Where to Sue in Aviation Products Liability Cases

Albert R. Abramson
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INTRODUCTION

In seeking an answer to the question of where to sue in aviation products liability cases, plaintiff’s counsel is often presented with many alternatives. Since this type of action is seldom limited by state boundaries, he has the unique opportunity of selecting his forum and his adversaries. This is an initial advantage which should not be wasted, but should be utilized to the utmost, by choosing the court, whether state or federal, where the most equitable and most favorable results can be expected for his client. Nowhere in tort law is this more important, since the typical case arises out of an accident in a remote and distant location, usually involving several possible non-resident defendants. The choice of forum will determine future proceedings and could well mean the difference between a well-prepared case and a successful trial or a disastrous result after thousands of hours of wasted effort. The decision as to where to file suit is necessarily dependent on who will be the defendants. Accordingly, plaintiff’s counsel must give thoughtful consideration to the selection of parties, as it is related to the choice of forum.

The ideal forum for the trial of an aviation products liability case, as any other, is in a friendly court, where plaintiff’s attorney has had a long association with the judge, knows the court attachés, the clerks, the bailiffs or marshals, the reporters, has appeared frequently, and is very familiar with the procedures. Of course, it may not be an advantage to be on a first-name basis with the judge, but it certainly would not hurt plaintiff’s case. This forum is in his

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own backyard, rather than the defendant’s, where plaintiff’s attorney, and possibly the plaintiff and some of his witnesses, are known, liked and respected. Unfortunately, this type of case infrequently is tried in such a court.

In aviation products litigation the plaintiff’s attorney usually has many forums from which to choose, and they increase with the number of possible defendants. In addition to the manufacturer of the aircraft, they include: the manufacturers of components and sub-assemblies within them; the distributors; the owner and former owner; and maintenance facilities and fixed base operators, along with the pilot or his estate. As numerous defendants add to the various possible forums, they complicate selection of the proper one. The inclusion of one defendant may prevent filing in the court of choice or create the danger of removal. In such a case, consideration must be given as to the necessity of his presence as a party. Additionally, when selecting a particular court, the plaintiff’s attorney must always give thought to possible future motions by a defendant to change venue, dismiss or remove the case to a federal court, and steps should be taken early to block such moves.

Accordingly, the skilled plaintiff’s attorney gives as much thought to his choice of forum as he does to his discovery, preparation for trial and trial itself. He conducts thorough legal research and factual investigation, knowing that his decision may well determine his success in the proceedings which follow. This article outlines for the plaintiff’s attorney various factors he should consider in making his choice between the state and federal forum and, within these judicial systems, the particular court, whether in a district, county or other political subdivision. The choice-influencing factors considered will be jurisdictional requirements as to subject matter and person, venue, choice of law rules, and general considerations such as procedures and ease of discovery, rules of evidence and other matters felt to be relevant. Areas of federally-created law will be discussed, such as the Federal Tort Claims Act, the Federal Death on the High Seas Act, Multidistrict Litigation Panel, and admiralty jurisdiction, some of which are applicable to state courts also. Emphasis will be placed on the choice between the state and federal forums and the strategy involved in insuring that plaintiff’s choice will not be disturbed by a defendant. Since most attorneys are familiar with their own state practice, that of the federal courts
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Where to sue will be highlighted. The advantages and disadvantages of state forums can be discussed only in general terms because of the great variation in their practices.

QUALITIES OF THE IDEAL FORUM

Undoubtedly, if other factors were equal, the best forum would be the local one, where the attorney knows the judge and court personnel quite well and is thoroughly familiar with the practice and rules of procedure. This is where the plaintiff's attorney will want to try his case if at all possible. Easy accessibility to the courthouse is very comfortable. He does not have to go far to file papers, check records, make and oppose motions, attend settlement and pretrial conferences, and try the case. All too often, unfortunately, he lets the advantage of his "home town" dictate his choice when other and more important factors make it wiser to file in a federal court or a distant court in his state, where he would have better law, more far-ranging discovery or a potentially higher verdict.

The goal of plaintiff's counsel is to file suit and try his aviation products case in the forum, whether federal or state, possessing the following four qualities, listed here not necessarily in order of importance:

1. Liberal Products Liability Law

About half of the states have adopted the doctrine of strict liability, at least as it is expressed in the Restatement of Torts, Section 402A. California has progressed beyond it and no longer requires that the product be "unreasonably dangerous." It was recently held that "unreasonable" is a negligence concept and has no basis in the law of strict liability. Of course, contributory negligence no defense, and that includes the failure to discover the defect. In California the defect can be patent and obvious and misuse of the product is no defense to the manufacturer if it was

foreseeable. Additionally, even though the manufacturer may have discovered a defect in his product and issued a warning to the employer of an injured plaintiff, the employer's disregard of it is not a defense if it was reasonably foreseeable.

2. Jurisdiction And Venue Over Crucial Defendants

Without this quality, plaintiff's attorney may find himself defending the conduct of an absent defendant, rather than attacking it. If a potentially responsible defendant is not a party, the others will undoubtedly point the finger of blame at him. If he is not there to defend himself, plaintiff may have to do so. It is far preferable for all potentially responsible defendants to be before the same court, where they can present their defenses, cross-complain and fight among themselves if they wish, helping the plaintiff's case at the same time. It is music to a plaintiff's attorney's ear to hear defense counsel tell the jury that the crash was a terrible tragedy, depriving a widow and orphan of their breadwinner, that they should be adequately compensated, but by the other defendants, not his client.

3. The Most Liberal Discovery Rules

This forum would be in the federal court and in states which have adopted the Federal Rules, or patterned their own discovery statutes after them. Unfortunately, there are still quite a few states where the "fishing expedition" objection is still sustained. The heart of an aviation products liability case is discovery, which necessitates easy access to thousands of documents in the manufacturer's file cabinets, running from original design proposals and engineering changes to service department deficiency, defect and malfunction reports. The plaintiff's attorney must also have the opportunity to take depositions of scores of personnel in the design, engineering, manufacturing, quality control, service and sales departments.

Federal Rule 26(b), the key to the federal discovery process, establishes a broad standard of relevancy. It provides that any party may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the action and reasonably calcu-

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lated to lead to the discovery of evidence admissible at trial. It applies to all five of the major discovery rules with only a few exceptions.

The 1970 amendments made remarkable changes in other federal discovery rules, particularly rule 34, which permits production, inspection or copying of documents, and inspection of objects relevant to the case, such as aircraft wreckage. Rule 34 is a key to the aviation plaintiff who must rely on thousands of documents possessed by the defendant to prepare his case. Prior to 1970, their production could be made only upon court order after a showing of good cause. The amendments deleted these requirements and substituted the "Request for Production of Documents," putting the burden on the defendant to reply within 30 days, wherein he must state which requested items will be made available and the reasons he objects to those not produced. [Federal Rules of Civil Procedure, 34(b).] The validity of his objections may be tested in court on a noticed motion [37(a)]. If no response is made, plaintiff may move for sanctions [37(d)]. This revised procedure was designed to encourage extra-judicial and more informal discovery and reduce the number of court appearances.

The Federal Rules of Civil Procedure apply to any action brought in federal court, including those in admiralty and ones which have been removed from state court. Since pretrial discovery is such a major factor in the ultimate disposition of an aviation products case, the plaintiff's attorney should assign great weight to it in making his choice between state and federal forums, if their discovery rules differ materially.

4. Expected Jury Verdict

One of the most important factors in the choice of forum, be it federal or state, is the expected amount of the jury verdict. The ultimate value of a case, whether determined by settlement or trial, is dependent upon trial locale. It is common knowledge that throughout this country there are high and low verdict areas, with California, New York, Illinois and Florida taking the lead. However, even within these states, areas—distant from the big cities—small towns, farming communities, bedroom suburbs, and places where the pace is slower and the attitude conservative—produce

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lower verdicts. Since the purpose of filing a suit is to obtain fair compensation for his clients, the plaintiff's attorney must give the highest consideration to filing in the forum which will produce a damage award commensurate with the losses sustained.

**General and Procedural Considerations**

Other considerations, both general and procedural, should be kept in mind when choosing a forum. The degree of court congestion varies in different areas of the country, both in state and federal courts. In some areas it is possible to go to trial within six months of filing, while in others, such as Chicago and New York, it takes four to five years. The financial ability of the plaintiffs to survive the delay may become a factor.

The nature of pretrial proceedings varies widely. Generally speaking, the federal forum asserts a greater degree of control over the case, since customarily it is assigned to one judge who stays with it from beginning to end. A plaintiff's attorney, as well as defense counsel, may not desire the consequent restriction on his freedom of action. Some districts require counsel to attend periodic status conferences so that the judge can keep abreast of developments in the case and direct future proceedings. Pretrial conference statements in the federal courts are usually much longer and more detailed than those in the states, requiring a complete listing of witnesses, documents and even the expected testimony. Very often state courts do not even require pretrial conferences and permit counsel for both plaintiff and defendant to proceed at their own paces.

A disadvantage to the federal forum from the plaintiff's viewpoint is the requirement that jury verdicts be unanimous. Any plaintiff's attorney can recite instances where a hung jury resulted when the division was nine-to-three or ten-to-two in his client's favor, whereas in a state court he would have had a verdict. Most state forums require that only three-quarters or five-sixths of the jurors concur. The composition of the federal jury panel is often drawn from the judicial district rather than from the county in which the court sits, as in the case of a state forum. This practice usually results in a more heterogeneous jury. People tend to regard service on the federal jury as being more prestigious than serving in the county. As a general rule, a federal jury consists of more
self-employed persons than employees of large corporations, a greater percentage of male jurors, and those of a higher socio-economic status, and not as many retired people as on state juries. The plaintiff's attorney must decide which type of jury panel is best suited for his case.

