AIRCRAFT BUILDERS COUNCIL, INC. LAW REPORT

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Fall 2016

The ABC Underwriters, as part of their comprehensive insurance plan, have requested Fitzpatrick & Hunt, Pagano, Aubert, LLP to prepare periodic reports on topics of interest to the members. Four articles appear in this Law Report relating to various aspects of products liability law.

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A STEP CLOSER TO THE AGE OF DRONES: THE FAA ISSUES COMPREHENSIVE RULES FOR COMMERCIAL UAS OPERATIONS

By: Christopher S. Hickey

The Federal Aviation Administration has finalized the first set of rules for routine commercial use of small unmanned aircraft systems (UAS or drones), opening a pathway to full integration of UAS into the nation's airspace. The new rules are now Part 107 of the Federal Aviation Regulations (FARs) and took effect on August 29, 2016.

Part 107, which concerns non-recreational, unmanned aircraft weighing less than 55 pounds, sets forth a comprehensive list of UAS rules concerning the use of airspace, aircraft operations, and airmen requirements. The regulations, designed to minimize risks to manned aircraft and people and property on the ground, are a step forward but they should also be read with an understanding of what they do not do, as much as for what they do accomplish.

Part 107 opens up a significant but somewhat narrow window of commercial operations for small UAS, operating at less than 400 feet and remaining within the line of sight of the operator. This will certainly allow for a wide range of commercial drone operations in aerial photography, utility inspections, construction surveys, agricultural monitoring, university research and possibly some search-and-rescues, but your pizza and new iPhone are still going to be delivered via city roads...for now. As FAA Administrator Michael Huerta stated, "...this is just our first step. We're already working on additional rules that will expand the range of operations."

HOW WE GOT HERE

Just a few years ago, drone operators in the United States were apoplectic over what they perceived as the FAA's glacial and antiquated approach toward UAS. More accustomed to the exponential technology growth of the last quarter-century, drone operators—who more typically have a tech rather than aviation background—could not fathom why they were receiving "cease and desists" letters from the FAA when countries such as Australia had in place commercial UAS regulations as earlier as 2002 and others, such as Japan, had been allowing commercial UAS operations as early as 1995 with essentially no drone-specific regulations. As an Amazon executive curtly noted once after waiting a year and a half for permission from the FAA to fly a specific drone model: "While the FAA was considering our applications for testing, we innovated so rapidly that the UAS approved last week by the FAA has become obsolete."

Change came in 2012 when Congress passed the FAA Modernization and Reform Act (FMRA). That statute tasked the FAA with temporarily allowing limited commercial use operations (referred to as the statute's "Section 333 exemptions") and creating a comprehensive plan to fully integrate UAS operations into civil air space by September 30, 2015.[1] Although that deadline was not met, in 2013, the FAA had granted permission to use UAS in operations over the Arctic Sea and it began approving Section 333 exemptions to commercial users in late 2014. By summer 2016, over 5,000 such Section 333 exemptions had been approved.

[1] FAA Modernization and Reform Act of 2012, PUB. L. 112-95 (2012).

The process of creating Part 107 began in February 2015 when the FAA issued a Notice of Proposed Rule Making (NPRM) outlining a set of detailed regulations to integrate small commercial UAS into U.S. airspace. After a notice and comment period and a few edits, the FAA finalized these rules in June 2016.[2] After a further 60-day comment period, they became effective August 29, 2016.[3]

Part 107: UAS Aircraft, Airspace and Airmen

Part 107 applies only to "small unmanned aircraft" which is defined by Part 107 as an aircraft that is less than 55 lbs/25 kg (aircraft and payload combined).[4] Larger drone operators must still seek an exemption from the FARs or a special airworthiness certificate. Currently, FAA approval of commercial operations for drones significantly larger than 55 lbs. is very rare.

The new rules also only apply to non-recreational operations. Under Part 107 the difference between a "model aircraft" and an "unmanned aircraft" is its intended use. Thus, The DJI Phantom (a popular 3 lbs. quad copter drone) is either a "model aircraft," and not subject to Part 107, if used recreationally, or an "unmanned aircraft" that is subject to Part 107, if used for commercial purposes. Recreational use of drones is somewhat regulated, just not by the new Part 107.[5]

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[2] Advisory Circular, 107-2 (June 21, 2016); 81 FR 42209 (June 28, 2016)
[3] 14 CFR part 107
[4] 14 CFR part 107.3
[5] See Section 336 of the FAA Modernization and Reform Act (2012) and FAA Aircraft Circular (AC) 91-57A (2015).

Finally, the new rules do not apply to public use unmanned aircraft (ie: UAS operated by the U.S. government). Government agencies' UAS flight operations still require a Certificate of Authorization (COA) from the FAA. The COA process was made easier by the FAA in 2015 but it is still burdensome and time consuming. The following chart summarizes the various categories of unmanned aircraft and the relevant regulations providing authority for flight:

UAS Type	Authority
Commercial UAS less than 55 lbs/25 kg	**Part 107**
Recreational model aircraft up to 55 lbs/25 kg	FMRA §336 and AC 91-57A
Any recreational model aircraft greater than 55 lbs/25 kg or non-recreational UAS 55 lbs/25 kg or greater	FMRA §333 exemption or special airworthiness certificate
Public UAS	FAA certificate of authorization (COA)

After defining the applicability of Part 107, the bulk of the FAA's 624 page final rule explains the number of requirements and restrictions on small commercial UAS operators. The following are the key points:

- **The UAS must be registered with the FAA**

The UAS does not need an FAA airworthiness certificate. However, if greater than 0.55 lbs., the UAS must be registered with the FAA.[6] The registration process can be performed online at the FAA's website and is simplified for small UAS that will only be operating within the United States. Like manned aircraft, the operator will receive a registration number ("N number") for their aircraft and that number must be indicated on the side of the aircraft during flight operations.

[6] 14 CFR part 48

- **The operator must hold a remote pilot airman certificate**

To fly a UAS, the operator must hold the newly created remote pilot airman certificate or be under the direct supervision of someone who does hold such a certificate. To qualify for a remote pilot airman certificate, a person must: (1) demonstrate aeronautical knowledge; (2) be vetted by the Transportation Security Administration (TSA); and (3) be at least 16 years old.[7]

Demonstrating aeronautical knowledge can be done in one of two ways depending on whether a person is already a licensed pilot.[8] Non-pilots must pass the FAA's initial aeronautical knowledge test. This test is very similar to the "written test" portion of a private pilot's exam in so far as it covers airspace, weather, aircraft systems, airport operations, emergency procedures, preflight procedures, etc., but certain of the test questions for those subjects will specifically relate to small UAS operations. Individuals that already possess a Part 61 pilot certificate—other than a student pilot—and who have completed their most recent biennial flight review need only complete a shorter UAS online training course. The training course can be accessed at the FAA's website.[9]

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[7] 14 CFR part 107.61; *Remote Pilot—Small Unmanned Aircraft Systems Airman Certification Standards*, FAA-S-ACS-10 (July 2016)

[8] 14 CFR part 107.63

[9] Part 61 pilots may also obtain a temporary remote pilot certificate immediately upon submission of their application for a permanent certificate.

After passing the necessary exam, the applicant will need to complete an application for a remote pilot certificate. The application process can be completed online and will solicit information needed for TSA. Upon successful completion of the TSA security vetting, the applicant will be issued a remote pilot airman certificate. Currently, the certificate will only be valid for two years—certificate holders will have to pass a recurrent knowledge test every two years.[10]

During flight operations, the remote pilot in command (PIC) is required to complete a preflight of the entire UAS (aircraft and ground control system), maintain all necessary documentation, and make available, upon request, the UAS for inspection and/or testing by the FAA. The remote PIC must also report to the FAA within 10 days any operation that results in serious injury, loss of consciousness, or property damage of at least $500.[11]

One thing the remote PIC is not required to do is get insurance. Although most countries around the world that have enacted comprehensive UAS regulations have included an insurance provision, the FAA chose not to do so. This is not surprising since pilots of private, manned aircraft are similarly not required by the FAA to carry liability insurance.

- **Flight limitations**

Registering the UAS and obtaining a remote pilot airman certificate allows for commercial operations but not *carte blanche* access to civilian airspace. Commercial unmanned flight operations must adhere to the following parameters designed to maintain

[10] 14 CFR part 107.65
[11] 14 CFR part 107.9

sufficient separation between UAS and manned aircraft, persons and buildings:[12]

- visual line-of-sight flying (VLOS) only ("line-of-sight" means the pilot's own eyes unaided by any device other than corrective lenses—not through binoculars or first-person-view cameras);
- daylight-only operations (civil twilight operations permitted if the UAS has anti-collision lighting);
- minimum 3 mile weather visibility from the UAS control station;
- UAS must stay within 400 feet AGL, or 400 feet from a structure (this provision allows inspection of communication towers which are frequently taller than 400 feet);
- maximum ground speed of 100 mph/87 knots;
- must yield right of way to manned aircraft;
- cannot operate UAS over any persons not participating in the flight operation; and
- cannot operate UAS under a covered structure (ie: covered sports stadiums).

[12] 14 CFR part 107.29 through 107.51

- **Airspace Limitations**

Part 107 allows commercial UAS operations in Class G (uncontrolled) airspace without prior permission. Potentially troubling, the FAA chose not to restrict UAS operations near airports despite contrary recommendations from the Aircraft Owners and Pilots Association (AOPA), National Business Aviation Association (NBAA), Air Line Pilots Association (ALPA) and General Aviation Manufacturers Association (GAMA). Under Part 107, "no notification or authorization is required to operate a UAS *at or near* an uncontrolled airport" within Class G airspace (emphasis added).[13] The FAA justified their position on the grounds that "Part 107 has specific risk mitigation and hazard reduction provisions that facilitate integration."[14]

To be sure, the remote PIC is prohibited from operating their UAS in a manner that interferes with airport traffic patterns and must also yield right of way to any manned aircraft, but the potential for aircraft separation issues obviously exists. Proximity problems may arise not just because of an unsafe UAS operator, which there will be, but also because there are certain pilots of manned aircraft that have a tendency to ignore established traffic patterns and other safety procedures at uncontrolled airports. Uncontrolled airports may also have glider and/or parachute activities congesting the airspace, as well.

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[13] Advisory Circular 107-2, §5.8.1

[14] Recreational UAS flying is still required to maintain a 5 mile separation from any airport unless there is an existing model aircraft field within 5 miles. In that instance, the recreational UAS operator must establish a mutually agreed operating procedure with the airport authority.

