed. R. Civ. P. 56. Accordingly, LIAT’s motion for summary judgment was granted and the case was dismissed.

194 Id. at *2.  
195 Id. at *6.  
196 Id. at *7.  
197 Id. at *8.  
198 Id.
TRAVERSING THE MINEFIELD:
OVERCOMING PROCEDURAL OBSTACLES IN AVIATION CASES

October 24, 2019

American Bar Association • Tort Trial & Insurance Practice Section
Aviation Litigation 2019

Moderator

A. Ilyas Akbari, Esq. | Partner
BAUM HEDLUND ARISTEI & GOLDMAN PC
10940 Wilshire Blvd. | 17th Floor
Los Angeles, California 90024

Panelists

James E. Robinson, Esq. | Partner
GORDON REESE SCHULLY MANSUKHANI, LLP
1717 Arch Street | Suite 610
Philadelphia, Pennsylvania 19103

Larry S. Kaplan, Esq. | Member
KMA Zuckert LLC
200 West Madison Street | 16th Floor
Chicago, Illinois 60606

Jeanne M. O’Grady, Esq. | Partner
SPEISER KRAUSE
800 Westchester Ave. | S-608
Rye Brook, New York, 10573

Debra Fowler, Esq. | Senior Aviation Counsel
U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, NW
Washington DC 20530-0001

Copyright 2019 American Bar Association
(excluding Department of Justice Submissions)
Speaker Biographies

To Be Or Not To Be…In Texas; Personal Jurisdiction Strategies  
James E. Robinson, Esq.

Appendix A: Pro-Plaintiff Decisions Post-Daimler & Bristol-Myers  
A. Ilyas Akbari, Esq. and Crawford Appleby, Esq.

Forum Non Conveniens In Foreign Air Crash Aviation Cases  
Larry S. Kaplan, Esq.

Appendix B: Cases Denying Motion To Stay Or Dismiss Based On  
Forum Non-Conveniens  
A. Ilyas Akbari, Esq.

The Electronic Docket And The Rise Of The Snap Removal  
Jeanne O’Grady, Esq.

Debra Fowler, Esq.
A. Ilyas Akbari is a partner and bioengineer at Baum, Hedlund, Aristei & Goldman. He is an experienced aviation litigator and an integral part of Baum Hedlund’s aviation litigation team, having worked on all of the firm’s aviation cases since he joined the firm in 2005. Ilyas has litigated over 180 aviation cases, including crashes and incidents involving commercial airlines, charter operations, general aviation aircraft, military aircraft, seaplanes, rescue and air ambulance aircraft, in addition to product liability claims against many of the aircraft and component part manufacturers.

The National Law Journal and ALM Media recognized Ilyas and his team in 2018 as Elite Trial Lawyers finalists in the Consumer Protection category for their achievement in representing the family of the only two American residents onboard Germanwings Flight 9525, whose co-pilot committed suicide by locking out the pilot and crashing the plane into the French Alps, killing all 150 souls. On the heels of the Daimler and Bristol-Myers Squibb opinions, and despite the airline not having any offices, employees, planes, equipment, routes or advertisements in the U.S., and never paying taxes in the U.S., he argued that Virginia’s long arm statute conferred personal jurisdiction over it because the German airline sold its tickets to passengers that resided in Virginia through its authorized agent and proxy, United Airlines. The Eastern District of Virginia agreed, in a published opinion, Selke v. Germanwings GmbH, 261 F. Supp. 3d 645 (E.D. Va. 2017).

Ilyas has served in numerous leadership positions and has represented clients in most of the major airline disasters, including the September 11 Litigation, American Airlines Flight 587, Air Midwest Flight 5481 (resulting in first public apology by an airline), Southwest Airlines Flights 1248 and 1380, TACA Flight 390, Continental Airlines Flight 1404, Colgan Flight 3407, Asiana Airlines Flight 214 (only case proceeding to trial, settling prior to voir dire), Germanwings Flight 9525 and Ethiopian Airlines Flight 302, among others.

Best Lawyers in America® has recognized Ilyas in the Plaintiffs Product Liability Litigation category since 2016 and Southern California Super Lawyers® has listed him as a top rated Aviation & Aerospace attorney since 2007. He has earned the highest AV® Preeminent™ Peer Review Rating through Lawyers.com / Martindale Hubbell®, the highest Avvo.com Superb Score of 10; and he is listed in The Bar Register of Preeminent Lawyers™, Martindale Hubbell®.
James E. Robinson
PARTNER

PRACTICES
- Aviation
- Commercial Litigation
- Tort & Product Liability
- Construction
- Appellate

Attorney Biography
James E. Robinson is a partner in the Philadelphia office of Gordon & Rees where his practice includes the defense of aviation, products liability, commercial litigation, construction and appellate matters. Jim’s clients include major manufacturers, commercial airlines, pilots, Part 135 operators, FBOs, Repair Stations and aviation insurers. He has handled wrongful death and survival actions, product liability and construction defect claims, commercial litigation, ground handling claims, passenger injury claims, commercial disputes, and product recalls, in a number of jurisdictions around the country, at trial and on appeal.

Jim currently serves as a Vice-Chair of the ABA TIPS Aviation and Space Law Committee, and is immediate past Chair of the DRI Aviation Law Committee, and a member of the DRI Judicial Task Force.

Jim has an active pro bono practice representing children who have been victims of abuse, neglect, dependency or crime for which he has been repeatedly recognized by the First Judicial District of Pennsylvania and was honored as a recipient of the 2014 Distinguished Advocate Award. Jim serves on the Board of the Support Center for Child Advocates.

Jim is admitted to practice in Pennsylvania and New Jersey, and before the U.S. Supreme Court, U.S. Courts of Appeals for the 3rd Circuit and 4th Circuit, the U.S. District Courts for the Eastern and Middle Districts of Pennsylvania, and the District of New Jersey.

Jim received his J.D., cum laude, from Pace University School of Law where he was Editor-in-Chief for the Pace Law Review. He also received his B.B.A., cum laude, in Business Management from Pace University.

In 2017, Jim was honored with the David Carr Outstanding Committee Chair Award from the Defense Research Institute. He also received the Distinguished Advocate Award in 2014 from the Support Center for Child Advocates.
Larry Kaplan is an experienced trial attorney who has litigated, arbitrated and tried cases throughout the United States, Europe and Asia. He has been the lead trial lawyer on cases which have gone to verdict in over twenty different state and federal courts. In addition to representing insurers, airlines and aerospace manufacturers, Mr. Kaplan’s courtroom work has encompassed the full spectrum of civil litigation, including commercial litigation, contract disputes, licensing agreements, covenants not to compete and employment litigation. Mr. Kaplan’s peers have recognized his special trial skills, consistently voting him as an Illinois Leading Lawyer and Illinois Super Lawyer. He is part of a select group named to Who’s Who Legal, and he is AV® Preeminent™ Peer Review Rated in Martindale-Hubbell.

Published Legal Writings

- **Predicting the Application of Vicarious Liability to Fixed Base Operators: Still Guess Work After All These Years**, *Journal of Air Law and Commerce*, Fall, 1981.

Conference Speaking Engagements

Mr. Kaplan has been invited to be a featured speaker and to conduct mock trials at numerous conferences, and associations, including, SMU Aviation Law Symposium; Aviation Insurance Association; Embry-Riddle Aviation Law Symposium; and RIMS.

Awards and Honors

- An Illinois Super Lawyer, as voted by his peers
- An Illinois Leading Lawyer, as voted by his peers
- Named in Who’s Who Legal Aviation
- AV® Preeminent™ Peer Review Rated in Martindale-Hubbell
Jeanne M. O’Grady  
*Member*

Since joining the Speiser Krause family as a law student in 1999, Jeanne O’Grady has been involved in the litigation of many major commercial air disasters, including the crash of American Airlines Flight 587 in Belle Harbor, New York; Comair Flight 5191 in Lexington, Kentucky; the crash of Colgan Air Flight 3407 in Buffalo, New York; and the September 11th terrorist attacks; as well as various general aviation matters. She served as a member of the Plaintiffs' Executive Committee leading the Flight 3407 litigation as well as the Plaintiffs' Committee of the September 11th Litigation. Jeanne has been active in representing 9/11 victims in litigation as well to the September 11th Victim Compensation Fund of 2001 and most recently to the United States Victims of State Sponsored Terrorism Fund.

Jeanne also focuses her practice on medical malpractice and on trucking, railroad and automobile accidents and has been honored for her pro bono work on behalf of the disabled.

Jeanne is a *cum laude* graduate of St. John's University School of Law and earned her Bachelor of Science degree in Biology from the Siena College/Albany Medical College Program for Science and the Humanities.
Debra Fowler holds the position of Senior Aviation Counsel in the Torts Branch, Civil Division, United States Department of Justice. She is one of the Department’s senior litigators, defending the government in cases arising under the Federal Tort Claims Act. Ms. Fowler joined the Department of Justice in 1990 as a Trial Attorney and held that position until being appointed Senior Aviation Counsel in 2001. She has represented the United States and its agencies, including the Federal Aviation Administration, the Drug Enforcement Agency, the United States Forest Service, the United States Air Force, Navy, Marine Corp and the Army National Guard in numerous aviation cases in Federal District Courts in California, Colorado, Florida, Texas, Wyoming, New Mexico, Washington, New York, Arizona, Alaska, Idaho, Oregon, Puerto Rico, Hawaii and Guam. She was lead counsel for the United States in the matter In re Aircrash at Agana, Guam on August 6, 1997, the multidistrict litigation involving approximately 168 cases arising out of a Korean Air Lines 747 crash on the island of Guam.

In 1989, Ms. Fowler graduated from the University of Tulsa with a joint Master of Arts and Juris Doctorate degree. She is a member of the Virginia bar and is admitted to practice before the Ninth Circuit Court of Appeals.

Ms. Fowler presently serves on the Board of Advisors of the Southern Methodist University Journal of Air Law and Commerce Symposium. She is a Past President of the International Aviation Womens Association and continues to serve on the Advisory Board of that organization. She is Past Chair of the Aviation and Space Law Committee of the Tort, Trial and Insurance Practice Section of the American Bar Association. She has also served as the Chair of the Government Liability subcommittee of the Aviation Litigation committee, Litigation Section, and on the editorial board of the ABA publication “The Brief.” Additionally, she served as a faculty member of the American Bar Association Trial Academy. Ms. Fowler is frequently called upon to serve as a guest lecturer or speaker at aviation symposia and events.
TO BE, OR NOT TO BE … IN TEXAS
PERSONAL JURISDICTION STRATEGIES

October 24, 2019

American Bar Association - Tort Trial & Insurance Practice Section
Aviation and Space Law Committee

James E. Robinson
Gordon Rees Scully Mansukhani, LLP
Three Logan Square
1717 Arch Street, Suite 610
Philadelphia, PA 19103
jrobinson@grsm.com
215.717.4007
You’ve determined that your client is not incorporated in the state where you’ve been sued and doesn’t have its principal place of business there either. Check. The cause of action did not arise from any contacts between your client and the forum. Check. Congratulations! You likely have a personal jurisdiction defense. But to paraphrase Winston Churchill, this is not the end of your analysis. It is not even the beginning of the end. It is, perhaps, just the end of the beginning.

In the typical multi-defendant aviation case, plaintiffs attempt to choose a jurisdiction in which the potentially liable defendants can be forced or convinced to defend in a single lawsuit. For a defendant, choosing where to defend the litigation can have a profound impact on the outcome of the case, and the most advantageous jurisdiction in which to defend may be one in which the defendant is not subject to personal jurisdiction.

Between 2011 and 2017, the United States Supreme Court issued six landmark decisions establishing and clarifying the limits of personal jurisdiction in this country. These decisions dramatically altered the landscape of personal jurisdiction, giving unprecedented opportunities to defendants to select the forum in which they defend, and causing plaintiffs to be strategic about where to bring cases.

While it is tempting for the defense to cling only to states where they are subject to general or specific jurisdiction, there are a multitude of reasons why a defendant should consider waiving this defense and litigating elsewhere. In this paper, we examine some of the strategic considerations that may entice a defendant to waive a jurisdictional challenge and submit to the plaintiff’s chosen forum.

A. Consider if This Is The Right Case to Challenge Jurisdiction

In a case with minimal damages, or minimal exposure, or a straightforward exit strategy (e.g., a product protected by the General Aviation Revitalization Act of 1994) simply answering the complaint might be your best option. Nothing frustrates a carrier more than a protracted personal jurisdiction battle that costs more than the whole case is worth. While attorney’s fees and related costs of litigation are a fact of life, a motion challenging personal jurisdiction is an entirely avoidable expense. If your most efficient exit strategy does not require a jurisdictional challenge, consider skipping it.

B. Consider the Burden on Your Client

Except in the clearest of cases, most courts will allow the plaintiff to take jurisdictional discovery in order to prepare a factual response to a jurisdictional challenge, and jurisdictional discovery can go deep into areas that might otherwise be irrelevant to the underlying litigation. A plaintiff may, for example, request documents such as Board of Directors minutes and resolutions, as well as marketing and distribution agreements to determine if a manufacturer has targeted the forum. Such requests would raise red flags during merits discovery.

While the most likely deposition target during jurisdictional discovery is the witness whose affidavit supports the defendant’s motion to dismiss, the plaintiff could conceivably go further. Under the analysis of Hertz Corp. v. Friend, a corporation’s principal place of business is “the place where the corporation's high level officers direct, control, and coordinate the corporation's activities.” While the principal place of business may be in the same location as the corporation’s headquarters, it may also be elsewhere, and that place may change as the

---

2 J. McIntyre Mach., Ltd., 564 U.S. at 882.
3 Hertz Corp. v. Friend, 559 U.S. 77, 80 (2010).
corporate decision-makers change or relocate.⁴ Ordinarily, a plaintiff would not be entitled to depose a C-Suite executive early in the case but to the extent there is a legitimate question about the location of the defendant’s principal place of business, that is a possibility and a burden that needs to be considered and discussed openly with the client before a jurisdictional motion is filed.

C. Consider the Substantive and Procedural Advantages in Each Jurisdiction: Conflicts of Laws, Comparative Negligence, and Joint and Several Liability

Before deciding to fight jurisdiction in a foreign state, consider carefully what law is likely to apply in each jurisdiction. The threshold question of “what law will apply?” is not easily answered and will likely require a conflicts of laws analysis. If both the foreign jurisdiction and the home jurisdiction follow a similar interests analysis, both jurisdictions may end up applying the same law. But if, for example, the choice is between a jurisdiction like Pennsylvania,⁵ that uses an interest analysis and a jurisdiction like South Carolina⁶ that follows lex loci delicti, the choice can have a profound impact and needs to be considered carefully.

Both the substantive laws and procedural rules of each jurisdiction need to be considered. Does the jurisdiction follow the Second Restatement of Torts or the Third? Does the jurisdiction allow strict liability claims? Are there caps on non-economic damages? Are punitive damages insurable? Can a malfunction be used as evidence of a defect? What is the law on spoliation of evidence? Does the jurisdiction allow expert depositions? Does it require expert reports?

---

⁴ See e.g., *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) (finding general jurisdiction in Ohio over a Philippine mining company whose President had temporarily relocated to Ohio during World War II).
There are practical questions as well, such as whether the case is removable to federal
court in the plaintiff’s chosen forum, or whether you will have access to witnesses and evidence
at trial. Can you compel the testimony of key trial witnesses in your home forum? Do you know
who controls the wreckage and can you gain access to it in the state where you hope to try the
case?

To the extent that the actions of the plaintiff are relevant to the cause of action, the rules
on Comparative Negligence or Contributory Negligence also need to be considered. Most states
have adopted some form of Comparative Negligence under which the plaintiff’s share of causal
negligence will offset or reduce the liability of the defendants. In some states, like New Jersey,
the plaintiff’s causal negligence can reduce recoverable damages and will bar any recovery if the
plaintiff’s negligence is greater than the combined negligence of all defendants.\(^7\) Other States
allow “pure” Comparative Negligence to reduce the awarded damages by the plaintiff’s
percentage of fault up to 99%. By contrast four jurisdictions, Alabama, District of Columbia,
Maryland, North Carolina, and Virginia, still apply Contributory Negligence principles which
will preclude the plaintiff from any recovery—a complete bar—if the plaintiff is found to be
causally negligent to any degree.\(^8\)

Consider also the likely makeup of your jury. Obviously a defendant should avoid
litigating in judicial hellholes if at all possible.\(^9\) Beyond the obvious though are the demographic
and cultural characteristics of the jury pool which you believe may favor your client or the


\(^8\) See e.g., General Motors Corp. v. Saint, 646 So. 2d 564 (Ala. 1994); Grogan v. General Maint.
Serv. Co., 763 F.2d 444, 448 (D.C. Cir. 1985) (contributory negligence is a defense in a
negligence action but not in a strict liability action); Mayor & City Council of Balt. v. Utica
Mutual Ins. Co., 802 A.2d 1070 (Md. App. 2002); Smith v. Fiber Controls, 300 N.C. 669, 672,
655, 659 (Va. 1963).

\(^9\) Zack Needles and Amanda Bronstad, After Six-Year Reprieve, Philadelphia Back Among the
plaintiff. Do you believe that an urban jury will be more generous to the plaintiff than a rural
jury? Do you believe that a jury drawn from near a large military base might be more technically
savvy and able to understand your case better? If your client is the largest employer in its home
jurisdiction, you might find many friendly faces among a home-state jury pool. But, if your
client has poor relations with its neighbors, has announced major layoffs, or caused
environmental havoc, you might do better in a jurisdiction where they are not as well known.
Whatever factors you might consider relevant when picking a jury should be front-loaded to your
decision whether to challenge personal jurisdiction.

In multi-party litigation, one of the most important considerations will be the potential for
joint and/or several liability among defendants at trial. Joint and several liability varies
considerably state to state, but in general, it permits a plaintiff to recover the full amount of
damages awarded from any defendant held liable. This can be a particularly important factor to
consider if, for example, your client is a “deep pocket” but only minimally liable for the loss. In
that case, it would be best to avoid pure joint and several liability jurisdictions like Alabama,
Delaware and North Carolina.10 In 2011, Pennsylvania adopted the “Fair Share” Act under
which each defendant is liable only for their own percentage of the damage award so long as that
defendant’s percentage of fault is less than 60%.11 Only a defendant found liable for 60% or
more of the total fault could be subject to joint and several liability.

---

10 Matkin v. Smith, 643 So. 2d 949, 951 (Ala. 1994); Ikeda v. Molock, 603 A.2d 785 (Del. 1991);
11 42 PA. CONS. STAT. ANN. § 7102(a.1).
D. Consider Both the Advantages and Lost Opportunities of a Successful Jurisdictional Challenge

If you win a jurisdictional challenge, the smart plaintiff lawyer will simply proceed in the “savings action” she previously filed in your home state and you are now the only defendant in that suit. The rest of the defendants are still litigating in the foreign jurisdiction, but without you. This is a very real scenario that needs to be considered when deciding whether to challenge jurisdiction.

If you can force plaintiff to proceed in both jurisdictions, you may put plaintiff’s experts in the uncomfortable position of issuing multiple and perhaps conflicting opinions on causation—those that exclude your client in the foreign jurisdiction, and those that focus only on your client in your home jurisdiction. While some plaintiff’s aviation experts are renowned for their “flexibility,” a smart plaintiff’s lawyer will not want to put such contradictions before either jury. In that circumstance, plaintiff’s counsel may be motivated to settle one of the cases before reports are issued rather than compromise their experts with intellectually uncomfortable opinions.

Litigating as a sole defendant may also be an advantage where the defendant is a remote or peripheral link in plaintiff’s chain of causation theory. Juries are bad at math, and the temptation to split liability among all defendants is a powerful force. But if that peripheral defendant is the only defendant at trial, the plaintiff may have a more difficult time explaining how the actions of your client alone caused the plaintiff’s injury.

Litigating a case as one of a group of defendants has certain advantages as well, not least of which is the ability to share costs. Understandably, it may be impossible for defendants to share liability experts, but even if the defendants are not completely aligned, it is usually possible to at least share damages experts: a vocational expert, forensic economist, medical experts, life
care planners, etc. These costs can be significant. And, to the extent the defendants can work out a joint defense agreement, litigating as part of a group of defendants may give your client access to your co-defendants’ confidential information, in-house experts, and documents, which would be difficult or impossible to obtain as a non-party. Manufacturers know more about their products than anyone else. Their witnesses, documents, and information may be critical to the defense of their co-defendants.

And, if your client is truly at odds with its co-defendants, litigating in plaintiff’s chosen forum makes asserting cross-claims that much easier, especially if they wish to assert contribution or common law indemnity claims. And, the burden will be on the plaintiff to establish personal jurisdiction over the cross-claim defendant. On the other hand, if you’ve won your jurisdictional challenge, you may be forced to bring a separate third party action against your former co-defendant and establish personal jurisdiction over them in your home state. If you can’t join the other potentially liable defendants in your home state, you need to consider whether your home state jury is allowed to consider the liability of parties not at trial, the so-called “empty chair.” In jurisdictions where the jury can only allocate fault to the defendants who are present at trial, your client may be forced to bring yet another action elsewhere in order to pursue its contribution or indemnity rights.

CONCLUSION

It’s tempting to go for the early, easy win of challenging personal jurisdiction, but except in rare cases, that alone will not end the litigation for your client. So before taking that first step, consider carefully all the steps that follow. Be strategic in selecting where and with whom to litigate so that you have the best chance to win the war, and not just the battle.
Appendix A

Pro-Plaintiff Decisions Post-Daimler & Bristol-Myers

October 24, 2019

by A. Ilyas Akbari & Crawford Appleby

On January 14, 2014, the Supreme Court of the United States decided the case of Daimler AG v. Bauman, 134 S. Ct. 746 (2014) [hereinafter Daimler], limiting general jurisdiction over corporate defendants to only where they are “essentially at home.” Then, on June 19, 2017, the Supreme Court issued its ruling in Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty., 137 S. Ct. 1773 (2017) [hereinafter BMS], finding that a nonresident corporation’s “continuous activity” in a state is insufficient for specific jurisdiction; the corporation’s contacts must be related to the suit itself.

Despite these rulings restricting personal jurisdiction, several jurisdictional bases (e.g., agent, alter ego, co-conspirator, waiver, FRCP 4(k), consent, in-state personal service, etc.) remain viable ways to establish personal jurisdiction over a non-resident corporation. Below is a list of pro-plaintiff decisions, organized by jurisdiction, issued by both federal and state courts after Daimler and BMS.¹ The ﬂ symbol denotes a case involving aviation.

1ST CIRCUIT

Massachusetts

Montoya v. CRST Expedited, Inc., No. CV 16-10095-PBS, 2019 WL 4230892 (D. Mass. Sept. 6, 2019): Collective action involving Fair Labor Standards Act claims brought by long-haul truck drivers against their employers. Massachusetts District Court held that one of the defendants waived its ability to move to dismiss the case based on lack of personal jurisdiction. Defendant consented to the court’s jurisdiction when it filed a FRCP 12(b)(6) motion to dismiss without objecting to personal jurisdiction under 12(b)(2).

In re BT Prime Ltd., 599 B.R. 670 (Bankr. D. Mass. 2019): Chapter 11 debtor adversary proceeding against its non-debtor affiliates based on preferential and fraudulent transfers. Massachusetts District Court held that it had personal jurisdiction over Maltese entity defendants based on their joint venture relationship with Massachusetts based defendants.

Roch v. Mollica, 481 Mass. 164, 113 N.E.3d 820 (2019): New Jersey resident filed an action in Massachusetts against New Hampshire residents for an injury that occurred at a Florida rental

¹ DISCLAIMER: Readers of this document should check to ensure that the caselaw contained herein is still good law and has not been overruled before citing to it or relying on it in any way. The authors of this document do not warrant or otherwise represent that the legal authorities contained herein are still good law.
Supreme Judicial Court of Massachusetts held that it had personal jurisdiction over non-resident defendants because they were personally served while intentionally, knowingly, and voluntarily in Massachusetts.

*Moura v. New Prime, Inc.*, 337 F. Supp. 3d 87 (D. Mass. 2018): Family of deceased truck driver brought an action against the potential employer and training driver after the driver was killed while riding in a truck driven by the trainer in Oklahoma. Massachusetts District Court held it had specific jurisdiction over the employer, a Missouri/Nebraska corporation. It transacted business in Massachusetts by contacting, trying to hire, and training the driver there, and the family’s claims also arose from defendant’s contacts with Massachusetts for these same reasons.

*Geis v. Nestle Waters N. Am.*, Inc., No. CV 17-12165-PBS, 2018 WL 3232351 (D. Mass. July 2, 2018): Class action involving fraudulently raising prices on beverages in breach of customer contracts. Massachusetts District Court held that it had specific jurisdiction over a Delaware/Connecticut corporation. Corporation did not dispute that it was subject to personal jurisdiction under the Massachusetts long-arm statute; indeed, the claims arose out of phone calls made to the corporation’s Massachusetts call center that employed 200 employees and entered into about 50,000 fraudulent contracts. The court rejected the corporation’s due process arguments, finding that litigating in Massachusetts would not be an undue burden, most discovery would be conducted in Massachusetts, Massachusetts’ interest in resolving these claims did not have to be greater than any other jurisdiction, and plaintiff’s choice of forum should be deferred to.

*Exxon Mobil Corp. v. Attorney Gen.*, 479 Mass. 312, 94 N.E.3d 786 (2018): Attorney general’s civil investigative demand to company seeking documents showing that company was aware that fossil fuels contributed to global warming. Supreme Judicial Court of Massachusetts held that it had specific jurisdiction over a Texas/New Jersey corporation based on “transacting business” there because it operates a franchise network of more than 300 retail service stations. Due process was satisfied because it purposefully availed itself to conducting business in MA. Court ruled it did not have general jurisdiction over corporation.

*Access Now, Inc. v. Otter Prod.*, LLC, 280 F. Supp. 3d 287 (D. Mass. 2017): ADA case by blind customer against a consumer electronics company. Massachusetts District Court held that it had specific jurisdiction over a Colorado corporation based on “transacting business” there because it had (i) 2%, i.e. $20 million, of its sales in MA, (ii) a field marketing representative in MA, (iii) was registered to do business in MA since 2013, and (iv) plaintiff was harmed when he tried to access the corporation’s website in MA. Due process was satisfied because there was only a slight burden on the corporation to appear in MA, MA had a strong interest in adjudicating disputes involving its blind residents, and it was plaintiff’s choice of forum. There was no mention of general jurisdiction. But see *Access Now, Inc. v. Sportswear, Inc.*, No. CV 17-11211-NMG, 2018 WL 1440315 (D. Mass. Mar. 22, 2018).

*Griffiths v. Aviva London Assignment Corp.*, 187 F. Supp. 3d 342 (D. Mass. 2016): Class action involving structured settlement annuities. Massachusetts District Court held that it had specific jurisdiction over a London-based corporation because it agreed to guarantee all annuities sold by its parent corporation pursuant to a capital maintenance agreement. The annuities were sold
from and in Massachusetts, they formed a nexus between the plaintiff and the defendant, and the
defendant’s guarantee created a right that was enforceable. The plaintiff did not argue for
general jurisdiction.

New Hampshire

(D.N.H. 2017): Multi-district litigation involving hernia repair products made from C-Qur mesh.
New Hampshire District Court granted plaintiffs’ motion for *jurisdictional discovery* against a
Swedish corporation based on allegations and supporting evidence that two domestic
corporations were acting as its agent or alter ego. The plaintiff did not argue for general
jurisdiction.

2ND CIRCUIT

*U.S. Bank Nat'l Ass'n v. Bank of Am. N.A.*, 916 F.3d 143 (2d Cir. 2019): A bank sued a
nationally chartered bank based in North Carolina over its violation of a mortgage loan purchase
agreement provision. Case was filed in Indiana but transferred to New York and then dismissed.
Second Circuit held that Indiana court had *specific* jurisdiction over defendant “because of the
contractual representations it undertook concerning real property in Indiana and the
commitments it undertook in the terms of the MLPA to perform acts in Indiana.”

*Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68 (2d Cir. 2018): Fraud case against
banks involving the manipulation of London Interbank Offered Rate (LIBOR). In a case that
was initiated in California, Second Circuit held that a New York District Court had *specific*
jurisdiction over defendant banks who sold debt instruments directly to plaintiff in CA. General
jurisdiction was not discussed.

Act and Nursing Home Reform Act case. Second Circuit held that a New York District Court had
*specific* personal jurisdiction over a Pennsylvania law firm under New York’s long-arm
statute because it mailed a debt collection notice to the plaintiffs, called the plaintiffs on the
phone, and mailed a summons and complaint to the plaintiffs in New York. General jurisdiction
was not discussed.

New York


involving mesothelioma contracted through contact with truck brake pads, clutches, and gaskets.
New York Appellate Court held that defendant waived defense of lack of general jurisdiction by failing to deny it with specificity in its answer to the complaint. Plaintiff allegations concerning general jurisdiction “were not denied by defendant, rather defendant admitted them to the extent that it ‘is a duly organized foreign corporation doing business in New York ...’ This answer, interposed in 2004, before the Supreme Court's ruling in Daimler . . . would have provided a basis for general jurisdiction.”

*Kuliarchar Sea Foods (Cox's Bazar) Ltd. v. Soleil Chartered Bank*, 168 A.D.3d 441 (N.Y. App. Div. 2019): Dispute over a letter of credit regarding the sale of black tiger shrimp. New York Appellate Court held that it had personal jurisdiction over a Union or Comoros entity because it was the alter ego of another, New York entity, plaintiff alleged sufficient facts to pierce the corporate veil, and “defendants’ documentary evidence fails to conclusively refute these allegations . . . .”

*Dennis v. JPMorgan Chase & Co.*, 343 F. Supp. 3d 122 (S.D.N.Y. 2018), adhered to on denial of reconsideration, No. 16-CV-6496 (LAK), 2018 WL 6985207 (S.D.N.Y. Dec. 20, 2018): Investor class action against financial institutions for manipulating interest rates that were used as benchmarks for, among other purposes, pricing financial derivatives. New York District Court held that plaintiffs made a prima facie showing that defendant consented to the court’s jurisdiction in an agreement stating it was “governed by New York law, ‘[w]ith respect to any suit, action, or proceedings related to this Agreement ... each party irrevocably ... submits to ... the non-exclusive jurisdiction of the courts of the State of New York and the United States District Court located in the Borough of Manhattan in New York City.’”

*Campbell v. Freshbev LLC*, No. 1:16-CV-7119(FB)(ST), 2018 WL 3235768 (E.D.N.Y. July 3, 2018): Class action involving misleading juice labels. New York District Court chose to defer on defendants’ motions to dismiss for lack of personal jurisdiction until plaintiff moved to certify a nationwide class. In so doing, the court noted that “[s]ome district courts have declined to extend the logic of [BMS], [holding, for example, that it] . . . does not preclude federal jurisdiction over out-of-state claims . . . . does not preclude personal jurisdiction over nationwide class actions . . . . [and that it] precluded federal jurisdiction over out-of-state mass tort claims but not nationwide class actions . . . .”

*Robins v. Procure Treatment Centers, Inc.*, 157 A.D.3d 606, 70 N.Y.S.3d 457 (N.Y. App. Div. 2018): Case against radiation facility involving treatment for a non-malignant brain tumor. New York court of appeal held that it had specific jurisdiction over a New Jersey corporation (PPM) because it “chose and marketed its Somerset, New Jersey, location to target New York residents, touting its proximity to New York in advertising, entered into an agreement with a consortium of New York City hospitals for the referral of cancer patients for treatment at its facility, and provided the consortium's doctors with privileges at its facility. . . . [Also, plaintiff] was directed to PPM by her New York doctor, defendant Raj Shrivastava, as part of a referral fee agreement, that Dr. Shrivastava thereafter co-managed her care, and that PPM billed her directly for Dr. Shrivastava's services.” The court also noted that a state filing reflected that PPM had a principal place of business in NY but did not specifically find that general jurisdiction existed.
Sonterra Capital Master Fund Ltd. v. Credit Suisse Grp. AG, 277 F. Supp. 3d 521 (S.D.N.Y. 2017): Putative class action alleging that corporations manipulated the Swiss franc London Interbank Offered Rate. New York District Court held it had specific jurisdiction over foreign corporations “based on allegations that they manipulated CHF LIBOR for the purpose of profiting from transactions for CHF LIBOR–based derivatives within the United States”, i.e. national contacts. The court ruled that defendants did not consent to general jurisdiction by registering to do business under federal or state banking laws.

Unterberg v. Mobil Shipping & Transportation Co., No. 14 CIV. 10025 (GBD), 2017 WL 4326040 (S.D.N.Y. Sept. 20, 2017): Mesothelioma wrongful death case resulting from exposure on oil tankers in the 1970s. New York District Court held it had specific jurisdiction over a Marshall Islands corporation because, at the time that that tortious conduct occurred, the corporation had its principal place of business in New York (for tax purposes) and this New York office oversaw the operations of the ships that decedent worked on when he was exposed to asbestos.

Cohen v. Facebook, Inc., 252 F. Supp. 3d 140 (E.D.N.Y. 2017): Case involving threats of terrorist attacks made on social media. New York District Court held it had personal jurisdiction over Facebook under the Anti-Terrorist Act and FRCP 4(k)(1)(c) because Facebook had sufficient contacts with the U.S. as a whole. General jurisdiction was not discussed.

Hecklerco, LLC v. YuuZoo Corp. Ltd., 252 F. Supp. 3d 369 (S.D.N.Y.), reconsideration denied, 258 F. Supp. 3d 350 (S.D.N.Y. 2017): Stock fraud case. New York District Court held that it had specific personal jurisdiction over a foreign corporation under New York’s long-arm statute because the foreign corporation used an agent to sell the stock to plaintiffs in New York. However, the court did not have general jurisdiction over the foreign corporation since it was not “at home” in New York.

In re Propranolol Antitrust Litig., 249 F. Supp. 3d 712 (S.D.N.Y. 2017): Antitrust class action involving prescription drugs. New York District Court held that it had specific personal jurisdiction over New Jersey and Minnesota corporations under New York’s long-arm statute because the corporations’ suit-related activities occurred in the U.S. and the Clayton Act and Sherman Act provide nationwide service of process. General jurisdiction was not discussed.

Joint Stock Co. v. Infomir LLC, No. 16CIV1318GBDBCM, 2017 WL 1321007 (S.D.N.Y. Mar. 30, 2017): Case involving “unauthorized interception and re-broadcasts of foreign language television programming over the internet.” New York District Court held that it had specific personal jurisdiction over a foreign corporation under New York’s long-arm statute because defendant sold multiple subscriptions for its services to an authorized dealer in New York. General jurisdiction was not discussed. See also Joint Stock Co. Channel One Russia Worldwide v. Infomir LLC, No. 16CV1318GBDBCM, 2017 WL 825482 (S.D.N.Y. Mar. 2, 2017) (Magistrate Judge’s ruling which was adopted in the above ruling).

In re Estate of Stettiner, 148 A.D.3d 184, 46 N.Y.S.3d 608 (N.Y. App. Div. 2017): Case to recover painting stolen by Nazis during World War II. New York court of appeal held that the Surrogate Court had specific personal jurisdiction over a foreign entity under New York’s long-
arm statute because Sotheby’s acted as the foreign entity’s agent when it sold the painting in New York and because the foreign entity transacted business with an art gallery in New York. General jurisdiction was not discussed.

*In re Motors Liquidation Co.*, 565 B.R. 275 (Bankr. S.D.N.Y. 2017): Bankruptcy action. New York Bankruptcy Court held that an Austrian lender consented to personal jurisdiction when it received funds from a New York bank account pursuant to an agreement that contained a New York choice of law and forum clause as well as a debtor in possession order. The court also had specific jurisdiction because the lender purchased interests in the loan term in New York, agreed to New York law and a New York forum, and the money was transferred to the lender’s New York bank account. The plaintiff did not argue for general jurisdiction.

*In re MF Glob. Holdings Ltd.*, 561 B.R. 608 (Bankr. S.D.N.Y. 2016): Bankruptcy action. New York Bankruptcy Court held that it had specific personal jurisdiction over Bermuda insurers because they entered into insurance contracts with New York entities for risks that might take place in New York, those contracts were expressly governed by New York law, the insurers underwrote polices in New York and marketed and sold policies in New York. General jurisdiction was not discussed.

*In re Commodity Exch., Inc.*, 213 F. Supp. 3d 631 (S.D.N.Y. 2016): Class action involving gold exchange-traded funds. New York District Court held that it had personal jurisdiction over a non-resident corporation (LGMF) based on allegations that it was an alter ego of a corporation that the Court had jurisdiction over (Fixing Banks). “Plaintiffs have plausibly alleged—albeit barely—that the Fixing Banks engaged in a conspiracy to manipulate the Fix Price between January 1, 2006 and December 31, 2012. According to the SAC, this scheme operated around and through the PM Fixing call administered by LGMF. The SAC alleges that the PM Fixing call was the perfect locus for the Fixing Banks' scheme because it was a seemingly-legitimate opportunity for the Fixing Banks to share information necessary to their collusion. [Citation.] Moreover, the SAC alleges that it was through the Fix Price, set by the Fixing Banks on LGMF's behalf, that the Fixing Banks ultimately profited from their manipulation. . . . LGMF and the Fixing Banks have overlapping ownership and directors; the Fixing Banks are the only owners and directors of LGMF. [Citation.] Plaintiffs have also alleged that LGMF is financially dependent on membership fees paid by the Fixing Banks and that LGMF has no real corporate headquarters or separate mailing address.”

