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After the Crash, Where Do You Land

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I. INTRODUCTION

IN AVIATION LITIGATION, where the suit is litigated is as important as the facts of the case. An aviation lawsuit often starts far from the crash site, and the early stages are almost always devoted to motion practice over jurisdiction and venue. This article addresses some of the more commonly occurring jurisdiction and venue issues that arise in aviation cases, from the perspective of both the plaintiff and the defendant. It also addresses recent legal developments that have a substantial effect on where aviation lawsuits finally land.

First, this article will describe the considerations that plaintiffs' attorneys should take into account when choosing where to bring suit, including identifying proper venues, determining whether each potential venue can support jurisdiction over the defendants, determining the availability of federal subject matter jurisdiction, and considering how the choice of law rules of the chosen forum will impact the applicable law. Second, this article will discuss the tools that defendants can utilize to obtain a more favorable forum, including challenging personal jurisdiction, removal to federal court, transfer of venue, and dismissal under the doctrine of forum non conveniens. This article will

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address recent major changes in the law that affect each of these options, including recent critical decisions relating to personal jurisdiction, subject matter jurisdiction, forum selection clauses, and forum non conveniens.

II. THE PLAINTIFF'S CHOICE

A. IDENTIFYING POTENTIAL VENUES

The first question an aviation plaintiff must answer is: where can the lawsuit be filed? Under federal law, venue is appropriate in a district where "any defendant resides, if all defendants are residents of the State in which the district is located," or where "a substantial part of the events or omissions giving rise to the claim occurred."[1] Although venue statutes may vary from state to state, they generally conform with the principles of the federal statute, and most focus on two critical factors: (1) where the defendants reside; and (2) where the operative facts of the case occurred.[2]

A diligent plaintiff's attorney should cast a wide net and look at all of the facts that could possibly support venue, identifying all of the states that may have a connection with the crash, and determine whether each state constitutes a proper venue. Aviation cases usually have links to numerous venues,[3] giving plaintiffs a variety of choices. The obvious place to start is the location of the crash. In many cases, this is the most convenient forum, where evidence and eyewitnesses are located.[4] In cases involving helicopters or smaller aircraft with limited ranges, crashes often

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[1] *See* 28 U.S.C. § 1391(b). "Resides" for purposes of this statute is where the corporation is subject to personal jurisdiction. 28 U.S.C. § 1391(c)(2).

[2] James L. Baudino, *Venue Issues Against Negligent Carriers—International and Domestic Travel: The Plaintiff's Choice?*, 62 J. AIR L. & COM. 163, 199 (1996) (noting that "most [state venue] provisions mirror the language of the federal statutes regarding defendant residency or domicile and locations where a substantial portion of events took place giving rise to the cause of action," although the provisions may "vary extensively" in other respects).

[3] *E.g.*, Eason v. Linden Avionics, Inc., 706 F. Supp. 311, 321 (D.N.J. 1989) (concerning a plane manufactured in Kansas, sold to subsidiaries in Indiana and New York, transported through Florida and eventually sold to a buyer in New Jersey. Component parts may have originated from Kansas, Delaware or Virginia. The plane took off in New Jersey and crashed in Rhode Island.).

[4] *See, e.g.*, Houck v. Trans World Airlines, Inc., 947 F. Supp. 373, 376 (N.D. Ill. 1996) (describing "the availability of evidence . . . [and] witnesses who observed the accident," proximity of "post-occurrence witnesses," and proximity of "participants in the recovery operations and the wreckage itself" as important factors recommending the transfer of venue to the state where the plane crashed).

take place during intrastate flights, and the victims or their survivors frequently live in the state where the crash took place.[5]

The location of the crash, however, will not always provide a plaintiff with a satisfactory forum.[6] In such cases, the plaintiff may consider other potential venues, including the locations of the manufacturers of the aircraft and its component parts, the locations where the aircraft was based, flown, and maintained, and the locations where the victims and their survivors reside.[7] This last option is particularly attractive because "it is commonly recognized that trial courts in a plaintiff's home state provide the plaintiff with the most sympathetic recourse for justice."[8] However, aviation cases are particularly unique in terms of venue because they often involve flights that cross over state or national boundaries.[9] In cases involving longer flights, aircrafts sometimes "fortuitously" crash in states that would otherwise have no connection to the case, giving a plaintiff a unique venue option.[10]

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[5] *See* Trump Taj Mahal Assocs. v. Costruzioni Aeronautiche Giovanni Agusta, 761 F. Supp. 1143, 1145 (D.N.J. 1991) (involving a helicopter crash in New Jersey, a New Jersey-based helicopter operator, and New Jersey-affiliated victims of the crash).

[6] Indeed, plaintiffs often attempt to bring suit in plaintiff-friendly forums far from the location of the crash. This is especially true for foreign plaintiffs seeking to take advantage of the perceived advantages of American law. *See* Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 44–45 (2006) (listing reasons for the perceived advantages of filing suit in the United States).

[7] *See* Beach v. United Airlines, Inc., 202 F. Supp. 2d 807, 809 (C.D. Ill. 2002) (holding that a national airline carrier and its subsidiary that made frequent flights in and out of Springfield, Illinois could reasonably expect to be sued there and that venue was therefore proper in the Central District of Illinois); Am. Aircraft Sales Int'l, Inc. v. Airwarsaw, Inc., 55 F. Supp. 2d 1347, 1351–53 (M.D. Fla. 1999) (holding that balance of convenience strongly favored transfer of dispute over purchase of airplane from Florida, where buyer resided, to Indiana, where seller and majority of witnesses resided, the plane was located, and almost all documentation relating to the plane was present); Melliere v. Luhr Bros., 706 N.E.2d 40, 44 (Ill. App. 1999) (holding that venue was appropriate in a particular county of Illinois because defendant leased an airplane hanger there). Counsel should pay close attention to the history of the aircraft, including maintenance records. These documents could reveal a variety of potential venue options.

[8] Nicholas D. Welly, *The Misleading Legacy of* Tseng*: Removal Jurisdiction Under the Montreal Convention*, 75 J. AIR L. & COM. 407, 413 (2010).

[9] *See, e.g.*, Miller v. United States, 725 F.2d 1311, 1312 (11th Cir. 1984) (involving the crash of a plane that departed from the Bahamas, was bound for Florida, and crashed in international waters).

[10] While the location of the crash will generally support venue as the place of the injury or where the harm was caused, whether the location of a crash is "for-

If a plaintiff selects a forum other than where the crash site is located, especially one with a tenuous connection to the facts, counsel must be prepared to fight a battle over venue.[11] Counsel should gather documentary evidence of acts or omissions that took place in the venue, such as maintenance records, witness statements, documents available from the public accident docket published by the National Transportation Safety Board, or sworn testimony that confirms the location of potentially culpable parties and acts. While jurisdictional discovery can sometimes be used, venue decisions are often made before the parties have any opportunity to take substantive discovery.[12] Plaintiffs must be prepared to make arguments supporting their chosen venue early in the case and should have their venue evidence marshaled and authenticated before filing suit.

B. Securing Personal Jurisdiction

It is not enough for a plaintiff to choose a proper venue. To effectively litigate against all potentially culpable parties in a single case, the state where the suit is filed must have either general or specific personal jurisdiction over all of the defendants.[13] In aviation cases, determining this can be a daunting task. The facts in air crash cases, by their nature, often spread across multiple jurisdictions, complicating a plaintiff's efforts to prove personal jurisdiction. For example, the component part manufacturer or maintenance company whose part failed or whose maintenance was defective may have had little or no business in the state where the aircraft crashed.[14] Or an aircraft may

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tuitous" or not often has a key impact on choice of law. *See infra* Section II.C and note 104.

[11] *See, e.g.*, Houck v. Trans World Airlines, Inc., 947 F. Supp. 373, 376 (N.D. Ill. 1996) (holding that the availability of witnesses, the proximity of the material event, and "public interest in having the case resolved near the forum where the tragedy occurred" all work in favor of transferring forum to the state where the plane crash took place).

[12] *See infra* note 46.

[13] Sher v. Johnson, 911 F.2d 1357, 1365 (9th Cir. 1990) (holding that "jurisdiction over each defendant must be established individually.").

[14] *See* Martinez v. Aero Caribbean, No. C 11-03194, 2012 WL 1380247, at *2 (N.D. Cal. Apr. 20, 2012) (personal jurisdiction found to be lacking over French component part manufacturer that had no independent business dealings in California); Agape Flights, Inc. v. Covington Aircraft Engines, Inc., 771 F. Supp. 2d 1278, 1286 (E.D. Okla. 2011); Williamson v. Petroleum Helicopters, Inc., 31 F. Supp. 2d 548, 551 (S.D. Tex. 1998) (third party claim brought against manufacturer of component part that allegedly failed and caused crash off Texas coast but had no regular business in Texas).

have been negligently maintained by a local shop far from the location of a crash without any knowledge that the aircraft would be flying over or operating out of the plaintiff's chosen forum.[15] Or an aircraft could have only ended up in a forum as a result of third parties selling or transporting the aircraft with no involvement of the manufacturer and no specific intent by the manufacturer to conduct business in that state.[16] As discussed below, the Supreme Court's recent decisions have cut back on plaintiffs' ability to secure personal jurisdiction.[17] Regardless of the fact pattern, plaintiffs' attorneys must carefully consider whether their chosen forum will provoke a jurisdictional fight, and if so, whether that fight can be won.

1. Daimler *and the Decline of General Personal Jurisdiction*

When a party is subject to general personal jurisdiction in a state, it can be sued there for any act, regardless of the nature of its connection to the actual forum.[18] The Supreme Court's recent decisions have substantially diminished a state's ability to exercise general personal jurisdiction over an out-of-state defendant.[19] General personal jurisdiction could traditionally be exercised over a party when it had "continuous and systematic" contacts in the forum state.[20] For decades, general personal jurisdiction was a frequent tool of plaintiffs' attorneys in multi-

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[15] *See* Raffile v. Exec. Aircraft Maint., 831 F. Supp. 2d 1261, 1268–75 (D.N.M. 2011) (holding that the company that maintained aircraft in Arizona was not subject to personal jurisdiction in a case brought where the aircraft crashed in New Mexico); Heckel v. Beech Aircraft Corp., 467 F. Supp. 278, 284 (W.D. Pa. 1979) (holding that "it is unfair for a small repair shop which has no contacts with the forum state to be subject to [the] court's jurisdiction"); Miller v. Cousins Props., Inc., 378 F. Supp. 711, 717 (D. Vt. 1974).

[16] *See* D'Jamoos ex rel. Estate of Weingeroff v. Pilatus Aircraft Ltd., 566 F.3d 94, 103–04 (3d Cir. 2009) (holding that the manufacturer of an aircraft that ended up in Pennsylvania as a result of third-party resales was not subject to personal jurisdiction in Pennsylvania); *accord* Bunch v. Lancair Int'l, Inc., 202 P.3d 784, 794 (Mont. 2009).

[17] Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 303–04 (2014) (noting the trend of procedural developments in the past quarter century of "narrowing both specific and general personal jurisdiction").

[18] For this reason, general personal jurisdiction is often referred to as "all-purpose jurisdiction." Daimler AG v. Bauman, 134 S. Ct. 746, 752 (2014); Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011).

[19] Miller, *supra* note 17, at 303–04.

[20] *Goodyear*, 131 S. Ct. at 2851 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

defendant aviation cases.[21] Plaintiffs could allege, and later prove by jurisdictional discovery, that manufacturers had years' worth of consistent and systematic sales in a given state, and this was often sufficient to establish general personal jurisdiction.[22]

In the 1984 decision *Helicopteros Nacionales de Colombia, S.A. v. Hall*, the Supreme Court began to recognize the limits of general personal jurisdiction.[23] *Helicopteros* involved a wrongful death action brought in Texas against a Colombian helicopter transportation company that arose out of a helicopter crash in Peru.[24] The defendant had sent its chief executive officer to Texas for a contract negotiation session; accepted checks drawn from a Texas bank; purchased helicopters, equipment, and training services from a Texas helicopter manufacturer; and sent personnel to Texas for training.[25] Nevertheless, the Supreme Court held that these contacts were insufficient to establish general personal jurisdiction.[26]

In recent years, the Supreme Court has become even more hesitant to authorize the exercise of general personal jurisdiction.[27] In a 2011 opinion, *Goodyear Dunlop Tires Operations, S.A. v. Brown*,[28] the Court rejected the exercise of general personal jurisdiction by North Carolina over a foreign tire manufacturer based solely upon the distribution of tires into the stream of commerce that ultimately ended up in the forum state.[29] *Goodyear* stressed the level of connections necessary that would need to be present for a court to exercise general personal jurisdiction, holding that defendants' connections must be extensive

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[21] *See, e.g.*, Eason v. Linden Avionics, Inc., 706 F. Supp. 311, 319–324 (D.N.J. 1989) (holding that a New Jersey court could exercise general personal jurisdiction over a Kansas corporation because the corporation had made enough sales and employee visits to New Jersey to create "continuous and systematic" contacts with the state).

[22] *E.g.*, Grimes v. Cirrus Indus., Inc., 712 F. Supp. 2d 1256, 1262–63 (W.D. Okla. 2010).