The subpoena power of the state court is limited to state boundaries and frequently to a specific distance, such as 150 miles, from where it sits. On the other hand, federal district courts may subpoena witnesses residing anywhere in the district where the court is sitting or within 100 miles of the courthouse even though across state boundaries. This difference may be important to plaintiff's counsel who anticipates he will have difficulty obtaining the attendance of unwilling witnesses.

The quality of the judiciary, best known by local practitioners, is certainly a factor to be considered in the choice of forum. Most state judges are elected to their positions for a specific term, whereas federal judges are appointed for life. The ranks of the federal bench may contain the antiquated tyrant, but also the enlightened student of the law who is unafraid to depart from the past and agree with the plaintiff's attorney that the time has come for new principles of law, as in the products liability field, reflecting the need for consumer protection. It is generally accepted that the quality of the federal bench is higher. One reason may be the training and experience received by most as state judges before appointment. The occupants of the federal bench usually require a greater degree of court decorum, and discipline is more readily enforced on the federal level. On the other hand, the state judiciary usually operates on a more informal basis.

It is the general practice in federal court for the judge to conduct practically all of the voir dire examination, limiting severely the questions an attorney may ask. On the other hand, in most state courts there is more liberality and the attorney is able to conduct his own voir dire, asking searching and far-reaching questions which will permit him to evaluate the prospective jurors, his purpose being to obtain at least an impartial panel, if he is not lucky

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enough to have his cousins on the jury or members of the church where he sings in the choir. All trial attorneys know that the composition of the panel is extremely important. No matter how good a plaintiff's case is, liability clear, and the law on his side, if it begins with a jury which is biased or prejudiced against plaintiff's interest, he will have little chance of success. Therefore, the plaintiff's counsel's right to voir dire is an extremely important factor to be considered in making a choice of forum.

Another consideration, possibly of less importance, is the right of the federal judiciary to comment on the evidence. Any experienced trial lawyer is well aware that the jury is easily influenced by the attitude of the court toward his case, even though it may be expressed subtly. A federal judge can advise the jury that he believes a witness, that certain testimony is inherently probable or improbable, and comment on the worth of a case as a whole. Most state judges do not have this power, and it has often been held judicial error for a judge to express his feelings to a jury. Also, in federal court, the judge's power to grant directed verdicts is much greater than in a state court. This would be a consideration to a plaintiff's attorney only if he had a very weak case and was worried about a nonsuit or a directed verdict.

THE RISK OF CONSOLIDATION BY JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

A more specific procedural difference between state and federal courts encountered in aviation products liability cases is the possibility of pretrial consolidation in the federal courts. Customarily, the plaintiff's attorney has a great amount of leeway in the manner in which he prepares his aviation case. This discretion may be severely restricted, however, if the case is in federal court and is factually related to cases pending in other districts, involves unusual multiplicity or complexity of factual issues, arises from a common disaster, or is a products liability case. In these cases, the Judicial Panel on Multidistrict Litigation, created by a recent addition to the United States Code, is empowered to transfer pending actions to a single federal district court for coordinated or consolidated pretrial proceedings. This will be done upon the Panel's de-

termination that such a transfer will be for the convenience of parties and witnesses and will promote the just and efficient conduct of the action.\textsuperscript{11} The statutory scheme comprehends that after the pretrial proceedings, the consolidated actions will be remanded for the purposes of trial to the districts from which they were transferred.\textsuperscript{12}

In these types of cases, the clerk of the federal district court in which an action is pending is required to notify the administrative office of the United States courts of the existence of such suits for consideration by the Judicial Panel on Multidistrict Litigation. The Panel may order pretrial consolidation on its own initiative. In addition, any party may make a motion seeking a determination by the Panel that transfer of all related cases for coordinated pretrial procedures is appropriate. The Panel's determination is then made upon notice to interested counsel, after a hearing (which can be held in any federal district). The ruling of the Panel is not subject to ordinary appeal procedures, and review may be had only by extraordinary writ pursuant to 28 U.S.C. § 1651.\textsuperscript{13}

Transfer under section 1407 is a mixed bag of blessings for plaintiff's counsel. The Manual for Complex Litigation promulgated by the Judicial Panel on Multidistrict Litigation provides for the appointment of "liaison" counsel.\textsuperscript{14} Customarily, plaintiff's liaison counsel is the attorney with the "largest stake" or greatest number of cases involved. After the appointment of liaison counsel, the conduct of pretrial proceedings, discovery, and tactics are determined largely by him. While all counsel may have input in his decisions, it is obvious that attorneys may have competing and significantly different approaches to the same general task. Also, aviation accident litigation is normally transferred under section 1407 to the district in which the accident occurred,\textsuperscript{15} and plaintiff's counsel may find participation in pretrial discovery highly impractical, either because of calendar conflicts or because of tactical economic considerations.

\textsuperscript{15} In re Air Crash Disaster at Tweed-New Haven Airport, 343 F. Supp. 951 (J.P.M.L. 1972).
Furthermore, despite the provisions of section 1407(a) that consolidated cases "shall be remanded . . . at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated . . . ", there is recent authority that the transferee court has the power under 28 U.S.C. § 1404(a) to refuse to remand, and consolidate the actions for trial in the transferee district.\footnote{Pfizer, Inc. v. Lord, 447 F.2d 122 (2d Cir. 1971).} The inconvenience and impracticality which may result from pretrial transfer may thus continue through the trial itself. The Pfizer decision is contrary to the letter and spirit of the federal transfer of venue section,\footnote{28 U.S.C. § 1404(a) (1970).} but must be considered with potential 1407-type cases.\footnote{See Comment, Consolidation and Transfer in the Federal Courts: 28 U.S.C. Section 1407 Viewed in Light of Rule 42(a) and 28 U.S.C. Section 1404(a), 22 HAST. L.J. 1289 (1971), for arguments supporting trial in transferor court after complete pretrial.}

On the other hand, consolidation of cases for pretrial discovery may enable counsel to take advantage of the experience of his more learned colleagues. Often the liaison counsel will be an experienced trial lawyer, with many years of aviation litigation behind him; nevertheless, there is no guarantee that this "experienced litigator" will obtain all the information that an absent counsel might deem appropriate. In addition, a common hazard to the "coat-tailing" plaintiff's attorney is the possibility that liaison counsel, who has done most of the work and is best informed to prepare the first case, may settle and leave the other plaintiff's counsel in the lurch and unprepared.

Thus when counsel is involved in a mass disaster accident or products case of wide applicability, it is imperative to decide whether to seek or oppose consolidation under section 1407. As stated in section 1407, the fundamental criteria relevant to a determination of whether to transfer are "the convenience of parties and witnesses" and the "just and efficient conduct of such action"; however, the panel will also take into consideration whether or not the common questions of fact are sufficiently complex to warrant consolidation.\footnote{2 U.S. CODE CONG. & AD. NEWS 1901 (1968).} Commentators have urged other criteria which include convenience of counsel; central geographic location; adequate transportation, lodging, and restaurant facilities; adequate court-
house; and adequate document reproduction facilities in the trans-
feree district. Consideration must be given to the number of cases 
involved, and if that number is low, a party seeking 1407 transfer 
may have a strong burden to show that the common questions of 
fact are so complex and the necessary discovery so lengthy as to 
overcome the inconvenience to a party whose case is being trans-
ferred.

Implicit in the Panel's decision to transfer is the selection of the 
transferee district. Generally, aviation accident cases are transferred 
to the place of the crash, where witnesses and documents are pre-
sumably available for pretrial discovery. However, cases have been 
sent to the district where the defendant manufactures its aircraft, 
engine, or component part. Other factors may affect the selection, 
such as the number of suits pending in the various districts. The 
one with the greatest number has been held the most convenient 
district for pretrial consolidation. Finally, a relevant, though 
necessarily delicate, factor is the ability of the transferee judge to 
conduct the complex pretrial and discovery proceedings.

It is apparent that the possibility of transfer under section 1407 
is a factor for consideration when choosing a forum. It can be 
avoided only if the suit is in a state court and there is no possibility 
of removal.

PROPOSED FEDERAL RULES OF EVIDENCE

A final federal-state choice influencing factor remains on the 
horizon. Whenever the proposed Federal Rules of Evidence finally 
become effective, their liberality may make the federal forum more

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20 Farrell, Multidistrict Litigation in Aviation Accident Cases, 38 J. Air L. & 
Com. 159, 163 (1973).
Transfer was ordered for 30 cases filed in 7 federal district courts, in re Midair 
Collision Near Fairland, Ind., 309 F. Supp. 621 (J.P.M.L. 1970); transfer was 
refused for 21 cases filed in 5 district courts in In re Air Crash Disaster at Falls 
22 In re Air Crash Disaster at Tweed-New Haven Airport, 343 F. Supp. 951 
(J.P.M.L. 1972).
24 In re Midair Collision Near Fairland, Ind., 309 F. Supp. 621 (J.P.M.L. 
1970).
attractive to plaintiff." Of course, this depends on the particular case and the comparative liberality of state rules of evidence. The Proposed Rules are very similar to the California Evidence Code, and not unexpectedly because they served as the model.

