AIRCRAFT BUILDERS COUNCIL, INC. LAW REPORT

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The ABC Underwriters, as part of their comprehensive insurance plan, have requested Fitzpatrick, Hunt, & Pagano, 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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Immunity from Liability for Aircraft Lessors

By Suzanne McNulty and Rachel Stern

Introduction

If an owner of an aircraft leases the aircraft to another, who then causes property damage or personal injury while using it, it would not seem fair to hold the owner/lessor liable. However, prior to 1994 an aircraft owner/lessor could be held responsible under this scenario. And, plaintiffs, prior to this date would routinely join the owner/lessor as a defendant, partially because the lessor/owner may have deeper pockets than the lessee who actually caused the loss.

Federal statute, 49 U.S.C. § 44112(b) ("the Statute"), enacted to address this very issue, provides immunity to aircraft lessors who, at the time of damage or injury, do not have actual possession or operational control of the leased aircraft. In 2018, this lessor immunity statute was amended to clarify the statute's application, to make the case of immunity for aircraft lessors even stronger. This Article will review Section 44112(b)'s requirements, exceptions and amendments to provide guidance to owners and lessors so that if and when an accident occurs, they can invoke the immunity this Statute provides.

49 U.S.C. § 44112(b) Prior to Amendment

On July 5, 1994, Congress enacted 49 U.S.C. § 44112(b) which provided, in relevant part:

"Liability. A lessor, owner, or secured party is liable for personal injury, death, or property loss or damage on land or water only when a civil aircraft, aircraft engine, or propeller is in the actual possession or control of the lessor, owner, or secured party, and the personal injury, death, or property loss or damage occurs because of—

(1) The aircraft, engine, or propeller; or
(2) The flight of, or an object falling from, the aircraft, engine, or propeller." (emphasis added)

The statutory wording "on land or water" initially caused some confusion. Did the Statute apply only if the injury actually occurred "on land or water," external to, but not on board, the aircraft? Due to this ambiguity courts not surprisingly were split on whether this federal statute pre-empted state law when the damage or injured party was *on board* the aircraft. Some state courts held that § 44112(b) was limited

in application to when the damages were on land or water to persons or property outside the aircraft. (This was initially confusingly described as "underneath the aircraft during its flight, ascent or descent." *Vreeland v. Ferrer,* 71 So. 3d 70, 80 (Fla. 2011)) Other state courts extended immunity to those on board the aircraft as well as "underneath" the aircraft. See *Id*.; *Sexton v. Ryder Truck Rental, Inc.,* 320 N.W.2d 843 (Mich. 1982); *Storie v. Southfield Leasing,* 282 N.W.2d 417 (Mich. 1979) (all holding that the federal statute did not have preemptive effect when the injured parties were on board the aircraft, rather than on the ground below the aircraft).

49 U.S.C. § 44112(b) After Amendment

On October 5, 2018, Congress enacted the Federal Aviation Administration Reauthorization Act to clear up this confusion regarding where the injured parties must be located. The amendment eliminated the phrase "on land or water" from the Statute. Section 514 of this Act (titled "Aircraft Leasing") amended 49 U.S.C. § 44112(b) to have preemptive effect regardless of where the injured parties are located, whether inside or outside the aircraft. The federal statute now clearly preempts conflicting state laws which would otherwise support the imposition of vicarious liability for the aircraft owner/lessor, wherever the damage occurs.[1]

The statute as amended now reads:

"Liability. A lessor, owner, or secured party is liable for personal injury, death, or property loss or damage only when a civil aircraft, aircraft engine, or propeller is in the actual possession or operational control of the lessor, owner, or secured party, and the personal injury, death, or property loss or damage occurs because of—
(1) the aircraft, engine, or propeller; or

[1] Preemption is a legal doctrine that is derived from the Supremacy Clause of the United States Constitution in which federal statutes and regulations, under certain circumstances, preempt state statutes and common law, requiring state law to give way. A federal statute might include a provision explicitly preempting state law, or preemption might be implied. Implied preemption can occur when state law conflicts with a federal law or where Congress has displayed an intent to occupy the entire field of lawmaking on a given issue such that any state law touching upon the same issue will be preempted. (*Hines v. Davidowitz,* 312 U.S. 52 (1941). Further, state law can be preempted where "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Hines* at 67). If a lessor can show it meets the requirements of the lessor immunity statute, a state's law which would otherwise impose liability on the lessor will be preempted to the extent inconsistent with, or frustrating the objectives of, the Statute.

(2) the flight of, or an object falling from, the aircraft, engine, or propeller."[2] (emphasis added)

The other significant change that the amendment made was the insertion of "operational" before the word "control." This further clarified that the owner/lessor will be immune from liability unless it was the party actually "operating" the plane at the time of injury. This eliminated any uncertainty that simply having theoretical control over the plane (i.e., financing it, providing fuel, scheduling it for maintenance, etc.) would defeat immunity. See *In re Hudson River Mid-Air Collision,* 2012 U.S. Dist. LEXIS 25149 (D. N.J 2012) (prior to the amendment, denying immunity for the lessor due to the close relationship between the lessor and lessee, even though the lessor was not operating the aircraft at the time of the crash).

The above amendments further strengthened the protections for aircraft owners/lessors as they clarify that immunity will be extended absent the exercise control over the operation (flight) and whether the damage or injury occurs *on board* the aircraft or elsewhere. Closing the loopholes, which the pre-amendment Statute provided, also further strengthens the owners/lessors position that the Statute shall have preemptive effect since these amendments leave little to no wiggle room for lessees to argue that the application of state laws imposing liability would be consistent with the Statute's grant of immunity.

The Statute's Actual Possession and Operational Control Requirements

While 49 U.S.C. § 44112(b) is somewhat broad, it is not absolute. The statute will not provide immunity for lessors who had *possession* or *operational control* of the aircraft at the time of the loss, damage, or injury.

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[2] For reference, the full text of 49 USC § 44112 is as follows:
§ 44112. Limitation of liability
(a) Definitions. In this section—
(1) "lessor" means a person leasing for at least 30 days a civil aircraft, aircraft engine, or propeller.
(2) "owner" means a person that owns a civil aircraft, aircraft engine, or propeller.
(3) "secured party" means a person having a security interest in, or security title to, a civil aircraft, aircraft engine, or propeller under a conditional sales contract, equipment trust contract, chattel or corporate mortgage, or similar instrument.
(b) Liability. A lessor, owner, or secured party is liable for personal injury, death, or property loss or damage only when a civil aircraft, aircraft engine, or propeller is in the actual possession or operational control of the lessor, owner, or secured party, and the personal injury, death, or property loss or damage occurs because of—
(1) the aircraft, engine, or propeller; or
(2) the flight of, or an object falling from, the aircraft, engine, or propeller.

To have "actual possession" of an object means having physical control of that object.[3] In other words, the object is on your premises, within your control, and readily accessible to you. In the aircraft context, actual possession is straightforward, whereas "operational control" is potentially less so.

According to 14 Code of Federal Regulation § 1.1, "Operational control, with respect to a flight, means the exercise of authority over initiation, conducting, or terminating a flight." Additionally, in invoking its authority pursuant to the Federal Aviation Act, the Federal Aviation Administration (FAA) issues Advisory Circulars that establish requirements, guidelines, and interpretations of its own laws and regulations. *Escobar v. Nev. Helicopter Leasing, LLC,* 2020 U.S. Dist. LEXIS 389890 (D. Hawaii 2020) at 6.

The FAA, in Advisory Circular 91-37B, regarding leasing and operational control, put forth several factors to assist in determining which party has operational control of the aircraft. These include whether the party in question has discretion or authority over:

a) The aircrew, by ensuring that "crewmembers are trained and qualified in accordance with the applicable regulations and remain in compliance with all applicable flight, duty, and rest requirements including designating a pilot in command (PIC) for each flight" (Advisory Circular, Para. 4.6.1);
b) The aircraft, by ensuring that the aircraft "is airworthy and is in compliance with the applicable regulations" (Advisory Circular, Para. 4.6.2);
c) Flight management, by specifying "the conditions under which a flight may be operated, such as determining weather minimums, proper aircraft loading, center of gravity (CG limitations), icing conditions, and fuel requirements", as well as handling "the monetary and logistical issues associated with the aircrew and aircraft" (Advisory Circular, Para. 4.6.3).

Other questions that can clarify who maintains operational control over the aircraft are:

a) Who makes the decision to assign crewmembers and aircraft; accept flight requests; and initiate, conduct, and terminate flights?
b) For whom do the pilots work as direct employees or agents?
c) Who is maintaining the aircraft and where is it maintained?

