

RECENT DEVELOPMENTS IN AVIATION
AND SPACE LAW

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I. MONTREAL CONVENTION

In 2003, the Convention for International Carriage by Air at Montreal (Montreal Convention)¹ amended and replaced provisions of the Warsaw Convention² concerning the liability of international air carriers and compensation of victims of air disasters and those injured while on board an aircraft.

The Montreal Convention creates a private right of action in U.S. courts and is the exclusive remedy for injuries or damage to persons or property incurred on international flights. Under Article 17 of the Montreal Convention, an injured person may recover for injuries sustained when the accident took place “on board the aircraft or in the course of any of the operations of embarking or disembarking.”³ The Convention permits plaintiffs to pursue their remedies in certain jurisdictions only—an action may be brought, at a plaintiff’s option, in the territory of a signatory country in which the “carrier” is domiciled,⁴ has its principal place of business, or has a place of business through which the contract was made, or at the place of destination. A “fifth jurisdiction” provision permits injured passengers to bring suit in the place where passengers have their “principal and permanent residence” at the time of the accident.⁵

Several decisions of the past twelve months have defined or construed key provisions of the Montreal Convention. Notable among the many decisions were *Hornby v. Lufthansa German Airlines*,⁶ which provides the first construction of the Convention’s “principal and permanent residence” provision for injured passengers; two cases—*Narkiewicz-Laine v. Scandinavian Airlines Systems*⁷ and *The Farm Inc. v. Private Jet Services Group, Inc.*⁸—in

1. Convention for International Carriage by Air, May 28, 1999, S. Treaty Doc. No. 106-45, 1999 WL 333292734 [hereinafter “Montreal Convention”].

2. Convention for the Unification of Certain Rules Relating to International Transportation by Air art. 1, Oct. 12, 1929, S. Treaty Doc. No. 106-45, 1999 WL 33292734 (2000).

3. Montreal Convention, art. 17.

4. The term “carrier” is undefined by the Montreal Convention, but does describe situations involving a “contracting carrier” and an “actual carrier” and provides that a plaintiff can bring an action for damages against either or both in specified fora. Montreal Convention, arts. 39, 45.

5. Montreal Convention, art. 33(1).

6. 593 F. Supp. 2d 1132 (C.D. Cal. 2009).

7. 587 F. Supp. 2d 888 (N.D. Ill. 2008).

8. No. 09-cv-165, 2009 WL 2497100 (D.N.H. Aug. 13, 2009).

which federal courts remanded claims that were not completely preempted by the Montreal Convention and *Pierre-Louis v. West Caribbean Airways*,⁹ in which the Eleventh Circuit considered whether the doctrine of *forum non conveniens* could be invoked by an air carrier in a case governed by the Montreal Convention.

A. *Hornsby v. Lufthansa German Airlines*¹⁰

Glenda Hornsby, a U.S. citizen, was living and working in Germany when she flew round-trip from Germany to Los Angeles. Hornsby claimed that she was injured during in-flight turbulence and sued Lufthansa in California. Lufthansa moved to dismiss on the grounds that Hornsby's principal and permanent residence was Germany and, therefore, the U.S. court lacked subject matter jurisdiction under the Montreal Convention.

Article 33(1) and (2) of the Convention sets forth the places in which a Convention claim "must be brought." Under the Convention's "fifth jurisdiction" provision, an injured plaintiff may sue in the country of her "principal and permanent residence" if that country is a convention signatory.¹¹ The Article defines "principal and permanent residence" as "the one fixed and permanent abode of the passenger at the time of the accident" and notes that the "nationality of the passenger at the time of the accident shall not be the determining factor."¹²

Lufthansa contended that Hornsby's "principal and permanent residence" at the relevant time was Germany, relying heavily on the phrase "at the time of the accident" found in Article 33 and the distinction between "domicile" and "residence" under federal law.¹³ As argued by Lufthansa, the inclusion of "at the time of the accident" precludes the interpretation of "one fixed and permanent abode"—and hence "principal and permanent residence"—as the place where a plaintiff intends to return. Instead, Lufthansa argued, Hornsby's actual residence at the time of the accident—unquestionably Germany—should function as her "principal and permanent residence" under the Convention.¹⁴

9. 584 F.3d 1052 (11th Cir. 2009).

10. 593 F. Supp. 2d 1132 (C.D. Cal. 2009).

11. The parties agreed that only one of the five jurisdictions that applied was the fifth jurisdiction, presumably because plaintiff sought to invoke Treaty jurisdiction under this provision. *Id.* at 1136.

12. Montreal Convention, art. 33(3)(b).

13. For instance, 28 U.S.C. § 1332 treats "domicile" as a party's fixed locality, where one resides with an intent to remain. *Cf. Weible v. United States*, 244 F.2d 158, 163–64 (9th Cir. 1957) (discussing difference between "domicile" and "residence").

14. *Hornsby*, 593 F. Supp. at 1133–34. Hornsby lived in Germany after selling her home in California more than two years before the incident. After the incident, she moved back to California. *See id.*

Hornsby asserted that while she may have been living in Germany at the time of the incident, her “principal and permanent residence” was still the United States because she always planned to return to California. Hornsby argued that the modification of “residence” with “permanent” in the Convention provision required an evaluation of the plaintiff’s intended residence. Lufthansa did not initially challenge the truth of Hornsby’s assertion that she always intended to return to the United States, asserting instead that her intent was irrelevant.¹⁵

The court first looked to the Convention’s definition of “principal and permanent residence” as “fixed and permanent abode” and concluded that “fixed and permanent abode” is “closer in meaning to ‘domicile’” than “residence” based on the dictionary definition of “permanent abode” as “domicile or fixed home, which the party may leave as his interest or whim may dictate, but which he has no present intention of abandoning.”¹⁶ As such, the intent of the passenger is relevant to determining her “permanent abode” and, by extension, her “fixed and permanent abode.”¹⁷ The court accepted Hornsby’s arguments and observed that measuring plaintiff’s “intent” was consistent with the inclusion of “permanent” in the meaning of “principal and permanent residence” and “fixed and permanent abode.”¹⁸

Lufthansa cited excerpts from the minutes of the International Civil Aviation Organization’s conference, which resulted in the final draft of the Montreal Convention, during which the “fifth jurisdiction” provision for injured passengers was heavily debated. During final deliberations, the would-be signatories considered and rejected the United States’ proposal to include “domicile” rather than “residence,” ultimately settling on “residence.” Lufthansa argued that the exclusion of “domicile” from the final draft indicated that the meaning of “principal and permanent residence” was closer to “residence” than “domicile.”¹⁹ In dismissing Lufthansa’s interpretation of this portion of the Convention’s legislative history, the court observed that the opponents to the “fifth jurisdiction” provision primarily objected to using a plaintiff’s nationality as the litmus test for jurisdiction. In the court’s view, the exclusion of “domicile” reflected this concern because as far as it could tell, before the U.S. proposal, the debate did not focus on the legal difference between “domicile” and “residence” under U.S. law.²⁰ The court was persuaded that the rejection of the U.S. proposal

15. *Id.* at 1134 n.4.

16. *Id.* at 1137.

17. *Id.*

18. *Id.* at 1138.

19. *Id.* at 1139.

20. *Id.*

was likely the product of the “confusion engendered by the multi-lingual nature of the negotiations” and not a recognition of the difference between “domicile” and “residence.”²¹

Based on the court’s conclusion that “principal and permanent residence” incorporates an element of intent and Hornsby’s undisputed intent at the time of the accident was to return to the United States while she was living in Germany, Hornsby could properly invoke the fifth jurisdiction provision of the Convention to bring suit in the United States under the Montreal Convention.²²

B. *Narkiewicz-Laine v. Scandinavian Airlines Systems*²³

Christian Narkiewicz-Laine brought suit against Scandinavian Airlines seeking damages because the delay of a Scandinavian flight caused him to miss his connecting flight and arrive an hour and a half later than originally scheduled, and for damages for Scandinavian Airlines’ refusal to issue a refund or rebook his flight. After Scandinavian Airlines removed to federal court under the Montreal Convention, Narkiewicz-Laine moved to remand.²⁴ Narkiewicz-Laine claimed that Scandinavian Airlines’ refusal to provide a ticket refund was a breach of contract case not governed by the Montreal Convention. Apparently conceding that the refund claim was not subject to the Montreal Convention, Scandinavian Airlines nonetheless urged the court to accept supplemental jurisdiction over the claim under 28 U.S.C. § 1367.²⁵

The U.S. District Court for the Northern District of Illinois, considering the preemptive scope of the Montreal Convention for the first time, compared the applicable Montreal Convention provision—Article 29—with its virtually identical corollary in the Warsaw Convention—Article 24.²⁶ The court then considered *Sompo Japan Insurance, Inc. v. Nippon Cargo Airlines Co., Ltd.*,²⁷ a 2008 Seventh Circuit decision that discussed the applicability of the Warsaw Convention’s liability limitation provisions. The question facing the Seventh Circuit in *Sompo* was whether the carrier was entitled to a setoff for the insurer’s settlements under the Illinois Joint Tortfeasor

21. *Id.*

22. *Id.*

23. 587 F. Supp. 2d 888 (N.D. Ill. 2008).