*Weiss v. Nat'l Westminster Bank PLC*, 176 F. Supp. 3d 264 (E.D.N.Y. 2016): Antiterrorism Act case involving attacks in Israel and Palestine. New York District Court did not have general jurisdiction over United Kingdom bank, but did find specific jurisdiction under New York’s long-arm statute. The defendant conducted business in New York because it had a New York branch and routinely utilized a correspondent account to clear U.S. dollar transfers for its customers (a total of 196 times), which is exactly how the defendant allegedly funded the terrorist organization responsible for the attacks. Jurisdiction was also proper under FRCP 4(k)(1)(C) because the defendant was properly served in New York. See also *Strauss v. Credit Lyonnais, S.A.*, No. 06CV702DLIMDG, 2016 WL 1305160 (E.D.N.Y. Mar. 31, 2016) (conducting the same analysis but with respect to a French bank).
Gucci Am., Inc. v. Weixing Li, 135 F. Supp. 3d 87 (S.D.N.Y. 2015): Trademark infringement case involving foreign manufacturer of handbags. New York District Court held that it had specific jurisdiction over a third-party bank in China such that it could compel it to comply with a subpoena. The bank owned multiple properties in New York, including two branches with employees, and its head office opened a correspondent account with JPMorgan in New York, which it used to market itself.

Ingenito v. Riri USA, Inc., 89 F. Supp. 3d 462 (E.D.N.Y. 2015): Pregnancy discrimination case. New York District Court held that it had specific jurisdiction over a Swiss corporation under New York’s long-arm statute. Minimum contacts were established because the corporation transacted business in New York through its wholly-owned sales and distribution company in the United States, the plaintiff worked for the subsidiary in New York, and the plaintiff’s “termination was implemented with the knowledge and consent, and even at the direction” of the corporation. Also, the single employer doctrine under Title VII of the Civil Rights Act of 1964 applied to the relationship between the corporation and its subsidiary. However, the court did not have general jurisdiction over the corporation since it was not “at home” in New York.

Williams v. Preeminent Protective Servs., Inc., 81 F. Supp. 3d 265 (E.D.N.Y. 2015): Unpaid-wage and retaliation case. New York District Court held that it did not have general jurisdiction over a non-resident corporation with only one employee and client in New York. But the court did have specific jurisdiction under New York’s long-arm statute because the corporation hired the plaintiff knowing she would work from home in Brooklyn, sent her all the materials she needed to do her job there and expected her to be on call at all times, required her to participate in weekly conference calls from home while reporting directly to its CEO, she did a large amount of substantive work at home, and the corporation paid her a commission for securing new business.

Elsevier, Inc. v. Grossman, 77 F. Supp. 3d 331 (S.D.N.Y. 2015): Fraud case where the defendants purchased individual subscriptions to scholarly journals then re-sold them to institutions at a higher rate. New York District Court held that it had specific jurisdiction over a Brazilian corporation and its CEO under New York’s long-arm statute because these defendants had some of the subscriptions delivered to the CEO’s address in New York. Also, agency jurisdiction was established as all of the alleged fraudulent subscriptions were ordered by another defendant (at the corporation and CEO’s direction and consent) who performed business operations in New York. General jurisdiction was not discussed.

Int'l Diamond Importers, Inc. v. Oriental Gemco (N.Y.), Inc., 64 F. Supp. 3d 494 (S.D.N.Y. 2014): Copyright infringement case involving jewelry designs against two foreign defendants and one New York defendant. Although the New York District Court held that it lacked general jurisdiction over Chinese and Indian corporations under agency theory and because neither corporation was doing business in New York, it allowed the plaintiff to conduct jurisdictional discovery to determine whether a New York corporation was the alter ego of the foreign corporations. The court also permitted jurisdictional discovery to determine if the New York corporation committed a tort while acting as an agent for the foreign corporations in order to establish specific jurisdiction.
Brown v. Web.com Grp., Inc., 57 F. Supp. 3d 345 (S.D.N.Y. 2014): Action against web service provider for deletion of customer data and website. New York District Court held it did not have general jurisdiction over a non-resident corporation, but it did find that it had specific jurisdiction under New York’s long-arm statute. The defendant transacted business in New York because it was one of the largest web site companies in the United States with 7.5 percent of its gross revenue from New York customers, had five employees in New York, and regularly “market[ed] services to and enter[ed into] transactions with New York-based customers” via its website. But, the case was ultimately dismissed for improper venue because the plaintiff had agreed to a Florida forum selection clause in his agreement with the defendant.

Schutte Bagclosures Inc. v. Kwik Lok Corp., 48 F. Supp. 3d 675 (S.D.N.Y. 2014): Trade dress infringement case concerning plastic clips used to seal food bags. New York District Court held that it had specific jurisdiction over a Netherlands corporation under New York’s long-arm statute because it transacted business in New York by shipping 100,000 clips to New York, sent promotional materials for distribution to New York bakeries, and hired a New York law firm for representation in obtaining a registered trademark. Specific jurisdiction was also established based on the corporation’s United States subsidiary acting as its agent by promoting and marketing its clips in New York, and because the subsidiary was wholly-owned by the corporation, it had no employees, and the subsidiary and corporation shared corporate directors. The plaintiff did not argue for general jurisdiction.

Roberts-Gordon LLC v. Pektron PLC, 999 F. Supp. 2d 476 (W.D.N.Y. 2014): Breach of contract action involving the manufacture of heating and cooling equipment. New York District Court held that it had specific jurisdiction over a United Kingdom corporation under New York’s long-arm statute. The defendant sent a representative to New York to meet with the plaintiff, and the purchase orders and invoices made it clear to the defendant that its products were being shipped to New York. The plaintiff did not argue for general jurisdiction.

Vermont

Cernansky v. Lefebvre, 88 F. Supp. 3d 299 (D. Vt. 2015): Wrongful death case involving an accident on a longboard style skateboard. Vermont District Court held that it did not have specific jurisdiction over a corporate defendant, but allowed the plaintiff to conduct limited jurisdictional discovery to determine whether general jurisdiction existed. Although the company was incorporated and had its principal place of business in New Hampshire, it maintained a Vermont-specific internet blog, which the court held “creat[ed] the prospect of advertisements and other marketing efforts targeting this judicial district directly.”

3RD CIRCUIT

Shuker v. Smith & Nephew, PLC, 885 F.3d 760 (3d Cir. 2018): Off-label, medical device case involving hip replacement surgery. Third Circuit held that it was an abuse of discretion for the Pennsylvania District Court not to allow plaintiffs to seek jurisdictional discovery regarding the alter ego claim. “[Plaintiffs’] allegations paint a plausible picture of control by PLC over Smith & Nephew: the two companies’ decisionmaking is integrated, PLC has authority over Smith & Nephew's strategic business decisions, PLC pays for the development of Smith & Nephew's
products, and executives from both companies work together to make decisions regarding Smith & Nephew's hip systems, as shown in a 2012 Smith & Nephew press release that directed investor and media inquiries not to Smith & Nephew employees, but to PLC executives.”

*Chavez v. Dole Food Co., Inc.*, 836 F.3d 205 (3d Cir. 2016): Toxic tort case filed by banana agricultural workers in Central and South America. Third Circuit held that a Delaware District Court did not have general personal jurisdiction over Chiquita Brands International, which was not incorporated, maintained no office, and did not supervise its business in Delaware. However, the district court erred by failing to transfer the case to New Jersey where Chiquita was incorporated, a decision that “flowed solely from its mistaken application of the first-filed rule.”

**Delaware**


**New Jersey**

*Formula One Licensing BV v. F1 New Jersey, LLC*, 180 F. Supp. 3d 330 (D.N.J. 2015): Trademark infringement suit involving the phrase “Formula 1.” New Jersey District Court allowed the plaintiffs to conduct jurisdictional discovery to establish specific jurisdiction over a group of non-resident corporations. The name of a New Jersey defendant and several other non-resident defendants was similar, the New Jersey defendant certified that he had three partners (but did not say who they were), and a press release indicated a partnership between the non-resident defendants and the New Jersey defendant. Also, the plaintiffs submitted evidence of cross-promotion between the New Jersey defendant and the non-residents defendants based on sponsorship and promotion between these defendants are their websites.

*Marchionda v. Embassy Suites, Inc.*, 122 F. Supp. 3d 208 (D.N.J. 2015): Sexual assault case that took place in hotel room in Iowa. New Jersey District Court allowed the plaintiff to conduct limited jurisdictional discovery to establish general jurisdiction over a group of non-resident corporations. Although it had serious doubts that the plaintiff could establish personal jurisdiction, “this action involves a maze of well-known and large corporate entities, with numerous corporate forms, and operations wide in scope [and] [a]s a result, the Court [could not] conclude, upon this record, that Plaintiffs [had] presented no factual allegations that suggest with reasonable particularity the conceivable existence of the requisite contacts between Defendants and the forum state.”

to personal jurisdiction by registering to do business in New Jersey and accepting service of process through a registered agent in New Jersey.

_Otsuka Pharm. Co. v. Mylan Inc._, 106 F. Supp. 3d 456 (D.N.J. 2015): Pharmaceutical patent infringement action. New Jersey District Court held that two non-resident corporate defendants consented to personal jurisdiction by registering to do business in New Jersey and accepting service of process through a registered agent in New Jersey. However, the plaintiff failed to show that a co-defendant corporation based in India had sufficient contacts with New Jersey to render it subject to specific jurisdiction there.

**Pennsylvania**

_Gress v. Freedom Mortg. Corp._, 386 F. Supp. 3d 455 (M.D. Pa. 2019): Multi-state, putative class action involving claims against assignee of mortgages and loans. Pennsylvania District Court held that it had specific jurisdiction over the claims of non-residents, declining to apply _BMS_ in the class action context.

_Lutz v. Rakuten, Inc._, 376 F. Supp. 3d 455 (E.D. Pa. 2019): Professional baseball player sued a Japanese baseball team for fraud, negligence misrepresentation, and promissory estoppel arising from contract negotiations. Pennsylvania District Court held that it had specific jurisdiction over a Japanese corporation because virtually all of the negotiations over plaintiff’s baseball contract took place in Pennsylvania.

_Vaughan Estate of Vaughan v. Olympus Am., Inc._, 208 A.3d 66 (2019), reargument denied (June 11, 2019): Wrongful death case resulting from an insufficiently sanitized duodenoscope that caused a patient to suffer a drug-resident infection and die. Superior Court of Pennsylvania held that it had specific jurisdiction over the non-resident scope manufacturer based on the in-state contacts of its regulatory agent.

_Murray v. Am. LaFrance, LLC_, 2018 PA Super 267 (Sept. 25, 2018): Firefighters suffered hearing loss as a result of excessive sound exposure from fire engine sirens. Pennsylvania superior court held that it had general personal jurisdiction over an Illinois corporation because it consented to jurisdiction when it registered to do business in Pennsylvania, pursuant to 41 Pa.C.S.A. section 5301(a).

_Webb-Benjamin, LLC v. Int'l Rug Grp., LLC_, 2018 PA Super 187 (June 28, 2018): Breach of contract case involving home furnishing sales events. Superior Court of Pennsylvania held that it had jurisdiction over a Connecticut corporation because it consented by registering to do business as a foreign corporation after the alleged wrongful conduct. 42 Pa.C.S.A. “section 5301(a) does not preclude jurisdiction for acts committed prior to registration.” Moreover, “_Daimler_ does not eliminate consent as a method of obtaining personal jurisdiction.”

_Hammons v. Ethicon, Inc._, 2018 PA Super 172 (June 19, 2018): Medical device liability case involving a “product used to treat prolapsed pelvic organs.” Superior Court of Pennsylvania held that it had specific jurisdiction over a New Jersey corporation because it designed and
manufactured the product in Pennsylvania in collaboration with a Pennsylvania company and a Pennsylvania physician.

_Gorton v. Air & Liquid Sys. Corp._, 303 F. Supp. 3d 278 (M.D. Pa. 2018): Asbestos case involving manufacture of automobiles. Pennsylvania District Court held that two non-resident corporations consented to personal jurisdiction by qualifying as foreign corporations under 42 Pa.C.S. § 5301. However, the court did not otherwise have general or specific jurisdiction over these defendants.


_Byrd v. Aaron's, Inc._, 14 F. Supp. 3d 667 (W.D. Pa. 2014) reversed on other grounds by _Byrd v. Aaron's Inc._, 784 F.3d 154 (3d Cir. 2015), as amended (Apr. 28, 2015), opinion vacated in part on reconsideration by _Byrd v. Aaron's, Inc._, No. CV 11-101, 2018 WL 1183207 (W.D. Pa. Mar. 7, 2018): Invasion of privacy case. Pennsylvania District Court held that it had specific jurisdiction over a non-resident corporation based on the “absent co-conspirator” doctrine: “Under Pennsylvania law personal jurisdiction of a non-forum co-conspirator may be asserted ... where a plaintiff demonstrates that substantial acts in furtherance of the conspiracy occurred in Pennsylvania and that the non-forum co-conspirator was aware or should have been aware of those acts.” Because the non-resident defendant allegedly used a Pennsylvania co-defendant’s computer servers to access the plaintiff’s computers, the absent co-conspirator doctrine applied to create jurisdiction over the non-resident corporation.

**4TH CIRCUIT**

_Sky Cable, LLC v. DIRECTV, Inc._, 886 F.3d 375 (4th Cir. 2018): Unauthorized transmission of television shows case. After obtaining a judgment against an individual defendant, plaintiff successfully reverse pierced the corporate veil as to defendant’s LLCs. Fourth Circuit held that it could exercise personal jurisdiction over the LLCs despite the fact that plaintiff did not serve them with process during the litigation because they were alter egos of the individual defendant.

_Maryland_

_Under Armour, Inc. v. Battle Fashions, Inc._, 294 F. Supp. 3d 428 (D. Md. 2018): Sportswear trademark infringement case. Maryland District Court held that it had specific jurisdiction over North Carolina corporations because defendants went beyond sending cease and desist letters to plaintiff in Maryland and interfered with plaintiff’s business by also sending letters to plaintiff’s advertising agency and the sports figure associated with the trademark as well as his agent. It is worth noting that these letters were sent to California and New York, not North Carolina.
Seidel v. Kirby, 296 F. Supp. 3d 745 (D. Md. 2017): Defamation case involving online posts on a fan fiction forum. Maryland District Court held that it had general jurisdiction over non-resident individuals because they waived their general jurisdiction defense by failing to raise it in their first motion to dismiss.

South Carolina

Harper v. Bridgestone, No. 2015-CP-40-03309 (Court of Common Pleas, Richland County, S.C., December 1, 2015): Attached as Exhibit. Auto accident case involving tire tread separation. South Carolina court held that it had specific jurisdiction over a non-resident corporation under South Carolina’s long-arm statute. The corporation designed and built automobiles for sale in all states (including South Carolina), undertook a duty to remove the defective tire from the marketplace using its dealerships in South Carolina, the dealership that sold the car and tire in question was located in South Carolina, the corporation advertised its cars in South Carolina, and it was registered to do business in and had an agent for service in South Carolina.

Virginia

Automobili Lamborghini S.P.A. v. Lamborghini Latino Am. USA, No. 1:18-CV-62, 2019 WL 4200871 (E.D. Va. Aug. 21, 2019): Trademark infringement suit involving counterfeit Lamborghini-marketed merchandise. Virginia District Court held it had Rule 4(k)(2) specific jurisdiction over a foreign individual who had falsely claimed to have licensing rights. Under the requirements of ALS Scan, “[defendant], in concert with [co-defendant], personally and substantially took steps to market and sell infringing and counterfeit Lamborghini-marked products into the United States through an online store at the website www.lamborghinigrupo.com.”

Gilmore v. Jones, 370 F. Supp. 3d 630 (W.D. Va. 2019), motion to certify appeal granted, No. 3:18-CV-00017, 2019 WL 4417490 (W.D. Va. Sept. 16, 2019): Defamation case filed by a diplomat who suffered backlash after posting a video online depicting a violent act that occurred at a protest in North Carolina. Virginia District Court held that it had specific jurisdiction over individual defendants residing in Florida, Missouri, and Texas who authored defamatory online posts about the plaintiff. In accordance with the requirements of ALS Scan, each of these defendants manifested an intent to direct their online posts at a Virginia audience.

Selke v. Germanwings GmbH, 261 F. Supp. 3d 645 (E.D. Va. 2017): International plane crash case. Virginia District Court held that a German airline was subject to specific personal jurisdiction under Virginia’s long-arm statute for a plane crash in France because of the contacts of Germanwings’ U.S. agent, United Airlines. Germanwings sold its plane tickets for Flight 9525 to plaintiffs’ decedents through United pursuant to an interline service agreement and United not only sold the tickets to decedents in Virginia but also had significant contacts with Virginia itself. This case did not concern general jurisdiction.

customers in Virginia, accepted money from Virginia, and shipped its infringing products to Virginia. The plaintiff did not argue for general jurisdiction.

5TH CIRCUIT

In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig., 888 F.3d 753 (5th Cir. 2018): Medical device case involving metal-on-metal hip implants. Fifth Circuit held that it had specific jurisdiction over a non-resident parent corporation because it had a “significant role in placing the [product] into the stream of commerce with the expectation that it would be purchased by consumers in Texas rendered [the parent] amenable to suit for injuries caused by the [product] in Texas.”

In re Chinese-Manufactured Drywall Prod. Liab. Litig., 753 F.3d 521 (5th Cir. 2014): Class action over defective drywall. The Fifth Circuit held that a Florida District Court had specific personal jurisdiction over a Chinese company under Florida’s long-arm statute based on the contacts of its subsidiary. The subsidiary acted as the Chinese company’s agent under Florida law by acting on the principal’s behalf, both companies held themselves out to be the same company, and the subsidiary was formed to conduct a narrow function only on behalf of the principal. The Fifth Circuit also found that a Louisiana District Court had specific jurisdiction over the Chinese Company under Louisiana’s long-arm statute based on alter-ego liability for these same reasons. This case did not concern general jurisdiction.

In re Chinese Manufactured Drywall Prod. Liab. Litig., 742 F.3d 576 (5th Cir. 2014): Class action over defective drywall. The Fifth Circuit held that a Chinese company was subject to specific personal jurisdiction under Virginia’s long-arm statute because it designed its product and packaging for a Virginia distributor, it entered into two contracts to sell a substantial amount of product in Virginia, and its contacts with Virginia (selling drywall) formed the basis for the class action. This case did not concern general jurisdiction.

Louisiana

In re Chinese-Manufactured Drywall Prod. Liab. Litig., No. MDL 09-2047, 2017 WL 5971622 (E.D. La. Nov. 30, 2017): Class action involving defective drywall. Louisiana District Court held that it had specific personal jurisdiction over a Chinese company, as it previously held and was affirmed by the 5th Circuit, and “BMS is not a change to controlling law regarding personal jurisdiction, class action, or agency relationship.”

Mayeaux v. DRV, LLC, 2016 WL 112704 (W.D. La. Jan. 8, 2016) [not reported]: Case involving rescission of sale of travel trailer. Louisiana District Court held that it had specific jurisdiction over a non-resident corporation because it sold its products in Louisiana, the plaintiffs shopped for a trailer at a Louisiana dealer (although they ultimately bought it in Texas), the defendant marketed the product in Louisiana, and was registered to do business and had an agent for service of process in Louisiana. Also, the “Defendant's decision to allow its products to be sold in Louisiana through an authorized dealer is directly implicated in Plaintiffs’ purchase of the product, though it was eventually purchased from a lower-priced competitor in a neighboring state.” The court did not find that it had general jurisdiction.
Mississippi

*Wilmington Tr., N.A. v. Lincoln Benefit Life Co.*, 328 F. Supp. 3d 586 (N.D. Miss. 2018): Life insurance bad faith case. Mississippi District Court held that it had specific jurisdiction over a non-resident corporation based on defendant’s contacts, “including but certainly not limited to, the selling of the policy at issue in this case to a Mississippi resident. Indeed, plaintiff notes that LBL has been authorized by the Mississippi Department of Insurance to sell insurance policies in Mississippi since 1981, and it has submitted a Market Share Report available on the Mississippi Insurance Department's website which reveals that, in the past five years, defendant has collected between $9 and $12 million each year in premiums from the life insurance policies it has sold in this state.”

Texas

*Garcia v. Peterson*, No. CV H-17-1601, 2018 WL 3496740 (S.D. Tex. July 20, 2018): Fair Labor Standards Act case involving moving truck drivers. Texas District court held that it had personal jurisdiction over a non-resident corporation based on consent since defendant instituted a receivership action in Texas state court that was related to plaintiffs’ FLSA claims. The court also declined to extend *BMS* to bar plaintiffs’ FLSA claims.

*Michelin N. Am., Inc. v. De Santiago*, No. 08-17-00119-CV, 2018 WL 3654919 (Tex. App. Aug. 2, 2018), review dismissed (Dec. 21, 2018): Tire products liability case involving the sale of a used tire in Texas but an accident in Mexico. Texas appellate court held that it had specific jurisdiction over a non-resident corporation through stream of commerce.

*Truhlar v. Alvarez*, No. 2014DCV1401 (County Court, El Paso County, Texas, May 13, 2016): Attached as Exhibit. Auto accident case involving a defective tire. El Paso County court held that it had specific jurisdiction over a Taiwanese corporation because the plaintiff purchased the tire in Texas, the corporation sold its tires in Texas for years by shipping directly to a number of distributors that were advertised on its website, advertised in Texas, transported its tires over the roads in Texas, routinely sent sales representatives to Texas, conducted market research in Texas, solicited opinions from distributors and consumers in Texas online, and regularly fielded inquiries from end users or dealers. General jurisdiction was not discussed.

*TV Azteca v. Ruiz*, 490 S.W.3d 29 (Tex. 2016): Defamation action between entertainer and broadcaster. Supreme Court of Texas held that it had specific jurisdiction over a Mexican corporation under the “directed-a-tort” test because the corporation “intentionally targeted Texas through their broadcasts that aired in Texas” and the defamation claims arose from and related to those particular broadcasts. The court did not reach the issue of general jurisdiction.

🐦 *Loyalty Conversion Sys. Corp. v. Am. Airlines, Inc.*, 66 F. Supp. 3d 795 (E.D. Tex. 2014): Patent infringement action involving customer loyalty award credits. Although a Texas District Court held it did not have general jurisdiction over a non-resident airline company, it did have specific jurisdiction under Texas’ long-arm statute. The airline did not fly to Texas or have any
offices in Texas, but it had a large number of loyalty awards members in Texas and transactions with those members related to the patent infringement claims at issue.

Casares v. Agri-Placements Int'l, Inc., 12 F. Supp. 3d 956 (S.D. Tex. 2014): Migrant and Seasonal Agricultural Worker Protection Act case. Texas District Court held that an Oklahoma corporation waived its personal jurisdiction defense by failing to include it in its motion for summary judgment.

Breathwit Marine Contractors, Ltd. v. Deloach Marine Servs., LLC, 994 F. Supp. 2d 845 (S.D. Tex. 2014): Maritime accident between two towing vessels. Texas District Court was doubtful that it had general jurisdiction over a Louisiana corporation, but did not reach that issue because it held that it had specific jurisdiction over that company. The defendant corporation’s vessel used Houston as its home port and traveled 100 miles in Texas, and the corporation operated at least six vessels in Texas and contracted with a Texas company for the trip in question. Even though the accident happened in Louisiana waters, the defendant corporation’s contacts with Texas for this trip were sufficient to meet the “but-for-plus” standard establishing that the contacts gave rise to this lawsuit.

6TH CIRCUIT

Power Investments, LLC v. SL EC, LLC, 927 F.3d 914 (6th Cir. 2019): Fraudulent investment case filed in state court and removed to federal court on diversity grounds. Sixth Circuit held that Kentucky District Court had specific jurisdiction over a Missouri corporation and its principal because the principal initiated a relationship and communicated extensively with plaintiff in Kentucky, even though the principal never entered Kentucky.

Kentucky

Eat More Wings, LLC v. Home Mkt. Foods, Inc., 282 F. Supp. 3d 965 (E.D. Ky. 2017): Action involving stolen recipe for chicken wing spices. Kentucky District Court held that it had specific jurisdiction over a non-resident corporation because it transacted business when it negotiated a deal with plaintiff over email and asked him to send samples and instructions knowing that he was in Kentucky at the time. Defendant’s act of allegedly stealing the recipe from a Kentucky resident and then shipping wings to Kentucky for sale caused tortious injury in Kentucky.

Tennessee

Hosp. Auth. of Metro. Gov't of Nashville v. Momenta Pharm., Inc., 353 F. Supp. 3d 678 (M.D. Tenn. 2018): Putative class action, Sherman Act case involving anticoagulant drugs. Tennessee District Court held that it had specific jurisdiction over defendants, even with respect to non-Tennessee resident claims. “Unlike in Bristol-Myers, here, [plaintiffs] can show an ‘affiliation between the forum and the underlying controversy’ sufficient to confer specific personal jurisdiction because the indirectly purchased enoxaparin was intended for distribution and ultimate consumption by Tennessee members. . . . Bristol-Myers does not apply to class actions.”

7TH CIRCUIT
Illinois

Schaefer v. Synergy Flight Ctr., LLC, 2019 IL App (1st) 181779: Family of passengers who died in an airplane crash brought lawsuit against Texas partnership that overhauled the defective left engine. Illinois Appellate Court held that it had specific jurisdiction over the Texas partnership. It “had ongoing business relationships with six Illinois customers and plaintiffs adequately alleged that [defendant’s] negligence caused the crash in Illinois of an Illinois-based plane.”

Mission Measurement Corp. v. Blackbaud, Inc., 287 F. Supp. 3d 691 (N.D. Ill. 2017): Trade secrets case involving social sector data. Illinois District Court held that it had specific jurisdiction over a non-resident corporation (Vista Management) because it “ha[d] an office in Chicago and that an employee of Vista Consulting Group in Illinois—an affiliate of Vista Management—communicated with certain Individual Defendants to discuss the valuation of MicroEdge's outcomes offering in 2014 prior to the sale to Blackbaud. (Id. ¶ 66.) Equally important, Vista Management was an integral part of fostering the relationship between MicroEdge and Mission Measurement concerning their joint development of the outcomes software.”

Harlem Ambassadors Prods., Inc. v. ULTD Entm’t LLC, 281 F. Supp. 3d 689 (N.D. Ill. 2017): Breach of contract case involving basketball shows. Illinois District Court held that it had specific jurisdiction over a Michigan individual defendant because she consented to jurisdiction in Illinois based on a forum selection clause in the contract at issue. The court also held that it had specific jurisdiction over a California individual defendant because he reached out to the Illinois plaintiff, entered into a confidentiality agreement with plaintiff, and arranged and attended meetings in Illinois.

Campbell v. Campbell, 262 F. Supp. 3d 701 (N.D. Ill. 2017): Defamation case involving emails sent by ex-husband to former wife’s new employer. Illinois District Court held that it had specific jurisdiction over a Minnesota individual defendant because he sent defamatory emails from Minnesota to his ex-wife’s new employer, which he knew was located in Illinois.

Kowal v. Westchester Wheels, Inc., 2017 IL App (1st) 152293, 89 N.E.3d 807, appeal denied, 94 N.E.3d 673 (Ill. 2018): Products liability action involving defective bicycle. Illinois court of appeal held that it had specific jurisdiction over a Taiwanese corporation under the stream of commerce theory. Defendant regularly sold bicycles to Illinois residents through approximately 40 authorized retailers, it used a second-tier subsidiary as its sole distributor in the U.S. with whom channels for providing regular advice to customers were established, plaintiff bought her defective bicycle through one of defendant’s authorized retailers in Illinois, and defendant had been a party to lawsuits in several states where it retained local counsel.

MG Design Assocs., Corp. v. CoStar Realty Info., Inc., 267 F. Supp. 3d 1000 (N.D. Ill. 2017): Tortious interference case involving trade show exhibit designs. Illinois District Court held that it had specific jurisdiction over a Virginia corporation because it stole the Illinois plaintiff’s design
and used it to encourage defendants to breach their contract with plaintiff for Illinois-based tradeshow operations.

_Khan v. Gramercy Advisors, LLC_, 2016 IL App (4th) 150435, 61 N.E.3d 107, appeal denied, 77 N.E.3d 82 (Ill. 2017), appeal denied, 77 N.E.3d 82 (Ill. 2017), and cert. denied, 138 S. Ct. 202, 199 L. Ed. 2d 115 (2017): Investment fraud case. Illinois appellate court held that it had specific jurisdiction over a non-resident corporation because it solicited business in Illinois through an advertiser/conduit located there and it made tortious misrepresentations to a plaintiff while in Illinois. The parties agreed that Illinois had no general jurisdiction over the defendants.

_M.M. ex rel. Meyers v. GlaxoSmithKline LLC_, 2016 IL App (1st) 151909, 61 N.E.3d 1026, appeal denied sub nom. M.M. v. GlaxoSmithKline LLC, 65 N.E.3d 842 (Ill. 2016), and cert. denied, 138 S. Ct. 64, 199 L. Ed. 2d 20 (2017): Birth defect case against pharmaceutical company. Illinois appellate court held that it had specific jurisdiction over a non-resident corporation because the corporation conceded that it purposely directed its activities at Illinois since it contracted with 17 doctors for drug trials, employed up to 121 people, and maintained an agent for service in Illinois. Also, the drug labels in question were created in part by the clinical trials of the drug that took place in Illinois thereby establishing that the plaintiffs’ claims arose out of the defendant’s contacts with Illinois. The plaintiffs did not argue that general jurisdiction was established.

_Johnson v. Creighton Univ.,_ 114 F. Supp. 3d 688 (N.D. Ill. 2015): Medical malpractice action based on misdiagnosis of melanoma. Illinois District Court held that it had specific jurisdiction over a Nebraska university under Illinois’ long-arm statute based on an agreement to provide pathology services between the university and an Illinois doctor who treated the plaintiff. The university also periodically reached out to the plaintiff’s doctor to offer pathology services and the doctor consistently sent pathology slides to the university over many years. The court did not reach the parties’ general jurisdiction arguments.

_¬ Eagle Air Transp., Inc. v. Nat’l Aerotech Aviation Delaware, Inc.,_ 75 F. Supp. 3d 883 (N.D. Ill. 2014): Breach of contract action involving the sale of an airplane. Illinois District Court held that it had specific jurisdiction over a non-resident corporation because the defendant reached out to the plaintiff in Illinois, communicated with the plaintiff over several months, entered into an agreement knowing that the plaintiff would fly the plane back to Illinois, and traveled to Illinois twice to perform work on the plane under a warranty provision in the agreement. The plaintiff did not argue for general jurisdiction.

_Wisconsin_

_Thomas v. Ford Motor Co.,_ 289 F. Supp. 3d 941 (E.D. Wis. 2017): Automobile that was manufactured in Michigan and assembled in Canada, purchased in Wisconsin, and involved in a rear-end crash in Pennsylvania. Wisconsin District Court held that it had specific jurisdiction over a non-resident automobile manufacturer based on the stream of commerce theory: (i) Plaintiffs were from WI, (ii) bought the car, registered/titled/insured and serviced it in WI, and (iii) “Ford's willingness to serve and sell to Wisconsin consumers, its pervasive marketing on multiple platforms to Wisconsin residents, and its accrual of benefits from Wisconsin consumers
buying its products that make it reasonable for Ford to anticipate being haled into a Wisconsin court.” It did not matter that defendant originally sold the vehicle in Oklahoma to another buyer. The plaintiff did not argue for general jurisdiction.

**Burton v. Am. Cyanamid**, 128 F. Supp. 3d 1095 (E.D. Wis. 2015): Toxic tort case involving minors with lead exposure. Wisconsin District Court held that it had specific jurisdiction over non-resident corporations because the corporations did not dispute that they purposefully directed some of its activities there by having many stores and employees in the state for years. The plaintiffs’ claims also arose out of the defendants’ contacts with Illinois because the defendants purposefully targeted Wisconsin for the sale of lead paint. The fact that the individual plaintiffs could not say which of the defendants specifically sold the paint that injured them did not prevent personal jurisdiction from being established. The plaintiffs conceded that they could not establish general jurisdiction.

**8TH CIRCUIT**

**Iowa**

**Ferman v. Jenlis, Inc.**, 224 F. Supp. 3d 791 (S.D. Iowa 2016): Copyright infringement action involving “no trespassing” signs. Iowa District Court held that it had specific jurisdiction over a Minnesota corporation because it offered its infringing products at an Iowa trade show, and the plaintiff’s claims arose from that contact. The plaintiff did not argue for general jurisdiction.

**Davis v. Simmons**, 100 F. Supp. 3d 723 (S.D. Iowa 2015): Civil rights action involving a private intelligence network between police officers. Iowa District Court held that it had specific jurisdiction over a non-resident corporation based on representatives of that corporation making a single trip to Iowa to train police officers in how to use its network. The nature and quality of this single contact was significant because it directly related to the claim the plaintiffs asserted for illegal search and seizure. The plaintiffs did not argue for general jurisdiction.

**Allianz Glob. Corp. & Specialty Marine Ins. Co. v. Watts Regulator Co.**, 92 F. Supp. 3d 910 (S.D. Iowa 2015): Insurance subrogation case involving flooding and water damage to real property from defective plumbing line strainer. Although Iowa District Court did not have general jurisdiction over a Massachusetts corporation, it did have specific jurisdiction based on Iowa’s long-arm statute. The corporation purposefully directed its actions to Iowa by selling $10 million worth of plumbing products through “independent regional sales companies.” The action arose out of the corporation’s contacts with Iowa because the plumbing line strainer in question came from one of the corporation’s local distributors.

**Sioux Pharm, Inc. v. Summit Nutritionals Int'l, Inc.**, 859 N.W.2d 182 (Iowa 2015): Pharmaceutical unfair competition case. Supreme Court of Iowa held that it did not have general jurisdiction over a New Jersey corporation. But it did have specific jurisdiction because the defendant’s source of the pharmaceutical product it was wrongfully repackaging and reselling came from an Iowa facility, the product was provided pursuant to a contract, the defendant advertised the Iowa source of its product on its website, listed the Iowa facility as its own, and the defendant also sold one shipment of its product to a company in Iowa.
**RELCO Locomotives, Inc. v. AllRail, Inc.,** 4 F. Supp. 3d 1073 (S.D. Iowa 2014): Breach of contract case involving sale of locomotive. Iowa District Court held that it had specific jurisdiction over a Canadian corporation because it visited an Iowa facility that was supplying the locomotive on multiple occasions concerning the sale, coordinated the transportation of the locomotive from Iowa to Canada pursuant to an “FOB is Albia” term in the agreement, and made a substantial monetary investment in the services being provided in Iowa (i.e. building the locomotive). The court also concluded it did not have general jurisdiction.

**Minnesota**

**Bandemer v. Ford Motor Co.,** 931 N.W.2d 744 (Minn. 2019): Automobile products liability case involving a defective airbag. Supreme Court of Minnesota held that it had specific jurisdiction over a non-resident corporation. “Ford’s data collection, marketing, and advertising in Minnesota demonstrate that it delivered its product into the stream of commerce with the intention that Minnesotans purchase such vehicles.”

**Rilley v. MoneyMutual, LLC,** 884 N.W.2d 321 (Minn. 2016), cert. denied, 137 S. Ct. 1331, 197 L. Ed. 2d 518 (2017): Class action involving payday loans. Supreme Court of Minnesota held that it had specific jurisdiction over a non-resident corporation under Minnesota’s long-arm statute. The defendant had minimum contacts with Minnesota because it solicited and transacted with over 1,000 Minnesotan loan applicants via email, sent follow up emails encouraging applicants to seek additional loans, and specifically targeted Minnesota residents using Google AdWords advertising. General jurisdiction was not an issue.

**George v. Uponor Corp.,** 988 F. Supp. 2d 1056 (D. Minn. 2013): Class action over defective plumbing components. Minnesota District Court held that, although general jurisdiction was lacking, it had specific jurisdiction over a Finland-based parent company because of the parent’s control and domination of its Minnesota subsidiary. Although the parent was separated from the subsidiary by several levels of a chain of ownership, the reality was that there was no dilution of ownership as each company in the chain wholly owned the company below it. The subsidiary was a mere extension of the parent’s business, the parent’s annual reports showed that it viewed itself and its subsidiaries as one single enterprise with multiple regions, it considered North American profits and liabilities as its own, and, even though the parent and subsidiary had separate websites, the parent’s “About Us” page suggested a symbiotic relationship between the parent and subsidiary.

