RECENT DEVELOPMENTS IN AVIATION LAW: GENERAL

WILLIAM V. O’CONNOR*
WILLIAM C. DALTON**

TABLE OF CONTENTS

INTRODUCTION ........................................... 153
I. FORUM NON CONVENIENS ............................ 154
II. PREEMPTION ......................................... 163
III. JURISDICTION AND REMOVAL .................... 167
IV. MILITARY CASES .................................. 172
V. GENERAL AVIATION REVITALIZATION ACT OF
   1994 ................................................ 174
VI. DEATH ON THE HIGH SEAS ACT .................... 184
VII. PROPERTY DAMAGE AND BUSINESS-LOSS
     CASES ............................................ 186
VIII. EVIDENCE AND EXPERTS .......................... 189
IX. PLEADING ISSUES .................................. 191
X. CHOICE OF LAW .................................... 192
TABLE OF AUTHORITIES ............................... 194

INTRODUCTION

INCLUDED IN THIS article are summaries of cases from the
past year that contain important learning points for aviation
lawyers.

* William V. O’Connor is a partner in the Product Liability Group of Morrison
   & Foerster, specializing in aviation litigation. Mr. O’Connor obtained his B.A.
   from the University of California, San Diego and a law degree from Georgetown
   University Law Center.

** William C. Dalton, an associate in the Product Liability Group of Morrison
   & Foerster specializing in aviation litigation, assisted in the preparation of this
   article. Mr. Dalton obtained his B.A. from Washington and Lee University and a
   law degree from Georgetown University Law Center.
I. FORUM NON CONVENIENS

In re Air Crash Disaster over Makassar Strait, Sulawesi involved cases filed in various courts and consolidated in the multi-district litigation (MDL) court in the Northern District of Illinois on behalf of fifty-two passengers who perished in the January 2007 crash of Adam Air Flight 574, traveling between the Indonesian islands of Java and Sulawesi. None of the decedents or their representatives were U.S. citizens or residents. The Indonesian government, which issued a report, investigated the accident. Additionally, there was evidence to suggest that several of the plaintiffs in the action executed general liability releases obtained by Adam Air, which “purport[ed] to absolve all potentially liable parties, including the [d]efendants in this litigation.” The defendants moved to dismiss the cases based on forum non conveniens with conditions for re-filing in the Indonesian courts.

The defendants, manufacturers of the aircraft and its component parts, argued in their forum non conveniens motion that Indonesia was an adequate and available forum and that the balance of private- and public-interests factors weighed in favor of dismissal. In support of their argument regarding availability, the defendants agreed to submit to the jurisdiction of the Indonesian courts and also provided a declaration from an Indonesian law expert stating that an Indonesian court would accept the defendants’ consent. As to whether the Indonesian forum was adequate, the defendants’ Indonesian law expert opined that the plaintiffs would have adequate remedies in Indonesia. To counter these arguments, the plaintiffs relied on several news articles in support of the assertion that Indonesian courts are corrupt. The court, however, found that “[n]one of the articles offer[ed] concrete proof of corruption.”

---

2 Id. at *2.
3 Id. at *1.
4 Id. at *2.
5 Id. at *1–2.
6 See id. at *2–4.
7 Id. at *3–4.
8 Id. at *4.
9 Id.
10 Id.
With regard to the balancing of private- and public-interest factors—the principal test to determine convenience—the court found that the location of witnesses and the ease of access to proof in Indonesia, including evidence in Adam Air’s possession, weighed in favor of dismissal. Moreover, the court relied on the inability of the defendants to implead Adam Air—a significant factor in the private-interests analysis.

For the public-interest factors supporting dismissal, the court noted that the accident occurred during “an Indonesian domestic flight, operated by an Indonesian domestic air carrier, carrying predominantly Indonesian citizens.” Additionally, the court determined that Indonesian interests in air safety, under the circumstances of the accident and the subsequent investigation, far outweighed any U.S. interest. The likely application of Indonesian law to the case was also cited as a factor favoring dismissal. Finally, the court addressed the proper deference to the foreign plaintiffs, concluding that this consideration is little more than a “‘tie breaker’” and that such deference should not tip the balance in the plaintiffs’ favor if dismissal results in the cases proceeding in their home forum, as it did here.

In re Air Crash over the Mid-Atlantic on June 1, 2009 involved the consolidated cases before the MDL court in the Northern District of California arising out of the Air France Flight 447 crash, which occurred during an international flight from Rio de Janeiro to Paris. All 228 passengers and crew perished in the accident. Cases were filed on behalf of dozens of foreign decedents from a multitude of countries, including claims from the survivors and relatives of two U.S. citizens onboard the flight. The defendants included Air France, Airbus, and various component-part suppliers for the A330 aircraft, some of which were domiciled in the United States. The manufacturing defendants moved to dismiss all cases based on forum non conveniens,
with conditions for re-filing in France. In a separate motion, Air France argued that the court lacked jurisdiction over the claims brought on behalf of the two U.S. citizen passengers under the Montreal Convention’s “fifth jurisdiction” provision because the principal and permanent residence of the decedents was Brazil and not the United States. In the alternative, Air France moved to dismiss the case on forum non conveniens grounds.

The court did not accept Air France’s “fifth jurisdiction” argument under the Montreal Convention and proceeded to consider the merits of the forum non conveniens dismissal to France, which all defendants endorsed. The court rejected the argument of the U.S. plaintiffs that the creation of the “fifth jurisdiction” in the Montreal Convention precluded dismissal of cases filed on behalf of U.S. citizens pursuant to the terms of the Convention. Relying on the decisions from the West Caribbean Airways litigation, which addressed a similar argument under the Convention, the court found that a forum non conveniens dismissal is not precluded in a Montreal Convention “fifth jurisdiction” case. Thus, finding no bar to dismiss the Montreal Convention case, the court proceeded to analyze the merits of dismissal based on the well-defined body of forum non conveniens case law from prior foreign aviation-accident cases.

The plaintiffs advanced the argument that France was not an adequate forum due to the seemingly slow pace of litigation in similar aviation-disaster cases, which previously languished in the courts of France for many years. The plaintiffs did not claim that jurisdiction over the defendants could not be had in France or that French law did not provide them with an adequate remedy. The court, therefore, quickly concluded that France was an adequate and available forum, notwithstanding the plaintiffs’ claim of delay.

21 Id. at *1.  
22 Id. at *1, 4.  
23 Id. at *1.  
24 Id. at *4.  
25 Id. at *5.  
27 In re Air Crash over Mid-Atlantic, 2010 WL 3910354, at *5–6.  
28 See id. at *6–10.  
29 Id. at *7.  
30 Id.  
31 Id.
Turning to the balancing of private- and public-interest factors, the plaintiffs' argument regarding the location of evidence in the United States relating to the U.S. defendants' potential liability did not persuade the court. Critical to its determination that the ease of access to proof in France tipped the balance in favor of dismissal was that the accident involved a French airline, a French-manufactured aircraft, an investigation led by the French authorities, and a likelihood that all cases would be consolidated into a single proceeding in France. For the public-interest analysis, the court found that France was more interested than the United States. The U.S. interest in ensuring the quality of component parts on aircraft in general did not rise to the level of the French interest clearly demonstrated by the significance of the French-led investigation. Additionally, the court found that "dismissal... avoids the prospect of courts in the United States having to apply French law." And finally, the court found it inappropriate to impose the burden of several trials on the federal judiciary and potential jurors. The court granted the forum non conveniens motion.

In Patricia v. Boeing Co., the federal district court in Illinois dismissed cases filed on behalf of foreign plaintiffs arising out of the 2007 crash of Kenya Airways Flight 507 in Douala, Cameroon. The defendants argued that Cameroon was an available forum because jurisdiction lies there and, in any event, the defendants consented to jurisdiction for any re-filed actions. In addition, the defendants asserted that Cameroon courts provide a remedy for negligence, strict liability, breach of warranty, and wrongful death claims.

The plaintiffs countered the defendants' argument regarding availability and adequacy by asserting that pretrial discovery is unavailable in Cameroon and there was no remedy for their spo-

32 See id. at *8–9.
33 Id.
34 Id. at *9.
35 See id.
36 Id. at *10.
37 Id.
38 Id. at *11.
40 Id. at *2.
41 Id. at *3.
The district court found the plaintiffs' arguments unpersuasive, pointing to the established body of forum non conveniens case law that holds the absence of U.S.-style discovery does not render a forum inadequate. Moreover, because “[p]laintiffs are not entitled to identical causes of action in the alternative forum,” the unavailability of a spoliation of evidence claim in Cameroon did not make its courts inadequate.

The district court’s consideration of the private-interest factors contained the usual exposition found in foreign-accident cases involving U.S. manufacturers—the location of liability and damages evidence, the authority charged with the investigation, and the location of the wreckage. Additionally, the district court confirmed, as many other courts have, that courts entitle foreign plaintiffs less deference in their choice of forum. Importantly, the district court noted that Kenya Airways, an indispensable party, was not subject to the court’s jurisdiction and, therefore, could not be joined if the lawsuits proceeded in the United States. In Cameroon, however, Kenya Airways could be joined, and thus, the district court found this to be a critical private-interest factor weighing in favor of dismissal. For the public-interest balancing, the district court found Cameroon’s interests predominated because U.S. interests diminish in a foreign-accident case involving a foreign airline resulting in the deaths of foreign individuals. Finally, the district court conducted a truncated choice of law analysis to demonstrate that Cameroon law was likely to apply if the cases remained in the United States—yet another factor favoring dismissal.

In Delta Air Lines, Inc. v. Chimet, S.P.A., the Third Circuit reviewed a Pennsylvania district court decision to dismiss on forum non conveniens grounds a declaratory relief action filed against the Italian metals manufacturer Chimet regarding the stolen shipment of 100 kilograms of pure platinum in the course of international transportation from Italy to the United States.