24. *Id.* at 890.

25. *Id.* at 889.

26. Article 29 of the Montreal Convention provides that “any action for damages . . . can only be brought subject to the conditions and such limits of liability as are set out in this Convention . . .” Article 24 of the Warsaw Convention provides that “any action for damages . . . can only be brought subject to the conditions and limits of liability set out in this Convention.”

27. 522 F.3d 776 (7th Cir. 2008).

Contribution Act (Contribution Act).²⁸ In order for the Contribution Act to apply, the carrier and the settling defendant “must have been liable in tort for the same injury.”²⁹ To resolve the question, the Seventh Circuit had to decide whether claims brought against the settling defendants sounded in tort or were brought under some other theory. The insurer argued that despite including negligence claims in its complaint, the claims were *in fact* Warsaw claims by virtue of Warsaw’s preemption of state tort law. The *Sompo* court concluded that a defendant’s potential liability in tort—even if the tort claim would be preempted—was enough to qualify for a setoff under the “must have been liable in tort” requirement of the Contribution Act.³⁰ The *Sompo* court observed that, in the context of the applicability of the setoff to the insurer’s claim, the liability limitation provision of the Warsaw Convention would “simply operate as an affirmative defense” that a defendant could choose not to raise, if, for instance, it strategically preferred to litigate the tort claims.³¹

The court in *Narkiewicz-Laine* held that the “logical extension” of this statement from *Sompo* meant that *Narkiewicz-Laine*’s claims against Scandinavian Airlines were subject to the affirmative defense that the Montreal Convention’s limitations applied but were not preempted.³² Because it decided the case on this ground, the court did not discuss Scandinavian Airlines’ assertion that the court had Convention jurisdiction over the flight delay claim and supplemental jurisdiction over the refund/rebooking claim.³³ Given Scandinavian Airlines’ apparent concession that the Montreal Convention would not govern the rebooking claim, the result appears consistent with the application of the “complete preemption” doctrine.³⁴

28. The court had already concluded that the Warsaw Convention did not preempt the Joint Tortfeasor Contribution Act. *Id.* at 782.

29. *Id.* at 783 (citing the Contribution Act).

30. The court relied on *Doyle v. Rhodes*, 461 N.E. 2d 382 (Ill. 1984), in which an employer argued that its immunity under the workers’ compensation act also immunized it from a contribution claim under the Contribution Act because it could not be liable in tort. The court rejected this, concluding that if tort claims were brought against the defendant, the defendant “could make the strategic decision to defend” against the tort claims and not make a preemption argument. *Id.* at 386–87. This “potential tort liability” was enough to implicate the Contribution Act.

31. *Sompo*, 522 F.3d at 785.

32. The court suggested, but did not decide, that the failure to refund contract claim was subject to the limits of the Montreal Convention should the airline raise this as an affirmative defense. *Narkiewicz-Laine v. Scandinavian Airlines*, 587 F. Supp. 2d 888, 890 (N.D. Ill. 2008) (“Plaintiff brought state-law breach of contract claims. Because the conditions and limits of the Montreal Convention are defenses to the state-law claims raised by plaintiff, they do not provide a basis for federal-question jurisdiction.”).

33. *Id.*

34. *Id.* The court did not recognize a distinction between the delay claim, which falls within the ambit of the Convention, and the contract claim, which did not.

C. *The Farm Inc. v. Private Jet Services Group, Inc.*³⁵

The result in *Narkiewicz-Laine* might be best understood in the context of *The Farm Inc. v. Private Jet Services Group, Inc.*, in which a New Hampshire federal court held that claims for nonperformance did not fall within the scope of the Montreal Convention.³⁶ Plaintiffs paid nearly \$150,000 to charter an aircraft from Private Jet for flights between Toronto and San Antonio and brought unjust enrichment and breach of contract claims after Private Jet canceled the flights. Private Jet removed the case, arguing that the Montreal Convention governed because the claims stemmed from international travel between Canada and the United States. The federal court disagreed, observing that plaintiffs' claims were for nonperformance of a contract, not for mere delay of a flight, and were "not within the preemptive scope of the Montreal Convention, whose only potentially relevant provision addresses delay claims rather than nonperformance claims."³⁷

D. *Pierre-Louis v. West Caribbean Airways*³⁸

In *Pierre-Louis v. West Caribbean Airways*, the Eleventh Circuit became the first circuit court to decide that the Montreal Convention does not preclude the application of the *forum non conveniens* doctrine.

On August 16, 2005, West Caribbean Airways Flight 708 crashed in the mountains of Venezuela while en route from Panama to Martinique.³⁹ All 152 passengers and 8 crew members died in the accident. The passengers, all citizens and residents of Martinique, brought claims under the Montreal Convention against West Caribbean, the operator of the aircraft; Newvac Corporation; and other defendants.⁴⁰ Newvac, an American company, had chartered the West Caribbean plane for round-trip flights from Martinique to Panama and had contracted with a travel agency to market them to Martinique residents. Newvac moved to dismiss the case on *forum non conveniens* grounds. The trial court agreed with Newvac that the Montreal Convention did not preclude its consideration of a motion to dismiss on *forum non conveniens* grounds and also agreed that France

35. No. 09-cv-165, 2009 WL 2497100 (D.N.H. Aug. 13, 2009).

36. *Id.* at *1. In this context, the suggestion of the court in *Narkiewicz-Laine* that plaintiff's contract claims were subject to the limitations of the Montreal Convention appears in error. *Narkiewicz-Laine*, 587 F. Supp. 2d at 890.

37. *The Farm*, 2009 WL 2497100, at *1.

38. 584 F.3d 1052 (11th Cir. 2009).

39. Martinique is a Department of France. *Id.* at 1055.

40. The crew were all citizens and residents of Colombia. They have brought product liability claims separately in the United States against the aircraft and engine manufacturers, among other defendants. *See id.*

was an available appropriate forum in which the claims would be more conveniently litigated.⁴¹

On appeal, plaintiffs argued that claims brought under the Montreal Convention, which designates a limited number of jurisdictions in which an action can be heard, cannot be dismissed on *forum non conveniens* grounds. Because the Convention does not mention the doctrine of *forum non conveniens*, or contemplate dismissal of an action that is properly brought in one of Article 33's enumerated jurisdictions, the plaintiffs argued the Convention should be read to bar *forum non conveniens* dismissal. To support their argument, plaintiffs relied on *Hosaka v. United Airlines*,⁴² a Ninth Circuit case interpreting a similar provision found in the Warsaw Convention.

In *Hosaka*, the Ninth Circuit found that the text of the Warsaw Convention was "susceptible to two equally plausible interpretations"—one that barred *forum non conveniens* dismissal and one that did not—as illustrated by *Milor v. British Airways, Plc.*,⁴³ a decision of the British Court of Appeals that concluded that the "natural meaning" of the Warsaw Convention precluded *forum non conveniens* dismissal, and *In re Air Crash off Long Island*, in which the Southern District of New York concluded that *forum non conveniens* is a "procedural tool available to U.S. courts."⁴⁴ The *Hosaka* plaintiffs urged the Ninth Circuit to adopt the textual analysis employed by the *Milor* court. Although it declined to do so, the Ninth Circuit concluded that the Convention text was ambiguous and turned to its legislative history and held that the doctrine of *forum non conveniens* was inconsistent with the twin purposes of the Warsaw Convention: uniformity of rules and balancing the interests of the air carriers and passengers.⁴⁵

The provision at issue in *Pierre-Louis* was Article 33(4) of the Montreal Convention, which provides that "[q]uestions of procedure shall be gov-

41. *Id.* at 1055–56. West Caribbean's motion to dismiss for lack of personal jurisdiction was held in abeyance while the district court decided Newvac's *forum non conveniens* motion. Newvac's separate argument that as a charter company that did not contract directly with passengers, it could not be liable as a "contracting carrier" was rejected by the district court. Because Newvac was a "contracting carrier," the case against Newvac could properly be brought in the United States, Newvac's domicile and principal place of business. The Eleventh Circuit did not consider Newvac's appeal on this issue.

42. 305 F.3d 989 (9th Cir. 2002).