**Missouri**

**Mitchell v. Eli Lilly & Co.,** 159 F. Supp. 3d 967 (E.D. Mo. 2016): Pharmaceutical class action concerning antidepressants. Missouri District Court held that it did not have general or specific jurisdiction over a corporation because it was “at home” in Delaware and because the plaintiffs conceded that their claims did not stem from the defendant’s conduct in Missouri. However, the court ruled that the defendant consented to jurisdiction because it registered to do business and maintained an agent for service in Missouri.
Nebraska

*Hand Cut Steaks Acquisitions, Inc. v. Lone Star Steakhouse & Saloon of Nebraska, Inc.*, 298 Neb. 705, 905 N.W.2d 644 (2018): Landlord tenant case involving an out-of-state guarantor. Supreme Court of Nebraska held that it had *specific* jurisdiction over a Delaware / Texas guarantor because it “executed this guaranty for the express purpose of inducing the lease of Nebraska property to a Nebraska business”, “Nebraska has a significant interest in having the dispute over this guaranty of the lease of Nebraska property adjudicated in Nebraska courts”, it “guaranteed the performance of Lone Star’s obligations under the lease, which obligations were governed by Nebraska law pursuant to the lease’s choice-of-law provision”, and it “was a named insured on the insurance policy covering the property and the Lone Star business . . . .”

South Dakota

*Lewis & Clark Reg’l Water Sys., Inc. v. Carstensen Contracting, Inc.*, 355 F. Supp. 3d 880 (D.S.D. 2018): Contractor was sued for installing defective pipes and, after it filed a third-party complaint against its supplier, the supplier moved to dismiss for lack of jurisdiction. South Dakota District Court held that it had *specific* jurisdiction over the pipe supplier because its “nature and quality of contacts with South Dakota included having representatives make trips to South Dakota for meetings in South Dakota concerning the Project, as well as sending emails and having telephone discussions with those working on the Project in South Dakota.”

*Estate of Moore Carroll v. Double D Servs., Inc.*, 159 F. Supp. 3d 1002 (D.S.D. 2016): Wrongful death case involving vehicle accident. South Dakota District Court held that it had *specific* jurisdiction over a non-resident corporation because it inspected the defendant driver’s truck for ten to fifteen years and knew he traveled to South Dakota regularly. The accident happened because the defendant’s truck’s taillights were malfunctioning and difficult for the decedent to see. The plaintiff did not argue for general jurisdiction.

9TH CIRCUIT

*Freestream Aircraft (Bermuda) Ltd. v. Aero Law Grp.*, 905 F.3d 597 (9th Cir. 2018): Aircraft company sued an attorney and its law firm for making defamatory statements while attending a trade show in Nevada that the company was committing illegal and unethical conduct. Ninth Circuit held that the Nevada District Court had *specific* jurisdiction over the defendants.

California

*Sotomayor v. Bank of Am., N.A.*, 377 F. Supp. 3d 1034 (C.D. Cal. 2019): Putative class action involving violations of Telephone Consumer Protection Act. California District Court held that it had *specific* jurisdiction over the claims of non-resident plaintiffs. “. . . Bristol-Myers applies to mass tort actions, not class actions.”

specific jurisdiction over a Korean distributor of the agent, who was included in the case via a cross-complaint filed by a co-defendant. The distributor made direct sales of the agent to distributors based in California, including co-defendant, for several years, satisfying stream of commerce.

San Diego Cty. Credit Union v. Citizens Equity First Credit Union, 325 F. Supp. 3d 1088 (S.D. Cal. 2018): Trademark infringement suit brought by one credit union against another. California District Court held that it had specific jurisdiction over an Illinois corporation. Defendant “committed an intentional act by filing a petition for cancellation in Virginia but [defendant] also committed intentional acts by acquiring three branches of California's Valley Credit Union in 2008, rebranding them as [defendant], adding two branches in California and marketing its services by using the purported trademarks.”

Sloan v. Gen. Motors LLC, 287 F. Supp. 3d 840 (N.D. Cal. 2018), order clarified, No. 16-CV-07244-EMC, 2018 WL 1156607 (N.D. Cal. Mar. 5, 2018): Class action involving faulty car engines that unexpectedly shutdown or caught fire. California District Court held that a non-resident corporation had waived personal jurisdiction by failing to challenge it in their first motion to dismiss, filed before the BMS decision. The court also held that it had specific jurisdiction over several out-of-state plaintiffs’ claims through the pendent personal jurisdiction doctrine.

Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc., No. 17-CV-00564 NC, 2017 WL 4224723 (N.D. Cal. Sept. 22, 2017): Class action regarding ginger ale’s failure to contain actual ginger root as advertised. California District Court held that it would have specific jurisdiction over a non-resident corporation because “(1) Dr. Pepper advertised and sold Canada Dry in California over a long period of time; (2) the named plaintiffs bought Canada Dry in California and were injured when they discovered that Canada Dry did not contain ginger too, as alleged; and (3) it is reasonable to have personal jurisdiction over Dr. Pepper based on these allegations, and Dr. Pepper has never claimed otherwise except to the extent it objects to the nonresident plaintiffs bringing claims against it in California.” The court also declined to extend BMS to bar this class action.

Synoptek, LLC v. Synaptek Corp., 326 F. Supp. 3d 976 (C.D. Cal. 2017): Trademark infringement action involving IT services. California District Court held that it had specific jurisdiction over a Virginia corporation because “it intentionally hired employees in California, sent materials and supplies to those employees in California, and directed additional employees to travel to and work in California to provide services at VA medical centers in California.”

Lions Gate Entm't Inc. v. TD Ameritrade Servs. Co., Inc., 170 F. Supp. 3d 1249 (C.D. Cal. 2016), on reconsideration in part sub nom. Lions Gate Entm't Inc. v. TD Ameritrade Holding Corporaiton, No. CV 15-05024 DDP (EX), 2016 WL 4134495 (C.D. Cal. Aug. 1, 2016): Copyright and trademark infringement case involving movie “Dirty Dancing.” California District Court held that, although no general jurisdiction existed, it had specific personal jurisdiction over a non-resident advertising corporation under California’s long-arm statute. Corporation spoofed the movie in a commercial so it knew that it was using the movie’s intellectual property and also targeted the plaintiff’s intellectual property. It also knew that
California would be the main target of the nationwide advertising campaign since it was a major hub of the ad company’s client, the location of the plaintiff’s principal place of business, and the center of the entertainment industry.

Senne v. Kansas City Royals Baseball Corp., 105 F. Supp. 3d 981 (N.D. Cal. 2015): Wage and hour case between baseball players, their teams, and MLB. California District Court held it had specific jurisdiction over three of the non-resident baseball corporation defendants. Conducting a team by team analysis, the court concluded that each team had minimum contacts with California based on factors like employing scouts who worked in California, drafting players from California and what percentage of total players drafted came from California, and whether the team was in contact with the plaintiff player in California when it signed that player. The court rejected the plaintiffs’ general jurisdiction arguments.

Falco v. Nissan N. Am. Inc., 96 F. Supp. 3d 1053 (C.D. Cal.): Automobile fraud case concerning defective timing chain system. California District Court ruled that it had specific jurisdiction over a non-resident corporation that participated in the manufacturing of the component at issue. The defendant intended its components to be sold in California by using a California corporation (that was also its subsidiary) as its distributor, sharing half its board of directors with the subsidiary, working closely with the subsidiary regarding the sale and distribution of the component, advertising the component in California, and issuing press releases in California. General jurisdiction was not at issue.

In re Cathode Ray Tube (CRT) Antitrust Litig., 27 F. Supp. 3d 1002 (N.D. Cal. 2014): Antitrust and competition case involving cathode ray tubes. California District Court held that it had specific jurisdiction over a Chinese company because it shared marketing information (including sales in the United States) with co-conspirators, the “co-conspirators coordinated pricing decisions in relation to United States market conditions,” discussed the prices of cathode ray tubes in U.S. dollars, and the defendant sold cathode ray tubes to a New Jersey corporation that sold televisions in the United States. Moreover, the plaintiffs established “but-for” causation because they paid artificially high cathode ray prices as a result of the defendant’s wrongful activities. The plaintiffs did not argue for general jurisdiction.

Montana

Ford Motor Co. v. Montana Eighth Judicial Dist. Court, 2019 MT 115: Automobile products liability action involving vehicle rollover that occurred in Montana. Supreme Court of Montana held that it had specific jurisdiction over a non-resident corporation. Stream of commerce theory plus was met even though Ford assembled the subject vehicle in Kentucky and sold it in Washington. “Ford delivers its vehicles and parts into the stream of commerce with the expectation that Montana consumers will purchase them[,] . . . advertises in Montana, is registered to do business in Montana, . . . operates subsidiary companies in Montana[,] . . . has thirty-six dealerships in Montana[,] . . . has employees in Montana[,] . . . sells automobiles, specifically Ford Explorers—the kind of vehicle at issue in this case—and parts in Montana[,] . . . provides automotive services in Montana, including certified repair, replacement, and recall services.”
Buckles by & through Buckles v. Cont'l Res., Inc., 2017 MT 235, 388 Mont. 517, 402 P.3d 1213: Wrongful death case where decedent died at oil well site in North Dakota. Supreme Court of Montana held that the district court should have conducted an evidentiary hearing to determine whether it had specific jurisdiction over an Oklahoma corporation. The corporation’s Montana office oversaw the well site in question, it “contracted with Montana entities to service the wells”, and “there [were] disputed issues of fact as to whether [the corporate defendant’s] oversight of the wells at issue—which it acknowledges was conducted from its [Montana] office—contributed to the operation of ‘an inherently dangerous and unsafe well site’ . . . .”

Chivaras v. Ford Motor Company, No. DDV-14-814 (Montana Eighth Judicial District Court, Cascade County, June 30, 2015): Attached as Exhibit. Death resulting from automobile rollover. Montana court held that it had specific jurisdiction over non-resident Ford Motor Company. “. . . Ford sold the same model of truck across the United States and Canada, including in Montana, provided for local recall, service, repair, and presumably local warranty service of those vehicles notwithstanding the point of origin, through its network of local independent dealers irrespective of whether the current owner was the original owner. . . . Ford had some forum-related connection beyond just the presence of that vehicle in Montana as evidence by the 2013 safety recall notice that directed the Montana owner of the vehicle to obtain recall service or repair at a local Ford dealer in Montana.” In addition, the court found that it had specific jurisdiction over Ford under the stream of commerce theory because the crash happened in Montana. However, general jurisdiction did not apply.

Nevada

Matter of Beatrice B. Davis Family Heritage Tr., 394 P.3d 1203 (Nev. 2017): Action involving investment trust. Supreme Court of Nevada held that it had specific jurisdiction over a non-resident investment trust advisor because the situs of the trust was in Nevada, and personal jurisdiction was provided by Nev. Rev. Stat. Ann. § 163.5555. General jurisdiction was not discussed.

Geanacopulos v. Narconon Fresh Start, 39 F. Supp. 3d 1127 (D. Nev. 2014): Breach of contract and fraud case against a drug rehabilitation center. Nevada District Court held that it had specific jurisdiction over two California corporations because they controlled a co-defendant corporation (named Fresh Start) that was based in Nevada. The defendants purposefully directed their activities at Nevada residents by exercising a high degree of control over Fresh Start (as shown on one defendant’s website), and the plaintiff’s injuries resulted from his treatment at Fresh Start and the misleading claims on Fresh Start’s website (approved by the two non-resident defendants). General jurisdiction was not an issue.

Oregon

in Oregon by selling parts, repairing parts, advertising and serving customers in Oregon, and maintaining an interactive website. The plaintiffs did not argue for general jurisdiction.

**Washington**

*Hawes v. Kabani & Co., Inc.*, 182 F. Supp. 3d 1134 (W.D. Wash. 2016): Misrepresentation case against a corporate auditor. Washington District Court did not have general jurisdiction over a California corporation, but specific jurisdiction was established because the defendant erroneously audited a Washington company, expressly aimed its actions at Washington since it knew the company it audited was in Washington, and “plaintiffs' injuries as shareholders [of the audited company] were intrinsically related to [the audited company’s] failure.” The court ruled it did not have general jurisdiction.

*State v. LG Elecs., Inc.*, 185 Wash. App. 394 (2016): Attorney General suit over cathode ray tube price-fixing. Washington court of appeals held that it had specific jurisdiction over foreign corporations under Washington’s long-arm statute. “[T]he large volume of [cathode ray tube] products that entered Washington constituted a regular flow or regular course of sales, . . . the Attorney General's claims arose from the Companies' contacts with Washington because consumers were injured by paying inflated prices as a result of the Companies' price-fixing, and . . . the concern for otherwise remediless consumers and the danger of insulating foreign manufacturers from the reach of Washington antitrust laws outweigh any inconvenience to the Companies.” This decision did not involve general jurisdiction.

**10TH CIRCUIT**

*Am. Fid. Assur. Co. v. Bank of New York Mellon*, 810 F.3d 1234 (10th Cir. 2016): Breach of contractual and fiduciary duties case over mortgage-backed securities. The Tenth Circuit held that the defendant waived its personal jurisdiction defense by failing to argue it in its prior motions to dismiss and in its answer. The defense was just as available to the defendant at the outset of litigation as it was after *Daimler* was decided during the litigation.

**Colorado**

*Align Corp. Ltd. v. Allister Mark Boustred*, 2017 CO 103, cert. denied sub nom. Align Corp. v. Boustred, No. 17-1227, 2018 WL 1142978 (U.S. June 11, 2018): Products liability action involving defective radio-controlled helicopter. Supreme Court of Colorado held that it had specific jurisdiction over a Taiwanese corporation under the stream of commerce theory. Plaintiff was a Colorado resident who was injured in Colorado by a product he purchased from a retailer there. Defendant “sells its products via an international distributorship network that includes four distributors in the United States, . . . [it] has sold over $350,000 worth of [it’s] products in Colorado; [it] placed no limitations on where Horizon could distribute products in the United States; [it’s] products are sold throughout the United States, including Colorado; All four distributors have distributed [it’s] products in Colorado; All four distributors are promoted and advertised by [defendant], and in particular on [defendant’s] website; [it] provided marketing materials to all of its U.S. distributors; [it] attended trade shows in the United States where it
actively marketed its products; and [it] established channels through which consumers could receive assistance with their . . . products.”

Mayo v. General Motors LLC, No. 15-cv-01418-RBJ (District Court of Colorado): Attached as Exhibit. Automobile accident case involving defective tire and seat belt. Colorado District Court held that it had no general jurisdiction, but it had specific jurisdiction over a group of foreign corporations. They manufactured and sold millions of seatbelts that were installed in General Motors’ vehicles, with the defendants knowing that those vehicles would be sold in the United States, and the defendants did not suggest that it would be unreasonable for them to defend the case in Colorado.

Matthys v. Narconon Fresh Start, 104 F. Supp. 3d 1191 (D. Colo. 2015): Breach of contract and fraud case against a drug rehabilitation center. Colorado District Court held that it had specific jurisdiction over two California corporations under Colorado’s long-arm statute because they controlled a co-defendant corporation (named Fresh Start) that was based in Colorado. The defendants purposefully directed their activities at Colorado residents by exercising a high degree of control over Fresh Start (as shown on one defendant’s website), and the plaintiff’s injuries resulted from his treatment at Fresh Start and the misleading claims on Fresh Start’s website (approved by the two non-resident defendants). General jurisdiction was not an issue.

New Mexico

LaVigne v. First Cnty. Bancshares, Inc., 330 F.R.D. 293 (D.N.M. 2019): Putative class action involving violations of the Telephone Consumer Protection Act. New Mexico District Court held that it had specific jurisdiction over non-residents’ claims. “. . . Bristol-Myers does not apply to this class action. . . . Even if Bristol-Myers did apply here, it is unclear why that defense should be asserted at the class notice stage. Any requested relief based on Bristol-Myers was not appropriately raised in a response to this class notice motion.”

Oklahoma

Braver v. Northstar Alarm Servs., LLC, 329 F.R.D. 320 (W.D. Okla. 2018): Putative class action involving violations of the Telephone Consumer Protection Act. Oklahoma District Court held that it had specific jurisdiction over non-residents’ claims. Defendants waived their ability to challenge personal jurisdiction by failing to raise it in their answers or motions to dismiss and by admitting personal jurisdiction in a joint status report. Also, “[t]his court joins the majority of other courts in holding that Bristol-Myers does not apply to class actions in federal court.”

Utah

Raser Techs., Inc. by & through Houston Phoenix Grp., LLC v. Morgan Stanley & Co., LLC, 2019 UT 44: Pattern of Unlawful Activity Act case involving naked short selling of plaintiff corporation’s stock. Supreme Court of Utah held that it had specific jurisdiction over a non-resident corporation. “We therefore adopt a conspiracy theory of jurisdiction that focuses on whether the defendant could have reasonably anticipated being subject to jurisdiction in the forum state because of her participation in the conspiracy. To assert specific personal
jurisdiction, the plaintiff must plead with particularity that (1) the defendant is a member of a conspiracy, (2) the acts of the defendant’s co-conspirators create minimum contacts with the forum, and (3) the defendant could have reasonably anticipated that her co-conspirator’s actions would connect the conspiracy to the forum state in a meaningful way, such that she could expect to defend herself in that forum.”

11TH CIRCUIT

Alabama

Jones v. Deupy Synthes Prod., Inc., 330 F.R.D. 298 (N.D. Ala. 2018): Products liability, putative class action involving faulty knee replacement system. Alabama District Court held that it had specific jurisdiction over non-residents claims, refusing to find that Bristol-Myers barred their claims.

Florida

Dolan v. JetBlue Airways Corp., 385 F. Supp. 3d 1338 (S.D. Fla. 2019): Putative class action against an airline because it did not disclose that it received a portion of the fee that it charged for trip insurance. Florida District Court denied the airline’s motion to dismiss for lack of specific personal jurisdiction because BMS did not bar non-resident class member claims.

Subic Bay Marine Exploratorium, Inc. v. JV China, Inc., 257 So. 3d 1139 (Fla. Dist. Ct. App. 2018): Purchaser of marine theme park failed to pay balance owed for shares of company’s stock. Florida appellate court held that it had general jurisdiction over the purchaser, a Florida corporation with its principal place of business in California. The trial court dismissed the case for lack of personal jurisdiction because it did not consider the defendant’s residency and instead “applied section 48.193, Florida Statutes (2016), Florida’s long-arm statute, which establishes when Florida courts may exercise jurisdiction over non-Florida residents.”

Becker v. HBN Media, Inc., No. 18-60688-CIV, 2018 WL 3007922 (S.D. Fla. June 6, 2018): Class action involving unsolicited telemarketing calls. Florida District Court held that it had specific jurisdiction over a Georgia corporation for claims brought by non-Florida residents. BMS was not a class action case; it addressed mass tort actions. Also, “[t]he U.S. Supreme Court left open ‘the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.’”

Tickling Keys, Inc. v. Transamerica Fin. Advisors, Inc., 305 F. Supp. 3d 1342 (M.D. Fla. 2018): Class action involving unsolicited facsimile advertisement. Florida District Court held that it had specific jurisdiction over non-resident corporations because they sent unsolicited faxes to plaintiff’s Florida office, and the relatedness, purposeful availment, and fair play prongs of personal jurisdiction were satisfied.

Rolls-Royce, PLC v. Spirit Airlines, Inc., 239 So. 3d 709 (Fla. Dist. Ct. App. 2018): Action by airline against manufacturer of engine that exploded during flight. Florida appellate court held that the trial court erred in failing to hold an evidentiary hearing to resolve disputed issues of fact
relating to defendant’s motion to dismiss. Plaintiff asserted that defendant delivered the engine to Florida where it was reinstalled on the plane, but defendant submitted two affidavits that created disputed issues of fact about plaintiff’s assertion.

**Gothard v. Ford Motor Company**, No. 2015CA-002724-0000-00 (Circuit Court of the Tenth Judicial Circuit, in and for Polk County, Florida): **Attached as Exhibit.** Automobile accident and products liability case involving the Polk’s County Sheriff’s Office Animal Control. The plaintiff argued that the Florida court had both general and specific jurisdiction over a non-resident corporation because (1) it had 110 car dealerships in Florida, (2) registered to do business in Florida with an agent for service, (3) marketed its vehicles to Florida residents, and (4) was involved in many legal proceedings in Florida, even though the sale of the vehicle in question did not take place in Florida. It is unclear whether the Florida court ultimately held that either general or specific jurisdiction applied as its ruling simply stated that it was based on the plaintiff’s arguments.

**Barriere v. Juluca**, No. 12-23510-CIV, 2014 WL 652831 (S.D. Fla. Feb. 19, 2014): Anguilla resort premises liability case. Florida District Court held that it had general jurisdiction over an Anguillian corporation because defendant failed to provide any evidence in support of its motion to dismiss and the court took plaintiffs’ allegations as fact. “Plaintiffs have alleged that Cap Juluca, an Anguillian corporation with its principle place of business in Anguilla, maintains a sales office in Florida. Plaintiffs have additionally alleged that Cap Juluca's assets are managed by its Florida-based agent, Maissen consultants. Plaintiffs further allege that Defendants Leading Hotels of the World and Hotel Representative, Inc., who have not objected to personal jurisdiction in Florida, promote, manage, operate, and provide reservation services for resorts including Cap Juluca; provide extensive sales and promotional support, including advertising and public relations; set forth the standards required to maintain association with the Leading Hotels of the World group; and regularly inspect Cap Juluca's premises in Anguilla. Plaintiffs have alleged that Leading Hotels of the World is the actual or apparent agent of Cap Juluca and that Cap Juluca maintained control over Leading Hotels of the World, or alternatively, that Leading Hotels of the World maintained control over Cap Juluca.”

**Georgia**

**Dennis v. IDT Corp.**, 343 F. Supp. 3d 1363 (N.D. Ga. 2018): Putative class action involving Telephone Consumer Protection Act. Georgia District Court held that it had specific jurisdiction over non-residents’ claims against New Jersey defendants. “[T]he Court joins the majority of district courts who have addressed this issue in finding that Bristol-Myers does not prevent this Court's assertion of specific jurisdiction over Defendants with regard to the claims of the putative non-resident class members.”

**Sanchez v. Launch Tech. Workforce Sols.**, LLC, 297 F. Supp. 3d 1360 (N.D. Ga. 2018): Class action involving violation of Fair Credit Reporting Act regarding employment. Georgia District Court held that it had specific jurisdiction over non-resident plaintiffs’ claims against a Delaware/Illinois corporation. “[B]ecause [BMS] simply reaffirms controlling due-process law and does not apply to federal class actions and because Launch has not otherwise presented persuasive authority in support of its motion, Launch has shown no reason that this Court may
not continue to exercise jurisdiction over a nationwide class claim on the strength of its specific personal jurisdiction over the defendant as to the named plaintiff’s claim.”

_Ralls Corp. v. Huerfano River Wind, LLC_, 27 F. Supp. 3d 1303 (N.D. Ga. 2014): Breach of contract case involving a wind farm. Georgia District Court ruled that it had _specific_ jurisdiction over a non-resident corporation under Georgia’s long-arm statute because part of the deal for the wind farm was negotiated in Georgia, representatives of the corporation attended several in-state meetings in Georgia, and representatives sent emails and made telephone calls to the plaintiff’s representatives in Georgia. General jurisdiction was not an issue.

**DISTRICT OF COLUMBIA**


_ImAPizza, LLC v. At Pizza Ltd._, 334 F. Supp. 3d 95 (D.D.C. 2018): IP infringement case involving pizza chain. DC District Court held that, although it was a close call, it had _specific_ jurisdiction over a restaurant in Scotland because its owner “traveled to the District for a business purpose: to conduct research for At Pizza about other pizza restaurants. . . . Moreover, there was at least some kind of ‘transaction’ in the traditional sense, as [owner] was a customer of ImAPizza during his visit.”


_Vasquez v. Whole Foods Mkt., Inc._, 302 F. Supp. 3d 36 (D.D.C. 2018): Wrongful termination and retaliation case involving improper bonus program and defamation. Although it was a “close call”, the DC District Court denied a Delaware/Texas corporation’s motion to dismiss and held that plaintiffs had made a prima facie showing of _specific_ jurisdiction. Defendant “provides administrative services ‘directly’ to the four stores located in the District of Columbia. . . . [it] provided legal services in connection with the investigation of Plaintiffs and other related pending matters”, and defamatory statements made outside of but received in DC. “But the ultimate determination of whether the court can exercise personal jurisdiction over [defendant] will have to wait until after the conclusion of discovery.”

_Stocks v. Cordish Companies, Inc._, 118 F. Supp. 3d 81 (D.D.C. 2015): Personal injury action against casino stemming from rouge roulette ball. DC District Court denied without prejudice a Maryland corporation’s motion to dismiss for lack of personal jurisdiction. Even though the defendant did not reside in DC and all the events giving rise to the plaintiff’s injuries took place
in Maryland, the court found that the “[p]laintiff's specific, uncontested factual averment about [the defendant's] advertising in the District of Columbia, and his allegation that his claim arose from that advertising, is sufficient under Shoppers Food [Warehouse v. Moreno, 746 A.2d 320 (D.C. 2000)] to avoid dismissal of its complaint under Rule 12(b)(2).” The court also noted that the plaintiff had not had an opportunity to conduct jurisdictional discovery and thought the issue would be better resolved on summary judgment: “At that stage, [p]laintiff will have to come forward with evidence about the actual content and pervasiveness of [the defendant’s] alleged advertising in the District of Columbia, and any other evidence that [the defendant] transacts business in the District, to meet its burden of proving personal jurisdiction. But, at this early stage, before Plaintiff has had any opportunity to take discovery, Defendant's motion to dismiss must be denied.”

Gilmore v. Palestinian Interim Self-Gov't Auth., 8 F. Supp. 3d 9 (D.D.C. 2014): Anti-Terrorism Act case involving a shooting in East Jerusalem. DC District Court held that it had personal jurisdiction over the Palestinian Interim Self-Governing Authority and the Palestine Liberation Organization because these defendants had waived jurisdiction by failing to raise the defense ten years earlier during the litigation when they originally moved to dismiss the case. See also Gilmore v. Palestinian Interim Self–Government Auth., No. 14-7129, 2016 WL 7210140, at *2 (D.C. Cir. Dec. 13, 2016) (conducting same analysis).

FEDERAL CIRCUIT

Genetic Veterinary Scis., Inc. v. LABOKLIN GmbH & Co. KG, 933 F.3d 1302 (Fed. Cir. 2019): Patent infringement action involving method of genotyping Labrador retrievers. Federal Circuit held that it had specific jurisdiction over a foreign corporation under Rule 4(k)(2). “[I]n addition to [sending] the cease-and-desist letter to PPG,’ [defendant] conducted business in the United States by entering into sublicenses in California and Michigan in accordance with an exclusive license granted to it on the disputed ’114 patent.” In addition, the court had personal jurisdiction over a foreign university “because the University is an agent or instrumentality of a foreign state that engaged in commercial activity sufficient to trigger an exception to immunity under § 1605(a)(2) as it had ‘obtained a [U.S.] patent and then threatened PPG by proxy with litigation.’”

Jack Henry & Assoc., Inc. v. Plano Encryption Techs. LLC, 910 F.3d 1199 (Fed. Cir. 2018): Patent infringement action involving bank software systems. Federal Circuit held that Texas District Court had general and specific jurisdiction over a Texas LLC. Defendant “has undertaken a licensing program, with threats of litigation, directed to the Banks conducting banking activity in the Northern District.”

Xilinx, Inc. v. Papst Licensing GmbH & Co. KG, 848 F.3d 1346 (Fed. Cir. 2017): Patent infringement and declaratory judgment action involving programmable logic devices. Federal Circuit held that a California District Court had specific personal jurisdiction over a German corporation because it sent multiple notice letters to the plaintiff and traveled to California to discuss the patent infringement with the plaintiff. It did not violate due process for the German corporation to have to defend the action in California because it was a non-practicing patent holder residing outside of the U.S. and it had filed prior litigations in California. However, the
California court did not have general jurisdiction because the corporation was “at home” in Germany.

*Acorda Therapeutics Inc. v. Mylan Pharm. Inc.*, 817 F.3d 755 (Fed. Cir. 2016): Pharmaceutical patent infringement case. The Federal Circuit held that a Delaware District Court had specific personal jurisdiction over a West Virginia corporation under Delaware’s long-arm statute because the corporation had “taken the costly, significant step of applying to the FDA for approval to engage in future activities—including the marketing of its generic drugs—that [would] be purposefully directed at Delaware . . . .” ANDA filings were sufficient to establish minimum contacts and the corporation could not show that due process weighed against litigating the action in Delaware.
FORUM NON CONVENIENS IN
FOREIGN AIR CRASH AVIATION CASES

OCTOBER 24, 2019

American Bar Association • Tort Trial & Insurance Practice Section
Aviation Litigation 2019

Larry Kaplan
Member
KMA Zuckert LLC
200 West Madison Street, 16th Floor
Chicago, Illinois 60606
+1.312.345.3000

Copyright 2019 American Bar Association
I. **Introduction**

A motion to dismiss based on the doctrine of *forum non conveniens* (“FNC”) is a procedural tool to be considered by defendants when the plaintiff’s choice of forum will result in litigation which is less convenient than it would be in a foreign jurisdiction. In the aviation context, the decision whether to file such a motion often arises in foreign air crash cases, filed in a U.S. court, where the accident involves a foreign air carrier at a location outside the United States.

The party filing an FNC motion bears the burden of showing that (1) there is an available and adequate alternative forum, and (2) the balance of relevant private and public interest factors indicates that maintaining the case in the current forum is comparatively inconvenient.

Because the trial court’s decision whether or not to dismiss a case based on FNC grounds is a question of procedural law, the court which decides the motion will look to the procedural laws of that jurisdiction in deciding the issue. Foreign air crash litigation often involves lawsuits initiated in or removed to a number of different federal courts, and it is likely that the Judicial Panel on Multidistrict Litigation (“MDL”) will centralize proceedings by assigning all cases to a single district court. Where that is the case, an MDL transferee court will apply the procedural laws of its own circuit in deciding an FNC motion.

A court may decide a forum non conveniens motion before considering any jurisdictional issues. See *Sinochem Int’l Co. Ltd. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 425 (2007). The filing of an FNC motion does not waive a foreign sovereign immunity or personal jurisdiction defense or a lack of jurisdiction under the Montreal Convention if otherwise preserved. The decision whether or not to dismiss a case based on FNC grounds is discretionary, and on appeal is subject to an abuse of discretion standard.
II. What are the Bases for Forum Non Conveniens Dismissal?

The U.S. Supreme Court has adopted a three-part analysis for forum non conveniens. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). The three-part analysis examines the following:

**What degree of deference should be given to plaintiffs’ choice of forum?**

- A domestic plaintiff’s choice of forum is often afforded substantial deference, but it is not conclusive. *Id.* at 256.
- A foreign plaintiff’s choice of forum receives less deference. *Id.*

**Does an adequate and available alternative forum exist?**

- Availability means only that the foreign forum can exercise jurisdiction to hear the case.
- The adequacy requirement is satisfied by the availability of a remedy in the foreign forum.

**Would private and public interests be better served by dismissing the case in favor of litigating in another jurisdiction?**

As to the assessment of the private and public interests, the following are some of the primary facts that are considered by the court:

- **Private Interest Factors:** Facts that make the litigation convenient for the parties.
  - Where is the evidence located?
  - Where are the witnesses located?
  - Who investigated the accident?
  - Where is the aircraft wreckage?

- **Public Interest Factors:** Facts that the court considers to best serve the public interest.
  - Is the case of sufficient U.S. interest to expend the court’s time and resources?
  - What are the competing interests of the U.S. versus alternative forums?
  - Will a U.S. court be applying a foreign country’s law?

The party moving to dismiss based on FNC grounds has the burden of showing the existence of an adequate alternative forum and that the balance of private and public factors favors
dismissal when considering the amount of deference that is owed to plaintiff’s choice of U.S. forum. The threshold inquiry is whether an alternate forum is “available” and “adequate.” The order in which the analysis proceeds, however, is not fixed as long as all factors are considered.

III. The Plaintiff’s Choice of Forum

A court must grant deference to a plaintiff’s choice of forum. Where the plaintiff involved in a foreign air crash is a citizen of the United States, the plaintiff’s choice of a U.S. court is entitled to substantial deference. Put another way, “[t]he plaintiff’s choice of forum will not be disturbed unless the private and public interest factors strongly favor trial in the foreign country.” In re Air Crash Over Mid-Atl. On June 1, 2009 (“Air France”), 760 F. Supp. 2d 832, 839 (N.D. Cal. 2010).

A non-U.S. plaintiff’s choice of forum is entitled to less deference.

The amount of deference owed in any given case corresponds to the assumption that a plaintiff will choose a convenient forum, and there may be varying shades of an American plaintiff’s connections to the U.S. that may militate against entitlement to substantial deference. For example, if a U.S. citizen has been residing in a foreign country for a long period of time, and has been working for years in that country, a court may consider those facts in determining the amount of deference to be given. Ex-patriot U.S. citizens living abroad receive a diminished degree of deference in the choice of the U.S. as a forum. Likewise, where the passenger-decedent was a citizen and resident of a foreign country, but a U.S. representative of the estate has been chosen – who had no connection to the decedent or his or her survivors – diminished deference will be given to the U.S. plaintiff. Generally speaking, the greater the ties the U.S. plaintiff has to the U.S., the greater the inconvenience to that plaintiff in litigating the case in a foreign jurisdiction, and greater deference will be afforded the plaintiff’s choice of a U.S. forum. However, FNC dismissal is not automatically barred when the plaintiff or real party in interest has filed suit in his or her home forum.
IV. Does an Available and Adequate Forum Exist

The determination of whether an adequate and available forum exists must be analyzed in the context of the causes of action filed by the plaintiff. With respect to Montreal Convention claims, for example, in order for a foreign country’s forum to be available the country must be a signatory to the Montreal Convention, and it must be one of the fora set forth under Article 33 of that Convention, so that its courts have the power to hear a plaintiff’s Montreal Convention claims. Likewise, in the case of wrongful death and product liability claims, the defendant must show that some cause of action or remedy is available in the foreign forum.

From the defendant’s perspective, it is obviously helpful if it can point to prior U.S. court FNC decisions which have held that the alternate country’s court system is available and adequate for the types of causes of action at issue in the present case. Additionally, the pendency of other suits from the same accident in the foreign jurisdiction can be argued to demonstrate that the foreign court is available and adequate.

Where there may be questions regarding the foreign court’s ability to maintain jurisdiction over any of the defendants or to enforce a judgment against any of the defendants there are a number of conditions to which a defendant can agree in order to render a forum court “available.” A defendant’s agreement to consent to jurisdiction in the foreign forum is normally dispositive in establishing the foreign forum’s availability. A defendant will also typically need to waive any statute of limitations defense for a reasonable period in order for a foreign court to be deemed “available.” Additionally, a defendant will need to agree to pay or cause to be paid any judgment entered against it in the foreign jurisdiction subject to appeal rights.

A plaintiff resisting a motion to dismiss based on FNC grounds may argue that even with all of the above agreements, the foreign court might not accept jurisdiction. In that case, the U.S. court can condition dismissal on the foreign court’s acceptance of the case.
A foreign forum is adequate if it affords the plaintiff with some remedy, even if the damages available would be less than those available in the United States and even if certain theories of liability are not recognized. If a jurisdiction does not permit litigation of the subject matter of the dispute, it would not meet the adequacy test. This may occur where the alternative forum cannot award any relief to a plaintiff at all, such as where the alternative forum’s governing law barred the plaintiff from directly filing his or her claim, or where the plaintiff’s claim in the alternative forum would be time-barred and the statute of limitations cannot be waived or is jurisdictional in the foreign forum.

In sum, a foreign court does not need to afford the same types of remedies as a U.S. court and the governing law does not need to be as favorable as U.S. law for the foreign court to be deemed an adequate forum. It is sufficient if the forum foreign provides some potential avenue for redress.

V. Private and Public Interest Factors

A. Private Interest Factors

Private interest factors involve all of the practical considerations that make trial of a case easy, expeditious and inexpensive. These considerations will typically involve the relevant ease of access to sources of proof; the availability of witnesses and the ability and cost to compel willing and unwilling non-party witnesses to appear; and access to the subject premises if viewing the premises would be appropriate. Additionally, the ability of a defendant to implead other parties in the plaintiff’s choice of forum is a private interest consideration. This may be a critical issue where there are potential sovereign defendants who cannot be impleaded in a U.S. court but would be subject to being impleaded in a foreign court.

It is often the case that the parties will dispute the primary location of liability evidence. A plaintiff who has sued a U.S. manufacturer will argue that the most critical evidence in the case
relates to the design and manufacture of the aircraft (or relevant component parts) and that that evidence, documentary and testimonial, is located in the U.S. In cases involving foreign carriers, defendants will typically argue that the maintenance records relating to the aircraft and the training records and psychosocial evidence relating to the crew are the most crucial evidence in determining causation, and that that evidence is located in the foreign jurisdiction. Depending on where the critical air traffic control events took place, it can be argued that the country where those air traffic controllers are located most satisfies the private interest factor. Overall, it is usually the case that even significant manufacturer evidence relating to a design claim does not tip the balance when compared with evidence in a foreign country where the airline is located; especially where that is the country where the accident occurred and where the ICAO Annex 13 investigation was conducted.