[23] Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).

[24] *Id.* at 409–10.

[25] *Id.* at 416.

[26] *Id.* at 417–18.

[27] Miller, *supra* note 17, at 303–04.

[28] 131 S. Ct. 2846 (2011).

[29] *Id.* at 2856–57. Stream of commerce arguments are similarly unavailing when a manufacturer targets a specific region; rather, the target must be the state in question. *See* Bell Helicopter Textron, Inc. v. Heliqwest Int'l, Ltd., 385 F.3d 1291, 1298 (10th Cir. 2004) (noting "[a] general hope that a party will use a product in a general region is too remote an aspiration to qualify as purposeful availment in a specific state").

enough to "render them essentially at home in the forum State."[30]

When it was published, the impact of *Goodyear* was less than clear; one commentator suggested hopefully that the Court's use of "essentially at home" was "just a figure of speech that does not raise the bar for general jurisdiction."[31] That opinion was proven wrong in 2014, however, when the Supreme Court issued its decision in *Daimler AG v. Bauman*.[32] In *Daimler*, the plaintiffs, victims of state-sponsored kidnapping, detainment, torture, and murder in Argentina, filed suit in California against Daimler AG, which the plaintiffs alleged had a subsidiary that collaborated with the Argentine government.[33] Daimler had a separate subsidiary in the United States with multiple California-based facilities.[34] Sales from that subsidiary accounted for 2.4% of Daimler's worldwide sales.[35] The district court found that general jurisdiction over Daimler was lacking, but the Ninth Circuit reversed on panel rehearing, and a subsequent *en banc* petition was denied over an eight-judge dissent.[36]

The Supreme Court granted certiorari and reversed the Ninth Circuit.[37] In addition to finding that Daimler's subsidiary's contacts could not be imputed to Daimler for purposes of general personal jurisdiction,[38] the Court held that even if they could be imputed, those contacts would not be sufficient to subject Daimler to personal jurisdiction in California.[39] Building upon *Goodyear*'s holding that "only a limited set of affiliations with a forum will render a defendant amenable to all-purpose

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[30] *Id.* at 2851. On the same day, in a plurality opinion issued in *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011), the Supreme Court rejected the exercise of specific personal jurisdiction over a foreign manufacturer of a product that ended up in New Jersey when there was no specific targeting of the New Jersey market by the manufacturer, holding that "[t]he defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum." *Nicastro*, 131 S. Ct. at 2788. While this decision addressed specific jurisdiction and not general jurisdiction, it is consistent with the Supreme Court's general trend that led to *Daimler*'s substantial limitation on the exercise of general jurisdiction. *See* Miller, *supra* note 17.

[31] Symeon C. Symeonides, *Choice of Law in the American Courts in 2011: Twenty-Fifth Annual Survey*, 60 AM. J. COMP. L. 291, 298 (2012).

[32] 134 S. Ct. 746 (2014).

[33] *Id.* at 750–51.

[34] *Id.* at 752.

[35] *Id.*

[36] *Id.* at 752–53.

[37] *Id.* at 753, 763.

[38] *Id.* at 759.

[39] *Id.* at 760.

jurisdiction there," *Daimler* essentially limited the exercise of general jurisdiction over a corporation to only its principal place of business and state of incorporation.[40] In a footnote, the Court stated that it did not "foreclose the possibility that in an exceptional case . . . a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State."[41] However, the limiting language of the decision clearly indicates that such exercises of personal jurisdiction will be rare in post-*Daimler* practice.

Daimler's significance cannot be understated. Plaintiffs' opportunities to secure general jurisdiction over a company in any forum where it has done business have taken a major blow.[42] It is no longer enough that a corporation does business in a state; as one commentator observed, "doing business jurisdiction is a dead letter."[43] The decision essentially forecloses a plaintiff's ability to rely upon a defendant's various places of business, products swept into the stream-of-commerce, or level of sales to establish general personal jurisdiction.[44]

As a result of *Daimler*, plaintiff's counsel must significantly alter his or her approach to personal jurisdiction. As an initial matter, if a plaintiff wants to rely upon general personal jurisdiction, the plaintiff should be prepared to engage in jurisdictional discovery tailored to *Daimler*'s requirements.[45] Prior to filing a lawsuit, a plaintiff rarely knows the extent of a company's operations in any given state. If the first pleading a plaintiff sees is a

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[40] *Id.*

[41] *Id.* at 761 n.19 (citing Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952)).

[42] *See* David D. Siegel, Note, *U.S. Supreme Court Severely Circumscribes "Presence" as Basis for Personal Jurisdiction of Foreign Corporations—Claim Itself Must Have Local Roots; If It Hasn't, Corporation's Overall Contacts with State Won't Support Jurisdiction*, 265 SIEGEL'S PRAC. REV. 1 (2014) (concluding that "[t]he opportunities for personal jurisdiction of foreign corporations are of course much reduced after *Daimler* . . .").

[43] Tanya J. Monestier, *Where is Home Depot "At Home"?* Daimler v. Bauman *and the End of Doing Business Jurisdiction*, 66 HASTINGS L.J. 233, 265 (2014).

[44] *See* Kate Bonacorsi, Note, *Not at Home with "At-Home" Jurisdiction*, 37 FORDHAM INT'L L.J. 1821, 1853 (2014) ("General jurisdiction, the sole door to relief for US plaintiffs when the minimum contacts approach was otherwise too narrow, is now officially closed.").

[45] *See* Monestier, *supra* note 43, at 282–83 (agreeing with Justice Sotomayor that the "likely effect" of *Daimler* "is to increase jurisdictional discovery"). *But see* Jamin S. Soderstrom, *The Shrinking Scope of Jurisdictional Discovery: What the* Bauman *Decision Really Means*, 78 TEX. B.J. 20, 21 (2015) (opining that *Daimler* limits the relevant topics for jurisdictional discovery).

challenge to personal jurisdiction, then a plaintiff should—and usually has the right to—explore the validity of the defendant's allegations regarding a court's lack of personal jurisdiction through discovery.[46] Notably, the Supreme Court's opinion in *Daimler* alluded to the fact that consideration can be given to the strength of a defendant's contacts with one state compared to others.[47] Unless the plaintiff's preferred jurisdiction is the defendant's state of incorporation or principal place of business, the plaintiff's time and expense may be better spent establishing specific jurisdiction.

2. *Establishing Specific Jurisdiction*

As aviation cases often involve defendants sued in locations far from where they would be considered "essentially at home" under *Goodyear* and *Daimler*, a plaintiff will be far more likely to succeed in establishing specific, rather than general, personal jurisdiction.[48] Unlike general personal jurisdiction, specific personal jurisdiction does not focus on a party's broader connections to a state; rather, it focuses on whether the cause of action arises out of or relates to actions that the defendant purposefully directed toward the forum state.[49] Thus, a manufacturer that specifically targets a given state with its products would be subject to specific personal jurisdiction in that state if its products caused an injury in that state.[50] Beyond that inquiry, a court may not exercise jurisdiction over a defendant "under circumstances that would offend 'traditional notions of fair play and

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[46] *See, e.g.*, Toys "R" Us, Inc. v. Step Two S.A., 318 F.3d 446, 456 (3d Cir. 2003) (holding that "the plaintiff's right to conduct jurisdictional discovery should be sustained" so long as the plaintiff presents factual allegations that suggest "with reasonable particularity" the existence of contacts sufficient to sustain jurisdiction); Eaton v. Dorchester Dev., Inc., 692 F.2d 727, 729–31 (11th Cir. 1982) (holding that a plaintiff has a qualified right to obtain jurisdictional discovery prior to dismissal). *But see* United States v. Swiss Am. Bank, Ltd., 274 F.3d 610, 625–26 (1st Cir. 2001) (noting that the entitlement to jurisdictional discovery is "not absolute" and within the court's discretion); Sunview Condominium Ass'n v. Flexel Int'l, Ltd., 116 F.3d 962, 964 (1st Cir. 1997) (same).

[47] *See* Daimler AG v. Bauman, 134 S. Ct. 746, 762 n.20 (2014) ("General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide.").

[48] *See id.* at 761; Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011).

[49] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984).

[50] *E.g.*, Grimes v. Cirrus Indus., Inc., 712 F. Supp. 2d 1256, 1261–62 (W.D. Okla. 2010).

substantial justice.'"[51] Furthermore, plaintiffs should be mindful of the requirements of a state's long-arm statute, which may involve a separate inquiry from the traditional federal analysis.[52]

In a recent unanimous decision, *Walden v. Fiore*,[53] the Supreme Court clarified certain aspects of the specific jurisdiction inquiry.[54] Interpreting prior case law, the Court emphasized that the defendant's relationship with the forum state must arise out of connections that the defendant itself, not any other party, has with the forum state.[55] A plaintiff's connections with the forum state, no matter how significant they are, cannot be "decisive" in determining whether a defendant is subject to specific jurisdiction in that state.[56] *Walden* also emphasized that the "minimum contacts" analysis "looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there."[57] Thus, the emphasis is on more than the defendant's relationship with the plaintiff; it is distinctly focused on the defendant's connection to, and intended affiliation with, the forum state.[58]

Walden highlights the unique issues facing aviation plaintiffs who are pursuing manufacturers and maintenance companies.[59] Aircraft are used all over the globe, and manufacturers often do not target specific states as markets.[60] Furthermore, aircraft, by their very nature, traverse state lines.[61] It has long been the law that specific jurisdiction cannot arise from a contact with a state based solely upon "the unilateral activity of the plaintiff" or an-

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[51] Asahi Metal Indus. Co. v. Super. Ct. of Cali., Solano Cnty., 480 U.S. 102, 113 (1987) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

[52] *E.g.*, Nat'l Union Fire Ins. Co. of Pittsburgh v. Aerohawk Aviation, Inc., 259 F. Supp. 2d 1096, 1102 (D. Idaho 2003) (conducting analysis under Idaho long-arm statute relating to crash in Idaho before engaging in analysis as to personal jurisdiction under the Due Process Clause). It should be noted, however, that although a state's long-arm jurisdiction can be more limited than federal due process allows, it cannot be more expansive. Bryant v. Salvi, 141 Fed. App'x 279, 282 (5th Cir. 2005).

[53] 134 S. Ct. 1115 (2014).

[54] *See* Air Tropiques, Sprl v. N. & W. Ins. Co., No. H-13-1438, 2014 WL 1323046, at *8 (S.D. Tex. Mar. 31, 2014) (characterizing *Walden* as a "rearticulat[ion]" of the standards for specific jurisdiction).

[55] *Walden*, 134 S. Ct. at 1122.

[56] *Id.* (quoting Rush v. Savchuk, 444 U.S. 320, 332 (1980).

[57] *Walden*, 134 S. Ct. at 1122.

[58] *Id.* at 1122–23.

[59] *See id.* at 1115.

[60] *E.g.*, Raffile v. Exec. Aircraft Maint., 831 F. Supp. 2d 1261, 1269 (2011); Heckel v. Beech Aircraft Corp., 467 F. Supp. 278, 284. (W. D. Pa. 1979).

[61] *Heckel*, 467 F. Supp. at 284.

other party.[62] Unfortunately, for aviation plaintiffs, pilots and distributors often take products far from where they were originally shipped, without any knowledge or control by the original manufacturer or seller.[63] Crashes thus frequently take place in a forum that a defendant never specifically targeted.[64] Additionally, maintenance companies may perform work on an aircraft during a stop-over in one state, with no knowledge as to where that aircraft is based or may be flown, much less where it may crash.[65] A court may conclude that a state would have specific jurisdiction under the applicable principles or long-arm statute because the injury occured within the state's borders, but if the defendant never had any purposeful contact with that state, the court may still find that the exercise of jurisdiction "would not comport with fair play and substantial justice."[66] As *Walden* stressed, it is the defendant's relationship with the state that matters, not necessarily with any particular individual in that state.[67]

This aspect of jurisdiction can create a conundrum for aviation plaintiffs because a state where an aircraft crashed, which may be a convenient forum, may not have the power to adjudicate a claim against a key defendant.[68] This is especially troublesome when the plaintiff's primary jurisdiction theory is based upon the defendant's placement of a product into the stream of commerce, a common fact pattern in aviation cases.[69] In *Asahi*

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[62] Bearry v. Beech Aircraft Corp., 818 F.2d 370, 374 (5th Cir. 1987) (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297–98 (1980)); *accord* Hanson v. Denckla, 357 U.S. 235, 253 (1958).

[63] *See, e.g.*, *Raffile*, 831 F. Supp. 2d at 1269.

[64] *See Bearry*, 818 F.2d at 375–76 (finding no personal jurisdiction over aircraft manufacturer when all of company's transactions were completed outside of the forum state and it had no office, agents, or control over dealers in forum state).

[65] *E.g.*, *Raffile*, 831 F. Supp. 2d at 1268–75; *Heckel*, 467 F. Supp. at 284.

[66] Bunch v. Lancair Int'l, Inc., 202 P.3d 784, 795 (Mont. 2009).