43. *Milor v. British Airways, Plc.*, (1996) 3 W.L.R. 642 (Q.B. 1996).

44. *In re Air Crash Off Long Island New York* on July 17, 1996, 65 F. Supp. 2d 207 (S.D.N.Y. 1999).

45. *Hosaka*, 305 F.3d at 996–97. Application of the doctrine of *forum non conveniens* would "undermine the goal of uniformity" because the Convention contains a "code on jurisdiction" that "harmonises" different views on jurisdiction. *Id.* at 997 (citing *Milor*, 1996 Q.B. at 706). *Forum non conveniens* was inconsistent with the balance of interests struck by the Convention because it would "cancel out the plaintiff's choice" of jurisdiction from the limited jurisdictional options available. *Id.*

erned by the law of the court seized of the case.” Finding no ambiguity or limitation in the express language of Article 33(4), the Eleventh Circuit quickly rejected plaintiffs’ attempt to import the *Hosaka* analysis. The Eleventh Circuit held that “*forum non conveniens* is a ‘question of procedure’ under U.S. law and thus it clearly falls within the ambit of Article 33(4).”⁴⁶ Although it had not engaged in the same extensive analysis that the Ninth Circuit performed in *Hosaka*, the Eleventh Circuit further disagreed with plaintiffs’ suggestion that applying *forum non conveniens* to divest the United States of jurisdiction would undermine the purpose of the Convention’s jurisdictional provisions. It determined that “the purpose of the Convention is adequately safeguarded under traditional *forum non conveniens* analysis”⁴⁷ because a court can only exercise its discretion to apply *forum non conveniens* “so long as another Convention jurisdiction is available and can more conveniently adjudicate the claim.”⁴⁸ The court concluded by holding that the district court had not abused its discretion in dismissing the claims of these French plaintiffs in favor of litigating in Martinique.⁴⁹

E. *Yahya v. Yemenia–Yemen*⁵⁰

While a passenger on a Yemenia–Yemen Airways flight from Detroit, Michigan, to the Republic of Yemen, Said Mohsin Yahya advised the flight crew that he had a life-threatening condition and required emergency medical assistance. The flight crew rejected Yahya’s request to make an emergency landing in Saudi Arabia, indicating that he would have to wait until they reached their scheduled destination in Yemen ninety minutes later. Yahya died on the flight. Yahya’s son (Yahya) subsequently sued Yemenia–Yemen and Northwest Airlines, among other defendants, in the U.S. District Court for the Eastern District of Michigan.⁵¹

Northwest filed a motion to dismiss on the grounds that all of Yahya’s causes of action were state law claims preempted by the Montreal Convention.⁵² The court agreed, granting Northwest’s motion to dismiss. However, the court also granted Yahya leave to file an amended complaint “comporting with the Montreal Convention,”⁵³ meaning that Yahya could allege that the airline’s refusal to assist with a passenger’s medical emergency constituted a compensable “accident” under Article 17 of the Mon-

46. *Id.* at 1057–58.

47. *Id.* at 1058.

48. *Id.*

49. *Id.* at 1061–62.

50. No. 08-14789, 2009 WL 2711955 (E.D. Mich. Aug. 25, 2009).

51. *Id.* at *1–2.

52. *Id.* at *2.

53. *Id.* at *7.

treational Convention.⁵⁴ The court did so in the face of Northwest's objection that such amendment would be futile as the incident complained of was not a compensable "accident" under the Convention according to the Eleventh Circuit's opinion in *Krys v. Lufthansa*.⁵⁵ In *Krys*, the Eleventh Circuit had held that an airline crew's refusal to divert an aircraft to an emergency landing after a passenger suffered a heart attack was not an "accident" contemplated by the Montreal Convention.⁵⁶ The trial court, however, observed that the Eleventh Circuit's opinion in *Krys* had been issued several years prior to the U.S. Supreme Court's decision in *Olympic Airways v. Husain*,⁵⁷ which involved a flight crew member's refusal to move an asthmatic passenger away from the smoking section of an international flight, resulting in the passenger's death.⁵⁸ In *Husain*, the Court held that the "'accident' condition precedent to air carrier liability under Article 17 is satisfied when the carrier's unusual and unexpected refusal to assist a passenger is a link in a chain of causation resulting in a passenger's pre-existing medical condition being aggravated" and causing injury to the passenger.⁵⁹ Relying upon *Husain*, the court concluded that Yahya could have compensable claims under the Montreal Convention and, therefore, amendment of his complaint would not be futile.⁶⁰

II. FORUM NON CONVENIENS

Although not destined to be the holding for which it is famous, *Pierre-Louis v. West Caribbean Airways* is but another in a nearly unbroken line of decisions that mechanically apply *Piper Aircraft*⁶¹ and *Gulf Oil*⁶² and conclude that the claims of foreign plaintiffs arising out of foreign aviation accidents are more conveniently litigated in a foreign forum. In *In re Air Crash Near Peixoto de Azevedo, Brazil*, the Eastern District of New York dismissed on *forum non conveniens* grounds claims stemming from the so-called Gol crash—the 2006 midair collision of a private jet with a Boeing 737-800 operated by Gol Airlines over the Amazon that resulted in the death of all passengers on the flight.⁶³ The Eleventh Circuit affirmed the

54. *Id.* at *6.

55. 119 F.3d 1515 (11th Cir. 1997).

56. *Yahya v. Yemenia—Yemen*, No. 08-14789, 2009 WL 2711955, at *6 (E.D. Mich. Aug. 25, 2009) (citing *Krys*, 119 F.3d at 1524).

57. 540 U.S. 644 (2004).

58. *Yahya*, 2009 WL 2711955, at *5.

59. *Id.*

60. *Id.* at *7.

61. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

62. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

63. *In re Air Crash Near Peixoto de Azevedo, Brazil*, on Sept. 29, 2006, No. 07 MD 1844 (E.D.N.Y. July 2, 2008).

forum non conveniens dismissal of product liability claims brought against an aircraft manufacturer stemming from Italy's deadliest aviation disaster in *King v. Cessna Aircraft Co.*⁶⁴ In *Melgares v. Sikorsky Aircraft Corp.*,⁶⁵ the District of Connecticut determined that a product liability lawsuit arising from the fatal July 2006 crash of a Sikorsky helicopter near Tenerife, Spain, would be more conveniently litigated in Spain, and in *Fredricksson v. Sikorsky Aircraft Corp.*,⁶⁶ the same court concluded that product liability claims stemming from an accident in the territorial waters of Estonia would be more conveniently litigated in Finland, the country of residence of the plaintiffs and their decedents. In *Vorbiev v. McDonnell Douglas Helicopters*, a California federal court rejected plaintiffs' claims that Russia would not be an adequate forum in which to litigate claims stemming from the crash of a McDonnell Douglas helicopter in Russia.⁶⁷

Vivas v. Boeing Co. represents a departure from this litany of *forum non conveniens* dismissals issued or affirmed in the past year.⁶⁸ On August 23, 2005, an airplane flying en route from Lima, Peru, to Pucallpa, Peru, crashed while attempting to land at an airport in Pucallpa. Of the ninety-eight persons on board, only fifty-eight survived.⁶⁹ The aircraft was operated by TANS Peru, a state-owned Peruvian carrier that flies exclusively in Peru. The survivors of the crash and representatives of the decedents brought various product liability claims against Boeing and the parent company of the engine manufacturer, United Technologies Corp. in Cook County, Illinois, the location of Boeing's corporate headquarters since 2001.⁷⁰ In many of the actions, plaintiffs also sued TANS Peru for its negligence in operating and maintaining the aircraft and its engines in Peru. However, TANS Peru was dismissed from some actions as immune from suit in the United States and was subsequently voluntarily dismissed from the remaining actions. The defendants moved to dismiss the plaintiffs' consolidated actions on *forum non conveniens* grounds, arguing that Peru was the more convenient forum. After the trial court denied the motion, the defendants filed an interlocutory appeal of the trial court's order.⁷¹

Although the majority of the plaintiffs were Peruvian⁷² and the crash had occurred in Peru, the appellate court affirmed the trial court's denial of the

64. 562 F.3d 1374 (11th Cir. 2009).

65. 613 F. Supp. 2d 231 (D. Conn. 2009).

66. No. 3:08CV450, 2009 WL 2952225 (D. Conn. Sept. 2, 2009).

67. No. 3:08-cv-05539-JSW, 2009 WL 1765675 (N.D. Cal. June 18, 2008).

68. 911 N.E.2d 1057 (Ill. App. Ct. 2009).

69. *Id.* at 1059.

70. *Id.* at 1061.

71. *Id.* at 1067.