The plaintiff’s theories of liability may influence the determination of the private interest factors. Montreal Convention claims which are limited to seeking recovery of the 113,100 special drawing rights against an airline require limited sources of proof – whether the air carrier experienced an “accident” and the amount of damages. Nonetheless, even when the recovery sought is within the liability limits, the recoverable damages must be proven, and when the injured passenger was a non-U.S. citizen or resident, evidence of the injury, treatment and damages may all be in a foreign jurisdiction. Moreover, plaintiffs rarely limit their Montreal Convention claims to the 113,100 special drawing rights, which explains why they seek relief in a U.S. court in the first place. When a plaintiff seeks in excess of the 113,100 special drawing rights, an air carrier is entitled to show that the accident is entirely attributable to events wholly outside the carrier’s control. Even if a plaintiff were to agree to provide the damages evidence in a U.S. court, if they are unwilling to limit their damages to the 113,100 special drawing rights cap, the defendant is
entitled to put on its liability defenses – which often depend largely on the foreign carrier’s liability evidence outside of the U.S. – and this inquiry then may tip the scales in favor of a foreign jurisdiction.

Damages evidence will almost always be primarily located in the jurisdiction where the passengers reside or resided. In the case of damages evidence relating to economic loss of a non-U.S. citizen or resident, a defendant will argue that evidence, in the form of the passenger’s work and financial records, is located in the foreign jurisdiction and more conveniently produced there. In terms of non-economic loss evidence, the defendant will argue that this proof involves the testimony of the passenger’s family and friends and that this evidence is located in the foreign jurisdiction as well.

In the case of liability evidence, a manufacturer seeking to dismiss based on FNC grounds can agree to produce all of the evidence deemed relevant by the foreign court in the foreign jurisdiction after refiling, at no cost to the plaintiff. Likewise, in the case of damages evidence, a plaintiff resisting a motion to dismiss on FNC grounds can agree to produce all of the relevant documentary damages evidence in the U.S. A court tasked with addressing this private interest factor when both sides agree to produce all of the relevant documentary information will still consider the cost of providing translations of foreign documents and of providing interpreters for foreign-speaking party witnesses in its FNC analysis. More importantly, a U.S. court will consider its ability to compel the presentation of non-party foreign witnesses in the U.S., such as a passenger’s medical treaters, employers or non-family members with knowledge. Even if a passenger, or his or her Estate, are willing and able to present the live testimony of these witnesses, the defenses that a defendant will potentially raise at trial if the matter would be proceed in a U.S. court must be considered, given the lack of jurisdiction of the U.S. court over foreign witnesses
and evidence the defendant will need and the likely inability to implead foreign parties, which can result in depriving defendants of a fair trial. At bottom, it is the convenience of the trial as a whole that guides the decision.

Where the ICAO Annex 13 investigation into the cause of a foreign air crash is pending in a foreign country, a defendant can argue that the investigators are necessary witnesses and cannot be compelled to testify in the U.S. A defendant can also argue that documentary evidence relating to the investigation such as transcripts and notes of investigator interviews is also not subject to compulsory process. A court must then evaluate the materiality of the investigation evidence which will and will not be subject to compulsory process in a U.S. court in conducting its FNC analysis.

Oftentimes, a foreign air crash will result in a criminal investigation being conducted. Where there is a criminal investigation in the same forum where the Annex 13 investigation is being conducted, this is an additional factor that would support a dismissal on the ground of FNC.

As discussed above, where non-party witnesses who are beyond the control of any party, and whose testimony would be critical to the case, the respective ability of the competing courts to compel the appearance of those witnesses becomes a key private interest factor. It will often be necessary to employ the use of a legal expert in the laws of the foreign country, to file a declaration to the effect that in the foreign jurisdiction, the courts have procedures that would allow them to compel the timely and efficient production of non-party evidence that is within their jurisdiction or where witnesses are located which is not subject to compulsory process in a U.S. court.

If the foreign country where the evidence is located is not a member of the Hague Convention or a participant in a similar evidentiary treaty, the production of evidence located in that country in a U.S. court would require the use of letters rogatory. It can be argued that
enforcement of letters rogatory in a foreign jurisdiction is very time-consuming, expensive, and inefficient, and that live testimony is far superior for getting at the truth.

The disparate locations of the parties to a foreign air crash case can create a private interest factor. The fairest most efficient trial is a single proceeding where all potential defendants can be joined with access to the available evidence. It is inconvenient and burdensome to require multiple proceedings to determine liability. Additionally, it can be unfair to a U.S. defendant if it is not able to implead as a third-party defendant a party whose joinder is critical to the presentation of the defense. Where contribution must be sought against a third-party defendant in the proposed alternative forum, there is a chance of inconsistent verdicts if the litigation remains in the United States.

In some instances, the inconvenience to a defendant required to litigate a foreign air crash case in a U.S. court can become so substantial it may even be argued to violate due process. At the end of the day, a federal court will emphasize the importance of trying the case in the forum that provides the greatest access to the most important sources of proof in its FNC analysis.

B. Public Interest Factors

The basic purpose behind the public interest factor analysis is to have localized controversies decided at home. Complex foreign air crash litigation will impose an administrative burden on the court and jury which will ultimately hear the dispute. It is not in the public interest to impose jury duty on citizens in communities which have no relation to the litigation or to congest the court docket of those communities to the disadvantage of local cases. The strongest case for dismissal based on a public interest analysis will arise where the foreign carrier was traveling to or from its home country when the accident occurred outside the United States or its territorial waters, and that country is also leading the investigation into the cause of the crash. This is especially true where a national carrier is involved. The safety of flights originating in a foreign
country are of major concern to the people of that country. Where initiatives have been taken by the foreign country to investigate the accident, it can be argued that this reflects the compelling interest of that country to have the dispute litigated there.

In cases involving foreign air carriers utilizing U.S. manufactured aircraft, the FNC public interest analysis will often focus on whether the country where the aircraft (or relevant components) was manufactured has a stronger interest in regulating the manufacturing and design practices of the manufacturer than the interest of the country where the air carrier is based in regulating the safe operation of the carrier. When these two competing interests clash, the interest of the country where the air carrier is based is usually deemed to outweigh the interests of the country where the aircraft was manufactured. And courts regularly find that the adequate and available alternative forum is just as capable of determining product liability issues and deterring improper behavior as the manufacturer’s home country.

As part of its public interest analysis, a court will also consider whether it will need to apply foreign law with which it is not familiar if the case is not dismissed on FNC grounds. Foreign air crash cases often involve complex choice of law issues where the law of the primary place of the business of the airline differs from the law of the decedent’s residence, or the law of the place where the accident took place. When complex choice of law issues become involved, a U.S. court will be reluctant to wade into the choice of law rules of a foreign country in deciding which country’s law should apply to which issues in the dispute.

VI. Overview of Federal Forum Non Conveniens Decisions Involving Aviation Accidents – 1980 to Present

Whether other potential dispositive motions are available or not, the federal courts tend to be inclined to dismiss foreign air crash litigation from the United States. The following are the key decisions supporting forum non conveniens dismissal in air crash cases:
Supreme Court and Circuit Courts of Appeal Cases


Fortaner v. Boeing Co., 504 F. App’x 573, 580 (9th Cir. 2013), aff’g In re Air Crash at Madrid, Spain, on Aug. 20, 2008, 893 F. Supp. 2d 1020, 1024 (C.D. Cal. 2011) (affirming forum non conveniens dismissal of claims arising from airplane crash in Spain in favor of litigation in Spain)

Galbert v. W. Caribbean Airways, 715 F.3d 1290, 1292 (11th Cir. 2013), aff’g In re W. Caribbean Airways, No. 06-22748, 2012 WL 1884684 (S.D. Fla. May 16, 2012) (affirming forum non conveniens dismissal of claims arising from airplane crash in Venezuela in favor of litigation in Martinique, France)

Lleras v. Excelaire Services, 354 F. App’x 585, 2009 WL 4282112, at *1 (2d Cir. Dec. 2, 2009), aff’g In re Air Crash Near Peixoto de Azeveda, Brazil, on Sept. 29, 2006, 574 F. Supp. 2d 272 (E.D.N.Y. 2008) (affirming forum non conveniens dismissal of claims arising from airplane crash in the Amazon rainforest in favor of litigation in Brazil)

Tazoe v. Airbus S.A.S., 631 F.3d 1321, 1337 (11th Cir. 2011), aff’g in part Tazoe v. Aereas, No. 07-21941, 2009 WL 3232908, at *2-*3 (S.D. Fla. Aug. 24, 2009) (affirming forum non conveniens dismissal of all claims arising from airplane crash in Sao Paulo in favor of litigation in Brazil except for one claim dismissed by district court sua sponte before that plaintiff could be heard on forum non conveniens)

Pierre-Louis v. Newvac Corp., 584 F.3d 1052, 1062 (11th Cir. 2009), aff’g In re West Caribbean Airways, S.A., 619 F. Supp. 2d 1299 (S.D. Fla. 2007) (affirming forum non conveniens dismissal of claims arising from airplane crash in Venezuela in favor of litigation in Martinique, France)


Clerides v. Boeing Co., 534 F.3d 1023, 1026 (7th Cir. 2008), aff’g In re Air Crash Near Athens, Greece on Aug. 14, 2005, 479 F. Supp. 2d 792 (N.D. Ill. 2007) (affirming forum non conveniens dismissal of claims arising from airplane crash near Athens in favor of litigation in Greece)


Lueck v. Sundstrand Corp., 236 F.3d 1137, 1140 (9th Cir. 2001) (affirming forum non conveniens dismissal of claims arising from airplane crash in New Zealand in favor of litigation in New Zealand)
Satz v. McDonnell Douglas Corp., 244 F.3d 1279, 1284 (11th Cir. 2001) (affirming forum non conveniens dismissal of claims arising from airplane crash near Nuevo Berlin, Uruguay in favor of litigation in Argentina)

Gschwind v. Cessna Aircraft Co., 161 F.3d 602, 604 (10th Cir. 1998) (affirming forum non conveniens dismissal of claims arising from airplane crash near Cannes in favor of litigation in France)

Magnin v. Teledyne Cont’l Motors, 91 F.3d 1424, 1431 (11th Cir. 1996) (affirming forum non conveniens dismissal of claims arising from airplane crash in France in favor of litigation in France)

De Aguilar v. Boeing Co., 11 F.3d 55, 56 (5th Cir. 1993), aff’g Torreblanca de Aguilar v. Boeing Co., 806 F. Supp. 139 (E.D. Tex. 1992) (affirming forum non conveniens dismissal of claims against arising from airplane crash in Mexico in favor of litigation in Mexico)


Zipfel v. Halliburton Co., 832 F.2d 1477, 1484-85 (9th Cir. 1987), amended on other grounds, 861 F.2d 565 (9th Cir. 1988) (affirming forum non conveniens dismissal of claims arising from airplane crash at Simpang Tiga Airport in Indonesia in favor of litigation in Indonesia)

Kryvicky v. Scandinavian Airlines System, 807 F.2d 514, 518 (6th Cir. 1986) (affirming forum non conveniens dismissal of claims arising from airplane crash near Madrid in favor of litigation in Spain)

Ahmed v. Boeing Co., 720 F.2d 224, 227 (1st Cir. 1983) (affirming conditional forum non conveniens dismissal of claims arising from airplane crash near Jeddah, Saudi Arabia in favor of litigation in Saudi Arabia or Pakistan)

Cheng v. Boeing Co., 708 F.2d 1406, 1411 (9th Cir. 1983), aff’g Nai-Chao v. Boeing Co., 555 F. Supp. 9 (N.D. Cal. 1982) (affirming forum non conveniens dismissal of claims arising from airplane crash in Taiwan in favor of litigation in Taiwan)

Miskow v. Boeing Co., 664 F.2d 205, 208 (9th Cir. 1981) (affirming forum non conveniens dismissal of claims arising from airplane crash at Cranbrook Airport in Canada in favor of litigation in Canada)

**Dahl v. United Tech. Corp.**, 632 F.2d 1027, 1028 (3d Cir. 1980) (affirming forum non conveniens dismissal of claims arising from helicopter crash in the North Sea off the coast of Norway in favor of litigation in Norway)

**District Court Cases**

*In re Air Crash over the Southern Indian Ocean on March 8, 2014*, 352 F.Supp.3d 19 (D.D.C. 2018) (dismissal under forum non conveniens all claims arising from airplane crash in the Southern Indian Ocean (en route from Kuala Lumpur to Beijing) in favor of litigation in Malaysia) (on appeal to D.C. Circuit)

*Siswanto v. Airbus Americas, Inc.*, No. 15-CV-5486, 2016 WL 7178460 (N.D. Ill. Dec. 9, 2016) (dismissal under forum non conveniens arising from airplane crash into the Java Sea near Borneo, Indonesia in favor of litigation in Indonesia)


*In re Air Crash Over the Mid-Atlantic on June 1, 2009*, 760 F. Supp. 2d 832, 842 (N.D. Cal. 2010) (dismissing under forum non conveniens all claims arising from airplane crash in the Atlantic Ocean (en route from Rio de Janeiro to Paris) in favor of litigation in France); *see also In re Air Crash Over the Mid-Atlantic*, 792 F. Supp. 2d 1090, 1094 (N.D. Cal. 2011) (dismissing re-filed claims under forum non conveniens)

*In re Air Crash Disaster Over Makassar Strait*, No. 09-CV-3805, 2011 WL 91037, at *4 (N.D. Ill. Jan. 11, 2011) (dismissing under forum non conveniens claims arising from disappearance of airplane over Makassar Strait, en route from Java to Sulawesi in favor of litigation in Indonesia)


*Navarrete De Pedrero v. Schweizer Aircraft Corp.*, 635 F. Supp. 2d 251, 261 (W.D.N.Y. 2009) (dismissing under forum non conveniens claims arising from helicopter crash in Ciudad Juarez, Mexico in favor of litigation in Mexico)
Melgares v. Sikorsky Aircraft Corp., 613 F. Supp. 2d 231, 246 (D. Conn. 2009) (dismissing under forum non conveniens claims arising from helicopter crash near Tenerife, Spain in favor of litigation in Spain)

Esheva v. Siberia Airlines, 499 F. Supp. 2d 493, 499-500 (S.D.N.Y. 2007) (dismissing under forum non conveniens claims arising from airplane crash in Moscow in favor of litigation in Russia)

In re Air Crash Near Athens, Greece on Aug. 14, 2005, 479 F. Supp. 2d 792, 798 (N.D. Ill. 2007) (dismissing under forum non conveniens claims arising from airplane crash near Athens, Greece in favor of litigation in Cyprus or Greece)

Da Rocha v. Bell Helicopter Textron, Inc., 451 F. Supp. 2d 1318, 1322 (S.D. Fla. 2006) (dismissing under forum non conveniens claims arising from helicopter crash in the Amazon rainforest in Brazil in favor of litigation in Brazil)


Faat v. Honeywell Int’l, Inc., No. 04-4333, 2005 WL 2475701, at *2 (D.N.J. Oct. 5, 2005) (dismissing under forum non conveniens claims arising from mid-air collision of airplanes over Überlingen, Germany (one en route from Moscow to Barcelona) in favor of litigation in Spain)

In re Air Crash Over Taiwan Straits on May 25, 2002, 331 F. Supp. 2d 1176, 1189 (C.D. Cal. 2004) (dismissing under forum non conveniens claims arising from airplane crash in Taiwanese waters (en route from Taipei to Hong Kong) in favor of litigation in Taiwan)


Helog Ag v. Kaman Aerospace Corp., 228 F. Supp. 2d 91, 93 (D. Conn. 2002) (dismissing under forum non conveniens claims arising from helicopter crash in Germany in favor of litigation in Germany)

Kern v. Jeppesen Sanderson, Inc., 867 F. Supp. 525, 538 (S.D. Tex. 1994) (dismissing, in part under forum non conveniens, claims arising from two different airplane crashes northeast of Kathmandu, Nepal, in favor of litigation in Nepal, Pakistan, Thailand, Germany, Great Britain, the Netherlands, or Spain)


Chhawchharia v. Boeing Co., 657 F. Supp. 1157, 1160 (S.D.N.Y. 1987) (dismissing under forum non conveniens claims arising from airplane crash near Tokyo, Japan in favor of litigation in India)

Rubenstein v. Piper Aircraft Corp., 587 F. Supp. 460, 461 (S.D. Fla. 1984) (dismissing under forum non conveniens claims arising from airplane crash in West Germany in favor of litigation in West Germany)

In re Disaster at Riyadh Airport, Saudi Arabia, on Aug. 19, 1980, 540 F. Supp. 1141, 1145-46 (D.D.C. 1982) (dismissing under forum non conveniens claims arising from in-flight fire of airplane near Riyadh, Saudi Arabia in favor of litigation in Saudi Arabia or the plaintiffs’ separate domiciles)


Fosen v. United Tech. Corp., 484 F. Supp. 490, 503-04 (S.D.N.Y.), aff’d, 633 F.2d 203 (2d Cir. 1980) (dismissing under forum non conveniens claims arising from helicopter crash in the North Sea off the cost of Norway in favor of litigation in Norway)
Appendix B

Cases Denying Motion to Stay or Dismiss Based on Forum Non-Conveniens

October 24, 2019
by A. Ilyas Akbari

Pacific Alliance Asia Opportunity Fund L.P. v. Kwok Ho Wan, 160 A.D.3d 452, 76 N.Y.S.3d 111 (1st Dep't 2018). Chinese citizen failed to establish that no substantial nexus existed between New York and breach of contract action brought by Hong Kong investment fund, with respect to transaction governed by Hong Kong law relating to real estate in China, as required for dismissal based on claim of inconvenient forum, even though most of the agreements at issue were negotiated and executed in Hong Kong or China; Chinese citizen had resided in New York for two years and sought asylum there, and although Hong Kong was potential alternative forum, it was not a suitable or adequate alternative, because citizen could not return there due to his pending asylum claim and fugitive status.

Espinoza v. Evergreen Helicopters, Inc., 359 Or. 63, 376 P.3d 960 (2016). Trial court applied the incorrect substantive standard in granting Oregon helicopter lessor's motion to dismiss based on forum non conveniens, in wrongful death action brought in Oregon by estates of passengers, who died in a helicopter crash in Peru, and thus decision dismissing action was an abuse of discretion; trial court stated that the ends of justice would have been "best served" by trial in Peru but not that trial in Oregon would have been so inconvenient as to be contrary to the ends of justice, and despite estates' well-pleaded allegations to the contrary, trial court appeared to base its decision on its determination that mechanical systems installed and tested by lessor in Oregon played no role in the crash, and that pilot error instead was its cause.

Bochetto v. Piper Aircraft Co., 94 A.3d 1044, 1056 (Pa. Super. Ct. 2014). An aircraft manufactured in the United States was exported to Belgium and was later taken to Portugal, where it subsequently crashed. The plaintiffs, survivors of the decedents, filed suit in a state court in Pennsylvania, and several of the defendants moved to dismiss in favor of Portugal on forum non conveniens grounds, which the trial court granted. On appeal, the Pennsylvania Superior Court reversed the district court's dismissal for forum non conveniens and remanded for further proceedings, criticizing the trial court's focus upon Pennsylvania and instructing that it reweight the private and public interest factors as to the case's network of connections to the United

1 DISCLAIMER: Readers of this document should check to ensure that the caselaw contained herein is still good law and has not been overruled before citing to it or relying on it in any way. The authors of this document do not warrant or otherwise represent that the legal authorities contained herein are still good law. The ➤ symbol denotes a case involving aviation.
States as a whole, not just Pennsylvania. If upheld and followed, *Bochetto* will make forum non
conveniens dismissal in international cases much more difficult, as nearly all cases involving
U.S.-made products have substantial connections to the broader United States.

* Sabatino v. The Boeing Co., No. 09 L 1056 (Ill. Cir. Ct., Cook Cty. May 3, 2010). Defendant
U.S. aircraft manufacturer, among others, was sued for personal injury related to an international
flight. Cook County Court denied Defendant's motion for dismissal based on forum *non
conveniens*. The Court ruled that although a foreign Plaintiff's choice of a U.S. forum is entitled
to less deference, this is not the same as “no deference.” The court weighed the private and
public interest factors, and ruled that Defendants failed to show that Plaintiffs' chosen forum is
inconvenient and that either the United Kingdom or Florida is more convenient. Because the
parties reside in different forums, potential witnesses reside in different forums and documents
exist in multiple forums, “one forum cannot be said to be more convenient to all the parties.”

A manufacturer was not entitled to dismissal of a purchaser's products liability action from the
chosen forum on the basis of forum non conveniens. The ends of justice would not be served by
dismissing the action in favor of Quebec, Canada, because the purchaser was severely injured
and still recovering his health and mobility in the forum. Furthermore, the purchaser had limited
financial resources.

*Wilson v. Island Seas Investments, Ltd.*, 590 F.3d 1264, 1271 (11th Cir. 2009). District court
erred in dismissing case by considering only contacts between the case and the Southern District
of Florida. Instead, the relevant focus is the connection between the litigation and the United
States as a whole.

*Ellis v. AAR Parts Trading, Inc.*, 357 Ill. App. 3d 723, 293 Ill. Dec. 416, 828 N.E.2d 726 (1st
Dist. 2005), as modified on denial of reh'g, (May 6, 2005). The trial court did not abuse its
discretion in denying Defendant's motion to dismiss on forum *non conveniens* grounds after
weighing the private and public interest factors in determining that they weighed in favor of
Illinois rather than the Philippines, in part because the defendants were residents of Illinois and
neither Illinois nor the Philippines had a predominate connection with the case.

forum non conveniens doctrine did not warrant a dismissal in favor of a Turkish forum of an
action to recover for damage to cargo during an ocean voyage. Although the shipment was
covered by a Turkish insurance policy and originated in Turkey, and the insurer, the shipper, and
the vessel's owner were based in Turkey, Puerto Rico was the destination of the cargo, the
damages were inspected in Puerto Rico, the plaintiff relied on claims based on federal maritime
law, and not all the defendants were amenable to the jurisdiction of the Turkish courts.
*Gupta v. Austrian Airlines*, 211 F. Supp. 2d 1078 (N.D. Ill. 2002). Doctrine of forum *non conveniens* did not warrant dismissal of action against Austrian airline alleging that passenger's death during nonstop flight between India and Illinois was caused in part by inadequate medical equipment on airplane and improper training of flight crew, even if all crew members and flight documents were in Austria, where Austrian courts had power to compel production of certain documents and attendance of unwilling witnesses, airline did not identify any specific witness who refused to submit to discovery in United States, United States courts could accept deposition testimony of witnesses beyond reach of compulsory process, airline was better equipped to transport witnesses and documents, there was no evidence regarding translation costs, and foreign law did not apply to any issue in case.
THE ELECTRONIC DOCKET AND
THE RISE OF THE SNAP REMOVAL

October 24, 2019

American Bar Association • Tort Trial & Insurance Practice Section
Aviation Litigation 2019

Jeanne M. O’Grady, Esq. | Partner
SPEISER KRAUSE
800 Westchester Ave. | S-608
Rye Brook, New York, 10573

Copyright 2019 American Bar Association
As electronic filing becomes the more prevalent – if not exclusive - method by which plaintiffs commence suit in the state courts, defendants are more frequently exploiting the likely unintended consequence of the amended federal removal statute by engaging in what is known as “snap” removal. This procedure, by which a defendant removes a diversity action prior to service, despite the presence of a forum defendant, has facilitated reverse forum shopping and litigation delays and, according to its critics, undermines the sovereignty of the states. The propriety of removal or remand decisions remains in effect largely unreviewable, since remand orders are not appealable, and decisions denying remand are subject to the final judgment rule.\(^1\) As a result, this issue did not make its way to the appellate courts until 2018, 70 years after the enactment of the federal rule upon which the snap removals are based.\(^2\) While district courts differ in their treatment of snap removals, the Second and Third Circuits, the only two federal appeals courts to address the issue, have recently endorsed the practice.\(^3\) These courts acknowledge that while the practice of snap removals does not serve the purposes of the federal removal statute, the plain language of the statute allows it, and they suggest that it is Congress who must limit the practice, not the courts.

As all first-year law students learn, the federal courts have original jurisdiction over matters brought pursuant to the courts’ federal question jurisdiction (28 U.S.C. 1331) or diversity jurisdiction (28 U.S.C. 1332). The federal removal statute allows a defendant sued in state court to remove to federal court any action that could have been brought within the federal courts’ original jurisdiction.\(^4\) The purpose of the federal removal statute relating to diversity actions was

---

\(^1\) See, e.g., *Bishop v. Bechtel Power Corp.*, 905 F2d 1272 (9th Cir. 1990).


\(^3\) 28 U.S.C. §1441.
to shield defendants from possible discrimination in a foreign forum. Within this federal removal statute, however, is a limitation on the removal of actions based on the court’s diversity jurisdiction, precluding removal where “any of the parties in interest properly joined and served as defendants is a citizen of the state in which the action is brought,” also known as the forum defendant rule. The justification for this limitation on the in-state defendant’s ability to remove the diversity action was that the concern regarding the potential for discrimination does not exist with respect to the in-state defendant. As such, it had been widely accepted that a defendant could not remove an action to federal court on the basis of diversity where the defendant was sued in its home state.

The “properly joined and served” limitation was added to the removal statute by amendment in 1948, in an effort to circumvent the fraudulent joinder of an in-state defendant whom the plaintiff had no intention of serving or prosecuting, an act of gamesmanship that had been utilized by plaintiffs to defeat removal and anchor actions in state court. The 1948 amendment allowed for removal “only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought.” The removal statute was amended yet again in 2011, and while the phrasing of this limitation was slightly altered, the “properly joined and served” language remained intact.

In 1948, the procedure for removal involved two steps that included the filing of a verified petition for removal. In 1988, this removal procedure was replaced with the current notice procedure which, upon a unilateral filing by the defendant, immediately divests the state court of

---

jurisdiction over the matter.\textsuperscript{7} The procedure for removal requires that the defendant file a notice of removal within 30 days of receipt of the initial pleading “by service or otherwise.”\textsuperscript{8} When the “properly joined and served” language was added to the removal statute in 1948, as a practical matter, defendants generally learned of the existence of a lawsuit when they were served with the complaint and that, together with the two-step process for removal, served to limit the inappropriate removal of diversity actions where a forum defendant had been sued.

It wasn’t until 1997 that defendants seized upon the “properly joined and served” language to remove actions on the basis of diversity, even in the presence of a forum defendant, during the period of time after the complaint was filed but before service had been effected, the practice now known as “snap removal.”\textsuperscript{9} But for nearly a decade these efforts were largely unsuccessful. Courts faced with pre-service removal generally remanded these actions on the grounds that prior to service, all defendants stood on equal ground and as a result the court had to look at the citizenship of all defendants, including the forum defendant, before determining whether removal was proper. These cases continued to remand cases back to state court where no defendant had been served.\textsuperscript{10}

Then, after about a decade of remanding these cases back to state courts, the tide began to turn and district courts began to adopt the arguments set forth by the removing defendants – reasoning that the plain language of the removal statute limits the defendants’ ability to remove only where “any of the parties in interest properly joined and served as defendants is a citizen of

\textsuperscript{7} 28 U.S.C. § 1446.
\textsuperscript{8} 28 U.S.C. §1446(b)(1).
the state in which the action is brought.” Therefore, so long as the forum defendant had not been
joined and served, these removals were often deemed to be proper.\textsuperscript{11} The decisions that endorse
the snap removal, initiated by either the non-forum defendant or even the forum defendant prior
to service, are consistent in their reasoning, to wit, the plain language of the statute allows it.\textsuperscript{12}
These decisions, relying solely on the language of the statute and rejecting any policy arguments,
permit pre-service removal even by the forum defendant. However, not all district courts endorsed
the practice, with some rejecting efforts by in-state defendants to remove diversity actions pre-
service, reasoning that to allow such removal contravenes the purpose of diversity jurisdiction and
that to allow the in-state defendant to remove the action to federal court pre-service produces an
absurd and unintended result, and encourages gamesmanship by defendants.\textsuperscript{13}

Though more district courts were condoning the procedure, it was not until 2018 that
snap removal was endorsed by a circuit court. The Third Circuit first addressed snap removals
in 2018, in \textit{Encompass Insurance Co. v. Stone Mansion Restaurant Inc.}\textsuperscript{14} The complaint in
\textit{Encompass} had been tendered to counsel for the defendant pursuant to an agreement by which
counsel agreed to accept service, but was removed to federal court prior to counsel’s return
of the notice of acceptance form that accompanied the complaint, a formality required under
Pennsylvania state law.\textsuperscript{15} The Third Circuit upheld the removal on the grounds that the plain
language of § 1441(b)(2) “precludes removal on the basis of in-state citizenship only when

\textsuperscript{11} See, e.g., \textit{Smethers v. Bell Helicopter Textron, Inc.}, 2017 WL 1277512 (S.D. Tex. 2017);
\textit{Breitweiser v. Chesapeake Energy Corp.}, 2015 WL 6322625 (N.D. Tex. 2015); \textit{Parker Hannafin

\textsuperscript{12} See, e.g., \textit{Valido-Shade v. Wyeth, LLC}, 875 F.Supp.2d 474 (E.D. Pa 2012); \textit{Thomson v.
Novartis Pharmaceuticals Corp.}, 2007 WL 15211138 (D.N.J. 2007); \textit{Johnson v. Precision
Airmotive}, 2007 WL 4289656 (E.D. Mo. 2007).

\textsuperscript{13} See, e.g., \textit{Fields v. Organon USA, Inc.}, 2007 WL 4365312 (D.N.J. 2007).

\textsuperscript{14} 902 F.3d 147 (3d Cir. 2018).

\textsuperscript{15} Id. at 150.
the defendant has been properly joined and served.” The Court noted that the purpose of this limitation on removal was to prevent the fraudulent joinder of in-state defendants by Plaintiffs, and that allowing pre-service removal by the in-state defendant doesn’t frustrate that purpose. While “this result may be peculiar,” the Third Circuit said it “is not so outlandish as to constitute an absurd or bizarre result.”

Then, in early 2019, in *Gibbons v. Bristol-Myers Squibb Co.*, the Second Circuit followed suit and endorsed the practice of snap removal. Plaintiffs in *Gibbons* had filed their complaints in Delaware state court against the corporation in its state of incorporation. The in-state defendants removed to federal district court prior to being served with the complaints. The plaintiffs moved to remand, arguing that “because the only basis for federal court jurisdiction was diversity of citizenship, Defendants’ status as citizens of Delaware meant that removal was prohibited under 28 U.S.C. § 1441(b)(2).” The court held that the forum defendant rule, 28 U.S.C. § 1441(b)(2), did not bar removal, focusing on the text of the statute to determine § 1441(b)(2) only barred removal once the home-state defendant “ha[d] been served in accordance with state law.” Since the defendants in this case removed the actions to federal court after the suit was filed in state court but before any defendant was served, removal was proper. Plaintiffs argued “it is absurd to allow a home-state defendant to use an exception meant to protect defendants from unfair bias (in the courts of a plaintiff’s home state) and language designed to shield them from gamesmanship (in the form of fraudulent joinder) to

---

16 Id. at 152.
17 Id. at 153-54.
18 919 F.3d 699 (2d Cir. 2019)
19 Id. at 703-04.
20 Id. at 704.
remove a lawsuit to federal court.”\textsuperscript{21} The Second Circuit rejected the absurdity argument. Plaintiffs further argued that the blind application of the text of the statute would “lead to non-uniform application of the removal statute depending on the provisions of state law” since some states require a delay between filing and service while other states allow the plaintiff to serve immediately.\textsuperscript{22} The Second Circuit said variation was not a strong enough consideration to depart from the plain language of the statute.\textsuperscript{23}

District courts outside the Second and Third Circuits remain split on snap removals. For example, in \textit{Delaughder v. Colonial Pipeline}, the District Court for the Northern District of Georgia rejected the Third Circuit approach and looked beyond the text of the statute to legislative intent and the possibility of absurd results.\textsuperscript{24} The district court found allowing a snap removal would “uniquely undermine the purpose of the forum-defendant rule.”\textsuperscript{25} According to the court, the likely purpose of the “properly joined and served” language is to prevent gamesmanship by plaintiffs seeking to block removal by joining an in-state defendant who the plaintiff did not intend to litigate against.\textsuperscript{26} Thus the district court found “the fact that the very words included to prevent gamesmanship have opened an avenue for more gamesmanship is an ironic absurdity that the Court will not enforce simply because the words ‘properly joined and served’ appear unambiguous in isolation, and Congress has not provided more guidance on the issue.”\textsuperscript{27}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{21} \textit{Id.} at 706.
\item \textsuperscript{22} \textit{Id.} at 705.
\item \textsuperscript{23} \textit{Id.} at 706.
\item \textsuperscript{24} 360 F.Supp.3d 1372 (N.D. Ga 2018).
\item \textsuperscript{25} \textit{Id.} at 1380.
\item \textsuperscript{26} \textit{Id.}
\item \textsuperscript{27} \textit{Id.} at 1380-81.
\end{itemize}
\end{footnotesize}
While the snap removal tactic is not new, it remains controversial and it is growing in frequency with the increasing prevalence of electronic dockets. Snap removal appears to be employed primarily by large corporate entities in actions brought by individuals, as these entities have the wherewithal to monitor electronic dockets and are motivated to remove the actions pre-service. The results can be to significantly delay litigating the merits of the action as plaintiffs fight to return their actions to state court, or to tie up individual cases in MDL proceedings in far flung venues that have little bearing on the merits of their disputes. While the practice has been endorsed by the only two circuit courts to address the issue, both courts have recognized the peculiarity of the result. Despite the two endorsement of the two circuit courts, district courts remain split on the propriety of snap removal. As many district courts have noted, it may be for Congress, and not the courts, to put an end this “peculiar” practice.
Removal under 28 U.S.C. § 1442(a)(1) 
in light of Riggs v. Airbus Helicopters

OCTOBER 24, 2019

American Bar Association • Tort Trial & Insurance Practice Section
Aviation Litigation 2019

Debra Fowler
Senior Aviation Counsel
U.S. Dept. of Justice
P.O. Box 14271
Washington, DC  20044
202 616-4015

By Debra Fowler

Under the federal removal statutes, a civil action may be removed to federal court if it is “against or directed to” the United States, including an “any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office.” 28 U.S.C. § 1442(a)(1). A recent case in the Ninth Circuit addressed whether employees of an aircraft manufacturer, acting as FAA designees for certification purposes. The court ruled against the manufacturer, and affirmed the order remanding the case to state court. 

Riggs v. Airbus Helicopters, Inc., No. 18-16396, 2019 WL 4556417 (9th Cir. Sept. 20, 2019). Airbus has filed a motion for extension of time to file a petition for rehearing, indicating that this fight – which has already divided the circuits – is not over yet.

The Riggs case arose following a helicopter sight-seeing accident in the Grand Canyon. Among other defendants, the plaintiffs sued Airbus Helicopters in state court in Nevada for wrongful death. Airbus removed the case to the U.S. District Court in Nevada, Case No. 2:18-cv-912. The plaintiffs immediately filed a motion to remand to state court, while Airbus also filed a motion to dismiss for lack of personal jurisdiction. The district court granted the motion to remand, and Airbus appealed. On appeal, the

---

1 Debra Fowler is a Senior Aviation Counsel, U.S. Department of Justice, Civil Division. The views expressed in this paper are those of the authors, and not the opinion of the Department of Justice. Debra gratefully acknowledges the assistance of her colleague, Senior Trial Counsel Jill Rosa, in drafting this paper.
circuit court affirmed the remand in an opinion by Judge Rawlinson, joined by Judge Schroeder. Judge O’Scannlain dissented.

In the decision, the court first described the FAA’s aviation regulatory authority, under which the agency promulgated standards for the certification of helicopters, 14 C.F.R. Part 27. Because the FAA has limited resources, Congress established its delegation authority, pursuant to 49 U.S.C. § 44702(d)(1), which allows the FAA to delegate to private persons the examination, testing, and inspection necessary to issue an aviation certificate, and the issuance of the certificate itself. The FAA instituted the Organization Designation Authorization (ODA) program to delegate to organizations, such as Airbus, the authority to inspect aircraft designs and issue certificates. 14 C.F.R. Part 183.

In Riggs, Airbus argued that when the FAA delegated it the authority to issue aviation certificates under the ODA program, it was “acting under” the federal government for purposes of § 1442(a)(1) removal. The court noted its precedent, under which extensive federal regulation alone did not suffice to meet the “acting under” requirement of § 1442(a)(1). The court cited favorably the decision of the 7th Circuit in Lu Junhong v. Boeing Co., 792 F.2d 805 (7th Cir. 2015), in which the Seventh Circuit rejected Boeing’s attempt to obtain a ruling that it was acting under federal authority for removal purposes when analyzing the adequacy of its autopilot and autothrottle systems to certify that they met FAA standards. The Riggs court ruled that Airbus’s actions were “mere compliance with regulatory standards.” 2019 WL 4556417 at *7. The court concluded that “[w]e join the Seventh Circuit in concluding that an aircraft manufacturer
does not act under a federal officer when it exercises designated authority to certify compliance with governing federal regulations.” *Id.*

In dissent, Judge O’Scannlain opined that the manufacturer did “act under” a federal agency when issuing certificates on the FAA’s behalf. *Id.* at *8. Judge O’Scannlain found persuasive the Eleventh Circuit’s decision in *Magnin v. Teledyne Cont’l Motors*, 91 F.3d 1424 (11th Cir. 1996). In that case, the Eleventh Circuit ruled that a case was properly removed under § 1442(a)(1) where a Designated Manufacturing Inspection Representative signed an expert certificate on behalf of the FAA. *Id.* at 1428. Judge O’Scannlain found the Federal Aviation Act’s delegation language to be broad enough to convert private employees into FAA agents for purposes of removal. 2019 WL 4556417 at *12.