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[3] Brian A. Garner, editor in chief. Black's Law Dictionary. St. Paul, MN :Thomson Reuters, 2014

d) Prior to departure, who ensures the flight, aircraft, and crew comply with regulations?
e) Who decides when/where maintenance is accomplished, and who directly pays for maintenance? (Advisory Circular 91-37B, Para. 6.3)

The answers to the above questions will factor into determining whether the owner/lessor retained operational control over the aircraft and, therefore, whether immunity will be afforded under the Statute.

Further, although the Statute itself does not specify the relevant time period for the actual possession and operational analysis, the case law has interpreted the Statute to require that the actual possession/operational control be *at the time of the injury-causing crash.* The precedent is clear that the relevant operational control analysis is whether a party had it at the time of the accident. *See Escobar v. Nev. Helicopter Leasing*, LLC, 2020 U.S. Dist. LEXIS 38980 (D. Hawaii 2020) at 4 ("The Court will instruct the jury on the definition of "operational control" and the factors that the jury shall consider in determining whether Defendant Nevada Helicopter Leasing LLC had operational control of the helicopter *at the time of the accident*) (emphasis added). *See also, In re Inlow Accident Litig*., 2001 U.S. Dist. LEXIS 2747 at 57 ("Through its requirement that a lessor must be in 'actual possession or control' of the aircraft *at the time of the accident*, § 44112 prevents the imposition of liability on lessors that are not engaged in some concrete fashion in the operation of the aircraft") (emphasis added). This is an added protection for some owners/lessors who may have retained some control over things such as scheduling maintenance or providing fuel, but had no hand in the flight which caused the personal injury or property damage.

The 30-Day Requirement

Lastly, it must be noted that to confer immunity, the Statute requires that the owner have leased the aircraft for at least thirty days prior to the date of loss. (§ 44112 (a)(1) states, "lessor" means a person leasing for at least 30 days a civil aircraft, aircraft engine, or propeller.") Therefore, it is important to check the precise circumstances of the lessor-lessee relationship in these situations. Ideally, from the perspective of an owner/lessor, there should be writings evidencing a lease agreement, dating more than a month prior to the date of the property damage or personal injury, and providing that the aircraft will be in the actual physical possession of the lessee.

Conclusion

In sum, an entity who is the owner and the lessor of an aircraft will not be subject to liability if the lessee causes damage with the aircraft, provided it meets the necessary requirements, which are threefold. First, the owner/lessor must not have had actual physical possession of the aircraft; rather, the plane must have been in the possession of the lessee. Second, the owner/lessor must not have had operational control over the aircraft at the time of the crash or accident. Lastly, ensure that the lease in question was in place for a period of at least thirty days prior to the date of the crash or accident. Actual physical possession and the 30-day lease requirement being relatively straightforward, the majority of the argument would be centered on the operational control analysis. The factors put forth in the FAA Advisory Circular and summarized in this Article should help answer that question.

If the above criteria are met, 49 U.S.C. § 44112(b) should shield the owner/lessor of an aircraft, engine or propellor from liability in both state and federal courts.

The Component Parts Doctrine: A Shield Against Liability for Manufacturers

*By Suzanne McNulty and Ethan Galaif**

Introduction

The component parts doctrine, which operates to shield manufacturers from liability when their products are integrated into a final product that causes harm, can be a powerful tool. Component parts have been defined as "products, whether sold or distributed separately or assembled with other component parts."[1] Components can be raw materials, bulk products, and other products sold for integration into other products. The component parts doctrine arises out of the Third Restatement of Torts[2] (hereinafter the "Restatement"), and applies when a supplier provides a component or raw material that is incorporated through a manufacturing process into a final product which ultimately injures an end user.[3] Under these circumstances, a component manufacturer is only subject to liability if the component is defective in itself, or the seller of the component substantially participates in the integration of the component into the design of the product. In either case, the defect must in addition cause harm.[4]

When an individual is injured by a product, most jurisdictions allow the plaintiff to sue all those in the marketing chain, including manufacturers, retailers, suppliers, distributors, etc. [5] This is referred to as the "stream of commerce" theory, which provides that any entity that enables a product to "enter the stream of commerce" or "passes it on" can be held liable for harm caused by defects in the product.[6] The component parts doctrine, where applicable, removes a component manufacturer from this distributive liability chain. For example, if a plane crashes as a result of a defect in its design, the manufacturer of one of the aircraft's component parts will only be liable if the part was defective itself and caused the

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[1] *Johnson v. United States Steel Corp.,* 240 Cal. App. 4th 22, 33 (2015).

[2] "In American jurisprudence, the Restatements of the Law are a set of treatises on legal subjects that seek to inform judges and lawyers about general principles of common law. They are published by the American Law Institute, an organization of judges, legal academics, and practitioners. Although Restatements of the Law are not binding authority in and of themselves, they are highly persuasive because they are formulated over several years with extensive input from law professors, practicing attorneys, and judges." https://en.wikipedia.org/wiki/Restatements_of_the_Law

[3] *Ramos v. Brenntag Specialties,* 63 Cal. 4th 500, 509 (2016) (citing Restatement 3d Torts, Products Liability, § 5, coms. a, b, and c, pp. 130–134).

[4] Restatement 3d of Torts: Products Liability, § 5

[5] *Bay Summit Community Assn. v. Shell Oil Co.*, 51 Cal.App.4th 762, 774 (1996).

[6] *Alvarez v. Felker Manufacturing*, 230 Cal.App.2d 987 (1964).

crash, or if the manufacturer of the component part substantially participated in the design of the aircraft system in which its part was integrated. Absent these two scenarios, the component parts doctrine would shield the component part manufacturer from liability.

Both the Restatement and related case law have developed rationales in support of the doctrine. Most rationales are grounded in efficiency and hold that without the protection of the component doctrine, unjust inefficiency will arise. The Restatement argues that imposing liability on a component parts manufacturer would require the component manufacturer to scrutinize another's product, which the component seller has no role in developing.[7] Courts have reasoned that suppliers of component products that have a variety of industrial uses should not be forced to retain experts in a vast number of areas to determine the possible risks associated with each potential use because the finished product manufacturers are in a better position to ensure the safety of the component for their applications. [8]

A. The Component Itself is Defective

A component manufacturer or supplier is not afforded the protection of the component parts doctrine if the component itself is defective and the defect causes the harm. A product can be defective in three ways: failure to warn, design defect, and manufacturing defect. Most jurisdictions recognize that the defect must be present when the component leaves the manufacturer's hands to lose the protection of the doctrine.

Failure to Warn: A product is defective for failure to warn when the foreseeable risks of harm could have been reduced or avoided by the provision of reasonable instructions or warnings, and the omission of the instructions or warnings renders the product not reasonably safe.[9] Some courts require the item to also be defective, through either design or manufacturing, and some jurisdictions require the product to also be unreasonably dangerous. [10]

Manufacturing Defect: A product is defective in manufacture or construction if "when it left the control of its manufacturer, it deviated in a material way from the design specifications, formula, or performance standards of the manufacturer."[11]

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[7] *supra* note 2 com. a, p. 134.
[8] *Taylor v. Elliott Turbomachinery Co. Inc.,* 171 Cal. App. 4th 564, 584 (2009).
[9] *Webb v. Special Electric Co., Inc.,* 63 Cal. 4th 167, 181 (2016).
[10] *Barnes v. Kerr Corp.,* 418 F.3d 583, 590 (2005) (applying Tennessee law).
[11] *Ace Am. Ins. Co. v. Gerling & Assocs.,* 2022 U.S. Dist. LEXIS 17452.

Design Defect: In determining a design defect, two primary tests are used by courts: the ordinary consumer expectation test and the risk benefit test. Under the risk benefit test, a product is defective if the risks outweigh the benefits of its design. Factors that are considered are the gravity of the danger posed by the design, the likelihood such danger would occur, the feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the consumer resulting from an alternative design.[12]

Under the consumer expectation test, plaintiffs must establish that an ordinary consumer would not have recognized the risks of using the product and that the product's performance did not meet the minimum safety expectations of the ordinary consumer. A popular iteration of the ordinary consumer test is that a product is unreasonably dangerous if its condition is "beyond that which would be contemplated by the ordinary and reasonable buyer."[13] The consumer expectation test is limited to cases in "which the everyday experience of the product's users permits a conclusion that the product's design violated minimum safety assumptions and is thus defective regardless of expert opinion about the merits of the design."[14] There is a strong basis for aviation manufacturers to challenge the consumer expectation test because of the complexity of aviation products, and the components themselves, which are arguably beyond the ordinary consumer's understanding.