72. No decedents or personal injury plaintiffs were residents of Illinois.

motion to dismiss on *forum non conveniens* grounds. The court noted that although foreign plaintiffs are afforded less deference to their choice of forum, less deference did not mean no deference.⁷³ In addition, the court concluded that location of the accident was relatively unimportant in a product liability action, and that the majority of the sources of proof would be located in the United States where the defendants' offices and facilities were located.⁷⁴ The court also found that the availability of compulsory process for unwilling witnesses and the cost of obtaining the attendance of willing witnesses cut against each forum equally.⁷⁵ The court expressly rejected the defendants' contention that Peru had the greater interest in this litigation, observing that "product liability actions are not 'localized' cases; they are cases 'with international implications.'"⁷⁶

In reaching its decision, the court relied heavily on Boeing having its headquarters in Illinois, and the defendants' aggregate contacts with the United States, particularly Washington and Connecticut, and did not identify any evidence located in Illinois. The court observed that it was constrained by defendants' motions to consider "only whether Peru is a more convenient forum" and pointedly noted that had defendants sought "transfer" to Connecticut or Washington, they "may have received a different answer."⁷⁷

The approach taken by the Illinois appellate court is a departure, both in its result and in the underlying analysis, from the decisions of other courts in the past year that dismissed product liability cases against U.S. manufacturers that stemmed from foreign aviation accidents, which evaluate the convenience of the plaintiff's chosen forum against the convenience of litigating in an alternative forum.⁷⁸ Before *Vivas*, Illinois followed this approach and compared whether Illinois was an appropriate state to litigate the controversy when compared to the proposed alternative forum.⁷⁹

73. *Id.* at 1069.

74. *Id.* at 1069–70.

75. *Id.* at 1070.

76. *Id.* at 1071.

77. This observation seemingly disregards the remedy sought in *forum non conveniens* cases, in which defendants seek dismissal only. An Illinois state court is powerless to effect a transfer to another state or country. See *Buxton v. Wyland Galleries Haw.*, 275 Ill. App. 3d 980, 983 (1995).

78. For instance, in *Melgares and Fredricksson*, the District of Connecticut evaluated the convenience of the plaintiffs' chosen forum as compared to their home forum under the Second Circuit's test for evaluating the level of deference given to a foreign plaintiff's forum selection in *Iragorri v. United Techs. Corp.*, 274 F.3d 65 (2d. Cir. 2001).

79. *E.g.*, *Woodward v. Bridgestone/Firestone, Inc.*, 368 Ill. App. 3d 827, 832 (2006) ("the focus of the inquiry is whether Illinois is an appropriate state to litigate the controversy" compared to Australia); *Ellis v. AAR Parts Trading Inc.*, 357 Ill. App. 3d 723, 740 (2005) ("[w]hen addressing the issue of interstate *forum non conveniens*, the focus of the trial court is on whether Illinois is an appropriate state in which to litigate the controversy" compared to the Philippines).

In *Vivas*, the Illinois appellate court aggregated the cases' contacts with the United States and concluded that when evaluated as a whole, Peru was not a more convenient place to litigate the cases.

III. DEATH ON THE HIGH SEAS ACT

In *Alleman v. Omni Energy Services Corp.*,⁸⁰ the Fifth Circuit considered whether a helicopter accident on an oil platform in the Gulf of Mexico off the coast of Louisiana was governed by the Death on the High Seas Act.⁸¹

The helicopter owner, Omni Energy Services Corp., provided passenger ferry services for employees of W&T Offshore, the oil platform operator, pursuant to a contract that included an indemnity clause requiring that each company indemnify the other against claims made by its employees. While ferrying employees between W&T platforms, the Omni helicopter's main rotor struck the boat landing, which caused the helicopter to fall into the Gulf. Two passengers were injured in the accident and a third passenger died of a heart attack while being rescued. As a result of the accident, the personal representative of a fatally injured passenger sued Omni, and Omni, in turn, sought indemnification from W&T.⁸²

To resolve Omni's claim, the court had to decide whether the Outer Continental Shelf Lands Act⁸³ would apply to an indemnification claim stemming from an accident on an oil platform. OCSLA extends the laws and jurisdiction of the United States, and, to the extent not inconsistent with federal law, the laws of the adjacent state, to the seabed and artificial islands on the outer continental shelf, including offshore platforms.⁸⁴ The threshold choice of law question—applicability of OCSLA and, by extension, its incorporation of the law of the adjacent state (in this case, Louisiana)—would determine whether a claim existed because, if applicable, Louisiana law would invalidate the indemnity provisions of the contract.⁸⁵

The Fifth Circuit applied its three-part test to determine OCSLA's applicability: the controversy must arise in an area covered by OCSLA, federal maritime law must not apply on its own force, and state law must not be inconsistent with federal law.⁸⁶ Because the parties agreed that the accident occurred on the outer continental shelf and that Louisiana law

80. 580 F.3d 280 (5th Cir. 2009).

81. Death on the High Seas Act (DOHSA) bars the recovery of certain nonpecuniary damages such as loss of society. 46 U.S.C.A. § 30301 (2009).

82. *Alleman*, 580 F.3d at 282–83.

83. 43 U.S.C. § 1333 (2009).

84. *Id.* § 1333(a)(1).

85. See Louisiana Oilfield Indemnity Act, LA. REV. STAT. § 9:2780. The parties did not dispute the effect of LOIA, only its applicability. See *Alleman*, 580 F.3d at 283.

86. *Union Tex. Petroleum Corp. v. PLT Eng'g, Inc.*, 895 F.2d 1043, 1047 (5th Cir. 1990).

was not inconsistent with federal law, the sole issue presented to the Fifth Circuit was whether maritime law applied to the Omni contract.

The Fifth Circuit observed that “[d]etermining whether a contract is maritime is a well-trod but not altogether clear area of law.”⁸⁷ Despite the contract’s choice of law provision specifically providing for the application of maritime law, the court looked to the “nature and subject of the contract” to consider whether it has “reference to maritime service or maritime transactions.”⁸⁸ The court noted that the applicability of admiralty law to a tort case differs from the applicability of admiralty law to a contract case, recognizing that an action in tort would have required the application of maritime law.⁸⁹ In this case, the contract for aviation services was not maritime in nature because “helicopters and other aircraft are not generally governed by maritime law in their normal operations.”⁹⁰ The court also found that because the crash “actually occurred” on the platform, the limits of the Death on the High Seas Act did not apply to the passenger’s tort claims.⁹¹

IV. FOREIGN SOVEREIGN IMMUNITIES ACT

In *Butler v. Sukhoi Co.*,⁹² the Eleventh Circuit considered whether claims brought against agencies owned and operated by the Russian Federation should be barred by the Foreign Sovereign Immunities Act or whether plaintiffs were entitled to discovery regarding their theory that the Russian-owned agencies were the alter egos of Sukhoi Design.⁹³ Sukhoi Design, a Russian corporation, had already been found liable pursuant to a default judgment for injuries incurred when an SU-29 crashed because of defects in the aircraft. Unable to collect on this judgment, the Butlers filed the current suit in August 2007 and named the alleged alter egos of Sukhoi Design.⁹⁴ In reversing the district court’s order allowing discovery into the jurisdictional issues, the Eleventh Circuit agreed with Sukhoi Design that “alter ego conduct” is “insufficient to divest appellants of their sovereign

87. *Alleman v. Omni Energy Servs. Corp.*, 580 F.3d 280, 284 (5th Cir. 2009).

88. *Id.*

89. *Id.* at 284–85. For instance in *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 219 (1986), the Supreme Court held that “admiralty jurisdiction is properly invoked” in a case involving “ferrying of passengers from an ‘island,’ albeit an artificial one, to the shore.” On the other hand, “maritime contract law applies based on the nature and character of the contract, rather than looking to where it occurred.” *Alleman*, 580 F.3d at 285.

90. *Alleman*, 580 F.3d at 285.

91. *Id.* at 286.

92. 579 F.3d 1307 (11th Cir. 2009).

93. *Id.* at 1310.