[67] Walden v. Fiore, 134 S. Ct. 1115, 1122–23 (2014). At least one commentator was concerned about this language, stating that "[t]aken out of context, this sentence might seem to announce a rule that dealings with forum-state plaintiffs could never suffice and that the minimum contacts test requires some additional connection to the forum state." Patrick J. Borchers, *The Twilight of the Minimum Contacts Test*, 11 SETON HALL CIR. REV. 1, 8 (2014). However, Professor Borchers noted that such an interpretation would conflict with previous Supreme Court decisions sustaining personal jurisdiction based solely upon a contract with the defendant in the forum state. *Id.* at 8–9.

[68] *Raffile*, 831 F. Supp. 2d at 1268; Mayo v. Tillman Aero, Inc., 640 So. 2d 314, 320 (La. Ct. App. 1994).

[69] *E.g.*, *Bunch*, 202 P. 3d at 794–95, 800; *Bearry*, 818 F. 2d at 372.

Metal Industry Co. v. Superior Court of California, Solano County,[70] a plurality of the Court opined that simply "plac[ing] . . . a product into the stream of commerce, without more," is insufficient to subject a party to personal jurisdiction in a given state.[71] Accordingly, to justify the exercise of specific jurisdiction, plaintiffs often have to rely upon activities that show a defendant's intent to serve the market in the forum state, such as a defendant's shipping of products or sales in the state, designing products for that state's market, advertising in the state, establishing channels for customers in the state, or marketing the products through a distributor in the state.[72] However, "a defendant's awareness that the stream of commerce may or will sweep the product into the forum state does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State."[73] This statement seems uncannily geared toward aviation cases, as such products cross state lines by the very nature of their use.[74]

In 2011, the Supreme Court revisited the "stream of commerce" theory in its divided decision, *J. McIntyre Machinery, Ltd. v. Nicastro*.[75] In *Nicastro*, the plaintiff injured his hand while using a metal-shearing machine manufactured by the defendant, an English company.[76] The injury occurred in New Jersey, where the plaintiff filed suit.[77] The manufacturer sold its products throughout the United States through an independent distributor, but did not specifically target New Jersey.[78] The plurality opinion, authored by Justice Kennedy, emphasized that, as to specific jurisdiction, "[t]he question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has power to subject the defendant to judgment concerning that conduct."[79] The plurality opinion found that an intent to serve the U.S. market, without more, could not subject a

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[70] 480 U.S. 102 (1987).

[71] *Id.* at 112.

[72] *Id.*

[73] *Id.*

[74] *See* Heckel v. Beech Aircraft Corp., 467 F. Supp. 278, 284 (W.D. Pa. 1979) (noting that aircraft are "fully . . . intended to fly everywhere at great speeds crossing state lines at will").

[75] 131 S. Ct. 2780 (2011).

[76] *Id.* at 2786.

[77] *Id.*

[78] *Id.*

[79] *Id.* at 2789.

defendant to specific personal jurisdiction in New Jersey; rather, the plaintiff needed to show that the defendant "purposefully availed itself of the New Jersey market."[80] In concurrence, Justice Breyer attempted to limit the holding to the specific facts of the case and criticized the plurality's failure to take a nuanced look at modern distribution practices.[81]

As the Court could not reach a five-Justice majority, *Nicastro* provides very little clarity regarding the law of specific personal jurisdiction.[82] However, it is clear that the location of a crash, without more, is no guarantee of personal jurisdiction.[83] Plaintiff's counsel should be mindful of a company's activities, advertisements, sales, and distribution practices in the chosen forum, and should be prepared to engage in jurisdictional discovery to determine if a defendant has undertaken sufficient activities to target the forum state.[84] Obtaining specific jurisdiction in a forum distant from the location of a defendant is more likely than securing general jurisdiction after *Daimler*,[85] but as *Nicastro* illustrates, it can still be a challenge.[86]

3. The Risk of Picking and Choosing Targets

Ordinarily, plaintiff's counsel in an aviation case can identify a primary target defendant, and choose a forum that has personal jurisdiction over that defendant. For example, if the plaintiff's theory is centered on the failure of a component part, the manufacturer's home state may be a choice forum, even though the crash took place in a different forum thousands of miles away.[87] There are risks to doing so, however, especially if the chosen forum is clearly not the most convenient under the facts of the case as a whole.[88] This is especially true when there are

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[80] *Id.* at 2790.

[81] *Id.* at 2793 (Breyer, J., concurring).

[82] *Id.* at 2780 (majority opinion).

[83] *See id.*; D'Jamoos ex rel. Estate of Weingeroff v. Pilatus Aircraft Ltd., 566 F.3d 94, 106 (3d Cir. 2009).

[84] Asahi Metal Indus. Co. v. Super. Ct. of Cal., Solano Cnty., 480 U.S. 102, 112 (1987).

[85] *See* Daimler AG v. Bauman, 134 S. Ct. 746, 757–58 (2014).

[86] *See Nicastro*, 131 S. Ct. at 2790.

[87] *See, e.g.*, Complaint at 4–5, 24–26, Allison v. Boeing Co., 2012 WL 2055104 (N.D. Ill. June 7, 2012) (No. 12CV04511) (Plaintiff filed suit against defendant manufacturer of component parts in defendant's principle place of business of Chicago, Illinois, even though the crash occurred in Nigeria).

[88] *See, e.g.*, Bunch v. Lair Int'l, Inc., 202 P.3d 784, 790, 795 (Mont. 2009) (finding that the manufacturer of a component part of an airplane could not be sub-

other potentially culpable parties beyond the jurisdictional reach of the forum state. Choosing a forum without regard to potential jurisdiction over critical non-parties could open the door to dismissal on other grounds.

For example, in *Piper Aircraft Co. v. Reyno*,[89] the plaintiff, a representative of the estates of individuals who perished in a plane crash in Scotland, chose to file suit in the United States and joined only the manufacturers of the aircraft and propeller.[90] The plaintiff did not seek to join the Scottish owner and operator of the aircraft, despite significant evidence of their responsibility for the crash.[91] In affirming the district court's dismissal under forum non conveniens, the Supreme Court emphasized the fact that the defendants would not have the opportunity to implead the Scottish parties in the forum state, although they were "crucial to the presentation of [the defendants'] defense," but they would be able to do so in Scotland.[92] This argument has been successfully employed by defendants in other foreign crash cases to obtain forum non conveniens dismissal.[93]

The lesson from *Reyno* is that plaintiff's counsel in an aviation case should consider the fact that a failure to choose a forum with personal jurisdiction over all potentially viable defendants could result in involuntary dismissal.[94] Of course, in some cases

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jected to personal jurisdiction in the state where the crash occurred because the dispute could be resolved more efficiently in a different forum).

[89] 454 U.S. 235 (1981).

[90] *Id.* at 239–40. The plaintiff actually originally filed suit in a California state court, which was removed to federal court and transferred to the United States District Court for the Middle District of Pennsylvania. *Id.* at 240–41.

[91] *Id.* at 239–40.

[92] *Id.* at 259.

[93] *See, e.g., In re* Air Crash Disaster Over Makassar Strait, Sulawesi, No. 09-CV-3805, 2011 WL 91037, at *6 (N.D. Ill. Jan. 11, 2011) (holding that "the fact that Defendants can implead Adam Air in Indonesia but not here weighs in favor of that forum"); *In re* Air Crash Near Peixoto De Azeveda, Brazil, on September 29, 2006, 574 F. Supp. 2d 272, 285 (E.D.N.Y. 2008), *aff'd sub nom.* Lleras v. Excelaire Servs. Inc., 354 Fed. App'x 585, 587 (2d Cir. 2009) (holding that the "difference in [personal] jurisdiction over potentially liable parties" in Brazil as opposed to New York "weighs strongly in favor of dismissal"); Gambra v. Int'l Lease Fin. Corp., 377 F. Supp. 2d 810, 824 (C.D. Cal. 2005) (inability to join potential third party defendant favored dismissal in favor of France); Nolan v. Boeing Co., 762 F. Supp. 680, 684 (E.D. La. 1989), *aff'd* 919 F.2d 1058, 1069 (5th Cir. 1990) (defendants' defense of negligence by British non-parties that could not be impleaded in Louisiana weighed in favor of forum non conveniens dismissal). The same argument could be used to support a transfer to a forum that does have personal jurisdiction over all potentially culpable parties. *See* 28 U.S.C. § 1631.

[94] *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

the alternative forum is so undesirable that the risk of picking a forum lacking jurisdiction over all potential parties is worth taking, and in other cases there simply will be no forum where every potential party would be subject to personal jurisdiction. While there may not be one right answer—and in some cases, no right answer—plaintiff's counsel must nevertheless be keenly aware of the personal jurisdiction issues that will arise regardless of which forum is ultimately chosen.[95]

C. Choice of Law Considerations

Even choosing what appears to be the best forum does not guarantee the application of the most favorable law.[96] The most overlooked consideration in choosing a forum is how that choice will affect the substantive law that will govern the case.[97] Aviation cases typically involve facts and parties that span the country or even the globe.[98] No matter where a case is filed, facts will likely exist to support the application of other states' laws.[99] Thus, as one commentator put it, "knowledgeable counsel, before filing suit, can survey the choice of law rules of the states in which service can be effected, and sue in the state whose choice of law rules are likely to result in application of the substantive law most favorable to her client's cause."[100]

Analyzing what law might apply under the potential forum's choice of law rules should be a critical consideration before the decision is finalized.[101] Savvy litigators should immediately abandon two common presumptions. First, picking what appears to be the friendliest forum is no guarantee that its law will apply.[102] Second, the site of a crash, particularly in cases involving flights

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[95] Anthony L. Ryan, *Principles of Forum Selection*, 103 W. Va. L. Rev. 167, 178 (2000).

[96] *See, e.g.*, Nat'l Union Fire Ins. Co. of Pittsburgh v. Dassault Falcon Jet Corp., 203 Fed. App'x 604, 606–07 (9th Cir. 2008).

[97] *See* Harry Litman, *Considerations of Choice of Law in the Doctrine of Forum Non Conveniens*, 74 Cal. L. Rev. 565, 591–92 (1986).

[98] James A.R. Nafziger, *Choice of Law in Air Disaster Cases: Complex Litigation Rules and the Common Law*, 54 La. L. Rev. 1001, 1005 (1994); *see Reyno*, 454 U.S. at 235.

[99] Nafziger, *supra* note 98; *see, e.g.*, Reno Flying Servs., Inc. v. Piper Aircraft, Inc., No. 13-cv-04346 NC, 2014 WL 6629531, at *4–5 (N.D. Cal. Nov. 21, 2014).

[100] Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 Geo. L.J. 1, 10 (1991).

[101] George D. Brown, *The Ideologies of Forum Shopping—Why Doesn't A Conservative Court Protect Defendants?*, 71 N.C. L. Rev. 649, 674 (1993).

[102] *See, e.g.*, Nat'l Union Fire Ins. Co. of Pittsburgh v. Dassault Falcon Jet Corp., 203 Fed. App'x 604, 606–07 (9th Cir. 2008).

across multiple states, is not guaranteed to provide the applicable law.[103] In fact, in air crash cases, courts have increasingly adopted the view that the location of an air crash in a transnational flight is considered "fortuitous" and should have a limited impact, if any, on choice of law.[104]

Thus, in addition to identifying the most friendly forum, plaintiff's counsel must also identify which substantive law will be the most favorable, and whether the chosen forum's choice of law rules will likely result in the application of that law.[105] This can be a complicated process, as choice of law rules vary from state to state.[106] Many states follow the Restatement (Second) of Conflict of Laws, which promotes a factor-based test that compares each state's connections with the case to determine which state has the "most significant relationship" to the case or specific issue.[107] Other states focus on a "governmental interest" test, which weighs the competing interests that each state has in applying its laws.[108] Certain states have their own unique approaches: Pennsylvania, for example, has a self-described "hybrid" choice of law system that incorporates the Restatement approach, a governmental interest analysis, and the more traditional but largely discarded lex loci delicti doctrine.[109]

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[103] *See, e.g.*, Saloomey v. Jeppesen & Co., 707 F.2d 671, 673 (2d Cir. 1983) (applying Colorado law to crash in West Virginia); Griffith v. United Air Lines, Inc., 203 A.2d 796, 798, 806–07 (Pa. 1964) (explicitly abandoning the doctrine of lex loci delicti, or applying the law of the place of the wrong, in favor of a "flexible" approach, and applying Pennsylvania damages law to Colorado airplane crash).

[104] Cousins v. Instrument Flyers, Inc., 376 N.E.2d 914, 915 (N.Y. 1978) (noting that "in airplane crash cases, the place of the wrong, if it can even be ascertained, is most often fortuitous"); Kuchinic v. McCrory, 222 A.2d 897, 900 (Pa. 1966) (site of crash in Georgia during flight from Florida to Pennsylvania had no impact on choice of law because it was "wholly fortuitous"); *see* Nafziger, *supra* note 98 (noting that "the rule or presumption of lex loci delicti is routinely discredited in air disaster cases because of the 'fortuity' of accidents"); *see also In re* Air Crash Disaster Near Chicago, Illinois on May 25, 1979, 644 F.2d 594, 615 (7th Cir. 1981) ("That the injury in our case occurred in Illinois can only be described as fortuitous. Had the DC-10's engine fallen off later, the injury might have occurred in one of any number of states.").