Probably the most revolutionary change made in the Supreme Court draft of the Proposed Rules is the relaxation of the hearsay rule. The House Judiciary Committee made several changes in the original draft limiting the autonomy of the Supreme and lower federal courts to adopt new rules and exceptions, but the thrust of the Supreme Court draft remains basically unchanged. Hearsay is defined, and its exceptions are listed in five rules in the House draft. Examples of this narrowing of the hearsay rule include the

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27 The Advisory Committee on the Rules of Evidence, appointed by the United States Supreme Court, approved a uniform set of federal evidence rules on November 20, 1972. Order, 56 F.R.D. 183 (Sup. Ct. 1972). These rules, which were to become effective July 1, 1973, were submitted to the Congress on February 5, 1973. The House Judiciary Committee's Special Subcommittee on Reform of Federal Criminal Laws (now renamed the Criminal Justice Subcommittee) decided that it would be impossible to analyze the proposed Rules (H.R. 5463, 93d Cong., 1st Sess. (1973)) by the July 1, 1973 date; so, it sought and obtained legislation to delay the effective date of the Rules until they were expressly approved by Congress. Act of Mar. 30, 1973, Pub. L. No. 93-12, § 1, 87 Stat. 9 applying 28 U.S.C. § 2071 (1949).

The Subcommittee held hearings during the spring of 1973; and on June 28, 1973 circulated a provisional draft of the Rules which was published in the Congressional Record. The Subcommittee's final report on its draft of the rules was October 10, 1973, and the full Judiciary Committee approved the Subcommittee draft on November 15, 1973. A hearing on H. R. 5463 was held before the House on February 6, 1974, and the bill was passed and published in the Congressional Record of that date. The Rules were referred to the Senate Judiciary Committee on February 7, 1974.


29 E.g., in the area of hearsay, the House draft omits two "catch-all" hearsay exceptions from the Supreme Court draft—that is, rules 803(24) and 804(b)(6). Both of them would admit into evidence: "A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness." This change was accompanied by a revision in the wording of Rule 802 (the hearsay rule) which has the effect of preventing the Supreme Court from adopting new hearsay exceptions without prior statutory authority.

30 Rule 801 (Defines hearsay and statements which are not hearsay); Rule 802 (The hearsay rule); Rule 803 (The 23 hearsay exceptions where availability of the declarant is not a factor); Rule 804 (Defines availability and lists five hearsay exceptions if the declarant is unavailable as a witness); Rule 805 (Hearsay within hearsay is not excluded if each part of the combined statements fits within a hearsay exception).
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following: (1) nonverbal conduct of a person is a statement for hearsay purposes only if it is assertive conduct [Rule 801(a) (2)]; (2) prior inconsistent statements of a witness given under oath and subject to cross examination may be used for substantive purposes in addition to impeachment [Rule 801(d) (1)]; (3) party opponent admissions are treated as hearsay exclusions rather than hearsay exceptions [Rule 801(d) (2)]; (4) the dying declaration abandons the common law restriction to criminal homicide and applies it, as well, to civil actions [Rule 804(b) (3)]; a declaration against interest is expanded beyond statements against pecuniary or proprietary interests to include statements subjecting the declarant to civil or criminal liability [Rule 804(b) (4)]. The preceding examples only illustrate a few of the important alterations made to the hearsay rule and its exceptions.

Another important area of evidence affected by the Proposed Federal Rules of Evidence is privilege3 [Rules 501-513]. Some of the traditional provisions have been excluded or limited while others are broadened. For example, the scope of the attorney-client privilege is expanded and is set out in detail [Rule 503]; the government privilege for secrets of state and other official information is greatly expanded and strengthened [Rule 509]; the physician-patient privilege is rejected for a broad psychotherapist-patient privilege [Rule 504]; and, the privilege for confidential communications between husband and wife—that is, the privilege not to testify against one's spouse—is excluded and the only marital privilege remaining is the limited privilege of a criminal defendant to keep his or her spouse from testifying [Rule 505].

An early problem with federally-created privileges was the extent to which the federal privileges could preempt state privileges, given the dictate of Erie R. R. v. Tompkins.34 The Supreme Court's Advisory Committee rejected the claim that Erie required recognition of state privilege rules.35 However, Congress changed rule 501 of the Supreme Court draft to add the following statement: "... However, in civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule

33 304 U.S. 64 (1938).
of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with state law. Congress has determined that the weight of authority requires the application of the state law privileges when state substantive law is applicable—for example, in diversity of citizenship cases. Thus, if the Federal Rules finally become effective in accordance with the House draft, choice between evidentiary privileges will not need to enter into plaintiff's determination as to whether to sue in state or federal court, when the potential basis for subject matter jurisdiction is diversity of citizenship.

It would be advisable for counsel practicing in the Federal Courts to obtain a copy of the House draft of the Rules so that he may compare it to the Supreme Court draft and study both in preparation for the upcoming application of the federal rules to the federal courts. A copy of the Supreme Court draft of the Rules can be found in 56 Federal Rules Decisions 183 [1972] or in 34 Lawyer's Edition 2d 7 [1973]. The House draft of the Rules can be found in the February 6, 1974 Congressional Record-House, H 543-570, wherein the Rules were debated and were passed. Interested counsel might also obtain a copy of H. R. 5463 itself [Report 93-650, 93rd Congress, 1st Session], which also outlines the changes the House made in the Supreme Court's original draft.

**Choosing the Competent Court—Subject Matter Jurisdiction**

**A. Jurisdiction Generally**

Jurisdiction is the power of a court to hear and determine a particular case brought before it. This judicial power is created by legislative and/or constitutional mandate, and exists only where the court has been given authority to decide a particular type of case involving certain types of litigants, most commonly described as jurisdiction over the subject matter and over the parties. There is not too much difference between the state and federal forums as to jurisdiction over the parties. However, there is a large difference in the scope of jurisdiction over the subject matter. States have general subject matter jurisdiction, meaning authority to hear all matters which are not precluded by the state constitution or statutes

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or within the exclusive realm of the federal courts. On the other hand, subject matter jurisdiction of the federal courts is limited to those powers granted by the United States Constitution, Article III, Section 2, Clause 1, and by congressional enactment.  

B. Diversity of Citizenship

The most common basis of federal subject matter jurisdiction is diversity of citizenship, as set forth in 28 U.S.C. § 1332. It gives the district court exclusive jurisdiction of all civil actions where the matter in controversy exceeds the sum of $10,000, exclusive of interest and costs and is between (1) citizens of different states; (2) citizens of a state, and foreign states or citizens or subjects thereof; and (3) citizens of different states in which one state or citizens or subjects thereof are additional parties. In essence, citizens of different states in the United States or citizens of a state and aliens may sue each other in federal court, provided the amount in controversy exceeds $10,000, exclusive of interest and costs and there is jurisdiction over the parties and the notice requirements of due process are satisfied.

For diversity purposes, citizenship of a natural person means both citizenship of the United States and of a state within it.  

Citizenship of a state is analogous to domicile, which is customarily defined as residence within a state coupled with the present intention of remaining there permanently or indefinitely; it is a question of fact determined after consideration of all the circumstances.

Unlike natural persons, corporations can be citizens of two or more states. Section 1332(c) of Title 28 of the United States Code is the source of a corporation's ability to be a "multicitizen," by providing that it is a citizen of the state or states where it is incorporated, as well as the state of its principal place of business. Since the typical aviation products case involves a number of possible defendants, the plaintiff's attorney must determine the citizenship of all of them. The World Aviation Directory, which lists the great majority of companies doing business in the aviation field, as well as the geographical spread of each, is a good place to start. Additionally, inquiry should be made with the Secretary of State, Cor-

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*1* J. Moore, *Federal Practice* § 0.60[3], at 607 (2d ed. 1974).
*3* Williamson v. Osenton, 232 U.S. 619 (1913); Hardin v. McAvoy, 216 F.2d 399 (5th Cir. 1954); Stine v. Moore, 213 F.2d 446 (5th Cir. 1954).
porations Commissioner, or other appropriate official in each state considered as a potential forum to learn if a defendant is incorporated or has its principal place of business there.

Determination of a corporation's principal place of business is not always as easy as its place of incorporation. Commentators and various circuits have developed many tests for determining the principal place of business, such as the "nerve center" or "home office" test, the "center of operations" test, and several variations on them. Obviously, the plaintiff's attorney should advocate the test which will give him the best opportunity of establishing diversity under the circumstances. If it is a toss-up whether it is in one state or another, the federal court is most likely to find it to be where diversity jurisdiction will be defeated, on the principle that it is a court of limited subject matter jurisdiction. This principle may produce drastic results for the unsuspecting plaintiff's attorney. For example, if counsel represents a California plaintiff and files in the Federal District Court for the Northern District of California, alleging diversity of citizenship against a Delaware corporation, on the assumption that its principal place of business is in New York, a finding that it is actually in California would necessitate dismissal because of incomplete diversity. This could be disastrous if the statute of limitations for filing suit has run and there is no other forum available. As a precaution, counsel must assess this potential hazard and consider the desirability of a "backup" state court action, if one can be filed.