94. *Id.*

immunity because, even if substantiated through discovery, it does not bring the claim within one of the statutorily-enumerated exceptions either to pre-judgment or post-judgment immunity under the FSIA.⁹⁵

V. PREEMPTION

In 1988, the Supreme Court concluded in *Boyle v. United Technologies Corp.*⁹⁶ that “state law which holds government contractors liable for design defects in military equipment does in some circumstances present a ‘significant conflict’ with federal policy and must be displaced,” and held that the federal government’s entitlement to sovereign immunity could be extended to private entities working on behalf of the government to bar such state law claims.⁹⁷ The Court went on to describe one of those circumstances in which a private contractor could assert such immunity—a circumstance that has given rise to what is known as the “military contractor defense.”⁹⁸ The military contractor defense may be asserted when the following conditions are met: “(1) the United States approved reasonably precise specifications for the equipment alleged to be defective; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not the United States.”⁹⁹ The U.S. Supreme Court has held that, when these requirements are met, a government contractor cannot be held liable under state law.¹⁰⁰

Several years after *Boyle*, the Ninth Circuit considered whether to extend such sovereign immunity-based preemption to protect private government contractors sued under state law for design defects in military equipment under circumstances other than those encompassed by the military contractor defense established in *Boyle*.¹⁰¹ In *Koobi v. United States*, heirs of the deceased passengers and crew of an Iranian civilian aircraft shot down by a U.S. warship sued the private contractor for design defects in the weapons system that resulted in the misidentification of a civilian Airbus as a hostile F-14 military jet.¹⁰² Relying on the Supreme Court’s analysis in *Boyle*, the Ninth Circuit concluded that the Iranian plaintiffs’ claims were barred

95. *Id.* at 1313.

96. 487 U.S. 500 (1988).

97. *Id.* at 512.

98. *Gray v. Lockheed Aeronautical Sys. Co.*, 125 F.3d 1371, 1373 (11th Cir. 1997).

99. *Boyle*, 487 U.S. at 512.

100. *Id.*

101. *Getz v. Boeing Co.*, No. C 07-6396, 2009 WL 636039, at *3 (N.D. Cal. Mar. 10, 2009).

102. 976 F.2d 1328, 1330–31 (9th Cir. 1992).

by the “combatant activities exception” to the Federal Tort Claims Act.¹⁰³ This exception provides that the government does not waive its sovereign immunity from suits regarding “any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.”¹⁰⁴ The *Koobi* court noted that “one purpose of the combatant activities exception is to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action” and that it was only logical that such immunity from liability be extended to those who supply the weapons used in such authorized military action.¹⁰⁵

In cases of note over the last year, the Eleventh Circuit determined whether post-design, post-production evidence can be used to satisfy the requirements of the military contractor defense established in *Boyle*, while a California federal court considered whether to extend the Ninth Circuit’s analysis in *Koobi* to all military contractors.

A. *Brinson v. Raytheon Co.*¹⁰⁶

After a serviceman died in the crash of a training aircraft, his widow brought suit against the manufacturer, alleging defective design of the aircraft’s rudder trim system.¹⁰⁷ Citing *Boyle*, Raytheon filed a successful motion for summary judgment on the grounds that the “military contractor defense” preempted Brinson’s state law tort claims.¹⁰⁸

On appeal, Brinson contended that Raytheon had failed to produce sufficient evidence to establish that it had met the first two prongs of the *Boyle* test—that is, that the United States had approved reasonably precise specifications for the equipment manufactured by Raytheon and that the equipment manufactured by Raytheon actually conformed to those specifications.¹⁰⁹ Brinson argued that the trial court had erred in considering post-design, post-production evidence submitted by Raytheon to establish its entitlement to assert the military contractor defense.¹¹⁰

Apparently, several months before the accident, the Air Force had issued an order requiring the inspection and replacement of the aircraft’s rudder trim pushrods.¹¹¹ Together with other evidence of the Air Force’s participation

103. *Id.* at 1336.

104. 28 U.S.C. § 2860(j).

105. *Koobi*, 976 F.2d at 1336–37.

106. 571 F.3d 1348 (11th Cir. 2009).

107. *Id.* at 1349.

108. *Id.* at 1350.

109. *Id.* at 1351.

110. *Id.* at 1352.

111. *Id.*

in the design of the aircraft, the trial court determined that the Air Force's decision to order the replacement of new pushrods reflected "an informed, discretionary decision on how to address a known problem,"¹¹² which led the court to conclude that the government had, in fact, approved reasonably precise specifications for the allegedly defective rudder trim system.¹¹³

Deciding what it termed as "an issue of first impression," the Eleventh Circuit adopted the trial court's analysis and affirmed its ruling. In doing so, the Eleventh Circuit joined the Fourth Circuit in *Dowd v. Textron*¹¹⁴ and the Second Circuit in *Lewis v. Babcock Industries, Inc.*¹¹⁵ in concluding that post-design evidence is relevant to determining whether a government contractor is entitled to assert the government or military contractor defense under *Boyle*.¹¹⁶

B. *Getz v. Boeing Co.*¹¹⁷

The survivors and heirs of military personnel killed in the crash of a U.S. military helicopter in southeastern Afghanistan sued the companies that designed, assembled, manufactured, inspected, tested, marketed, and sold the helicopter, its component parts, and related software and hardware.¹¹⁸ The defendants filed a motion for summary judgment, arguing that Getz's claims were barred by the "combatant activities exception" set forth in *Koobi* because "*Koobi* stands for the broad proposition that the combatant activities exception provides immunity to all government contractors manufacturing military equipment."¹¹⁹

The trial court rejected this argument, pointing out that the plaintiffs in *Koobi* had been Iranian passengers on a civilian aircraft mistaken by a U.S. naval cruiser for an Iranian F-14 during the Iran-Iraq war after the United States had announced it would be protecting Kuwaiti ships from attacks by Iran.¹²⁰ In reaching its decision, the trial court noted, the *Koobi* court had focused on the fact that "one purpose of the combatant activities exception is to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action."¹²¹ In contrast, the trial court observed, those injured in the

112. *Id.* at 1356.

113. *Id.*

114. 792 F.2d 409 (4th Cir. 1986).

115. 985 F.2d 83 (2d Cir. 1993).

116. *Brinson*, 571 F.3d at 1352-54.

117. No. C 07-6396, 2009 WL 636039 (N.D. Cal. Mar. 10, 2009).

118. *Id.* at *1.

119. *Id.* at *3-4.

120. *Getz*, 2009 WL 636039, at *3.

121. *Id.* at *4 (quoting *Koobi v. United States*, 976 F.2d 1328, 1337 (9th Cir.)).

case before it—that is, those to whom a duty of reasonable care would be owed—were members of the U.S. military; and, therefore, the principles underlying the combatant activities exception did not apply.

In denying defendants' motion for summary judgment based on the combatant activities exception, the trial court addressed contrary federal court decisions cited by the defendants. First, the court addressed the ruling of a sister California federal court in *Bentzlin v. Hughes Aircraft Co.*,¹²² which had concluded that a "government contractor who manufactures the weapons of war cannot be liable for deaths of American soldiers arising from combat activity."¹²³ The trial court rejected the *Bentzlin* court's analysis as having expanded the "[*Koobi*] doctrine beyond the stated holding."¹²⁴ The court also dismissed a Tennessee federal court's decision in *Flanigan v. Westwind Technologies, Inc.*,¹²⁵ which held that the claims of an Apache helicopter pilot's widow were barred by the combatant activities exception, as having no precedential value and utterly lacking any substantive analysis.¹²⁶

VI. GENERAL AVIATION REVITALIZATION ACT (GARA)

It has been sixteen years since Congress passed the General Aviation Revitalization Act of 1994 ("GARA"), which created an eighteen-year statute of repose for lawsuits against manufacturers of general aviation aircraft and component parts.¹²⁷ GARA essentially provides immunity to general aviation aircraft manufacturers from liability for manufacturing and/or design defects associated with aircraft that are more than eighteen years old. GARA's statute of repose can be reset by the introduction of a new "component, system, subassembly, or other part" as a replacement in or addition to the aircraft when that new component, system, subassembly or other part is alleged to have caused the death, injury, or damage complained of.¹²⁸ This resetting of the GARA statute of repose is often referred to as GARA's "rolling feature" or provision.¹²⁹

Over the course of the last year, several courts have addressed the issue of whether a manufacturer's service bulletins and other mailings are "other

122. 833 F. Supp. 1486 (C.D. Cal. 1993).

123. *Id.* at 1494.

124. *Getz v. Boeing Co.*, No. C 07-6396, 2009 WL 636039, at *5 (N.D. Cal. Mar. 10, 2009).

125. 648 F. Supp. 2d 994 (W.D. Tenn. 2008).

126. *Getz*, 2009 WL 636039, at *6.

127. 49 U.S.C. § 40101 (2000).

128. *Id.* § 40103(2)(a).