---

42 Id. at *2–3.
43 See id. at *2.
44 Id. at *3.
45 Id.
46 Id. at *4.
47 Id.
48 See id.
49 Id. at *5.
50 Id. at *6.
Delta sought a declaration that the cargo limits set forth in the Montreal Convention limited its liability. The dispute centered on the meaning of the shipment’s air waybill, the standard International Air Transportation Association (IATA) cargo form, and a consignment agreement. The principal arguments advanced by Chimet in support of dismissal included the convenience to Italian witnesses required to interpret the Italian language documents at issue and the likelihood that Italian parties beyond the court’s jurisdiction would need to be joined in the litigation. On this record, the Third Circuit affirmed the dismissal of Delta’s claims to Italy. Moreover, Delta’s argument that the district court failed to give deference to Delta’s chosen forum under prevailing forum non conveniens jurisprudence did not persuade the Third Circuit. It rejected this argument, finding that the deference to the plaintiff’s choice of forum must be balanced against the inconvenience to the defendant, and in this case, the inconvenience to Chimet if forced to litigate outside of Italy overcame Delta’s choice to sue in the United States.

In Khan v. Delta Airlines, Inc., the district court in New York sua sponte issued an order to show cause for why the court should not dismiss on forum non conveniens grounds an action brought by a Canadian citizen. The case involved claims under the Montreal Convention by a Delta passenger injured when he fell on his way to the baggage area. The plaintiff alleged that Delta failed to provide the wheelchair he requested during ticketing. During two status conferences regarding the parties’ ability to marshal evidence for U.S. proceedings, the district court became concerned because most of the witnesses and the plaintiff’s treating physicians were located in Canada. Thus, the order to show cause followed.

The district court first addressed whether a forum non conveniens dismissal was permitted in an action brought under the

---

52 Id.
53 Id. at 292.
54 Id. at 294.
55 See id. at 301.
56 See id. at 295–96.
57 Id. at 296.
59 Id.
60 Id.
61 See id. at *1.
Montreal Convention. The district court concluded that dismissal was permitted because a court may employ its own procedural rules in a Montreal Convention case, which includes the doctrine of forum non conveniens. As to the deference afforded to the Canadian plaintiff's choice of forum, the court afforded less deference to the plaintiff because, "when a foreign plaintiff chooses a U.S. forum, it 'is much less reasonable' to presume that the choice was made for convenience" and more plausible to assume that the choice "'was made for forum-shopping reasons.'" In balancing the convenience of the parties and the private- and public-interest factors, the court concluded that New York was not the center of the case. Witnesses and evidence were readily accessible in Canada, and the facts occurring in New York were not seriously in dispute. Finally, the court found the Canadian forum "'significantly preferable'" to the New York forum and dismissed the case.

In Can v. Goodrich Pump & Engine Controls Systems, Inc., Turkish citizens filed suit in Connecticut district court against Rolls-Royce and Goodrich Pump & Engine Control Systems (GPECS) for damages arising from a helicopter crash in Antalya, Turkey. The defendants moved to dismiss the complaint, arguing that a prior Indiana state court dismissal of an almost identical lawsuit on forum non conveniens grounds should be given preclusive effect. In addition, the defendants made a substantive forum non conveniens motion, urging dismissal of the Connecticut lawsuit. In a lengthy exposition of the issue-preclusion doctrine under applicable law, the district court concluded that the Indiana dismissal should be given preclusive effect and dismissed the suit on that basis.

In addition, the court addressed the substantive arguments renewed before it regarding forum non conveniens. The plaintiffs did not dispute that Turkish courts provided an available

---

62 Id. at *2.
63 Id.
64 Id. at *4 (citations omitted).
65 Id. at *4–7.
66 Id. at *5, *7.
67 Id. at *10.
69 Id. at 245.
70 Id. at 245–46.
71 Id. at 257.
72 Id.
and adequate forum.\textsuperscript{73} Thus, the court easily determined dismissal to Turkey would be appropriate if the balance of private- and public-interest factors, when juxtaposed with the proper deference afforded to the plaintiffs, weighed in favor of dismissal.\textsuperscript{74} In its analysis of the balancing factors, the court noted that the foreign plaintiffs were entitled to little, if any, deference to their choice of forum.\textsuperscript{75} Moreover, the scales tipped in favor of dismissal because all of the plaintiffs' decedents were citizens of Turkey, the witnesses to the accident were in Turkey, and a substantial amount of evidence was located in Turkey.\textsuperscript{76} Finally, the court pointed out that "'[c]ourts have repeatedly exercised their discretion to hold that a defendant's manufacturing activities within the U.S. do not tilt the public interest in favor of retaining jurisdiction.'"\textsuperscript{77}

In \textit{Sabatino v. Boeing Co.}, the Illinois state court in Cook County denied the defendants' forum non conveniens motion in a case brought by United Kingdom residents involving exposure to toxic fumes, which allegedly caused respiratory problems during a charter flight from London to Orlando, Florida.\textsuperscript{78} The plaintiffs alleged that the manufacturers of the aircraft's bleed-air system, the aircraft, and its engines were at fault based on theories of strict liability and negligent design.\textsuperscript{79} The defendants moved to dismiss the case for re-filing in the United Kingdom based on forum non conveniens, arguing that Illinois had no significant connection to the case.\textsuperscript{80} Although the court afforded the foreign plaintiffs less deference in its analysis, it held nonetheless that the convenience factors did not favor one forum over the other.\textsuperscript{81} Because evidence was located in multiple forums, the court concluded that, as a practical matter, ease of access to proof was not significant when the availability of documentary evidence is made easier in the age of the Internet, e-mail, and other forms of telecommunication.\textsuperscript{82} The court seemed to ignore its inability to compel unwilling witnesses for

\textsuperscript{73} Id. at 258.
\textsuperscript{74} See id. at 258–62.
\textsuperscript{75} Id. at 259.
\textsuperscript{76} See id.
\textsuperscript{77} Id. at 260 (citations omitted).
\textsuperscript{78} Sabatino v. Boeing Co., No. 09 L 1056, slip op., at 1 (Ill. Cir. Ct., Cook Cnty., May 3, 2010).
\textsuperscript{79} Id.
\textsuperscript{80} Id. at 1–2.
\textsuperscript{81} Id. at 5.
\textsuperscript{82} Id. at 6.
trial, concluding that the private-interest factors did not compel the court to dismiss.\textsuperscript{83} Regarding public-interest factors, the court found that Illinois had just as much of an interest as the United Kingdom in the safety of aircraft, especially when the defendants conduct business in Illinois and take advantage of Illinois law.\textsuperscript{84}

In \textit{Arik v. Boeing Co.}, foreign plaintiffs filed suit in Cook County, Illinois, state court against the aircraft manufacturer and the manufacturer of the ground-proximity warning system following the 2007 crash of Atlasjet Flight 4203 near Keçiborlu, Turkey.\textsuperscript{85} The plaintiffs, who were representatives of thirty-two decedents, alleged causes of action based on product liability, wrongful death, and negligence.\textsuperscript{86} The defendants moved for forum non conveniens dismissal to Turkey, or in the alternative, to the State of Washington, where the aircraft manufacturer's main base for commercial-airplane manufacturing was located.\textsuperscript{87}

The Cook County court found that Turkey was an available and adequate forum, noting that the defendants consented to jurisdiction there.\textsuperscript{88} The court rejected the plaintiffs' argument that the requirement of Turkish courts of a hefty filing fee and the unavailability of U.S.-style discovery in Turkey rendered the forum unavailable.\textsuperscript{89} When balancing the private- and public-interest factors, however, the court pointed out that witnesses and evidence were scattered among various countries and states, making no singular forum more convenient.\textsuperscript{90} As a result, the court found that the private-interest factors did not strongly favor dismissal.\textsuperscript{91} Regarding the public-interest factors, the court pointed out that Illinois was the headquarters of one the defendants, where it enjoyed the protection of Illinois law; thus, it was not appropriate to dismiss the case for re-filing in Turkey.\textsuperscript{92} Moreover, while Washington was an available forum, the defendants did not establish that Washington had a greater interest in the case than Illinois or that evidence could be more

\begin{flushleft}
\textsuperscript{83} See id. \\
\textsuperscript{84} Id. at 7. \\
\textsuperscript{85} Arik v. Boeing Co., No. 08 L 012539, slip op., at 1 (Ill. Cir. Ct., Cook Cnty., Feb. 18, 2010). \\
\textsuperscript{86} Id. at 1. \\
\textsuperscript{87} Id. \\
\textsuperscript{88} Id. at 2. \\
\textsuperscript{89} Id. \\
\textsuperscript{90} Id. at 4–5. \\
\textsuperscript{91} Id. at 5. \\
\textsuperscript{92} Id. at 5–6.
\end{flushleft}
readily obtained in that forum. The court, therefore, denied the defendants' forum non conveniens motion.

In *Lleras v. ExcelAire Services, Inc.*, the Second Circuit reviewed the forum non conveniens dismissal by the MDL court in the Eastern District of New York of the cases arising out of the Gol Flight 1907 mid-air collision over the Amazon rainforest. The MDL involved over 100 cases filed on behalf of Brazilian plaintiffs against U.S.-domiciled defendants. The Second Circuit affirmed the decision of the MDL court, finding that the foreign plaintiffs were not entitled to deference in their choice of forum and that Brazil was a "significantly preferable" forum to hear the cases arising out of the accident due to the U.S. courts' lack of jurisdiction over potentially liable parties and the lack of compulsory process over witnesses and evidence located in Brazil. Thus, the Second Circuit found, on balance, the U.S. forum to be "genuinely inconvenient" as compared to Brazil, further concluding that the balance of public- and private-interest factors favored dismissal. Finally, the Second Circuit found no error in the MDL court's determination that Brazil was an available and adequate forum.