When he has established the citizenship of all potential defendants, the next step is to check that diversity is complete. He must be sure that no plaintiff is a citizen of the same state as any of the defendants. The plaintiff who is a citizen of a state which is a major producer of aircraft and aviation components may very well have common citizenship with a potential defendant. If his attorney wishes to stay in federal court, consideration should be given to leaving the non-diverse defendants out of the lawsuit. Under the

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40 See 1 J. Moore, FEDERAL PRACTICE ¶ 0.77 [3.1-3.4], at 717.60-82 (2d ed. 1974); Comment, 47 IOWA L. REV. 1151 (1962).
41 Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806); Quaker State Dyeing & Finish Co. v. ITT Terryphone Corp., 461 F.2d 1140 (3d Cir. 1972).
products liability law in most states, the manufacturer of the completed aircraft is responsible for any defective component it contains, even though made by another. If the component manufacturer has a common citizenship with the plaintiff, it need not be sued. On the other hand, if the completed aircraft manufacturer has the common citizenship, it may be wise to leave it out of the lawsuit as long as the component maker is included, provided the defective component was not altered after it left the maker's possession.

A possible limitation on this approach to a maintenance of diversity would be the objection raised by a diverse defendant that an absent potential defendant is an indispensable party pursuant to rule 19(b) of the Federal Rules of Civil Procedure. If the potential defendant's joinder is not feasible because it would destroy diversity, the "equity and good conscience" test of rule 19(b) is applied to determine whether or not the absent party is indispensable. The rule 19(b) test balances four interests: plaintiff's interest in having a forum, defendant's interest in avoiding multiple litigation, the interest of the outsider whom it would have been desirable to join, and the interests of the courts and the public in complete, consistent and efficient settlement of controversies. If a finding of indispensability is made, the plaintiff's action is dismissed. However, there are ample holdings that a joint tortfeasor is not an indispensable party.

A recent decision may be the beginning of inroads on the requirement of complete diversity. Jacobs v. U.S. held in a Federal Tort Claims Act case that the doctrine of "pendent jurisdiction" called for the joinder of a non-diverse defendant, so that all the plaintiffs' claims could be tried in one forum. The court felt that the justification for such joinder lies in considerations of judicial economy, convenience and fairness to litigants. Such considerations may well be the future basis for joining non-diverse parties in cases not involving the FTCA.

**PREVENTING REMOVAL TO FEDERAL COURT**

Plaintiff's counsel must always be wary of the possibility of re-

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43 Provident Tradesmen's Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968); Schutten v. Shell Oil Co., 421 F.2d 869 (5th Cir. 1970).
44 See cases cited in 3A J. Moore, Federal Practice § 19.07[1], at 2226 n.18 (2d ed. 1974).
moval of his case from the state to the federal court, and it is incumbent on him to consider it before making his initial choice. Of concern here are the provisions of 28 U.S.C. § 1441, which permit removal of any civil action if there is not complete diversity between plaintiffs and defendants or the action is founded on a law of the United States. Defendant has the absolute right to remove the action to the federal court for the district in the state in which the action was brought, as long as there is a basis for original federal subject matter jurisdiction.

It is obvious that defendant's right of removal is a dangerous weapon against a plaintiff who has chosen the state forum without first considering the possibility of removal. He may find himself a victim of the "hop-skip" tactic. That is, a defendant who is able to satisfy the removal requirements may then try to transfer the action to a forum more convenient to him, possibly his home town, under 28 U.S.C. § 1404(a), or he may try to consolidate the action with other similar actions for pretrial under 28 U.S.C. § 1407 (Multi-district Litigation). Thus, a plaintiff who originally sought the advantages of suing in his own bailiwick may find himself litigating the action in some far-off locale which might provide defendant with the advantages the plaintiff initially desired. It should be re-emphasized that removal is defendant's right and that all defendants must join in the petition. However, when the only basis for original subject matter jurisdiction of the federal court is diversity of citizenship, a defendant cannot remove if he is a citizen of the state in which the action is brought, as this would obviously destroy diversity. At the same time, when defendant relies on a federal question as the basis for removal, his right is not affected by common citizenship with the plaintiff.⁴⁶

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⁴⁶ (a) Except as otherwise expressly provided by act of Congress, 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. (b) Any civil action of which the district courts have original jurisdiction founded on a claim of 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 actions 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. . . .

Since few, if any, aviation products cases are premised on federal question subject matter jurisdiction,7 this brief analysis of removal will be concerned with protecting the state action by destroying diversity at the outset. The most common method of spoiling a defendant's removal strategy is to name a single resident defendant in the state court suit. Care should be taken that a cause of action can be stated against him and that there is enough evidence available to resist a motion for summary judgment. In the case of a manufacturer, possible local defendants could be sales personnel, technical representatives stationed with an airline or the military, and the distributor, whether a direct employee of the company or an agent or independent contractor. With respect to an airline, possible local defendants are mechanics, inspectors, company meteorologists, dispatchers and possibly flight crew members.

If plaintiff wants state court jurisdiction at the domicile of a defendant or at its principal place of business, diversity can possibly be destroyed by the appointment of a personal representative or by assignment of the cause of action or part of it to a person who resides in the same state.8 Of course, a plaintiff may not want to go to the extreme of preventing diversity by such a tactic if it involves filing in the court of the home town of a large manufacturer, which is the beneficent employer of a substantial number of provincial citizens, where the jury would be composed of people well aware that its financial soundness may affect their livelihood, though indirectly. A sure-fire way to prevent removal in a diversity case is for the plaintiff to seek damages no higher than $10,000. However, this option would seldom be available in an aviation crash case.

In summary, it is essential that plaintiff's counsel take a close look at the possibility of removal before he files his state court action.

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Before filing suit, the plaintiff's attorney should give consideration to an action against the United States Government under the Federal Tort Claims Act. The primary section is 28 U.S.C. § 1346(b) which states as follows:

... [T]he district courts ... shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages ... for injury or loss of property, or personal injury or death caused by the negligence or a wrongful act or omission of an employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Other provisions are scattered throughout the judicial code. Jurisdiction under this act, as well as the Federal Death on the High Seas Act, is vested exclusively in the federal courts, unlike admiralty cases which may be filed in state courts.

Possible bases for suit against the federal government arising from an aircraft crash include negligent certification of an aircraft and its components, negligent certification of an airfield, negligent air traffic control, negligent chart publication, negligent licensing of an airman, and negligent maintenance of airway facilities.

Before the plaintiff's attorney attempts to file under the Federal

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28 U.S.C. §§ 1346(b), 1402(b), 1504, 2110, 2401(b), 2402, 2411(b), 2412, 2671-80.


Cases cited note 50 supra.


(which would seem to be on the same basis as an aircraft.)

Tort Claims Act, he should carefully consider the following limitations imposed on such an action. It may not be brought against the United States under the authority of section 1346(b) until a claim is first presented to the appropriate federal agency, and it is actually denied in writing or is deemed finally denied. The claim requirement is jurisdictional and cannot be waived, its purpose being to avoid unnecessary trials and to encourage settlement.

The Federal Tort Claims Act has two time limitation periods. Administrative claims must be presented within two years of the instance giving rise to said claim or it will be forever barred. The action itself must be filed within six months after the date of a mailing of the notice of final denial. Six months after submission of the claim, it may be deemed denied by the claimant, and a suit may be commenced. No state tolling provisions affect this six month limitation for filing an action.

Jury trials are not permitted. However, counsel may request an advisory jury to assist the judge in determining questions of fact. Punitive damages cannot be recovered against the United States. Finally, the Federal Tort Claims Act establishes a ceiling on the attorney's fee. It cannot exceed 25 percent of the judgment or settlement made after the action is filed with the court. If the case is settled in the claims procedures stage, prior to filing the action, the fee cannot exceed 20 percent of such settlement.

Servicemen on active duty or their heirs cannot recover from the government under the Federal Tort Claims Act for injuries or

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57 Bialowas v. United States, 443 F.2d 1047 (3d Cir. 1971).
59 Standard Form 95.
63 Brown v. United States, 353 F.2d 578 (9th Cir. 1965).
deaths sustained "incident to service." However, nothing prevents a serviceman or his heirs from suing a third party tort-feasor, such as an aircraft manufacturer.

It is unsettled whether a case involving a violation of Federal Aviation Regulations presents a "federal question," thus giving federal courts subject matter jurisdiction absent diversity. There is conflicting authority, and resolution hopefully is forthcoming.

It has been held that plaintiff could join a non-diverse defendant with the U.S.A. under the doctrine of "pendent jurisdiction," so that all his claims could be decided in one proceeding, thereby fostering judicial economy, convenience and fairness to litigants.

THE PROS AND CONS OF ADMIRALTY JURISDICTION

Federal admiralty jurisdiction, or the application of general maritime principles on the "law side" of the federal court, or in state court, offers advantages to the aviation personal injury or wrongful death plaintiff that he may not have elsewhere. The most obvious one is the general liberality of maritime law. It applies comparative negligence rather than the harsh doctrines of contributory negligence and assumption of risk. Unlike diversity or general federal question cases, no minimum amount in controversy is required. Additionally, venue in admiralty may be laid properly in any district court in which service of process on defendant can be effected.

A possible drawback to the choice of this jurisdiction,

73 Admiralty jurisdiction is that original exclusive federal jurisdiction provided in 28 U.S.C. § 1333(1) (1970):

The district court shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.


75 Venue may be properly laid in any federal district in which service of process upon the defendant can be effected. Healy, The Admiralty Remedy, Law Notes (Trial Practice) (Oct. 1966). See FED. R. CIV. P. Supplementary Rule 9 for more detailed venue and transfer of venue provisions.
dependent, of course, on the viewpoint of plaintiff's counsel in relationship to the type of case he has, is the absence of a jury trial. However, a jury may be had if it is filed on the "law side" of the federal district court, where there exist other jurisdictional bases, or in the state court.