UAS operations in Class B, C, D and E airspace are not allowed without prior authorization from ATC. ATC may not deny access solely on the basis that the UAS does not possess certain equipment not required by Part 107 (ie: two-way communications, transponder) but it can take the lack of such instrumentation into account when determining if the UAS operation will have an adverse safety effect.[15]

Subjects Part 107 Did Not Address

Part 107 did not create an organization or method of enforcing the new rules. The FAA has fined drone operators for flying recklessly, and can still do so, but the cases have been few compared to the number of small UAS currently flying. The FAA has registered 461,420 drones since the registration process began in December 2015.[16] That's more than double the entire active fleet of general aviation aircraft. An estimated 700,000 small UAS were sold in the U.S. in 2015 alone, according to trade groups. Not all of those will be used for commercial operations but as Sarah Kreps, a government professor at Cornell University, noted after the final rule was announced: "Given the growing prevalence of drones, it is hard to see how the Federal Aviation Administration actually can ensure that these rules are followed."

[15] Advisory Circular 107-2, §5.8

[16] FAA Press Release—FAA Releases Drone Registration Location Data (May 12, 2016)

The FAA declined to include an express statement on preemption. Instead, the FAA referred parties to its Fact Sheet on State and Local Regulation of Unmanned Aircraft Systems, published December 17, 2015, and reiterated its position that "[p]reemption issues involving small UAS necessitate a case-specific analysis that is not appropriate [for] a rule of general applicability."[17] Thus, Part 107 also does not address any of the privacy concerns raging around the country. Thirty-one states have adopted laws that restrict drone operations, such as barring flights over private property, and 13 have adopted criminal penalties for misusing drones. Thus, nuisance, trespass, privacy and reckless endangerment issues under individual state laws are likely to conflict with flight operations seemingly authorized by Part 107. For good or bad, depending on your point of view, these issues may somewhat stifle commercial drone operations.

The FAA also elected not to create a separate class of micro-UAS. Among the countries that were first to regulate drones, the trend is to create different classes of small UAS. Canada, for example, modified its small UAS rules in 2014. Its new regulations set forth two separate classes of small UAS: (1) aircraft with a maximum take-off weight of 2 kg/4.4 lbs; and (2) aircraft with a maximum take-off weight exceeding 2 kg/4.4 lbs but not exceeding 25 kg/55 lbs. The rules are slightly different for each category with the smaller category given more freedom of flight due to their smaller size.

Finally, Part 107 also does not require UAS operators to have an emergency plan in case of a lost communication link with their aircraft nor an ability to communicate with ATC in case of an emergency. Again, the trend among countries that were first to regulate drones (Australia and Canada are two examples) is to require both for the larger categories of commercial UAS.

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[17] Final Rule, RIN 2120-AJ60 (p. 524); *State and Local Regulation of Unmanned Aircraft Systems (UAS)*, FAA Office of General Counsel (December 17, 2015)

New Rules Are Expected To Expand Commercial Operations

Despite the limitations of Part 107, the consensus appears to be that commercial operations will greatly expand. "The final rule will be highly beneficial to the industry overall, as it resolves many uncertainties in the law and creates an improved regulatory environment," said Dave Mathewson, the Academy of Model Aeronautics' executive director. "We look forward to seeing widespread commercial and civil operations of unmanned aircraft take flight." Adam Lisberg, spokesman for DJI, one of the largest drone manufacturers, agrees and called the new rules a milestone for the industry. "We take this as the FAA endorsing all of the benefits that drones can bring and that they can be safely integrated with the proper precautions."

In total, the industry estimates that the new rules will generate more than $82 billion for the U.S. economy and create more than 100,000 new jobs over the next 10 years. The Association for Unmanned Vehicle Systems International (AUVSI) believes that $13.6 billion and 70,000 jobs will be created in the first three years alone.

One activity expressly addressed by the new rules is communication tower and antenna inspections. Historically, the inspection of tall communication towers has been a precarious occupation as it requires an employee to climb to, and work at, great heights. In 2013 and 2014, there were 13 and 12 deaths, respectively, at communication tower worksites, according to the Occupational Safety and Health Administration. While the new rules require drones to fly no higher than 400 feet, there is an exception when operating near a structure, such as a building, communication tower or antenna. Because manned aircraft already maintain adequate separation from tall towers and building, Part 107 does not limit a drone's altitude so long as it's operating within 400 feet of a structure.

With drones able to legally fly the entire height of a tower or building, businesses won't need to put their employees in harm's way as often to complete inspections. "We do believe there's inherent safety value in the use of drones," said Todd Schlekeway, the executive director of the National Association of Tower Erectors. "Anything we can do to mitigate that risk is of tremendous importance," he further stated. Mr. Schlekeway believes drones could eliminate 30% of the climbs that tower technicians make to inspect and maintain communications infrastructure.

And what about those pizza and iPhone deliveries? Many commentators have stated, correctly, that the new regulations eliminate long distance drone delivery because pilots are required to keep the drone within their visual line of sight. But it's premature to sound the drone delivery death knell. Part 107 interestingly left the airspace between 400 and 700 feet (the typical floor of Class E controlled airspace) largely open. That just happens to be the proposed air route for package deliveries that is being pushed by Amazon for its Prime Delivery Service. "We wanted to make sure we're striking the right balance between innovation and safety," said Transportation Secretary Anthony Foxx. FAA Administrator Michael Huerta said research is continuing for automated programming over congested areas that would be required for deliveries. "The department is working cooperatively with industry," Huerta said. "We certainly see the benefit of this. What we need to see is that it can be done safely."

CONCLUSION

There is risk associated with introducing unmanned aircraft into the national airspace. Careless UAS operators, like careless pilots of manned aircraft, will constantly serve to highlight the challenges of having a diverse mix of aircraft operating in the same airspace. However, having in place a regulatory framework for commercial UAS can only help to minimize risk. Thus, whatever its perceived shortcomings—doesn't adequately address safety issues, is too restrictive, etc.—Part 107 should at least be viewed as a welcome first step in the right direction.

FORUM SELECTION: A GAME OF TUG OF WAR

By: Stephanie B. Gonzalez

Many factors impacting the outcome of a lawsuit are established long before suit is filed, such as the events leading to the dispute, the parties involved and the contents of relevant documents. However, one important factor is not determined until a case is filed, yet can have an enormous impact on the outcome: the forum for the litigation. The litigation forum determines the make-up of the judge and jury who will ultimately decide the case, and often determines the substantive law that will apply. Local laws differ dramatically from state to state in terms of statutes of limitation, the proper measure of damages, allocation of fault principles, and the availability of substantive defenses such as economic loss doctrine or government contractor defense. As a result, forum can be vital to the outcome of dispositive motions and trial.

In some instances, the facts of the case dictate where it will be tried. For example, if a product manufactured by a company from State A causes injury to a resident of State A in State A, barring unusual circumstances, the lawsuit must be tried in State A. In such a scenario, neither the plaintiff nor the defendant has the ability to choose the forum for the lawsuit. However, with globalization, ease of travel, and intricate corporate structures of product liability defendants, this simple scenario is increasingly rare. If a plaintiff from state A is injured while traveling in State B by a product manufactured in State C by a company based in State D, where should the lawsuit be heard? Of course, the plaintiff will seek to have the suit heard in a forum where the judges, juries and local law most favor the plaintiff's case, and the defendant will likewise seek a forum that is most advantageous to it. Herein lies the tug of war.

There is little doubt that the plaintiff has a starting advantage in the tug of war over forum selection, as he or she

decides where to file the lawsuit in the first instance. If the defendant believes that the lawsuit should be heard in a different forum, the defendant has the burden of timely challenging the plaintiff's choice. While there are number of forum challenges available to a defendant, the ultimate decision rests with the judge, who often has discretion over these procedural questions.

Although it may be an uphill battle, challenging the plaintiff's chosen forum is a critical step in evening the playing field of the litigation, and for that reason, must be seriously considered by defendants at the start of every case. Such challenges sometimes take months, or even years, to play out, but the importance of the ultimate forum often warrants the effort.

In addition to discussing the most commonly used procedural devices for challenging a plaintiff's selected forum, this article will look at one example of a particularly complex procedural challenge that played out over the course of a year and a half to illustrate the practical effects and benefits of such devices.

1. Procedural Devices to Even the Playing Field

a. Challenging Personal Jurisdiction

Personal jurisdiction is arguably the most important challenge to a plaintiff's selected forum that is available to product liability defendants. Personal jurisdiction is the power of a court over the parties to a case. A particular court has jurisdiction over a company or individual who consents to the court's jurisdiction, or who through his actions, subjects himself to the court's jurisdiction. Historically, this standard was broadly interpreted. Product manufacturers were vulnerable to being sued in any state in the U.S. simply by placing their products into the "stream of commerce." Also, large companies with a significant amount of business in the U.S. were often found to have consented to general or "all purpose" jurisdiction in any number of states where they had offices or operations, meaning that they could be subject to suit there for a dispute arising anywhere in the U.S. The practical

impact of such a broad application of personal jurisdiction was that a plaintiff could choose to sue a corporate defendant in a "plaintiff-friendly" forum, even if that forum had minimal connection to the defendant, or for that matter, the injury-causing event.

However, as discussed in detail in a recent ABC Law Report article entitled "Supreme Court Revives Personal Jurisdiction as Viable Defense for Product Manufacturers," (Mark R. Irvine, Fall 2015), the U.S. Supreme Court has limited the scope of personal jurisdiction. A product manufacturer is now only subject to general or "all purpose" jurisdiction in the state where it is "at home," meaning incorporated or headquartered.[1] This vastly limits a plaintiff's ability to "forum shop"—or choose the forum most favorable to the plaintiff—and has made litigation more predictable for corporate defendants. Of course, a product defendant may still be subject to "specific" jurisdiction in the state where the injury-causing event occurred, subject to certain limitations. However, such a forum is less likely to be the subject of a personal jurisdiction challenge than is a "plaintiff-friendly" forum with no connection to the litigation.

In the tug of war over forum selection, these recent developments in personal jurisdiction case law can be considered a few steps in favor of the defense.

b. Challenging Venue

Even if a defendant is subject to personal jurisdiction in the plaintiff's selected forum, venue rules give defendants some further control over the place of trial. If not for venue rules, plaintiff could file suit in a remote district where it would be unreasonably burdensome to defend the litigation, or could file suit in a very liberal district within an otherwise conservative state.

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[1] *See Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

Venue rules balance the conveniences of the parties with other policy factors to determine an appropriate forum for trial.[2]

Under federal law[3], venue is proper in a district where a "substantial part of the events or omissions" giving rise to the claim occurred, or, if all the defendants are residences of one state, venue is proper in the district where one of the defendants resides.[4] If more than one district qualifies as a "proper venue" under this rule, the plaintiff is entitled to choose the district in which to file suit, and a defendant cannot generally challenge this choice.

If plaintiff files suit in the wrong district and a defendant timely objects to improper venue, a federal court must dismiss the action or transfer it to any district in which it could have been brought.[5] A court that is facing both a personal jurisdiction and venue challenge, may choose to transfer the case to a venue that has personal jurisdiction over the defendant, rather than dismissing the case. Either way, the plaintiff loses some control over forum selection. A meritorious venue challenge can therefore be a powerful tool.