II. PREEMPTION

In *US Airways, Inc. v. O'Donnell*, the Tenth Circuit considered the preemptive scope of the Federal Aviation Act of 1958 (FAAct) as it applied to a New Mexico law that regulated the service of alcoholic beverages onboard commercial flights. After a high-profile incident involving an intoxicated US Airways passenger who was killed along with five others in an automobile accident on his drive home from the Albuquerque airport, the New Mexico Alcohol and Gaming Division (AGD) "served U.S. Airways with a citation asserting that U.S. Airways had served alcohol to an intoxicated person." Further, the AGD "served [US] Airways with a cease-and-desist order directing [US] Air-

---

93 Id. at 6–7.
94 Id. at 7.
96 *In re Air Crash Near Peixoto De Azeveda, Brazil, on Sept. 29, 2006*, 574 F. Supp. 2d 272, 275–76 (E.D.N.Y. 2008).
97 *Lleras*, 354 F. App’x at 587 (citation omitted).
98 Id.
99 Id.
100 *US Airways, Inc. v. O’Donnell*, 627 F.3d 1318, 1321–22 (10th Cir. 2010).
101 Id. at 1322–23.
ways 'to refrain from . . . serving . . . alcoholic beverages'” on its flights in New Mexico without a license.102 US Airways promptly applied for a "license to serve alcoholic beverages to passengers on aircraft in New Mexico."103 The AGD issued a 90-day temporary license to US Airways, but the AGD subsequently declined to grant US Airways a permanent license, claiming US Airways did not comply with the required New Mexico alcohol-server training and cited the prior incident involving the US Airways passenger as an additional basis for denial.104

US Airways filed suit against the AGD in district court in New Mexico, asserting that the Airline Deregulation Act of 1978 (ADA) and the FAAct preempted New Mexico's regulation of the service of alcoholic beverages on US Airways flights.105 Both sides moved for summary judgment in the district court on the issue of preemption.106 The AGD prevailed on its motion, with the district court finding that the ADA and FAAct did not preempt New Mexico's regulation of the service of alcoholic beverages on commercial flights.107 An appeal to the Tenth Circuit followed.

"On appeal, [US] Airways reassert[ed] its contention that federal law both expressly and impliedly preempts [New Mexico]'s regulation of an airline's alcoholic beverage service provided on aircraft” under the ADA and FAAct, respectively.108 The court only addressed the issues of implied field preemption under the FAAct because the outcome on this question did not require an examination of whether the regulation was expressly preempted under the ADA.109 The court did find the New Mexico regulation preempted under the FAAct in a lengthy, well-reasoned opinion that seemed to abandon the Tenth Circuit's prior decision in Cleveland v. Piper Aircraft Corp., which found that the FAAct did not preempt the entire field of aviation safety.110 Recognizing that the Tenth Circuit was in the minority of circuits on the issue of implied field preemption under the FAAct, the court fashioned its opinion to be in line with other circuits find-

102 Id. at 1323.
103 Id.
104 Id.
105 Id.
106 Id.
107 Id. at 1323–24.
108 Id. at 1324.
109 Id.
110 Id. at 1322; see Cleveland v. Piper Aircraft Corp., 985 F.2d 1438, 1442 (10th Cir. 1993).
ing that Congress intended to occupy the entire field of aviation safety. The court closely reviewed the various federal-aviation regulations regarding the service of alcoholic beverages onboard aircraft and found that such regulations left no room for additional state regulation. Moreover, the court found that the federal regulations addressing the service of alcoholic beverages on aircraft related to aviation safety and were pervasive. Thus, the court held that federal law preempted New Mexico’s attempt to impose licensing requirements and additional training on airlines, such as US Airways.

In Elassaad v. Independence Air, Inc., the Third Circuit addressed whether federal law preempted the claims brought by a disabled passenger injured when he fell down the airstairs of a commuter aircraft. The defendant moved for summary judgment, arguing that federal law, here the Air Carrier Access Act (ACAA), provided the standard of care in the case and preempted the plaintiff’s state law negligence claims. Because the ACAA requires that a passenger request assistance and the plaintiff had not done so, the defendant could not be held liable to the plaintiff under this federal standard of care. The district court concluded that under the Third Circuit case Abdullah v. American Airlines, Inc. federal law indeed preempts state law standards of care, and, due to the plaintiff’s inability to show that the defendants violated any federal standard in the ACAA, the court granted summary judgment in the defendant’s favor.

On appeal, the Third Circuit reaffirmed its reasoning in Abdullah that federal law impliedly preempts the entire field of aviation safety, thus supplying the standard of care in cases that seek to hold a defendant liable for aviation-safety related claims. However, the court clarified that this preemption only extends to in-flight safety, and because the plaintiff’s injuries occurred during the disembarkation process, the court

---

112 Id. at 1325–26.
113 Id. at 1327–28.
114 Id. at 1328–29.
115 Elassaad v. Independence Air, Inc., 613 F.3d 119, 121 (3d Cir. 2010).
117 Elassaad, 613 F.3d at 123.
118 Id.
120 Elassaad, 613 F.3d at 123–24.
121 Id. at 125.
could apply state law standards. The court vacated the decision of the district court and remanded to the trial court for further proceedings.

In Sikkelee v. Precision Airmotive Corp., a case arising from a 2005 crash of a Cessna aircraft manufactured in 1976, the plaintiff brought multiple Pennsylvania state law claims against the defendants. The defendants argued that federal law preempted the plaintiff's claims because federal-aviation regulations provide uniform and exclusive standards for the entire field of aviation safety. A plaintiff's "claims must consequently allege violations of federal standards of care." Since the plaintiff asserted state law standards of care, the defendants argued that those claims must necessarily be dismissed. The plaintiff argued that the Third Circuit's Abdullah decision had been "overruled by the Supreme Court's preemption decision in Wyeth v. Levine." Citing multiple statutes and cases, the court held that Abdullah is still applicable post-Wyeth. Thus, the court dismissed all claims asserted by the plaintiff under state law standards of care.

Specifically discussing the General Aviation Revitalization Act (GARA), the court recognized that "some courts found that GARA's legislative history demonstrated that Congress intended not to preempt the entire field of aviation safety." Furthermore, "some scholars observed that, until the commencement of the statute of repose, state products-liability standards control actions regarding the design or defects of general-aviation aircraft and component parts." Nevertheless, the court stated

---

122 Id. at 128.
123 Id. at 134.
125 Id. at 432.
126 Id.
127 Id.
128 Id. at 433; see generally Wyeth v. Levine, 555 U.S. 555 (2009).
130 Id. at 439.
131 Id. at 434.
132 Id.
that certain jurisdictions, “including the Third Circuit, have held that the comprehensive and pervasive nature of federal regulation evinces Congressional intent to impliedly preempt the entire field of aviation.”

III. JURISDICTION AND REMOVAL

In In re Air Crash near Clarence Center, New York, on Feb. 12, 2009, the district court considered a motion to remand by five plaintiffs who originally filed their actions in New York state court. The defendants removed the cases, which arose out of the Continental Connection Flight 3407 crash, to the federal MDL court based on diversity and federal-question jurisdiction. According to the defendants, the plaintiffs fraudulently joined Flight Safety, a New York corporation and a defendant in the state court actions, for the purpose of defeating diversity. Moreover, the defendants argued that the Federal Aviation Act of 1958 and the Airline Deregulation Act of 1978 preempted the plaintiffs’ state law claims. Thus, federal-question jurisdiction provided an additional basis for removal. The district court disagreed with the defendants and remanded the cases back to state court. The court based its decision to remand on a finding that Flight Safety was not fraudulently joined and that preemption does not typically provide a basis for removal. As to the fraudulent joinder of Flight Safety, the court reasoned the defendants had not shown that there was no possibility of recovery or that New York’s educational-malpractice bar applied to Flight Safety. Additionally, the preemption argument was not persuasive, as the court found that preemption, here implied field preemption, is merely a defense that does not give rise to a federal claim sufficient to support removal.

133 Id.
135 Id.
136 Id. at *3.
137 Id. at *10.
138 See id.
139 Id. at *1, *12.
140 Id. at *4, *11.
141 Id. at *6. Flight Safety allegedly provided training to the flight crew, Rebecca Shaw, and Marvin Renslow. Id. at *1. There was a factual dispute regarding the level of direct involvement by Flight Safety. Id. at *8.
142 Id. at *9.
In *Scrogin v. Rolls-Royce Corp.*, the district court confronted whether the defendants properly removed an injury case filed in Connecticut state court arising out of the crash of an OH-58 Kiowa Warrior helicopter near Kirkuk, Iraq, during a night convoy security mission in an active war zone. In response to the plaintiffs' motion to remand, the defendants argued that the plaintiffs' claims presented substantial issues of federal law and, therefore, removal was proper under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*. As an additional basis for removal, the defendants relied on the federal officer-removal statute, citing to the fact that the aircraft and its engines were produced for the military under government contracts and the defendants had at least two colorable federal defenses—the government-contractor defense and the combatant-activities exception to the Federal Tort Claims Act, the latter of which bars certain tort claims against military contractors arising during a time of war.

The district court agreed with the defendants' removal grounds; namely, that the plaintiffs' claims presented substantial issues of federal law such that removal was proper because the case involved active-duty military officers, an accident that occurred during a military operation, and an allegedly defective engine that was sold exclusively to the U.S. Army. Moreover, the district court concluded that removal under the federal officer-removal statute was proper because the defendants were acting under the close supervision of the government and the conduct giving rise to the plaintiffs' claims was pursuant to that direction. As to the colorable federal-defense prong, a requirement under the federal officer-removal statute, the district court found that a viable government-contractor defense existed.

---


144 *Id.* at *2 (citing *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 314 (2005)). The U.S. Supreme Court case *Grable* provides a removal framework, though narrowly construed, for cases that turn on the interpretation of federal law. *Grable*, 545 U.S. at 314. The case is often cited as a basis for removal when combined with federal standard of care preemption, issues regarding proper certification and delegation of related duties to manufacturers under DER or DOA authority, and other inherently federal issues that permeate aviation accident litigation.