If plaintiff's attorney has a claim which is classifiable as a maritime tort and wishes the benefits of maritime law, forum choice can become involved. This is so because the "saving to suitors" clause of 28 U.S.C. § 1333(1) permits the maritime claimant to elect between the admiralty or law side of the federal court, provided an independent basis for subject matter jurisdiction can be established for the latter. The maritime claimant has the third option of avoiding federal court by suing in an appropriate state court.

Since the unification of civil and admiralty procedure in 1966, the remaining procedural differences between the two sides of the federal district court are few; however, plaintiff's attorney should carefully consider their effect on the outcome of his case before making an election. Of course, if plaintiff's aviation tort claim arises under the Federal Death On High Seas Act (FDOHSA),

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The election is made pursuant to Fed. R. Civ. P. 9(h) which requires the plaintiff's complaint to include a statement identifying the claim as an admiralty or maritime claim if he desires admiralty jurisdiction. The pleader's identification of his claim as admiralty or maritime or his failure to do so is not treated as an irrevocable election and the complaint may be amended pursuant to Fed. R. Civ. P. 15. See C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE Civil § 1314 (1969).

Like the "law side" of the federal court, the state court offers plaintiff the advantage of a jury trial. However, plaintiff's attorney should consider the forum choice factors listed in Parts I, IIA (1 through 3) and III before deciding between the "law side" of the federal courts and a state court.

The major procedural difference between the admiralty and civil sides of the federal district court is the existence of six Supplemental Rules for Certain Admiralty and Maritime Claims (Rules A-F) which provide special procedures for attachment and garnishment, limitation of liability, and so on. Other important differences between the two sides of the federal court can be found in the Federal Rules of Civil Procedure themselves; for example, freedom from jury trial on the admiralty side of the court (Rule 38(e)), the ability in admiralty to take depositions immediately upon the commencement of the action (Rule 26(a)), and, admiralty's freedom from the more restrictive venue provisions (e.g., 28 U.S.C. §§ 1391-93 (1970)) applied on the law side of the court (Rule 82).

42 U.S.C. §§ 761-68 (1970). The important element of the FDOHSA regarding aviation litigation is its application of the mechanical "locality test" for the determination of maritime torts. Under the Act, any aviation deaths occur-
which provides an exclusive admiralty remedy for death occurring beyond a marine league (3 miles) from shore, he will have no choice. 1

Outside the scope of the FDOHSA lie the more hazy areas for plaintiff's election, including aviation personal injury on or over the high seas and, until very recently, aviation torts occurring within the 3-mile limit.

In _Executive Jet Aviation, Inc., v. City of Cleveland, Ohio, et al._, 8 the United States Supreme Court took the first step in limiting the forum variety that the aviation plaintiff has been enjoying by virtue of the "saving to suitors" clause and the heretofore simplistic definition of a maritime tort. _Executive Jet_ excluded from federal admiralty jurisdiction tort claims arising from flights of land-based aircraft occurring on or over navigable water within state territorial limits when the aircraft is flying between two points in the continental United States. 9

The case dealt with a commercial airliner, destined for points within the continental United States, which crashed into the navigable territorial waters of Lake Erie shortly after engine ingestion of a flock of seagulls during takeoff.

The underlying issue facing the Court was whether or not it was going to recognize the creeping extension of federal admiralty jurisdiction to aviation accidents occurring in territorial navigable waters. It decided to call a halt by redefining the concept of maritime tort in this area. 10 As a result, the "strict locality test" was rejected as the sole test for determining maritime torts on the ground that it was established long before airplanes existed and is no longer meaningful by itself. In its place, the Court created a new two-pronged test for the determination of maritime torts, retaining the locality test as one prong and adding the requirement that the wrong bear some relationship to traditional maritime activity on or over the high seas are presumptively maritime torts. Thus, it is understandable why admiralty has become a popular forum in the area of aviation litigation.

1 Lindsay v. McDonnell Douglas Aircraft Corp., 460 F.2d 631 (8th Cir. 1972).

8 405 U.S. 915 (1972).

9 Comment, _Admiralty Tort Jurisdiction and Aircraft Accident Cases: Hops, Skips, and Jumps into Admiralty_, 38 J. AIR L. & COM. 53 (1972).

tivity in the absence of legislation to the contrary.86 The Supreme Court applied its new test to the facts before it and found that the type of aviation in issue bore no relationship to traditional maritime activity.

The Court's holding is actually very narrow and inadequate in several respects. For example, how can the FDOHSA, based on the locality test of maritime torts, be reconciled with the updated test of Executive Jet? At one point, the Court reaffirms exclusive admiralty jurisdiction under the FDOHSA, but at another point indicates that it plans to put emphasis on its new test to make federal admiralty jurisdiction "off limits to landbased aircraft"!87 Some commentators have advocated that the FDOHSA was intended to be remedial rather than jurisdictional—that is, there is no remedy for death on the high seas unless death occurred under circumstances found to be within federal admiralty jurisdiction. In other words, they would limit the FDOHSA by requiring the Executive Jet two-pronged maritime tort test be applied to wrongful death aviation accidents on or over the high seas, as well.87

The Executive Jet decision seems to put most high sea aviation personal injury and property damage actions, as contrasted with wrongful death cases, outside admiralty jurisdiction because most do not bear the relationship to traditional maritime activity and no legislation exists bringing such actions within admiralty jurisdiction.86 However, the Court chose not to foreclose the question by saying it was not deciding whether any aviation tort can ever meet the second prong of its new test.

The decision leaves the plaintiff's lawyer in uncertainty. Assume that a commercial aircraft taking off from Miami for New Orleans

86 The matters with which admiralty is basically concerned have no conceivable bearing on the operation of aircraft, whether over land or water. ... It is clear, therefore, that neither the fact that a plane goes down on navigable waters nor the fact that the negligence 'occurs' while a plane is flying over such waters is enough to create such a relationship to traditional maritime activity as to justify the invocation of admiralty jurisdiction.
87 Bell, Admiralty Jurisdiction in the Wake of Executive Jet, 15 ARIZ. L. REV. 67 (1973).
crashes into the high seas. What would be the jurisdictional consequences after Executive Jet? Any wrongful death actions would have exclusive federal admiralty jurisdiction under the FDOHSA. Any personal injury or property damage actions would probably be outside of federal admiralty jurisdiction unless a traditional maritime nexus could be shown. If the destination were changed from New Orleans to London, it would be uncertain whether a crash within the 3-mile limit or personal injury or property damage sustained on the high seas would be within admiralty jurisdiction. What about the inter-continental flight that crashes within the 3-mile limit? Again, this question was not decided, but the Court suggests, in dictum, that one might be able to argue that an inter-continental flight bears a nexus to traditional maritime activity because the airplane now has taken the ship's place in transoceanic inter-continental transportation.

Federal admiralty jurisdiction should be approached with extreme caution until the whole effect of Executive Jet is determined. If federal jurisdiction is desired, it would be advisable to file either a companion state action as a safety valve, or be certain that there is diversity of citizenship just in case the particular court determines that admiralty jurisdiction does not exist. Otherwise, dismissal after the statute of limitations has run would be disastrous.

**Obtaining Jurisdiction Over the Parties**

As has been illustrated, it is generally possible to find many courts with proper subject matter jurisdiction. Counsel therefore must be careful to choose a forum where he can obtain personal jurisdiction over the maximum number of critical defendants. In aviation accident litigation, potential defendants include the manufacturer and designer of the airframe, the manufacturer and designer of the engine, and manufacturers and designers of various component parts. Other possible defendants include the maintenance facility, the present and prior owner(s), and the crew members or their estates. If a rental aircraft is involved, the fixed base operator will be a defendant. If it is a commercial aircraft, the airline or air taxi will be a defendant, probably joined as such with the United States for some negligence of the Federal Aviation Administration. If plaintiff has ascertained his "principal" defendants

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*See Section II, on Federal Tort Claim Cases *supra.*
before suit is filed, it is essential that personal jurisdiction over them is assured. If they are not known early in the case, then forum selection with an eye toward personal jurisdiction over the greatest number of possible defendants is the goal.

It is unnecessary to find federal authority for assertion of in personam jurisdiction in federal courts. They are authorized to use bases of personal jurisdiction available to the courts of the state in which they are located, including the utilization of state methods of service and long-arm statutes; thus, if one's defendants are amenable to suit in a particular state court, they can likewise be sued in the federal district courts of that state. Consequently, the answer to personal jurisdiction is found by comparing the laws of the different states where the action may be brought.

A brief overview of personal jurisdiction is necessary before considering the factors affecting forum selection. The basic test for assumption of jurisdiction over the parties is "fair play and substantial justice" as expressed in *International Shoe Co. v. Washington.* Without protracted comment, the test boils down to one of reasonableness. In applying it, courts will often assess the convenience of the parties and witnesses and the ease of access to evidence. *International Shoe* recognized that *forum non conveniens* factors often enter into a determination of in personam jurisdiction. Since courts often weigh the factors of convenience differently, results necessarily vary from forum to forum and even among courts within the same state. The aviation attorney faces the problem of applying these abstractions to his particular defendants.

In personam jurisdiction over defendants who are natural per-

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90 Advisory Committee Note to 1963 Amendment of Fed. R. Civ. P. 4; Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963); Farr & Co. v. CIA Intercontinental de Navigacion, 243 F.2d 342 (2d Cir. 1957).

91 "[D]ue process requires only that in order to subject a defendant to a judgment in personam . . . he have certain minimum contacts (with the forum) such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945).

92 [The demands of due process] may be met by such contacts of the corporation with the state of the forum as make it reasonable . . . to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection.