[105] *See* Brown, *supra* note 101, at 674. ("The plaintiff's shopping will consist generally of a twofold search for a jurisdiction with a favorable substantive law and a choice of law theory that will point to the application of that law.").

[106] Ryan, *supra* note 95, at 191.

[107] RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145; *see* Torrington Co. v. Stutzman, 46 S.W.3d 829, 848 (Tex. 2000); Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 420–21 (Tex. 1984).

[108] *See* Nat'l Union Fire Ins. Co. of Pittsburgh v. Dassault Falcon Jet Corp., 263 Fed. App'x 604, 605–06 (9th Cir. 2008).

[109] *See* Garcia v. Plaza Oldsmobile Ltd., 421 F.3d 216, 219–20 (3d Cir. 2005).

Determining the likely applicable law is often more important than establishing that the venue meets the necessary procedural and jurisdictional requirements.[110] A change of venue is not necessarily fatal, but failing to consider the impact of choice of law at the outset can be.[111] In one recent case, *Reno Flying Services, Inc. v. Piper Aircraft, Inc.*, the plaintiff, the owner of an aircraft damaged while landing in California, sued in California the Florida manufacturer of the component part that allegedly failed.[112] California law and Florida law, however, were drastically different in terms of the application of the economic loss doctrine.[113] Under California law, whether a component part's damaging of the larger product should be barred by the economic loss doctrine is typically a question for the finder of fact.[114] By contrast, Florida law bars tort claims as a matter of law when a component part damaged the larger product under its version of the economic loss doctrine.[115] On summary judgment, the district court held that, despite the occurrence of the crash in California, Florida law should apply under California choice of law rules, and under Florida law, the plaintiffs' tort claims were barred.[116] The plaintiff could have avoided this result by choosing a forum whose choice of law rules were more likely to result in the application of California law.[117] As *Reno Flying Services* illustrates, determining which substantive law is likely to apply is a critical consideration in choosing the forum.[118]

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[110] Reno Flying Servs., Inc. v. Piper Aircraft, Inc., No. 13-cv-04346 NC, 2014 WL 6629531, at *1 (N.D. Cal. Nov. 21, 2014).

[111] *See, e.g., id.* at *5.

[112] *Id.* at *1.

[113] *Id.* at *2–4.

[114] *See, e.g.*, Jimenez v. Super. Ct., 58 P.3d 450, 483–85 (Cal. 2002); KB Home v. Super. Ct., 5 Cal. Rptr. 3d 587, 596 (Cal. App. 2d Dist. 2003), *as modified on denial of reh'g* (Nov. 19, 2003).

[115] *See, e.g.*, Turbomeca, S.A. v. French Aircraft Agency, Inc., 913 So. 2d 714, 717 (Fla. 3d Dist. App. 2005); Am. Universal Ins. Grp. v. Gen. Motors Corp., 578 So. 2d 451, 452–53 (Fla. 1st Dist. App. 1991).

[116] *Reno Flying Servs.*, 2014 WL 6629531, at *2–5.

[117] In fact, an unpublished but closely analogous Ninth Circuit decision had reached an identical conclusion in a similar air crash case. The California court in *Reno Flying Services* relied heavily on that persuasive non-binding decision. *See* Nat'l Union Fire Ins. Co. of Pittsburgh v. Dassault Falcon Jet Corp., 263 Fed. App'x 604, 606–07 (9th Cir. 2008).

[118] *See Reno Flying Servs.*, 2014 WL 6629531, at *2–5.

D. THE FEDERAL OPTION

Once a plaintiff settles on a state in which to file suit, he or she must then decide whether to bring the case in federal court or state court.[119] If federal court is the chosen route, the plaintiff must ensure that all of the prerequisites for federal jurisdiction are met.[120] Alternatively, a plaintiff may be committed to bringing suit in state court, and must then take precautions to keep the case there.[121]

1. Prerequisites of Federal Subject Matter Jurisdiction

Federal courts are courts of limited jurisdiction; they can only hear cases over which they have original jurisdiction conferred by Congress.[122] The two most common forms of original jurisdiction are federal question jurisdiction[123] and diversity of citizenship jurisdiction.[124] Federal courts have federal question jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States."[125] Aviation cases, however, are almost always governed by state law; thus, federal question jurisdiction is rarely a basis to get to federal court.[126]

Accordingly, diversity of citizenship jurisdiction is the most common basis for bringing an aviation case in federal court. Federal courts have diversity jurisdiction over "all civil actions where the matter in controversy exceeds the sum or value of $75,000" and is between citizens of different states, including cases where foreign citizens are additional parties, cases between citizens of a state and subjects of a foreign state, and cases where a foreign state is a plaintiff and citizens of a state or different states are defendants.[127] The amount in controversy require-

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119 Ryan, *supra* note 95, at 180.

120 *Id.*

121 *Id.*

122 *See* Marshall v. Gibson's Prods., Inc. of Plano, 584 F.2d 668, 672 (5th Cir. 1978) ("[F]ederal courts are courts of limited jurisdiction; the exercise of federal jurisdiction is proper only when prescribed by Congress.").

123 28 U.S.C. § 1331.

124 *Id.* § 1332.

125 *Id.* § 1331.

126 Defendants occasionally attempt to remove cases relating to air crashes to federal court on the basis of federal preemption, arguing that federal statutory and regulatory law preempts the field of aviation. While federal courts have largely rejected this approach, they are occasionally successful. *See* Michael L. Slack & Donna Bowen, *Don't Let Preemption Ground Your Aviation Case*, 43 TRIAL 37, 38 (2007).

127 28 U.S.C. § 1332(a).

ment is almost always met in aviation cases; personal injury claims often involve serious injuries or deaths that have damages far in excess of $75,000, and property damage claims on aircraft typically exceed this amount as well. Thus, diversity jurisdiction usually turns on the citizenship of the parties.

The diversity of citizenship requirement mandates that all plaintiffs be of diverse citizenship from all defendants.[128] Individuals are citizens of the state in which they are "domiciled," which is generally determined by the individual's residence and their intention to remain there.[129] In aviation cases, plaintiffs often include the estate of the deceased or the next friend of a minor. Importantly, in such cases it is the citizenship of the deceased or represented individual that is relevant for diversity purposes, not the citizenship of the personal representative or administrator.[130]

A corporation has two independent bases for citizenship: its state of incorporation and its principal place of business.[131] While a corporate defendant's state of incorporation is obvious, until recently, its principal place of business was not.[132] Federal circuits had taken different views of what constituted a corporation's principal place of business: some looked to the corporate headquarters or "nerve center" of the business, while others considered where a corporation's actual business activities occured.[133] Still others muddled the two approaches, attempting to determine the state where the "center of gravity" of the corporation was located.[134] In 2010, in *Hertz Corp. v. Friend*,[135] the Supreme Court, recognizing the "divergent and increasingly complex" approaches by the lower courts, attempted to put an end to the uncertainty.[136] The Court adopted the "nerve center" test for determining a corporation's principal place of business, which "should normally be the place where the corporation

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[128] *See* Wis. Dept. of Corr. v. Schacht, 524 U.S. 381, 388 (1998).

[129] *See* EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 251–52 (4th ed. 2004) ("Most of the litigated problems in the area of domicile concern the acquisition of a domicile of choice and center about the quality of an individual's physical presence at the place of the alleged domicile and the nature of his intention or attitude of mind regarding that place.").

[130] 28 U.S.C. § 1332(c)(2).

[131] *Id.* § 1332(c)(1).

[132] *See* Hertz Corp. v. Friend, 559 U.S. 77, 89 (2010).

[133] *See id.* at 89–90

[134] *See id.* at 91 (describing lower court cases).

[135] *Id.*

[136] *Id.* at 92.

maintains its headquarters—provided that the headquarters is the actual center of direction, control and coordination . . . and not simply an office where the corporation holds its board meetings."[137]

By adopting this approach, the Court created a test with greater simplicity and predictability, as it intended.[138] However, the Court's caveat that a corporation's headquarters may not be the actual nerve center of the corporation allows for some leeway, particularly when a corporation uses its published headquarters only sparingly.[139] In these situations, parties can make the case that the true nerve center is elsewhere.[140] Often, this will depend heavily on the evidence presented by either side; notably, in two separate post-*Hertz* cases out of the Eastern District of Pennsylvania, two different judges reached different decisions about the same corporation's principal place of business based on the level of evidence provided by the same defendant.[141] Suffice it to say, a plaintiff that is trying to justify subject matter jurisdiction, or, conversely, a defendant that is trying to challenge it, must be prepared to present evidence to satisfy a court that the state of a corporation's "nerve center" is diverse from the citizenship of all plaintiffs.[142]

Finally, one additional basis for original jurisdiction that frequently arises in aviation cases is "civil case[s] of admiralty or maritime jurisdiction."[143] Statute 28 U.S.C. § 1333 provides federal courts with original jurisdiction over cases that involve matters arising in navigable waters historically associated with admiralty law.[144] However, throughout the twentieth century, land-based aircraft took on many of the same roles that ships filled, and questions arose as to whether admiralty or maritime jurisdiction should also cover these claims.[145] In *Executive Jet Avi-*

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[137] *Id.* at 92–93.

[138] *Id.* at 95.

[139] *Id.* at 95–96.

[140] *See* Agostini v. Piper Aircraft Corp., No. 11-7172, 2012 WL 646025, at *1–4 (E.D. Pa. Feb. 29, 2012) (determining that a company's principal place of business was in Pennsylvania, despite having an alleged corporate headquarters in Massachusetts).

[141] *Compare id., with* Lewis v. Lycoming, No. 11-6475, 2012 WL 2422451, at *5–6 (E.D. Pa. June 27, 2012).

[142] *See Hertz Corp.*, 559 U.S. at 92–93; Wis. Dept. of Corr. v. Schacht, 524 U.S. 381, 388 (1998).

[143] 28 U.S.C. § 1333(1).

[144] *See* Blake v. Farrell Lines, Inc., 417 F.2d 264, 265 (3d Cir. 1969).

[145] *See In re* Air Crash at Belle Harbor, N.Y. on Nov. 12, 2001, MDL No. 1448, 2006 WL 1288298, at *1350 (S.D.N.Y. May 9, 2006) ("Federal courts long have

ation, Inc. v. City of Cleveland,[146] the Supreme Court established a two-prong test for determining whether an aviation case was subject to maritime jurisdiction: (1) the *situs* of the crash must be in navigable waters; and (2) there must be some nexus between the type of activity involved and traditional maritime activity.[147] The first element is relatively broad and straightforward: "[i]t has long been the rule in the United States that all waters within the ebb and flow of the tide are considered navigable waters."[148] The second element can be more complicated. When an aircraft performs "a function traditionally performed by waterborne vessels," there is a sufficient nexus to traditional maritime activities.[149] "Federal courts have concluded nearly unanimously that transoceanic or island voyages that, but for air travel, would have been conducted by sea have a significant relationship to maritime activity."[150] Thus, in the many cases that arise out of crashes of aircraft on navigable waters, 28 U.S.C. § 1333(1) can provide an additional avenue for plaintiffs to bring suit in federal court.[151]

2. *Preventing Removal*

Regardless of the forum the plaintiff chooses, a plaintiff cannot prevent a defendant from attempting to change the venue in certain ways. Every jurisdiction, state or federal, has a version of the doctrine of forum non conveniens,[152] and defendants can always attempt to transfer a case within the judicial system where

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struggled with the issue of when aviation accidents are properly encompassed within admiralty jurisdiction.").

146 409 U.S. 249 (1972).

147 *Id.* at 268.

148 Isla Nena Air Servs., Inc. v. Cessna Aircraft Co., 380 F. Supp. 2d 74, 77–78 (D.P.R. 2005) (citing cases).

149 Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 218–19 (1986).

150 *In re Air Crash at Belle Harbor*, 2006 WL 1288298, at *1353 (citing cases). *But see* U.S. Aviation Underwriters, Inc. v. Pilatus Bus. Aircraft, Ltd., 582 F.3d 1131, 1141 (10th Cir. 2009) (crash in international waters on flight "for the express purpose of aircraft evaluation and demonstration" was not sufficiently related to traditional maritime activities to invoke admiralty jurisdiction); Kapar v. Kuwait Airways Corp., 845 F.2d 1100, 1104 n.14 (D.C. Cir. 1988) (finding that hijacking in flight over international waters was not subject to admiralty jurisdiction because it was "only fortuitously and incidentally connected to navigable waters"); Brons v. Beech Aircraft Corp., 627 F. Supp. 230, 233 (S.D. Fla. 1985) (finding that crash on training flight over the waters was "totally fortuitous" and rejecting the application of admiralty jurisdiction and maritime law).

151 *See infra* Section III.B.3.

152 *See infra* Section III.D.

the action was brought.[153] However, if a plaintiff elects to file in state court, there are certain precautions that can end any effort to remove the case to federal court before it begins.