Given the differing opinions of the circuits, now with the Ninth and Seventh on one side, and the Eleventh on the other side, it is likely this issue will receive additional scrutiny. The FAA’s delegation program has existed since the very beginning of aviation regulations, yet this issue remains unresolved in many circuits.
FOREIGN LAW IN AVIATION CASES: GO OR NO GO

October 24, 2019

American Bar Association • Tort Trial & Insurance Practice Section
Air and Space Law Committee

Ralph Pagano, Fitzpatrick & Hunt, Pagano, Aubert, LLP, New York, NY
Sarah Passeri, Holland & Knight, LLP, New York, NY
Keri Ryan, AXA XL, New York, NY
Ladd Sanger, Slack Davis Sanger, LLP, Dallas, TX
When Does Foreign Law Come Up & What Foreign Law is Considered

Litigants in aviation cases are routinely faced with a multitude of options for application of foreign laws or international treaties to any given case. In some instances, there may be differing laws applied to liability and damages in one crash. While it seems illogical at first blush that two passengers seated next to each other may have the value of their cases dramatically affected by what law applies to their case, this is the reality of complex aviation cases. Similarly, two defendants in the same crash may have different damages and liability laws applied to them. For example, in a Montreal Convention case the carrier’s liability and damages exposure may be governed by the Convention where the product manufacturer may have general state tort law. The root of why choice of law is such a hard-fought battle in aviation cases boils down to one simple factor – MONEY. From the plaintiff’s perspective it is maximizing the recoverable damages for each given plaintiff based on the particular facts of the case. Factors that affect what law the plaintiff will seek to include are: who are the surviving beneficiaries, what is the demonstrable economic loss, what are the facts of pre-crash or post-crash pre-death pain and suffering, is there possible punitive conduct by the defendant, statute of repose issues, strict liability issues, and finally personal jurisdiction issues. From the defendant standpoint the two primary factors, beyond trying to avoid being subject to jurisdiction and in the case in the first place, is to limit economic exposure and shift as much exposure as possible to other parties, whether they are in case or nonparties. At the end of the day there may be different laws for damages and liability for both the plaintiffs and defendants.1 Those different laws can be international treaties, state laws, a foreign country’s laws or federal maritime laws.2

Choice of law has been an evolving process. In early jurisprudence lex loci delecti was the general rule. This meant the law of the of the location of the accident is what governed. While the number of jurisdictions applying lex loci have declined over time, a handful of states like New Mexico still follow it.3 Due to the “fortuitous” nature of plane crashes there has been an evolution toward the most significant relationship test.4 In federal court the party that intends on raising an issue about a foreign country’s law must give notice by pleading or other writing. The court may then consider any relevant material or source, whether submitted by a party or admissible under the Federal Rules of Evidence. Fed. R. Civ. P. 44.1.

The discussion of choice of law can fill volumes of law books. Despite all the in-depth academic arguments of arcane legal precedents and justifications made by creative lawyers on both sides, at the end of the day it boils down to jockeying to maximize the plaintiff’s recovery or minimizing the defendant’s exposure. Unfortunately, the result of years of jurisprudence on choice of law has resulted in some inequitable results for parties on both sides of the case.

Let’s say we have an accident which occurs in Mexico, but lawsuits related to the accident are filed in Federal Court in Illinois. The facts of the case confirm that, the aircraft is registered in Mexico, the passengers are all Mexican citizens, the owner of the

1 See e.g. In re Air Crash at Belle Harbor, 2006 WL 1288298 (S.D.N.Y May 9, 2006); In re Air Disaster at Ramstein Air Base v. Lockheed Corp., 81 F.3d 570, 576 (5th Cir. 1996).
2 In re Air Crash off Point Mugu, 145 F. Supp2d 1156 (N.D. Ca. 2001).
3 See e.g. Coleman v. Eddy Potash, Inc., 905 P.2d 185 (N.M. 1995).
aircraft is a Mexican citizen and it would appear the cause of the loss is a combination of poor maintenance and pilot error.

Choice of Law analysis arises where an actual conflict exists, where the outcome of a case might be different based upon what law could apply to the lawsuit at issue.\(^5\) Absent a conflict, the courts could simply apply Illinois law to the plaintiffs’ claims.\(^6\) In diversity and pendent claims, federal courts apply the substantive law of the state in which they sit.

We see this most often in the application of damages. Many foreign countries have statutory limits on damages, particularly with regards to wrongful death. Additionally, the reality is that the statutory limits and the value of life of a citizen is different in every country and can be much less in countries outside the United States.

Assuming an actual conflict, the next questions is what choice of law should be used. In diversity and pendant claims, in the example stated above, the Illinois Court and the Seventh Circuit should apply the choice of law rules in the state in which the lawsuit was filed.\(^7\)

When considering what foreign law should be applied, we need to consider which jurisdictions have at least some interest in the lawsuit. Under the test set forth in the Restatement (Second) of Conflicts, the Court must presume at the outset that the law of the place where the injury occurred applies.\(^8\) To deviate from this presumption, the Court must find that another jurisdiction has a more significant relationship that the place of injury with respect to any particular issue.\(^9\)

The Restatement provides the following sets of factors and contacts to consider in determining what state or nation has the most significant relationship to a given issue:

**Factors relevant to Choice of Law Determination**

a. The needs of the interstate and international systems  

b. The relevant policies of the forum  

c. The relevant policies of the other interested states and the relative interests of those states in the determination of the particular issues  

d. The protection of justified expectations  

e. The basic policies underlying the particular field of law  

f. Certainty, predictability and uniformity of result; and

---

\(^5\) *Air Crash Disaster Near Roselawn*, 948 F. Supp. 748 750 (N.D. Ill. 1996) (“Roselawn II”).  

\(^6\) See *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); *McCoy v. Iberdrola Renewables, Inc.*, 760 F. 3rd 674, 684 (7th Cir. 2014).  


\(^8\) See Restatement (Second) Conflicts of Laws, 145-147; see also *Disaster Near Chicago*, 644 F.2d at 611; *Miller v. Long-Airdox, Co.*, 914 F.2d 976, 978 (7th Cir. 1990) (In tort case, “the two most important contacts are the place where the injury occurred and the place where the conduct causing the injury occurred.”)  

\(^9\) See *Disaster Near Chicago*, 644 F. 2d at 611.
g. Ease in the determination and application of the law to be applied

Contacts to Consider in Applying the Above Factors
   a. The place where the injury occurred
   b. The place where the conduct causing the injury occurred
   c. The domicile, residence, nationality, place of incorporation and place of business of the parties; and
   d. The place where the relationship, if any between the parties is centered.

According to the Restatement, the “contacts are to be evaluated according to their relative importance with respect to the particular issue.”\(^{10}\) Notably, under the Restatement’s test the place where the lawsuit is filed is not one of the contacts to be considered.\(^{11}\)

In the example case, arguable Mexican law should be applied. Mexico is where the injury occurred and it the country where all the injured parties resided, moreover, in this case it was arguably also where the cause of the injury occurred as the aircraft was maintained in Mexico. U.S. courts can properly apply another nation’s law. In fact, it happens often, even where applying foreign law terminates or greatly reduces the value of a claim. The fact that another nation’s law is different or less favorable does not disqualify it unless it so violates the Court’s public policy that it produces and “evil or repugnant result.”\(^{12}\)

Both the Restatement and the cases interpreting it generally support applying the law of the injured persons’ domiciles to compensatory damages issues. Typically, court’s find that the jurisdictions where the plaintiffs or decedents are from have the greatest interest in ensuring that their residents are appropriately compensated for their injuries.\(^{13}\)

Considerations in Seeking the Application of Foreign Law in a U.S. Legal Proceeding

There are many considerations when seeking the application of foreign law in a United States court proceeding. One is the adequacy of the law of the foreign nation, which is similar to a *forum non conveniens* analysis. Looking at the *forum non conveniens* standard, “[a]n alternative forum is adequate when the parties will not be deprived of all remedies or treated unfairly.”\(^{14}\) Courts have generally found alternative forums to be inadequate where the available remedies are “so clearly inadequate or unsatisfactory.”\(^{15}\)

For example, in *Rasoulzadeh v. Associated Press*, the court found that the Iranian courts in the 1980’s were inadequate because plaintiffs’ lacked the ability to “obtain justice at the hands of the courts administered by Iranian mullahs. On the contrary, I consider that if the plaintiffs returned

\(^{10}\) Restatement (Second) Conflicts of Laws 6, 145.

\(^{11}\) See, e.g. *Muncie Power products, Inc. v. United techs. Auto., Inc.*, 328 F. 3d 870, 875 (6th Cir. 2003) (Restatement omits as factor location of the lawsuit).

\(^{12}\) *Spinzozi v. ITT Sheraton Corp.*, 174 F.3d 842, 847 (7th Cir. 1999).

\(^{13}\) See, e.g. *Disaster Near Chicago*, 644 F.2nd at 613; *Roselawn I*, 926 F. Supp at 745.

\(^{14}\) *In re Factor VIII or IX Concentrate Blood Products Litig.*, 484 F.3d 951, 957 (7th Cir. 2007).

to Iran to prosecute this claim, they would probably be shot.” So, the likelihood of being executed for adjudicating a claim is a dispositive, albeit extreme, factor. Courts will consider the general political unrest and danger of prosecuting a claim in a certain forum when analyzing whether the forum is adequate. The court will dismiss a *forum non conveniens* motion if “the plaintiff[] is highly unlikely to obtain basic justice.” Further, courts seem reluctant to find a forum adequate if the relevant claim could be barred by an applicable statute of limitations in the alternative forum. We can expect that the same would be true in a U.S. court is asked to apply the law of a foreign court where the statute of limitation would have barred the action. However, a country’s less favorable laws are not a legitimate ground for denying a *forum non conveniens* motion, and the fact that U.S. law would allow plaintiffs a greater potential remedy compared to another country is not a ground to not apply the law of the foreign country.

Another major consideration for aviation defendants is the choice-of-law analysis. The choice-of-law doctrine governs which state or country’s laws will apply to various aspects of a lawsuit, including laws establishing liability or damages. First, if there is a conflict of laws, the court must perform a choice-of-law analysis to determine which forum’s law will apply. The court will apply their own procedural law and the determined forum’s substantive law. Most states require that choice of law determinations to be made on an “issue-by-issue basis,” meaning the law of different states or countries can apply to different issues in the case. In diversity cases, federal courts apply the choice-of-law rules of the forum state.

For foreign plaintiffs that sue in the United States, the inquiry is often fact intensive, and typically hinges on which state or country has the “most significant relationship to the occurrence and the parties” for the particular issue at hand. The factors that the court considers are: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered. These contacts are to be evaluated according to their relative importance with respect to the particular issue.

For example, if a Russian plaintiff brings suit in a U.S. District Court for injuries arising out of a plane crash in Russia, the U.S. court will apply the choice-of-law rules of the forum state of the court. As mentioned above, the court will likely analyze Russia’s relationship to the accident and the parties by looking at where the accident occurred, where the conduct occurred

---

18 *Neelon v. Krueger*, 63 F.Supp.3d 165 (D. Mass 2014)(Canada was not adequate because the Canadian action could be barred by statute of limitations); *Lang v. Corporacion De Hoteles*, S.A., 522 F.Supp.2d 349 (D. P.R. 2007)(finding that the Dominican Republic was inadequate in part because plaintiff’s claim would be time barred under the laws of the Dominican Republic
19 *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1140 (9th Cir. 2001).
20 *See Spence v. Glock, Ges.m.b.H.*, 227 F.3d 808, n. 6 (5th Cir. 2000); *Robeson Industries Corp. v. Hartford Acc. & Indem. Co.*, 178 F.3d 160, 168 (5d Cir. 1999); *Morris v. SSE, Inc.*, 912 F.2d 1392, n. 2 (11th Cir. 1990).
22 Restatement (Second) Conflict of Laws § 145.
23 *Id.*
24 *Id.*
25 It is important to note that a court will only begin a choice-of-law analysis if there is a conflict between Russian and U.S. law.
that caused the injury, the location/domicile of the parties, and the relationship between the parties. Thus, it is extremely likely in the above example that Russian substantive law will be applied given the fact that the crash occurred in Russia to Russian plaintiffs.

Of course, a defendant must consider whether the application of foreign law is beneficial to his or her client. For instance, in the United States, there are a number of defenses, such as, the Government Contractor Defense, GARA, Death of the High Seas, and several others that would not be available if foreign law is applied.

**Damages**

All litigants would have to analyze the potential application of a foreign country’s laws on damages. Typically, damages are considered state substantive law and will be applied along with the other substantive law of a foreign country. As such, whether the foreign country ultimately recognizes or caps certain types damages can greatly impact the total amount of compensation a plaintiff can receive for their claims. For example, most U.S. states along with Australia, Canada, England and New Zealand permit the recovery of some form of punitive damages. Whereas countries such as Japan, Ethiopia, and Mexico do not. Given the severity of the alleged wrongdoing, punitive damage awards can exceed what was award to the plaintiff as compensatory damages. Many countries, like Switzerland, have a formulaic approach to the calculation of damages, leaving no room for a U.S. jury to apply its broad opinion on the value of the case.

Given the fact intensive nature of the choice-of-law determination, it is difficult to determine from the outset what forum’s damages law will apply. Especially in the context of foreign aviation cases, a thorough analysis of each potential forum’s damages law is required to assess the full extent of exposure for a particular claim.

**Miscellaneous Considerations**

If a litigant seeking to apply the law of a foreign country is able to obtain the support of that country in interpreting its laws, either through an amicus curiae brief, or a supporting affidavit, the United States Supreme Court has held that such support is not dispositive of the issue.

---

26 Restatement (Second) Conflict of Laws § 145.
32 *Wooley v. Lucksinger*, 61 So. 3d 507 (La. 2011) (Louisiana court upholding $45.5 million dollar punitive damage award under Texas damages law even though Louisiana itself does not ordinarily permit punitive damages and the total compensatory award was for $44.54 million).

ASP claimed that the defendants engaged in price-fixing and supply manipulation. However, Hebei moved to dismiss on the grounds that Chinese law actually required them to price-fix. Hebei claimed that the Chinese government issued regulations that required them to do so. The Chinese government also submitted their own interpretation of these regulations to the court. The District Court denied Hebei’s motion claiming that there was no evidence Chinese law actually imposed this requirement. On appeal, the 2nd Circuit vacated the judgment on international comity grounds. The court explained that the District Court erred in not appropriately deferring to the Chinese government’s interpretation of its own law, provided that the interpretation was reasonable.

In a unanimous decision, the Supreme Court reversed, holding that “a federal court determining foreign law under F.R.C.P. 44.1 should accord respectful consideration to a foreign government’s submission, but the court is not bound to accord conclusive effect to the foreign government’s statements.” In analyzing the foreign government’s interpretation the court should consider “the statement’s clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement’s consistency with the foreign government’s past positions.”

Binding U.S. courts to a foreign government’s interpretation of its own laws would be inconsistent with Rule 44.1 as the Rule treats the issue of foreign law as a question of law and allows courts consider “any relevant material or source.”

Thus, it follows, that given that a foreign country’s interpretation of its own laws are merely afforded “respectful consideration” by a court in the U.S., it behooves litigants to obtain an expert in the law of the country to support his or her position regarding the application of that law in the U.S. court.

There are various other considerations that may attract a foreign plaintiff to litigate in the United States, including contingent fee representation, liberal discovery standards, favorable substantive law and jury trials.

Not all countries allow an attorney to represent their client on a contingent fee. The United States generally allows an attorney to represent their client in a civil case on a contingent basis, so long as the contingent fees are “reasonable.” Other countries such as Australia, Brazil, Canada,

---

33 138 S. Ct. 1865 (2018)  
34 Id. at 1867  
35 Id.  
36 Id.  
37 Id.  
38 Id.  
39 Id. at 1868.  
40 Id.  
41 Id.  
42 Id.  
43 Id. 1869.  
44 ABA Model Rules of Professional Conduct R. 1.5(d) prohibits an attorney from working for a contingent fee in criminal cases or certain types of family law claims.
England, Germany, Italy, and Japan also allow an attorney to receive contingent fees. However, other countries like Belgium, Netherlands, Portugal, and Sweden do not allow contingent fees.

The Federal Rules of Civil Procedure also provide an expansive pre-trial discovery standard whereby both parties “may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” In other countries, parties are under no obligation to produce documents or respond to pre-trial discovery. As an example, the German Code of Civil Procedure Zivilprozessordnung does not allow for pre-trial discovery and there is no general obligation to produce documents to assist the opposing party, instead, the law creates rebuttable presumptions in favor of that party with regard to information withheld by the opposing party. In Switzerland, parties are only required to produce documents when requested by the judge.

The law in the United States may also be favorable to a plaintiff and a defendant. Certain substantive law such as strict products liability, negligence per se, class actions, and res ipsa loquitur can assist a plaintiff in adjudicating their case. Likewise, contributory negligence, indemnification laws, the government contractor defense, federal preemption, and various immunity defenses can be beneficial to a defendant.

The U.S. judicial system also allows for jury trials on all issues of fact whereas many foreign countries do not use a jury system, or implement a quasi-jury system with six citizen judges and three professional judges.

---

DEALING WITH EXPERT WITNESSES:
SEE AND AVOID THESE COMMON MISTAKES

October 24-25, 2019 – Ritz Carlton in Washington, D.C.

American Bar Association ▪ Tort Trial & Insurance Practice Section
The Aviation Lawyer’s Operating Handbook:
Learning to Litigate, Navigate, and Communicate

Robert J. Gross
Senior Trial Counsel
U.S. Department of Justice
Civil Division, Torts Branch
Aviation, Space & Admiralty Litigation
P.O. Box 14271
Washington, DC 20044-4271
(202) 616-4038

The views expressed in this paper are those of the author and not necessarily those of the
U.S. Department of Justice.

The author wishes to acknowledge Robert C. Winn, Ph.D., Principal and Emeritus of
Engineering Systems, Inc., for his assistance in writing this paper.
OVERVIEW

Lawsuits arising from aircraft accidents frequently involve a “battle of the experts.” To win that battle, your experts need to be credible and effective.

The Federal Aviation Regulations require pilots in visual meteorological conditions to maintain vigilance to “see and avoid” other aircraft. 14 C.F.R. § 91.113. Likewise, lawyers need to be vigilant in using and opposing experts. This paper will highlight a number of mistakes to “see and avoid” when relying on experts to help prosecute or defend your case.

SELECTING AN EXPERT

Choosing an expert who lacks the proper expertise. When selecting an expert, make sure your expert has appropriate qualifications. Otherwise, the court may exclude the witness or limit his or her testimony. Even if the court allows the testimony, unless your expert has impeccable qualifications, the factfinder (whether a judge or jury) may be unimpressed by your witness and give his or her testimony little or no weight.

In federal court, a witness may qualify as an expert based on his or her “knowledge, skill, experience, training, or education.” Fed. R. Evid. 702. If the judge decides that the proposed expert does not satisfy these criteria, it could leave a gaping hole in your case.

In Pan American World Airlines v. The Port Authority of New York and New Jersey and the United States, 787 F. Supp. 312 (E.D. N.Y. Mar. 1992), Pan Am claimed that its DC-10 Jumbo-Jet sustained damage due to the negligence of air traffic controllers in the control tower at John F. Kennedy International Airport. The damage occurred when the pilots of the DC-10 attempted to avoid a ground collision with Port Authority sanding vehicles on an icy taxiway. During the trial, Pan Am proffered a former air traffic controller and NTSB investigator to testify as an expert on ATC tower procedures. Although the proposed expert had some approach control experience, he had little experience working the ground or local control positions, particularly at large metropolitan airports. After my voir dire, the court refused to qualify the witness as an ATC expert, citing to his lack of hands-on experience. With no other witnesses to call, Pan Am rested. The court granted the United States’ motion to dismiss, agreeing that Pan Am failed to meet its burden of proof. The Court of Appeals for the Second Circuit affirmed the ruling on Pan Am’s proposed expert. Pan American World Airlines v. The Port Authority of New York and New Jersey, 995 F.2d. 5, 10 (2d Cir. 1993) (finding that the trial court’s ruling was proper because the proposed expert “never completed local air traffic control training, had little experience in large airports, and . . . worked for the National Transportation Safety Board for only eighteen months.”)
Wasik v. U.S., Civ. No. 85-7526-DT (E.D. Mich. 1988) is also instructive. During the trial, the plaintiff proffered an expert to testify about pilot and ATC procedures. Although a pilot, the expert simply had zero experience in air traffic control. The judge refused to allow this “expert” to testify on ATC procedures, leaving plaintiff with no ATC expert. Consequently, plaintiff voluntarily dismissed her case.

In another case I defended, the plaintiff made a similar mistake when they offered the same expert to testify on both air traffic control and flight service station (FSS) procedures. Although the expert had experience as an air traffic controller, he had none as a FSS specialist. (By contract, the United States’ expert had significant experience as a FSS specialist, supervisor, instructor, and evaluator.) While the court did not entirely preclude the testimony of plaintiffs’ “FSS expert,” it gave the testimony of plaintiffs’ expert little, if any, weight. See Bearden v. U.S., 21 Avi. Cases (CCH) 18,268 (N.D. Ala. 1987).

Choosing an expert who thinks his or her role is that of an advocate. An expert who appears be an advocate will not come across well to the judge or jury. Make sure your expert understands the importance of being an objective witness. Litigation is a search for the truth, it is not “win at all costs.”

I deposed a pilot/human factors expert who wrote in an article: “The role of any expert is to be a paid advocate of the client. Scientific objectivity is never the first priority in either the development or the analysis of the data upon which the expert witness’s reports are prepared.” AAP Newsletter, Feb. 20, 1995. The article was absent from his resume and he did not know I had it in my possession. The use of his misguided statement helped to demolish Plaintiffs’ case.

Choosing an expert who cannot communicate effectively with a jury or judge. It is important to select someone who is not only highly qualified but also a skilled communicator. The expert must be able to explain things so that a tenth grader can understand. Some experts will inadvertently use acronyms (e.g., ILS, RNAV, and NOTAMS), technical language, or jargon – this may leave the testimony impossible to follow. A good expert will be able to simplify and use analogies to help explain complex subjects. If the factfinder does not understand your expert’s testimony, your chances of winning the case will be greatly diminished.

Failing to identify all potential conflicts. Some experts are in high demand. Determine if the expert you want to hire has previously talked with opposing counsel or their clients about working on the matter. Depending on what they discussed, the expert may have inadvertently established a confidential relationship with your opponent (or prospective opponent). If there is any doubt as to whether such a relationship exists, seek permission from your opponent to hire the expert. Better to resolve the matter rather than face a motion to disqualify the expert later in the case. The expert’s past employment may also present confidentially problems. Before retaining the expert, make sure you and your prospective expert have identified all potential conflicts.
Not digging deeper into the expert’s background. In evaluating whether to hire a particular expert, consider asking the following questions:

- Have you given a deposition or testified in court in a similar case?
- If yes, how many times for the defendant and how many times for the plaintiff?
- Is there anything you have said in deposition or trial that is inconsistent with anything you might say in this case?
- What percentage of your work is for plaintiffs?
- What percentage of your work is for defendants?
- Has a court ever disqualified you as an expert?
- Has a court ever limited, criticized, or rejected your testimony?

Don’t take anything for granted, the above questions are just a sample of some issues to explore.

Automatically not hiring a rookie. Every expert has to start somewhere so it may be okay to retain a rookie. If the expert has the right background and is a good communicator (or one you can work with in improving his or her communication skills), you may have found a great witness.

PREPARATION

Not adequately preparing your expert. Make sure you properly prepare the expert, regardless of his/her experience level. Do not assume that the expert does not need any preparation; an experienced expert witness will not be offended if you start at square one.

Consider discussing the following with your expert:

1. The goal is for the judge or jury to accept your opinions and reject those of your counterpart.

2. In a criminal case, the standard of proof is beyond a reasonable doubt; however, in a civil tort case, the standard is “more likely than not.”

3. How the factfinder weighs evidence.

4. What it means to prove a case by a “preponderance of the evidence.”

5. That it is not the number of witnesses who testify for a given side that counts but the quality of their testimony.

6. The difference between speculation, probabilities, and certainty.

7. The meaning and use of such phrases as “to a reasonable degree of scientific certainty” or “to a reasonable degree of [discipline] certainty.”
**Not being clear on scope of work.** An expert must make sure the client knows what he or she plans to do. If the expert undertakes work that the client did not authorize or expect, it could do harm to the relationship. Clear communications regarding the scope of work is essential.

**Not having sufficient information.** At the very outset, discuss with the expert what he or she needs to do, see, and review to analyze thoroughly the issues at hand. The expert should provide a list if necessary. Sometimes, what the expert envisions may be too expensive (a flight test, for example) in which case the client will need to make a value judgment (i.e., is the result worth the cost?) about the requested item.

Joint meetings of experts are extremely useful. They provide the team of experts with an opportunity to get to know each other, discuss the issues, share information, and learn what each has been tasked with doing. Joint meetings may reveal (and potentially avoid or solve) any disagreements, inconstanties, and duplication of effort.

**Not making sure your expert’s opinions have a solid basis.** Make sure to explore the following:

- Is your expert missing any critical information?
- Are there any materials that the expert would like to review but does not have?
- What assumptions is the expert relying on? Are they sound?
- Are your expert’s opinions scientifically valid?
- Is your expert’s methodology flawed or solid?
- Is your expert cherry picking (ignoring adverse studies or evidence) without explanation?
- Is your expert relying on anything that is inadmissible (e.g., opinions of NTSB investigators), irrelevant or unreliable.

I tried a case in Tampa, Florida, involving an aircraft accident allegedly caused by a wake turbulence encounter. Plaintiffs designated two experts on wake vortices, an aeronautical engineer and a fluid dynamicist. The United States’ wake turbulence expert (a former FAA Chief Scientist on the subject), determined that plaintiffs’ engineer used a flawed methodology, scientifically invalid principles, and erroneous assumptions in calculating the location, duration, strength, and movement of the wake vortex in question. Accordingly, I filed a motion in *limine* under *Daubert* to preclude the engineer’s testimony. The judge, however, denied the motion on the ground that the court’s role as a gatekeeper for expert evidence is less critical in bench trials. She decided to let the expert testify and accord his testimony the weight, if any, it deserved.

Plaintiffs decided, however, not to call either of their wake experts to testify, although they both sat in the courtroom for the entire trial. Instead, Plaintiffs relied on a process of elimination, advanced by Plaintiffs’ accident reconstructionist, to argue that a wake encounter was the only logical explanation for the accident. In finding that Plaintiffs failed to meet their burden of proving a wake encounter, the judge emphasized that the reconstructionist admitted he was not an expert on wake turbulence and did no calculations...
in the case regarding the wake turbulence. See Cahill v. United States, No.: 8:05-CV-2379-T-24MSS, 2008 WL 1711519, at *4 (M.D. Fla., Apr. 10, 2008). Because of mistakes made by Plaintiffs’ wake turbulence experts, exposed in depositions and in the Daubert motion, Plaintiffs had no choice but to rely on a non-wake expert to prove their case. Do not fall into a similar trap.

Not writing your own report. The expert should write his report in his own words. It is okay for his client to give the expert some guidance, see, e.g., Fed. R. Civ. P. 26(a)(2) advisory committee’s note to 1993 amendment), but if a lawyer or someone else wrote it, the expert may lose credibility by looking like an advocate. In addition, if the expert is untruthful about who wrote the report (or portions of it), it will further erode any confidence the court might have had in accepting his or her opinions. See Anders v. United States, 307 F.Supp.3d 1298, 1312-14 (M.D. Fla. 2018)(finding the testimony of Plaintiff’s air traffic control expert to be unreliable after he admitted at trial that he had lied about the authorship of his report.”)

In Anders, the Court noted that Plaintiffs’ counsel attempted to mitigate [the expert’s] conduct by explaining that he testified falsely only to avoid disclosing that Plaintiffs’ counsel was the author of the copied material. In other words, [the expert] believed he had a duty to protect counsel and that that duty trumped his oath to tell the truth. He considered himself to be a member of ‘Plaintiffs’ team’ and he wanted to make sure he did nothing to impede the team’s success.” Id at 1314. The court rejected this explanation and then stressed that “it may explain why some of [the expert’s] air traffic control opinions are in conflict with a plain reading of the Air Traffic Control Manual (Pls.’ Ex. 108A).” Id. Avoid this pitfall.

Allowing your expert to wander outside his or her area of expertise. Sometimes an expert will try to extend his or her expertise from a broad field of endeavor to a narrow subspecialty within the same area. Just because your expert has a Ph.D. in aeronautical engineering does not mean he or she is an expert in every aspect of that subject. At other times, the expert may try to testify on a subject in a different field entirely. Consider a fluid dynamics expert extending his expertise to flight mechanics.

An expert might not know enough about the subject to realize that he or she is wrong. If so, the expert’s credibility drops to zero. I handled a suit involving a Westwind business jet that rolled over and crashed on final approach to John Wayne Airport; it happened due to an encounter with wake turbulence from a preceding United Airlines B-757. As I cross-examined the plaintiffs’ air traffic control (ATC) expert at trial, the judge jumped in and asked whether he thought the pilots of the Westwind had any responsibility for the accident. Rather than concede that he was not a pilot expert, the witness attempted to exonerate the pilots. In finding no ATC blame for the accident, the court commented about this expert’s testimony: “[Plaintiffs’ ATC expert] demonstrated his lack of credibility by opining, in response to an inquiry by the Court, that the Westwind pilots bore no responsibility for this accident, in the face of overwhelming evidence to the contrary.” Management Activities, Inc. v. U.S., 21 F.Supp.2d 1157, 1174 (C.D. Cal. 1998).
In the same case, plaintiffs’ visibility expert testified that the local controller in the John Wayne Tower should have issued the range and altitude of the United B-757 to the Westwind in half-mile increments. But the court found, “This absurd assertion would seem to require an individual air traffic controller for every airplane. Although plaintiffs’ counsel promised to produce an expert witness who would testify that this was the standard, no such testimony was ever offered.” Id.

The expert and client must be cognizant of the old adage that, “during cross-examination, the more an expert goes out on a limb, the easier it is to chop him off.” Both the attorney and the expert have to work together to ensure that this does not occur.

**Not using your expert to your maximum advantage.** Retain your experts early in the case. They can assist you in gathering evidence and determining what the important or “make or break” issues are in the case. Budget permitting, arrange for your experts to attend the depositions of their counterparts. As the deposition progresses, they can help formulate questions, point out things you may have missed, and obtain a more complete picture of the case. The same holds true for trial. Some judges will allow the experts to sit in the back of the courtroom and watch the proceedings, especially if there is no objection to their presence. Others will forbid or limit it. If the court allows it, the expert will be better prepared when it is his or her turn to take the witness stand.

**Not adequately preparing the expert for his or her deposition.** Some experts feel intimidated when being deposed especially if it is in the opposing counsel’s law office. Counter this by insisting on a neutral location (e.g., the court reporter’s office). Make sure your expert knows what to expect and how best to answer questions. Discuss with the expert how to answer hypothetical questions based on erroneous facts, how to deal with yes/no questions, and when to answer, “It depends.” The expert’s demeanor is also important. Experts risk looking like advocates and losing credibility when they lash out at opposing counsel, do not concede minor points, or are impolite. On the other hand, the expert must not let opposing counsel put words in his or her mouth (i.e., agree to something that the expert did not really mean). Your expert should be the most knowledgeable person in the room on the subject matter at hand, not opposing counsel. A mock deposition helps identify weaknesses and shows the expert what to expect.

**Not adequately preparing the expert for trial.** As with depositions, do not skimp on practice sessions. Reiterate items discussed in preparation for a deposition, such as how to answer trick or tough questions. If possible, take the expert to the courtroom before trial to get the lay of the land. Have him or her sit in the witness chair. Discuss the placement of demonstrative aids for maximum effect. If a bench trial, explain that the judge may decide to ask questions, and that is routine, especially when the judge is “dialed in.” The expert should anticipate this, welcome any exchange with the court, and use it to his or her advantage. It is also helpful to set up a war room in advance of trial. Use it for meetings and practice sessions (particularly involving the use of exhibits and visual aids), and for debriefings after each day of trial.
PRESENTATION

On direct, not keeping the focus on your expert. Your expert should be the center of attention. The judge or jury must be able to relate to and trust the expert, and comprehend and remember what he or she said. Highlight all aspects of the witness’s qualifications to build credibility. Except in rare circumstances, do not agree to waive this part of your expert’s testimony in return for an agreement that he or she is qualified as an expert. Spend time going over all the steps the witness took in investigating the case and formulating his or her opinions. Go in chronological order and make sure to include documents reviewed, site visits, wreckage inspections, facilities visited, tests conducted, studies conducted, etc. The idea is for the judge and the jury to feel confident that your expert is not only well qualified, but also has done a thorough investigation in the case, understands the issues, and knows what he or she is doing.

Embrace teaching moments. With the court’s permission, ask the witness to come off the witness stand to approach a model, diagram, chart, white board, etc. Practice this with your witness beforehand to prevent any stumbling around the courtroom. Ask the judge to step down from the bench if it will provide him or her with a better view. Maintain situational awareness to make sure everything is going smoothly and as planned. If you are trying a Federal Tort Claims Act case to an advisory jury, remember it is still the judge who will be making the ultimate decision as to the United States’ liability. Make sure the judge can see all the exhibits and/or demonstrative aids and is paying attention to your expert’s testimony.

On cross, not keeping the focus on you. Here, you should be the center of attention. If the judge will allow it, move away from the podium and approach the expert or a demonstrative exhibit when asking questions. Keep your questioning narrowly focused. If the expert gave favorable testimony in a deposition, ask him or her the exact same questions that elicited that testimony. If the expert deviates from his or her previous answer, use the deposition transcript to impeach his or her trial testimony.

In one of my cases, plaintiffs’ wake turbulence expert admitted in his deposition and then during my cross-examination of him at trial that his initial Rule 26 report and his two supplemental reports contained numerous mistakes and miscalculations. The judge commented on the credibility of this witness in her written decision in favor of the United States. The judge stated, “[The testimony of the United States’ wake turbulence expert] was infinitely more credible than that of plaintiffs’ wake expert, who admitted multiple mistakes and uncertainty in connection with his opinions. Taking into account all of the expert testimony, the Court finds that plaintiffs have not satisfied their burden of proving that wake turbulence caused this accident.” Excel-Jet, Ltd., et al. v. United States, 2010 WL 2501113, at *9 (D. Colo. Jun. 17, 2010). Armed with the favorable deposition testimony of plaintiffs’ expert, I was able to demonstrate his lack of credibility at trial. This proved highly instrumental in winning the case.

One of the biggest mistakes lawyers make during cross-examination is allowing the opposing party’s expert to reiterate and reemphasize points previously made on direct. Do not ask open-ended questions. Save that for direct or redirect of your own expert. Another
huge mistake is opening the door to an area of testimony that your opponent failed to cover with the witness on direct.

Avoid asking the opposing expert questions that will elicit the following responses: “Glad you asked me that.” “Excellent point! I’m glad you brought that up.” “As I said on direct….” If you ask non-leading, open-ended questions, you do so at your peril.

Consider asking the judge to modify the order of proof. In one of my cases, the judge allowed the medical experts in a given specialty to testify first, whether for the plaintiff or for the defendant, before moving on to the next medical specialty. Each expert heard the testimony of the other and was then asked on direct or redirect whether he agreed or disagreed with certain portions of that testimony and why. This narrowed the focus and facilitated the judge’s understanding of the complex medical issues at hand.

It is also important to anticipate that some experts who have given a deposition may not appear at trial. See Fed. R. Civ. P. 32(a)(4). In such cases, your opponent may ask the court or jury to read designated portions of the expert’s testimony in lieu of his or her live testimony. This can be problematic if you did not fully cross-examine the witness during his or her deposition. Keep this in mind when deciding whether to save some of your cross for trial. In one of my cases, the plaintiffs offered into evidence the deposition testimony of three of their experts who did not appear for trial. As this was a bench trial, the judge asked the attorneys on each side to use a highlighter to designate the portions of the deposition transcripts they wanted him to read. Fortunately, I fully cross-examined these experts when I took their depositions. The judge later quoted many of my deposition questions and the witnesses’ answers in his 90-page written decision in favor of the United States. See Bearden v. U.S., 21 Avi. Cases (CCH) 18,268 (N.D. Ala. 1987).