Even if the injured party successfully establishes that a component part or raw material was defective under these tests, the injured party must prove that the defective component part or raw material supplied by the defendant was a substantial factor in bringing about his or her injury.[15] A factor that is only an "infinitesimal" or "theoretical" in bringing about injury is not a substantial factor.[16] The substantial factor standard is "relatively broad" and only requires that the "contribution of the individual cause be more than negligible or theoretical.[17]

B. Substantial Participation

[12] *Saller v. Crown Cork & Seal Co., Inc*. 187 Cal.App.4th 1220, 1233 (2010).
[13] Ark. Code Ann. § 16-116-202(7)(A); *Berkeley Pump Co. v. Reed-Joseph Land Co.*, 653 S.W.2d 128, 133 (1983); *Fullington v. Pfizer, Inc.,* 720 F.3d 739, 746 (8th Cir. 2013).
[14] *Soule v. General Motors Corp.,* 8 Cal.4th 548, 567 (1994).
[15] *Rutherford v. Owens-Illinois, Inc.,* 16 Cal.4th 953, 958 (1997).
[16] *Id.* at 969.
[17] *Id.* at 978.

A component manufacturer or raw material supplier cannot avail itself of the component parts defense if it substantially participates in the design of the final product or in the integration of the component into the final product.

Substantial participation hinges on the amount of control the component manufacturer possesses over the integration and design process. [18] To qualify as substantial participation, the component manufacturer must have "some control" over the decision-making process regarding the final product or system, not the component itself. If there is evidence that the component part manufacturer "played a direct role in designing the final product and installing and integrating its component into the final product, then the manufacturer may be held strictly liable for the defect in the final product."[19] However, knowledge of the ultimate design by itself usually does not amount to substantial participation and a component manufacturer does not have a duty to analyze or anticipate the design of the product or system into which the component will be installed.[20] Courts also recognize that communication between the buyer and component manufacturer is a necessity for functional business and does not automatically constitute substantial participation.[21] A component parts supplier is not expected to operate in a "factual vacuum when attempting to match its products to the needs of its customers."[22]

To illustrate, in *Zager v. Johnson Controls*, the plaintiff was injured in a car crash when a cooler went through the trunk and hit the back seat the plaintiff was sitting in.[23] Here, the component (seat) manufacturer worked with Chrysler to design the rear seat assembly for installation into the car. Chrysler provided input and guidance on what the component manufacturer was required to do to meet Chrysler requirements.[24] The component manufacturer also had periodic meetings with Chrysler.[25] However, the court held that this type of communication did not amount to substantial participation by the seat manufacturer because the communications were related to the design of the seat, and not the overall design of the car or Chrysler's system of cargo retention. [26]

Typically, designing a component to a buyer's specifications does not amount to substantial participation. For example, in *Taylor v. Elliot Turbomachinery*, the

[18] *Zager v. Johnson Controls, Inc*., 18 N.E.3d 533, 547 (Oh.App.2014).
[19] *Id.*
[20] *Id.*
[21] *Id.* at 548.
[22] *Id.* (internal quotations omitted)
[23] *Id.* at 536-7.
[24] *Id.* at 548.
[25] *Id.*
[26] *Id.*

injured plaintiff claimed the component parts doctrine did not apply since the component manufacturer was following exact specifications provided by the Navy when manufacturing equipment for the propulsion system on the *USS Hornet*.[27] The court disagreed and held that following specifications does not amount to substantial participation that would prevent the application of the doctrine.[28] However, in some jurisdictions, the component manufacturer will be found to have substantially participated if the specifications provided are obviously unreasonably dangerous.[29]

To avoid losing the protection of the component parts doctrine based on "substantial participation," component manufacturers and raw material suppliers should keep records of all communications between themselves and the buyer and consider the ramifications when providing guidance or insight into the final product at issue. Usually, following buyer specifications does not amount to substantial participation; however, if the specifications are deemed unreasonably dangerous, component manufacturers may be held liable.

C. Generic v. Specific Components

Some jurisdictions only apply the doctrine to "generic components" and reject the doctrine's use for "specific components." For example, California is a generic component jurisdiction, meaning the doctrine only applies to '"generic" or "off-the-shelf" components, as opposed to those which are "really a separate product with a specific purpose and use."[30] In *Romine v. Johnson Controls*, the plaintiff was severely injured when a collision caused the back of her seat to collapse. The plaintiff brought a strict product liability action against the seat manufacturer.[31] The court found that since the seat was designed and manufactured to be used specifically in the type of car the plaintiff was driving, it did not qualify as a "generic part," making the component part doctrine inapplicable.[32] Conversely, Massachusetts applies the doctrine to specialized components that have "no functional capabilities unless integrated into other products."[33]

It is important to know if you are in a generic or a specific component jurisdiction. Although following the buyers' specifications does not amount to substantial participation, component manufacturers should be careful when

[27] *supra* note 6 at 571.
[28] *Id.* at 575.
[29] *Davis v. Komatsu America Industries Corp.,* 42 S.W.3d 34,38 (Ten. 2001).
[30] *Romine v. Johnson Controls*, 224 Cal.App.4th 990,1006 (2014) (citations omitted).
[31] *Id.* at 1004.
[32] *Id.* at 1003.
[33] *Nemirovsky v. Daikin North America, LLC,* 488 Mass. 712, 719 (2021).

following buyers' unique individualized specifications. Doing so may render the component parts doctrine inapplicable. However, this is not consistent across jurisdictions and depends on the which state's laws apply.

D. The Bulk Supplier & Raw Materials

The bulk supplier doctrine is a particular application of the component parts doctrine which is specifically applied to raw materials that are supplied in bulk and are intended to undergo further processing. It is a "corollary of the component doctrine" which addresses the special considerations that apply when the component is a raw material.[34] The Restatement provides that basic raw materials such as sand, gravel, or kerosene cannot be defectively designed, and the inappropriate use of such materials are not due to the supplier of the raw materials but to the fabricator.[35]

In *Artiglio v. General Electric Co.,* plaintiffs alleged that the breast implant manufacturer, and the supplier of component silicone compounds (raw materials), were negligent in failing to warn customers about the health risks of silicone in medical devices.[36] The court held that bulk raw material suppliers owed no duty of care to consumers of the finished product when four conditions are met: the material supplied is not inherently dangerous; the material is sold in bulk to a sophisticated buyer; the material is substantially changed during the manufacturing of a finished product; and the supplier has a limited role in creating the finished product.[37] The court found that the supplier of silicone satisfied each element of the bulk supplier defense: the silicone was not inherently dangerous; the breast implant manufacturers were highly sophisticated buyers; the silicone materials were subject to substantial processing by the implant manufacturers; and the silicone suppliers did not have any control over the design, testing or labeling of the implants.[38] The supplier of the silicone compounds successfully availed itself of the protection of the component parts doctrine. The court reasoned that it would "not be appropriate" to impose liability on the silicone supplier and the cost of imposing liability would far exceed the utility.[39]

The elements of the bulk supplier defense reflect the underlying principles of the component parts doctrine. Both doctrines require the component itself to not be

[34] *supra* note 7 at 180.
[35] *supra* note 2 com. c, p. 134.
[36] 61 Cal. App. 4th 830, 833 (1998).
[37] *Id.* at 839.
[38] *Id.* at 840.
[39] *Id*. at 841.

defective or inherently dangerous. Further, like the component parts doctrine, the bulk supplier defense recognizes the loss of protection through substantial participation by requiring the raw material supplier to have a limited role in creating the finished product. The only element which is unique to the bulk supplier doctrine is that in order for a manufacturer to take advantage of its application, the materials must be sold to a sophisticated buyer. A "sophisticated user" or "sophisticated buyer" is one who "by virtue of training, experience, or a profession, . . . is or is generally expected to be knowledgeable about a product's properties, including a potential hazard or adverse effect."[40] However, this requirement should not be difficult to satisfy. Buyers who are buying bulk raw materials for further processing are most likely sophisticated buyers.