129. *See, e.g.*, *Caldwell v. Enstrom Helicopter Corp.*, 230 F.3d 1155, 1156 (9th Cir. 2000).

parts” for purposes of triggering GARA’s rolling statute of repose. In doing so, these courts have rejected efforts to extend the Ninth Circuit’s analysis in *Caldwell v. Enstrom Helicopter Corp.*,¹³⁰ in which that court held that a revised flight manual was a new “part” of the aircraft for purposes of GARA’s rolling provision,¹³¹ to include service bulletins and other mailings from a manufacturer. GARA defendants have stymied these attempts to expand the *Caldwell* holding to such materials by citing to the Fourth Circuit’s opinion in *Colgan Air Inc. v. Raytheon Aircraft Co.*,¹³² which painstakingly distinguished an aircraft’s maintenance manuals from the flight manuals discussed in *Caldwell* in concluding that a maintenance manual was *not* an integrated part of the aircraft.¹³³

Interestingly, GARA was not at issue in *Colgan Air* and it was not the plaintiff but rather the defendant aircraft manufacturer who argued that the allegedly defective maintenance manual ought to be treated as an integrated part of the aircraft, so as to bar the plaintiff’s claims against it under the aircraft’s warranty.¹³⁴ The Fourth Circuit rejected this argument, however, and permitted the plaintiff to proceed against the manufacturer.¹³⁵

A. *Brewer v. Parker Hannifin Inc.*¹³⁶

The personal representatives of the pilot and passenger killed when the vacuum pump on the accident aircraft failed brought product liability claims against Parker Hannifin, Inc., the manufacturer of the vacuum pump. Because the vacuum pump left Parker’s facility in 1984, GARA’s statute of repose was implicated. Brewer argued, however, that manuals and mailings distributed by Parker within the eighteen-year statute of repose triggered GARA’s rolling provision because they constituted new “parts” of the aircraft under *Caldwell*.

The Ninth Circuit acknowledged that, under the *Caldwell* analysis, “manuals and mailings can generally be considered a ‘part’ for the purposes of [GARA].” It went on to note, however, that the manuals and mailings at issue in this case did not satisfy GARA’s other requirement, which is that these “parts” must constitute “an integral part of the general aviation aircraft product” that is “alleged to have caused the death, injury, or damage.”¹³⁷ The court pointed out that the allegedly defective pump had

130. *Id.* at 1155.

131. *Id.* at 1157.

132. 507 F.3d 270 (4th Cir. 2007).

133. *Id.* at 280.

134. *Id.* at 274.

135. *Id.*

136. 298 Fed. App’x 582 (9th Cir. 2008).

137. *Id.* at 583.

been overhauled by another entity, using “cannibalized sub-parts” from a different manufacturer. In other words, the pump had been so substantially altered since it left Parker’s facility that it could no longer be considered a “Parker” pump. Thus, even if the manuals and mailings could be considered “parts” capable of restarting GARA’s rolling provision, they were not “parts” of the pump that actually caused Brewer’s damages.¹³⁸

B. *Burton v. Twin Commander Aircraft, LLC*¹³⁹

A twin-engine turbo prop airplane crashed after the rudder tip and rudder assembly came loose, causing the pilot to lose control of the aircraft and killing all seven persons on board.¹⁴⁰ The personal representative of the decedents’ estates sued the current type certificate holder for the aircraft, Twin Commander Aircraft, LLC, alleging various product liability and failure to warn claims.¹⁴¹ Twin Commander argued that GARA barred Burton’s claims because the aircraft had been delivered in 1981—or more than eighteen years before the accident.

Burton contended that the issuance of a service bulletin in 2003 requiring a visual inspection of the rudder cap, rudder rib, and forward rudder spar triggered GARA’s rolling provision. Relying on the Ninth Circuit’s holding in *Caldwell*, Burton argued that the service bulletin should be treated as “part” of the aircraft because a service bulletin is considered to be part of an aircraft’s maintenance manual and a maintenance manual is similar to the flight manual discussed in *Caldwell*.¹⁴² Twin Commander urged the Washington appellate court to follow the Fourth Circuit’s analysis in *Colgan Air, Inc. v. Raytheon Aircraft Co.*¹⁴³ and hold that a maintenance manual “is not sufficiently similar to a flight manual” to be considered an integrated part of an aircraft and, therefore, is not capable of triggering GARA’s rolling provision.¹⁴⁴ Adopting the reasoning of *Colgan Air*, the court declared that, because a maintenance manual is not necessary to operate the aircraft, does not need to be on board the aircraft during flight, and can apply to more than one model of aircraft, it “is not a ‘part’ of the aircraft for purposes of the rolling provision under GARA.”¹⁴⁵

138. *Id.* at 582–83.

139. 221 P.3d 290 (Wash. Ct. App. 2009).

140. *Id.* at 291.

141. As type certificate holder, Twin Commander was “required to provide ongoing support to the accident aircraft and report information to the FAA that could result in a risk to flight safety.” *Id.* at 292.

142. *Id.* at 295–96.

143. 507 F.3d 270 (4th Cir. 2007).

144. *Burton*, 221 P.3d at 296.

145. *Id.*

In an interesting twist, the court remanded the case to the trial court for a determination of whether Twin Commander qualified as a manufacturer of the subject aircraft entitling it to assert GARA's statute of repose because, although Twin Commander was the type certificate holder for the aircraft, it had never actually *manufactured* the model of aircraft that was involved in the fatal accident. Thus, the *Burton* court held that Twin Commander had failed to establish that it was a "successor manufacturer" entitled to GARA protection.¹⁴⁶

C. *Moyer v. Teledyne Continental Motors Inc.*¹⁴⁷

On January 26, 2003, Ronald and Judy Moyer were killed when their Beech V35B single-engine aircraft suffered a partial loss of engine power and crashed. The surviving adult children subsequently brought claims for negligence, breach of warranty, and strict liability against the engine manufacturer, engine repair company, and company that provided the replacement crankcase.¹⁴⁸

The trial court granted summary judgment in favor of the engine manufacturer on the grounds that GARA's eighteen-year statute of repose barred Moyer's claims as the allegedly defective engine crankcase had been delivered to the original owner twenty-one years prior to the accident. Moyer appealed, arguing that the statute of repose did not begin to run until the manufacturer's issuance of a service bulletin in 1990 that pertained to the allegedly defective engine. Specifically, Moyer contended that the manufacturer's instructions for continuing airworthiness, which included "crankcase inspection criteria," constituted a replacement part under GARA.¹⁴⁹ Relying principally on the *Caldwell* holding that flight manuals could be considered a "new part" or a "defective system" of an aircraft for purposes of GARA's rolling statute of repose, Moyer argued that the service bulletin was essential to the operation of the aircraft and, therefore, tantamount to an instruction or flight manual.¹⁵⁰

The trial court rejected Moyer's argument and granted the manufacturer's motion for summary judgment for three reasons, which were adopted by the appellate court. First, the trial court observed that Moyer had failed to cite any authority from Pennsylvania state courts or the Third Circuit to support the proposition that a service bulletin is equivalent to a flight manual. Second, the trial court opined that "if the statute of repose [were]

146. *Id.* at 297-98.

147. 979 A.2d 336 (Pa. Super. Ct. 2009).

148. *Id.* at 339-40.

149. *Id.* at 344.

150. *Id.*

triggered every time a service bulletin was issued, the intent of GARA would be eviscerated.”¹⁵¹ Third and finally, the trial court distinguished *Caldwell* from the case before it, noting that, in *Caldwell*, the manual itself was alleged to be defective, thereby satisfying the causation element in GARA. Moyer, on the other hand, was not claiming that the service bulletin itself had failed or was defective.¹⁵²

In affirming summary judgment against Moyer, the appellate court cited to the Washington appellate court decision in *Burton v. Twin Commander Aircraft, LLC*, discussed *supra*, in support of its analysis. Quoting liberally from *Burton*, the Pennsylvania appellate court pointed out that a flight manual was distinguishable from a service bulletin or maintenance manual because a flight manual was required by FAA regulations to be kept on board the aircraft and could thus be deemed a part of the aircraft, whereas a service bulletin or maintenance manual was not required to be kept on the aircraft during operation and could be used on and apply to different models of aircraft.¹⁵³ Curiously, although the unpublished *Burton* decision relied heavily on the reasoning in the Fourth Circuit’s published opinion in *Colgan Air*, the *Moyer* court, which lies in the neighboring Third Circuit, made no mention of *Colgan Air* at all.

VII. FEDERAL TORT CLAIMS ACT (FTCA)

A. *United States Aviation Underwriters, Inc.* (USAU) v. *United States*¹⁵⁴

Following the crash of a twin-engine aircraft after encountering severe clear air turbulence, the aircraft’s insurers sued the United States under the Federal Tort Claims Act for damage to the aircraft. The insurers contended that the Aviation Weather Center (“AWC”), which is a meteorological watch office of the National Weather Service, has a nondiscretionary duty to issue a Significant Meteorological Information warning whenever sudden severe clear air turbulence is occurring or expected to occur, and the AWC had failed to issue such a warning to the pilot of the accident aircraft.¹⁵⁵ In support of their claim, the insurers relied on National Weather Service Instruction 10-811, which requires that the Aviation Weather Center issue a Significant Meteorological Information warning once meteorologists determine that severe clear air turbulence is occurring or is likely to occur.¹⁵⁶

151. *Id.*

152. *Id.*

153. *Id.* at 346.