Conclusion

This paper highlighted a number of mistakes to “see and avoid” when using and opposing experts. I hope that the tips and strategies presented in this paper will help you to win the “battle of the experts” and achieve a favorable outcome.
Navigating the Tripartite Relationship

I. INTRODUCTION

The tripartite relationship is the relationship between the insured, its insurer, and the defense counsel that the insurer retained to defend a claim against the insured. It is a foundational component of most insurance defense litigation, including aviation work, and is governed by case and statutory law, contracts, and rules of professional conduct. On occasion, the tripartite relationship might also highlight competing interests between the parties. Put simply, the traditional doctrines governing the attorney-client relationship can in certain circumstances become somewhat hazy in the tripartite relationship. In addition to defending against a third-party’s claim against the insured, it is imperative that the parties be mindful of the unique challenges that the tripartite relationship presents to avoid inadvertent disclosure of confidential information, to meet their ethical duties to each client, and to maintain their relationships with the insured and its insurer. Defense counsel must skillfully navigate the variables that threaten the tripartite relationship while remaining judicious in advancing the insured and insurer’s common goal: resolving claims in a quick and cost-effective manner.

II. MAJORITY/MINORITY VIEW

As with many areas of the law, defense counsel must first ask: Who is my client? While the insured is always defense counsel’s client, whether the insurer is also a client can be less certain. Defense counsel must determine if their jurisdiction follows the traditional dual client relationship (majority view) or limits representation to the insured (minority view). Under the majority view, defense counsel represents two clients: the insured and the insurer. The reasoning behind the two-client theory is that both the insured and its insurer are beneficiaries of the insurance company’s control over the litigation.
Under the minority view, defense counsel only represents the insured. Arkansas, Colorado, Pennsylvania, Tennessee, South Dakota, Texas, West Virginia, and Connecticut have adopted the minority view. Minority view jurisdictions reason that the insured is either defense counsel’s only client or its “primary client.” In either scenario, in these jurisdictions, defense counsel owes the insured a greater duty than its insurer under the minority view. This could create tension between the three parties in the tripartite relationship because the insurer has a significant stake in resolving matters, but does not receive the full protections included under the attorney-client relationship.

III. PARTIES IN THE TRIPARTITE RELATIONSHIP

As discussed, the traditional parties in the tripartite relationship are the insured, its insurer, and defense counsel. Each party serves an important role in resolving claims. The insured usually possesses the most knowledge and information about the facts of the claim. The insurer has extensive experience managing and resolving claims. And defense counsel will have the experience to communicate with the insured, its insurer, and opposing counsel. Moreover, defense counsel has the expertise to identify information that it needs from parties to resolve claims quickly.

In addition to the traditional parties, there are often ancillary parties to the tripartite relationship, such as brokers and monitoring counsel. Aviation policies, like other specialized lines of coverage, commonly foster close relationships between the broker and the insured. The insured’s broker generally has intimate knowledge of the insured’s business. That expertise can be an efficient resource to defense counsel when forming a defense strategy. Even though the insured’s broker may appear as an extension of the insured, courts typically do not consider them to be part of the tripartite relationship. Similarly, it is common for insurers to hire monitoring
counsel to evaluate the claim against the insured, to opine on how to handle the claim, and to opine on coverage-related issues. The insured’s broker and monitoring counsel both possess valuable insight, but defense counsel must remain conscientious that neither are clients. Thus, they are outside of the attorney-client relationship and defense counsel must be vigilant to not disclose confidential information to them.

IV. ATTORNEY-CLIENT PRIVILEGE

As the reader knows, the attorney-client privilege is a legal privilege that preserves the confidentiality of communications between lawyers and their clients. Its purpose is to encourage open communication between clients and their attorneys, which allows attorneys to provide effective representation. In the tripartite relationship, defense counsel must first determine whether they have an attorney-client relationship with the insurer. In majority view jurisdictions, defense counsel’s communications with the insured and insurer for the purpose of providing legal advice are protected because they are both clients.¹

Minority view jurisdictions impose additional challenges to the tripartite relationship because the attorney-client privilege is only valid between defense counsel and the insured; communications that include the insurer are not protected. Defense counsel, before sending the insurer information in minority view jurisdictions, must determine whether releasing the information could waive the attorney-client privilege. Doing so could certainly be detrimental to all parties in the tripartite relationship. The insured’s confidential information would become

¹ It is generally accepted that communications between defense counsel and the insurer “concerning such matters as progress reports, case evaluations, and settlement should be regarded as privileged and otherwise immune from discovery by the claimant or another party to the proceeding,” RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS, § 134(f).
discoverable, the insurer would likely pay a higher settlement, and defense counsel would have violated the duty of confidentiality it owed the insured.\textsuperscript{2}

Defense counsel in minority view jurisdictions must be cognizant of the competing obligations to communicate with the insured and its insurer while safeguarding confidential information. Specifically, defense counsel must ensure that they communicate with insurers without jeopardizing their privileged communications with the insured. Insurers in minority view jurisdictions still require information to assess the claims against the insured, the damages claimants seek, and the potential exposure of each claim. Defense counsel can certainly provide the insurer, brokers, and monitoring counsel information that is publicly available without fear of waiving the attorney-client privilege. Defense counsel may also provide the insurer substantive updates telephonically or in person. Of course, these may also become discoverable. Depending on the jurisdiction, defense counsel might also in certain circumstances execute joint defense agreements, common interest agreements, or confidentiality agreements between the insured its insurer.

Defense counsel should also be aware of the rules governing communications between the insured and its insurer. Most courts recognize that direct communications between the insured and its insurer for the purpose of providing legal advice are protected attorney-client communications under the “common interest doctrine.”\textsuperscript{3} The common interest doctrine is an extension of the attorney-client privilege that protects the compelled disclosure of communications between two or more parties and their respective counsel when the parties share a common legal interest. In the context of the tripartite relationship, this may very well allow the

\begin{footnotesize}
\begin{enumerate}
\item See ABA Model Rule of Professional Conduct 1.6.
\item The common interest doctrine is also known as the joint defense doctrine, or the allied-litigant privilege.
\end{enumerate}
\end{footnotesize}
insured, insurer, and defense counsel to share confidential communications without waiving the attorney-client privilege.

Defense counsel should consider these principles when navigating the tripartite relationship. Defense counsel must also recognize, however, that state law governs the attorney-client privilege. And boundaries vary greatly in each jurisdiction. To that end, defense counsel must know the governing jurisdiction’s rules on the attorney-client privilege and the tripartite relationship to ensure that they do not waive the attorney-client privilege inadvertently and risk disclosing confidential information.

V. Work Product Protection

Another issue that defense counsel must consider is work product protection. Fortunately for all parties in the tripartite relationship, work product protection encompasses documents prepared by the insured, the insurer, and defense counsel that are related to the third-party’s claim. Under the Federal Rules of Civil Procedure, “a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) . . .”4 This work product protection applies to claim files because litigation can be anticipated when a claimant makes a claim against the insured. Similar to rules governing attorney-client privilege, it is imperative for defense counsel defending claims in state court to determine whether the governing jurisdiction’s rules have a similar provision to the Federal Rules.

VI. Example of the Tripartite Relationship

---

4 Fed. R. Civ. P. 26(b)(3)
Ironshore Europe DAC v. Schiff Hardin, L.L.P. ("Ironshore") offers a recent example that underscores the perils of the tripartite relationship and defense counsel’s duties to the insured.\(^5\) In Ironshore, an insurer filed a negligent misrepresentation suit against defense counsel in Texas, a minority view jurisdiction. The insurer alleged that defense counsel made misstatements and omissions in the course of reporting on litigation against the insured. The insurance policy included an “assistance and cooperation” provision giving the insurer the right to associate with the insured in defending any claim.

The underlying claim against the insured was a products liability lawsuit filed in Texas. The jury in the underlying case awarded a $34,000,000 verdict and the parties ultimately settled in posttrial mediation. The insurer then sued defense counsel for failing to disclose information about the underlying suit’s facts and settlement and judgment value. The insurer maintained that it would have settled the matter earlier had defense counsel provided it with more information.

Even though defense counsel did not represent the insurer, defense counsel did communicate with the insurer about the case. Such communications included: (1) reporting on the status of litigation and settlement discussions; (2) providing opinions as to the strength and valuation of plaintiffs’ claims; (3) providing opinions as to the perceived litigation strategies employed by opposing counsel and the potential prejudice of pre-trial developments; (4) providing estimates of potential liability; (5) reporting on the progress of a jury trial; and (6) reporting on pre-trial rulings and pre-trial settlement offers.

On appeal, the Fifth Circuit reversed the trial court’s order denying defense counsel’s motion to dismiss and held that defense counsel’s conduct fell “within the routine conduct attorneys engage in when handling this type of litigation.” The court noted that defense

\(^5\) 912 F.3d 759 (2019).
counsel’s conduct fell within its representation of its client, the insured. Relevant to the tripartite relationship, the court affirmed that defense counsel’s first duty was to its client, the insured, and that it was up to the insurer to retain its own counsel if it was dissatisfied with the comprehensiveness of the information it was receiving from its insured’s attorneys.

*Ironshore* is a reminder of the difficult and unique challenges that the tripartite relationship presents to all involved parties. Defense counsel must be aware of the insured’s and insurer’s interests and develop communication strategies to keep them apprised of developments as they arise. Even though defense counsel secured a dismissal of the insurer’s lawsuit, the litigation resulted in additional time and expense to all concerned.

**VII. PRACTICAL TIPS**

Whether practicing in a majority or minority jurisdiction, defense counsel should take steps to avoid inadvertent disclosure of its communications with each party in the tripartite relationship.

- Communicate with the insured and its insurer about the protections and limitations of the attorney-client privilege.

- Identify and label communications that are protected under the attorney-client privilege. The communications may be labeled as “Attorney Client Communication” or “Confidential, Subject to the Attorney-Client Privilege.” Labelling privileged documents will also prevent inadvertent production during discovery.

- Instruct the insured and its insurer to include the attorney in the “to” line in emails that they send communications that they intend to be privileged.

- Always consider each individual included on privileged communications.

- Instruct the insured and its insurer to make clear in communications that they are seeking legal advice.
FAA PRODUCT CERTIFICATION AND THE USE OF THE DELEGATION SYSTEM IN AVIATION

October 24, 2019

American Bar Association · Tort Trial & Insurance Practice Section Aviation and Space Law Committee
TIPS 2019 AVIATION LITIGATION CONFERENCE

Lauren L. Haertlein
GENERAL AVIATION MANUFACTURERS ASSOCIATION

John M. Kelly
ADLER MURPHY & MQUILLEN LLP

Robert A. Clifford
CLIFFORD LAW OFFICES PC
I. Introduction

Aviation products are regulated “to a degree not comparable to any other” industry.\(^1\) Nearly every aspect of flight—from the development, use, and maintenance of the products to the persons maintaining, flying, dispatching, and controlling aircraft, and the airspace itself—is subject to federal standards and certification.

Recent international events have brought the system for certifying aviation product designs into the public dialogue—in particular, the U.S. system for aircraft certification and the use of delegation programs.

II. The FAA Aircraft Certification Process

A. Type Certification

In the United States, the Federal Aviation Administration (“FAA”) establishes safety standards for the design of aviation products and certifies compliance with those standards. The FAA also retains ultimate authority over changes to approved designs and monitors aviation products throughout their lives in service to address any safety issues.

Design approval is the foundation of the FAA’s certification system. The FAA’s regulation of aviation product design begins at a product’s inception, with a five-phase type certification process: conceptual design, requirements definition, compliance planning, implementation, and post certification.\(^2\) Once an applicant submits an application for type

---


\(^2\) See generally FAA Order No. 8110.4C, Type Certification (Mar. 28, 2007) (hereinafter “FAA Order 8110.4C”).
certification, the FAA sets the certification basis for the project. A product’s certification basis designates all applicable federal regulations and any special conditions that must be met to achieve type certification, effectively defining the FAA safety standards for the product. “The certification basis is established by the FAA and agreed to by the applicant, based on a mutual understanding of the design features of the product to be certified.”

Manufacturers must demonstrate compliance with every requirement of the certification basis in accordance with the detailed certification plan approved by the FAA. This can take thousands of work-hours, and many years to complete. After a manufacturer generates, substantiates, and documents compliance data, the FAA reviews the data and makes an independent finding about whether to issue a type certificate. The FAA approves the design of an aviation product and issues a type certificate only if the agency determines that the product satisfies its certification basis and has no unsafe feature or characteristic. A type certificate includes “the type design, the operating limitations, the certificate data sheet, and the applicable regulations . . . with which the FAA records compliance, and any other conditions or limitations prescribed for the product.”

Federal regulations also require FAA certification in order to manufacture duplicate products of an approved design (production certificate), and FAA certification to ensure that

---

3 If the FAA finds that the airworthiness regulations “do not contain adequate or appropriate safety standards for an aircraft, aircraft engine, or propeller because of a novel or unusual design feature” the agency prescribes special conditions and amendments to ensure “a level of safety equivalent to that established in the regulations.” 14 C.F.R. § 21.16.

4 FAA Order No. 8110.4C, supra note 2 at 30–31.

5 Id. at §§ 21.17; 21.20; 21.21.


7 Id. at § 21.41.
each individual aircraft or product meets its approved design and “is in a condition for safe operation”8 (airworthiness certificate). The FAA is also tasked with overseeing approved aviation designs while the designs are in service.

**B. The Use of Delegation in Aircraft Certification**

Congress empowered the FAA to delegate to designees the legal authority to act on the agency’s behalf in order to assist the agency in meeting its comprehensive regulatory responsibilities, including product certification.9 The designee program was first authorized by Congress in 1958 through the Federal Aviation Act and reaffirmed in the Reauthorization Act of 2018.10 The designee system includes individual persons and organizations. Designated Engineering Representatives (“DERs”) are individual engineering and flight test designees responsible for finding that engineering data complies with the appropriate airworthiness standards.11 Organization Designation Authorization (“ODA”) is the program by which FAA grants designee authority to organizations or companies.12

i. **The Structure of DERs and the ODA**

DERs are typically designated to serve one-year terms, which are eligible for renewal of additional one-year terms at the FAA’s discretion.13 Some of the relevant regulatory FAA DER

---

8 *Id.* at § 21.1(b)(1); *see also Id.* at pt. 21, subpt. H (describing the procedural requirements for the FAA to issue airworthiness certificates).


12 *Id.*

appointment criteria include: “(1) the applicant is cognizant of regulatory requirements and problems relating to civil aircraft approvals and his direct experience requiring expertise in the general certification process; and (2) the applicant has thorough working knowledge of the specific 14 CFR parts and predecessor regulations for which the designation is requested.”\textsuperscript{14} In addition, the FAA imposes numerous technical appointment criteria. For example, each applicant must be “cognizant of related technical requirements and problems related to civil aircraft approval,” maintain basic engineering knowledge demonstrated by 8 years of continuous engineering experience, and a relevant engineering degree.\textsuperscript{15} All technical qualifications must be verified by three references to substantiate the required level of expertise of a DER.\textsuperscript{16}

All designee applications are reviewed by the FAA and are evaluated based on merit, as well as the need and ability of the FAA to manage based upon project workload, geographic location, number of FAA employees, and the ratio of designees to FAA advisors.\textsuperscript{17}

Upon admission as a designee, the FAA requires all DERs to attend training modules, including various seminars on FAA procedure, DER responsibilities, and various certification activities.\textsuperscript{18} All DERs must attend a recurrent seminar every two calendar years “to maintain their knowledge of the regulations and policies and as a condition for renewal.”\textsuperscript{19} In addition to continual training, the FAA maintains oversight of all DERs either through in person contact or

\begin{itemize}
\item \textsuperscript{14} FAA Order No. 8100.8D, 402(a) (1)-(2) (Oct. 28, 2011).
\item \textsuperscript{15} Id. at 403(a).
\item \textsuperscript{16} Id. at 403(a)(3).
\item \textsuperscript{17} Id. at 502(a)(1).
\item \textsuperscript{18} Id. at 801.
\item \textsuperscript{19} Id. at 803(g).
\end{itemize}
data review.\textsuperscript{20} To ensure that oversight measures are productive and effective, the FAA established an oversight team in 1994 to develop a process for identifying accountability between the FAA and the DER, and measure quality of performance of the DER on a continuous basis.\textsuperscript{21}

At all times, a DER designation may be rescinded should the FAA determine that he/she has not properly met his/her duties.\textsuperscript{22} A designation is a privilege, not a right; therefore, DER designations may be suspended or terminated at the discretion of the FAA. The process of suspension “removes some or all authority for a designee to act on behalf of the FAA.”\textsuperscript{23} A DER may be suspended for a number of reasons including, failure to accomplish recurrent training or failure to receive renewal of DER licensure.\textsuperscript{24} Suspension permits the FAA to take corrective action without complete termination of a DER’s appointment and the possibility of reinstatement. In contrast, termination “is the action by the FAA to not renew or to rescind a designation at any time for any reason the Administrator considers appropriate.”\textsuperscript{25} A DER may be terminated for poor performance; use of excessive resources; or a demonstrated lack of care, judgment, or integrity.\textsuperscript{26} The process of termination does include notice and an opportunity for appeal to a three-person panel of FAA DER advisors.\textsuperscript{27}

\begin{thebibliography}{99}
\bibitem{Id.}{Id. at 904.}
\bibitem{Id.}{Id.}
\bibitem{§ 183.15 supra note 13.}{§ 183.15 supra note 13.}
\bibitem{Id. at 1101.}{Id. at 1101.}
\bibitem{Id. at 1103.}{Id. at 1103.}
\bibitem{Id. at 1105.}{Id. at 1105.}
\bibitem{Id. at 1105(b).}{Id. at 1105(b).}
\bibitem{Id. at 1108.}{Id. at 1108.}
\end{thebibliography}
The Organization Designation Authorization, created in 2005, is the program by which the FAA grants designee authority to organizations or companies. There are many types of ODAs for which a qualified organization may apply, including:

**Type Certificate ODA (TC ODA):** Holders of a TC ODA may manage and make findings for type certification programs. In addition to the engineering and manufacturing approvals that are part of the certification program, a TC ODA holder may issue airworthiness certificates, but may not issue an original type certificate (TC) or amended TC. A TC ODA is available to organizations holding a TC issued by the FAA.

**Supplemental Type Certification ODA (STC ODA):** Holders of a STC ODA may develop and issue supplemental type certificates (STCs) and related airworthiness certificates. An STC ODA is intended primarily for repair stations, operators, and manufacturers, but consultant groups with the required knowledge and experience may also qualify for an STC ODA.

**Production Certification ODA (PC ODA):** Holders of a PC ODA may issue airworthiness certificates and approvals, determine conformity, perform evaluation leading to amendment of its production limitation record, and approve minor changes to its quality control manual. To qualify for a PC ODA, an applicant must be an existing production certificate (PC) holder, or have applied for a TC and PC.

**Parts Manufacturing Approval (PMA ODA):** Holders of a PMA ODA may issue PMA supplements based on test and computation approvals, STCs, or licensing agreements. Only existing PMA holders qualify for this ODA type.

**Technical Standard Order Authorization ODA (TSOA ODA):** Holders of a TSOA ODA may issue airworthiness approvals and determine conformity of articles, test articles and test set-ups in support of FAA managed TC or STC projects. Only existing technical standard order (TSO) authorization holders qualify for a TSOA ODA.

**Major Repair, Alteration and Airworthiness ODA (MRA ODA):** Holders of an MRA ODA may approve data for major repairs and alterations, issue airworthiness certificates and approvals, and perform aging aircraft inspections and records reviews. Repair stations and operators qualify for all functions available under MRA ODA. Consultant groups are only eligible for engineering approval functions.

**Airman Knowledge Testing ODA (AKT ODA):** Holders of an AKT ODA type are responsible for testing center personnel and facility management,
administration and delivery of airman knowledge tests, and issuance of airman knowledge test reports (AKTR) to airman applicants. The AKT ODA managing office is the Airman Testing Standards Branch (AFS-630), located in Oklahoma City, Oklahoma. AKT ODA must be reviewed, approved, and authorized by this office.

**Air Operator ODA (AO ODA):** Holders of an AO ODA may conduct certification or portions of the certification process towards issuance of a Rotorcraft External-Load Operator Certificate. ODAs for operational certifications may be expanded in future revisions of this order to include additional air operator, airman, air carrier, or air agency certification functions. An AO ODA is intended primarily for consultant groups, but experienced certificated operators may also qualify.²⁸

The FAA maintains a rigorous process for issuing an ODA. ODA members “must have demonstrated experience and expertise in FAA certification processes, a qualified staff, and an FAA-approved procedures manual before they are appointed.” Regular oversight of ODA companies is accomplished by a team of FAA engineers and inspectors “to ensure the ODA holder functions properly and that any approvals or certificates issued meet FAA safety standards.” Today, there are 79 aviation companies with ODA.²⁹

In conjunction with the ODA, the FAA implemented Risk-Based Resource Targeting (“RBRT”) in 2007. The RBRT system classifies each certification project as low, medium, or high risk categories. This classification requires engineers and managers to focus oversight efforts on projects deemed to have the highest risk ratings.

An FAA designation establishes a unique relationship between the agency and the designee, under which the designee is granted the authority to act as a “representative of the

---

²⁸ *Types of Organizational Designation Authorizations, Federal Aviation Administration* (Jan. 31, 2019), [https://www.faa.gov/other_visit/aviation_industry/designees_delegations/delegated_organizations/types/](https://www.faa.gov/other_visit/aviation_industry/designees_delegations/delegated_organizations/types/).

²⁹ Elwell, *supra* note 10 at 3.
Although a designee may be a person or an organization that witnesses inspections or conducts test on behalf of the FAA, designees are “legally distinct” and act independent from the organizations that employ them. A designee’s actions are governed by “the same standards, procedures, and interpretations applicable to FAA employees accomplishing similar tasks.” Subject to FAA oversight, designees could engage in about 90% of all regulatory compliance determinations for a single aircraft or aircraft component design, and are required to exercise “the same care, diligence, judgment, and responsibility when performing the authorized functions as the FAA would use in performing” those functions.

The FAA oversees and manages the work of designees and maintains the authority to undertake the agency’s own tests, if warranted. Importantly, the FAA controls the initial approval of, and changes to, designs – regardless of whether delegation is involved.

III. The History of the Delegation System

A. Historical Background

At present, the FAA delegates aspects of the certification of aircraft (engineering design, manufacturing, operations, and maintenance) and people (medical examinations, pilots, mechanics, parachute riggers, dispatchers, and knowledge testing). This use of delegation is not new, although it has increased over time. The FAA delegation program’s inception dates back to the 1920s, with the utilization of private persons by the federal government to examine, test, and inspect aircraft for safety in 1927. Beginning in the 1940s, the FAA established programs to

---

30 About the FAA Designee Program, FEDERAL AVIATION ADMINISTRATION (Jan. 31, 2019), https://www.faa.gov/other_visit/aviation_industry/designees_delegations/about/.


appoint designees to perform certain duties such as “airman approvals, airworthiness approvals, and certification approvals.” The program grew further throughout the 1950s due to the rapid expansion of the aircraft industry and the need to supplement the agency’s limited resources for certification. Over time, the delegation system expanded to include air carriers, commercial operators, and domestic repair stations to develop and utilize major repair data under FAA supervision. The 1980s produced massive growth of the delegation system. During that time, the program expanded the functions that individual designees could perform and paved the way significantly for the delegation system that is currently in place.

**B. Why the FAA Delegates**

Delegation is intended to address government resource limitations and provide a structured system to leverage industry expertise to support the FAA in making its decisions. The delegation system “maximizes efficiency without compromising on quality, as designees are experts in the aviation and medical communities who are familiar with the regulation and certification requirements necessary to issue a certificate.” Indeed, “[w]ith strict FAA oversight, delegation extends the rigor of the FAA certification process to other recognized professionals, thereby multiplying the technical expertise focused on assuring an aircraft meets

---


34 Id.

35 Id.

36 Id.

37 By way of example, the FAA’s Aircraft Certification Service (“AIR”) only employs approximately 1,300 individuals responsible for the design, production, and airworthiness certification, and continued airworthiness of all U.S. civil aviation products and imported foreign products.

38 Federal Aviation Administration, supra note 31.
FAA regulations.” Designees can include: mechanics, pilots, engineers, and inspectors. As stated by the FAA, “using designees for routine certification tasks allows the FAA to focus its limited resources on safety critical certification issues as well as new and novel technologies.” The FAA has further explained that, with regard to product certification, “[t]he designee system enables the FAA to meet its safety requirements and responsibilities and provide timely certification services.” Delegation also “allows the FAA to maintain the highest level of safety.”

The United States is not alone in leveraging the expertise of industry through the delegation process. Other leading international aviation authorities employ similar constructs, with some having much more substantial delegation than the United States. For example, the European Union employs a similar delegation system with the European Union Aviation Safety Agency at its helm. Ali Bahrami, former President of Civil Aviation at Aerospace Industries Association of America and current Associate Administrator of the FAA, stated in 2013 before the House Committee on Transportation and Infrastructure, that “FAA certification is still the ‘gold standard’ sought by aviation authorities throughout the world.”

Delegation has become increasingly important as shifts in the worldwide market toward Asia and developing nations demand that the United States remain competitive. A key way to

---

39 Federal Aviation Administration, supra note 11.

40 Federal Aviation Administration, supra note 31.


42 Id. at 2973.


44 Id.
ensure competiveness of U.S. manufacturers is the delegation system, which allows manufacturers to move improved products into the marketplace at a faster rate than foreign manufacturers. For this reason, our system allows the U.S. aviation market to grow and remain competitive with foreign competitors.

IV. Criticisms of Delegation

Recently, the delegation system has received intense scrutiny from the press, lawmakers, and the public at large. Most claim that the delegation has gone too far, with the FAA relinquishing too much authority to privately-employed companies. Critics worry that delegation amounts to self-regulation and have expressed apprehension about the possibility of safety compromises due to intense lobbying from companies, who seemingly participate in the delegation system as a means to certify their aircraft for flight. Another stated concern is the potential conflict of interest between private companies lobbying both Congress and federal agencies, while still retaining the power to participate in certification activities. Yet, it is important to note, that certification safety is still at the FAA’s discretion, ultimately.

Notably, the Office of the Inspector General (“OIG”) for the U.S. Department of Transportation has issued three reports over the last decade identifying certain areas where it believed that the FAA was not meeting its safety objectives in its ODA and RBRT programs. As discussed in more detail below, the OIG reports pinpoint key and critical areas in which the FAA needs / needed to improve to ensure the continuance of its delegation system while still maintaining a high level of safety for travelers. For its part, the FAA has accepted most of the findings in the OIG reports and worked (and continues to work) to make significant changes to its oversight system, shifting the focus to identification of risk and safety.

A. The OIG’s 2011 Report
In 2011, the Office of the Inspector General for the U.S. Department of Transportation released an audit report of the FAA’s certification program with particular focus on the ODA Program and the RBRT system in response to a request from lawmakers. Lawmakers expressed concern over the lack of oversight the FAA retained over designees who perform the certification work on behalf of the FAA and the inability of designees to adequately rate specific projects as low, medium, or high risk.\(^{45}\) In its report, the OIG confirmed those concerns and reiterated the need for more FAA oversight and regulation. The OIG concluded that the FAA had significantly reduced its role in choosing and approving the individuals who work on behalf of the FAA.\(^{46}\) Under previous forms of delegation, the FAA controlled the approval of each ODA personnel appointment. However, the OIG determined that the FAA’s role in selection of personnel had dramatically decreased over time.\(^{47}\) The OIG discovered that personnel could be selected by an ODA company without the concurrence of the FAA once the FAA had approved the company’s standard personnel selection process. Moreover, many ODA companies could proceed with self-selection at a faster rate once the company had “demonstrated a capability to do so.”\(^{48}\) In addition, the selection of ODA personnel proved to be inconsistent across companies due to lack of clear guidance from the FAA. The OIG further reported on the FAA’s lack of personnel


\(^{46}\) Id.

\(^{47}\) Id.

\(^{48}\) Id. at 6.
performance tracking policies, which led to personnel with past performance problems continuing to act as representatives of the FAA.  

In its 2011 overview, the OIG also focused on the FAA’s lack of oversight in its use and implementation of its RBRT system, which evaluates risk associated with non-compliance of FAA regulations for both aircraft and aircraft component designs. The risk assessment is translated as a number from 1 to 5 and characterized as low, medium, or high risk. The higher the risk, the greater amount of direct FAA oversight applied to the project. Although this system was designed to further direct the FAA’s limited resources to the most critical projects, the OIG concluded the entire system was ineffective due to lack of detailed data and engineer subjectivity. The overall system was driven by expert opinion rather than objective data, thus giving little value to the determination of risk from project to project.

The FAA responded to the 2011 report with concurrence as to the OIG’s criticism on both the lack of oversight and RBRT ineffectiveness, and vowed to execute changes to improve its ODA system as a whole. For example, in June 2015, the FAA adopted a new oversight system known as the Compliance Philosophy. The new program shifted the FAA’s safety oversight strategy and set goals to: “(1) achieve rapid compliance; (2) eliminate a safety risk or


50 Id. at 2.

51 Id. at 10.

52 Id. at 10.

53 Federal Aviation Administration, Agency Comments and Memorandum (Jun. 1, 2011).

54 The Compliance Philosophy was renamed the Compliance Program in October 2018. See FAA Order 8000.373A, “Federal Aviation Administration Compliance Program.”
deviation; and (3) ensure positive and permanent changes.”55 The foundation of the new program is “based on the premise that the greatest safety risk in the industry does not arise from a specific event or its outcome, but rather from an operator which is unwilling or unable to comply with rules and best practices for safety.”56 The program works closely with air carriers as well as ODA companies to identify the root causes of a violation in order to maximize safety levels. The new program works in tandem with ongoing efforts to emphasize a strong safety culture throughout the FAA and its designated ODA companies.57

B. The OIG’s 2015 Report

The U.S. Department of Transportation OIG conducted an additional, extensive review in October 2015. The report focused on the lack of effective staffing and determined, for the second time, that the ODA system lacked risk-based oversight.

In its analysis, the OIG determined that the FAA lacked a comprehensive process for estimating staffing needs. At the time, the FAA utilized a system called the Aviation Safety Staffing Tool and Reporting System.58 However, the system projected staffing needs nationally, rather than at the office and ODA team level.59 Thus, the FAA was unable to accurately estimate future staffing needs for each office or effectively respond to varying workload demands. FAA


56 Id.

57 Id. at 8-9.


59 Id.
managers at two of six offices expressed concerns of inadequate representation and improper
distribution of labor.\textsuperscript{60}

Additionally, a focus on risk-based oversight had proven to be a consistent problem for
the FAA. At the time of the report, the FAA did not employ a systems- and risk-based oversight
approach, which undermined its effectiveness. Instead, the FAA employed two types of
oversight: (1) an 18 item supervisory checklist overviewed annually, and (2) a team audit
conducted every two years.\textsuperscript{61} This system focused on meeting minimum oversight requirements,
rather than assessing high-risk issues and safety-critical items. In contrast, a systems-based
oversight “requires a shift from focusing on individual projects to holistically assessing whether
ODA companies have the people, processed, procedures, and faculties in place to produce safe
products, thus allowing FAA to focus its oversight on the highest risk areas.”\textsuperscript{62} This shift would
allow the FAA to increase focus on “robust safety oversight” and direct its attention to “critical
projects that include novel aspects of certification, such as new types of aircraft or
components.”\textsuperscript{63} Similar to its earlier criticism, the OIG again concluded that the FAA had not
provided adequate guidance or data to ODA teams to identify high risk areas and did not use the
data gathered from biennial audits of ODA companies to further assess the areas in which FAA
attention was most needed.\textsuperscript{64} This lack of risk assessment further extended to oversight of
external suppliers worldwide that produce and supply components to local manufacturers.\textsuperscript{65} For

\textsuperscript{60} Id.; see also Kaplan, supra note 50.

\textsuperscript{61} Id. at 6.

\textsuperscript{62} Id.

\textsuperscript{63} Id.

\textsuperscript{64} Id. at 9.

\textsuperscript{65} Id. at 10.
example, with external suppliers ranging from Canada, Europe, and Asia, 4% of those suppliers experienced FAA oversight through ODA companies.\(^66\)

The FAA again responded to the review in agreement with the OIG in conjunction with a timeline in which the FAA hoped to complete many of the OIG’s recommendations through 2017. Yet, the FAA defended its system, arguing that the “ever expanding magnitude of the U.S. aerospace industry requires that the agency delegate an increasing number of oversight functions” to companies it regulates.\(^67\)

C. OIG’s 2019 Commentary

Again, in March 2019, the OIG released an additional report, “Perspectives on Overseeing the Safety of the U.S. Air Transportation System.” The report discussed broadly safety issues in need of FAA attention, which included the Office’s current comments on the Aircraft Certification Process. In its findings, the OIG stated that, “enhancing risk-based oversight, effectively leveraging industry collaboration and enforcement, and fostering a strong safety culture remain key challenges for FAA as it works to implement its new oversight strategies and ensure the safety of the travelling public.”\(^68\) The OIG did note that, in response to both the 2011 and 2015 reports, the FAA executed substantial changes to its processes.

As it had done before in response to OIG reports, in July 2019, the FAA introduced a new process to its oversight approach. This new approach includes an identification of system

\(^{66}\) Id.


\(^{68}\) Scovel, supra note 56.
elements, such as training and company self-audit processes, and developing new evaluation criteria to be implemented in oversight evaluations.  

V. Cases Discussing FAA Delegation

The FAA delegation system has been discussed by a variety of U.S. courts. Many courts have accepted and recognized the importance the delegation system plays in the facilitation of safe and efficient travel.

In U.S. v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), the U.S. Supreme Court addressed the delegation system in a claim stemming from a fire that broke out aboard an aircraft on a flight from Rio de Janeiro to Paris in 1984. The majority of the aircraft was consumed by flames and destroyed. The owners of the commercial aircraft later brought suit against the U.S. government under the Federal Tort Claims Act (FTCA), alleging negligence and seeking damages for the loss of the aircraft. The court reversed the decision of the 9th Circuit and held that the discretionary power of the FAA precluded an action under the FTCA and “judicial intervention, through private tort suits. . .would require the courts to second-guess the political, social, and economic judgments of an agency exercising its regulatory function.”

In its analysis, the Court noted that the “FAA obviously cannot complete this elaborate compliance review alone.” Designees act as “surrogates of the FAA in examining, inspecting, and testing aircraft for purposes of certification” in the day-to-day involvement in the development and inspection of an aircraft. Thus, the need for designees is crucial to the

69 Id.
71 Id.
72 Id. at 820.
73 Id. at 807.
functionality of the certification system. The Court noted that the delegation system falls squarely within the FAA’s discretion to adequately and effectively uphold the safety of commercial aircraft.

In 2017, the U.S. District Court for the Middle District of Pennsylvania reiterated the FAA’s discretionary power and strong oversight of its designees. In *Sikkilee v. AVO Corp.*, a fiery and fatal plane crash led to the aforementioned litigation.74 In its decision, the court looked to the relationship between the FAA designated engineering representatives and the independent manufacturer of an engine carburetor. In its examination of the delegation system, the court noted that the FAA “exercises significant control over its DERs in the performance of their official duties.”75 The court also pointed out that the FAA maintains control over the appointment, renewal, and possible termination of all DERs with no constraints on their discretion or determinations regarding such. In addition, the FAA may review, modify, or reverse any decision by a DER deemed “unreasonable” or “unwarranted.”76

The court reiterated the earlier sentiment of the *S.A. Empresa* court and noted that “any DER must follow the same procedures that an FAA engineer must follow when performing compliance finding functions.”77 Further, in relation to independent manufacturers, any proposed changes, even minor, still remain subject to FAA’s broad oversight through the use of its designees. The court emphasized the importance of the delegation system, stating “a DER serves as a functional extension of the FAA, working to make the Administration’s approval process

---

75 *Id.* at 675.
76 *Id.*
77 *Id.*
more efficient—not to lower applicable regulatory standards.” The court ended its discussion of the delegation system by noting, “that court must prioritize functional realities over cursory labels when analyzing employment or delegation relationship” and that “economic reality rather than technical concepts is to be the test.”

The Seventh and Ninth Circuits have also had the opportunity to discuss the constraints of the delegation process, and both courts have held that, while the FAA delegates to ODA-manufacturers the ability to “perform specified functions on behalf the FAA related to engineering, manufacturing, operations, airworthiness, or maintenance,” the ultimate authority is vested with the FAA for making and issuing type-certificate compliance regulations and approving type-certificates. Recently, in Riggs v. Airbus Helicopters, the Ninth Circuit addressed whether an aircraft manufacturer (Airbus) with a FAA-certified Designation could seek removal to federal court pursuant to 28 U.S.C. § 1442(a)(1) because it was “acting under” the FAA as a FAA-delegee. Relying, in part, on the Seventh Circuit’s decision in Lu Junhong v. Boeing Co., which addressed an identical factual circumstance, the majority held that in order

78 Id. at 677.

79 Id.

80 Riggs v. Airbus Helicopters, No. 18-16396, slip op. at 2 (9th Cir. Sept. 20, 2019); Lu Junhong v. Boeing Co., 792 F.3d 805 (7th Cir. 2015).