E. California's Limitation Established by *Ramos v. Brenntag Specialties*

In 2016, the California Supreme Court rejected the application of the component parts defense in the *Ramos v. Brenntag Specialties* case, holding that the component parts doctrine is inapplicable if the component has not been integrated into a final product, which injures an end user, and the person injured was using the product as the supplier intended.[41]

In *Ramos,* a metal foundry worker developed interstitial pulmonary fibrosis and brought action against a variety of companies that supplied products for use in a manufacturing process.[42] One group of defendants supplied metal products that were melted in furnaces to form metal castings.[43] Another group of defendants supplied plaster, sand, limestone, and marble that were used to create molds for the casting process.[44] Plaintiff asserted that the suppliers' products, when used in their intended fashion, produced harmful fumes and dust that were a substantial cause of his pulmonary illness.[45] The defendants argued that the component parts doctrine shielded them from strict liability.[46] The court disagreed, holding that the component parts doctrine is not applicable when the plaintiff's injury is not caused by a finished product into which the materials supplied by defendants are integrated and the plaintiff is using the product as the supplier intended.[47] In other words, the

[40] *Heaton v. Benton Constr. Co*., 286 Mich. App. 528, 534 (2009).
[41] 63 Cal. 4th 500, 509 (2016).
[42] *Id.*
[43] *Id.* at 505.
[44] *Id.*
[45] *Id.* at 504
[46] *Id.* at 506.
[47] *Id.* at 504.

defense is not available when an employee claims injury from the product or raw material being used during the course of manufacturing what will become the end product.[48] The *Ramos* court holds that the applicability of the defense requires that the component be integrated into a final product which causes injury to an end user, not an employee involved in the manufacturing process of the end product.

Thus, under California law, suppliers of raw materials, such as metal products, plaster, sand, limestone, and marble that produce harmful fumes and dust when used in manufacturing will not have the protection of the component parts doctrine when the manufacturer's employee develops injuries as a result.[49] While other jurisdictions may hold the same, only a Florida case has cited to the *Ramos* case in adopting the same reasoning.[50]

While the component parts doctrine will not apply if the component part or raw material has not yet been integrated into an end product that harms an end user (such as the employee who is working with the supplied raw material as part of the process of manufacturing a final consumer product), other defenses, including, but not limited to, the sophisticated user/intermediary defense, third-party superseding cause, and product misuse, may be available. Also, to the extent that a defendant can show it has complied with governing state or federal regulations that mandate certain warnings, this will help defeat the plaintiff/employee failure to warn claims.

F. Connection to Aviation

The application of the component parts doctrine in purely aviation cases is limited, but not insignificant. Before the Restatement and further refinement of the doctrine by the courts, *McCullough v. Beech Aircraft Corp,* without directly referencing the doctrine by name, stated the principles underlying the doctrine. In another aviation case, *Stecyk v. Bell Helicopter Textron,* the court denied the application of the component parts doctrine due to substantial participation by the component supplier in the final design.

In *McCullough v. Beech Aircraft Corp.,* a pilot was killed while piloting a single engine Beech Musketeer.[51] The pilot's widow and children brought suit against Beech and the engine manufacturer, Continental Motors Corporation.[52] The

[48] *Id.* at 508 (quoting Restatement 3d Torts, Products Liability, § 5, com. a, p. 131.)
[49] *Id.* at 507.
[50] *In re 3M Combat Arms Earplug Prods. Liab. Litig*, 545 F. Supp. 3d 1239, 1247 (2021).
[51] 587 F.2d 754, 756 (5th. Cir. 1979).
[52] *Id.*

court held that no liability was extended to the component manufacturer, Continental, because the plaintiffs failed to show that the engine components were defective in design or in manufacturing when they left the component manufacturer's control, and that a defect in the component was a proximate cause of the plaintiffs' injuries.[53] This holding – that a component manufacturer is not liable if the component is not itself defective and caused the harm – is consistent with the Restatement's iteration of the component parts doctrine and, as the court states, consistent with "reasonable and fair-minded" principles.[54]

In *Stecyk v. Bell Helicopter Textron, a* V-22 Osprey crashed during a demonstration flight causing the deaths of multiple individuals. The plaintiffs alleged the crash was caused by the incorrect installation of Osprey's fuel tank seals.[55] The seals were allegedly installed backwards, allowing fuel to leak into the engine, resulting in an explosion.[56] The plaintiffs claimed the seals were defective in design because the seals were unidirectional instead of bi-directional, making it possible for the seals to be incorrectly installed.[57] The manufacturer of the seals, Macrotech, argued the component parts doctrine shielded it from liability because it only manufactured a component part, the seals, based on specifications provided by Bell Helicopter.[58] However, the court found that Macrotech initiated the concept of the uni-directional seals, rather than bi-directional seals and prepared the design drawings for the seals.[59] The court determined that Macrotech substantially participated in the design of the ultimate seal and the ultimate configuration of the engine, and therefore could not avail itself of the component parts defense. [60]

Conclusion

Under the component parts doctrine, component manufacturers may avoid liability if they do not participate in the design of the final product and additionally ensure that their components are not themselves defective. However, the more specialized a product is (for example, if it can only be used in one type of product), the less likely the component manufacturer will be able to avail itself of this defense. Additionally, in view of the *Ramos* case, raw material suppliers and component manufacturers should know that, although other defenses may apply, the component parts defense may not be available where a worker, engaged in

[53] *Id.* at 759
[54] *Id.*
[55] *Stecyk v. Bell Helicopter Textron*, U.S. Dist. LEXIS 4022 (E.D. Pa.1996).
[56] *Id*.
[57] *Id.* at 18.
[58] *Id.* at 44.
[59] *Id.*
[60] *Id.* at 37.

manufacturing a final product for an end consumer's use, claims injury while using the suppliers' component part/raw materials.

As your ABC counsel, we can assist you in navigating the pathways in determining when the manufacture of a component part may create liabilities and when the circumstances should dictate otherwise. We can also assist in implementing certain safeguards in the manufacturing process itself which, in the event of accident, could protect you against a finding of fault.

There's No Place Like Home: A Brief Personal Jurisdiction Analysis of Products Liability Claims

By James C. Stroud and Rachael Shulman

Introduction

It is not uncommon for a plaintiff to engage in "forum shopping" to initiate litigation in a state court which has historically treated claims against corporations favorably. This favoritism might be a product of the procedural laws of the jurisdiction, the prejudices of the judiciary or the general makeup of the prospective jury. In any case, the general impression of defense counsel is that federal courts are the friendlier litigation forum and therefore, when possible, will attempt to remove the case to federal court. A typical basis for initiating a case in or removing a case to federal court is to establish diversity of citizenship between the parties—otherwise known as diversity jurisdiction. Diversity jurisdiction, a type of subject matter jurisdiction, is granted by the US Constitution, Article III Section 2, and codified by statute in 28 USCA § 1332 as well as the 14th Amendment to the Constitution. Section 1332 reads as follows:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of $75,000, exclusive of interest and costs, and is between-

1. Citizens of different States;

The diversity must be "complete" to beget federal jurisdiction. In other words, two or more parties cannot be from the same state. For example, a citizen of New Jersey sues a corporation which is determined to be a citizen of Pennsylvania. If an additional party on either side is a citizen of either New Jersey or Pennsylvania, diversity cannot be established. In *Lincoln Property Company v. Roche*, 546 U.S. 81 (2005) the United States Supreme Court explained this rule:

…we have read the statutory formulation 'between…citizens of different States' to require complete diversity between all plaintiffs and all defendants.[1]

The complete diversity rule is intended to promote the purpose of diversity jurisdiction: to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home state litigants. For example, if a case is kept out of federal court for lack of complete diversity because there are parties from the same state on both sides of a dispute, a state court acting in favor of one citizen of that state would necessarily have to disfavor the other citizen. Diversity jurisdiction is perceived to alleviate any bias concerns in litigating in state court.[2]

If a plaintiff files a case in federal court based on diversity jurisdiction, a defendant can challenge the action through a motion to dismiss for lack of personal jurisdiction via Fed. R. Civ. P 12(b)(2). If a plaintiff initiates a case in state court, a defendant may attempt to remove the case to federal court, where it feels a challenge to personal jurisdiction will be looked upon more favorably, via diversity jurisdiction. In either case, a plaintiff must prove that the federal court, sitting in diversity jurisdiction, has personal jurisdiction over the defendant(s) to sustain the matter in that particular court. For corporate defendants defending against products liability claims, the personal jurisdiction analysis can be quite fact specific and subject to incredible nuance.

General Jurisdiction

As noted above, diversity jurisdiction requires a determination of party citizenship. But citizenship is not only relevant to diversity jurisdiction—it is pertinent to personal jurisdiction as well. [3] As 28 U.S.C. § 1332 provides: "a corporation shall be deemed a citizen of every State and foreign state by which it has been **incorporated** and of the State or foreign state where it has its **principal place of business**." General jurisdiction, a type of personal jurisdiction exercised when a

[1] *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 68 (1996). It has been held that a party that is "stateless," which includes those who are U.S. citizens but domiciled abroad, destroys diversity. *Page v. Democratic Nat'l Comm.,* 2F4th 630, 637-38 (7th Cir. 2021); e.g., *Swiger v. Allegheny Energy, Inc.*, 540 F.3d 179, 184-85 (3d Cir. 2008) ("Because [a member of a defendant company], as a stateless person, cannot sue or be sued in federal court based upon diversity jurisdiction neither can [defendant company]"). However, such parties may be dismissed by the court if they are "dispensable" to preserve diversity jurisdiction. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989).