146 See *Scrogin*, 2010 WL 3547706, at *4–6.

147 See *id.*
RECENT DEVELOPMENTS: GENERAL

because the defendants contended that they complied with reasonably precise specifications set forth by the government for the design and manufacture of the engine.\textsuperscript{148} Additionally, the court concluded that the combatant-activities exception to the Federal Tort Claims Act may apply in light of the circumstances of the accident occurring during a time of war.\textsuperscript{149}

Broussard v. LCS Correction Services, Inc. involved a wrongful death case brought by the family of a Louisiana man who was killed when a Beechcraft Baron crashed into his mobile home near the Jeanerette Le Maire Memorial Airport.\textsuperscript{150} The plaintiffs filed an amended complaint, their fourth such amendment, which contained new allegations that the defendants’ violations of various federal-aviation regulations found in Title 14 of the Code of Federal Regulations caused the accident.\textsuperscript{151} The defendants timely removed the case to the Louisiana federal court, claiming the case now presented a federal question, namely, the defendants’ alleged violations of the regulations set forth in Title 14.\textsuperscript{152}

The plaintiffs moved to remand, arguing that the framework articulated in Grable did not support removal.\textsuperscript{153} The district court agreed, finding “that ‘the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction.’”\textsuperscript{154} The court relied on a body of case law holding that an alleged violation of the federal-aviation regulations does not support removal.\textsuperscript{155} The district court reasoned that, although aviation cases may involve alleged violations of federal-aviation regulations, resolving those federal issues will not necessarily be dispositive of the entire case.\textsuperscript{156} Moreover, the district court found that the case did not turn on

\textsuperscript{148} Id. at *5.
\textsuperscript{149} Id. at *6.
\textsuperscript{151} Id. at *1.
\textsuperscript{152} Id.
\textsuperscript{153} Id. at *1–2.
\textsuperscript{154} Id. at *2, *6 (quoting Merrell Dow v. Thompson, 478 U.S. 804, 813 (1986)).
\textsuperscript{156} Id. at *6.
a disputed interpretation of federal law as it did in Grable; rather, the case was fact intensive and concerned whether the facts alleged amounted to a violation of the federal regulations.\textsuperscript{157}

In West v. A & S Helicopters, the defendants removed a case filed in Missouri state court based on Grable and the federal officer-removal statute.\textsuperscript{158} The case involved the crash of a privately owned MD500, which killed one passenger and injured another.\textsuperscript{159} The plaintiffs moved to remand, and the defendants asserted two principal arguments in support of removal.\textsuperscript{160} First, the defendants relied on Grable, claiming the plaintiffs' action necessarily involved substantial issues of federal law, actually disputed, that required a uniform application of federal law by federal courts.\textsuperscript{161} Specifically, the defendants pointed to the plaintiffs' allegation that they violated the federal aviation regulations in connection with their duties as type-certificate holders for the helicopter.\textsuperscript{162} Additionally, the defendants argued that the federal officer-removal statute was met, as the defendants' employees were delegated certain responsibilities by the FAA regarding certification.\textsuperscript{163} The Grable arguments did not persuade the court, which found that courts in similar cases rejected this basis for removal.\textsuperscript{164} As to the federal-officer ground for removal, the district court was unwilling to impute delegated actions to the defendants, which would allow them to avail themselves of the federal officer-removal statute.\textsuperscript{165} The court went on to find that FAA designees and their employers were distinct legal entities for purposes of federal-officer removal.\textsuperscript{166} Thus, the defendants could not rely on federal-officer removal for the federally delegated acts of their employees.\textsuperscript{167}

In Koral v. Boeing Co., the Seventh Circuit considered whether Boeing's removal of several cases filed in Illinois state court was

\begin{itemize}
\item \textsuperscript{157} Id.
\item \textsuperscript{158} West v. A & S Helicopters, No. 2:10-CV-04181-NKL, 2010 WL 4703820, at *1 (W.D. Mo. Nov. 15, 2010).
\item \textsuperscript{159} Id.
\item \textsuperscript{160} Id.
\item \textsuperscript{161} Id. at *3.
\item \textsuperscript{162} Id.
\item \textsuperscript{163} Id. at *4.
\item \textsuperscript{164} Id. at *3.
\item \textsuperscript{165} Id. at *5.
\item \textsuperscript{166} Id.
\item \textsuperscript{167} Id. at *6.
\end{itemize}
proper under the Class Action Fairness Act. The cases, 29 in total with 117 named plaintiffs, arose out of the 2009 crash of a Boeing-built Turkish airliner in the Netherlands. Boeing moved to dismiss the state court cases on the basis of forum non conveniens, arguing, among other grounds, that Washington was a more convenient forum, as its Washington-based employees—required witnesses for trial—would be burdened by attending twenty-nine separate trials in Illinois. In response to Boeing's motion, the plaintiffs argued that, as a practical matter, there would likely be a single liability trial in an exemplar case, thus obviating the need for Boeing's witnesses to make multiple trips to Illinois for subsequent trials. The court will, therefore, establish liability, or lack thereof, in a single proceeding, according to the plaintiffs' filing.

The Class Action Fairness Act provides for removal of a "mass action... in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." Seizing on the plaintiffs' statement in response to the state court forum non conveniens motion, Boeing removed, arguing that the plaintiffs were proposing a mass-action trial as defined by the Class Action Fairness Act. The various district courts to which the removed cases were eventually assigned disagreed, remanding at least seven cases back to state court before the Seventh Circuit considered the issue. The Seventh Circuit held that "Boeing's removal of the [ ] cases was premature" because the plaintiffs must clearly propose a joint trial themselves and the statement contained in the opposition to the forum non conveniens motion regarding a single liability trial was not a proposal, but a prediction of what might happen if an Illinois state court judge decided to hold a single liability trial.

---

169 Koral, 628 F.3d at 946.
170 Id.
171 Id.
172 Id.
174 Koral, 628 F.3d at 946.
175 Id. Provisions of the Class Action Fairness Act provide for appellate review of remand orders upon the granting of a petition for permission to appeal. 28 U.S.C. § 1453(c). The Seventh Circuit granted Boeing's petition on the basis that the appeal presented novel issues. Koral, 628 F.3d at 946.
176 Koral, 628 F.3d at 946-47.
Seventh Circuit thought it too harsh to displace the plaintiffs' chosen forum for merely pointing out a practical consideration of the Illinois state court regarding a possible liability trial in an effort to avoid dismissal of their state court cases to Washington.\textsuperscript{177}

IV. MILITARY CASES

\textit{Linfoot v. MD Helicopters, Inc.} addressed the application of the combatant-activities exception of the Federal Tort Claims Act to claims against military contractors brought by a U.S. Army pilot injured when his AH-6M Little Bird helicopter crashed south of Baghdad following a main driveshaft failure.\textsuperscript{178} The accident occurred during an undefined mission, though the plaintiff was a member of the 160th Special Operations Aviation Regiment (SOAR), a Special Forces regiment typically tasked with high-risk combat missions at night.\textsuperscript{179} The defendants moved for judgment on the pleadings, asserting that the combatant-activities exception barred the plaintiff's state product liability claims against military contractors because the injuries arose from combatant activities.\textsuperscript{180} Furthermore, the defendants claimed, the "use of military equipment for combat purposes is a 'uniquely federal interest' and that if military contractors could be sued for injuries occurring during combat operations, such actions would pose a significant conflict with the federal government's interest in procuring military equipment and making combat-related decisions."\textsuperscript{181}

The district court denied the defendants' motion without prejudice, allowing further discovery to determine whether the combatant-activities exception applied to the case.\textsuperscript{182} The court noted that the defense appeared to require a fact-based approach, much like the government-contractor defense.\textsuperscript{183} To the extent the plaintiff's claims, when further developed, present a significant conflict with federal policy, the court may find the exception applies, but on the current state of the factual record, the court was not prepared to rule in the defendants'
favor. Thus, it is likely that the issue will continue to be litigated in the Linfoot case as the parties conduct discovery and prepare for trial.

In Getz v. Boeing Co., a case arising from the crash of an Army MH-47E Chinook helicopter in Afghanistan, the plaintiffs sued the manufacturers of the aircraft, its engines, and various components for design defects, manufacturing defects, and failure to warn. The court held that the government-contractor defense applied to all defendants and, therefore, granted summary judgment to each. The court analyzed the government-contractor defense’s application to each defendant individually. Outlining the legal standard as set out in Boyle v. United Technologies Corp., the court stated that a state law, which holds government contractors liable for design defects, must be displaced “when (1) the United States approved reasonably precise [design] specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not the United States.”

The plaintiffs alleged that Honeywell, which manufactured the aircraft’s engines, had simply provided the U.S. Army with a “stock” or “off-the-shelf” engine and, therefore, failed to satisfy Boyle’s first prong. The court disagreed, stating that all the evidence indicated that the U.S. Army had been heavily involved throughout the engine design and qualification process, continuing through the testing and installation phases of development. The plaintiffs also claimed Honeywell failed to satisfy the third prong because it failed to warn the U.S. Army about the danger that water ingestion could cause engine failure. Again, the court disagreed, stating that because the U.S. Army already knew of this danger, Honeywell was not required to provide such a warning.

The plaintiffs claimed Goodrich was liable for design defects related to the engines’ “Full Authority Digital Electronic Cont-

---

184 Id.
186 Id. at 995, 997, 999–1000.
187 Id. at 991.
188 Id. at 990 (quoting Boyle v. United Techs. Corp., 487 U.S. 500, 512 (1988)).
189 Id. at 992.
190 Id. at 993.
191 Id. at 994.
192 Id. at 994–95.
control system (FADEC), which controls an engine’s fuel flow and includes the Digital Electronic Control Unit (DECU)." The plaintiffs specifically alleged that the U.S. “Army had absolutely no involvement with the initial design of the FADEC,” which they claimed had been completed in the United Kingdom for the Royal Air Force’s (RAF) Chinook helicopters. The court found that the components at issue, while similar to those used by the RAF, were models specifically developed for and approved by the U.S. Army.

Finally, the plaintiffs sought to hold Boeing liable for defects in the design and manufacture of the aircraft itself. The plaintiffs first alleged that the U.S. Army merely “rubber-stamped” a pre-existing helicopter design, rather than defining precise specifications for the aircraft. Boeing refuted this argument by providing uncontroverted evidence that it worked with the U.S. Army for many years to develop the MH-47 version of the Chinook helicopter. The plaintiffs claimed that, like Honeywell, Boeing failed to warn the U.S. Army of dangers known to it about the engines. However, “[b]ecause Boeing manufactured the aircraft and not the engine, its only obligation under Boyle was to inform the Army of the hazards in the use of the aircraft, not in the use of its engines.”

V. GENERAL AVIATION REVITALIZATION ACT OF 1994

In Castillo v. Cessna Aircraft Co., defendant Teledyne Continental Motors, Inc. moved for summary judgment in a product liability action arising from the crash of a Cessna aircraft equipped with a Teledyne engine. The aircraft took off from Peten, Guatemala, en route to Guatemala City; at least two of the passengers onboard had been seriously injured in an automobile accident and were being transported to Guatemala City for medical care. Teledyne argued that GARA barred the plaintiffs’ claims.