81 “A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending: (1)The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.” Riggs, at 8-10. (emphasis added).

82 It should be noted that the Seventh Circuit adopted a slightly different approach in analyzing the “acting under” requirement. Namely, the Seventh Circuit held that delegation of “rule making” authority as opposed to “rule compliance” was a requirement to meet the “acting under” standard. Lu Junhong, at 810. At minimum, an aircraft manufacturer would have had to have been delegated the “power to issue conclusive certification of compliance” to qualify for removal under § 1442(a)(1). Id. The Ninth Circuit in Riggs declined to adopt the Seventh Circuit’s “rule-making-rule compliance” distinction. Riggs, at 16.
to satisfy the “acting under” requirement of § 1442(a)(1) Airbus would have to prove that, in issuing type-certificates, it was doing something other than simply complying with FAA regulations.83

The Ninth Circuit majority stated that Airbus was not and noted that a manufacturer’s “mere compliance with federal directives does not satisfy the ‘acting under’ requirement of § 1442(a)(1), even if the actions are ‘highly supervised and monitored.’”84 Instead, Airbus’s certification power was circumscribed by FAA authority and therefore it was “duty-bound to follow prescriptive rules set forth by the FAA....”85 Judge O’Scannlain dissented, writing that the majority misunderstood the FAA's regulatory regime and misapplied Supreme Court precedent.

VI. The Future of the Delegation System

Regardless of the criticism of the delegation system, it remains the most efficient and effective way to regulate more than 230,000 aircraft, 1,600 manufacturers, and 5,200 aircraft operators that flow through our nation’s economy.86 This past March, in testimony before the Senate, the acting FAA administrator, Daniel K. Elwell, described the delegation system “as critical to the success and effectiveness of the certification process.”87 He further reassured Congress that the entire process “is not self-certification; the FAA retains strict oversight authority.”88 The system reduces the costs to the federal government, maximizes utilization of

83 Id. at 16.
84 Id. at 17.
85 Id.
86 U.S. Dep’t of Transp., Office of Inspector General, supra note 43 at 1; Scovel, supra note 56 at 5.
87 Elwell, supra note 10 at 3.
88 Id.
industry expertise, and allows for a comprehensive process in which companies may receive certification.

Moreover, the system is effective. Since 1997, “the risk of a fatal commercial aviation accident in the United States has been cut by 95 percent.” 89 In the past decade, it has been proven that the system enhances safety, “with only one fatality in a domestic passenger airline accident since 2009.” 90 This decade has been touted as the safest in the history of U.S. travel. With constant changes and advancements within the aviation industry and relevant technology, the delegation system remains the best way to maximize efficiency without comprising the safety of travelers.

89 Id. at 1.

90 Id.
TRIAL TIPS FROM THE TRENCHES: THINGS THEY DON’T TEACH YOU IN LAW SCHOOL ABOUT TRYING AVIATION LAWSUITS

October 24, 2019

American Trial Association • Tort Trial &Insurance Practice Section

THE AVIATION LAWYER’S OPERATING HANDBOOK:
LEARNING TO LITIGATE, NAVIGATE, AND COMMUNICATE

Gary C. Robb
ROBB & ROBB LLC
1200 Main Street, Suite 3900
Kansas City, Missouri 64105
(816) 474-8080

Copyright 2019 American Bar Association
It is widely-accepted that aviation litigation is as factually and legally complex as any other category of lawsuit. On the legal side, counsel must have demonstrated expertise in all manner of procedural and jurisdictional rules and case law, understand the nuances of products liability, deal with the various rules and roles of experts, and that is before she even enters the courtroom! After that, how to select a jury, present opening statement and examine witnesses are the critical skills.

Before focusing on the topic of what one is not taught in law school about trying aviation lawsuits specifically one should recognize that law students are not taught nearly enough about trying lawsuits in general. The vast majority of law students obtain no actual in-court experience of any kind. Some are fortunate enough to experience a quality trial advocacy program but that is the extent of their law school experience.

Shifting to real world trial lawyer experience presents an even gloomier picture. The notion of “vanishing trials” is truer today than ever as the latest research shows that only 1.8% of all federal civil cases are resolved by trial.

So how is a young lawyer or any lawyer for that matter to obtain quality trial experience?

Here are some practical suggestions:

1. **Attend the Best Trial Advocacy Programs for Learning Jury Trial Skills**

   Many law firms in this day and age conduct their own in-house trial advocacy workshops. But not all. The best alternative would be to attend
workshops such as those sponsored by the National Institute for Trial Advocacy (NITA) or the American Association for Justice (AAJ) in either the introductory or advanced formats.

2. **Take on Pro Bono or Small Dollar Cases Which Can Be Tried to Verdict**

   Most every law firm will provide an opportunity for young lawyers to handle pro bono cases. Young lawyers should take every such opportunity even if that means working that much harder. Early courtroom experience is so important to acquire the basic trial skills one needs throughout his or her career.

   Other opportunities may avail where smaller (lesser at stake) cases arise for young associates to handle. These can be wonderful educational opportunities if handled under the supervision of a more senior trial attorney. If circumstances permit, proceeding to trial and through verdict will have immensely valuable rewards for an early trial attorney’s professional prospects.

3. **Target Cases for Trial**

   This is a time-tested technique for lawyers of all ages to improve and maintain trial skills. For 35 years our office always has had several cases which are “targeted” for jury trial. This means that absent a premium offer or some other unexpected circumstance, the case will be tried. The advantages are several. First, all attorneys involved know that they are preparing for an actual trial and not for some eventual settlement. Second, the increase in moral among non-attorney staff is immeasurable. All share the secret that the X v. Y case will be tried and after utilizing the technique for several years everyone understands that that will indeed be the case!
This “targeted case” technique can just as easily be used on the defense side. With the client and insurance carrier’s permission the case will either be a no offer or lowball offer and will give defense counsel needed jury trial experience. Some defense firms, especially in the medical malpractice context, utilize this technique frequently.

Once that threshold of basic jury trial experience is crossed, there are many factors which distinguish aviation jury trials from most any other type of case:

1. **Simplify the Technical Aviation Jargon**

   As aviation lawyers, we can speak in terms of vectors and angles of attack and loss of tail rotor effectiveness, but the jury has no idea what these terms mean. Aviation lawyers, as should all good trial attorneys, be patient and skilled teachers to the jury of these aviation concepts.

2. **Know Your Aviation Case Adversary**

   While there are a number of aviation lawyers who have considerable trial experience, others have very little or even none. I learned this lesson early on as a young defense attorney. I was asked to evaluate a case and then met with a senior partner concerning valuation and action plan. I had the theories of liability, computed damages, and all sort of procedural issues in mind but none of that mattered to this senior trial partner. His first question was “who is the plaintiff’s attorney and what do you know about him or her?” That taught me a lot.

3. **Use Demonstrative Exhibits**

   In every aviation trial we always make extensive use of a model of the subject airplane or helicopter. This model can be used by eyewitnesses to
demonstrate the movement of the aircraft just prior to the crash. The model also may be used by experts to demonstrate any in-flight mechanical malfunction or piloting deficiency.

In virtually every case we have used computer-generated animation to demonstrate the crash sequence. Studies have shown that jurors can readily understand and evaluate such computer-generated graphics especially when presented in conjunction with a quality expert. Another aspect of using such computer-generated evidence is that it tends to hold the jury’s attention rather than drab lengthy explanations from an expert.

4. **Use Actual as Well as Exemplar Aircraft Components**

Where at issue counsel must utilize actual as well as exemplar aircraft components. Having a portion of the allegedly failed propeller or the engine component is far more effective than photographs. If admitted as evidence (which they should be), this real evidence will go back to the jury room and the proponent of that evidence gains a decided advantage. Similarly, use of exemplar aircraft components is helpful in demonstrating to the jury the proper functioning of a product or system. Aviation trial counsel who is better at explaining his or her theory of the case gains a measure of credibility and trust which more often than not translates into a successful jury verdict.

5. **Assess Prospective Jurors’ Personal and Family Experience with Same or Similar Category of Aircraft**

If a jury panel member has ridden in a helicopter and he had a death-defying experience, counsel sure better learn about that! Such an experience may cut both ways: The juror may be grateful to the pilot for successfully operating and landing
the aircraft or vows that anyone who would voluntarily board a helicopter is risking death and destruction.

Given cut-rate commercial fares that are widely available, virtually every jury panel member would have flown and some rather extensively. Counsel must explore the potential juror’s attitude toward flying and whether he or she would be willing to hold a manufacturer responsible or, contrary wise, find in favor of a manufacturer if the aircraft were not properly operated.

6. Use the NTSB Factual Report Effectively

In every aviation case, a common battleground is to what extent the NTSB Factual Report should be admissible. In all but exceptional cases (such as where the adversary imprudently opens the door) the NTSB Probable Cause Report is not admissible. Admitting into evidence the NTSB Factual Report and highlighting these factual findings which are supportive of and consistent with counsel’s theory of the case will add credibility to the case as bearing the “stamp of approval” of the federal government. Where possible to do so, counsel should align their claims with the factual findings of the NTSB so as to persuade the jury that counsel’s theories are more likely to be based on the true facts.

7. Practice Your Opening Statement!

The night before trial is not the proper time to outline the opening statement. The opening statement should be a work in progress throughout the entire length of discovery leading up to the close of discovery but well ahead of trial. Presenting the opening statement before family members, friends and fellow trial lawyers will invariably result in such key questions as: What do you mean by X? Why didn’t
you sue Y? Why are you suing Z? And you may even receive the comment that it is too long and cut stuff out!

By the time trial arrives counsel must know that opening statement cold. This is the first and best opportunity to persuade the jury what the facts of the case are and ultimately to convince the jury to decide those facts in counsel’s favor.
Discussion- “Ethical considerations that can arise pre-suit in commercial air disasters”

Plaintiff’s Attorneys- early contact with victims. (Stuart Fraenkel, Austin Bartlett)

- Applicable rules
  - ABA Rule
    - Rule 7.3 of the American Bar Association’s Model Rules of Professional Conduct addressing “Direct Contact with Prospective Clients”
    - The standard governing direct in-person solicitation (many jurisdictions have more restrictive local rules)
    - Three exceptions: (1) direct contact with clients with whom the lawyer has had a prior professional relationship; (2) direct contact with individuals with whom the lawyer has an established personal relationship; or (3) solicitation of clients for “political” purposes rather than pecuniary gain.
  - State Rule
    - Example: Fla Bar Rule 4-718 “Direct Contact with Prospective Clients”
    - A lawyer may not send a written communication to prospective client unless the accident or disaster occurred more than 30 days prior to the mailing of the communication
  - Federal Rule
    - 49 U.S. Code § 1136(g)(2) “Aviation Disaster Family Assistance Act”
    - (2) Unsolicited communications.— In the event of an accident involving an air carrier providing interstate or foreign air transportation and in the event of an accident involving a foreign air carrier that occurs within the United States, no unsolicited communication concerning a potential action for personal injury or wrongful death may be made by an attorney (including
any associate, agent, employee, or other representative of an attorney) or any potential party to the litigation to an individual injured in the accident, or to a relative of an individual involved in the accident, before the 45th day following the date of the accident.

○ Other Constraints
○ Ethical considerations
○ Techniques

Defense Counsel- same considerations may apply (Justin Lee, Austin Bartlett)

○ Complication- airline’s need to resolve claims for lost or damaged personal possessions
  ■ Applicable laws (State, Federal, Treaty)
  ■ Represented v. Unrepresented passengers or personal representatives

○ Airline’s desire to make advance payments
  ■ Applicable laws (State, Federal, Treaty)
  ■ Represented v. Unrepresented passengers or personal representatives

Example: (Justin Lee)

Texas Rules of Professional Conduct

Rule 4.03. Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Comment: An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer’s representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.
Rule 4.02. Communication with One Represented by Counsel

(a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Comments:

1. Paragraph (a) of this Rule is directed at efforts to circumvent the lawyer-client relationship existing between other persons, organizations or entities of government and their respective counsel. It prohibits communications that in form are between a lawyer’s client and another person, organization or entity of government represented by counsel where, because of the lawyer’s involvement in devising and controlling their content, such communication in substance are between the lawyer and the represented person, organization or entity of government.

2. Paragraph (a) does not, however, prohibit communication between a lawyer’s client and persons, organizations, or entities of government represented by counsel, as long as the lawyer does not cause or encourage the communication without the consent of the lawyer for the other party. Consent may be implied as well as express, as, for example, where the communication occurs in the form of a private placement memorandum or similar document that obviously is intended for multiple recipients and that normally is furnished directly to persons, even if known to be represented by counsel. Similarly, that paragraph does not impose a duty on a lawyer to affirmatively discourage communication between the lawyer’s client and other represented persons, organizations or entities of government. Furthermore, it does not prohibit client communications concerning matters outside the subject of the representation with any such person, organization, or entity of government. Finally, it does not prohibit a lawyer from furnishing a “second opinion” in a matter to one requesting such opinion, nor from discussing employment in the matter if requested to do so.

In re News America Pub., Inc., 974 S.W.2d 97 (Tex. App.—San Antonio 1998)

Background: One of the defendants (Frazier) in a breach of contract lawsuit sent a letter to Plaintiffs and their attorney to discuss the lawsuit. In the letter, Frazier stated that he wanted to meet with Plaintiffs and their attorney to discuss the lawsuit. Frazier also stated in the letter that he had terminated his own attorney and wished to proceed with the meeting without his own legal counsel. Shortly after the meeting, Plaintiffs nonsuited Frazier. At the time of the nonsuit, however, Frazier had not communicated to his attorney that the professional relationship was terminated. No notice of the meeting was given to Frazier’s counsel or to counsel for the other Defendants until several months later. Defendants moved for sanctions and sought to disqualify Plaintiffs’ counsel.
Issue: When a client makes a unilateral statement to counsel for the opposing party that he has terminated his own attorney-client relationship and wishes to engage in discussions without his “former” lawyer present, is he still represented by counsel within the context of Rule 4.02(a) until he has conveyed this decision to his lawyer?

Opinion: Citing Comment 2 of Rule 4.02, the court noted that as long as the attorney does not cause or encourage communication between the parties without the consent of the other party’s attorney, such communications are not prohibited. The court further noted that Rule 4.02 does not require an attorney to “affirmatively discourage” communications between the attorney’s client and the other represented party. But the court held that the spirit of Rule 4.02 requires an attorney to avoid such communications for as long as the other party’s attorney has not officially withdrawn from representation.

ABA Guidance: “As a practical matter, a sensible course for the communicating lawyer would generally be to confirm whether in fact the representing lawyer has been effectively discharged. For example, the lawyer might ask the person to provide evidence that the lawyer has been dismissed. The communicating lawyer can also contact the representing lawyer directly to determine whether she has been informed of the discharge. The communicating lawyer may also choose to inform the person that she does not wish to communicate further until she gets another lawyer.” ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95–396 (1995).

Pre- and post-suit discovery- (Justin Lee, Kathleen Silbaugh)

- Need for the air carrier and other parties to cooperate with investigators and insurers can complicate discovery
  - Case filed before accident investigation complete
  - FOIA and Touhy requests
  - Redacted Documents
  - NTSB Parties
    - pre-suit testing, inspections, reports
      - Discoverable?
    - Post-suit (ie. case filed but NTSB investigation not complete)
      - Are party tests, inspections, reports discoverable?
      - NTSB’s position
      - Applicable rules

NTSB’s official investigation process (Kathleen Silbaugh, Stuart Fraenkel)

- Applicable Law- release of information derived from the official investigation before the NTSB Public Docket becomes available
• NTSB often obtains information marked or reasonably believed to be proprietary

• Trade Secret or Confidential Commercial Information under FOIA

• Work to balance investigative needs with duty to minimize disclosures

• 49 U.S.C. § 1114(b) (b) Trade secrets-- (1) The Board may disclose information related to a trade secret ... only-- (D) to the public to protect health and safety after giving notice to any interested person to whom the information is related and an opportunity for that person to comment in writing, or orally in closed session, on the proposed disclosure, if the delay resulting from notice and opportunity for comment would not be detrimental to health and safety

○ Ethical considerations arising when parties obtain or withhold information early in the investigative process

• Party Release Considerations
  • Proprietary information
  • Source of information

• NTSB Release Considerations and Procedure
  • Is info marked as (or reason to believe) trade secret or confidential commercial information?
  • If yes, NTSB must provide opportunity to comment on any proposed disclosure
  • Negotiate to minimize disclosure
  • Owner generally must show competitive harm
  • Even with competitive harm, NTSB can disclose if necessary to protect health and safety,
  • Prefer to reach consensus with parties; will work to minimize disclosure
  • Final 10-day notice if unable to reach consensus
BEST PRACTICES IN MEDIATION FOR THE AVIATION LAWYER
(MEDIATION ADVOCACY)

Introduction:

Mediation Advocacy has been defined as the technique of presenting and arguing a client’s position, needs and interests in a non-adversarial way. It recognizes the following:

- The negotiated outcome to a dispute is usually more satisfying, more effective, more workable, more flexible and more durable than an order imposed by a court or other tribunal;

- The parties to a dispute should control its process and its outcome;

- The parties to a dispute should be assisted by their professional representatives or advisors in coming to a settlement that both deals with all matters at issue and also meets their true needs and wider interests; and,

- The parties to a dispute should have regard to helping the opposite party secure its needs while at the same time preserving their own.¹

To be effective, “the mediation advocate” and their client must be engaged with the mediator in the problem-solving process. Problem solving has been described as “an orientation to negotiation which focuses on finding solutions to the parties’ sets of underlying needs and objectives. The problem-solving conception subordinates strategies and tactics to the process of identifying possible solutions and therefore allows a broader range of outcomes to negotiation problems”.²

The ABA has traditionally identified four primary roles for attorneys: advocate, counselor, evaluator and negotiator. For many of us, our education and legal practice has been predominantly focused on our role as a “litigation advocate”. While this background and particular skill set is certainly advantageous in a litigation setting, it can prove to be an impediment in the preparation for and participation in the mediation process. When we fail to recognize and appreciate the need for a different approach to a different process, opportunities to meet and satisfy client needs can be overlooked or missed.

Mediation advocacy has become a critical skill set for attorneys. It is the goal of this presentation to offer valuable insights from the perspective of plaintiffs, defendants and insurance carriers on how to prepare for and effectively navigate the mediation process.

¹ Standing Conference of Mediation Advocates, http://www.mediationadvocates.org.uk/79/
The Traditional Negotiation Landscape:

- Distributive Bargaining v. Integrative Bargaining

In most instances, the negotiation of insured matters is typically characterized by positional or traditional bargaining because of the nature of the disputes themselves. The description that author and scholar, Dwight Golann provides relative to the limitations of the problem-solving method in insured claims and other monetary disputes is fitting and aptly describes the prevailing dynamic in this particular type of litigation. Professor Golann points out that “because of the nature of the dispute itself, the resolution of insured claims is characterized by positional, or traditional bargaining … plaintiffs want as much money as they can get; defendants want to pay as little as they can get by with. There is little in these types of disputes that have to do with working relationships that allows parties in other types of disputes to reach creative solutions or create mutually beneficial relationships that may be long-lasting”. 3

The following chart provides a concise overview of the characteristics of distributive and integrative negotiation.4

<table>
<thead>
<tr>
<th>Negotiation Type</th>
<th>Process</th>
<th>Communication</th>
<th>Movement Motivation</th>
</tr>
</thead>
</table>
| Distributive     | • limited resources (fixed pie)  
                  • zero-sum result (win-lose)  
                  • competitive (adversarial)  
                  • positional (haggling)  
|                  | • start high (or low)  
                  • small incremental moves  
                  • share little accurate information  
                  • meet “in the middle”  
|                  | • confusion or intimidation  
                  • legitimacy (fairness)  
                  • power-based asymmetry  
                  • undisclosed interests  
| Integrative      | • expandable resources (bigger pie)  
                  • mutual self-interest (win-win)  
                  • cooperative (collaborative)  
                  • problem solving  
|                  | • probe or undisclosed interests  
                  • share information  
                  • generate options  
                  • test fairness and satisfaction  
|                  | • satisfy mutual needs  
                  • solve joint problem  
                  • legitimacy (fairness)  
                  • power-based symmetry  

---


In their seminal work, *Getting to Yes – Negotiating Agreement Without Giving In*, Authors Roger Fisher, William Ury and Bruce Patton point out the pitfalls of positional bargaining and suggest an alternative approach for resolving disputes. In advancing their theories, they discuss the benefits of an interest-based form of negotiation where they reframe “negotiation as bargaining” to “negotiation as joint problem solving”. This approach has been enthusiastically embraced by the mediation community and has had a major impact on the problem-solving model of mediation. The Authors state that this method, an alternative to positional bargaining, was explicitly designed to produce wise outcomes efficiently and amicably. The method is comprised of four propositions of principled negotiation:

1) **People**: Separate the people from the problem.
2) **Interests**: Focus on interests, not positions.
3) **Options**: Generate a variety of possibilities before deciding what to do.
4) **Criteria**: Insist that the result be based on some objective standard.

While this approach has proven very effective in many types of negotiations, it can certainly have its limitations when applied to cases where money is strictly at the heart of the matter (e.g. product liability and negligence cases), unless the mediator approaches the process in a creative fashion.

**Preparing for the Mediation Session:**

- **Selecting a Mediator**

An effective mediator can change the orientation of the mediation process through thorough preparation, active listening and dynamic communication. He or she can educate the parties to realize and appreciate that shared interests do in fact exist in most disputes. Once this reality is accepted, the paradigm can shift to facilitate the sharing of information, create a sense of legitimacy and generate additional options for successful resolution.

- **Common Types of Mediator Styles:**
  - **Facilitative Approach**: (Elicitive) Focus is on process, not outcome; neutral; empathetic; active listener; asks open-ended questions; seeks to find common

---


ground; does not focus on positions; finds the interests behind the stated positions; does not pass judgment; focuses on communication; concentrates on maintaining or building relationships; knows how to “expand the pie”.

- **Evaluative Approach:** (Directive) Focus is on outcome; usually an expert in the substantive subject being mediated; tests reality throughout the process; tends to move through the process more quickly; focuses on the positions of the parties; assumes that parties want direction as to grounds of settlement – based on law, industry practice or technology; gives opinion.

- **The Toolbox Approach:** While some mediators might fall under one of the above mediation styles, other mediators take a “toolbox” approach and use whatever style seems most appropriate for a particular case or combine the above styles.

- **Other Factors for Consideration:**
  - Mediator’s Professional Background
  - Subject Matter Expertise
  - Mediator’s Personality
  - Mediator’s Ability to Build Rapport
  - Mediator’s Demographic

**Submitting an Effective Mediation Brief:**

- Changing the Tone of Your Writing to Match Your Purpose
- Expressing Your Client’s Interests
- Informing Mediator to Possible Settlement Roadblocks
- The Elephant in the Room – What is driving the Case that No One is Talking About

**Attorneys’ Preparation for Mediation:**

- Gather and Know Relevant Information
  - Identify Parties’ Underlying Needs and Interests and Creative Ways to Meet Them
  - Determine Goals and Case Theme
  - Select Materials for Mediator’s Review
  - Determine BATNA (Best Alternative to a Negotiated Agreement)
  - Attempt to Define the Bargaining Zone
  - Identify Areas for Movement/Compromise
  - Identify Areas of Sensitivity
Identify Ways to Create Goodwill

- Consider the Other Side’s Case
- Craft a “Nimble” Negotiation Plan

Preparing the Client for Mediation – Making your Client “Mediation Savvy”:

- Prepare for Negotiation
  - Educate the Client about the Nature and Process of Mediation
  - Advise the Client of Mediation Ground Rules
  - Advise the Client about the Role of the Mediator
  - Discuss Client’s Behavior during the Mediation
  - Explain the Importance of Active Listening
    - Discuss Underlying Interests and Needs
    - Discuss the Bargaining Zone
    - Identify BATNA
    - Brainstorm Different Solutions
    - Prepare for Movement
- What to Expect from the Mediator
- Advise the Client of the Advocate’s Role - Preparing Them to See You in a Non-Adversarial Environment
- Present Reality Checks if Necessary (Note: See Page 9, A Valuable Tool for a “Reality Check”)

Implementing the Mediation Design and Efficacy of Pre-Mediation Caucus Sessions:

An effective mediator will often, in appropriate cases, begin the process by reaching out to each of the parties inviting them to participate in separate pre-mediation caucus sessions. This is the mediator’s first opportunity to begin building rapport and establishing credibility on a personal, procedural and institutional level. The purpose of these sessions is to meet and identify all the participants that are vital to the process – plaintiffs (including family members who may provide advice and/or support), the defendants and their respective corporate representatives and insurers who possess full authority for a resolution within the parameters of a tendered demand and/or insurance policy limits, retained experts
and interested third persons who may not be parties to the litigation but may have an interest in the ultimate resolution (i.e. lien holders and structured settlement advisors). These sessions are used to gather as much additional information as possible and affords the mediator the opportunity to obtain a keen sense of attitudes and expectations as well as respective viewpoints relative to case strengths and weaknesses. Notwithstanding positions that may be espoused in the parties’ mediation briefs, these meetings will serve to flush out the true nature of the conflict – whether the dispute is over liability, damages or both. Conducting separate caucuses can be beneficial in identifying these issues prior to the mediation.

The mediator is also interested in obtaining answers to the types of questions enumerated in an article entitled, “Psychological Principles in Negotiating Civil Settlements”. The answers to these questions by the parties are fundamental to obtaining a clear perspective of their initial positions: (1) How much is a case like this worth? (2) How likely am I to prevail? (3) How much information do I need to gather? (4) How do I evaluate the strength of the information that I gather? (5) What constitutes a good outcome? (6) What is a fair resolution of this matter? (7) Should I make the first offer or wait until the other side makes it? If I make it, how extreme should it be? (8) How should I frame or present my offer? (9) How should I evaluate offers from the other side? and (10) How can I get people to accept my offers (or counter-offers)?

The responses to the above questions also serve as one of the methodologies of defining the “bargaining zone”. As pointed out in the article, “A Positive Theory of Legal Negotiation”, by Russell Korobkin, “First, negotiators attempt to define the bargaining zone – the distance between the reservation points (or “walkaway” points) of the two parties – in the manner most advantageous to their respective clients.” The author emphasizes that “thorough preparation is a prerequisite for the negotiator to accomplish zone definition as advantageously as possible.” He describes preparation as a two-step process comprised of internal preparation: (1) research that the negotiator does to set and adjust his own reservation point and external preparation; and (2) research that the negotiator does to

---

9 Id. at 277-278.
11 Id. at 13.
12 Id. at 13.
13 Id. at 15.
estimate and manipulate the other party’s reservation point.\textsuperscript{14}

Additionally, this evaluation would also assist the parties in identifying their Best Alternative to a Negotiated Agreement, and evaluate which alternative would be the most desirable. Roger Fisher and his co-authors in their book, “\textit{Getting to Yes – Negotiating Without Giving In}” coined the phrase, “\textit{BATNA}” to identify this choice.\textsuperscript{15} BATNA “is the standard against which any proposed agreement should be measured...the only standard which can protect the parties from accepting terms that are too unfavorable and from rejecting terms it would be in your best interest to accept.”\textsuperscript{16} Russell Korobkin also maintains that “the identity and quality of a negotiator’s BATNA is the primary input into his reservation price.”\textsuperscript{17}

The pre-mediation caucus sessions will also afford the mediator the opportunity to coordinate, to the extent possible, the exchange of information as most sophisticated advocates and parties can evaluate reasonable goals and achieve common ground if they are considering the same information.\textsuperscript{18} At this preliminary stage of the proceeding, the mediator can:

- Clarify the goals of the mediation;
- Define the roles of the participants;
- Identify and frame the issues in a genuine and constructive manner;
- Uncover interests that may lie behind stated positions;
- Begin the process of generating creative ideas; and
- Start to transform the negotiation into a mixed motive exchange (not only claiming value but creating value as well).\textsuperscript{19}

\textbf{Mediation Session:}

- Opening Statement (Joint Session or Not)

\textsuperscript{14} \textit{Id.} at 15-16.
\textsuperscript{16} \textit{Id.} at 100.
\textsuperscript{19} Instructors Lamoureux and Seifert, Mediation Theory and Practice, Straus Institute for Dispute Resolution, Pepperdine University School of Law, Lecture, Saturday, January 22, 2011.
Carefully Consider your Purpose
Straight Talk – Open and Honest Communication
Power of Listening
Letting Your Client Speak (if appropriate)

- Private Caucus
  - Honesty and Candor in dealing with Mediator (e.g. explore underlying interests behind stated positions)
  - Using Mediator to Help Tame a Difficult Client
  - Using Mediator to Generate Settlement Options
  - Using Mediator to Assist Client in Making a Sound Settlement Decision
  - Using Mediator as a Negotiation Coach
  - Using Mediator to Facilitate “Reality Checks”

**Common Obstacles to Settlement at Mediation:**

Always be cognizant of the obstacles, listed below, which can seriously impact the negotiation in most cases. Understanding the distinctions between the strategic, practical and psychological aspects of the negotiation process can be a powerful tool to subordinate tactics and strategies that serve to undermine the likelihood of a successful settlement.

- **Fixed-pie bias:** “Even when they are not involved in a legal dispute, negotiators have great difficulty recognizing opportunities for interest-based bargains because they assume the other side’s interests are directly opposed to their own. Negotiators, in other words, view the ‘pie’ of items over which they can negotiate as fixed, forcing them into win-lose bargaining. This phenomenon, known as ‘fixed-pie bias,’ inhibits bargainers from looking for mutually beneficial trade-offs. Fixed-pie bias is a special problem in legal mediation, because parties are typically represented by lawyers who naturally think in terms of the remedies a court could award, usually limited to money.”

- **Selective Perception:** “Humans instinctively form a viewpoint or image of any new situation – in mediation terms, they create a ‘frame’ in which they view a dispute. People then process any new information they receive about the situation through their existing frame. When a person receives data that conflict with his frame, it creates clashing images in his mind – ‘cognitive dissonance.’ The human brain tries to eliminate this dissonance by unconsciously filtering out data that conflict with the existing frame. This tendency to disregard data is known as ‘selective perception’… selective perception poses a serious

---

problem in mediation. A typical litigant will quickly form an opinion about who is right in a controversy…many disputants find it impossible, however, to separate advocacy from assessment and become convinced by their own arguments.”

- **Optimistic Overconfidence**: “Assessing the value of a legal case requires predicting events that are uncertain, for example, how an unknown jury will react to evidence that may or may not be admitted. These assessments are often unreliable. For one thing, people are consistently overconfident about their ability to assess uncertain data. Why is this? The problem is that when we don’t know something – even a fact that we aren’t expected to have at our fingertips – either we are embarrassed to admit our ignorance or simply feel a competitive urge to be right…There is a related problem. When people in an uncertain situation are asked to estimate the likelihood of a good or bad outcome, they consistently underestimate the chances of an unfavorable result. The reason, it appears, is that we like to believe that we are in control of events and thus able to bring about good results, even when we cannot…Lawyers are often asked to estimate the likely outcome of court proceedings at a point when they have little basis for offering an accurate assessment. In such situation, to maintain their reputations as expert litigators and avoid appearing ignorant to a client or another lawyer, they are likely to offer an overoptimistic estimate, and to have more confidence in the correctness of their forecast than their knowledge supports. To make matters worse, both lawyers and clients ‘bet’ on their cases by investing substantial amounts of time and money in them, thus accentuating the inherent tendency to err.”

- **Loss Aversion**: “Disputants often develop an opinion about the ‘right’ outcome in a case early in the process. They form these opinions based on statements by friends about what is ‘right’ in their dispute, chance comments by lawyers, stories they see in the media about superficially similar cases, and other sources. Their opinion then becomes an internal benchmark for the correct result. Parties also invest large resources in their cases, in terms of out-of-pocket costs for legal fees, time and aggravation. Each party is then likely to factor the cost of litigation into its benchmark for a fair outcome: plaintiffs feel they must recover enough both to cover their legal costs and pay them a fair amount, while defendants are likely to deduct their defense costs from what they believe is a fair outcome. As a matter of law, parties can rarely recover their legal costs in court regardless of the outcome, so what a party has spent on a case should be irrelevant to decisions about settlement. As a matter of psychology, however, litigation costs become part of what must not be ‘lost’ in settlement.”

- **Reactive Devaluation**: “We all have a tendency to reject offers made by anyone we see as an adversary…Our instinctive response to an opponent’s offer is reminiscent of Groucho Marx, who vowed never to join any club that would have him as a member”.

---

21 *Id.* at 129-130.
A Valuable Tool for a “Reality Check”:

A well thought out “reality check” was authored by Thomas D. Jensen, Esq. and appeared in his article, “Making the Case for Directive Mediation”.\textsuperscript{25} As part of his materials, he always carried a copy of these lists to distribute to mediation parties as “food for thought” if it became necessary.

Prepared for Trial? Considerations and Questions

Considerations

- Your lawyer's effort to hide unfavorable evidence may be unsuccessful (\textit{in limine motion}).
- The judge—while fair—may prefer your opponent's case.
- If mediation is unsuccessful, the trial judge may push hard for settlement, after significant additional fees are incurred.
- Witnesses expected to perform well at trial may underperform.
- Witnesses expected to perform poorly at trial may outperform.
- Many times expert witnesses perform better in your lawyer's conference room preparing for trial than they do on the witness stand at trial.
- Your opponent may not permit your tightly scheduled expert to be called as a witness out of order.
- Your key witness may suddenly be unavailable for trial.
- The judge may select jury instructions that are unfavorable to your case.
- The judge may select a special verdict form that is unfavorable to your case.
- If you lose your trial, remember that appellate courts try to affirm or support the trial court's result.
- Even if you win the trial, appellate courts may throw out the trial court's decision.
- If you lose your trial for improper reasons, appellate courts can affirm trial court decisions even if they disagree with the trial court's reasoning.\textsuperscript{26}

Questions

- Is there anything in your background that your opponent may seek to exploit regarding your credibility?
- How certain are you that your expert witnesses' background contains nothing that your opponent may seek to exploit?
- How certain are you that there is nothing in the background of your other witnesses that your opponent may seek to exploit?
- If your expert witness opinion disclosure was not comprehensive, will an important but undisclosed opinion at trial be ruled out?
- Are the complex issues presented in your case suitable for evaluation by a jury?

\textsuperscript{25} Thomas D. Jensen, Esq., \textit{Making the Case for Directive Mediation}, For the Defense Magazine, Alternative Dispute Resolution Section (August, 2009), page 44.