[2] Scott Dodson, BEYOND BIAS IN DIVERSITY JURISDICTION, 69 Duke L.J. 267, 285 n.90 (2019).

[3] Though general and diversity jurisdiction inquiries may overlap, the presence of *personal* jurisdiction does not necessarily render a defendant a citizen of the forum state. *Wachusett Potato Chip Co. v. Mohawk Bev., Inc*., 2007 U.S. Dist. LEXIS 56835, at *2-3 (D. Mass. July 27, 2007) (The fact that a Massachusetts court may have personal jurisdiction over a defendant does not mean that defendant is somehow converted into a Massachusetts citizen.").

defendant is "at home" in the forum state, so too can be satisfied by this definition of citizenship.[4]

The idea of general jurisdiction is that by targeting such extensive connections with the forum state, a defendant can be sued for any claim regardless of whether the claim arose out of the defendant's connections with the forum state and such a suit would still align with constitutional fairness and due process principles. But with such a broad grant of jurisdiction comes the potential for abuse by plaintiffs who seek to essentially "hale" a defendant into court in the forum state "to answer for any of its activities anywhere in the world."[5] Given this concern, the analysis of general jurisdiction has evolved over time from its original, rigid definition to include a more comprehensive analysis of the corporation's activities within the forum.[6]

Thus, the rule for defendants who were not incorporated or whose principal place of business was not in the forum state has evolved to a test of whether the defendant's "affiliations with the forum state [were] so continuous and systematic as to render [it] at home."[7] Plaintiffs have attempted to stretch the limits of this rule. For example, the products liability plaintiffs in *Helicopteras* asserted that mere purchases in the forum state of defendant's products, occurring at regular intervals, were enough to warrant general jurisdiction over nonresident defendant so as to submit it to claims *unrelated to such purchases*.[8] The Court disagreed and declined to extend general jurisdiction.

The United States Supreme Court set forth a more restrictive interpretation of these contacts which might allow jurisdiction to be established beginning with *Goodyear Dunlop Tires Operations, S.A. v. Brown,* and continuing through *Daimler AG v. Bauman.*[9] *Daimler* effectively curtailed the "substantial, systematic, and continuous" rule, concluding a corporation's activities must render it "at home," and that to require any less would be "unacceptably grasping."[10] The Second Circuit opined on this set of cases, stating that while *Goodyear* seemed to have "left open the possibility that contacts of substance, deliberately undertaken and of some

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[4] *See Havell Trust v. 41 Still RD, LLC*, 2021 U.S. Dist. LEXIS 36226 (D.N.J. 2021) ("A corporation is 'at home' at least—and usually solely—where it is incorporated or has its principal place of business") (quoting *Chavez v. Dole Food Co.*, 836 F.3d 205, 223 (3d. Cir. 2016)).
[5] *Schwarzenegger v. Fred Martin Motor Co.* 374 F. 3d 797, 801 (9th Cir. 2004).
[6] *Pennoyer v. Neff*, 95 U.S. 714 (1878); *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Burger King v. Rudzewicz*, 471 U.S. (1985).
[7] *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *see Helicopteras Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 416 (1984) (plaintiffs alleged that general jurisdiction could be established if the corporate defendant "engaged in substantial, continuous and systematic course of business," within the relevant state) (citing *Perkins v. Benguet Consol. Mining Co.*,342 U.S. 437 (1952)).
[8] *Helicopteras,* 466 U.S. at 418 [emphasis added].
[9] 564 U.S. 519 (2011); 571 U.S. 117 (2014).
[10] *Daimler*, 571 U.S. at 138.

duration, could place a corporation 'at home' in many locations," *Daimler* "all but eliminated that possibility…more narrowly holding that aside from the truly exceptional case, a corporation is at home and subject to general jurisdiction only in its place of incorporation or principal place of business."[11]

This was great news for corporate defendants being sued for products liability claims, because the substantial and systematic "direction of [a defendant's] products" into the forum state was no longer sufficient to establish general jurisdiction.[12] Other factors to consider in evaluating a defendant's "at home" status include whether the defendant: has any directors, officers, employees, agents, or local residents assigned in the state; solicits or conducts business in the state with respect to the product at issue; has entered into any contracts in the state regarding the product at issue, and, has established channels for advising users in the state of the product or provides warranties in the state related to the product. Specifically in products liability actions against an aircraft component manufacturer, a defendant's "shipment of an engine to the forum state" has been held to fall far below the "at home" threshold.[13] Further, even where a defendant corporation had thirteen active business and employed nearly 5,000 people in the forum state, the court declined to establish general jurisdiction because these operations were a small fraction of defendant corporation's national and worldwide operations. *Ainette v. Mkt. Basket Inc.* at 20; *see Minholz v. Lockheed Martin Corp.*, 227 F.Supp.3d 249, 261-62 (N.D.N.Y. 2016).

Due to general jurisdiction's "more demanding minimum contacts analysis" commensurate with the consequences of establishing such jurisdiction, a court is much more likely to find specific jurisdiction over a given defendant.[14] Justice Ginsburg, writing for the majority in both *Goodyear* and *Daimler*, stated as much, referencing general jurisdiction's "sprawling view" which, requires a heightened standard so as to not unfairly subject a corporate manufacturer to "any claim for relief, wherever its products are distributed."[15] To allay every plaintiff's fear, Justice Ginsburg then noted that where general jurisdiction is lacking, certain contacts with the forum state may "bolster an affiliation germane to specific jurisdiction."[16]

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[11] *Brown v. Lockheed Martin Corp.*, 814 F.3d 619 (2d Cir. 2016); *See George Moundreas & Co SA v. Jinhai Intelligent Manufacturing Co Ltd*, 2021 U.S. Dist. LEXIS 9588, at *4 (S.D.N.Y. Jan. 18, 2021) (same).
[12] *Ainette v. Mkt. Basket Inc*., 2021 U.S. Dist. LEXIS 145144, at *19-20 (S.D.N.Y. Aug. 2, 2021). This "direction" has also been interpreted as a "stream-of-commerce" theory, wherein an out-of-state manufacturer places its product into an extensive chain of distribution before reaching and causing harm to the consumer in the forum state. *Goodyear* struck this theory down as a bare basis for general jurisdiction. 564 U.S. at 927.
[13] *Golf Doc LLC v. Teledyne Cont'l Motors, Inc*., 2016 U.S. Dist. LEXIS 180535, at *6 (E.D. Tex., 2016).
[14] *Cirrus Design Corp. v. Berra*, 633 S.W.3d 640, 647 (Tex. App. 2021) (internal citations and quotations omitted).
[15] *Goodyear*, 564 U.S. at 929.
[16] *Id.* at 916.

The courts' history of general jurisdictional analysis has certainly not been confined to discussions relating to a defendant's state of incorporation and principal place of business, and the cases referenced above have collectively defined the "paradigm…bases for general jurisdiction."[17] In this modern era of jurisdictional analysis, U.S. courts have tailored the standard to extend general jurisdiction only where absolutely warranted, and not in scenarios where granting such jurisdiction renders "at home" synonymous with simply placing a product on the market.

Specific Jurisdiction

Where a non-resident defendant's activities with the forum state have not been so pervasive to achieve general jurisdiction, a plaintiff may be able to establish personal jurisdiction through specific jurisdiction. While both forms of personal jurisdiction require "certain minimum contacts with [the state] such that maintenance of the suit does not offend traditional notions of fair play and substantial justice," specific jurisdiction contact standards are far less demanding.[18] This is because specific jurisdiction only subjects the defendant to suits relating to its contacts with the forum state.[19]

The original framework for specific jurisdiction was set out in *International Shoe.*[20] There, the Supreme Court found specific jurisdiction where the in-state activities "had not only been continuous and systematic, but also g[a]ve rise to the liabilities sued on."[21] However, *International Shoe* in no way mandated "continuous and systematic" contact in specific jurisdiction to conform with fairness principles. Rather, it opined that "'the commission of some *single or occasional acts* of the corporate agent in a state' may sometimes be enough to subject the corporation to jurisdiction in that State's tribunals with respect to suits relating to that in-state activity."[22]

But not all contacts regarding a given forum state lend themselves to a finding of specific jurisdiction. Moreover, the defendant must have activities with the forum state *itself* rather than simply contacts with a plaintiff residing in that forum.[23] Since

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[17] *Id.* at 924.
[18] *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).
[19] *See Minholz*, 227 F. Supp. 3d at 259-260 ("The plaintiff must demonstrate that her claim arises out of or relates to defendant's contacts with the forum state and that the defendant purposefully availed itself of the privilege of doing business in the forum state such that it could foresee being haled into court there.")
[20] 326 U.S. 310 (1945).
[21] *Id.* at 317.
[22] *Daimler*, 571 U.S. at 127 (quoting *International Shoe*, 326 U.S. at 318) (emphasis added).
[23] *Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 801 (7th Cir. 2014), *as corrected* (May 12, 2014) (citing *Walden v. Fiore*, 134 S.Ct. 1115, 1123 (2014)).