First, plaintiffs can prevent removal premised on diversity jurisdiction by joining in-state or non-diverse defendants.[154] For a defendant to remove a case to federal court on diversity grounds, no properly joined and served defendant may be a citizen of the state where the action was filed.[155] Aircraft often contain component parts manufactured by numerous entities located in various states, and they are frequently maintained by entities throughout the country.[156] An aircraft's log books or list of components can provide a plaintiff with numerous targets for joining an in-state or non-diverse defendant.[157] If such a party is joined, the removing defendant's only option is often to prove that the non-diverse or in-state defendant has been improperly or fraudulently joined, which is a very heavy burden to meet.[158] If a state's pleading and joinder rules allow it, a plaintiff wishing to preserve a state court forum could file suit against any in-state defendant alone, and then, after service has been perfected, join any out-of-state defendants.[159]

Second, if a case is removed, the plaintiff should immediately take note of the grounds for removal and attempt to spot both substantive and procedural defects. If the case lacks subject matter jurisdiction on its face, a plaintiff can move to remand at any time.[160] However, if the defect is merely procedural, such as timeliness or because one of the defendants is a citizen of the forum state, the plaintiff must move to remand within thirty days of removal, or the defect can be considered waived.[161] If the

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153 *See infra* Section III.C.

154 *See* 28 U.S.C. § 1441(b)(2).

155 *Id.* ("A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.").

156 *E.g.*, Eason v. Linden Avionics, Inc., 706 F. Supp. 311, 321 (D.N.J. 1989).

157 *See, e.g.*, Yellen v. Teledyne Cont'l Motors, Inc., 832 F. Supp. 2d 490, 503 (E.D. Pa. 2011).

158 *See infra* Section III.B.1.

159 *See* Centaurus Unity v. Lexington Ins. Co., 766 F. Supp. 2d 780, 790 n.27 (S.D. Tex. 2011) (finding that state joinder laws should be used in determining whether there has been a fraudulent or improper misjoinder "since the claimant was required to follow the state's joinder rules when it initially brought suit").

160 28 U.S.C. § 1447(c).

161 *Id.*

plaintiff fails to timely move to remand, all of the precautions taken to prevent removal would be undone.

III. THE DEFENDANT'S OPTIONS

A. CHALLENGING PERSONAL JURISDICTION

A defendant's first consideration should be whether the court has personal jurisdiction over it under the current state of the law.[162] The general law relating to personal jurisdiction and the impact of these cases was discussed at length in Part I.B., but defendants should nonetheless be mindful of the requirements of challenging personal jurisdiction. Requirements sometimes vary under the laws of the various states and federal circuits, but some general prerequisites should always be met.[163] First, lack of personal jurisdiction must be asserted in the defendant's first pleading or it is generally considered to be waived.[164] Second, while the ultimate burden of establishing jurisdiction is on the plaintiff, the defendant generally has the initial burden of providing affidavit testimony or other evidence showing that personal jurisdiction does not exist.[165] Third, the defendant should be mindful of whether the state's laws require an evidentiary hearing on the issue of personal jurisdiction.[166] Recent cases such as *Daimler* will serve to make jurisdictional challenge a much more effective tool, but defendants must be prepared to meet all of the requirements to challenge jurisdiction from the outset.[167]

B. REMOVAL TO FEDERAL COURT

If the case is filed in state court, a defendant may consider removing the case to federal court. Federal courts may have a number of procedural or strategic advantages over state courts

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[162] *See generally* Daimler AG v. Bauman, 134 S. Ct. 746 (2014); Walden v. Fiore, 134 S. Ct. 1115 (2014); J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011); Goodyear Tire & Rubber Co. v. McDonnell Douglas Corp., 820 F. Supp. 503 (C.D. Cal. 1992).

[163] *See* T. Steven Har, *Representing Foreign Defendants in the U.S. Courts A Global Economy Means Global Litigation*, 14 No. 3 PRAC. LITIGATOR 27, 32 (May 2003). *Compare* SUPER. CT. CIV. R. 4(d)(5), *with* S.D. CODIFIED LAWS § 25-9C-201(a)(2).

[164] *See* FED. R. CIV. P. 12(h)(1).

[165] *See, e.g.*, Future Tech. Today, Inc. v. OSF Healthcare Sys., 218 F.3d 1247, 1249 (11th Cir. 2000).

[166] *See, e.g.*, TEX. R. CIV. P. 120a; Milacron Inc. v. Performance Rail Tie, L.P., 262 S.W.3d 872, 876 (Tex. App.—Texarkana 2008, no pet.) (noting that a defendant objecting to personal jurisdiction must ask for and secure a hearing).

[167] *See Daimler*, 134 S. Ct. 746.

for defendants.[168] Federal procedural rules are frequently more developed and uniform than their state court counterparts, giving plaintiffs fewer opportunities to take advantage of looser rules or practices in a state court forum.[169] Furthermore, as discussed in more detail below, being in federal court opens up other avenues to changing the venue, including federal transfer of venue statutes.[170] If a case is pending in federal court, parties seeking to change the venue to another state need not seek dismissal and refile in the other state's court system; instead, the district court can simply transfer the case to a sister federal court in the defendant's proposed forum.[171]

At the outset, the defendant must determine if the case is removable on its face, and if so, ensure that all procedural requirements are satisfied.[172] First, the case must be removed within thirty days of service of process upon the last-served defendant.[173] Second, the removing defendant must obtain the written consent of every other properly joined and served defendant.[174] If the defendant does not timely accomplish these tasks, then any effort at removal is likely doomed from the start.[175] If the procedural requirements can be met, then the defendant must ensure that a federal court would have federal sub-

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168 *See* WILLIAM W. SCHWARZER ET AL., CALIFORNIA PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL § 2:2191 (National ed., The Rutter Group) (observing that "removal is sought on the basis of what defendants perceive to be the *practical* and *strategic* advantages of litigating the case in federal court, rather than state court") (emphasis in original).

169 *See* Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 618 (2006).

170 A prime example is *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), in which the defendants removed a case originally filed in state court in California, had it transferred to a federal district court in Pennsylvania, and finally obtained forum non conveniens dismissal of the case to Scotland. *See generally id.*; Richard D. Freer, *Refracting Domestic and Global Choice-of-Forum Doctrine Through the Lens of a Single Case*, 2007 B.Y.U. L. REV. 959, 963–73 (2007) (describing the procedural history of *Reyno* and praising the defendants' strategy of "incremental assault on the plaintiff's forum selection").

171 *See, e.g.*, 28 U.S.C. §§ 1404, 1406, 1631.

172 *See* Vasquez v. Americano U.S.A., LLC, 536 F. Supp. 2d 1253, 1257 (D. N.M. 2008).

173 28 U.S.C. § 1446(b)(1).

174 *Id.* § 1446(b)(2)(A); *see also Vasquez*, 536 F. Supp. 2d at 1258 ("To join a notice of removal is to support it in writing.").

175 *See* Britton v. Rolls Royce Engine Servs., No. C 05-01057 SI, 2005 WL 1562855, at *5 (N.D. Cal. June 30, 2005) (remanding due to untimeliness of removal).

ject matter jurisdiction over the case.[176] The requirements to satisfy the forms of original subject matter jurisdiction that are primarily relevant in aviation cases are discussed in detail in Part I.D. However, defendants should be aware of additional bases for removal that may allow them to access a federal forum despite a plaintiff's efforts to avoid it.

1. Fraudulent/Improper Joinder

When faced with an in-state or non-diverse defendant, a diverse out-of-state defendant may attempt removal on the grounds of fraudulent or improper joinder.[177] This doctrine provides that the citizenship of an in-state or non-diverse defendant may be disregarded if the out-of-state defendant demonstrates to the court that the plaintiff does not actually have a viable claim against that party.[178] Early in a case, if a plaintiff has even a plausible theory against an in-state or non-diverse defendant, this will usually be sufficient to avoid removal based on fraudulent joinder.[179] If it becomes clear as the case develops that a defendant has been joined solely to keep a case out of federal court, a diverse defendant can later attempt to remove the case to federal court within thirty days of discovering the basis for removal.[180] If that discovery takes place more than one year after commencement of the lawsuit, however, the defendant must also show that "the plaintiff acted in bad faith in order to prevent a defendant from removing the action."[181] Regardless of the timing, defendants are generally faced with a heavy burden of persuasion if they wish to justify removal on this ground.[182]

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[176] 28 U.S.C. § 1441.

[177] *In re* Briscoe, 448 F.3d 201, 215–16 (3d Cir. 2006).

[178] *See* Yellen v. Teledyne Cont'l Motors, Inc., 832 F. Supp. 2d 490, 503 (E.D. Pa. 2011) ("The fraudulent joinder line of cases distills to a simple principle: a court cannot permit a plaintiff to join a straw-man defendant solely to deprive removal-eligible defendants of a federal forum to which they are otherwise entitled.").

[179] *See* Travis v. Irby, 326 F.3d 644, 647–48 (5th Cir. 2003).

[180] *See* 28 U.S.C. § 1446(b)(3) ("Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.").

[181] *Id.* § 1446(c)(1).

[182] *See Travis*, 326 F.3d at 649 ("The burden of persuasion on those who claim fraudulent joinder is a heavy one."); *Yellen*, 832 F. Supp. 2d at 503.

2. Federal Officer Removal

Defendants in aviation cases occasionally have the opportunity to remove a case on the basis of 28 U.S.C. § 1442(a), generally referred to as the "federal officer removal" statute. In relevant part, this statute permits the removal of actions brought against "any person acting under" the United States or any of its agents or officers for acts committed under the color of such office.[183] Government contractors have used this statute to remove actions to federal court on this basis alone.[184] Federal officer removal requires the removing party to meet four elements: (1) the defendant must be a person; (2) the federal government or a federal officer must have directed the defendant to take action; (3) the action was the causal nexus of the plaintiff's claim; and (4) a colorable federal defense must exist as to the claim.[185] To successfully assert this basis for removal, the defendant must be able to show more than just federal regulation in "considerable detail," but actual government intervention, control, or direction.[186]

One of the most common types of federal officer removals in the aviation context is when an individual defendant takes an action causally related to the plaintiff's claims in his role as a designated agent of the Federal Aviation Administration.[187] At least one court has imputed such actions to the individual's employer to permit removal, even though that individual was not named as a defendant.[188] Other courts have rejected this expansion, noting "FAA designees and their employers are distinct legal entities."[189] This statute can be a valuable tool if the facts can show sufficient government control and direction to justify federal jurisdiction.

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183 28 U.S.C. § 1442(a)(1).

184 *See* Magnin v. Teledyne Cont'l Motors, 91 F.3d 1424, 1428 (11th Cir. 1996).

185 Andrew E. Shipley & John F. Henault, *Federal Officer Removal: The Misunderstood Removal Statute*, 60-MAY FED. LAW. 72, 72 (May 2013) (citing Mesa v. California, 489 U.S. 121 (1989)).

186 *See* Watson v. Philip Morris Cos., Inc., 551 U.S. 142, 145 (2010); Shipley & Henault, *supra* note 185, at 72.

187 *See Magnin*, 91 F.3d at 1428–29.

188 AIG Europe (UK) Ltd. v. McDonnell Douglas Corp., No. CV 02-8703-GAF, 2003 WL 257702, at *4 (C.D. Cal. Jan. 28, 2003).

189 West v. A & S Helicopters, 751 F. Supp. 2d 1104, 1110 (W.D. Mo. 2010).

3. Removal Based upon Admiralty Jurisdiction

Statute 28 U.S.C. § 1333(1) provides a basis for federal jurisdiction over civil cases arising under admiralty jurisdiction.[190] The location of a crash frequently brings a subsequent lawsuit within the ambit of federal maritime law or the Death on the High Seas Act (DOHSA).[191] However, the option of taking advantage of federal jurisdiction was traditionally reserved for plaintiffs. The admiralty jurisdiction statute contains a unique "saving to suitors" clause, which preserves to plaintiffs "all other remedies to which they are otherwise entitled."[192] Courts have interpreted this clause to provide state and federal courts with concurrent jurisdiction over in personam maritime claims.[193] Furthermore, because of this clause, courts consistently held that removal of admiralty claims was barred unless there was an independent basis for federal jurisdiction.[194]

However, Congress's amendments to the removal statute in the Federal Courts Jurisdiction and Venue Clarification Act of 2011,[195] perhaps unintentionally, have opened the door to removal based solely upon admiralty jurisdiction.[196] The statute, which remained unchanged in relevant part, states that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."[197] Prior to 2011, 28 U.S.C. § 1441(b) stated that:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable 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.[198]

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190 28 U.S.C. § 1333(1).

191 *See* 46 U.S.C. § 30307 (establishing when DOHSA is applicable to commercial aviation accidents).

192 28 U.S.C. § 1333(1).

193 *See* Madruga v. Super. Ct., 346 U.S. 556, 560–61 (1954).

194 *E.g.*, Barker v. Hercules Offshore, Inc., 713 F.3d 208, 220 (5th Cir. 2013) (interpreting an older version of the statute).

195 Pub. L. No. 112-63, 125 Stat. 758.

196 *See* 28 U.S.C. § 1333(1).

197 28 U.S.C. § 1441(a).

198 28 U.S.C. § 1441(b).