Even if plaintiff's chosen venue is technically proper, a defendant can challenge the venue as inconvenient, and seek to transfer the case to a more convenient venue. The federal rules provide for a discretionary transfer to another venue in the U.S. where the case "might have been brought," meaning that the new

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[2] *See Denver & Rio Grande Western R.R. Co. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556 (1967).

[3] The issue of venue is governed principally by state and federal statute. However, because the 50 states differ in how they determine proper venue, this article will look only at the federal venue provisions to analyze potential challenges available to defendants.

[4] 28 U.S.C. § 1391(b). If no district qualifies under this rule (e.g., the "events or omissions" occurred in a foreign country, and the defendants are not all located in one state), plaintiff may file the action in any district in which a defendant is subject to the court's personal jurisdiction, subject to a "convenience" challenge by the defendants.

[5] 28 U.S.C. § 1406.

court has jurisdiction over the case and the parties.[6] In deciding whether to transfer venue under this statute, courts look at the convenience to the parties and witnesses, and the interest of justice.

c. *Forum Non Conveniens*

Another tool used by defendants to pull forum selection in their favor is *forum non conveniens*, which provides a basis for dismissal in favor of a more convenient foreign forum. Under this doctrine, U.S. courts have discretion to dismiss the case where a defendant shows that a foreign forum is "adequate," and a balancing of specific private and public interest factors favors dismissal.

For a foreign country to provide an "adequate" alternative forum, all defendants must be amenable to service of process and subject to personal jurisdiction there (although they can voluntarily submit to the foreign court's jurisdiction to encourage dismissal on this basis). There must also be a remedy available to plaintiff under the foreign law, although it is generally irrelevant if the foreign law is less favorable to plaintiff.[7] The private and public interest factors take into account, among other things, where the parties and witnesses are located, access to physical evidence and local interest in the subject matter of the lawsuit.

Forum non conveniens motions are most often brought when the defendant is a foreign company and the injury-causing event occurred abroad. Under these circumstances, many of the witnesses, evidence and documents are necessarily located abroad, and therefore litigating the case in the foreign forum will often be more "convenient" than the U.S. Nevertheless, if the plaintiff has filed suit in his or her home state, that forum choice will be afforded heightened deference.[8] Conversely, a foreign plaintiff's

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[6] 28 U.S.C. § 1404.
[7] *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981).
[8] *Koster v. (American) Lumbermens Mut. Cas. Co*., 330 U.S. 518, 524 (1947).

choice of a U.S. forum is given "little deference," and a *forum non conveniens* motion is much more likely to be successful.[9] As a result, this tool is useful to prevent "litigation tourism" in U.S. courts.

d. Removal to Federal Court

Another important challenge to a plaintiff's selected forum is "removal" of a case from state to federal court. Plaintiffs generally prefer state court as the judges and juries tend to be more liberal (hence more plaintiff-oriented), dispositive motions are more likely to be denied, and frankly plaintiff's attorneys are often more familiar with the procedures and judges in state court. Defendants tend to prefer federal judges, who are more likely to grant dispositive motions, and the more conservative federal court juries. As a result, a key question for a defendant served with a state court complaint is, can and should this case be heard in federal court?

i. *Federal Question Jurisdiction*

Federal courts have original jurisdiction over all cases "arising under" federal law, meaning that the case involves a claim or defense that arises under the U.S. Constitution, federal law, or a treaty to which the U.S. is a party.[10] For instance, if a plaintiff's state law claim is governed by the Montreal Convention, the defendant will likely be entitled to remove that case to federal court on the basis of federal question jurisdiction.

The Constitution also provides for exclusive federal jurisdiction over claims arising on a "federal enclave," such as a military base or fort.[11]

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[9] *Viviendi SA v T-Mobile USA Inc.*, 586 F.3d 689, 693-94 (9th Cir. 2009).
[10] 28 U.S.C. § 1441(c).
[11] *See Holliday v. Extex*, No. 05-cv-0194, 2005 WL 2158488 (D.Haw. July 6, 2005).

ii. *Federal Officer Removal*

Another basis for removal is the federal officer removal statute, which permits a defendant who was acting at the direction of a federal officer and has a "colorable federal defense," to remove a case to federal court.[12] A private corporation "acts" under a federal officer when it assists or helps carry out the duties or tasks of the federal officer. For instance, a product manufacturer may be acting under the direction of a federal officer when it designs or manufactures a product pursuant to specifications provided by the U.S. government.

"Colorable federal defenses" available to a product manufacturer include the government contractor defense, the political question doctrine and the state secret defense. The government contractor defense may be invoked where the product was designed and manufactured in conformity with reasonably precise specifications provided or approved by the U.S. government.[13] The political question doctrine protects the separation of powers, and bars a court (the judicial branch) from reexamining decisions by the U.S. government (the executive branch).[14] For example, if the military specifies certain design features of a product customized for combat, a court cannot second guess that design decision in a lawsuit against the product manufacturer. The state secret doctrine may provide a defense if the government's decision to withhold military secrets from discovery for national security reasons impedes a defendant's ability to assert an otherwise valid defense.[15] In the context of products liability, this might come up where a product was modified post-sale by the government for special operations missions.

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[12] 28 U.S.C. § 1442(a)(1).
[13] *See Boyle v. United Technologies Corp*., 487 U.S. 500 (1988).
[14] *See Japan Whaling Ass'n v. Am. Cetacean Soc*., 478 U.S. 221 (1986)
[15] *See U.S. v. Reynolds*, 345 U.S. 1 (1953).

iii. *Diversity Jurisdiction*

Even if all the claims and defenses arise under state law, a defendant may be able to remove the case to federal court based on "diversity jurisdiction." This is where the defendants are "diverse" from the plaintiffs—meaning that all defendants reside in different states from all the plaintiffs—and the claimed damages exceed $75,000.00.[16] However, if even one defendant resides in the state where the action is pending, it cannot be removed to federal court. For example, a case filed in Illinois by two Illinois plaintiffs against a California defendant and a Delaware defendant would be removable to federal court based on diversity jurisdiction. However, if that same case was filed in either California or Delaware, it would not be removable and would remain in state court. As a consequence, plaintiffs often choose to file the lawsuit in a state where at least one defendant resides in order to remain in state court.

Another tactic plaintiffs sometimes employ is to name a local corporation or individual as a defendant in order to destroy diversity. Using the example above, the Illinois plaintiffs could name an Illinois company as a defendant just to keep the case in state court, even if it turns out that company is not a proper defendant in the lawsuit. Where this occurs, defendants can challenge the pleadings based on "fraudulent joinder," and may still be able to remove the case to federal court if they can show that the local defendant was sued for no reason other than to destroy diversity.

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[16] In the (thankfully) rare situation where at least 75 people have died in an accident, federal courts can exercise jurisdiction over the case if there is "minimal diversity," meaning that at least one plaintiff and one defendant are citizens of different states. (*See* Multiparty, Multiforum Jurisdiction statute, 28 U.S.C. § 1369.)

2. Recent "Tug of War" Won by the Defense

Our firm is currently defending a product liability case in which we successfully employed a number of these challenges to ensure that our client ended up in the fairest forum for trial. The case stems from a U.S. Army helicopter crash in Savannah, Georgia. The plaintiffs filed suit against four defendants—manufacturers and maintenance providers for the helicopter—in state court in California.

First, the defendants successfully removed the case to California federal court on grounds of federal officer and federal enclave jurisdiction.

Second, we successfully challenged the California court's personal jurisdiction over our client, a Connecticut corporation. Under the recently articulated U.S. Supreme Court standard discussed above, the district court declined to exercise general jurisdiction over our client, finding that it was not "at home" in California. The district court further ruled there was no specific jurisdiction because nothing about the plaintiffs' claims had any ties to California. Another defendant, an Arizona company, was also dismissed for lack of personal jurisdiction.

In an effort to maintain some control over the forum selection process, the plaintiffs then requested that, instead of dismissing these defendants for lack of personal jurisdiction, the California district court transfer the case to a district court in Georgia, where the accident occurred, pursuant to the federal venue transfer provisions discussed above. However, the California district court declined to transfer the case because plaintiffs failed to show that a Georgia court had jurisdiction over all the parties.

As a result of these California federal court rulings, the plaintiffs had no choice but to file individual lawsuits against the non-California defendants in their home states of Connecticut and Arizona (plus a later-added defendant in Texas), in addition to

continuing to prosecute their claim in California against two other defendants.

In another attempt to regain control over forum, and presumably because the prospect of litigating in four separate and far-flung forums was not appealing to plaintiffs' counsel, the plaintiffs filed a petition with the Judicial Panel on Multi-District Litigation (MDL) to centralize all the actions and transfer them to a single federal court in Georgia for pre-trial purposes. MDL can be used to consolidate numerous filings (usually by different plaintiffs) that all arise from a single incident or product.[17] Here, the defendants opposed MDL on the grounds that centralization was not warranted, and discovery could be coordinated based on the cooperation of counsel. The Judicial Panel agreed, and declined to MDL the cases to a single jurisdiction.

This "tug of war" over venue took place over a year and a half, but was ultimately worth the battle. The defendants will now be able to defend themselves in a fair forum, rather than in the far away forum chosen by plaintiffs with no connection to the dispute.

CONCLUSION

Although procedural challenges related to forum may seem like mere tactical ploys to gain an advantage, they are not. They are critical for ensuring that defendants have a level playing field, and preventing plaintiffs from unilaterally selecting the forum. As stated above, the forum will determine not only the judge and jury who will decide the case, but will also often determine the applicable substantive law. As a result, asserting a meritorious forum selection challenge at the outset of a case is essential to securing a fair forum, and hopefully the best outcome, for the client.

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[17] MDL proceedings are often employed in the context of medical device and pharmaceutical litigation, where there may be hundreds or thousands of individual plaintiffs filing suit all over the country involving the same product defect claims. By using the MDL procedure, all of the claims are consolidated for discovery and pre-trial rulings, but then are sent back to their original state for trial.

PREEMPTING PRECEDENT: THE THIRD CIRCUIT'S EVOLVING ANALYSIS OF PREEMPTION IN AVIATION

By: Samantha L. Buchalter and Tara E. Nicola

The Third Circuit has long been the source of seminal preemption decisions in aviation litigation. In 1999, it issued the unprecedented *Abdullah v. American Airlines, Inc.*, which held that the entire field of aviation safety was preempted by the Federal Aviation Act. 181 F.3d 363 (3d Cir. 1999). Over ten years later, the Court in *Elassaad v. Independence Air, Inc.* restricted its own holding by denying that *Abdullah* controlled once an aircraft has ceased in-flight operations and arrived at its destination. 613 F.3d 119 (3d Cir. 2010). The Third Circuit continued to chip away at *Abdullah*'s broad holding in 2016, when it issued the highly-anticipated decision on preemption of aviation products liability claims in *Sikkelee v. Precision Airmotive Corporation*. 822 F.3d 680 (3d Cir. 2016). Once again, the Court restricted the scope of *Abdullah* by holding that state law products liability claims are not preempted by the Federal Aviation Act. *Id.* at 683. The once broad holding of *Abdullah* that provided support for preemption of all state law claims in aviation cases implicating safety has slowly been eviscerated by the very Court that espoused that holding.