International Shoe, the inquiry for specific jurisdiction has been defined by this three-part test:

(1) the defendant must have purposefully availed himself of the privilege of conducting business in the forum state or purposefully directed his activities at the state; (2) the alleged injury must have arisen from the defendant's forum related activities; and (3) the exercise of jurisdiction must comport with traditional notions of fair play and substantial justice.[24]

The purposeful-direction or purposeful-availment prong largely depends on the type of claim at issue. *Id.* Purposeful direction requires "that the defendant allegedly ha[s] (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state."[25] Purposeful availment is a more general standard that evaluates whether the defendant "performs some type of affirmative conduct which allows or promotes the transaction of business within the forum state."[26] In products liability actions, the tests for both purposeful-direction and purposeful-availment have been applied.[27] Many courts end up applying a combination of the two to make a specific jurisdiction determination.

In manufacturer products liability cases, a "stream-of-commerce" theory has been applied to determine whether a defendant's contacts with a state fulfill the purposeful direction prong of fairness and due process. For example, in *Lewis v. Conagra Brands*, *Inc.*, the court found specific jurisdiction in a forum state where defendant sold its product to an Illinois wholesaler that then regularly distributed the products to the forum state retailers and defendant indirectly derived substantial financial benefit from sales in the forum state.[28] In *Simons v. Arcan, Inc.*, the court found specific jurisdiction where defendant-manufacturer sold its product to forum-state-based non-resale retailers, shipped products directly into the state, and had a manufacturer's agent whose goal was to increase forum state sales.[29] In *D'Jamoos ex rel. Estate of Weingeroff v. Pilatus Aircraft Ltd.*, the court declined to grant specific jurisdiction where the presence of defendant's product in the forum state was a result of "fortuitous circumstances," and not because defendant placed its

[24] *Felland v. Clifton*, 682 F.3d 665, 673 (7th Cir. 2012).
[25] *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002).
[26] *Sinatra v. Nat'l Enquirer, Inc.*, 854 F.2d 1191, 1195 (9th Cir. 1988).
[27] See e.g., *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 878, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011) (applying **purposeful availment** analysis in products liability case); *Anaya v. Machines de Triage et Broyage*, 2019 U.S. Dist. LEXIS 37126, 2019 WL 1083783 (N.D. Cal. Mar. 7, 2019) (applying **purposeful direction** in products liability action)
[28] 2023 V.I. LEXIS 21, at *4 (Super. Ct. 2023).
[29] 2013 U.S. Dist. LEXIS 44254, at *8 (E.D. Pa. 2013).

product into that state through the "stream-of-commerce."[30] These holdings vary greatly due to major and minor factual discrepancies, but such caselaw is illustrative of the large range of contacts that can give rise to specific jurisdiction. Even where a manufacturer has a sizeable presence in a forum state, a finding of specific jurisdiction is precluded if the cause of action did not arise out of the manufacturers' business in that state.[31]

Since personal jurisdiction inquiries are highly fact specific and intensive, some courts have permitted "jurisdictional discovery," where the court allows the parties to undertake discovery of facts relevant to the jurisdictional determination. This discovery—which is said to be permissible, but not mandated, where "issues arise as to jurisdiction or venue"—typically follows a defendant's motion to dismiss for lack of jurisdiction under Fed. R. Civ. P. 12(b)(2) and is requested by a plaintiff.[32] However, the legal standards regarding the availability of jurisdictional discovery "are not well defined" and parties are given "scant guidance regarding what the scope of jurisdictional discovery should be once it is ordered."[33] For example, some courts order discovery only after a plaintiff has made a prima facie case of jurisdiction, whereas others simply require "a sufficient start toward establishing personal jurisdiction.[34] Unlike class discovery, a routine and more well-established jurisdictional discovery, jurisdictional discovery based on personal jurisdiction is relatively unexplored and somewhat rare due to its complexity and potential risks.[35]

Conclusion

Historically, corporate defendants prefer litigating in federal forums. Therefore, when a plaintiff files a case in state court, defendants will often seek removal to theoretically maximize their chances of a successful defense. One avenue of defense once in federal court is to challenge personal jurisdiction. Personal jurisdiction can be either general, which subjects a defendant to any claim brought in the forum state, or specific, which subjects a defendant only to claims which arise out of the defendant's activities in the forum state. Because general jurisdiction exposes a defendant to an exponentially greater range of claims in the forum state,

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[30] 566 F.3d 94 (3d Cir. 2009).

[31] *See e.g., Hinkle v. Cirrus Design Corp.,* 775 F. App'x 545, 550 (11th Cir. 2019) (declining to grant specific jurisdiction in forum state where defendant sold, promoted, and serviced its aircrafts because plaintiffs' claims arose from the purchase of defendant aircraft outside of the forum state and they failed to sufficiently allege that the plane crash was a result of defendant's tortious conduct in the forum state).

[32] *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978).

[33] S.I. Strong, JURISDICTIONAL DISCOVERY IN UNITED STATES FEDERAL COURTS, 67 Wash & Lee L. Rev. 489, 495 (2010).

[34] *Id.* at 526-27 (citing cases) (internal citations omitted).

[35] "There is nothing 'limited' about jurisdictional discovery today. This is highly problematic, given that parties request jurisdictional discovery at a time when it is unclear whether the court even has jurisdiction over the parties and the dispute. *Id*. at 584.

it requires proof of substantially greater contacts with the forum state than specific jurisdiction—so much so that the defendant is considered "at home" in that state.

In products liability actions, a defendant manufacturer's mere direction of its products into the stream-of-commerce is not enough to subject it to general jurisdiction. However, if that defendant placed its products into the stream-of-commerce knowing that those products are regularly sold in a particular forum state, that may be enough to establish specific jurisdiction. Ultimately, there are numerous factual considerations in a jurisdictional analysis, and in some cases, additional discovery may be granted to aid in a jurisdictional determination. Regardless of the forum, products liability defense counsel should be prepared to set forth jurisdictionally mitigating facts when challenging personal jurisdiction.

STILL IDLING: PREEMPTION IN AVIATION CLAIMS TRYING TO POWER ITS WAY TO THE U.S. SUPREME COURT

*By Thomas R. Pantino and Laurie N. Coffey**

Federal preemption in the field of aviation claims is an overarching concept that would unify exposure of manufacturers to liability. As such, the topic has been addressed repeatedly in the Aircraft Builder's Council Law Report as cases have wound their way through the courts with inconsistent results. This article will summarize some of that history, and then discuss a recent and still pending case on the topic, *Jones v. Goodrich Corp.*, and whether that case may finally position the topic for review in front of the United States Supreme Court.

The legal concept of federal law taking precedent over the application of state law empirically arises from the United States Constitution, and more specifically the "Supremacy Clause" found in Article VI, Paragraph 2, which in pertinent part provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, 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.

This federal "preemption" of state law can be "express" (when a federal statute or regulation contains explicit preemptive language), or it can be "implied" (when the preemptive intent of Congress is implicit in the relevant federal law's structure and purpose).

Implied preemption comes in two forms. The first is "field preemption", applied by courts when it is concluded that an entire area of regulation has been implemented by the federal government such that it implicitly precludes any regulation by the state that supplements the federal, or any attempt by a state to regulate a field where there is a sufficiently dominant federal interest.[1] Applying these principles, the United States Supreme Court has held that federal law

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[1] *See Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218 (1947).

exclusively regulates several fields, including food labeling, immigration, nuclear safety, railroad equipment and tanker vessels.

The second form of implied preemption is "conflict preemption". This is most likely to arise as a result of a federal law that provides authority for states to enact their own laws that work in conjunction with federal law. Conflict preemption occurs when a conflict arises between a state law and a federal law. It is itself broken down into two categories: impossibility preemption (in situations where it would be impossible to comply with both federal and state law); and obstacle preemption (in situations where a state law becomes an obstacle to federal law, i.e., the state law interferes with Congress' purpose for the federal law).

A case of significant notoriety in the area of field preemption was *Cipollone v. Liggett Grp.*[2] At issue was whether a warning placed on a pack of cigarettes could be challenged as not reasonable if it complied with federal law regarding mandatory labelling. The United States Supreme Court concluded that a plaintiff could not challenge the warning, as the Federal Cigarette Labeling and Advertising Act[3] preempted all state laws which would have created a question of fact regarding the adequacy of the warning.