"Although the district courts have original jurisdiction over maritime cases, maritime law claims in general were not viewed as 'arising under the Constitution, treaties or laws of the United States.'"[199] Accordingly, removal based upon admiralty jurisdiction alone was not permitted.[200] In the 2011 amendments, Congress altered 28 U.S.C. § 1441(b) to delete the language that referred to any civil action "founded on a claim or right arising under the Constitution, treaties or laws of the United States."[201] With that language eliminated, the plain language of the statute could be interpreted as discarding the requirement that diversity must exist for removal to be effectuated in cases that fall under federal courts' original jurisdiction but do not necessarily arise under the Constitution, treaties, or laws of the United States.[202]

With this semantic change, admiralty defendants have attempted to remove cases solely on the grounds of admiralty jurisdiction under 28 U.S.C. § 1333(1). In *Ryan v. Hercules Offshore, Inc.*, the district court reviewed these changes to the statute and concluded that the effect of this change was to permit the removal of any claims over which a district court has "original jurisdiction," which includes cases that arise under admiralty or maritime jurisdiction.[203] Departing from decades of precedent interpreting the previous version of the removal statute, the court allowed the removal of claims under DOHSA and admiralty law without requiring that the parties be diverse.[204] Some district courts have since followed suit,[205] but others have vociferously disagreed.[206] Certain courts have based their decision to remand on the fact that removal to federal court on the basis of

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[199] Charles S. Davant, *Navigating New Waters: The Impact of Recent Changes to the Federal Removal Statute in Maritime Law*, 33 TRIAL ADVOC. Q. 23, 24 (2014).

[200] Tenn. Gas Pipeline v. Houston Cas. Ins. Co., 87 F.3d 150, 153 (5th Cir. 1996).

[201] Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758; Davant, *supra* note 199, at 24.

[202] *See* Davant, *supra* note 199, at 24.

[203] Ryan v. Hercules Offshore, Inc., 945 F. Supp. 2d 772, 777-78 (S.D. Tex. 2013).

[204] *Id.* at 778.

[205] *E.g.*, Provost v. Offshore Serv. Vessels, LLC, No. 14-89-SDD-SCR, 2014 WL 2515412, at *3 (M.D. La. June 4, 2014); Wells v. Abe's Boat Rentals Inc., No. H-13-1112, 2013 WL 3110322, at *3 (S.D. Tex. June 18, 2013).

[206] *E.g.*, Figueroa v. Marine Inspection Servs., 28 F. Supp. 3d 677, 680-81 (S.D. Tex. 2014); Rogers v. BBC Chartering Am., LLC, No. 4:13-CV-3741, 2014 WL 819400, at *1 (S.D. Tex. Mar. 3, 2014); Barry v. Shell Oil Co., No. 13-6133, 2014 WL 775662, at *3 (E.D. La. Feb. 25, 2014).

admiralty jurisdiction may strip a plaintiff of the right to a jury trial.[207] The amendment to the removal statute may have been intended to clarify jurisdiction rules, but at least as to admiralty jurisdiction, it has had the opposite effect.[208] While there is a split of authority on the issue among the district courts,[209] it is now clear that at least a colorable basis exists to remove a case based solely upon admiralty or maritime jurisdiction.

C. TRANSFER OF VENUE

One of the most common mechanisms for changing the forum is seeking a transfer of venue within the judicial system in which the action was filed.[210] If the plaintiff's chosen venue is improper, or if another venue would be more convenient, the defendant may request that the case be transferred to a proper or more convenient forum.[211] This section discusses the most prominent transfer statutes that defendants can rely on, and the critical impact of a recent Supreme Court decision that drastically enhanced the power of forum selection clauses.

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[207] *See* Coronel v. AK Victory, 1 F. Supp. 3d 1175, 1188 (W.D. Wash. 2014) (stating that removal based solely on admiralty jurisdiction "would deprive the plaintiff of his long-recognized choice of remedies, including, potentially, his right to a jury trial").

[208] *See* Matthew H. Ammerman, *The New Removal Regime*, 38 TUL. MAR. L.J. 389, 409–11 (2014).

[209] *See* Bourdreaux v. Global Offshore Resources, LLC, No. 14-2507, 2015 WL 419002 (W.D. La. Jan. 30, 2015). This case provided a detailed summary and list of the published cases that support both interpretations of the amended statute. Judge Hill characterized the position that the 2011 amendments did not change the law to permit the removal of claims based on 28 U.S.C. § 1333(a) without an independent basis for removal as the "majority view," and ultimately sided with that approach. *Id.* at *4–5, *7.

[210] If removal from state court to federal court is successful, this can open the door to interstate transfer between federal courts. *E.g.*, Piper Aircraft Corp. v. Reyno, 454 U.S. 235, 240–41 (1981); Gschwind v. Cessna Aircraft Co., 161 F.3d 602, 605 (10th Cir. 1998). If removal is unsuccessful, however, the defendant must rely upon the doctrine of forum non conveniens to change the venue to another state. *See infra* Section III.D.

[211] If a case cannot be removed to federal court, defendants also have the ability to pursue transfers within the state court system, and would be wise to look at their options in those cases as well, with an eye toward how the state's standards are different from federal standards. As discussed below, if a case is pending in state court, it cannot be transferred to another state court and the moving defendant must rely upon the doctrine of forum non conveniens. *See infra* Section III.D.

1. Transfer to Fix the Venue

Plaintiffs tend to file suit in jurisdictions where there is at least some possibility that venue will be sustained; therefore, motions attempting to change venue on the grounds of convenience are the most common types of transfer motions seen in aviation cases. On the rare occasion when the plaintiff's chosen venue is wholly improper, 28 U.S.C. § 1406 allows for transfer of venue when it is necessary for the action to continue at all.[212] This section applies to cases filed in an improper venue, requiring a court to "dismiss, or if it be in the interest of justice, transfer such case" to a proper venue.[213] This form of transfer, while rare, can be used when a plaintiff attempts to file suit in a federal court that has such an attenuated connection to the case that venue would be considered improper.[214]

2. Transfer for Convenience

Just because a venue is proper does not mean it cannot be changed. The most commonly used transfer statute is 28 U.S.C. § 1404(a), which permits the transfer of a case "[f]or the convenience of the parties and witnesses" and "in the interest of justice" to any federal district to which the parties have consented or where the case may have been brought.[215] Such transfer motions generally follow a multi-step process.[216] The court must first determine whether the case could have been brought in the requested transferee forum. This inquiry involves a determination of whether it is a proper venue and whether all of the defendants would be subject to personal jurisdiction in that forum.[217]

If the transferee forum is a proper venue, the court must weigh both private and public interest factors to determine

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[212] *See* 28 U.S.C. § 1406(a). A defendant can also move to dismiss a case on the grounds of improper venue. FED. R. CIV. P. 12(b)(3). Doing so, however, will allow the plaintiff a second chance to pick the forum. *See* FED. R. CIV. P. 41(b). A motion to transfer will allow the defendant to identify and advocate for its own chosen forum in the first challenge to venue. 28 U.S.C. § 1404(b).

[213] 28 U.S.C. § 1406(a).

[214] *See id.*

[215] 28 U.S.C. § 1404(a).

[216] *See* Saint-Gobain Calmar, Inc. v. Nat'l Prods. Corp., 230 F. Supp. 2d 655, 658 (E.D. Pa. 2002).

[217] Encyclopedia Britannica, Inc. v. Magellan Navigation, Inc., 512 F. Supp. 2d 1169, 1172 (W.D. Wisc. 2007) (citing Hoffman v. Blaski, 363 U.S. 335, 344 (1960)).

whether they weigh in favor of transfer.[218] While the specific factors vary slightly between the circuits, they generally focus on similar interests.[219] The private interest factors focus on the interests of the parties and those affected by the case.[220] These factors usually include the relative ease of access to sources of proof, the availability of compulsory process to secure the attendance of witnesses, the cost of attendance of willing witnesses, and all other practical issues that may prevent a trial from being easy, expeditious, and inexpensive.[221] In aviation cases, evidence concerning the location of the crash site, the location and availability of third-party witnesses such as accident investigators, first responders, and maintenance companies who worked on the aircraft, the location of documentary evidence about the aircraft and its parts, and the locations of the parties are all relevant to the court's weighing of the private interest factors.[222]

The public interest factors, by contrast, focus on the interests of the court system and the public in general.[223] These factors include the administrative difficulties flowing from court congestion, the local interest in having localized disputes decided at home, the familiarity of the forum with the law that will govern the case, and the avoidance of unnecessary problems with conflicts of law or the application of foreign laws.[224] Important considerations in aviation cases relevant to the public interest factors can include the forum's involvement in the investigation, choice of law considerations, and the pendency of other actions related to the same crash, which impacts judicial economy.[225] Additionally, courts give substantial weight to the plaintiff's

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[218] Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex., 134 S. Ct. 568, 581 (2013).

[219] *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). *Compare In re* Volkswagen of America, Inc., 545 F.3d 304, 315 (5th Cir. 2008), *with* Creative Tech., Ltd. v. Aztech Sys. Pte., Ltd., 61 F.3d 696, 703–04 (9th Cir. 1995).

[220] *See Atl. Marine*, 134 S. Ct. at 581 n.6.

[221] *E.g.*, *In re Volkswagen*, 545 F.3d at 315.

[222] *See, e.g.*, Islamic Republic of Iran v. Boeing Co., 477 F. Supp. 142, 143 (D.D.C. 1979) (finding that the location of the wreckage and the documents and witnesses connected with "the manufacturer, testing, and sale of the subject aircraft" in transferee forum favored transfer).

[223] *See Atl. Marine*, 134 S. Ct. at 581 n.6.

[224] *In re Volkswagen*, 545 F.3d at 315.

[225] *Cf. In re* W. Caribbean Airways, 619 F. Supp. 1299, 1317 (S.D. Fla. 2007) (noting the general interest in "the consolidation of multiple lawsuits arising out of a single air disaster in a single forum state").

choice of forum, particularly when the plaintiff resides there.[226] Nevertheless, courts also consider whether the plaintiff engaged in forum shopping in determining how much weight to give the plaintiff's choice.[227]

When a plaintiff brings suit far from the crash site or location of other critical operative facts of the case, and the case is either brought in or removed to federal court, 28 U.S.C. § 1404(a) can be a powerful tool. Plaintiffs will often stress the most tenuous connections to justify a favorable forum, but this tactic will not protect them if a different forum is more convenient.[228] Oftentimes, the most convenient forum will be the location of the crash, which is where eyewitnesses, first responders, and investigators are usually located, as well as critical evidence such as the wreckage and medical or autopsy records.[229] Other times, courts will consider the location of a manufacturer's or maintainer's allegedly negligent conduct to be the most convenient forum.[230] If a plaintiff chooses a forum based solely on the presence of one marginal defendant, the residence of one plaintiff, or the location of one of numerous actions that are relevant to the case, a motion to transfer to a demonstrably more convenient forum has a strong chance of success.

3. Transfer to Cure a Want of Jurisdiction

Dovetailing with the use of 28 U.S.C. § 1404(a)[231] is an often overlooked and underutilized statute, 28 U.S.C. § 1631, which permits a court to transfer venue to cure a want of personal jurisdiction.[232] To transfer a case under this statute, three elements must be met: "(1) the transferring court lacks

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[226] *See* Schindelheim v. Braniff Airways, Inc., 202 F. Supp. 313, 315 (S.D.N.Y. 1962) (favoring plaintiffs' choice of home forum after giving "substantial weight" to the fact that crash victims' residence was in New York).

[227] *See* Grace v. Bank Leumi Trust Co. of New York, No. 02 CIV. 6612 (RMB), 2004 WL 639468, at *4–5 (S.D.N.Y. Mar. 31, 2004).

[228] *Cf. Schindelheim*, 202 F. Supp. at 315–17.

[229] *Cf.* Islamic Republic of Iran v. Boeing Co., 477 F. Supp. 142, 143 (D.D.C. 1979).

[230] *See* Goodyear Tire & Rubber Co. v. McDonnell Douglas Corp., 820 F. Supp. 503, 507 (C.D. Cal. 1992) (finding that California, the venue where the events causing a brake failure that led to a crash, was more convenient than Texas, where the crash took place).

[231] 28 U.S.C. § 1404(a) has also been utilized to transfer cases to a forum that has personal jurisdiction over a defendant where the transferor court lacks personal jurisdiction. *See, e.g.*, Mangia Media Inc. v. Univ. Pipeline, Inc., 846 F. Supp. 2d 319, 324 (E.D.N.Y. 2012).

[232] 28 U.S.C. § 1631.

jurisdiction; (2) the transferee court could have exercised jurisdiction at the time the action was filed; and (3) the transfer is in the interest of justice."[233] When one or more defendants successfully challenge personal jurisdiction, 28 U.S.C. § 1631 permits a court to transfer the case to a forum that has personal jurisdiction.[234] Essentially, this statute is a fallback option for a court that finds that one or more defendants are not subject to personal jurisdiction, but does not want to dismiss the case.[235] Because aviation cases often involve numerous defendants from across the country or the world, including aircraft and component manufacturers and sellers, aircraft owners, maintenance facilities, and pilots, one or more defendants very likely will have legitimate challenges to personal jurisdiction.[236] This is especially true if the case is brought in a venue far from where the aircraft operated or crashed.[237] Furthermore, as discussed in part I.B.1, the Supreme Court's decision in *Daimler* is likely to increase both the number and the success rate of challenges to personal jurisdiction.[238] With personal jurisdiction now more limited in light of *Daimler*, transfers to cure a want of jurisdiction will likely become more common, and 28 U.S.C. § 1631 will become an important tool for defendants. Utilizing this statute will allow a defendant the opportunity to advocate for a potential alternative forum, which seeking outright dismissal for lack of personal jurisdiction does not provide.