THE DOCTRINE OF PREEMPTION

The doctrine of preemption arises from the existence of two sovereigns in the United States: the Federal and State governments. *See Arizona v. United States*,—U.S.—-,—-, 132 S.Ct. 2492, 2500 (2012). It is a central principle of Federalism that the Federal and State governments respect one another's sovereignty. *See Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). "From the existence of two sovereigns follows the possibility that laws can be in conflict or at cross-purposes." *Arizona*, 132 S.Ct. at 2500. The Supremacy Clause of the Constitution provides that in such a situation, Federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any

Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. Accordingly, as the author of federal law "Congress has the power to preempt state law." *Arizona*, 132 S.Ct. at 2500 (citing *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000); *Gibbons v. Ogden*, 9 Wheat. 1, 210-11 (1824)).

The preemption analysis starts with the assumption that state law is not preempted "unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Gregory*, 505 U.S. at 460-61. "The purpose of Congress is the ultimate touchstone." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96 (1992) (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985)).

Preemption may be express or implied. *Altria Grp. v. Good*, 555 U.S. 70, 76 (2008). It "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Gade*, 505 U.S. at 98 (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

Express Preemption

Congress effects express preemption when it enacts a statute with a preemption provision that "withdraw[s] specified powers from the States." *Arizona*, 132 S.Ct. at 2500-01 (citing *Chamber of Commerce of United States of Am. v. Whiting*, 563 U.S.—-,—-, 131 S.Ct. 1968, 1974-75 (2011)). For example, the Federal Food, Drug, and Cosmetic Act (FDCA) contains a section that expressly preempts any state law that imposes a requirement on medical devices that differs from the FDCA's requirements. *See* FDCA § 521, 21 U.S.C. § 360k.

Implied Preemption

Even in the absence of an express preemption provision, implied preemption may preclude state law through either conflict or field preemption. *Gage*, 505 U.S. at 98.

Conflict preemption arises when state law conflicts with federal law. *Arizona*, 132 S.Ct. at 2501 (citing *Crosby*, 530 U.S. at 372). This conflict may be direct—when it is "impossible" to comply with both federal and state law. *Crosby*, 530 U.S. at 372 (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)). Even if there is no such impossibility preemption, conflict preemption may arise when the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Crosby*, 530 U.S. at 373.

Field preemption precludes states from regulating an area in which Congress intends federal law to "occupy the field." *California v. ARC Am. Corp.*, 490 U.S. 93, 100 (1989). Such an intent may be inferred from "a scheme of federal regulation . . . so pervasive . . . that Congress left no room for the States to supplement it." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Field preemption may also arise when federal law "touch[es] a field in which the federal interest [is] so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Id.* (quoting *Rice*, 331 U.S. at 230). "Thus, implied federal pre-emption may be found where federal regulation of a field is pervasive, . . . or where state regulation of the field would interfere with Congressional objectives." *Abdullah*, 181 F.3d at 367 (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); *Rice*, 331 U.S. at 230).

FEDERAL OVERSIGHT OVER AVIATION

The Federal Aviation Act and its Predecessors

Federal regulation of civil aviation began in 1926, when the federal government first assumed jurisdiction over the safety of civil aviation by adopting the Air Commerce Act of 1926 ("1926 Act"). Air Commerce Act of 1926, 44 Stat. 568 (1926), *amended by* Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (1938). The

1926 Act charged the Secretary of Commerce with fostering air commerce, issuing and enforcing air traffic rules, licensing pilots, and certifying aircraft. *See* 1926 Act.

In response to developments in aviation, the Civil Aeronautics Act of 1938 ("1938 Act") was enacted. Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (1938), *amended by* Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (1958) (current version at 49 U.S.C. § 40101 (2000)). The 1938 Act transferred responsibility for aviation regulation from the Secretary of Commerce to a new, independent agency: the Civil Aeronautics Authority (the "Authority"). 1938 Act § 201. The Authority was empowered and directed to "promote safety of flight in air commerce by prescribing and revising from time to time . . . [s]uch minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety. . . ." *Id.* § 601(a)(1). The 1938 Act also subsumed whatever role the states had previously played in the regulation of interstate aviation safety by empowering the Authority to oversee all aspects of air commerce and defining "air commerce" to include "any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce." *Id.* § 1(3). The hallmark of the 1938 Act was full control over design, production, maintenance, use and enforcement of the aviation industry. *See, e.g.*, *id.* § 601 (general safety powers and duties); § 602 (airman certificates); § 603 (aircraft certificates); § 604 (air carrier operating certificates); § 605 (maintenance of equipment in air transportation); § 609 (amendment, suspension, and revocation of aircraft or airman certificates); § 610 (prohibitions); § 901 (civil penalties); § 902 (criminal penalties); § 903 (venue and prosecution of offenses).

As air traffic increased and aviation development advanced, accidents increased and aviation safety became a dominant federal concern. As a consequence of the increase in accidents, the Federal Aviation Act of 1958 was enacted to ensure

that safety regulation of aviation would be indivisible by consolidating it in a single entity, the Federal Aviation Administration ("FAA"). Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (1958) (current version at 49 U.S.C. § 40101); Comm. on Interstate and Foreign Com., Federal Aviation Act of 1958, H.R. REP. NO. 85-2360 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3741, 3741-42. President Eisenhower proposed and Congress ultimately agreed "that the preparation, issuance, and revision of regulations governing matters of safety can best be carried on by the agency charged with the day-to-day control of traffic, the inspection of aircraft and service facilities, the certification of pilots and related duties." Letter of President Eisenhower to Congress, dated June 13, 1958, *reprinted in* S. REP. NO. 1811, at 25-29, 85th Cong., 2d Sess. 27 (1958); *see also Northwest Airlines, Inc. v. Gomez-Bethke*, No. 4-83-773, 1984 WL 1040, at *9 (D. Minn. Apr. 1, 1984) (quoting President Eisenhower's letter to Congress). All such functions concerning "air safety regulations," then vested in the Civil Aeronautics Board, were transferred to the FAA. S. REP. NO. 1811, at 21 ("Thus the Civil Aeronautics Act of 1938 is repealed and replaced by the present Federal Aviation Act of 1958.").

As the House Report accompanying the Federal Aviation Act of 1958 commented, "in passing [the 1938 Act], Congress recognized the need for a unified, independent aviation agency." H.R. REP. NO. 85-2360, 1958 U.S.C.C.A.N. at 3743. The corresponding Senate Report acknowledged that prior to the 1938 Act, "at one time there were a total of 75 different interagency groups working on 1 phase or another of aviation policy or planning. The difficulty of this procedure was that the greater the problem, the less susceptible it was to compromise solution; decisions often had to be made unanimously or not at all." S. REP. NO. 1811, at 6. The House Report emphasized this point, stating that "[t]here must be a well planned system operated by qualified technicians working within the framework of rules devised to provide safety features necessary for modern-day air operations."

H.R. REP. NO. 85-2360, 1958 U.S.C.C.A.N., at 3747. It is against this historical background that the current federal aviation scheme operates.

Under the current Federal Aviation Act, the Administrator of the FAA has the responsibility to prescribe "minimum standards required in the interest of safety for appliances and for the design, material, construction, quality of work, and performance of aircraft, aircraft engines, and propellers." 49 U.S.C. § 44701(a)(1) (2000). The Administrator was also given plenary authority for prescribing safety regulations and minimum standards. *Id.* § 44701(a). The House Report recommending the passage of the Federal Aviation Act made clear that "[t]he Administrator of the new Federal Aviation Agency . . . would be given full responsibility and authority for the . . . promulgation and enforcement of safety regulations." H.R. REP. NO. 85-2360, 1958 U.S.C.C.A.N., at 3741. The House Report also included an Executive Branch letter that emphasized the significant role of the FAA as the sole regulator of aviation, stating that "[i]t is essential that one agency of government, and one agency alone, be responsible for issuing safety regulations if we are to have timely and effective guidelines for safety in aviation." H.R. REP. NO. 85-2360, 1958 U.S.C.C.A.N. at 3761.

Regulation of Aviation Safety through the Federal Aviation Act and Regulations

Today, the Federal Aviation Act and the Federal Aviation Regulations ("FARs") establish a comprehensive regulatory scheme governing aviation safety. *See* 49 U.S.C. § 40104 *et seq*.; 14 C.F.R. § 1.1 (2016) *et seq*. The FARs are pervasive and provide standards for aviation safety, including standards for the design and manufacture of aircraft and their component parts, and aircraft regulations. *See generally* 14 C.F.R. § 1.1 *et seq*.

The Federal Aviation Act sets forth a comprehensive, detailed framework that governs aircraft design, production, and

use. 14 C.F.R. pt. 21; 14 C.F.R. pt. 23; 14 C.F.R. pt. 25; 14 C.F.R. pt. 26; 14 C.F.R. pt. 27; 14 C.F.R. pt. 29; 14 C.F.R. pt. 33-36; 14 C.F.R. pt. 39; 14 C.F.R. pt. 43; 14 C.F.R. pt. 65. The FAA issues type certificates for aircraft, engines and associated appliances to ensure they are safe. 49 U.S.C. § 44704 (2012). A manufacturer wishing to design an aircraft must obtain a type certificate from the FAA. 14 C.F.R. pt. 21; 14 C.F.R. § 21.1; 14 C.F.R. § 21.5. To obtain a type certificate, a manufacturer must demonstrate to the FAA that the product's design, specification and manufacturing process satisfy applicable FAA regulations. 14 C.F.R. pt. 21. The process to obtain a type certificate for an aircraft is extensive, including specific testing that must be done and setting forth certain specifications which must be met. 14 C.F.R. pt. 21 sub. pt. B; 14 C.F.R. pt. 23; 14 C.F.R. § 23.1; 14 C.F.R. pt. 25; 14 C.F.R. § 25.1; 14 C.F.R. pt. 27; 14 C.F.R. § 27.1; 14 C.F.R. pt. 29; 14 C.F.R. § 29.1. There are detailed regulations governing the specifications, performance and operation of the powerplant system of the aircraft. 14 C.F.R. § 23.903; 14 C.F.R. § 25.903; 14 C.F.R. § 27.903; 14 C.F.R. § 29.903. In addition, the engine is subjected to a separate detailed process under which it may obtain type certification before it can be utilized in an aircraft. 14 C.F.R. pt. 33; 14 C.F.R. § 33.1.