Similarly, in *English v. General Elec. Co.*, the United States Supreme Court opined that preemption:

> … may be inferred from a "scheme of federal regulation … so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "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."[4]

Of interest specifically for this article, cases have and are being litigated regarding the Federal Aviation Act[5] and language therein reflecting a legislative intent to regulate the aviation industry by implementing standards designed to assure aviation safety.[6] Regretfully, the federal appellate courts have so far been largely reluctant to apply the implicit intent of Congress to have one set of rules governing

[2] *Cipollone v. Liggett Grp.*, 505 U.S. 504 (1992).
[3] 15 U.S.C. §1331.
[4] *English v. General Elec. Co*., 496 U.S. 72, 79 (1990) (citing *Rice v. Santa Fe Elevator Corp.* 331 U.S. 218 (1947).
[5] A Congressional Act first enacted in 1958, it created the Federal Aviation Agency, later Federal Aviation Administration. Both superseded the Air Commerce Act of 1926 and the 1938 Civil Aeronautics Act. The FAA was responsible to oversee and regulate safety in the airline industry and the use of American airspace by both military and civilian aircraft.
[6] *See* Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C. §§ 40101 et seq.

the aviation industry. Rather, courts (and particularly the U.S. Court of Appeals for the Third Circuit ("Third Circuit")[7] have identified multiple reasons for allowing exceptions to the general policies applicable to the aviation industry. Discussed below are several aviation industry-related cases and the rulings which allowed state tort causes of action to override what arguably should more properly have been field preempted.

In *Abdullah v. American Airlines,*[8] plaintiff instituted a suit for personal injuries sustained during an encounter with clear air turbulence, contending that the airline was negligent in failing to provide verbal instructions about wearing seat belts in addition to illuminating the overhead "Fasten Seatbelt" sign. A jury found in favor of the plaintiff, and the airline appealed. The Third Circuit concluded that 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." The court stated unequivocally that "we hold 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."[9]

The court held further that "despite federal preemption of the standards of care, state and territorial damage remedies still exist for violation of those standards." Thus, plaintiffs were not precluded from alleging state court *remedies*, though in the field of air safety, only the federal *standard of care* was applicable.

As seen in the following discussion of two cases subsequent to *Abdullah*, the Third Circuit would later distinguish between air safety related to activities in-flight (as in *Abdullah*) and activities occurring on the ground. Such a distinction is artificially limiting, and precludes the true intent of the Federal Aviation Act and its promulgated regulations to control all aspects of air safety by maintaining regulated, mandated requirements with consistent application across the aviation industry.

Elassaad v. Independence Air[10] was an opportunity for the Third Circuit to reinforce the preemptive conclusions of *Abdullah*. However, rather than enlarging the scope, the court drew an artificial distinction which inhibited consistency in the

[7] There are 13 Federal Circuits. Eleven cover the 50 United States, one the District of Columbia and one (the Federal Circuit) uniquely has nationwide jurisdiction in various subject areas (e.g., international trade, government contracts, patents, trademarks and certain claims against the U.S. government.) The Third Circuit covers Delaware, New Jersey, Pennsylvania and the U.S. Virgin Islands.
[8] *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999).
[9] *Id.* at 367.
[10] *Elassaad v. Indep. Air, Inc.*, 604 F.3d 804 (3d Cir. 2010).

enforcement of air safety. The case involved a disabled passenger disembarking from an airplane. Using crutches in the process, he sustained injuries after he lost his balance, and fell to the tarmac from the stairway attached to the airplane. The allegation was that the defendant airline was negligent in not assisting the passenger in the disembarkation process. The airline moved for summary judgment[11] on the basis that it had complied with federal standards, and that the state cause of action alleging simple negligence was barred by federal regulations. The District Court (trial court) agreed, and the matter was appealed to the Third Circuit. The initial Third Circuit analysis reviewed the basis on determining Congress' intent for federal law to occupy a field exclusively. In *Abdullah,* the court had found that there was implied preemption of the 'entire field of aviation safety' as a result of the Federal Aviation Act, and its implementing regulations reaffirmed the conclusion that the state law standard of care within the field of aviation safety was preempted, and instructed that "a court must refer … to the overall concept that aircraft may not be operated in a careless or reckless manner" in addition to any specific regulations that may be applicable.[12]

Further amplifying the applicability of field preemption in aviation safety, the *Elassaad* court purported to endorse the holding of *Abdullah* in concluding that the Administrator of the FAA:

> 'has implemented a comprehensive system of rules and regulations' to promote flight safety. Based on the comprehensive regulatory system, we determined that federal law so thoroughly occupies the legislative field of aviation safety that federal law impliedly preempts state regulation in that area.[13]

The *Elassaad* court, however, without explanation or discussion, proceeded to modify the unambiguous total preemption language by concluding, in an amended opinion, that state law remedies survived such field preemption. Having first endorsed the legal conclusions of *Abdullah* and establishing that the FAA exclusively established the standard of care in evaluating air safety claims, the court then began a tortured analysis to find factual exceptions to circumvent preemption in the case at bar. More specifically, the court found that the state law claim asserted by the plaintiff was not barred, as the accident did not occur during air travel but rather after the aircraft was parked at the gate and as the plaintiff was exiting the

[11] Summary judgment seeks a ruling from the court based on the evidence, without needing to go to trial. It is sought when there is stated to be no genuine dispute as to any material fact, such that the movant is entitled to judgment as a matter of law.
[12] *Abdullah,* 181 F.3d at 371.
[13] *Elassaad,* 613 F.3d 119, 125 (Amended Opinion, vacating the original).

aircraft. Such a conclusion, following a confirmation of implied preemption of the entire field of "air safety" was strained, and turned the recently upheld precedent on its head.

Sikkelee v. Precision Airmotive Corp.[14] in 2016 continued the Third Circuit's review of preemption where federal law conflicted with that of the state. The case involved the crash of a Cessna 172 aircraft equipped with a Textron Lycoming engine, resulting in the death of the pilot. The deceased's estate filed a complaint alleging, among other causes of action, that the aircraft's engine was defectively designed and thus was unreasonably dangerous pursuant to the Restatement (Second) of Torts Section 402A. The District Court granted summary judgment to the defense, and the estate appealed.

The appellate analysis questioned the general preemption conclusions of *Abdullah* and *Elassaad* and focused on whether the way the FAA certificated an engine design established the standard of care applicable to a product liability case under state law. Specifically, the question was whether the engine design, having been approved and accepted by the FAA with the issuance of a type certificate, established that the engine could not be defectively designed. To the extent the federal standard of care was met, as a matter of law, this certification was controlling, regardless of the submission of alternative designs. The court spent considerable time attempting to find a basis for its clearly desired conclusion that the estate's product liability claim should not be preempted. The *Elassaad* case had limited the areas of preemption by excluding accidents which occurred after landing. While *Abdullah* spoke in clear terms of aviation safety, it allowed state court remedies by further limiting preemption to in-flight operations. While one would think that the design of an aircraft engine would inarguably operate as an act in the furtherance of aviation safety, the *Sikkelee* court ultimately ignored this logic.

The court requested an *amicus curiae* brief[15] from the FAA and Department of Transportation (via the Department of Justice (DOJ)) regarding the FAA's position on preemption applying to engine design, including the scope of field preemption, the existence and source of any federal standard of care for design defect claims, and the role of the type certificate in determining whether the relevant standard of care has been met.

[14] *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680 (3d Cir. 2016).
[15] An *amicus curiae* brief is one from a non-party having an interest in the outcome of the case. The party can assist an appellate court by offering additional, relevant information or arguments the court may want to consider before making its ruling.

The DOJ's brief responded that field preemption extended "broadly to all aspects of aviation safety and includes product liability claims based on allegedly defective aircraft and aircraft parts by preempting state standards of care."[16] Apparently not receiving the answer it wanted, the court simply ignored it, concluding that it was not bound by such position – a position expressed by the very government agency created to develop and implement a system for insuring air safety. The Third Circuit therefore remanded the case to the District Court.

A subsequent 2018 Third Circuit decision in *Sikkelee*[17] continued the appellate review of litigation that had been proceeding for eleven years. Again, the trial court granted the defendant's motion for summary judgment dismissing the plaintiff's negligence and product liability claims, this time based on conflict preemption. The factual issue was whether the design change that the plaintiff asserted: (1) could have been made; (2) would have prevented the engine failure; and (3) if suggested by the manufacturer, would have been accepted by the FAA as a change to the original type certificate. The majority opinion concluded that there was not a true conflict between state and federal standards of care and thus the case was remanded to the District Court again to allow evidence of feasibility. The dissent countered that "when federal regulations prevent a manufacturer from altering its product without prior agency approval, design defect claims are preempted …"[18] A petition was filed with the United States Supreme Court but was denied, leaving the Third Circuit's rejection of preemption undisturbed.