326 U.S. at 317.
sons has been upheld as "fair and reasonable" on the following bases:

(i) Physical presence in the jurisdiction,
(ii) Domicile, citizenship, or residency,
(iii) Consent,
(iv) Appearance in the action,
(v) Doing business in the forum,
(vi) Doing an act within the state, or causing an effect in the state by an act or omission elsewhere.

Jurisdiction over corporations can be based on factors (iii), (iv), (v) and (vi) and these additional factors:

(vii) Incorporation within the forum (for domestic corporations)
(viii) Appointment of an agent for accepting service of process.

Jurisdiction over domestic corporations may be based on factor (vii) alone, but obtaining jurisdiction over foreign corporations is more complex and often involves varying combinations of (v) and (vii). Counsel's task of securing personal jurisdiction over foreign corporations is aided immeasurably by state legislation, commonly known as "long-arm" statutes, which codify one or more of these bases as a legislative determination of reasonableness.

Illinois was the leader in long-arm legislation. Its statute is typical and sets forth the specific acts or conduct which bring a defendant within the court's jurisdiction. California's long-arm statute is as broad as due process itself and states:

92 Pennoyer v. Neff, 95 U.S. 714 (1877).
95 Blackmer v. United States, 284 U.S. 421 (1932).
103 (1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual,
A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or the United States.\textsuperscript{104}

The existence of a long-arm statute in a particular forum is no magical solution to the problem of personal jurisdiction. Counsel must still apply the accepted jurisdictional bases to the facts of his particular case.

The comments below will focus on factor (v), because of its importance in aviation litigation. The “doing business” basis of personal jurisdiction has been considerably extended in California by a Supreme Court decision—\textit{Buckeye Boiler Co. v. Superior Court}.\textsuperscript{105} In \textit{Buckeye}, a California plaintiff was injured by a pressure tank manufactured by an Ohio corporation. This Ohio defendant had no normal business contacts with the state of California but sold some of its pressure tanks to an Ohio corporation, which sold products and maintained a plant in California. Buckeye filled orders placed in California by the other Ohio corporation, and shipped some pressure tanks to the California plant. There was no evidence that Buckeye shipped to the California plant the tank

\begin{itemize}
\item his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any such acts:
\item (a) The transaction of any business within this State;
\item (b) The commission of a tortious act within this State;
\item (c) The ownership, use, or possession of any real estate situated in this State;
\item (d) Contracting to insure any person, property or risk located within this State at the time of contracting;
\item (e) With respect to actions of divorce and separate maintenance, the maintenance in this State of a matrimonial domicile at the time the cause of action arose or the commission in this State of any act giving rise to the cause of action.
\end{itemize}

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this Section, may be made by personally serving the summons upon the defendant outside this State, as provided in this Act, with the same force and effect as though summons had been personally served within this State.

(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this Section.

(4) Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.


\textsuperscript{105} 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).
which injured the plaintiff. The court employed a two-step analysis: first, personal jurisdiction depended on a "threshold of sufficient economic activity." This "threshold" can be established:

whenever the purchase or use of a (manufacturer's) product within a state generates gross income for the manufacturer and is not so fortuitous or unforeseeable as to negate the existence of an intent on the manufacturer's part as to bring about the result.106

Even prior to Buckeye, California courts adopted an expansive view of "doing business." Where a foreign corporation made sales through its agents or by direct mail,107 or through an exclusive sales agent,108 or got the benefit of maintaining a sales force through a non-exclusive sales-representative, or an unincorporated distributor, it was subject to personal jurisdiction in California.109 The second phase of the court's analysis was a forum non conveniens balancing test (alluded to in International Shoe) to determine the reasonableness of requiring a defendant foreign corporation to defend a suit in the forum court. Even with a liberal definition of "doing business," as adopted in Buckeye, courts will still "balance the inconveniences" as an ingredient of personal jurisdiction. Thus, counsel must be familiar with the doctrine of forum non conveniens110 and also with the possibility of the transfer of the action notwithstanding existence of subject matter jurisdiction, personal jurisdiction, and proper venue.111

One possible problem may arise with the "doing business" jurisdictional basis when the cause of action bears no relationship to defendant's economic activity within the state. Personal jurisdiction has been held to be absent in situations wherein the plaintiff brings the cause of action in his home state against a foreign corporation for injuries received in a third state.112 This defense of

106 Id. at 902, 458 P.2d at 64, 80 Cal. Rptr. at 120.
111 This latter topic is discussed more fully in the venue section of this article.
"no relation" has had little success when the cause of action arises within the forum state, even though it is unrelated to defendant's in-state activities.\footnote{Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 80 Cal. Rptr. 113 (1969).}

Another possible problem with long-arm jurisdiction may come up when counsel attempts to assert personal jurisdiction over a parent corporation based upon the presence of a subsidiary corporation within the forum. The mere existence of a subsidiary within the jurisdiction has been held insufficient, without more, to subject the parent to personal jurisdiction of the forum.\footnote{Canon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925).} However, where the parent is reaping the economic benefit of the subsidiary's conduct, under the rationale of \textit{Sales Affiliates, Inc.}\footnote{Sales Affiliates, Inc. v. Superior Court, 96 Cal. App. 2d 134, 214 P.2d 541 (1950).} this should suffice for personal jurisdiction. \textit{Buckeye's} reference to generation of gross income as a contact and that court's emphasis upon economic reality can be persuasive in rebutting the claim of lack of personal jurisdiction.

On the other hand, one of the primary reasons for setting up parent and subsidiary corporations is to shield the parent from liability. At least one recent federal case apparently has held that such a corporate structure will accomplish this intended purpose.\footnote{Aanestad v. Beech Aircraft, Civil No. 72-1104 (N.D. Cal. 1973).} However, this result seems to be incorrect given the broad gross income and "commercial actuality" language in \textit{Buckeye}, and another recent federal court decision.\footnote{Johnson v. Express Lift Co., Civil No. 73-398 (C.D. Cal. 1970).} In New York, this difficulty is eliminated by treating the subsidiary as a branch of the foreign parent corporation.\footnote{Boryk v. De Havilland Aircraft Co., 341 F.2d 666 (2d Cir. 1965); Taca Int'l Airlines S.A. v. Rolls-Royce of England, Ltd., 15 N.Y.2d 97, 204 N.E.2d 329, 256 N.Y.S.2d 129 (1965).} This approach appears to be better reasoned; to hold otherwise would exalt form over substance to the prejudice of the injured plaintiff.

The above general principles should be kept in mind when considering the personal jurisdiction aspects of forum selection. To be realistic, most lawyers will want to file suit in their home state, where they are familiar with the courts and the law. This is becoming generally more possible with the widespread adoption of...
long-arm legislation permitting personal jurisdiction over foreign corporations. However, convenience of counsel should not be the ultimate criterion. As discussed, the nature of aviation litigation often does not permit counsel to know his principal defendants prior to filing suit. His suit, therefore, should be placed in a forum where he has personal jurisdiction over as many defendants as possible. This requires a thorough examination of the bases of personal jurisdiction available in the potential forums. The end result of his case will often be a function of the care with which he conducted the examination.

LAYING THE PROPER VENUE

Once jurisdiction in a state or federal court is established, the next issue is the choice of the proper “place” for the trial of the action. This brings into play the rules of venue. Their purpose is to locate the litigation in a forum mutually convenient for the litigants. State and federal venue provisions differ widely, although sometimes overlapping, and the federal rules usually provide a greater number of locales than do the states. In state court actions, for example, the question usually involves the selection of a proper county for trial; whereas, in federal court, the query relates to the most appropriate federal judicial district. Venue “is not a qualification upon the power of the court to adjudicate, but a limitation designed for the convenience of litigants.”

In most states, the placing of venue is governed by statutes which characteristically provide that venue is proper in the county in which any defendant resides. There are also provisions in some states for venue in the county where the cause of action arose—such as the place of injury in tort actions or the designated place of performance of an obligation in contract actions.

Federal venue provisions for diversity and federal question cases are codified in 28 U.S.C. § 1391, which is sub-divided into sections that set forth differing rules corresponding to the type of defendant involved. Section 1391(a) for example, pertains to diversity cases involving individual (as opposed to corporate) defendants. Venue in such situations is proper in the judicial district (1) where all plaintiffs reside, (2) where all defendants reside, or (3) where the

120 See, e.g., CAL. CODE CIV. P. § 395 (West 1973).
claim arose. In federal question cases, however, section 1391(b) controls and provides that venue is proper (1) where all the defendants reside or (2) where the claim arose, except as otherwise provided by law. Section 1391(b) permits an alien to be sued in any district.

Since the plaintiffs in aviation cases often find themselves facing corporate defendants in a federal forum, special attention should be paid to section 1391(c) of 28 U.S.C. That section provides that a plaintiff may sue a corporate defendant in the judicial district where the defendant corporation is (1) incorporated, (2) licensed to do business or (3) doing business. Note, in this regard, that a corporation which is licensed or incorporated by the State is deemed a resident of each federal judicial district within that state, and thus venue is proper in any of such districts.121 Furthermore, when defendants reside in different districts in the same state, and plaintiff is unable to satisfy the requirements of section 1391, he may sue them in any of the districts in which one of them resides.122

For actions brought under the Federal Tort Claims Act, venue is proper only in the judicial district where the plaintiff resides or where the act or omission occurred.123 And in admiralty actions, the venue provision is even broader.124

There are several practical considerations which plaintiff's attorney must take into account in selecting venue in a state or federal forum. The length of the trial calendar, the local pretrial conference policy, the experience and reputation of the bench, the court's location in relation to the residences of the witnesses, the convenience and expense of trying a case in a certain locale, the attitude of the jurors, and the probable verdict range for comparable cases must be carefully weighed before a final determination is made.