Once an aircraft manufacturer has established compliance with the extensive FARs governing the issuance of a type certificate, it then may apply for a production certificate so that it may manufacture the aircraft. 14 C.F.R. § 21.131. A production certificate is an approval to manufacture duplicate products under an FAA-approved type design. 14 C.F.R. pt. 21 sub. pt. G. The regulations governing the issuance of a production certificate are extensive. 14 C.F.R. §§ 21.131-133; 21.135; 21.137-147; 21.150.

Each aircraft that comes off the production line must be deemed "airworthy" by the FAA for it to be legally flown. *See* 49 U.S.C. § 44711(a)(1) (2012). Under the Federal Aviation Act, an airworthy aircraft will be issued an airworthiness certificate when the aircraft conforms to its type certificate and, after inspection by

the FAA, is deemed to be in a safe condition. 49 U.S.C. § 44704(d). FAR § 3.5(a) defines the term "airworthy" as "the aircraft conforms to its type design and is in a condition for safe operation." 14 C.F.R. § 3.5(a).

The manufacturer's duty to comply with federal regulations regarding design and manufacture does not end once an aircraft is deemed airworthy. The FARs require type certificate holders to report to the FAA any known failures, malfunctions or defects in the aircraft. 14 C.F.R § 21.3. If any action is required to correct the defect, the manufacturer must send the data necessary for issuing an appropriate airworthiness directive to the aircraft certification office. 14 C.F.R. § 21.3(f).

In addition, an aircraft manufacturer is not free to depart from the type certificated design at its desire. Rather, any departure from the type certificated design must be approved by the FAA or a new type certificate needs to be applied for and granted by the FAA. *See* 14 C.F.R. §§ 21.91, 21.93, 21.95, 21.97, 21.99, 21.101; *see also* 14 C.F.R. § 21.19 ("[E]ach person who proposes to change a product must apply for a new type certificate if the FAA finds that the proposed change in design, power, thrust or weight is so extensive that a substantially complete investigation of compliance with the applicable regulations is required.").

Additionally, the FAA can require a manufacturer to change its design if the FAA determines a change is necessary to correct an unsafe condition of the product. 14 C.F.R. § 21.99. The FAA may also require a design change even if it does not find the product to be unsafe, but determines that a change in the design "will contribute to the safety of the product. . . ." 14 C.F.R. § 21.99(b).

The FAA has also promulgated several regulations relating to aircraft operations. A pilot must have a certified pilot certificate to act as a pilot or a member of the pilot flight crew. 14 C.F.R. § 61.3. The FAA requires pilots to perform certain pre-flight duties, including review of available information

concerning the flight, verification of the aircraft's airworthiness, and making sure that passengers are briefed on seatbelt use. 14 C.F.R. §§ 91.103; 91.7; 14 C.F.R. § 91.107. During flight, the pilot is required to "discontinue the flight when unairworthy mechanical, electrical, or structural conditions occur." 14 C.F.R. § 91.7. Additionally, the regulations specify that "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another." 14 C.F.R. § 91.13. Flight rules are also the subject of FAA regulations. *See* 14 C.F.R. § 91.101 ("This subpart prescribes flight rules governing the operation of aircraft within the United States and within 12 nautical miles from the coast of the United States.").

HISTORY OF PREEMPTION IN AVIATION CASES

The extensiveness of the Federal Aviation Act (the "Act") prompted defendants in aviation cases to argue that the Act preempted any state law claims brought against them. Prior to the Third Circuit's holding in *Abdullah*, some federal courts limited the preemptive effect of the Act to the express preemption clause of § 1305(a)(1), which applies only to laws "relating to rates, routes, or services of any air carrier. . . ." § 1305(a)(1). *See, e.g.*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S.Ct. 2031 (1992) (holding that the express preemption provision did not preempt state actions that affected rates, routes, or services "in too tenuous, remote, or peripheral a manner"); *Public Health Trust of Dade Cty., Fla. v. Lake Aircraft, Inc.*, 992 F.2d 291, 294-95 (11th Cir. 1993) (finding that existence of § 1305 demonstrated that Congress did not intend any additional implied preemption outside of the express provision); *Stewart v. Am. Airlines, Inc.*, 776 F. Supp. 1194, 1197-98 (S.D. Tex. 1991) (finding that plaintiff's negligent maintenance and operation claims resulting from a deflated nose wheel did not relate to "services" within the meaning of § 1305).

Other courts relied on the Act's savings clause, § 1506, to conclude that traditional state tort law survived the federal regulations. *See Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408,

1416 (9th Cir. 1984) (holding that the Act does not preempt negligent infliction of emotional distress claims); *In re Aircrash Disaster at Sioux City, Iowa*, 734 F. Supp. 1425, 1428 (N.D. Ill. 1990) (finding that state's allowance of punitive damages was not preempted by the FAA); *see also* § 1506 ("Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.").

Some courts undertook the analysis of whether there was implied preemption under the Act and nonetheless found that state law was not preempted. *See Cleveland By and Through Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1447 (10th Cir. 1993) (ruling that products liability claims were not preempted by federal law, but rather subject to state law); *Holliday v. Bell Helicopters Textron, Inc.*, 747 F. Supp. 1396, 1398-1400 (D. Haw. 1990) (declining to find that there was either conflict or field preemption of state crashworthiness claims).

Those courts that did find implied preemption by the Act limited the scope of that preemption to discrete aspects of aviation. *See City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 633 (1973) (holding that the Act and the Noise Control Act preempted state laws regarding aircraft noise); *French v. Pan Am Express, Inc.*, 869 F.2d 1, 6 (1st Cir. 1989) (determining that pilot regulation was federally preempted); *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306, 1316 (9th Cir. 1981) (finding that the state's attempt to regulate airspace was preempted); *Price v. Charter Township*, 909 F. Supp. 498, 501-02 (E.D. Mich. 1995) (holding that flight control regulation seeking to reduce noise was federally preempted). But until *Abdullah*, no court found that the Act was so extensive as to preempt any and all claims relating to aviation.

THE THIRD CIRCUIT'S ANALYSIS OF FEDERAL PREEMPTION IN AVIATION CASES

The Third Circuit's 1999 decision *Abdullah v. American Airlines* changed the landscape of federal preemption in aviation cases. Indeed, for the first time a federal circuit court held—without limitations—that the entire field of aviation safety is preempted by the Federal Aviation Act. *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 365 (3d Cir. 1999). This was a significant departure from the cases discussed above, in which preemption in the context of aviation claims was either wholly rejected or quite narrowly construed. Nonetheless, in *Elassaad* and *Sikkelee*, even the Third Circuit began to narrow its holding in *Abdullah*. *See Elassaad v. Independence Air, Inc.*, 613 F.3d 119 (3d Cir. 2010); *Sikkelee v. Precision Airmotive Corporation*, 822 F.3d 680 (3d Cir. 2016).

Abdullah v. American Airlines

In *Abdullah,* the plaintiffs were passengers on an American Airlines flight from New York to Puerto Rico. *Abdullah*, 181 F.3d at 365. During the flight, the aircraft encountered severe turbulence that caused plaintiffs to suffer physical injuries. *Id.* The crew had illuminated the seatbelt sign, but did not alert the passengers of the expected turbulence. *Id.* Nor did the pilot change course to avoid the storm. *Id.* At trial before the District Court of the Virgin Islands, the jury found defendant American Airlines liable and awarded damages totaling more than two million dollars. *Id.* After the verdict, American Airlines moved for dismissal and/or a new trial. *Id.* at 366. Among other arguments, American Airlines argued that the District Court improperly applied territorial common law to establish the standards of care for the passengers and crew. *Id.* It argued that the Act preempts the standards for airline safety, including those applied by the District Court. *Id.* The District Court agreed, holding that "the [Act] impliedly preempts state and territorial regulation of aviation safety and standards of care for pilots, flight attendants, and passengers," but it also held

that the plaintiffs could recover under state and territorial law for violation of federal standards. *Id.* (citing *Abdullah v. American Airlines, Inc.*, 969 F. Supp. 337, 341 (D. Vi. 1997)). Based on this decision, a new trial was ordered. *Id.*

The District Court certified the following issue to the Third Circuit: "Does federal law preempt the standards for air safety, but preserve State and Territorial damage remedies?" *Id.* at 364. After an extensive analysis of the history of the Act and case law governing preemption, the Third Circuit answered "yes" to both parts of the certified question. *Id.* at 365. The Court held: "we find implied federal preemption of the entire field of aviation safety." *Id.* Notably, the Court based its finding on the "determination that the [Act] and relevant federal regulations establish complete and thorough safety standards for interstate and international air transportation and that these standards are not subject to supplementation by, or variation among, jurisdictions." *Id.* The Third Circuit recognized that some circuit courts have found federal law to preempt discrete aspects of air safety, but it went further and held that "federal law establishes the applicable standards of care **in the field of air safety, generally**, thus preempting the entire field from state and territorial regulation." *Id.* at 367 (emphasis added) (citing *French,* 869 F.2d 1; *World Airways, Inc. v. International Bd. of Teamsters,* 578 F.2d 800 (9th Cir.1978); *Kohr v. Allegheny Airlines, Inc.,* 504 F.2d 400 (7th Cir.1974)).

To reach its finding of broad preemption, the *Abdullah* Court reviewed the legislative history of the Federal Aviation Act as well as prior decisions interpreting the legislative intent of the Federal Aviation Act. *Id.* at 368-76. The Court found that Congress' purpose in enacting the Federal Aviation Act was "to promote safety in aviation and thereby protect the lives of persons who travel on board aircraft." *Id.* at 368 (citing *In re Mexico City Aircraft of October 31, 1979*, 708 F.2d 400, 409 (9th Cir. 1983)). The Third Circuit cited Congress' determination that "the creation of a

single, uniform system of regulation was vital to increasing air safety." *Id.* The Court stated:

> the Federal Aviation Act and relevant federal regulations establish complete and thorough safety standards for interstate and international air transportation that are not subject to supplementation by, or variation among, jurisdictions . . . we hold that federal law establishes the applicable standard of care in the field of air safety, generally, thus preempting the entire field from state and territorial regulation.

Id. at 367.