Jones v. Goodrich Corp.[19], currently pending, has brought yet a different spin on the federal preemption issue. The litigation stemmed from the 2011 crash of an Army Mission Enhanced Little Bird ("MELB") helicopter that resulted in two fatalities. The aircraft component in question was the Full Authority Digital Electronic Control (FADEC), which controls the flow of fuel to the engine. Plaintiffs alleged that the FADEC was defectively designed, and thus its manufacturer, as well as the engine manufacturer, were liable under state product liability law. Citing *Sikkelee*, the plaintiffs contended that preemption was not applicable to its cause of action as it focused on design, not in-air operation of the aircraft.[20] The District Court undertook a detailed review and analysis of the history of the helicopter design, development and certification, finding:

[16] Brief for the DOJ as Amicus Curiae at 7, *Sikkelee v. Precision Airmotive Corporation*, No. 14-4193 (U.S. Sept 21, 2015.
[17] *Sikkelee v. Precision Airmotive Corp.*, 907 F.3d 701 (3d Cir. 2018).
[18] *Sikkelee,* 907 F.3d at 718.
[19] *Jones v. Goodrich Corp.*, 422 F. Supp. 3d 518 (D. Conn. 2019)
[20] *See Jones*, 422 F. Supp. 3d at 524.

> The Army required both the baseline MELB engine and all its modifications, including modifications to the FADEC, be FAA certified. Any changes in equipment that were required by the Army also required the engine and FADEC manufacturers to obtain additional FAA certification. Plaintiffs' statement of additional uncontested facts provided: "It is clear that the FAA was the 'Airworthiness Authority' for the C30R/3M [accident] engine."[21]

The District Court in *Jones* (located in Connecticut, which is within the Second Circuit[22]) was not bound by, and indeed did not adopt, the reasoning of the Third Circuit, but relied on the few previous cases within the Second Circuit addressing preemption in aviation. Its analysis of the law led to the legal finding that aircraft component design fell clearly within the authority of the FAA, and that "[a]ccordingly, the Court finds that, under Second Circuit precedent, the level of federal interest presented by the FAA's product certification scheme sufficient to warrant a finding of preemption."[23]

The plaintiffs had submitted that even if the design of aircraft components fell under the authority of the FAA and thus was subject to preemption, a military aircraft such as the accident helicopter, was not treated the same as civil aircraft but rather, its design was subject to the control of the military branch, not the FAA. This theory was declined by the District Court, in holding:

> The decision to exempt government military aircraft from FAA standards in certain contexts does not constrain the clear congressional intent to occupy the entire field of aviation safety. It merely represents a choice by Congress to relieve American Armed Forces from civilian restraints that would be unreasonable in a war setting, not an opportunity for states to impose patchwork standards of care on suppliers of the military forces of the United States. Imposition of various common law rules upon military aircraft would be incompatible generally with the federal government's authority to regulate the field of air safety, and specifically with the decision by Congress to relax regulations for aircraft used exclusively in the service of government.[24]

The District Court thus dismissed the case on implied field preemption grounds. The case was appealed to the Second Circuit. Following briefing and oral argument, at the request of the Court, an *amicus curiae* brief was filed by the

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[21] *Id.* at 520.
[22] The Second Circuit covers New York, Connecticut and Vermont.
[23] *Id.* at 524.
[24] *Id.* at 525.

Department of Justice (DOJ) on behalf of the FAA and Department of Defense (DOD). As of this writing, no decision has been reported; however, this article will comment on the arguments submitted in the appellate papers and questions posed by the Court to the FAA/DOD and the agencies' response.

Here, the Second Circuit requested answers to several questions, relating to both field and conflict preemption (even though the District Court's decision was based only on field preemption). The field preemption queries included whether, assuming the Federal Aviation Act implicitly preempts the field of aviation safety, that preemption extends to military aircraft and parts used in military aircraft; and whether such preemption includes tort claims based on alleged defective design or manufacturing defect claims with respect to military aircraft or parts used in military aircraft. The conflict preemption queries included whether the FAA, in issuing a type certificate for military aircraft or part, does so pursuant to the requirements of the Federal Aviation Act, or only because a manufacturer has opted to seek the type certificate according to contract. And if the type certificate is obtained pursuant to contract, does conflict preemption apply: (1) where a state standard of care would require a modification of the type certification received from the FAA; or (2) when a contractor, with the approval of the military, adopts a new design without seeking a new type certification.

The United States[25] replied to the Second Circuit's request to the FAA/DOD with an extensive brief, concluding that the Federal Aviation Act did *not* preempt state law product liability law in the context of military aircraft. Rather:

> DOD has directed each military department to establish an "airworthiness authority" to "assess and issue airworthiness approvals for manned and unmanned aircraft and air systems owned, leased, operated, used, designed, or modified by their respective Departments." … The Commanding General of the U.S. Army Aviation and Missile Command is the Army's airworthiness authority. … That office is responsible for developing "airworthiness standards," overseeing "airworthiness qualifications for aircraft systems, subsystems, components. and allied equipment," and evaluating "compliance to airworthiness standards." … Those standards are then incorporated in Army procurement contracts.[26]

[25] This Brief, responding to the Second Circuit's letter addressed to the FAA and DOD, is titled "Brief for the United States as Amicus Curiae" and as such, references herein will be to "the United States" instead of "FAA and DOD".
[26] Brief for the United States as *Amicus Curiae* at 5, *Jones v. Goodrich Corporation*, No. 20-2951 (U.S. Feb. 8, 2023).

The general position of the United States was that the preemption issues addressed in the cases discussed above do not apply to military aircraft, even though in certain circumstances, as in the procurement of the MELB, the FAA plays a role in the Army airworthiness qualification process. Pursuant to DOD Directive,

> Each military department … oversees "a robust engineering organization capable of independently assessing the airworthiness of aircraft and air system configurations and establishing airworthiness limitations for all aircraft and air systems owned, leased, operated, used, designed, or modified by that Military Department" … The airworthiness authorities of the military departments are ultimately responsible for the assessment and approval of their aircraft.[27]

The United States raised in its *amicus curiae* brief that separate from preemption, what may be the deciding factor in the final adjudication of the *Jones* case is the applicability of the government contractor defense "(GCD") established in *Boyle v. United Technologies*[28] ("*Boyle*"). This defense was briefed in the *Jones* District Court, but was rendered moot when that court dismissed the case on field preemption grounds. As such, the GCD was not at issue in the Second Circuit proceedings. However, the United States raised it in its brief:

> Under *Boyle*, plaintiffs' state-law design-defect claims cannot proceed if defendants can show that the Army approved reasonably precise specifications for the engine and fuel-system components at issue and that the components conformed to the government's specifications. … Defendants would also need to show that they warned the government of any dangers about which the government did not already know.[29]

Especially in light of the position taken by the United States in its *amicus curiae* brief, it is anticipated that the Second Circuit will more likely than not hold that federal preemption (whether field or conflict) is not applicable to military aircraft. If that is the result, then the Second Circuit theoretically can itself decide whether the plaintiffs' claims should be dismissed under the *Boyle* government contractor defense, though it is more likely that the Court will reverse and remand the case to the District Court to make that determination.

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[27] Brief for the United States as *Amicus Curiae* at 7, *Jones v. Goodrich Corporation*, No. 20-2951 (U.S. Feb. 8, 2023).
[28] *Boyle v. United Techs. Corp.*, 487 U.S. 500, 108 S. Ct. 2510 (1988).
[29] Brief for the United States as *Amicus Curiae* at 20, *Jones v. Goodrich Corporation*, No. 20-2951 (U.S. Feb. 23, 2022).

In the unlikely event the Second Circuit were to affirm the dismissal of the *Jones* case on field preemption grounds, the *Jones* case would be very ripe for appeal to the U.S. Supreme Court as a result of the clear conflict that would exist between the holdings of the Second and Third Circuits on the preemption issue. Such conflict needs to exist before the Supreme Court will consider granting a writ of certiorari to review the issue.

That said, should the Second Circuit find that preemption does not apply to military aircraft as anticipated, then such conflict between the Circuits will still not have yet arisen. Until one does, the United States Supreme Court will not address the issue, and federal courts will remain free to interpret for themselves when federal preemption in the context of aviation claims is and is not applicable.

Aircraft Builders Council, Inc.