154. 562 F.3d 1297 (11th Cir. 2009).

155. *Id.* at 1298–99.

156. *Id.* at 1299.

The United States conceded that the Aviation Weather Center has no discretion to decline to provide a Significant Meteorological Information warning once the National Weather Service forecasts moderate or severe turbulence. Instead, it contended that the underlying act of forecasting clear air turbulence is discretionary conduct that is exempted from claims under the FTCA. The FTCA excludes “[a]ny claim . . . based on the exercise or performance or the failure to exercise or perform a discretionary function or duty. . . .”¹⁵⁷ When successfully invoked, federal courts are divested of subject matter jurisdiction over the claim against the United States and the claim must be dismissed.¹⁵⁸

In its review, the Eleventh Circuit noted that, in *United States v. Gaubert*,¹⁵⁹ the Supreme Court had established a two-part test to be used in determining whether the discretionary function exception to the FTCA applies to a particular case.¹⁶⁰ First, a court must determine whether the alleged conduct is “discretionary in nature” or “involve[s] an element of judgment or choice.”¹⁶¹ Then, the court must evaluate whether the judgment or choice at issue is of the type that the discretionary function exception was intended to shield from liability—that is, whether it implicates policy concerns.¹⁶²

Applying the two-part test set forth in *Gaubert* and relying on its earlier holding in *Monzon v. United States*,¹⁶³ in which it had held that the forecasting of a riptide event by the National Weather Service was discretionary conduct immune from an FTCA claim, the Eleventh Circuit determined that the discretionary function exception barred the insurers’ FTCA claim. First, the court found that forecasting weather—and specifically distinguishing between moderate and severe clear air turbulence—requires the meteorologist to exercise judgment by weighing a number of factors and evaluating a range of available data.¹⁶⁴ Second, quoting the First Circuit’s opinion in *Brown v. United States*,¹⁶⁵ the court pointed out that “[a] weather forecast is a classic example of a prediction of indeterminate reliability, and a place peculiarly open to debatable decisions, including the desirable degree of investment of government funds and other resources.”¹⁶⁶

157. 28 U.S.C. § 2680(a).

158. *United States v. Gaubert*, 499 U.S. 315, 334 (1991).

159. *Id.*

160. *USAU v. United States*, 562 F.3d 1297, 1299 (11th Cir. 2009).

161. *Id.*

162. *Id.*

163. 253 F.3d 567 (11th Cir. 2001).

164. *USAU*, 562 F.3d at 1300.

165. 790 F.2d 199 (1st Cir. 1986).

166. *USAU v. United States*, 562 F.3d 1297, 1300 (11th Cir. 2009).

The Eleventh Circuit concluded that such conduct is precisely the type of policy decision that the discretionary function exception is intended to shield from liability under the FTCA.¹⁶⁷

B. *Hertz v. United States*¹⁶⁸

On May 31, 2004, Roger Hertz was a passenger on board an experimental airplane when he was killed after the airplane flew into a thunderstorm and crashed. The National Transportation Safety Board (NTSB) investigated the crash. On June 25, 2004, Hertz's widow was informed by the NTSB's investigator-in-charge that "the NTSB believed that the cause of the accident was related to air traffic controller negligence."¹⁶⁹ The Federal Aviation Administration (FAA) was the entity responsible for air traffic control of the aircraft.¹⁷⁰

Although Hertz promptly retained counsel to pursue claims against any entities responsible for her husband's death, her counsel did not file suit against the FAA until June 9, 2006—or more than two years after the crash, but less than two years after the NTSB informed Hertz that the FAA's negligence was responsible for her husband's death.¹⁷¹ The United States filed a successful motion to dismiss Hertz's claim as time-barred under the FTCA, which provides that a claim against a federal agency must be brought within two years after such claim accrues.¹⁷²

Citing the Supreme Court's opinion in *United States v. Kubrick*,¹⁷³ the Sixth Circuit explained that the accrual of a claim under the FTCA does not "await awareness by the plaintiff that his injury has been negligently inflicted."¹⁷⁴ Under *Kubrick*, the Sixth Circuit noted, a claim accrues when a plaintiff possesses enough information with respect to her injury that "had she sought independent legal and expert advice at that point, she should have been able to determine in the two-year period whether to file [her] claim."¹⁷⁵ The *Kubrick* rule, the court observed, is not a "discovery" rule but rather an "inquiry-notice" rule. The court went on to point out that, with plane crashes in particular, the *mere fact of the event* should be typically enough to put the plaintiff on "inquiry-notice" of her claim. Finally, if the record disclosed that the plaintiff "should have been able to determine in

167. *Id.*

168. 560 F.3d 616 (6th Cir. 2009).

169. *Id.* at 617.

170. *Id.*

171. *Id.* at 617–18.

172. *Id.* at 618 (citing 28 U.S.C. § 2401(b)).

173. 444 U.S. 111 (1979).

174. *Hertz v. United States*, 560 F.3d 616, 618 (6th Cir. 2009).

175. *Id.*

the two-year period whether to file [a] claim,” then, the court concluded, there was no reason to depart from the general rule that accrual of a claim under the FTCA occurs upon injury.¹⁷⁶

VIII. PERSONAL JURISDICTION

A. *Dos Santos v. Bell Helicopter Textron, Inc.*¹⁷⁷

After a fatal helicopter crash in Brazil, the widow of the pilot (“Dos Santos”) brought a products liability action against the helicopter manufacturer (“Bell”).¹⁷⁸ Bell subsequently filed a third-party complaint against Helisul Taxi Aero, LTDA (“Helisul”), which had purchased the accident helicopter from Bell through a lease-purchase agreement, based on an indemnity provision contained in that agreement.¹⁷⁹ Helisul filed a motion to dismiss for lack of personal jurisdiction.¹⁸⁰

Bell argued that Helisul had acquiesced to jurisdiction in the Northern District of Texas pursuant to a forum selection clause contained in the lease-purchase agreement. Helisul responded with two arguments. First, it argued that Bell should be judicially estopped from arguing that the court had personal jurisdiction over Helisul because this position was inconsistent with a position that Bell had adopted in prior similar litigation. In *Da Rocha v. Bell Helicopter Textron, Inc.*,¹⁸¹ another case in which both Helisul and Bell were defendants, Bell had argued that dismissal of the plaintiff’s cause of action based on *forum non conveniens* was appropriate because “personal jurisdiction [over Helisul] does not exist in the United States.”¹⁸² Second and perhaps more importantly, Helisul contended that, since Bell was not actually a party to the lease-purchase agreement, it was not entitled to enforce the forum-selection clause.¹⁸³

The trial court disagreed. As to Helisul’s judicial estoppel argument, the court observed that judicial estoppel is an equitable doctrine that may be invoked or rejected at a court’s discretion. Here, the court had exercised that discretion in declining to estop Bell from arguing that personal jurisdiction existed over Helisul.¹⁸⁴ Regarding Helisul’s contention that Bell was not entitled to enforce the lease-purchase agreement’s forum-selection

176. *Id.* at 619.

177. 651 F. Supp. 2d 550 (N.D. Tex. 2009).

178. *Id.* at 551.

179. *Id.* at 551–52.

180. *Id.*

181. 451 F. Supp. 2d 1318 (S.D. Fla. 2006).

182. *Dos Santos*, 651 F. Supp. 2d at 552.

183. *Id.*

184. *Id.* at 553–54.

clause, the court found that, although a nonsignatory of the agreement, Bell was authorized to enforce the forum-selection clause under the “close relationship” standard or third-party beneficiary principles because Helisul knew that the object of the agreement was a Bell helicopter and that Bell was involved with and would benefit from the transaction.¹⁸⁵

In any event, the court pointed out, it had an independent basis for asserting specific personal jurisdiction over Helisul. To establish specific jurisdiction over a nonresident defendant, the court noted, a party’s claims against the defendant must “arise out of or relate” to the defendant’s purposeful contacts with or availment of the forum.¹⁸⁶ In the court’s view, the terms of the lease-purchase agreement and evidence that Helisul intended to continue to purchase helicopters from Bell in similar such lease-purchase agreements—agreements under which Bell would provide training of Helisul pilots and mechanics in Fort Worth, financing, and ongoing customer service—served to satisfy the Supreme Court’s “purposeful availment” requirement.¹⁸⁷ Meanwhile Bell’s allegation that Helisul had been negligent in its “ownership, inspection, maintenance, and operation” of the accident helicopter fulfilled the condition that the claims being asserted against the nonresident defendant relate to the contacts constituting the defendant’s purposeful availment of the forum.¹⁸⁸

B. *Getz v. Boeing Co.*¹⁸⁹

This case arose from the crash of a U.S. military helicopter engaged in a combat mission in southeastern Afghanistan after the pilots experienced a sudden, unexpected loss of power. Plaintiffs (“Getz”) were thirty-three individuals who were injured in the crash or the heirs of individuals killed in the crash. Suit was filed in California state court because two of the Getz plaintiffs were California residents.¹⁹⁰ Defendant Boeing removed the case to federal court under 28 U.S.C. § 1442(a)(1), or the federal officer removal statute.¹⁹¹

ATEC, a resident and citizen of the United Kingdom, was among the defendants sued by the plaintiffs.¹⁹² ATEC subsequently filed a motion to dismiss for lack of personal jurisdiction. The Getz plaintiffs argued that the court had specific jurisdiction over ATEC but were unable to adduce

185. *Id.* at 558.