193 Id. at 995.
194 Id.
195 Id. at 995–96.
196 Id. at 997.
197 Id. at 998.
198 Id.
199 Id. at 999.
200 Id.
202 Id.
203 Id.
The Florida district court, applying Florida choice of law rules, applied the "most significant relationship" test and determined that Guatemalan law applied to the substantive issues of the case. The "most significant relationship" standard dictates "that in tort actions involving more than one state, all substantive issues should be determined in accordance with the law of the state having the most "significant relationship" to the occurrence and parties." Finding that a statute of repose is a substantive rather than a procedural issue under Florida choice of law principles, the court held that Guatemalan statutes of limitations and repose applied, and GARA, therefore, did not bar the plaintiffs' claims.

The court further noted that even if GARA were applicable to the claims at bar, an issue of material fact existed relating to one of the four GARA exceptions. "GARA's statute of repose does not apply 'if the person for whose injury or death the claim is being made is a passenger for purposes of receiving treatment for a medical or other emergency.'" It was undisputed that at least two of the decedents were seriously injured and were being taken to Guatemala City because of poor hospitals elsewhere. The plaintiffs argued that GARA's emergency exception applied; the defendant argued that the emergency exception applies only to passengers who receive emergency-medical treatment while onboard the aircraft. The court stated that under GARA's specific language, the "purpose" of the persons who caused the injured passengers to board the aircraft is "critical." Since the defendant failed to establish that there was no genuine issue of material fact as to why the injured passengers were "made passengers" on the flight at issue, the court did not grant summary judgment under GARA.

In Aubrey v. Precision Airmotive LLC, two defendants, Lycoming and Precision Airmotive, sought collateral review of a trial court's denial of their motions for summary judgment under

---

204 Id. at 1310–11.
205 Id. (quoting Merkle v. Robinson, 737 So. 2d 540, 542 (Fla. 1999)).
206 Id. at 1311.
207 Id. at 1312.
209 Id.
210 Id.
211 Id.
212 Id. at 1312–13.
The plaintiffs alleged that in a case arising from the 2003 crash of a Piper aircraft manufactured in 1967, GARA’s statute of repose did not apply because the defendants’ actions fell within the statute’s rolling provision. The accident-aircraft’s engine underwent an overhaul in 1989, “during which new compression rings were installed and the carburetor received a brass float system replacement.” The plaintiffs further alleged that GARA did not apply because the defendants knowingly misrepresented to the FAA information material to the performance of their component parts.

Lycoming asserted it did not manufacture the broken compression ring on the accident aircraft, and GARA’s rolling provision was therefore inapplicable. Because the plaintiffs provided expert testimony and documentation establishing that Lycoming may have manufactured, sold the compression ring, or both, the court found that a genuine issue of material fact existed, which needed to be decided at trial. Collateral review was therefore inappropriate.

Lycoming also argued that the trial court erred in its application of GARA’s fraud exception by failing to require evidence of intent or scienter. The court stated that the plaintiffs provided evidence that Lycoming had notice of defects in its design, which a jury must consider in deciding whether GARA’s fraud exception applies. Ruling on the defendant’s motion would, therefore, require a fact-based review, which the court held was inappropriate upon collateral review.

Like Lycoming, Precision Airmotive argued that it did not manufacture the replacement part at issue. But, in Precision’s case, the court found that collateral review was appropriate because it questioned whether the trial court broadened the scope of the term “manufacturer” under GARA by holding that Precision would be treated as a manufacturer by virtue of its sta-

\[\text{\footnotesize 214 Id. at 258–59.} \]
\[\text{\footnotesize 215 Id. at 259.} \]
\[\text{\footnotesize 216 Id. at 266.} \]
\[\text{\footnotesize 217 Id. at 262.} \]
\[\text{\footnotesize 218 Id.} \]
\[\text{\footnotesize 219 Id.} \]
\[\text{\footnotesize 220 Id.} \]
\[\text{\footnotesize 221 Id.} \]
\[\text{\footnotesize 222 Id. at 263.} \]
\[\text{\footnotesize 223 Id.} \]
RECENT DEVELOPMENTS: GENERAL

The court held that “the term ‘manufacturer,’ in the context of the rolling provision, is limited to the actual manufacturer of a replacement product, or one who supplies the replacement product as its own.” The trial court, therefore, “erred in denying summary judgment insofar as it concluded that Precision could be deemed a ‘manufacturer’... by virtue of its status as a PMA certificate holder.”

In *Stewart v. Precision Airmotive, LLC*, Lycoming and Precision, sought collateral review of a trial court’s denial of their motions for summary judgment under GARA. The plaintiffs alleged that in a case arising from the 2005 crash of a Piper aircraft manufactured in 1964, GARA’s statute of repose did not apply because the defendants’ actions fell within the statute’s rolling provision. The accident-aircraft’s engine underwent an overhaul in 1991, during which the carburetor received a float-system replacement. The plaintiffs further alleged that GARA did not apply because the defendants knowingly misrepresented to the FAA information material to the performance of their component parts.

The trial court denied both defendants’ summary judgment motions with respect to the plaintiffs’ claims of misrepresentation. The trial court held that “Lycoming was entitled to GARA’s protection under § 2(a)(2)... because [Lycoming] did not manufacture the replacement parts installed on the aircraft that allegedly caused the accident.” As to the allegations of misrepresentation, however, the trial court found that questions of fact remained as to whether Lycoming knowingly breached its duty to inform the FAA of known defects that could adversely affect an aircraft’s airworthiness. Collateral review, therefore, was inapplicable to Lycoming.

Precision claimed that, although it was the PMA certificate holder for the carburetor at issue and because it had not physically manufactured the carburetor on the accident aircraft, it

---

224 Id. at 264.
225 Id. (citing Pridgen v. Parker Hannifin Corp., 905 A.2d 422, 437 (Pa. 2006)).
226 Id.
228 Id.
229 Id.
230 Id. at 269–70.
231 Id. at 270.
232 Id. at 272 (internal quotations omitted).
233 Id. at 274.
234 Id.
was not a "manufacturer" within the meaning of GARA. The court disagreed, holding that the term "manufacturer" is not uniform throughout GARA. While a defendant may not be considered a "manufacturer" in terms of GARA's rolling provision, a PMA certificate holder qualifies as a manufacturer within the meaning of the fraud exception because the exception "expressly contemplates the duties and obligations arising out of the type certificate," and the role of the PMA certificate holder is inextricable from that of the type-certificate holder. The court stated, "unlike the right to repose afforded by GARA, an airplane manufacturer's duty to report [defects] does not implicate the concerns recognized by Congress in passing GARA: 'the impact of long-tail liability on a declining American aviation industry.'"

In Crouch v. Honeywell International, Inc., the court determined that although an engine maintenance manual is not a "part" of the engine, GARA entitles protection to an engine manufacturer producing such a manual. The district court previously denied the defendant engine manufacturer's motion for summary judgment, which defendant AVCO argued was warranted under GARA. The case arose from a 2006 crash of a plane equipped with an engine manufactured in 1978. The plaintiffs "argued that AVCO negligently wrote or revised [the] maintenance manual that a mechanic had used to overhaul the engine in 2005;" AVCO revised the manual within the eighteen years prior to the crash, which reset the clock on GARA's statute of repose. The court originally declared that because the manual was not an aircraft "part," AVCO was not entitled to summary judgment on GARA grounds because GARA's statute of repose simply did not apply.

Upon AVCO's motion for reconsideration, the court reversed itself. The court explained that FAA regulations require avia-

235 Id. at 275.
236 Id.
237 Id. (quoting Pridgen v. Parker Hannifin Corp., 905 A.2d 422, 435–36 (Pa. 2006)).
238 Id. at 277.
240 Id. at *1.
241 Id.
242 Id.
243 Id.
244 Id. at *2.
tion-engine manufacturers “to follow an extensive certification process,” including the production of “instructions to assist in the continuing maintenance and overhaul of the engine” they produce. \[245\] “Thus, when AVCO[ ] . . . produced the engine, it was also required to produce the overhaul manual.” \[246\] Because a manufacturer’s production of such manuals “is an essential element in the overall process of creating a product that satisfies FAA regulations,” AVCO was acting in its capacity as an engine manufacturer when it produced the overhaul manual. \[247\] Therefore, although the manual was not a “part” of the engine, “such that its modification would restart the statute of repose,” GARA’s statute of repose applied to it, as well as to the engine itself. \[248\] The court granted AVCO summary judgment on GARA grounds. \[249\]

In Rogers v. Bell Helicopter Textron, Inc., the court determined that GARA does not protect a helicopter manufacturer who produced a defective maintenance manual because such manuals are not “part” of the helicopter. \[250\] In 2005, a Bell 47D-1 helicopter operated since 1951 crashed, injuring the plaintiff; the helicopter had a maintenance manual issued in 1969. \[251\] The plaintiff’s case was based on the allegation that the maintenance manual was defective in that it provided improper instructions for balancing the aircraft’s tail-rotor blades. \[252\] The trial court granted Bell’s motion in limine to exclude evidence that the manual was defective, ruling that the manual was part of the helicopter and, therefore, subject to GARA’s statute of repose. \[253\]

The court of appeals reversed, holding that a maintenance manual is not part of the helicopter and that GARA is inapplicable. \[254\] The court explained that there are three different “triggers” for GARA’s eighteen-year limitations period:

\[
[(1)] \text{ for any part that was “originally in” the aircraft, the limitations period runs from the date the aircraft was delivered . . . ;}
\]

\[245\] Id. at *1.
\[246\] Id.
\[247\] Id. at *2.
\[248\] Id.
\[249\] Id.
\[251\] Id.
\[252\] Id. at 2.
\[253\] Id.
\[254\] Id. at 2, 6.
[(2)] for any part that was “added to” the aircraft, the limitations period runs from “the date of completion of the addition[;]” and [(3)] for any part that “replaced another part” of the aircraft . . . , the limitations period runs from “the date of completion of the replacement.”

None of these triggers apply to the production of a maintenance manual. GARA’s provisions tie to the idea of delivery of an aircraft with its original component parts, which would have included the accident aircraft’s flight manual, but not a maintenance manual.