In addition, the Third Circuit reviewed the individual regulations relating to aircraft operations and found that 14 C.F.R. § 91.13(a), which governs "Careless or Reckless Operation," provides the comprehensive standard of care to be exercised by pilots and flight crew. *Id.* at 371. This regulation prohibits the "operation of an aircraft in a careless or reckless manner so as to endanger the life or property of another." *Id.* (quoting 14 C.F.R. § 91.13(a)). The Court explained that while there is no specific regulation governing air safety, § 91.13 provides the general standard for the safe operation of aircraft. The Third Circuit found that the Federal Aviation Act and its legislative history, as well as the regulations promulgated under it, demonstrated Congress' intent to preempt the field of aviation safety. *Id.*

Elassaad v. Independence Air

Over a decade later, the Third Circuit was called upon to revisit its *Abdullah* decision in *Elassaad v. Independence Air*, 613 F.3d 119. In *Elassaad*, the plaintiff alleged state law claims against the defendant airline for injuries allegedly sustained while the plaintiff was disembarking from an aircraft parked at the gate. *Id.* at 121. The Third Circuit acknowledged that "*Abdullah*'s primary holding was that federal law preempted 'the entire field of

aviation safety.'" *Id.* at 126 (quoting *Abdullah*, 181 F.3d at 365). The *Elassaad* court then sought to exempt the case before it from that preempted field. The Court examined the FARs, stating that "most of the regulations adopted pursuant to the Aviation Act concern aspects of safety that are associated with flight. For example, the regulations detail certification and 'airworthiness' requirements for aircraft parts." *Id*. at 128. The Court gave other examples of regulations associated with flight, including those that set qualifications for pilots, restrictions on aircraft speed, flight path and communications. *Id.* at 128-29. The Court observed "[t]he primary purpose of these regulations appears to be the prevention of accidents, and the assurance of passenger safety, in connection with flight." *Id.* at 129. After analyzing the regulations, the *Elassaad* Court confirmed *Abdullah*'s holding that the Federal Aviation Act preempts "the entire field of aviation safety" from state regulation, but limited the definition of "aviation safety" to mean only "in-air safety." *Id.* at 127. While it looked to *Abdullah*, the *Elassaad* Court did not provide any support from that precedent for such a limitation. Nonetheless, by restricting "aviation safety" to "in-air safety," the Court was able to conclude that claims relating to a flight crew's responsibilities for the disembarkation of passengers once a plane has come to a complete stop at its destination were not preempted. *Id*. at 121.

Sikkelee v. Precision Airmotive

On April 19, 2016, the Third Circuit drastically narrowed the once-broad scope of the *Abbdullah* by holding that "neither the [Federal Aviation] Act nor the issuance of a type certificate per se preempts all aircraft design and manufacturing claims." *Sikkelee*, 822 F.3d at 683. Prior to *Sikkelee*, courts in the Third Circuit and elsewhere relied on *Abdullah* to hold that a wide range of aviation cases, including products liability cases, are preempted by the Federal Aviation Act. *See U.S. Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1325-26 (10th Cir. 2010); *Montalvo v. Spirit Airlines*, 508 F.3d 464, 468-69 (9th Cir. 2007); *Greene v. B.F. Goodrich Avionics*

Sys., Inc., 409 F.3d 784, 795 (6th Cir. 2005), *cert. denied*, 547 U.S. 1003 (2006); *Sikkelee v. Precision Airmotive Corp.*, 731 F. Supp. 2d 429 (M.D. Pa. 2010); *Bomanski v. US Airways Grp., Inc.*, 620 F. Supp. 2d 725, 729 (E.D. Pa. 2009); *Evac EMS, Inc. v. Robinson*, 486 F. Supp. 2d 713, 720 (M.D. Tenn. 2007); *Pease v. Lycoming Engines*, No. 4:10-CV-00843, 2011 WL 6339833 (M.D. Pa. Dec. 19, 2011); *Landis v. US Airways, Inc.*, No. 07-1216, 2008 WL 728369 (W.D. Pa. March 18, 2008); *Duvall v. AVCO Corp.*, No. 4-CV 05-1786, 2006 WL 1410794 (M.D. Pa. May 19, 2006). Courts have found that *Abdullah*'s broad field of "aviation safety" includes alcoholic beverage service on an aircraft, *O'Donnell*, 627 F.3d at 1325-26, passenger warnings, *Montalvo*, 508 F.3d at 468-69, regulation of air ambulance avionics equipment, *Evac EMS*, 486 F. Supp. 2d at 720, failure to warn claims, *Greene*, 409 F.3d at 795, negligence claims arising from luggage falling prior to takeoff, *Bomanski*, 620 F. Supp. 2d at 728-29, and the design and manufacture of aviation products, *Pease*, No. 4:10-CV-00843, 2011 WL 6339833 at *21; *Landis*, No. 07-1216, 2008 WL 728369; *Duvall*, No. 4-CV 05-1786, 2006 WL 1410794. The *Sikkelee* decision disrupted this line of logic.

In *Sikkelee*, the Third Circuit was presented with the question of whether *Abdullah* extends to state law product liability claims for design and manufacturing defects. 822 F.3d at 683. The Third Circuit unequivocally held that these claims are not preempted by federal law because none of the relevant statutes or regulations signal an intent by Congress to fully occupy the field of aviation design and manufacture. *Id.* at 695. The Court found that "the Federal Aviation Act, the General Aviation Revitalization Act of 1994, and the regulations promulgated by the Federal Aviation Administration reflect that Congress did not intend to preempt aircraft products liability claims in a categorical way." *Id.* at 683.

Sikkelee involved the July 2005 crash of a Cessna 172N aircraft equipped with a Lycoming engine. *Id.* at 685. The aircraft crashed shortly after take off from Transylvania County Airport in Brevard, North Carolina. *Id.* David Sikkelee, the pilot and sole

occupant of the aircraft, died as a result of injuries and burns sustained in the crash. *Id.* Decedent's wife, plaintiff Jill Sikkelee, commenced suit in 2007 in the Middle District of Pennsylvania against seventeen defendants alleging strict liability, negligence, breach of warranty, misrepresentation and concert of action claims under state law. *Id.* Sikkelee alleged the aircraft lost power as a result of a defect in the engine's carburetor. *Id.* Sikkelee claimed the design was flawed because the manner in which the throttle body was attached to the float bowl of the engine allowed raw fuel to leak out of the carburetor into the engine, causing the crash. *Id.*

In 2010, the District Court for the Middle District of Pennsylvania granted the defendants' motion for judgment on the pleadings, holding that the state law claims were preempted because they were within the "field of air safety." *Id.* Sikkelee filed an amended complaint that included state law claims, as well as allegations of violations of the Federal Aviation Regulations. *Id.* As the case was prepared for trial, Sikkelee submitted proposed jury instructions to the court for her claims. *Id.* at 686. The Middle District determined that *Abdullah* required the court to apply some federal standards, but found it to be "arduous and impractical" to create these standards from the applicable regulations. *Id.* (quoting *Sikkelee*, 45 F. Supp. 3d at 437 n. 4). The District Court requested additional briefing on the question of the appropriate standard of care and invited Lycoming to file a motion or summary judgment. *Id.* (citing *Sikkelee*, 45 F. Supp. 3d at 438). In ruling on Lycoming's motion, the Court found that the federal standard of care was established by the engine's type certificate. *Id.* The Middle District held that the FAA's issuance of a type certificate for the engine meant that federal standards of care had been satisfied as a matter of law and granted Lycoming's motion for summary judgment, in part. *Id.* The Court denied the motion on Sikkelee's failure to warn claims premised on the allegation that Lycoming violated 14 C.F.R. § 21.3 for failing to report any failure malfunction or defect in a part manufactured by Lycoming. *Id.* The Court then certified the

order for immediate appeal and the Third Circuit granted interlocutory review. *Id.* at 687.

The Third Circuit commenced an analysis of *Abdullah* and immediately sought to distinguish *Abdullah* from the case before it. *Id.* at 687-90. The Court acknowledged that the *Abdullah* Court explicitly stated that the Federal Aviation Act preempted the "field of aviation safety," but nonetheless determined that *Abdullah* did not apply to the case. The Third Circuit relied on its decision in *Elassaad* to support its conclusion that *Abdullah* did not apply. *Id.* at 689. The Court reasoned that *Elassaad* "made clear that the field of aviation safety described in *Abdullah* was limited to in-air operations." *Id.* Following *Elassaad*'s lead, the *Sikkelee* Court excepted its case from the "field of aviation safety" by deciding that *Abdullah* relied on regulations relating to in-air aircraft operation to set the federal standard for that claim, which did not apply to designing or manufacturing aircraft. *Id.* at 689-90. The Court reasoned that the design regulations governing the issuance of type certificates are not as comprehensive as the regulations governing pilot certification, pilot pre-flight duties, pilot flight responsibilities, and flight rules discussed in its prior decision. *Id.* at 689.

Because the Court concluded that *Abdullah* did not apply to the case before it, it necessarily embarked on an analysis of whether Congress intended for the Federal Aviation Act to specifically preempt products liability claims. *Id.* at 692-99. Upon review of the regulations, the Court concluded that the "regulations do not purport to govern the manufacture and design of aircraft per se or to establish a general standard of care but rather establish procedures for manufacturers to obtain certain approvals and certificates from the FAA . . . and in the context of those procedures, to 'prescribe[] airworthiness standards *for the issue of type certificates*.'" *Id.* at 694 (citing 14 C.F.R. § 21; quoting 14 C.F.R. § 33.1(a); citing 14 C.F.R. §§ 23.1(a), 25.1(a), 27.1(a), 29.1(a), 31.1(a), 35.1(a)) (emphasis in *Sikkelee*). The Third Circuit found the regulations do not provide "standards governing manufacture generally." *Id.* Rather, the Court determined that a

type certificate "is merely a baseline requirement" that establishes minimum standards as set forth in the Federal Aviation Act. *Id.* The Court also found that the standards that must be met for the issuance of type certificates do not provide the same "'comprehensive system of rules and regulations' [that] existed in *Abdullah* to promote in-flight safety." *Id.* (quoting *Abdullah*, 181 F.3d at 369).

The Third Circuit also found that the General Aviation Revitalization Act of 1994 ("GARA") supported its decision against preemption in design defect claims. *Id.* at 696-99 (discussing GARA, Pub L. No. 103-298, 108 Stat. 1552 (*codified at* 49 U.S.C. § 40101 (2000))). GARA is a statute of repose that bars suit against an aircraft manufacturer arising from a general aviation accident brought more than eighteen years after the aircraft was delivered or a new part was installed. *Id.* at 696 (citing 49 U.S.C. § 40101 note § 3(3)). GARA was enacted to provide aid to the general aviation industry, which was ailing due to an abundance of litigation, by limiting the long tail of liability against this discrete class of aerospace manufacturers. *Id.* (citing *Blazevska v. Raytheon Aircraft Co.*, 522 F.3d 948, 951 (9th Cir. 2008)). The Court viewed GARA's bar against certain products liability suits to mean that Congress expressly accepted that, when timely, these types of state law claims are permissible. *Id.* The Third Circuit explained that GARA would be meaningless and unnecessary if all aviation products liability claims are preempted. *Id.* at 696-97.