4. Atlantic Marine *and Transfers Involving Forum Selection Clauses*

Many aviation cases involve tort claims with victims who had no contractual relationship with any of the potential defendants.[239] However, disputes between a manufacturer and an air-

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[233] Molina-Camacho v. Ashcroft, 393 F.3d 937, 942 (9th Cir. 2004).

[234] 28 U.S.C. § 1631; *see* Ross v. Colo. Outward Bound Sch., Inc., 822 F.2d 1524, 1526–27 (10th Cir. 1987); Gallant v. Trustees of Columbia Univ., 111 F. Supp. 2d 638, 644–45 (E.D. Pa. 2000).

[235] *See Ross*, 822 F.2d at 1526.

[236] *See* Martinez v. Aero Caribbean, 764 F.3d 1062, 1064 (9th Cir. 2014); Crouch v. Honeywell Intern, Inc., 682 F. Supp. 2d 788, 791–92 (W.D. Ky. 2010); Kern v. Jeppesen Sanderson, Inc., 867 F. Supp. 525, 533–34 (S.D. Tex. 1994).

[237] *See* Helicopteros Nacionales de Colom., S.A. v. Hall, 1045 S. Ct. 1868, 1870–71 (1984).

[238] *See supra* Section II.B.1.

[239] *See, e.g.*, Nat'l Union Fire Ins. Co. of Pittsburgh v. Dassault Falcon Jet Corp., 263 F. App'x 604, 605 (9th Cir. 2008); Bieberle v. United States, 255 F. Supp. 2d 1190, 1193 (D. Kan. 2003).

craft purchaser or operator, or a claim only involving damage to the aircraft, may be limited to claims based in contract.[240] Such claims will often involve a forum selection clause.[241] A recent Supreme Court decision, *Atlantic Marine Construction Co. v. United States District Court*,[242] substantially altered the transfer analysis under 28 U.S.C. § 1404(a) when a valid forum selection clause is present.

Enforcement of forum selection clauses have long been favored in the federal courts,[243] but until recently, it was just one of many factors to consider in a "flexible and individualized" transfer analysis.[244] In *Atlantic Marine*, however, the Supreme Court departed from the discretion generally vested in the district courts and gave such clauses a substantially greater impact.[245] The Court held that a forum selection clause changes the traditional transfer analysis under 28 U.S.C. § 1404(a) in three ways.[246] First, the plaintiff's choice of forum is now entitled to no weight, and the burden of convincing the court to disregard the forum selection clause falls on the plaintiff.[247] Second, the private interest factors are eliminated from the analysis; only the public interest factors may be considered.[248] The Court deemed an agreement to a forum selection clause to be a waiver of all private convenience-related concerns about the forum.[249] Finally, regardless of the original choice of forum, the choice of law rules of the forum specified in the forum selection clause must be applied.[250]

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[240] *See, e.g.*, Reno Flying Servs., Inc. v. Piper Aircraft, Inc., No. 13-cv-04346 NC, 2014 WL 6629531, at *1–5 (N.D. Cal. Nov. 21, 2014); Petroleum Helicopters, Inc. v. Apical Indus., Inc., No. 6:13-cv-00015, 2013 WL 2297066, at *8 (W.D. La. May 23, 2013).

[241] *See* Kostelac v. Allianz Glob. Corp. & Specialty AG, 517 F. App'x 670, 672–73 (11th Cir. 2013).

[242] 134 S. Ct. 568, 575 (2013).

[243] Estate of Myhra v. Royal Caribbean Cruises, Ltd., 695 F. 3d 1233, 1238 (11th Cir. 2012); M/S Bremen v. Zapata Off-Shore Co., 92 S. Ct. 1907, 1912–13 (1972).

[244] *See* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29–30 (1988) (noting that a forum selection clause "will be a significant factor that figures centrally in the district court's calculus").

[245] *See* Alex J. Whitman, *Assessing* Atlantic Marine*: How the Supreme Court's Strengthening of the Forum Selection Clause Will Impact Aviation Cases*, 1 ABA YOUNG LAWS. DIVISION AIR & SPACE LAW COMMITTEE NEWSL., No. 2, Jan. 2014, at 5 (providing analysis regarding *Atlantic Marine*).

[246] *Atlantic Marine*, 134 S. Ct. at 581.

[247] *Id.* at 581–82.

[248] *Id.* at 582.

[249] *Id.*

[250] *Id.*

The effect of *Atlantic Marine* is profound. In essence, absent exceptional circumstances, valid forum selection clauses must be enforced by the courts, making them extremely powerful tools for aviation defendants.[251] In fact, a recent Fifth Circuit decision involving a helicopter crash in the Gulf of Mexico found that a forum selection clause applicable to only one of several defendants, which was included in an unsigned warranty provision, had to be enforced regardless of the effect enforcement had on the defendants who were not subject to the forum selection clause.[252] As a result, a case involving an indivisible injury caused by the actions of three separate potentially liable defendants was severed into separate actions in separate forums.[253]

Under *Atlantic Marine*, parties' contracts with forum selection clauses, even ones included in unsigned form warranties,[254] would appear to trump most considerations of convenience, judicial economy, or practicality. Furthermore, even outside of the context of motions to transfer, *Atlantic Marine* was nothing less than a full-throated endorsement of forum selection clauses, which can be used to support other efforts to dismiss in favor of state or international forums as well.[255] Thus, as it stands now, *Atlantic Marine* has tilted the playing field substantially in favor of defendants who can point to a forum selection clause, even if there is no evidence that the clause was a material, bargained-for part of a contract—and even if the clause is in a document that was never signed or acknowledged by the plaintiff.[256]

Atlantic Marine has had an immediate impact on litigation in the lower courts. As of the date of the submission of this article, just over a year after the case was decided, *Atlantic Marine* has been cited in over 350 published cases.[257] However, while the Supreme Court likely intended to establish a bright line rule, lower courts are struggling to apply the principles of *Atlantic Marine* in different fact patterns. For example, in reversing a dis-

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[251] *See id.*

[252] *In re* Rolls Royce Corp., 775 F.3d 671, 681 (5th Cir. 2014).

[253] *Id.* at 683.

[254] *See* Lyon v. First Choice Loan Servs., Inc., No. 15-cv-00269-CMA-NYW, 2015 WL 3956366, at *3 (D. Colo. June 29, 2015).

[255] *See* Pappas v. Kerzner Int'l Bah. Ltd., 585 F. App'x 962, 967 (11th Cir. 2014) (relying upon *Atlantic Marine* to support forum non conveniens dismissal in favor of Bahamas pursuant to forum selection clause).

[256] *See Lyon*, 2015 WL 3956366, at *3; Barilotti v. Island Hotel Co., No. 13-23672-CIV, 2014 WL 1803374, at *3 (S.D. Fla. May 6, 2014).

[257] *See Atlantic Marine*, 134 S. Ct. 568 (Westlaw KeyCite as of February 12, 2015). As of November 8, 2015, *Atlantic Marine* has been cited in over 600 cases. *Id.*

trict court's conclusion that *Atlantic Marine* did not eliminate a district court's discretion on whether to grant or deny severance under Federal Rule of Civil Procedure 21 in a case involving nonparties to the forum selection clause, the Fifth Circuit fashioned a new three-part test for severance and transfer in cases where a forum selection clause is present, which does not appear to consider the public interest transfer factors specifically preserved by *Atlantic Marine*.[258] Other courts have come to divergent conclusions when there are multiple forum selection clauses with multiple defendants that point to different forums; one court applied *Atlantic Marine* and split up the case,[259] while another disregarded *Atlantic Marine* entirely.[260] Still other courts have declined to apply *Atlantic Marine* and do not give a forum selection clause controlling weight when the language of the clause is permissive rather than mandatory.[261] As the lower courts continue to struggle with the effect of *Atlantic Marine*, further guidance from the Supreme Court will likely be necessary.

D. Forum Non Conveniens

When a case is pending in federal court and a defendant wishes to move the case to a different forum within the United States, the federal transfer statutes provide a well-established method of doing so.[262] However, if the change of venue would involve an entirely different court system, such as from one state court's system to another or from a federal court to the courts of a foreign country, the defendant must utilize the related doc-

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[258] *Compare In re* Rolls Royce Corp., 775 F.3d 671, 681 (5th Cir. 2014) (district courts are to (1) weigh the private factors in favor of the contractually agreed forum; (2) consider the private factors as to non-signatories to the forum selection agreement; and (3) determine whether this weighing is outweighed by the interest of judicial economy of having all claims considered in a single lawsuit), *with Atlantic Marine*, 134 S. Ct. at 582 (stating that "a district court may consider arguments about public-interest factors only").

[259] *See* 1-Stop Fin. Serv. Ctrs. of Am., LLC v. Astonish Results, LLC, No. A-13-CA-961-SS, 2014 WL 279669, at *9–11 (W.D. Tex. Jan. 23, 2014) (severing and transferring claims asserted by plaintiffs against two defendants to two different forums based upon separate forum selection clauses).

[260] *See* Samuels v. Medytox Sols., Inc., No. CIV.A. 13-7212 SDW, 2014 WL 4441943, at *7–8 (D.N.J. Sept. 8, 2014) (refusing to apply *Atlantic Marine* when plaintiff filed claims against two defendants, each with valid forum selection clauses in their favor, specifying different forums).

[261] *See, e.g.*, Networld Commc'ns, Corp. v. Croatia Airlines, D.D., No. CIV.A. 13-4770 SDW, 2014 WL 4724625, at *2–3 (D.N.J. Sept. 23, 2014); RELCO Locomotives, Inc. v. AllRail, Inc., 4 F. Supp. 3d 1073, 1085 (S.D. Iowa 2014).

[262] *See supra* Section III.C.

trine of forum non conveniens.[263] This doctrine is especially helpful to defendants in aviation cases where the crash took place on foreign soil, as foreign crash cases are frequently brought in the United States against U.S. companies and manufacturers to take advantage of the United States' more generous damages system.[264] While there is "ordinarily a strong presumption in favor of the plaintiff's choice of forum,"[265] although less so for foreign plaintiffs,[266] courts have not hesitated to dismiss cases in favor of more convenient foreign forums in the face of a strong evidentiary showing by the defendant.[267]

While certain factors or standards vary by jurisdiction, analysis of a case under the doctrine of forum non conveniens generally follows a three-step process.[268] First, the defendant must show that the forum is "available" to address the dispute.[269] This requirement is satisfied when the defendant is subject to jurisdiction in the proposed alternative forum.[270] When the proposed alternative forum is the jurisdiction where the crash took place, defendants will normally not contest whether they are subject to jurisdiction in that forum.[271] Further, in most cases, because the remedies available in the proposed alternative forum are much more favorable for defendants, parties seeking to take advantage

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[263] *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981); Lambert v. Goodyear Tire & Rubber Co., 332 Ill. App. 375, 378 (Ill. App. Ct. 2002).

[264] Thad Thano Dameris et al., *The United States is No Longer the Courthouse for the World*, 22 No. 1 AIR & SPACE LAW. 9, 12 (2008) (citing *Reyno*, 454 U.S. at 252 n.18).

[265] *Reyno*, 454 U.S. at 255.

[266] La Seguridad v. Transytur Line, 707 F.2d 1304, 1307 (11th Cir. 1983).

[267] *E.g.*, *Reyno*, 454 U.S. at 261; Satz v. McDonnell Douglas Corp., 244 F.3d 1279, 1284 (11th Cir. 2001); Clerides v. Boeing Co., 534 F.3d 623, 630 (7th Cir. 2008); Magnin v. Teledyne Cont'l Motors, 91 F.3d 1424, 1429–31 (11th Cir. 1996); Dahl v. United Techs. Corp., 632 F.2d 1027, 1032–33 (3d Cir. 1980); Melgares v. Sikorsky Aircraft Corp., 613 F. Supp. 2d 231, 237, 252–53 (D. Conn. 2009); Jennings v. Boeing Co., 660 F. Supp. 796, 807–09 (E.D. Pa. 1987).

[268] Certain courts include a fourth step: whether the plaintiffs can reinstate their suit in the alternative forum without undue inconvenience or prejudice. Galbert v. W. Caribbean Airways, 715 F.3d 1290, 1295 (11th Cir. 2013); Leon v. Million Air, Inc., 251 F.3d 1305, 1309–11 (11th Cir. 2001).

[269] *In re* Air Crash Near Athens, Greece on Aug. 15, 2005, 479 F. Supp. 2d 792, 797 (N.D. Ill. 2007).

[270] *See Reyno*, 454 U.S. at 254 n.22 ("Ordinarily, this requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction.") (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506–07 (1947)).