While federal regulation in force in 1951 required a flight manual be furnished with each helicopter, there was no analogous provision for a maintenance manual. The court explained that a later regulation requiring that a maintenance manual be provided to the aircraft’s owner upon the aircraft’s delivery was inapplicable because that regulation specifically states that it applies to aircraft for which type-certificate application was made after January 28, 1981.

The court in Fletcher v. Cessna Aircraft Co. held that GARA does not bar claims against a defendant arising out of conduct unrelated to aircraft manufacturing. The Fletcher court, therefore, considered whether a failure to warn claim, brought over thirty years after Cessna delivered the aircraft to its original purchaser, was against Cessna “in its capacity as a manufacturer.”

A Cessna aircraft manufactured and delivered in 1975 crashed in 2005, and the plaintiff claimed Cessna failed to warn its owners of the effects of ice in the aircraft’s fuel system. The plaintiff argued “that a manufacturer acts in its capacity as such only while manufacturing the aircraft or part.” Therefore, the action for failure to warn about proper servicing and use of an aircraft is not an action against Cessna “in its capacity as a man-

---

255 Id. at 3.
256 See id.
257 Id.
258 14 C.F.R. § 27.1581(a) (2010).
259 Rogers, 185 Cal. App. 3d at 5–6.
260 Rogers, 185 Cal. App. 3d at 4; see 14 C.F.R. § 21.50(b).
262 Fletcher, 991 A.2d at 861.
263 Id.
264 Id. at 862.
manufacturer' but in a capacity better characterized as 'servicing' or 'publishing instructional materials.'"\textsuperscript{265}

The court stated that GARA's legislative history indicates Congress's purpose to afford broad protection to manufacturers, with narrowly crafted exceptions.\textsuperscript{266} One such exception applies when a manufacturer knowingly misrepresents to the FAA, or conceals from the FAA, required information material to the performance or maintenance of an aircraft.\textsuperscript{267} "Unless Congress viewed claims based upon disclosure or failure to disclose such information as conduct undertaken by a manufacturer 'in its capacity as a manufacturer,' there would be no need for the exemption . . . ."\textsuperscript{268} "[T]he fact that Congress crafted an exception for certain egregious failures to disclose information to the FAA suggests that Congress did not intend to preserve other claims based on failures to disclose[,] advise," or warn.\textsuperscript{269} The court held that the plaintiff's claim was brought against Cessna "in its capacity as a manufacturer," and the court upheld Cessna's GARA defense.\textsuperscript{270}

In \textit{Johnson v. AVCO Corp.}, the plaintiffs alleged that a defectively designed engine, manufactured and delivered in 1975, caused an airplane crash in 2005.\textsuperscript{271} In considering the defendant manufacturers' motion for summary judgment, the court stated that GARA applied to the case because it was a "civil action for damages for death or injury to persons arising out of an accident involving a general aviation aircraft" and because the injuries sustained occurred less than eighteen years after the aircraft's initial delivery.\textsuperscript{272}

The court denied the summary judgment motion, however, because the plaintiffs showed sufficient evidence that (1) the aircraft's engine was defectively designed, and (2) the defendants supplied the engine parts at issue, which they installed in 2001, well within the 18-year statute of repose.\textsuperscript{273} Because GARA's

\textsuperscript{265} \textit{Id.}
\textsuperscript{266} \textit{Id.} at 864.
\textsuperscript{267} See \textit{id.} at 862–63.
\textsuperscript{268} \textit{Id.} at 863.
\textsuperscript{269} \textit{Id.}
\textsuperscript{270} \textit{Id.} at 865.
\textsuperscript{271} \textit{Johnson v. AVCO Corp.}, 702 F. Supp. 2d 1093, 1099 (E.D. Mo. 2010).
\textsuperscript{272} \textit{Id.} at 1116 (internal quotations omitted); see \textit{General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552, § 2(a).}
\textsuperscript{273} \textit{Johnson, 702 F. Supp. 2d} at 1116.
clock restarted in 2001, GARA did not bar the plaintiffs’ claims.\textsuperscript{274}

In \textit{South Side Trust \& Savings Bank v. Mitsubishi Heavy Industries, Ltd.}, the Illinois appellate court considered how GARA applied to four separate defendants in a case arising out of a 2001 crash of an aircraft delivered in 1970 that had its fuel-control units (FCU) and propeller governors reconditioned and reinstalled in 1988 and was certified as meeting the FAA’s airworthiness requirements in 1999.\textsuperscript{275}

The trial court granted summary judgment to defendant Woodward, which reconditioned and reinstalled the FCU and propeller governors because the plaintiff failed to present sufficient evidence that those parts caused the accident.\textsuperscript{276} The appellate court reversed, holding that GARA did not compel summary judgment.\textsuperscript{277} Once Woodward asserted the affirmative defense of GARA’s statute of repose, “it was [the] plaintiff’s burden to show facts [either] tolling or creating an exception to GARA.”\textsuperscript{278} In order to toll the statute, the plaintiff had to show evidence that (1) Woodward installed new parts on the aircraft and (2) those parts caused the alleged damages.\textsuperscript{279} The plaintiff presented evidence to support both of these elements, and, at the summary judgment stage, a plaintiff is not required to prove causation.\textsuperscript{280}

Defendant Honeywell manufactured the engine installed in the airplane in 1980, but the plaintiff asserted that GARA did not apply because Honeywell issued a revised engine-maintenance manual in 1994, which restarted GARA’s clock.\textsuperscript{281} The plaintiff argued that a maintenance manual is a “new component” under GARA § 2(a)(2).\textsuperscript{282} The court recognized “that a flight manual [is] considered a ‘part’ of a general-aviation aircraft” under GARA because it is an integral part of every general-aviation aircraft, federal regulation requires it to be onboard every aircraft, and it contains instructions necessary to

\textsuperscript{274} \textit{Id.}
\textsuperscript{276} \textit{Id.} at 185–86.
\textsuperscript{277} \textit{Id.} at 195.
\textsuperscript{278} \textit{Id.}
\textsuperscript{279} \textit{Id.}
\textsuperscript{280} \textit{Id.}
\textsuperscript{281} \textit{Id.} at 196.
\textsuperscript{282} \textit{Id.}
operate the aircraft. A maintenance manual, however, does not fit within GARA’s scope as it is not necessary to operate an airplane and no regulation requires it to be onboard during flight. Because the maintenance manual was not a “part” of the airplane, a revision to the manual did not toll GARA’s statute of repose, and the court upheld Honeywell’s summary judgment.

The lower court granted summary judgment under GARA to Mitsubishi, the Japanese company that manufactured the airplane, because the crash occurred more than eighteen years after the original purchaser received the plane. On appeal, the plaintiff argued that GARA’s legislative history shows congressional intent to limit the statute’s protection to American manufacturers. The plain language of the statute, however, “refers only to a ‘manufacturer’ of ‘general aviation aircraft’;” it does not limit GARA’s benefits only to American manufacturers. Furthermore, GARA covers “‘any aircraft’ awarded a type certificate or certificate of airworthiness by the FAA.” The trial court, therefore, did not err in finding that GARA applies to a foreign manufacturer.

Finally, the court considered whether defendant Mitsubishi Industries America (MIA) was the successor manufacturer to Mitsubishi and, therefore, protected by GARA, despite the fact that MIA does not manufacture anything. In the past, courts held that the holder of an aircraft’s type certificate or PMA has an affirmative duty to report to the FAA any problems with the aircraft and to issue instructions for continued airworthiness. On the basis of these duties, GARA considers the holder to be the aircraft’s “manufacturer.” Mitsubishi, pursuant to a licensing agreement, delegated performance of those duties to MIA. The court found that MIA’s assumption and performance of those duties qualifies it as a “manufacturer” under

283 Id.
284 Id. at 196–97.
285 Id. at 197–98.
286 Id. at 198.
287 Id.
288 Id. at 199.
289 Id.
290 Id.
291 Id. at 203.
292 Id. at 203–04.
293 Id. at 204.
294 Id.
GARA, and it upheld the trial court’s grant of summary judgment.\(^{295}\)

In *AVCO Corp. v. Neff*, a Florida appellate court considered whether to accept an interlocutory appeal from the defendants whose motion for summary judgment, based on GARA, the trial court denied.\(^{296}\) Ultimately, the court refused to allow the appeal, holding that GARA does not provide manufacturers with immunity from suit.\(^ {297}\)

The case involved an aircraft that crashed twenty-three years after it was manufactured.\(^ {298}\) The defendants moved for summary judgment, arguing that GARA barred the claims against them.\(^ {299}\) The trial court denied the motion because genuine questions of fact existed.\(^ {300}\) The defendants’ argument on appeal was that the purpose of GARA was to shield manufacturers from costly litigation, which is precisely the harm they would suffer if the appellate court did not intervene and grant summary judgment.\(^ {301}\)

The appellate court, therefore, had to determine whether a manufacturer’s protection under GARA is a right to immunity from suit or merely a defense to liability.\(^ {302}\) The court held that GARA’s statute of repose is more analogous to a statute of limitations that operates as an affirmative defense than absolute immunity from suit.\(^ {303}\) The court stated, “[t]he repose period is not absolute;” GARA’s legislative history indicates “that the statute was enacted to protect manufacturers from the ‘infinite liability-tail’ of product liability suits rather than to protect them from the burdens of discovery and trial.”\(^ {304}\)

VI. DEATH ON THE HIGH SEAS ACT

*In re Air Crash Disaster off the Coast of Nantucket Island, Massachusetts on Oct. 31, 1999* is a case arising from a 1999 crash of an airliner into the Atlantic Ocean approximately sixty miles from

\(^{295}\) Id. at 203, 206.

\(^{296}\) AVCO Corp. v. Neff, 30 So. 3d 597, 600–01 (Fla. Dist. Ct. App. 2010).

\(^{297}\) Id. at 604.

\(^{298}\) Id. at 599–600.

\(^{299}\) Id. at 600.

\(^{300}\) Id. at 601.

\(^{301}\) Id. at 601–02.

\(^{302}\) Id. at 602.

\(^{303}\) Id. at 604.

\(^{304}\) Id.
Nantucket Island. The defendants moved to dismiss under the Death on the High Seas Act (DOHSA), arguing the plaintiff lacked capacity to sue. Under DOHSA, only a court-appointed personal representative of the decedent’s estate may bring a suit for wrongful death. This personal representative must initiate such an action within DOHSA’s three-year statute of limitations, which accrues at the time of death. The limitations period will only be tolled if the plaintiff can demonstrate a strong justification for the delay.