Although the Third Circuit rejected the application of field preemption to aviation design defect claims, *Sikkelee* did leave the door open to the application of conflict preemption in these cases. Relying on preemption cases in the context of pharmaceutical litigation, the Third Circuit explained that an aviation product manufacturer may find it "impossible to simultaneously comply with both a type certificate's specifications" and a state tort duty because manufacturers are not permitted to make major changes to the design of their products without FAA approval. Accordingly, even courts following *Sikkelee*'s narrowing

of *Abdullah* may still be able to salvage preemption of aviation products liability claims.

CONCLUSION

With *Sikkelee*, the Third Circuit became the first federal circuit court to rule on the discrete issue of whether state law products liability claims are preempted by the Federal Aviation Act. In light of its prior holding in *Abdullah* that the entire field of aviation safety is preempted by federal law—and even with the subsequent limitation of that holding in *Elassaad* that only in-air safety is preempted—it was expected that the Third Circuit would be the court to apply the doctrine of preemption to products liability cases. However, in yet another landmark decision, the Third Circuit concluded that its holding in *Abdullah* did not apply to products liability claims. The Court indicated that *Abdullah* applies only to the in-flight operation of aircraft and concluded that Congress did not manifest any intent to preempt claims relating to the design of aircraft and their parts. Nonetheless, the *Sikkelee* decision has left aircraft product manufacturers with a glimmer of hope for a successful preemption argument on conflict preemption grounds. Of course, this discussion on conflict preemption is *dicta* and not an express holding of the Court. To reveal whether the Third Circuit would adopt such a holding, the Court will have to confront this issue in another aviation products liability preemption case.

The force and impact of *Sikkelee* remains to be seen as no federal courts have been presented with the application of the case since the decision was handed down. If history is any indication of the power of the Third Circuit on the subject of preemption in aviation cases, we can expect the decision will be adopted elsewhere. Only time will tell whether preemption in aviation products liability cases is a relic or a viable tool for the defense of aircraft and parts manufacturers.

RULE AMENDMENTS TO MAKE LITIGATION MORE JUST, SPEEDY AND INEXPENSIVE

By: Mark R. Irvine

Five years in the making, amendments to the Federal Rules of Civil Procedure took effect this past year, in December 2015. Rule makers expect the amendments to significantly change civil practice in the federal courts, particularly as to case management, discovery and electronically stored information ("ESI"). A summary of the key amendments and explanation of their impact follow.

OVERVIEW

The rule changes will result in more focused discovery, which should reduce expense. Overbroad discovery will be minimized by a redefined scope of discovery that includes a proportionality requirement, and deletion of a long standing and oft-repeated "reasonably calculated" standard. Discovery responses and objections must be more specific, and responders must now provide a timeframe for document productions. Courts can be expected to be more proactive in expediting litigation and may hold more conferences with litigants. The amendments also incorporate a reasonableness approach to ESI preservation, and set a national standard on sanctions for lost ESI that resolves inconsistencies in the circuit courts.

Source of the New Rules

The amendment process began at the so-called "Duke Conference," held at Duke University School of Law in 2010. The Civil Rules Advisory Committee organized the conference to consider whether federal civil practice was living up to Rule 1's promise of a "just, speedy and inexpensive determination of every action."[1] Concern had been raised over issues of expense and delay in civil litigation, including sentiments that defendants sometimes settle meritless cases to avoid high discovery costs.[2] Conference participants were invited to consider "whether we should totally rethink the current approach" taken by the civil rules.[3] Following more than 2,300 comments and testimony by more than 120 witnesses, consensus was reached that while there was need for improvement, "the time has not come to abandon the system and start over."[4]

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[1] FED. R. CIV. P. 1; Judicial Conf. Advisory Comm. on Civil Rules & Comm. on Rules of Practice & Procedure, Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation, at 2, available at http://www.uscourts.gov/file/reporttothechiefjusticepdf (last visited July 15, 2016) [hereinafter *Report to the Chief Justice*].

[2] *Report to the Chief Justice, supra* note 1, at 3.

[3] See Thomas Y. Allman, The Civil Rules Package as Approved by the Judicial Conference (Sept. 2014), quoting Mary Kay Kane, *Pretrial Procedural Reform And Jack Friedenthal*, 78 Geo. Wash. L. Rev. 30, 38 (2009).

[4] *Report to the Chief Justice*, *supra* note 1, at 5. Background information on the purpose and scope of the Duke Conference, including papers, empirical research and agenda materials, is available at http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil.

And indeed the amendments are not extensive. They might best be described as impactful tweaks—consisting of a few added phrases and some re-arranging of existing wording. As U.S. Supreme Court Chief Justice John Roberts observed: "The amendments may not look like a big deal at first glance, but they are."[5] They are considered a big deal based on three broad policy goals aimed at addressing litigation problems such as "hyperadversary" behavior, delay and high cost: greater cooperation on the part of litigants, greater proportionality in discovery, and more active case management.[6] An additional amendment addresses preservation and loss of ESI.

Rule 1—Parties' Obligation to Cooperate

Rule 1 addresses the scope and purpose of the procedural rules as a set. Rule 1 is not often amended, and some resisted changing it because of its iconic status.[7] Rule 1 provides as mentioned that the purpose of the rules are "to secure the just, speedy, and inexpensive determination of every action and proceeding." The amendment expands Rule 1 "by a mere eight words, but those are words that judges and practitioners must take

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[5] Chief Justice John Roberts, 2015 Year—End Report on the Federal Judiciary at 5 (2015), available at https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf (last visited July 15, 2016) [hereinafter *Chief Justice Year-End Report*].
[6] *Report to the Chief Justice, supra* note 1, at 4; Memorandum from Judge David G. Campbell to Judge Jeffrey S. Sutton, at p. 16 (May 8, 2013) available at http://www.uscourts.gov/file/14696/download (last visited July 25, 2016) [hereinafter *2013 Rules Memorandum*].
[7] Memorandum from Judge David G. Campbell to Judge Jeffrey Sutton, at Rules App. B-13 (June 14, 2014) available at http://www.uscourts.gov/file/18218/download (last visited July 18, 2016) [hereinafter *2014 Rules Memorandum*].

to heart," according to Chief Justice Roberts.[8] The new rule now reads, with the addition emphasized:

> "These rules ... should be construed, ~~and~~ administered, ***and employed by the court and the parties*** to secure the just, speedy, and inexpensive determination of every action and proceeding."

The added words make clear that *parties* share in the responsibility to achieve just, speedy and inexpensive resolutions of cases. Rule makers explained that this amendment discourages costly "over-use, misuse, and abuse of procedural tools."[9] As to concern about the effect of an explicit duty of cooperation on the attorney's advocacy role, rule makers observed that "effective advocacy," as opposed to "hyper-advocacy," is consistent with and depends upon cooperation.[10]

The practical impact of this amendment will likely depend on the management style and creativity of the judge assigned to the case, who may find the rule useful during management conferences and discovery disputes. Rule makers acknowledged that rules only go so far in terms of changing litigation behavior, and that this amendment would need to be combined with educating litigants and courts on reducing unnecessary costs.[11] The Advisory Committee Note specifies that the rule does not create a new or independent source of sanctions.[12] In commenting on this rule Chief Justice Roberts explained that while it does create an affirmative duty for lawyers to work together, and with the court, the obligation is given effect by other amendments, explained next.[13]

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[8] *Chief Justice Year-End Report*, *supra* note 4, at 6.
[9] FED. R. CIV. P. 1, advisory committee's note to 2015 amendment.
[10] *Id*.; *Report to the Chief Justice, supra* note 1, at 7.
[11] *2014 Rules Memorandum*, *supra* note 7, at Rules App. B-13.
[12] FED. R. CIV. P. 1, advisory committee's note to 2015 amendment.
[13] *Chief Justice Year-End Report, supra* note 5, at 6.

Rule 26—Discovery Must be Proportional to Needs of the Case

The rule governing the scope of discovery has been re-written to highlight that discovery must be proportional to the needs of the case.[14] A previous phrase often applied to make the scope of discovery quite broad—"reasonably calculated to lead to discovery of admissible evidence"—has been deleted.[15]

Duke Conference studies suggested that disproportionate discovery occurs in a significant percentage of cases, resulting in some meritorious cases not filed, and some cases with meritorious defenses settled to avoid costs.[16] This is despite the fact that proportionality has been required by the rules for decades. But there was consensus that the existing rules have not been applied. To make proportionality "unavoidable,"[17] rule makers moved proportionality and its factors to the rule governing discovery's scope, now defined as follows:

> **Scope in General.** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense ***and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.***[18]

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[14] FED. R. CIV. P. 26(b)(1).
[15] FED. R. CIV. P. 26, advisory committee's note to 2015 amendment ("The phrase has been used by some, incorrectly, to define the scope of discovery.")
[16] Hon. David G. Campbell, *New Rules, New Opportunities*, 99 Judicature no. 3, Winter 2015, 20-21. [hereinafter *Campbell, New Rules*].
[17] *Id*., at 21.
[18] FED. R. CIV. P. 26(b)(1).

Rule makers also re-ordered the proportionality factors. Under the prior iteration, "amount in controversy" came first. Now it is second, after "importance of the issues at stake in the action," to avoid "any implication that the amount in controversy is the most important concern."[19] The "parties' relative access to relevant information" is new, to address cases of "information asymmetry," where one party, typically the plaintiff, has little discoverable information, while the other party has vast amounts.[20] The Advisory Committee Note instructs that the heavier discovery burden in this situation does not make discovery impermissibly disproportionate.

Elimination of the phrase—"reasonably calculated to lead to discovery of admissible evidence"—is a major change. It would be difficult to find a discovery dispute that has not utilized this mantra-like phrase. Rule makers explained that the deleted phrase originated in 1946 in response to objections during depositions that a question was not proper if it called for hearsay evidence.[21] A "reasonably calculated" phrase was crafted in response to invalidate such objections. Over time the phrase took on the unintended role of defining the scope of discovery, sometimes to such degree that requests "reasonably calculated" to lead to something merely helpful became the standard.[22] The current amendments correct the misapplication by deleting the phrase and clarifying that information within the scope of discovery—i.e. relevant and proportional—need not be admissible in evidence to be discoverable.[23]

The practical impact of this amendment will limit over-broad discovery. Although proportionality has been a central issue in most ESI discovery disputes, all discovery must now be

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[19] *2014 Rule Memorandum, supra* note 7, at Rules App. B-8.
[20] FED. R. CIV. P. 26, advisory committee's note to 2015 amendment.
[21] *2014 Rules Memorandum, supra* note 7, at Rules App. B-10.
[22] *Id*.
[23] FED. R. CIV. P. 26(b)(1).

viewed through a proportionality lens. Chief Justice Roberts explained that "lawyers must size and shape their discovery requests to the requisites of a case ... The key here is careful and realistic assessment of actual need."[24] Comments by the Advisory Committee also suggest that the burden and expense of any proposed discovery "should be determined in a realistic way," including for example reducing such burden or expense by utilizing computer-based searching and other technological advances.[25]

Requests to shift costs may increase. Rule makers considered a requester-pays approach to discovery, but ultimately held to the assumption that the producing party bears the expense.[26] However, the amended rule makes explicit the possibility of including cost-shifting as a term in a protective order, based on existing common law.[27]

Any perceived advantage of "going on the offensive," by either moving to compel production, or moving for protection, will probably be neutralized by comments addressing burden of proof. The Advisory Committee Note indicates that the amendment does not place on the requester "the burden of addressing all proportionality considerations," and nor does it permit the responder to refuse production "simply by making a boilerplate objection."[28] Rather, rule makers stated that "[t]he parties and the court have a collective responsibility to consider the proportionality of all discovery."[29] Practically, a plaintiff seeking broad discovery will probably focus on its relevance, while the defendant will probably focus on the burden, and both parties will address proportionality based on the factors set out in the amended rule.