[271] *See In re* Air Crash Over the Taiwan Straits on May 25, 2002, 331 F. Supp. 2d 1176, 1180–83 (C.D. Cal. 2004); Zermeno v. McDonnell Douglas Corp., 246 F. Supp. 646, 651 (S.D. Tex. 2003).

of forum non conveniens dismissal will often consent or stipulate to the jurisdiction of the foreign court.[272]

Second, the moving defendant must show that the proposed alternative forum is "adequate" to resolve the dispute.[273] A forum is "adequate" if it can provide for the litigation of the subject matter of the dispute and potentially offer redress for the plaintiffs' injuries.[274] Importantly, plaintiffs cannot complain that the theories of liability are different or that their damages would be less under the foreign forum's law; so long as it is shown that they have a remedy and will be treated fairly, the alternative forum will be considered adequate.[275] As the remedies provided by American courts are usually far more generous than their foreign counterparts, this precedent is very favorable for defendants.[276]

Additionally, while the moving party has the burden to establish that an alternative forum is adequate, plaintiffs must nevertheless raise any reason to the trial court why the forum may be inadequate.[277] In *Galbert v. W. Caribbean Airways*, the plaintiffs, who were representatives of decedents killed in the crash of an aircraft flying between Panama and Martinique, originally filed suit in the Southern District of Florida, but their claims were dismissed for forum non conveniens in favor of the courts of Martinique.[278] The Martinique court subsequently determined, however, that because the plaintiffs initially chose to file suit in the Southern District of Florida, the court was precluded by the Montreal Convention from exercising jurisdiction over the

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[272] *See* King v. Cessna Aircraft Co., 562 F.3d 1374, 1382 (11th Cir. 2009) (holding that Italy, the site of an aircraft crash, was an available alternative forum "because Cessna is willing to submit to jurisdiction and is amenable to process there"); *Magnin*, 91 F.3d at 1429 ("Here the defendants agreed to submit to the jurisdiction of an alternative forum (in France), rendering that forum available."); Da Rocha v. Bell Helicopter Textron, Inc., 451 F. Supp. 2d 1318, 1322 (S.D. Fla. 2006) (stipulation by aircraft and engine manufacturers to jurisdiction of Brazil's courts made forum available).

[273] *In re Air Crash Near Athens, Greece*, 479 F. Supp. 2d at 797.

[274] *See King*, 562 F.3d at 1382. Usually, this can be demonstrated with the affidavit of an attorney from the proposed alternative jurisdiction. *Da Rocha*, 451 F. Supp. 2d at 1322.

[275] *Reyno*, 454 U.S. 235, 254–55 (1981); Lueck v. Sundstrand Corp., 236 F.3d 1137, 1144–45 (9th Cir. 2001).

[276] *See* Freer, *supra* note 170, at 973–74 (discussing the effect of this aspect of *Reyno*'s holding).

[277] Galbert v. W. Caribbean Airways, 715 F.3d 1290, 1295 (11th Cir. 2013).

[278] *Id.* at 1292–93.

case.[279] Based on that ruling, the plaintiffs moved in the Florida district court to vacate the original dismissal order.[280] The district court denied their motion.[281] On appeal, the Eleventh Circuit affirmed the denial, concluding that, because the plaintiff did not raise the Montreal Convention issue in their opposition to the forum non conveniens motion, they waived their argument.[282] Thus, *Galbert* underscores the importance of raising all arguments in opposition to a forum non conveniens motion, regardless of who has the burden of proof.

Finally, the moving defendant must demonstrate that the private and public interests favor adjudication of the dispute in the alternative forum.[283] As in a transfer analysis, the private interest factors include "the relative ease of access to sources of proof;" the availability of compulsory process for the attendance of unwilling witnesses, and the cost of obtaining the attendance of willing witnesses; the possibility of a view of the premises, if appropriate; and "all other practical problems that make trial of a case easy, expeditious, and inexpensive."[284] The public interest factors include "administrative difficulties flowing from court congestion; the 'local interest in having localized controversies decided at home;'" the interest in having a case tried in a forum at home with the applicable law; "the avoidance of unnecessary problems in conflict of laws; or in the application of foreign law, and the unfairness of burdening citizens in an unrelated forum with jury duty."[285]

Foreign crash cases frequently present defendants with numerous facts that weigh in favor of dismissal. The wreckage of the aircraft, which is usually the most important piece of evidence, is often kept in the country where the crash took place, under the auspices of that country's authorities.[286] Critical evidence, eyewitnesses to the crash, and individuals familiar with facts relating to the maintenance and history of the aircraft will

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279 *Id.* at 1293.

280 *Id.* at 1294.

281 *Id.*

282 *Id.* at 1295.

283 Lueck v. Sundstrand Corp., 236 F.3d 1137, 1145 (9th Cir. 2001).

284 Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 n.6 (1981) (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947)).

285 *Id.*

286 *See* Clerides v. Boeing Co., 534 F.3d 623, 629 (7th Cir. 2008); Melgares v. Sikorsky Aircraft Corp., 613 F. Supp. 2d 231, 242 (D. Conn. 2009).

also frequently be located in the alternative forum.[287] Documentary evidence will also usually be located in the alternative forum, though if the aircraft was manufactured in the United States, this may be balanced by evidence that the aircraft was designed and manufactured in or near the forum state.[288] However, a defendant's offer to make witnesses and evidence available in the foreign forum will often alleviate the inconvenience of transporting documents elsewhere.[289] The foreign state's investigative authorities may also lead or fully conduct the investigation of the crash, ensuring that important evidence will be located in the foreign forum; when this occurs, it demonstrates and underscores that country's clear interest in any civil controversy arising from the crash.[290] A critical factor can also be a defendant's inability to join parties essential to its defense of the case in the United States, which goes to both convenience and judicial economy, not to mention issues of fundamental fairness.[291]

Typically, in an international forum non conveniens case, private and public interest factors are weighed between the state where the case was brought and the foreign nation where the crash took place.[292] Thus, while broader connections to the United States such as regulatory concerns and the location of manufacturers may be relevant, they are usually not as pertinent

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[287] *See* Fortaner v. Boeing Co., 504 Fed. App'x. 573, 581 (9th Cir. 2013); *Melgares*, 613 F. Supp. 2d at 242–43.

[288] *See* Lewis v. Lycoming, 917 F. Supp. 2d 366, 371–72 (E.D. Pa. 2013) (finding location of wreckage in United States and manufacturing records in United States to weigh against dismissal for forum non conveniens).

[289] *See Clerides*, 534 F.3d at 629; Gambra v. Int'l Lease Fin. Corp., 377 F. Supp. 2d 810, 819 (C.D. Cal. 2005); Sun v. Singapore Airlines, Ltd., No. 02 L 13640, 2004 WL 601953, at *1 (Ill. Cir. Ct. Mar. 19, 2004).

[290] *See Clerides*, 534 F.3d at 630; Lueck, v. Sundstrand Corp., 236 F.3d 1137, 1147 (9th Cir. 2001); Baumgart v. Fairchild Aircraft Corp., 981 F.2d 824, 836 (5th Cir. 1993); *Melgares*, 613 F. Supp. 2d at 249; Van Schijndel v. Boeing Co., 434 F. Supp. 2d 766, 776–77, 784 (C.D. Cal. 2006).

[291] *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 259 (1981); Dahl v. United Techs. Corp., 632 F.2d 1027, 1031–33 (3d Cir. 1980); *In re* Air Crash Over Mid-Atl. on June 1, 2009, 760 F. Supp. 2d 832, 846 (N.D. Cal. 2010); *Melgares*, 613 F. Supp. 2d at 247; Jennings v. Boeing Co., 660 F. Supp. 796, 806 (E.D. Pa. 1987); *see also supra* Section II.B.3. (discussing plaintiffs' risk of not choosing a forum that can hear claims against third party defendants).

[292] *See Dahl*, 632 F.2d at 1028 (comparing chosen forum of Delaware against the crash site of Norway); *accord* Gonzalez v. Chrysler Corp., 301 F.3d 377, 383–84 (5th Cir. 2002) (comparing chosen form of Texas against crash site of Mexico); *cf.* Lacey v. Cessna Aircraft Co., 862 F.2d 38, 39 (3d Cir. 1988) (weighing interest of Pennsylvania against crash site of British Columbia).

as connections between the crash and the individual state.[293] However, a recent forum non conveniens decision, *Bochetto v. Piper Aircraft Co.*, placed far greater emphasis on a case's connections with the United States as a whole.[294] On its face, *Bochetto* is very similar to the Supreme Court's decision in *Reyno*: an aircraft manufactured in the United States was exported to Belgium and was later taken to Portugal, where it subsequently crashed.[295] 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.[296] 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 re-weigh the private and public interest factors as to the case's network of connections to the United States as a whole, not just Pennsylvania.[297] In this respect, *Bochetto* is a significant departure from the traditional approach courts take in weighing the forum non conveniens factors.[298] 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.

There are several other unique considerations that aviation attorneys must consider in seeking forum non conveniens dismissal. Forum non conveniens differs from transfer, which simply changes the forum to another court within the same judicial system, in that the lawsuit must actually be dismissed and re-filed in another judicial system.[299] Because this frequently could cause a new lawsuit to run afoul of a statute of limitations, or

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[293] *See, e.g., Melgares*, 613 F. Supp. 2d at 249, 252 (granting defendants' motion, despite the fact that defendants' factories were located in the forum state).

[294] Bochetto v. Piper Aircraft Co., 94 A.3d 1044, 1056 (Pa. Super. Ct. 2014).

[295] *Id.* at 1045.

[296] *Id.* at 1046–47.

[297] *Id.* at 1054–56.

[298] *See* Windt v. Quest Commc'ns Int'l, Inc., 529 F.3d 183, 191 (3d Cir. 2008) (rejecting the argument that the forum non conveniens inquiry looks to the connections to the United States rather than the state where the court is located); Torreblanca de Aguilar v. Boeing Co., 806 F. Supp. 139, 144 (E.D. Tex. 1992) ("The fact that some evidence concerning the aircraft's design and manufacture may be located elsewhere in the United States does not make the Eastern District of Texas a convenient forum.").

[299] *See* Norwood v. Kirkpatrick, 349 U.S. 29, 30–31 (1955).

force parties into courts where the exercise of personal jurisdiction is questionable, courts will often condition a forum non conveniens dismissal upon the defendant's waiver of the defenses of limitations or personal jurisdiction.[300] Defendants seeking to use this defense would be wise to notify their co-defendants of their planned course of action and obtain their consent or cooperation. Plaintiffs will often join local defendants for other venue purposes and reach an understanding with them to cooperate in venue matters.[301] A co-defendant's refusal to cooperate can quickly undermine a forum non conveniens dismissal.[302]

Finally, when a case is pending in state court, defendants should be aware of any statutory standards or limitations regarding the state's forum non conveniens doctrine. While some states, like the federal courts, have adapted forum non conveniens from the common law, other states have codified the doctrine with different requirements and standards, or their courts have developed standards that deviate from federal law.[303] Some states, such as Texas and Illinois, have implemented time limits for moving to dismiss on forum non conveniens.[304] Others, such as Florida, require that all defendants stipulate to certain conditions, such as a waiver of limitations, for the motion to be granted, and impose time limits on the dismissed plaintiff to re-file the case.[305]

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[300] Gschwind v. Cessna Aircraft Co., 161 F.3d 602, 605 (10th Cir. 1998); Gambra v. Int'l Lease Fin. Corp., 377 F. Supp. 2d 810, 827–28 (C.D. Cal. 2005); Zermeno v. McDonnell Douglas Corp., 246 F. Supp. 2d 646, 658–59 (S.D. Tex. 2003).

[301] CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3807 (4th ed. 2014).

[302] *See Zermeno*, 246 F. Supp. 2d at 659.

[303] *See, e.g.*, Mar-Land Indus. Contractors, Inc. v. Caribbean Petroleum Ref., L.P., 777 A.2d 774, 778 (Del. 2001) (under Delaware law, a case may only be dismissed for forum non conveniens if litigation in Delaware would impose an "overwhelming hardship" upon the defendant). *But see* Kinney Sys., Inc. v. Cont'l Ins. Co., 674 So.2d 86, 93 (Fla. 1996) (adopting the federal doctrine of forum non conveniens).

[304] ILL. S. CT. R. 187(a) (requiring a motion to dismiss for forum non conveniens to be filed within ninety days after the last day allowed for the filing of the moving party's answer); TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(d) (West 2008) (requiring the motion to be filed no later than 180 days after the time required for filing a motion to transfer venue).

[305] FLA. R. CIV. P. 1.061(b–h).

IV. CONCLUSION

The forum where the crash site is located is by no means the one in which an aviation case must be litigated. A creative plaintiff's lawyer will discover a number of potentially viable forums, and must then engage in the arduous task of deciding which is the most favorable. Conversely, skilled defense attorneys have a number of tools at their disposal in their attempt to get the case out of the plaintiff's chosen forum and into one that is more favorable—or at a minimum, convince a court to apply the law of a more favorable jurisdiction, regardless of which forum the case is actually litigated in. Counsel for both sides must be fully prepared for this inevitable battle, as winning or losing the lawsuit might just depend upon where the case lands after the crash.


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Comments


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