The importance of selecting the proper venue cannot be overemphasized—especially with respect to actions brought in certain states whose rules relating to improper selection of venue are rather harsh. In California, for example, a plaintiff who has chosen an improper forum may find himself entirely at the mercy of the de-

121 1 J. Moore, Federal Practice § 0.142 [5.-3] n.25 (2d ed. 1974).
124 See part II. A. 4. of this article.
fendant. California rules provide that, where plaintiff has selected an improper venue and the parties cannot agree to a mutually convenient venue, defendant may object and designate any proper court in the county in which the action was commenced or any other proper county as the place for trial.125

The federal rules regarding improper selection of venue are not quite so harsh, in that plaintiff's errant choice gives rise to a transfer of the action to any proper judicial district as designated by the court rather than by the defendant.126 It is important to note, however, that federal courts still have the statutory power to dismiss a case brought in a district having improper venue. Therefore, venue selection is a step in the forum-choice process that should not be taken lightly.

CHANGE OF VENUE—THE SPECTRE OF FORUM NON CONVENIENS

Once again, venue deals with the convenience of the litigants rather than the authority of a court to hear a particular matter. Out of this concept of convenience has grown a doctrine known as forum non conveniens which gives the court discretion to refuse to hear a case even though jurisdiction and venue requirements have been met.127

On the state level, the application of this doctrine may lead to dismissal of a properly filed action.128 The classic forum non conveniens case arises in aviation actions where defendant manufacturer is subject to jurisdiction and proper venue in several states, and a non-resident plaintiff sues in a state other than that where the accident occurred. Defendant's goal in making his motion may be to move the action to a low-verdict state and/or one where it might be able to impanel a more friendly jury. Since the place of the accident may be such a locale, defendant may well argue that the action should have been brought there because all the eyewitnesses are available, the evidence is there, the site of the crash can

be easily viewed, and so on. Defendant manufacturer may also advocate the state of its principal place of business as the more convenient place since it is the location of the corporate records and key personnel. To prevail, defendant must show that it will be subjected to some degree of hardship by plaintiff's initial choice of venue and that another appropriate forum is available. If plaintiff is a domiciliary of the original forum state or if the accident occurred there, defendant's motion will have little chance of success.

*Gulf Oil v. Gilbert* introduced the doctrine of *forum non conveniens* to the federal courts; and this development was soon followed by the enactment of 28 U.S.C. § 1404 (a), which was "drafted in accordance with the doctrine." It provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Section 1404(a) motions generally are granted on a lesser showing of inconvenience than required for a *forum non conveniens* dismissal on the state court level. Although a more relaxed federal standard for *forum non conveniens* transfer could be considered a disadvantage of the federal forum, if defendant's motion is granted the transferee federal court must apply the substantive law which the transferor court would have applied. The effect is that defendant cannot change plaintiff's original choice of law decision by making a Section 1404(a) motion. In comparison, if a plaintiff's action in a state court is dismissed on *forum non conveniens* grounds and he is forced to file in another state, he would be at the mercy of the latter's choice of law rule, which might well point to an entirely different body of substantive law than the state of his choice.

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Like state *forum non conveniens*, the section 1404(a) test is a balancing of factors of convenience. Unless the balance is strongly in favor of defendant, plaintiff's choice of forum is rarely disturbed. The primary factors for consideration that were laid down in the landmark *forum non conveniens* case of *Gulf Oil v. Gilbert* and are still relevant to cases under section 1404(a) include: the ease of access to a source of proof, the availability of compulsory process for the attendance of unwilling witnesses, the cost of compelling attendance, relative calendar congestion and the interests of justice. Factors which are *not* generally considered include the relative size of the damage awards in different forums, the number of available witnesses as opposed to the actual importance of their testimony, and the convenience of counsel as distinguished from the convenience of the parties.

It must be noted that the effect of a transfer for convenience of witnesses differs significantly from the effect of transfer due to improper venue [28 U.S.C. § 1406(a)]. Under 1404(a), the place of trial may be changed in order to accommodate parties and witnesses even if venue is proper where the action is originally filed. The effect of such a transfer is a change in the place of trial, not in the applicable law. On the other hand, where venue is improper, the action may be transferred to a place where it could have been brought. Since venue is improper, plaintiff has no right to use the transferor district's choice of law rule, substantive law, statutes of

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139 *Blue Bell, Inc. v. Jayman-Ruby, Inc.*, 311 F.2d 942 (S.D.N.Y. 1969); *Glenn v. Trans World Airlines, Inc.*, 210 F. Supp. 31 (E.D.N.Y. 1962); *Cressman v. United Air Lines, Inc.*, 158 F. Supp. 404 (S.D.N.Y. 1958). In balancing the *forum non conveniens* factors of forum choice, plaintiff should consider that a limitation on the exercise of a district court's discretion in dealing with Section 1404(a) motions is the strict requirement that the transferee district must be one where the plaintiff might have been able to bring the action initially. This means that jurisdiction and venue must have been originally proper in the transferee judicial district. *Hoffman v. Blaski*, 363 U.S. 335, 343-44 (1960). In this respect, Section 1404(a) is considered to be narrower than the non-statutory doctrine of *forum non conveniens*. Also, if the federal court determines the state court to be the most convenient forum, it may dismiss the case. *Altman v. Central of Ga. R.R.*, 254 F. Supp. 167 (E.D. Ga. 1965).

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limitation, etc., and the transeree court will apply its local law to
the cause.141

Consideration of the forum non conveniens factors is essential
in the jurisdiction and venue choice process. Plaintiff will want to
minimize defendant's opportunity to dismiss or transfer the action
to a venue which is more favorable to defendant than himself.
Plaintiff is more susceptible to a transfer in the federal forum and
will have no control over the choice of the transeree forum. In
state court, plaintiff will have a better chance to protect his initial
choice and may be the one to choose a new forum if a state court
dismisses his action on forum non conveniens grounds. However,
a defendant who has removed a case from state to federal court
under 28 U.S.C. § 1441 may then make a section 1404(a) motion
to transfer the action to a distant venue.142 Therefore, consideration
of the forum non conveniens factors is a key element in the state-
federal forum choice decision.

PICKING THE MOST FAVORABLE LAW—
THE CHOICE OF LAW INQUIRY.

Aviation is a multistate activity; thus, several states may have
an interest in a crash resulting from a defect in an aircraft's manu-
ufacture. Consider the situation wherein a Texas businessman pur-
chases and takes delivery in California of a light aircraft manufac-
tured in Kansas. On its maiden flight from California to Texas, the
plane crashes in the Nevada desert, killing the businessman and
his colleague from Oklahoma. Investigation reveals that a defect
in the plane's design was the reason for the crash. Assuming that
the businessman's wife can obtain personal jurisdiction over de-
fendant manufacturer in Texas, Kansas, California or Nevada and
that state or federal subject matter jurisdiction and venue require-
ments could be satisfied in all four states, which state, choice of law-
wise, would be the most favorable forum for the resulting wrongful
death product liability action? The foregoing fact pattern is not
at all unusual because the typical aviation product liability case is
one for wrongful death. This question can only be answered after
plaintiff's attorney analyzes the choice of law rules and relevant

141 Geehan v. Monahan, 382 F.2d 111 (7th Cir. 1967).
substantive and procedural law—e.g., wrongful death acts, statute of limitation, borrowing statutes and products liability law—of all four contact states above.\footnote{143}

Where more than one state has "sufficiently substantial contact" with the activity in question, the forum, by analysis of the interests possessed by the states involved, should apply the statute and case law of one or another state having the greatest interest.\footnote{144} In other words, filing an action in State A does not insure that its procedural and substantive law will govern the issues of the case. The forum court commonly recognizes that other states have contacts with a particular multistate activity giving rise to interests which may require the application of their law to the issues raised in State A. As a result, choice of law rules have been fashioned which serve to help the forum court apply the law of the state which has the predominant or significant interest in the accident in question. Plaintiff's attorney must determine which state's choice of law rule will permit the application of the substantive law most favorable to his case.

It should be made clear that choice of law considerations presently do not enter into the decision whether to file in a federal or state court when both sit in the same state, and the potential basis for federal subject matter jurisdiction is diversity of citizenship.\footnote{145} On the other hand, if the basis for federal subject matter jurisdiction is federal question, the federal court will apply federal law

\footnote{143} This section on choice of law serves only as an introduction to the various choice of law rules. No attempt will be made to discuss choice of law in regard to each of the aforementioned areas of law; however, choice of law as it applies to products liability actions will be briefly discussed.