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[24] *Chief Justice Year-End Report, supra* note 5, at 7.
[25] FED. R. CIV. P. 26, advisory committee's note to 2015 amendment.
[26] *2013 Rules Memorandum, supra* note 6, at p. 12.
[27] FED. R. .CIV. P. 26(c)(1)(B).
[28] FED. R. CIV. P. 26, advisory committee's note to 2015 amendment.
[29] Id.

Rule 34—Clearer Responses to Production Demands

While proportionality may be seen as addressing the perceived problem of over-demanding discovery, additional amendments concerning responses to requests for production are aimed at addressing under-inclusive discovery responses.[30] The amendments make several changes, each of which will have an impact on practice as noted.

Objection specificity—It has long been the rule that objections to requests for production must be asserted, lest they be waived. Such objections must now be stated "with specificity."[31] The change is designed to eliminate the practice of including "broad, boilerplate objections that provide little information about the true reason a party is objecting."[32]

Production at specified time—This change conforms the rule to the common practice of producing copies of documents or ESI, rather than permitting inspection. However, such production must in addition now be completed no later than the time set in the request, "or another reasonable time specified in the response."[33] If a production must be made in stages, the response "should specify the beginning and end dates of the production."[34] This change eliminates the common practice of stating in responses that responsive documents will be produced, without indicating when, "and which often are followed by long delays in production."[35]

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[30] *See* FED. R. CIV. P. 34, advisory committee's note to 2015 amendment.
[31] FED. R. CIV. P. 34(b)(2)(B).
[32] *2014 Rule Memorandum, supra* note 7, at Rules App. B-11.
[33] FED. R. CIV. P. 34(b)(2)(B).
[34] FED. R. CIV. P. 34, advisory committee's note to 2015 amendment.
[35] *2014 Rule Memorandum, supr*a note 7, at Rules App. B-11.

Withholding alert—This change requires the responder to state whether any responsive materials are being withheld on the basis of an asserted objection.[36] The change is meant to "end the confusion that frequently arises" when a responder asserts objections and nevertheless produces information, "leaving the requesting party uncertain whether any relevant and responsive information has been withheld...."[37] The Advisory Committee Note explains that a log of withheld documents is not required, only an "alert" to "facilitate an informed discussion of the objection."[38]

Rule 16—Active Judicial Case Management

Although existing rules already require early management of cases by judges, including issuance of a scheduling order, the Duke Conference generated "[p]leas for universalized and invigorated case management."[39] Lawyer surveys reported that many federal judges fail to actively manage cases.[40] Amendments on this topic thus include a requirement to hold the scheduling conference earlier—90 days after a defendant has been served, which is down from 120 days.[41] Rule makers also deleted language that allows scheduling conferences to be held by telephone.[42] The Advisory Committee Note explains that in-person conferences are more effective, but that conferences in person, by phone or "by more sophisticated electronic means" are permitted.[43]

Contents of a scheduling order were also amended. ESI "preservation" may now be included in a scheduling order, as well as agreements concerning inadvertent disclosure of privileged

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[36] FED. R. CIV. P. 34(b)(2)(C).
[37] FED. R. CIV. P. 34, advisory committee's note to 2015 amendment.
[38] Id.
[39] *Report to the Chief Justice, supra* note 1, at 10.
[40] *Campbell, New Rules, supra* note 16, at 23.
[41] FED. R. CIV. P. 16(b)(2). Alternatively the conference may be held 60 days after the defendant has appeared, down from 90 days.
[42] FED. R. CIV. P. 16, advisory committee's note to 2015 amendment.
[43] Id.

matter.[44] More preservation orders may be seen as a result.[45] The scheduling order may now also include a requirement that a pre-motion conference be held with the court prior to filing any discovery motion.[46] Rule makers considered making this practice mandatory based on its effect in reducing cost and delay.[47] Chief Justice Roberts noted of this technique: "a well-timed scowl from a trial judge can go a long way in moving things along crisply."[48] But rule makers were apparently reluctant to interfere with each judge's independence and creativity, and thus opted to make this practice discretionary.[49]

Rule 37(e)—Reasonable Steps to Preserve ESI Suffice

Rule 37(e) was re-written to address ESI costs and a case-law split on ESI loss sanctions. Comments at the Duke Conference expressed a "sense of bewilderment" about ESI preservation obligations and the consequences for lost ESI.[50] Many complained that the uncertainty led to costly "over preservation."[51] There was strong support by both plaintiff and defense groups for clearer guidance.[52]

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[44] FED. R. CIV. P. 16(b)(3)(B).
[45] FED. R. CIV. P. 37, advisory committee's note to 2015 amendment ("Preservation orders may become more common....").
[46] FED. R. CIV. P. 16(b)(3)(B)(v).
[47] *2013 Rule Memorandum, supra* note 6, at 8; *see also* 99 Judicature no. 3, *The Nuts and Bolts*, Winter 2015, 32 (a District Court Judge noted that he prefers conducting pre-motion conferences "because I like to see who's being reasonable and who's not being reasonable.")
[48] *Report to the Chief Justice, supra* note 1, at 7.
[49] FED. R. CIV. P. 16, advisory committee's note to 2015 amendment; *Report to the Chief Justice, supra* note 1, at 4.
[50] *Report to the Chief Justice, supra* note 1, at 8.
[51] *2014 Rule Memorandum, supra* note 7, at Rules App. B-14 ("Many entities described spending millions of dollars preserving ESI for litigation that may never be filed.")
[52] *Report to the Chief Justice, supra* note 1, at 8.

A comprehensive rule addressing when a preservation duty is triggered, and its scope and duration, was initially contemplated.[53] But rule makers determined that such detailed rule was not feasible, and thus trigger, scope and duration will continue to be governed by case law.[54] The new rule addresses actions courts may take when ESI that should have been preserved is lost.

The rule has a hierarchical structure to ensure that only necessary measures to cure prejudice are taken. Thus, the court must follow the below sequence to determine whether curative measures are appropriate:

1. Should the ESI have been preserved in the anticipation or conduct of litigation?
2. If so, was the ESI lost because a party failed to take reasonable steps to preserve it?
3. If so, can the ESI be restored or replaced through additional discovery?
4. If not, was another party prejudiced by the loss of the ESI?
5. If so, the court "may order measures no greater than necessary to cure the prejudice."[55]

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[53] *2014 Rule Memorandum, supra* note 7, at Rules App. B-14.
[54] *Id*., at Rules App. B-15.
[55] FED. R. CIV. P. 37(e).

What constitutes reasonable steps is not defined. Rule makers acknowledge in the Advisory Committee Note that in today's world of escalating amounts of ESI, data may get lost for reasons beyond a party's control. They explain that "perfection in preserving all relevant electronically stored information is often impossible," and that "the rule recognizes that 'reasonable steps' to preserve suffice; it does not call for perfection."[56] Proportionality should also be considered when evaluating the reasonableness of preservation efforts, and courts should be sensitive as well to party resources given that "aggressive preservation efforts can be extremely costly."[57]

In determining an appropriate, no-greater-than-necessary, curative measure, "[m]uch is entrusted to the court's discretion," but courts are warned not to tread into more severe measures reserved for cases of intentional destruction of ESI, explained next.[58] Rather, examples of curative measures for unintentional destruction may include forbidding the party from putting on certain evidence, or permitting the parties to present evidence and argument to the jury regarding the loss of the ESI.[59]

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[56] FED. R. CIV. P. 37, advisory committee's note to 2015 amendment.
[57] *Id*.
[58] FED. R. CIV. P. 37, advisory committee's note to 2015 amendment.
[59] Id.

The "very severe measures" reserved for intentional violations likewise apply only if steps 1-3 of the above sequence are satisfied, and then only on a finding that the party acted with the intent to deprive another party of the information's use in the litigation.[60] No specific finding of prejudice is required. This aspect of the new rule resolves the split in cases on when courts may give an adverse inference instruction for ESI loss. Adverse inference instructions presume that the lost ESI was unfavorable to the party responsible for its loss. Federal circuits have split on whether such instructions must be based on bad faith intent, or whether mere negligence suffices.[61] The new rule establishes a national standard that adverse-inference instructions may only be given where the party who lost ESI acted with intent to deprive another party of its use in the litigation.[62] Upon finding that a party so intentionally acted, courts may presume that the lost information was unfavorable to that party, and instruct the jury accordingly, or strike a pleading, or enter a default judgment.[63]

As in the unintentional context, courts are likewise instructed to use caution in meting out measures for intentional conduct: "the remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures

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[60] FED. R. CIV. P. 37(e)(2).

[61] *See, e.g. Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997) ("The adverse inference must be predicated on the bad faith of the party destroying the records. Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case."); *Residential Funding Corp. v. DeGeorge Finan. Corp.*, 306 F.3d 99, 113 (2d Cir. 2002) ("discovery sanctions, including an adverse inference instruction, may be imposed upon a party that has breached a discovery obligation not only through bad faith or gross negligence, but also through ordinary negligence.")

[62] FED. R. CIV. P. 37, Advisory Committee Note to 2015 Amendment.

[63] FED. R. CIV. P. 37(e)(2), and Advisory Committee Note to 2015 Amendment (appropriate (e)(2) measures may include an "order striking pleadings related to, or precluding a party form offering any evidence in support of, the central or only claim or defense in the case.")

such as those specified in [unintentional] subdivision (e)(1) would be sufficient to redress the loss."[64]

CONCLUSION

The new rules are modest in scope, and not all that new. Cooperation has long been expected, and proportionality has long been required. Courts have been encouraged to actively manage their cases for many years. The express goal of the amendments—"to secure the just, speedy and inexpensive determination of every action and proceeding"—has been part of the rules from the start, in 1938. And yet, this latest effort to improve federal civil practice by changing the legal culture shows promise of taking hold. At this writing, less than eight months since the rules took effect, 445 cases had utilized the newly highlighted proportional wording relating to discovery. Chief Justice Roberts' prediction about the amendments being a big deal, even though they do not appear to be, may prove true.

[64] Id.

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