186. *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

187. *Id.* at 559–60.

188. *Id.* at 561.

189. No. C 07–6396, 2009 WL 636086 (N.D. Cal. Mar. 10, 2009).

190. *Id.* at *1.

191. *Id.* at *2.

192. *Id.* at *1.

any facts to support finding the “minimum contacts” necessary to assert specific jurisdiction over a party.¹⁹³ Thus, in the alternative, the plaintiffs argued that the court could assert personal jurisdiction over ATEC under Federal Rule of Civil Procedure 4(k)(2).

Federal Rule of Civil Procedure 4(k)(2) authorizes the exercise of federal jurisdiction over a foreign defendant when three conditions are met: (1) the cause of action must arise under federal law; (2) the defendant must not be subject to the personal jurisdiction of any state court of general jurisdiction; and (3) the federal court’s exercise of personal jurisdiction must comport with due process.¹⁹⁴ Although their claims were based on California state law, the Getz plaintiffs argued that their causes of action arose under federal law because the defendants had removed their action to federal court based on the assertion of an affirmative federal defense—Boeing was acting in its capacity as a “federal officer,” thereby creating subject-matter jurisdiction.¹⁹⁵

Citing the “well-pleaded complaint rule,” the court rejected this argument, noting that “federal jurisdiction exists only when a federal question is presented on the face of the plaintiff’s properly pleaded complaint. . . . Actual or anticipated federal defenses are not part of [the Getz plaintiffs’] well-pleaded complaint and do not create a federal question.”¹⁹⁶ The court concluded that, because the plaintiffs’ cause of action against ATEC did not arise under federal law, Federal Rule of Civil Procedure 4(k)(2) did not authorize the exercise of jurisdiction over ATEC.¹⁹⁷

IX. ECONOMIC LOSS RULE

A. *Kalitta Air, LLC v. Central Texas Airborne Systems, Inc.*¹⁹⁸

Kalitta Air, LLC (“Kalitta”) contracted with defendant Central Texas Airborne Systems, Inc. (“CTAS”) to convert a Boeing 747-100 aircraft from a passenger to a freighter configuration.¹⁹⁹ The conversions were performed using Supplemental Type Certificates (STCs) approved by the FAA.²⁰⁰ Several years later, these STCs were reviewed by the FAA, which issued an Airworthiness Directive (AD) that reduced the permissible payload of the modified aircraft from 220,000 to 120,000 pounds.²⁰¹ Kalitta complained

193. *Id.* at *2–3.

194. *Id.* at *3.

195. *Id.*

196. *Id.* at *3–4.

197. *Id.* at *4.

198. No. C 96-2494, 2009 WL 1636036 (N.D. Cal. June 8, 2009).

199. *Id.* at *1.

200. *Id.*

201. *Id.* at *2.

that the AD effectively grounded the aircraft and sued CTAS for negligent misrepresentation and general negligence in performing the conversions.²⁰² CTAS moved for summary judgment on the plaintiff's negligence claim on the grounds that it was barred by the economic loss rule.²⁰³

Relying upon the Ninth Circuit's previous ruling that, in the absence of personal injury, physical damage to other property, a "special relationship" between the parties, or some other common law exception to the rule, recovery for purely economic loss is barred in negligence actions, the trial court proceeded to evaluate whether the "special relationship" doctrine set forth in the California supreme court decision *J'Aire Corp. v. Gregory*²⁰⁴ applied to Kalitta's negligence claim.²⁰⁵

Under *J'Aire*, a court must examine the following six factors in determining whether a special relationship exists between the plaintiff and defendant: (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm.²⁰⁶

The trial court found that all six factors favored the existence of a special relationship between Kalitta and CTAS. First, Kalitta produced sufficient evidence that the modifications at issue had involved "particularized workmanship for an individual purchaser"—in this case, Kalitta.²⁰⁷ Second, Kalitta showed that the STCs were based on data that CTAS should have known would lead to structural problems and that should have indicated to CTAS that the modifications were deficient. Therefore, Kalitta's substantial loss of income from the improperly modified aircraft was a foreseeable result of CTAS's conduct.²⁰⁸ Third, Kalitta demonstrated that its business losses exceeded \$235 million in addition to the \$20 million lost as a result of being forced to scrap the modified aircraft. Fourth, CTAS's failure to test the modification design led it to omit reinforcing doublers in the aircraft's fuselage that compromised the structural integrity of the aircraft,

202. *Id.*

203. *Id.* at *3. CTAS also had moved for summary judgment on the plaintiff's negligent misrepresentation claim on the ground that it was barred by the economic loss rule, but the Ninth Circuit ruled that the economic loss doctrine did not apply to negligent misrepresentation claims. *Id.* at *2-3.

204. 24 Cal. 3d 799 (Cal. 1979).

205. *Kalitta Air, LLC v. Cent. Texas Airborne Sys., Inc.*, No. C 96-2404, 2009 WL 1636036, at *5 (N.D. Cal. June 8, 2009).

206. *Id.*

207. *Id.* at *7.

208. *Id.*

which caused the FAA to ground Kalitta's modified aircraft.²⁰⁹ Fifth, the court found evidence of moral blameworthiness in a CTAS internal document addressing the modification of a critical joint where that memo stated that CTAS had three choices: (1) to properly generate loads, analyze the joint, and redesign it; (2) to refuse to install the improperly designed joint; or (3) to refuse to install the poorly designed parts. The court observed that, although the memo had declared that "the last option was ethically indefensible," that was the option chosen by CTAS.²¹⁰ Finally, as to the sixth factor, although CTAS argued that there was no evidence that it or any other entity would ever use the deficient STCs to modify an aircraft again and so deterrence was unnecessary, the court emphatically disagreed, observing that "public policy will generally be better served if aircraft contractors face liability in tort for negligent modifications."²¹¹

B. *In re Cessna 208 Series Aircraft Products Liability Litigation*²¹²

The owner and operator of a Cessna 208B aircraft that crashed in Idaho sued Cessna Aircraft Co. and Goodrich Corporation to recover for the negligent design and manufacture of the aircraft's de-icing system. The plaintiffs sought damages in the amount of \$1.4 million in addition to the value of the aircraft.²¹³

Defendants moved for summary judgment on the plaintiffs' claims, arguing that such claims were barred by the economic loss rule. Applying Idaho law, the court agreed.²¹⁴ Idaho's economic loss rule, like most formulations of the economic loss rule, prohibits the buyer of a defective product from recovering purely economic losses in a negligence action. Instead, the buyer is limited to remedies available under the applicable warranty or sales contract.

The court rejected the plaintiffs' argument that the economic loss doctrine should not apply to property injuries sustained in an "accident." Although the Idaho Supreme Court had not addressed the issue, the court predicted that the Idaho Supreme Court would not distinguish economic loss cases based on the manner in which damage to the product occurs.²¹⁵

209. *Id.*

210. *Id.* at *8.

211. *Id.*

212. 591 F. Supp. 2d 1161 (D. Kan. 2008).

213. *Id.*

214. The parties assumed that Idaho law would apply to plaintiffs' claims. Plaintiffs were Idaho corporations, with their principal places of business in Idaho. Defendants were not Idaho corporations. The accident flight originated in Utah with a final destination in Idaho. *Id.* at 1165–66.

215. *Id.*

The court also refused to recognize an exception to the economic loss doctrine based on the plaintiffs' argument that the aircraft was a "total loss." Finally, the court held that none of the three exceptions to the economic loss rule recognized in Idaho—loss "parasitic" to injury to person or property, "unique circumstances," or "special relationship" between the parties—applied to the plaintiffs' particular claims.²¹⁶

216. *Id.* at 1171–72.