\footnote{144} Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). Klaxon held that a federal court sitting in a diversity action should apply the forum state's choice of law rules. This means that a federal court should reach the same choice of law result as the court of the state in which it sits. Some commentators criticize Klaxon—a product of Erie R.R. v. Tompkins, 304 U.S. 64 (1938)—for putting federal courts in a straitjacket as to choice of law matters. They advocate an independent choice of law rule for the federal courts. They recognize that the short term effect of their suggestion would result in forum-shopping between the state and federal court sitting in the same state, but the long term effect probably would be uniformity in choice of law rules with the federal courts taking the lead. R. Weintraub, Commentary on the Conflict of Laws (1st ed. 1971); Carpenter, Pluralistic Legislative Jurisdiction: Plaintiff's Choice under the Klaxon Rule, 4 C IND. L.J. 477 (1965). For a good discussion of choice of law in federal diversity aviation actions, see Bailey & Broder, Choice of Law—Mass Disaster Cases Involving Diversity of Citizenship, 38 J. AIR L. & COM. 285 (1972).
rather than state law. In Federal Tort Claims Act actions, 28 U.S.C. § 1346(b)\(^{146}\) provides a built-in choice of law rule which is "the law of the place where the act or omission occurred." Richards v. United States\(^{147}\) added a little flexibility to this rather rigid rule by interpreting it to mean the "whole law" of the state where the act or omission occurred, which should include the state's choice of law rule as well as its substantive law. Thus, if a Federal Tort Claims Act action is filed in the federal district court in State A for an aviation accident occurring in State B, the federal court could rely on any flexibility provided in the State B choice of law rule rather than being forced to apply its substantive law only. By comparison, in most maritime actions, choice of substantive law is not such a problem. This is so because if a case is classified as maritime, it must be governed by maritime principles, even if it is tried by a state court or in a federal diversity court applying state law.\(^{148}\) Since the great majority of aviation products liability cases brought in federal court are based on diversity of citizenship, the focus in choice of law will be on the rules of the various states, and it will become clear that there is a dreadful lack of uniformity among them. They have and are still undergoing a great deal of metamorphosis. At present there are three basic varieties: (1) the vested rights or territorial approach embodied in the Restatement of Conflict of Laws, (2) the Restatement of Conflict of Laws' most significant contacts approach, and (3) governmental interest analysis.

The vested rights rules are entirely too rigid for conflict analysis in our modern industrialized and consumer-oriented society. States which still apply this approach first characterize an action as being a tort, contract, property or other type of action. A choice of law rule, in which the most important contact has been predetermined, is then applied to the action to find the appropriate law. For example, the traditional choice of law rule for tort actions is called lex loci delicti, or place of wrong or injury, which means that the rule considers the place of wrong to be the significant contact; therefore, the substantive law of the place of wrong will be applied regardless of the importance of any contacts the state may have.\(^{149}\)


\(^{147}\) 369 U.S. 1 (1962).


\(^{149}\) Texas is an example of a state which clings to lex loci delicti in wrong-
In the early 1960's, states openly began to revolt against "vested rights" as being a superficial approach to conflict analysis. New York helped lead the assault with its "grouping of contact" or "center of gravity" approach in tort and contract cases. A weakness of the center of gravity test is that it is susceptible to mechanical contact counting rather than meaningful analysis. Nevertheless, the Restatement (2d) of Conflict of Laws abandoned the vested rights approach to choice of law problems for its own version of the most significant contacts test. The Restatement approach lists the significant contacts for contract actions and encourages plaintiff to

ful death actions. Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182 (Tex. 1968); Click v. Thuron Indus., Inc., 460 S.W.2d 506 (1972). Texas' rationale for this is an early Texas case that interpreted its wrongful death statute as having no extraterritorial effect. However, there is an indication that Texas has adopted the more liberal interest analysis in personal injury cases. Lederle v. United Serv. Auto Ass'n, 394 S.W.2d 31 (Tex. Civ. App. 1965); Seguros Tepeyac S.A. v. Bostrom, 347 F.2d 168 (5th Cir. 1965). See Comment, At the Crossroads—Lex Loci Delictis or Most Significant Relationship, 24 BAYLOR L. REV. 359 (1972).


131 See Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965), for an illustration of how reliance on contact counting can cause distorted results. Two other New York opinions, Macey v. Rozbicki, 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966), and Tooker v. Lopez, 24 N.Y.2d 569, 241 N.E.2d 394, 301 N.Y.S.2d 519 (1969), did their best to distinguish Dym to reach more logical results. See also Public Adm'r v. Curtiss-Wright Corp., 224 F. Supp. 236 (S.D.N.Y. 1963), involving a crash in Florida of a plane manufactured in New Jersey and sold in California. The flight originated in Florida and the only contact between the parties took place in Florida. The court held the action was governed by Florida law, and no rationale was given why the Florida contacts were the "most significant contacts."

132 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145, is the tort choice of law test:

1. The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with re-
consider the qualitative factors of its section 6 in determining the state with the most significant contacts. The inherent danger in this approach is that it too may easily degenerate into "contact counting" because there are no real standards for determining which state has the most significant contacts.

The final major choice of law approach is government interest analysis.\textsuperscript{139} This approach is a step in the correct direction in that it endeavors to take a more qualitative stance. The courts following this approach isolate the competing laws, determining underlying policy for the laws, compare the policies to see if they conflict, and try to solve the conflict, if one exists. However, the analysis tends to break down in two spots. First, how are courts going to go about ascertaining the policy underlying a particular piece of legislation? Oftentimes, this will amount to guesswork and is more idealistic than practical. Second, by what method are the courts going to solve "true conflicts"—that is, situations where the underlying policies of the two states cannot be reconciled? As to the second fault, practically every commentator in the field has his own "pet" solution. Some rely on a mechanical forum-preference approach to
the resolution,\textsuperscript{154} while others have concocted elaborate checklists of "choice-influencing considerations."\textsuperscript{155}

The problem of choice of law in products liability cases is put in perspective when the attorney recognizes that choice of law rules and the law of products liability have undergone simultaneous revolutionary development in the last 15 years. Choice of law is moving away from a desire for mechanical uniformity toward an analytical case-by-case approach. Similarly, substantive products liability law is discrediting the privity-limited versions of negligence and breach of warranty for the enterprise liability concepts of breach of warranty without privity\textsuperscript{156} and strict liability in tort.\textsuperscript{157}

The concurrent developments have not at all been uniform, and this is what makes choice of law in products liability confusing.\textsuperscript{158}

Even nearly universal adoption of the Uniform Commercial Code (UCC) has not brought uniformity in the breach of warranty approach to products liability.\textsuperscript{159} Variations in the issues of who may sue and who may be sued are generated as states have either modified portions of the UCC or have refused to adopt certain sections.\textsuperscript{160} The high courts of only 22 states, so far, have expressly adopted strict liability in tort, while others have either inferentially adopted strict liability in tort or rely on the strained concept of warranty without privity or other more conventional theories.\textsuperscript{161} So, plaintiff's attorney must take caution to find the theory which will enable him to recover from the defendants he

\textsuperscript{154} B. Currie, \textit{Selected Essays on the Conflict of Laws} (1963 ed.).

\textsuperscript{155} R. Leflar, \textit{American Conflicts Law} (1st ed. 1968).

\textsuperscript{156} Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69, 75 A.L.R.2d 1 (1960).


\textsuperscript{160} A prime example is \textit{Uniform Commercial Code} § 2-318, which deals with privity (i.e., the relationship between the contracting seller and buyer). See generally White & Summers, \textit{Handbook of the Law Under the Uniform Commercial Code} 331 n.16 (1st ed. 1972).

wishes to sue. In states which accept strict liability in tort, a user, consumer, and, in some states, a bystander, will be able to sue the manufacturer, wholesaler, retailer, maintainer and others in the distributive chain. It is possible that warranty actions in some states may be as broad or even broader than the strict liability in tort action, but that depends on that jurisdiction's particular adoption or modification of the warranty provisions of the Uniform Commercial Code.

None of the three major choice of law approaches specifically deals with products liability. In fact, the vested rights approach emphasizes characterization. It is evident how this would cause confusion when applied to the products liability action—a hybrid of tort and warranty contract theories. However, the products liability action is considered to be more of a tort-based theory than a contract theory, and choice of law is moving towards interest analysis approaches which cut across the theoretical labels and make it easier to analyze products liability actions.

There is no simple solution to the choice of law stage of picking a forum in the aviation products liability action. The best approach is to seek application of the most liberal products liability law, and that is usually the law that permits the largest class of plaintiffs to sue the maximum number of defendants. This requires plaintiff to research the products liability law of the states which have contact with the incident—e.g., the place of the accident, of manufacture, of sale and delivery of the aircraft, and the place where the plaintiffs and defendants are domiciled. The plaintiff should then classify the choice of law rules of all potentially acceptable forums in order to decide on the forum whose rule will most probably apply the most favorable products liability law. Of course, the forum's approach to the applicable statute of limitations, wrongful death act, etc., are also material considerations. It is easy to see that lack of uniformity in choice of law rules and products liability law make choice of law a most challenging element in the decision on where to sue.


163 It has been advocated that characterization has no place in products liability. See Kühne, supra note 158, and Weintraub, supra note 159 at 1437-38.

CONCLUSION

The ideal forum for the plaintiff is not an unattainable goal. Products liability law is constantly expanding in recognition of the need for consumer protection on a national and international basis. The standards for establishing personal jurisdiction over out-of-state defendants have been considerably relaxed, properly reflecting the oneness of this country and the fact that aviation products are rarely confined to state and national boundaries. Discovery rules are opening doors and disclosing information hitherto forbidden to the victims of airplane crashes. In many states jury verdicts are now beginning to award damages commensurate with the actual losses sustained. Along with these trends, we have the uncertainty and confusion in the area of choice of law and the prospect of a period of uncertainty in the interpretation of the new federal rules of evidence until appellate decisions bring to them some uniformity.

Amidst these developments the plaintiff's attorney must make crucial decisions both as to parties and forum. Since aviation is an activity which transcends state and international boundaries, so must counsel broaden his horizon and think "spatially" in terms of jurisdiction, venue and choice of law. It is hoped that this article will be of assistance to him in arriving at decisions which will lead to an equitable and just result for his client.