\textsuperscript{26} \textit{Id.} at 45.
- Were you or will you be given enough chances to remove unsuitable jury candidates if your jury pool was or is worrisome (peremptory strikes)?
- Can you be certain that a "rogue juror" was or will not be selected in your case—a juror with a hidden, key bias capable of swaying the outcome?
- How will you perform on the witness stand after an anxiety-filled, lousy sleep?
- If your deposition testimony is effectively twisted around by the other lawyer at trial, will the jury doubt your credibility (impeachment)?
- What will happen to your case if your opponent's questioning of your witnesses is effective?
- Will the jury pay much attention to the defense's case after the plaintiff presents evidence for several days?
- Can you be certain no juror will research your case or issues on the Internet and reach a decision unrelated to the trial evidence?
- Are diversity or cultural considerations part of the party-counsel-jury dynamic in the courtroom, and will they potentially affect the jury's evaluation of your case?
- Given the judge's almost unlimited power to exclude evidence from the jury, what happens to your case if key evidence is kept out?
- How confident are you that your estimates of others' fault are correct (comparative fault)?
- How confident are you that the law will not make you pay someone else's bill (joint and several liability)? Is bad publicity a possibility after the trial?
- Could the result of this case adversely affect other cases, if you have more than one?
- Will a successful money judgment be collectable from your opponent?
- Will liens adversely affect a successful damages award?
- What risks to your case are presented if another defendant settles during your trial and you are alone?27

27 Id.
Costs of Trial and Appeal

- Cost of:
  - Courtroom trial presentation graphics
  - Evidence video display equipment rental
  - Expert trial testimony preparation
  - Counsel's miscellaneous trial preparation
  - Counsel's deposition outline preparation
  - Counsel's legal research as new issues arise
  - Counsel's trial brief preparation
  - Counsel's adverse expert cross-exam preparation
  - Counsel's jury selection preparation
  - 12-hour trial days (in court and outside preparation)
  - Directed verdict motion preparation
  - Exhibit photocopies
  - Motion filing fees
  - Time diversion from work and non-work activities
  - Post-trial opening brief
  - Post-trial legal research to support/oppose motion
  - Cost bond on appeal
  - Trial transcript
  - Court of appeal opening brief
  - Court of appeal oral argument preparation
  - Supreme Court review application
  - Supreme Court opening brief
  - Supreme Court oral argument preparation
  - Opponent's costs (if unsuccessful)
  - Judgment collection efforts/defenses

- Cost of:
  - Evidence presentation software databases
  - Records custodian depositions for exhibit proof
  - Trial expert fees and disbursements
  - Witness subpoenas and service fees
  - Counsel's special verdict form preparation
  - Counsel's jury instruction preparation
  - Counsel's in limine motion preparation
  - Counsel's opposition to the opponent's in limine motions
  - Adverse expert background investigation
  - Paralegal preparation time
  - Lunches/similar expenses during trial
  - Playback of video depositions
  - Jury consultant, if retained
  - Other required pre-trial filings
  - Post-trial reply brief
  - Supersedeas bond on appeal
  - Court of appeals filing fee cost of appeal legal research
  - Court of appeals reply brief
  - Court of appeals oral argument
  - Supreme Court filing fee
  - Supreme Court reply brief
  - Supreme Court oral argument
  - Opponent's attorney’s fees (if allowable)
  - New trial, if granted on appeal

Suggested Readings:
1) Cited Articles.
Legal Liability for Damage to Spacecraft from Orbital Debris

By

David J. Harrington
Condon & Forsyth LLP

&

Chaitanya Sanghadia

ABA Tort Trial & Insurance Practice Section, Aviation and Space Law Committee

October 24-25, 2019
Washington, DC
Orbital debris is a real and significant problem for all space faring nations, commercial space enterprises, and potentially the general public that relies on a daily basis on satellites for such things as GPS navigation, telecommunications, television and internet access, and even the weather forecast. According to the European Space Agency, there are currently almost 800,000 pieces of orbital debris that are 10cm or larger and millions more that are smaller. They orbit the earth at speeds up to 17,000 miles an hour, so even the smallest piece of debris could potentially significantly damage a space object, which would then likely produce even more space debris. The risk of a collisions between orbital debris and an active spacecraft, while still relatively low, increase with every new rocket launch and space object put into orbit. Accordingly, the potential for liability claims has also increased, although the various space activity stakeholders, including governments, operators, and insurers, have recognized this threat and are working on orbital debris removal and mitigation technologies and standards/regulations that will hopefully keep this threat in check. However, the legal liability regime initially put in place to deal with damage caused by space objects (Convention on International Liability for Damage Caused by Space Objects of 1972, the “Liability Convention) has not been revised in close to 50 years, and a lot has changed in space during that time. Further, while the Liability Convention lays out basic strict and fault based liability principles, there are many important issue not addressed, especially with respect to space debris, which will likely be subject to significant debate and litigation moving forward.
I. Background of Orbital/Space Debris

To begin, there is no single “legal” definition of orbital/space debris. According to the Science and Technology Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space (UN COPUOS), space debris is “[a]ll man-made objects including fragments and elements thereof, in Earth orbit or re-entering the atmosphere, that are non-functional.” According to NASA, “orbital debris” refers to “any man-made object in orbit about the Earth which no longer serves a useful function”. It includes, among other things, spent rocket bodies, non-functional satellites, and debris left over from human activities in space. Orbital debris can also include certain types of liquids, such as low vapor pressure ionic liquids used as propellant that can persist in the form of droplets and can cause substantial or catastrophic damage if they collide at orbital velocities with another space object.

Persistent orbital debris has been around since the start of the space race in the late 1950s to early 60’s beginning with the United States Vanguard spacecraft. The Vanguard was put into orbit in 1958 and is predicted to be in orbit for over 200 years. The European Union and United States use two different tracking systems - the Space Surveillance and Tracking (SST) system for the EU and the Space Surveillance Network (SSN) operated by the U.S. Strategic Command (STRATCOM) - to catalog and track objects in space, including orbital debris. Both systems use a combination of radars and telescopes to identify and track space objects. Currently, the SSN tracks close to 20,000 objects in space: ~ 12,000 in Low Earth Orbit (LEO), ~100 in Semi-Synchronous Orbit (SSO), ~1000 in Geostationary Orbit (GEO), and several thousand objects in highly eccentric orbits that cross between LEO and GEO (see Figures 1 and
However, only roughly 2000 of the catalogued and tracked objects are controlled, functioning space objects are functioning satellites and an even smaller number of those have the ability to maneuver to avoid a collision with another tracked object, the rest are considered orbital debris. And these numbers do not account for the hundreds of thousands of objects not catalogued and tracked due in large part to tracking sensor limitations. Today, cataloguing capabilities are limited to objects of approximately 10cm in diameter in LEO and only about 1 meter in GEO. Other systems augment the SSN and provide data of smaller “trackable” objects down to 1cm in LEO and 10cm in GEO. As technology increases, our ability to detect and track smaller pieces of space debris will increase, which will increase the amount of objects catalogued but will also increase our ability to avoid collisions.

Figure 1 Key orbital regions (with altitude regions) for space activity

* Semi-synchronous orbit
As noted above, the vast majority of tracked space objects are in LEO and there have been more reported breakups in LEO, which also would result in a greater amount of uncatalogued and potentially untracked space debris. For example, in a sun-synchronous orbit within LEO, the annual probability of collision of a 1 cm size debris with a 10m² satellite exceeds 0.8%, which is the highest debris collision hazard anywhere in Earth orbit. Collision risks in GEO are relatively low, and much lower than that of LEO, future projections are very difficult due to limited ability to track objects in GEO, anomalies associated with certain GEO orbits, potential shedding of hardware in GEO “graveyard” disposal orbits, among many other factors. However, the GEO
collision risk is likely to increase over time despite current efforts of active debris removal and other debris mitigation efforts.

The increased risk of collision in LEO has been well-publicized and is most associated what is known as the Kessler Syndrome. The Kessler Syndrome, popularized in the 2013 movie Gravity, is a well-established theory proposed by NASA scientist Donald Kessler in 1978 in which the density of objects in LEO is high enough that collisions between objects could cause a cascading chain of collisions that would make earth’s orbits a literal minefield for any current or new spacecraft. Apart from the immediate damage caused to operational space objects, any such self-sustaining cascading event would disrupt future satellite launches for potentially generations and make future space travel to the Moon and beyond virtually impossible due to inability to escape the earth’s orbit without spacecraft sustaining heavy damage.

II. Damage Caused by Orbital Debris

Even the smallest amount of orbital debris can interfere with a spacecraft’s operation and result in significant repercussions. One of the earliest examples of damage from space debris is the Solar Maximus Mission (SMM) satellite, which was launched in 1980 to study solar activity. The SMM satellite functioned for a total of four years before needing maintenance because of thruster malfunctions. In 1984, the Space Shuttle Challenger captured and attempted to repair the satellite. During repairs, astronauts noticed approximately 500 holes and 1000 craters in its louvers, a mechanism to dissipate heat, and its first layer of the thermal shielding. These holes and craters were caused by the SMM satellite’s own paint, exhaust, and waste materials. Although the damage did not destroy the SMM satellite, it probably played
a part in the myriad of technical problems it suffered during the rest of its operational life.

The US Space Shuttles were also regularly affected by orbital debris. When the orbiter was developed in the early 1970s, engineers never considered orbital debris damage in their designs. In 1983 during the Challenger’s second mission, a small fleck of white paint chipped off the spacecraft and hit a window creating a pea-sized crack measuring 1mm wide (which cost NASA over $50,000 to replace). The number of collisions per mission increased throughout the years and debris damage came to be expected after every shuttle mission.

Similarly, the International Space Station (ISS) is constantly under threat from being damaged by orbital debris. The ISS is protected by three types of “Whipple shielding” which minimizes orbital debris and micrometeoroid damage by catching debris before it hits the space station. Despite this protection system, there have been many instances where debris damaged the space station. For example, in 2016, a small piece of orbital debris hit the space station’s windows, causing a small crack in the glass. While the small piece of debris did not pose a real threat to the ISS, a large piece could cause catastrophic failure. In fact, there have been several instances where the space station astronauts had to take shelter in escape capsules due to close encounters with orbital debris.

Orbital debris can affect our everyday lives here on Earth. In 1977, the Russian Cosmos 954 satellite began an irregular orbit that caused it to slowly degrade and enter the atmosphere. Although much of it burned up on reentry, portions of the satellite crashed in Canada. The Cosmos 954 was a powered by a nuclear reactor and when
it burned up in the atmosphere, the satellite left a large trail of radioactive waste over northwestern Canada.\textsuperscript{25} Canada cleaned up the waste with the help of the US, but not before it caused significant environmental damage.

III. Orbital Debris Mitigation

Treaties, Policy and Guidelines

Although the dangers and risks associated with space debris have been well known since the 1970’s, it was not until the mid-1990’s that the main space-faring nations and the international space and legal communities make substantial strides in establishing guidelines on orbital debris mitigation. As a backdrop to the development of debris mitigation policies and guidelines, it is important to note that neither of the two main international space treaties in effect today, the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies\textsuperscript{26} (the “Outer Space Treaty”) and the Liability Convention, make any mention of orbital or space debris or efforts to mitigate debris. Furthermore, none of the current international guidelines and policies in place today are legally binding on any operator or nation.

International Efforts

A. The UN Committee on the Peaceful Uses of Outer Space\textsuperscript{27}

It wasn’t until 1994 that the Scientific and Technical Sub-Committee (STSC) of the UN COPUOS first put space debris on its agenda. In 2004 the STSC established working group to develop a set of debris mitigation guidelines, and in 2007 the UN General Assembly endorsed the Space Debris Mitigation Guidelines of UN COPUOS. They are generally considered the leading international guidance on how to conduct
space activities, from mission planning, design, manufacturing, launch, operation, and disposal of a space object/satellite, in a manner that mitigates as best possible any harmful by-products. However, the Guidelines are not legally binging under international law. Further, the Space Debris Mitigation Guidelines are very general in nature and give no guidance as to questions of liability for damage caused by debris. While the Space Debris Mitigation Guidelines were an important start to the issue of debris mitigation, they will need to be updated to remain useful, and those efforts are underway by the STSC.

B. The Inter-Agency Space Debris Coordination Committee (IADC)\textsuperscript{28}

The IADC is an organization of the European Space Agency (ESA) and national space agencies from 11 countries that was founded in 1993. The purpose of the IADC was to exchange information on space debris, review ongoing cooperative efforts, and identify debris mitigation opportunities. As part of its function, in 2002 the IADC issued its own Space Debris Mitigation Guidelines, which are largely similar to the UN COPUOS Guidelines, although the IADC Guidelines are slightly more detailed. The IADC Guidelines have been used by many nations when developing their national standards.

C. The International Organization for Standardization (ISO)\textsuperscript{29}

The ISO is the primary international standards organization relevant to the space sector. The ESA and many national space agencies have adopted ISO space standards. For debris mitigation purposes, ISO 24113,2011, "Space systems – Space debris mitigation requirements" is an important document that applies to all unmanned systems. Additionally, ISO is currently developing ISO 16158, "Space systems –
Avoiding collisions with orbiting objects.” As noted with the other international guidelines compliance with ISO standards is voluntary and the ISO has no power of enforcement.

D. The International Law Association (ILA)\textsuperscript{30}

The ILA’s Space Law Committee produced a Draft Convention on Space Debris in 1994, recognizing the gaps in the Outer Space Treaty and the Liability Conventions with respect to damage caused by space debris. The Drat Convention applies to “space debris which causes or is likely to cause direct or indirect, instant or delayed damage to the environment, or to persons or objects.” It also includes provisions on international responsibility and liability. Specifically, Article 6 states that rules concerning responsibility and liability “apply to damage caused by space debris in the space environment and, in the absence of other international agreements on the matter, to damage caused to the Earth environment.” However, the ILA Draft Convention has not been adopted by any nations and is not a legally binding international instrument.

United States Debris Mitigation Efforts

The U.S. has a rather complex and interwoven set of standards, guidance and regulations relating to debris mitigation. There are multiple national mechanisms dealing with orbital debris mitigation in the U.S., including the FAA, NOAA, NASA, the FCC, the DoD, the US Geological Survey, as well as the overarching 2010 US National Space Policy, Presidential Policy Directive 4 (PPD-4), as recently amended by President Trump’s March 2018 National Space Strategy, which is comprised of four Space Policy Directives. This paper will focus on the major guidelines and regulations and those that specifically impact commercial space activities.
A. National Space Policy

Presidential Policy Directive 4 (PPD-4), the National Space Policy of 2010, directs the United States to continue to follow the United States Government Orbital Debris Mitigation Standard Practices, consistent with mission requirements and cost effectiveness, in the procurement and operation of spacecraft, launch services, and the conduct of test and experiments in space.

In 2017, President Trump signed Space Policy Directive 1 (SPD-1) into effect. It makes the government more involved in the endeavors of private space companies like Space X and paves a path for man’s return to the Moon and eventually Mars. It also resurrected the National Space council, led by Vice President Pence. In May of 2018, President Trump signed Space Policy Directive 2 (SPD-2) into effect. SPD-2 created a regulatory commission to oversee a spacecraft’s launch and re-entries. Specifically, it aimed to combine licenses for both launching and re-entering spacecraft into one license, making commercial space flight easier.

The most recent addition to President Trump’s space policies, Space Policy Directive-3, was signed in June of 2018. SPD-3 sets for the U.S. National Space Traffic Management Policy. SPD-3 is a broad, sweeping policy directive that fully recognizes the commercial and national concerns associated with the increasingly congested orbital belts. The policy calls for new approaches to space traffic management (STM) and space situational awareness (SSA). One of the primary goals of SPD-3 is to mitigate the effect of orbital debris on space activities through new SSA and STM technologies and from improved SSA data interoperability and greater SSA data sharing. SPD-3 requires that the relevant government stakeholders (i.e., NASA, DoD,
FCC, FAA, etc.) work together to update the US governments Orbital Debris Mitigation Standard Practices, as well as develop space traffic standards and best practices and an improved domestic space object registry.

B. United States Government Orbital Debris Mitigation Standard Practices

The United States Government Orbital Debris Mitigation Standard Practices were drafted in 1997, presented to U.S. industry in 1998, and were adopted in February 2001. The standard practices encompass all program phases, from initial concept development to space hardware disposal, focusing on: the minimization of intentional debris releases and the occurrence of accidental explosions; the avoidance of hazardous collisions; and, responsible disposal of space hardware. The U.S. Government Orbital Debris Mitigation Standard Practices serve as the overall U.S. Government space debris mitigation technical guidance and as the foundation for specific orbital debris mitigation requirements issued by individual U.S. Government departments and agencies.

The U.S. Government Orbital Debris Mitigation Standard Practices apply to all U.S. Government Departments and Agencies involved in space operations, including regulatory authorities. The implementation of these standard practices is executed through Department/Agency specific requirements or regulations, as applicable. The National Space Policy requires the head of the department or agency sponsoring a launch to approve exceptions to the Standard Practices and notify the Secretary of State.
C. NASA Procedural Requirements (NPR) for Limiting Orbital Debris\textsuperscript{37}

The current NPR 8715.6A represents the culmination of more than 20 years of orbital debris mitigation policy at NASA. The NPR establishes (1) the organizations and personnel responsible for orbital debris mitigation within NASA, (2) specific program and project responsibilities from development through end-of-operations, and (3) the report structure necessary to document compliance with the NPR.

D. NASA Process for Limiting Orbital Debris\textsuperscript{38}

NASA Standard 8719.14A serves as a companion to NPR 8715.6 and provides specific technical requirements for limiting orbital debris and methods to comply with the NASA requirements for limiting orbital debris generation. These requirements cover the basic four elements of the U.S. Government Orbital Debris Mitigation Standard Practices, as well as other specific areas, such as the use of space tethers. This standard helps ensure that spacecraft and launch vehicles meet acceptable standards for limiting orbital debris generation.

NASA orbital debris mitigation requirements are mandatory for each NASA space program and project, although individual requirements can be waived by senior NASA management on a case-by-case basis with justification.

E. DoD Directive 3100.10 (Space Policy) and DoD Instruction 3100.12 (Space Support)\textsuperscript{39}

The DoD Space Policy directs all DoD components to promote the responsible, peaceful, and safe use of space, including following the U.S. Government Orbital Debris Mitigation Standard Practices, in accordance with direction in the U.S. National Space Policy. The implementing Space Support Instruction contains procedures DoD will
follow to limit debris and responsibilities for implementing these guidelines. All DoD components are required to follow DoDD 3100.10 and DoDI 3100.12.

F. Regulation of United States Commercial Space Transportation

The Federal Aviation Administration (FAA), under the purview of the U.S. Department of Transportation, regulates U.S. commercial space transportation. All U.S. persons launching from U.S. launch sites, reentering to U.S. sites, or conducting launch or reentry operations outside the United States, must adhere to these requirements for commercial launch and reentry vehicles. The FAA does not issue licenses for activities the U.S. Government carries out for the U.S. Government.

The FAA issues licenses to commercial launch vehicles after a rigorous evaluation of the safety of the launch system. If at any time the license holder does not comply with the regulations, the FAA may revoke the license or impose a fine.

The current FAA orbital debris mitigation regulations focus on safety at the end of launch. End of launch is defined by the FAA as the last exercise of control over the launch vehicle. The relevant regulations are as follows:

- §415.39 Safety at end of launch -- To obtain safety approval, an applicant must demonstrate compliance with §417.129 of this chapter, for any proposed launch of a launch vehicle with a stage or component that will reach Earth orbit.

- §417.129 Safety at end of launch -- A launch operator must ensure for any proposed launch that for all launch vehicle stages or components that reach Earth orbit—
a) There is no unplanned physical contact between the vehicle or any of its components and the payload after payload separation;
b) Debris generation does not result from the conversion of energy sources into energy that fragments the vehicle or its components. Energy sources include chemical, pressure, and kinetic energy; and
c) Stored energy is removed by depleting residual fuel and leaving all fuel line valves open, venting any pressurized system, leaving all batteries in a permanent discharge state, and removing any remaining source of stored energy.

- §431.43(c)(3) Reusable launch vehicle (RLV) mission operational requirements and restrictions for an RLV mission -- There will be no unplanned physical contact between the vehicle or its components and payload after payload separation and debris generation will not result from conversion of energy sources into energy that fragments the vehicle or its payload. Energy sources include, but are not limited to, chemical, pneumatic, and kinetic energy.

The 14 CFR part 400 regulations are applicable to commercial launch vehicles launched in the United States and to commercial launch vehicles launched by United States citizens or companies.

G. Federal Communications Commission (FCC) Regulations

The FCC regulations apply to radiofrequency licensing of satellite communications, other than communications using U.S. Federal Government stations.
(47 U.S.C. 301, 305). The regulations require applicants to provide information concerning use of orbits and plans for mitigation of orbital debris (47 C.F.R. 5.64, 25.114, 97.207). The information is analyzed to determine whether a grant serves the public interest. The FCC must find that the “public interest, convenience, and necessity” will be served in order to grant a license. (47 U.S.C. 308).

FCC regulations also require that geostationary satellites be relocated at end-of-mission in accordance with the IADC guideline, and all satellites must discharge stored energy sources at end-of-mission. 47 CFR 25.283.

An FCC Order (FCC 04-130) articulates additional policies and practices.

The FCC first established its orbital debris rules in 2004 and in February 2019 issued a Notice of Proposed Rulemaking titled “Mitigation of Orbital Debris in the New Space Age.” (IB Docket No. 18-313; FCC 18-159). The FCC recognized that there have been significant developments in the area of orbital debris, that the number of debris objects capable of producing catastrophic damage to functional spacecraft has increased, and that proposed development of large satellite constellations in the LEO region will increase the risk of debris-generating events, all requiring changes to their current rules and regulations with respect to orbital debris. The NPRM covers a number of topics, including seeking comments on whether the FCC space station licensees should indemnify the United Stated against any costs associated with a claim brought against the U.S. under international law related to the authorized facilities. Similarly, the FCC is seeking comments on the costs and benefits of insurance as an economic incentive for orbital debris mitigation.
FCC regulations and radio station licensing provisions apply to operations of earth stations in the United States and mobile stations (including space stations) under the jurisdiction of the United States, except for U.S. Federal Government stations. (47 U.S.C. 301, 305). Compliance with regulations is mandatory.

H. National Oceanic and Atmospheric Administration (NOAA): Regulation of Private Remote Sensing

a. Title 51, U.S.C., National and Commercial Space Programs, Subtitle VI, Earth Observations, Section 60122, Conditions for Operations:

Defines specific guidelines and policy for private remote sensing spacecraft. This statute contains a specific requirement that operators shall, upon termination of operations under the license, make disposition of any satellites in space in a manner satisfactory to the President.

b. National and Commercial Space Programs Act (NCSPA) of 2010 (Title 51 U.S.C., Subtitle VI):

This Act applies to all U.S. operators of commercial remote sensing satellites. Written compliance with U.S. orbital debris and disposal policies and best practices is a prerequisite for obtaining a license.

These Regulations apply to all U.S. operators of commercial remote sensing satellites. Written compliance with U.S. orbital debris and disposal policies and best practices is a prerequisite for obtaining a license.

IV. Active Debris Removal/In-Orbit Servicing

A 2005 NASA study showed that even if no future launches occurred, collisions between existing satellites would increase the 10-cm and larger debris population faster
than atmospheric drag would remove objects. The "No New Launches" scenario highlights the need for remediation of existing space debris (also known as active debris removal, or ADR). The potential for collisions to damage the space environment was underscored by the Chinese ASAT test in 2007 and the accidental collision between Cosmos 2251 and Iridium 33 in 2009 (discussed below) The two events increased the SSN tracked orbital population by almost one third. According to NASA, studies have indicated that the removal of as few as five of the highest risk objects per year can stabilize the long-term LEO debris environment.43

The June 2010 National Space Policy for the United States of America directs NASA and the Department of Defense to "Pursue research and development of technologies and techniques… to mitigate and remove on-orbit debris…"44 However, currently, no U.S. government entity has been assigned the task of removing existing on-orbit debris. The June 2018 SPD-3, the National Space Traffic Management Policy, also states that "The United States should pursue active debris removal as a necessary long-term approach to ensure the safety of flight operations in key orbital regimes. This effort should not detract from continuing to advance international protocols for debris mitigation associated with current programs."

As the risk of damage to space objects such as satellites increases, numerous commercial enterprises and governments have taken the initiative to develop systems/spacecraft that can take actively remove orbital debris. For example, Astroscale, a Japanese company, has developed its own satellite, ELSA (End of Life Service), which can identify and remove orbital debris while operators control it from a
ground station.\textsuperscript{45} ELSA uses a combination of cameras and magnets to analyze and capture the debris in question.\textsuperscript{46}

Similarly, the European Space Agency (ESA) has developed their own spacecraft, the RemoveDebris satellite, which uses nets and harpoons to capture debris and remove it from orbit. In September 2018, the satellite’s net was successfully tested with the net wrapping around debris. The RemoveDebris satellite would then drag the debris so that it will be vaporized in the atmosphere.\textsuperscript{47} In February 2019, the satellite successfully demonstrated its harpoon which hooks onto orbital debris and reels it back to the satellite.\textsuperscript{48} The satellite will complete the rest of its test and deploy a sail to drag itself into the atmosphere so that it does not become another piece of orbital debris itself. However, The ESA has recently announced their decision to refocus their efforts from single purpose ADR vehicle to an in-orbit servicing vehicle that could be used to refuel, refurbish or re-boost satellites. Based on the lack of economic interest in technology aimed solely at debris removal, ESA official decided to develop a versatile system — a multipurpose "Swiss army knife" type of satellite that could perform a whole range of in-orbit tasks, such as moving satellites to different orbits or attaching new equipment to them. Active space-debris removal would only be one of the potential applications of the spacecraft.

While the emphasis is currently on the technology associated with ADR and in-orbit servicing, significant legal issues will also need to be dealt with if ADR is to become a reality. As noted, none of the international space treaties deals specifically with space debris, and as noted the terms space debris or orbital debris are not even defined in any of the relevant treaties. This is partly influenced by the rigid property
rights for an object in space. International space law states that even if a spacecraft is defunct, it still the property of the launching state. While the principle purpose of this tenet is well founded, to prevent intellectual property theft, the rigidity of the clause prevents any governmental or commercial entity from removing another nation's defunct satellite without their permission.

V. Legal Liability of Damage from Orbital Debris

The Outer Space Treaty and the Liability Convention are the key treaties governing liability in space.

The Outer Space Treaty, Article VII states:

Each State Party to the Treaty that launches or procures the launching of an object into outer space, including the moon and other celestial bodies, and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its component parts on the Earth, in air or in outer space, including the moon and other celestial bodies.

The Liability Convention contains both absolute liability and fault-based liability depended on whether damage caused by a space object occurs. Articles II, III, and IV of the Liability Convention are reproduced below in full:

Article II

A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft flight.
Article III

In the event of damage being caused elsewhere than on the surface of the earth to a space object of one launching State or to persons or property on board such a space object by a space object of another launching State, the latter shall be liable only if the damage is due to its fault or the fault of persons for whom it is responsible.

Article IV

1. In the event of damage being caused elsewhere than on the surface of the earth to a space object of one launching State or to persons or property on board such a space object by a space object of another launching State, and of damage thereby being caused to a third State or to its natural or juridical persons, the first two States shall be jointly and severally liable to the third State, to the extent indicated by the following:

   (a) If the damage has been caused to the third State on the surface of the earth or to aircraft in flight, their liability to the third State shall be absolute;
   (b) If the damage has been caused to a space object of the third State or to persons or property on board that space object elsewhere than on the surface of the earth, their liability to the third State shall be based on the fault of either of the first two States or on the fault of persons for whom either is responsible.

2. In all cases of joint and several liability referred to in paragraph 1 of this article, the burden of compensation for the damage shall be apportioned between the first two States in accordance with the extent to which they were at fault; if the
extent of the fault of each of these States cannot be established, the burden of compensation shall be apportioned equally between them. Such apportionment shall be without prejudice to the right of the third State to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable.

Under the Liability Convention, “Damage” is defined as: “loss of life, personal injury or other impairment of health; or loss of or damage to property of States or of persons, natural or juridical, or property of international intergovernmental organizations.” This is likely a purposefully broad definition, as the type of damage flowing from space activities can lead to unpredictable effects, including environmental damage.

Article I(d) states that a “Space object” “includes component parts of a space object as well as its launch vehicle and parts thereof.” It is not clear whether “space debris” is captured by the definition of space object, as either an independent space object or as a component part of a space object. As noted above, there is no legal definition of space debris. Whether or not pieces of a space object, when fragmented due to a collision or defunct/abandoned, are still part of the original “space object” has yet to be addressed. Of course positively identifying the “ownership” (i.e. the “Launching State”) of space debris can be very difficult.

The phrase “caused by” is undefined within the Liability Convention and the applicable test for causation is not clear.

In Articles III and IV, where fault-based liability is required, the Liability Convention clearly delineates “causation” and “fault” as separate tests, but offer no
clear definition or meaning of the term “fault”. US practitioners would likely argue that “fault” should be equated to “negligence,” (i.e. duty, breach, causation, damage) especially since Article V uses the term “gross negligence” in another context. The concept of “duty” in a negligence scheme also raises issue of “reasonable foreseeability,” which could be very difficult to establish in the space environment. However, “fault” could also be equated to the civil law standard of “culpa,” which is the failure to act as a “reasonable person” under the circumstances. In international law fault-based liability generally requires an intentional act or omission. Therefore, while a state may cause damage, the state is only liable if it was their intentional act or omission caused the damage.

With respect to orbital debris, the legal issue that receives the most attention is whether or not non-compliance with the various internally recognized or domestic debris mitigation policies/guidelines constitute “fault” within the meaning of the Liability Treaty. While the international guidelines are not legally binding, if an operator was operating under an FCC license they would be required to comply with all FCC regulations, including those related to orbital debris mitigation. This raises the question whether non-compliance of an operator’s mitigation plan required by the FCC would be enough to satisfy the “fault” requirement of the Liability Convention.

VI. Case Studies On the Legal liability Regime of Orbital Debris Damage

Cosmos 954

There has only been one claim for damages under the Liability Convention. On September 18, 1977, the Soviet Union launched the Cosmos 954 into space, a reconnaissance satellite meant to observe ocean traffic. Though intended to orbit the
Earth long-term, by December 1977 the satellite deviated from its orbit. The Soviet Union subsequently attempted to re-establish the proper orbit, causing the satellite to make erratic movements that changed its orbital altitude by up to 75 kilometers. Proper control over the satellite was lost, and the satellite was to re-enter Earth’s atmosphere. However, the satellite had a nuclear reactor core. The satellite contained a mechanism meant to launch the core into orbit but the mechanism failed. On January 24, 1978, the satellite re-entered Earth’s atmosphere and scattered radioactive debris over a 600-square-kilometer area of Canada.52

The U.S. offered to assist Canada with the cleanup operation and Canada accepted the offer. The Soviet Union also offered to help clean up Cosmo 954’s remains, but Canada declined the Soviet offer. Canada spent nearly C$14 million on the cleanup and the U.S. spent US$2.5 million.53

Canada and the Soviet Union had different versions of the facts of the accident. The Soviet Union blamed the fall of Cosmos 954 on a mid-space collision, while the Soviet Union blamed the fall on a faulty rocket system. They also claimed that the satellite had been completely destroyed during re-entry, despite Canada finding charred pieces of the satellite on the ground, and that even if there were pieces that fell to the ground they posed a minimal radiation hazard. Canada found that all but two of the recovered fragments were radioactive and that some fragments were of lethal radioactivity.

Under the Liability Convention, Canada claimed damages of just over C$6 million for actual and future unpredicted expenses associated with the search and recovery mission and radioactive material (a claim for the U.S. cleanup costs was never
presented by Canada or the U.S.). Such damages presumably flow from Article II of the Liability Convention, which states: “A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft flight.” According to Article II, the Soviet Union was liable for the damages caused by Cosmos 954 and suffered by Canada on the basis of absolute liability. No formal proceedings followed. Instead, Canada and the Soviet Union agreed on C$3,000,000 in damages, less than half of Canada’s original claim, presumably due to the difference in opinion on what damages were recoverable the calculation of those damages under the Liability Treaty.54

**Cosmos 2251 - Iridium 33 Collision**

On February 10, 2009, an inactive Russian communications satellite, designated Cosmos 2251, collided with an active commercial communications satellite operated by U.S.-based Iridium Satellite LLC.55 The Iridium 33 satellite was launched from the Baikonur Cosmodrome in Kazakhstan. The incident occurred approximately 800 kilometers (497 miles) above Siberia. This collision produced almost 2,000 pieces of debris, measuring at least ten centimeters (4 inches) in diameter, and many thousands more smaller pieces.56 Much of this debris will remain in orbit for decades or longer, posing a collision risk to other objects in LEO. This was the first-ever collision between two satellites in orbit.

Russia was the “Launching State” for the Cosmos 2251. However, it is unclear whether the “Launching State” for Iridium 33 is the United States or Kazakhstan as Iridium 33 was not registered with the United Nations, as required by the 1974 Registration Convention. Furthermore, as noted above, the Liability Convention
dictates that for damages that occur on orbit, fault must be determined. However, as discussed, a legal definition does not currently exist for fault within the context of the Liability Convention. Unfortunately for legal scholars, the Liability Convention was never formally invoked in the Iridium-Cosmos collision, having been settled by the respective countries outside of the Liability Convention.  

2007 Chinese ASAT Test

Anti-satellite (ASAT) weaponry has been around since the launch of Sputnik and various nations like the US and the USSR have tested ASAT weapons in the mid-1980’s. China was the third nation to test ASAT weapons. They conducted their own successful ASAT in January of 2007. The test was conducted to boast their space-defense capabilities and to show the US that they have the power to destroy military satellites. The incident left a ring of over 35,000 pieces of orbital debris, most of which are currently untrackable. Almost two-thirds of LEO satellites pass through the area affected by the collision.

VII. Insurance Issues

There are basically two types of insurance products available relevant to orbital debris: (1) Launch and in-orbit insurance, and (2) third-party liability insurance. Launch and in-orbit insurance protects owners/operators of a damaged satellite, while third-party insurance addresses liability of a satellite owner/operator whose satellite or space debris is considered to be the cause of an impact or collision.
Launch and In-Orbit Insurance

Launch and in-orbit insurance are typically purchased by the insured as combined policies, generally starting at ignition of the launch vehicle engine and extending to the “life” of the satellite, or portion thereof (i.e., launch plus one year).

These policies are generally considered a first-party all risk policy designed to cover loss, damage, malfunction or any defect that impacts the operation of the satellite, including loss or damage from any form of space debris that may collide with the insured's satellite during either the launch or more likely during the in-orbit phase of coverage. Some satellite operators elect to self-insure at least some portion of the in-orbit phase, generally purchasing coverage for one-year following successful launch.

Historically, the insurance market has considered the probability of collision between a satellite and a piece of debris or collision between two satellites, especially in GEO, to be very low. As discussed above, the risk of collision and debris damage is greater in LEO and with the expected development of large constellations with hundreds of satellites each, insurers will likely be constantly reassessing their potential exposure to damage as a result of collision.

Third Party Liability Insurance

Apart from insurance designed to protect the satellite operator against the loss of the property (described above), the satellite operator may also purchase insurance designed to address liability arising for damage from space debris to persons and property on the ground as a result of a launch failure damage; damage to persons and property on the ground from a re-entering satellite; and damage occasioned in space such as debris impact to, or collision with, another satellite in-orbit.
Launch

The most common form of third party liability insurance provides protection during the launch phase. International launch services providers are often required by domestic law or industry practice to obtain such coverage. For example, in the United States, the Commercial Space Launch Act of 1984, as amended, and associated regulations require any person licensed to operate a launch vehicle to obtain third party insurance; or demonstrate financial responsibility in amounts to compensate for the maximum probable loss from claims by a third party for death, bodily injury, or property damage or loss resulting from an activity carried out under the license. In addition, domestic law may require that the satellite owner, respective national governments and certain other parties be named as additional insureds under the third party liability policy.

Coverage is limited in terms of duration, generally it is specific to launch only or it may extend to the end of the first year of the satellite’s life. In addition, the launch policy excludes damage/loss for debris from the launch vehicle that may impacted the satellite/payload. This exclusion is due to a waiver of liability (or hold harmless) having been previously entered into between a launch provider and the satellite operator/insured and forming part of the terms of the launch services agreement between the two parties. Under U.S. law, coverage is designed to cover the "maximum probable loss" (not to exceed USD 500 million) to third parties from a launch accident.
In-Orbit

After expiration of the launch provider’s coverage, there is generally no requirement for the satellite operator to purchase liability insurance. The exception to this rule is for UK satellite operators, who are required to purchase liability insurance for GBP 100 million, with UK government as additional insured. Although as noted above, in the US, the FCC is considering mandating in-orbit insurance, including indemnity agreements with the US government, as an economic incentive for orbital debris mitigation.

Typically, GEO satellite operators do not purchase third-party in-orbit liability insurance for orbital liability for their functional spacecraft or space debris since the assessed risk is so low. LEO satellite operators are more apt to procure this coverage due to increase, and increasing, risks. And in some instances, LEO operators may be required by their government to procure third-party liability insurance, especially if the LEO operator plans to re-enter their satellites at end of life.65

---

1 Chaitanya Sanghadia was a high school senior from BASIS Chandler high school in Chandler, AZ, who as part of his senior project interned in Condon & Forsyth LLP’s New York office and worked with partner David Harrington in preparing this article. Chaitanya is currently attending the Honors College at the University of Arizona in Tucson, Arizona.
4 Space Debris Mitigation Guidelines of the Committee on the Peaceful Uses of Outer Space, as annexed to UN doc. A/62/20 (2007), report of the COPUOS.
6 Federal Register, Vol. 84. No. 33, February 19, 2019, p. 4744.
7 Hall, Lorreta. “The History of Space Debris.” Commons.erau.edu, 6 Nov. 2014, 13:30, commons.erau.edu/cgi/viewcontent.cgi?article=1000&context=stm.
8 An object is considered “catalogued when it is tracked reliably enough such that a precise orbit can be determined and updated over time, and thus ne included in a “catalogue.”
11 Id.
12 Id.
13 Id.
14 NASA Orbital Debris Program Office (https://orbitaldebris.jsc.nasa.gov/modeling/legend.html)
22 Id.
24 Id.
28 Id.
29 Id.
30 Id.
31 Compendium of space debris mitigation standards adopted by the States and international organizations, Contribution of the United States of America (2014), Committee on the Peaceful Uses of Outer Space, Legal Subcommittee, A/AC.105/C.2/2014/CRP.15/Add.1
34 Space Traffic Management shall mean the planning, coordination, and in-orbit synchronization of activities to enhance the safety, stability and sustainability of operations in the space environment. (SPD-3) (2018).
Space Situational Awareness shall mean the knowledge and characterization of space objects and their operational environment to support safe, stable and sustainable space activities, SPD-3 (2018).


Liability Convention, Article I(a).

Liability Convention, Article I(d), Liability Convention, Article I(c) (The term "launching State" means: (i) A State which launches or procures the launching of a space object; (ii) A State from whose territory or facility a space object is launched).

Though the debris was ultimately located within a 600-kilometer area, the search and recovery operation canvassed an area of 124,000 square kilometers.


Federal Aviation Regulations, Insurance requirements for licensed or permitted activities, 14 C.F.R. § 440.9(b) (2006).


Federal Aviation Regulations, Duration of coverage for licensed reentry; modifications, 14 C.F.R. § 440.12(a) (2006).