The plaintiff originally filed his complaint in 2001, soon after his parents’ death, but he did not become the representative of their estate until 2009, nearly ten years after the crash and seven years after the limitations period expired. Because the process of appointing the plaintiff representative of his parents’ estate was not completed within the limitations period, the court granted the defendants’ motion to dismiss, holding that the plaintiff lacked capacity to sue.

The court in Gund v. Pilatus Aircraft, Ltd. confirmed the longstanding rule that DOHSA allows for recovery of pecuniary losses in cases “‘occurring on the high seas beyond 3 nautical miles from the shore of the United States.’” The court further noted that the statute allows for nonpecuniary damages for “‘commercial aviation accident[s] occurring on the high seas beyond 12 nautical miles from the shore of the United States.’” Gund involved a crash three miles off the coast of Costa Rica resulting in six deaths. The court held that DOHSA applied because “‘something that happens within the territorial waters of a foreign state occurs on the “high seas” for purposes of DOHSA.’”

---

305 In re Air Crash Disaster off the Coast of Nantucket Island, Mass. on Oct. 31, 1999, No. MD-00-1344 (BMC), 2010 WL 1221401, at *1 (E.D.N.Y. Mar. 29, 2010).
307 In re Air Crash Disaster off the Coast of Nantucket, 2010 WL 1221401, at *4.
308 Id. at *5.
309 Id. at *5; 46 U.S.C. § 30106.
310 In re Air Crash Disaster off the Coast of Nantucket, 2010 WL 1221401, at *5.
311 Id.
312 Id. at *4–5.
314 Id. at *2 (quoting 46 U.S.C. § 30307).
315 Id. at *1, *3.
316 Id. at *3 (quoting Howard v. Crystal Cruises, Inc., 41 F.3d 527, 529, 530 (9th Cir. 1994)).
The defendant argued that, because the flight was a "private-sightseeing flight," rather than one involving a "transport category aircraft with fare-paying passengers," the accident was not a "commercial aviation accident," and only pecuniary damages should be available to the plaintiffs. The court disagreed, holding that because the passengers paid for the flight and that the passengers and pilot did not share a bona fide common purpose, the crash at issue constituted a "commercial aviation accident" under DOHSA. "Both pecuniary and nonpecuniary damages [were] therefore available . . ." The plaintiffs also argued that nonpecuniary damages were available because Costa Rican law, which they demanded should govern the case, allowed for moral damages. In determining the choice of law, the court applied the Lauritzen v. Larsen factors: "(1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured party; (4) the allegiance of the defendant shipowner; (5) the place of contract; (6) the inaccessibility of the foreign forum; and (7) the law of the forum." Applying these factors, the court held that only the first factor clearly favored Costa Rican law. Because the interests of the United States were "sufficiently implicated," Costa Rican law was not available to the plaintiffs.

VII. PROPERTY DAMAGE AND BUSINESS-LOSS CASES

In Kalitta Air, LLC v. United Air Lines, Inc., the subrogated insurers of Kalitta sought to recover damages from United Airlines arising out of an October 2004 engine-separation incident involving a Kalitta Boeing 747 cargo aircraft. One of the 747's JT9D engines separated from the aircraft after take-off from Chicago O'Hare and plunged into Lake Michigan. The NTSB determined that improper repair work to the engine performed in 1996 by United Airlines for Polar Air Cargo caused the accident. Polar Air Cargo removed the engine from service and

317 Id. at *3-4.
318 Id. at *6.
319 Id.
320 Id.
321 Id. at *7; see Lauritzen v. Larsen, 345 U.S. 571, 582-92 (1953).
323 Id.
325 Id.
326 Id.
placed it in storage from 1998 until 2003, when Kalitta subsequently purchased the engine and installed it on one of its aircraft.\footnote{327}

United moved for summary judgment on the ground that it owed no duty of care to Kalitta, the subsequent purchaser of the engine; its only duties were owed to Polar Air Cargo as United’s contractual customer for the repair work.\footnote{328} The district court disagreed, relying on the Second Restatement of Torts § 324A, which provides that a party acting under contract may not exculpate itself from liability to third persons such as Kalitta.\footnote{329} Additionally, the court found that United’s act of certifying the engine as airworthy by issuing FAA Form 337 created an affirmative duty to the public, not just Kalitta, which United possibly breached by performing the improper engine work.\footnote{330} Accordingly, the district court denied United’s motion for summary judgment.\footnote{331}

In \textit{Britton v. Dallas Airmotive, Inc.}, the district court reviewed the report of the magistrate judge recommending the denial of the defendants’ summary judgment motion regarding lost profits as precluded by Idaho law.\footnote{332} The case involved the 2003 crash of an Aerospatiale AS450D helicopter operated by the plaintiff Silverhawk Aviation, an aerial firefighting outfit.\footnote{333} The helicopter suffered an engine failure and crashed, causing the helicopter to be damaged beyond repair.\footnote{334} Silverhawk Aviation sought to recover its damages for the hull loss and its lost profits as a result of the helicopter being out of service.\footnote{335} The defendants moved for summary judgment, arguing that Idaho law precluded recovery of any damages other than the value of the helicopter and, therefore, lost profits were unrecoverable.\footnote{336} In adopting the finding of the magistrate judge and denying the defendants’ motion, the district court found that under Idaho law, economic loss is recoverable in tort when the loss is para-

\footnote{327}{\textit{Kalitta}, 2011 WL 8146, at *5.}
\footnote{328}{\textit{Kalitta}, 2011 WL 8146, at *7.}
\footnote{329}{Id. at *3 (citing \textit{RESTATEMENT (SECOND) OF TORTS} § 324A cmt. a (1997)).}
\footnote{330}{\textit{Kalitta}, 2011 WL 8146, at *5.}
\footnote{331}{Id. at *7.}
\footnote{333}{Id.}
\footnote{334}{Id.}
\footnote{335}{Id.}
\footnote{336}{Id.}
sitic to an injury to person or property. Accordingly, the alleged loss of profits caused by the total destruction of the helicopter and its unavailability for use in the plaintiff’s business was parasitic to the property damage to the helicopter, and the plaintiff could recover such economic losses under Idaho law.

Cantor Fitzgerald & Co. v. American Airlines, Inc. is a property damage suit arising from the September 11, 2001, attacks in which Cantor Fitzgerald (Cantor) lost its principal office in the World Trade Center and 658 of the approximately 1,000 officers and employees who worked there. In a lawsuit in which Cantor sued American for negligently failing to prevent the hijacking of American Flight 11, American moved for partial summary judgment to limit the scope of Cantor’s claimed damages.

In estimating its damages, Cantor used a “holistic” approach. Its damages expert stated that “when the airplane crashed into the building it destroyed-killed people, it destroyed office space, it destroyed the books of business, it destroyed the relationships. I quantified the damages related to all of that.”

Using this approach, Cantor claimed losses of almost $1 billion.

American argued that Cantor’s business interruption claim was “based substantially on the consequences of the deaths of its employees, in contravention of New York law.” The court agreed that the major part of Cantor’s loss resulted from having lost the services of its deceased employees. It granted American’s motion and required Cantor to restate its damages estimate.

New York law allows an individual whose business is harmed to sue for damages to compensate for lost profits. But, “[t]he

---

337 Id. at 2. The Idaho Supreme Court in Duffin v. Idaho Crop Improvement Ass’n, 895 P.2d 1195 (Idaho 1995) announced the Idaho rule regarding economic loss relied on by the court.
340 Id. at *1–2.
341 Id. at *5.
342 Id. (internal quotations omitted).
343 Id.
344 Id. at *7.
345 Id.
346 Id. at *11–12.
347 Id. at *7.
cause of action for lost profits must arise from physical damage to property; it cannot be maintained if a plaintiff alleges only economic damages. To allow Cantor to claim lost profits arising from the deaths of its employees would be to recognize master/servant liability, which posits that an employer has a proprietary interest in his employees' services. New York law does not permit a plaintiff employer to sue for acts that interfere with the employer's ability to enjoy the employee's labor. The court declared that New York law does not permit Cantor's holistic approach, and it, therefore, limited the scope of Cantor's available damages.

VIII. EVIDENCE AND EXPERTS

In Godfrey v. Precision Airmotive Corp., the District Court of Appeal of Florida addressed, among other issues, the standard for admitting evidence of other accidents. The Godfrey case arose out of a Cessna 150 crash alleged to have been caused by a defective carburetor. The plaintiffs sued three defendants; Precision Airmotive settled, while Teledyne suffered adverse verdicts, including an award of punitive damages. The trial court granted Teledyne's motion for new trial, and the plaintiffs appealed. On Teledyne's cross-appeal, it raised a point of error regarding the trial court's admission of evidence, over Teledyne's objection, of more than 100 other incidents without proper foundation to establish that substantially similar defects to those alleged by the plaintiff caused the events.

In its opinion, the Florida District Court of Appeal reviewed the standard for admission of such evidence established by the Florida Supreme Court, which requires that other accident evidence involve the same type of equipment under substantially similar conditions and that the evidence establish the accident or incident is substantially similar. In reviewing the trial record, the Florida Court of Appeal concluded that the plaintiffs

348 Id. at *8.
349 Id. at *9.
350 Id.
351 Id. at *11.
353 Id. at 1022.
354 Id. at 1023 (Sawaya, J., dissenting).
355 Id. at 1021 (majority opinion).
356 Id. at 1021-22.
357 Id. at 1022.
failed to establish similarity in the products or the circumstances involved in the other incidents and accidents.\textsuperscript{358} For example, several incidents involved different engines, including engines not manufactured by Teledyne, and furthermore, the engines were not always equipped with the same model carburetor.\textsuperscript{359} The court, thus, remanded the case to the trial court for a new trial as to Teledyne only; Precision Airmotive apparently settled with the plaintiffs while the case was on appeal.\textsuperscript{360}

In \textit{Stephenson v. Honeywell International, Inc.}, the district court considered, among other issues, whether to exclude the plaintiffs' expert's opinions based on a non-testifying consultant's flight-path analysis.\textsuperscript{361} The defendant argued that the plaintiffs' expert "should not be permitted merely to parrot another expert's opinions."\textsuperscript{362} The district court declined to exclude the flight-path analysis on the basis that the consultant was acting at the direction of the plaintiffs' testifying expert, and there is no rule prohibiting an expert's use of a collaborating consultant if the ultimate opinions are those of the testifying expert qualified to give the opinion.\textsuperscript{363} The defendant did not challenge the testifying expert's qualifications, and, therefore, the court declined to exclude the opinion in question, further noting that the defendant was free to inquire of the testifying expert during deposition regarding the analysis and conclusions supported by the consultant's work.\textsuperscript{364}

In \textit{In re Air Crash near Clarence Center, New York, on Feb. 12, 2009}, the plaintiffs filed a motion to compel production of the plane's cockpit voice recorder (CVR), claiming that "the written transcript of the recording [was] incomplete and inaccurate."\textsuperscript{365} The plaintiffs argued that "evidence relevant to the [passengers'] pre-impact terror, conscious pain and suffering, the pilots' attentiveness, the atmosphere in the cockpit, and situation[al] awareness," could only be discerned from the actual audio recording.\textsuperscript{366}

\textsuperscript{358} \textit{Id.}
\textsuperscript{359} \textit{Id.} at 1022–23.
\textsuperscript{360} \textit{Id.} at 1023.
\textsuperscript{362} \textit{Id.} at 1255.
\textsuperscript{363} \textit{Id.}
\textsuperscript{364} \textit{Id.} at 1255–56.
\textsuperscript{365} \textit{In re Air Crash near Clarence Ctr., N.Y., on Feb. 12, 2009, No. 09-md-2085, 2010 WL 4116790, at *1 (W.D.N.Y. Oct. 19, 2010).}
\textsuperscript{366} \textit{Id.}
The court applied the legal standard defined in 49 U.S.C. § 1154.\footnote{Id.} To wit, discovery of a recording is authorized if, after an in-camera review, the court decides that (1) the available transcript does not provide the moving party with sufficient information for that party to receive a fair trial, and (2) discovery of the recording is necessary for the moving party to receive a fair trial.\footnote{49 U.S.C. § 1154(a)(3) (2006).} Discovery of a non-public recording can occur only under the terms of a protective order that, in the least, (1) limits use of the recording to the judicial proceeding, and (2) prohibits dissemination of the recording to any person that does not need access to it for the proceeding.\footnote{49 U.S.C. § 1154(a)(4)(A).}

After reviewing the recording in camera, the court declared that the plaintiffs met their burden since the written transcript did not reflect the tone of voice, pitch, volume, or inflection; nor did it accurately reflect other ambient noises pertinent to the aircraft's operation.\footnote{In re Air Crash near Clarence Ctr., 2010 WL 4116790, at *2.} Because these attributes of the recording were relevant to the plaintiffs' claim and stating that a CVR "is often the only piece of neutral evidence in an air crash case," the court held that discovery of the CVR was necessary to ensure a fair trial.\footnote{Id. at *2-3.} In accordance with § 1154(a)(4)(A), the court entered a protective order to allay the defendants' concerns for the privacy rights of the crew and their families.\footnote{Id. at *4.}

IX. PLEADING ISSUES

In American Guarantee and Liability Insurance Co. v. Cirrus Design Corp., the subrogated property insurers of residents and businesses of an Eastside Manhattan condominium building sought to recover damages from Cirrus Design for insurance benefits paid after an SR-20 crashed into the building.\footnote{Am. Guar. & Liab. Ins. Co. v. Cirrus Design Corp., No. 09 Cv. 8357, 2010 WL 5480775, at *1 (S.D.N.Y. Dec. 30, 2010).} Insurers claimed that the SR-20 had known control-system problems, which the plaintiffs alleged caused the aircraft to lose control while making a left turn over the East River.\footnote{Id.} The complaint alleged "'certain defects' in the steering controls that made the aircraft uncontrollable and that Cirrus knew of these defects at
the time of the crash. The insurers did not specify the actual defective component or the nature of the defect. Cirrus moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, arguing that the unspecified defect could encompass any one of the many component parts of the systems designed to operate the rudder and ailerons of the aircraft. The district court agreed with Cirrus, reasoning that the insurers’ complaint failed to meet the pleading standards developed by the U.S. Supreme Court in Ashcroft v. Iqbal and Bell Atlantic Corp. v. Twombly. The court granted the motion to dismiss, though the court granted the insurers leave to amend. The district court noted that it refused to grant summary judgment in Cory Lidle’s case, the related wrongful death action against Cirrus for the death of the New York Yankee’s pitcher onboard the aircraft with his flight instructor, Tyler Stanger.

X. CHOICE OF LAW

The choice of law decision in Iskowitz v. Cessna Aircraft Co. came from a series of consolidated actions arising from the 2005 Pueblo, Colorado, crash of a Cessna 560. The plaintiffs’ decedents and heirs resided in either Virginia or Illinois; other defendants (Martinair, and Circuit City Stores, which, respectively, provided the crew and owned the aircraft) were Virginia residents. The United States was also a defendant in some of the actions.

Cessna filed a motion for determination of state law, contending that to the extent state law applied, the law of Cessna’s prin-

---

375 Id. at *2.
376 Id.
377 Id.
378 Id. Bell Atl. Corp. v. Twombly and Ashcroft v. Iqbal are two recent U.S. Supreme Court cases addressing the pleading standard to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Under this formulation, “a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 570). Moreover, legal conclusions “must be supported by factual allegations.” Id. at 1950.
380 Id.
382 Id. at *9–10.
383 Id. at *1.
RECENT DEVELOPMENTS: GENERAL

The principal place of business—Kansas—should govern as to liability and damages issues. Martinair and Circuit City also filed a choice of law motion, advocating for Colorado law.

The district court held that there was an “outcome-determinative” conflict on the issue of statutory non-economic damages caps among the laws of the four states that could potentially apply. Two of the states (Colorado and Kansas) capped such damages, but differed as to the amount of the cap; the other states (Virginia and Illinois) did not cap such damages. After conducting a Second Restatement of Conflict of Laws analysis, noting that the place of injury was “fortuitous” in this aviation-accident setting, the court held that the most important factor on the damages-cap issue was the location of Cessna’s conduct, which allegedly caused injury to the plaintiffs. Since that location was Kansas, Kansas law applied to claims against Cessna.

The district court also held on the Martinair/Circuit City motion regarding the issue of allocation of fault among the defendants that comparative fault rather than joint and several liability would apply. Again, there was a conflict in laws, as two states (Colorado and Kansas) utilized comparative fault principles, while two others (Virginia and Illinois) applied joint and several liability (with some exceptions in the case of Illinois). The court noted that considerations of uniformity of approach dictated that either one or the other system of allocation must apply to all claims against all defendants. The court again focused on the location of the defendants’ conduct, noting that the wrongful conduct of Martinair and Circuit City occurred in Colorado, as the location of the accident. The court ruled that Colorado comparative-fault principles should apply.

---

384 Id.
385 Id.
386 Id. at *7.
387 Id. at *3–4.
388 Id. at *7.
389 Id.
390 Id. at *7–8.
391 Id. at *8.
392 Id. at *11.
393 Id. at *9–11.
394 Id. at *11. Special thanks to Marilyn S. Chappell of Wells, Anderson & Race in Denver for assistance with the analysis of the Iskowitz decision. Ms. Chappell, along with Mary A. Wells, represented Cessna Aircraft Co. in the district court.
# TABLE OF AUTHORITIES

## Cases

<table>
<thead>
<tr>
<th>Citation</th>
<th>Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arik v. Boeing Co., No. 08 L 012539, slip op. (Ill. Cir. Ct., Cook Cnty., Feb. 18, 2010)</td>
<td></td>
</tr>
<tr>
<td>AVCO Corp. v. Neff, 30 So. 3d 597 (Fla. Dist. Ct. App. 2010)</td>
<td></td>
</tr>
<tr>
<td>Bennett v. Sw. Airlines Co., 484 F.3d 907 (7th Cir. 2007)</td>
<td></td>
</tr>
<tr>
<td>Cleveland v. Piper Aircraft Corp., 985 F.2d 1438 (10th Cir. 1993)</td>
<td></td>
</tr>
<tr>
<td>Duffin v. Idaho Crop Improvement Ass’n, 895 P.2d 1195 (Idaho 1995)</td>
<td></td>
</tr>
</tbody>
</table>
RECENT DEVELOPMENTS: GENERAL

Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg., 545 U.S. 308 (2005)
Howard v. Crystal Cruises, Inc., 41 F.3d 527 (9th Cir. 1994)
In re Air Crash Disaster off the Coast of Nantucket Island, Mass. on Oct. 31, 1999, No. MD-00-1344 (BMC), 2010 WL 1221401 (E.D.N.Y. Mar. 29, 2010)
In re Air Crash Disaster over Makassar Strait, Sulawesi, No. 09-cv-3805, 2011 WL 91037 (N.D. Ill. Jan. 11, 2011)
In re Air Crash near Clarence Ctr., N.Y., on Feb. 12, 2009, No. 09-md-2085, 2010 WL 5185106 (W.D.N.Y. Dec. 12, 2010)
In re Air Crash Near Peixoto De Azeveda, Brazil, on Sept. 29, 2006, 574 F. Supp. 2d 272 (E.D.N.Y. 2008)
In re Air Crash over the Mid-Atlantic on June 1, 2009, No. 10-2144-CRB, 2010 WL 3910354 (N.D. Cal. Oct. 4, 2010)
Koral v. Boeing Co., 628 F.3d 945 (7th Cir. 2011)
Lauritzen v. Larsen, 345 U.S. 571 (1953)
Lleras v. ExcelAire Servs., Inc., 354 F. App’x 585 (2d Cir. 2009)
Merkle v. Robinson, 737 So. 2d 540 (Fla. 1999)
Merrell Dow v. Thompson, 478 U.S. 804 (1986)
US Airways, Inc. v. O’Donnell, 627 F.3d 1318 (10th Cir. 2010)

Statutes

14 C.F.R. § 21.50(b) (2010)
14 C.F.R. § 27.1581(a) (2010)


Other Authorities

Restatement (Second) of Torts § 324A cmt. a (1997)