Recent Developments In Aviation Products Liability

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This article[1] addresses selected topics of current interest and recent developments in the field of aviation products liability.[2] The cases and legislation discussed below touch upon a wide variety of topics, including: pleading requirements arising out of *Iqbal* and *Twombly*; the General Aviation Revitalization Act of 1994 ("GARA"); federal preemption; the government contractor defense, the educational malpractice doctrine and duty to train; the recently enacted Federal Courts Jurisdiction and Venue Clarification Act of 2011; and removal of aviation products liability cases based on federal question jurisdiction. To conclude, we briefly address recent developments in electronic discovery that have the potential to alter case strategy and the landscape of the cost of defending aviation products liability and commercial litigation cases.

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[2] For a broader and more historical context, see J. DENNY SHUPE & VINCENT LAMONACA, PRODUCTS LIABILITY LITIGATION - PAST, PRESENT AND INTO THE 21ST CENTURY, IN AIRCRAFT ACCIDENT RECONSTRUCTION AND LITIGATION, Lawyers and Judges Publishing Company, Inc. (4th ed. 2011).

I. Pleading Requirements After *Iqbal* and *Twombly*

The United States Supreme Court decisions of *Bell Atlantic Corporation v. Twombly*[3] and *Aschcroft v. Iqbal* [4] and their progeny have altered the interpretation of the liberal pleading requirements of the Federal rules in ways that can be of benefit to aviation manufacturers. This section discusses two recent cases that address what it now means to "state a claim to relief that is plausible on its face."[5] At a minimum, plaintiffs must sufficiently identify the component or components that are claimed to be defective, the manner in which the components failed, and who is responsible for the failure.

***Sikkelee v. Precision Airmotive Corp*., No. 07-886, 2011 U.S. Dist. LEXIS 38382 (M.D. Pa. Apr. 8, 2011).**

Sikkelee v. Precision Airmotive Corporation[6] involved a Complaint against many Defendants for strict liability, negligence, breach of warranty, misrepresentation, and concert of action related to a 1976 Cessna aircraft accident that resulted in the death of plaintiff's husband. The accident allegedly was caused by a malfunctioning carburetor. On July 10, 2005, the decedent was flying the accident aircraft when its Lycoming engine allegedly lost power due to a fuel system malfunction shortly after takeoff. The aircraft had been overhauled "to a factory new condition," which included a carburetor rebuilt or

[3] 550 U.S. 544 (2007).

[4] 556 U.S. 662 (2009).

[5] *Iqbal,* 129 S. Ct. at 1949.

[6] 2011 U.S. Dist. LEXIS 38382 (M.D.Pa. Apr. 8, 2011).

overhauled by the Kelly Defendants. Among other things, Plaintiff asserted that Defendants were aware of numerous problems and defects with the screws and locking mechanism for the carburetor, but failed to disclose that information. Defendants filed a joint motion for judgment on the pleadings, which was granted in part, as to allegations about state common-law standards of care, since the Court found that the field of aviation safety is preempted by federal law and regulations. However, the Court also granted Plaintiff's request for leave to amend the complaint to assert violations of federal standards of care.

Defendants' subsequent motion to dismiss Plaintiffs' amended complaint asserted, among other things, that Plaintiff had failed to allege that Lycoming had manufactured, sold, or supplied the allegedly defective parts. Plaintiff argued that *Twombly* and *Iqbal* should not apply to the Amended Complaint since the original Complaint was filed before those cases were issued. Disagreeing with the Plaintiff, the Court applied the heightened pleading standards set forth in *Twombly* and *Iqbal*. As to Lycoming, the Court held that although Plaintiff alleged the collective responsibility for the carburetor by other parties, she also provided numerous detailed allegations which supported a claim that Lycoming was the manufacturer (or was in the chain of production) of the carburetor.[7]

[7] *Id.* at *16.

***Am. Guar. & Liab. Ins. Co. v. Cirrus Design Corp*., No. 09-8357, 2010 U.S. Dist. LEXIS 137527 (S.D.N.Y. Dec. 30, 2010).**

American Guarantee & Liability Insurance Company, v. Cirrus Design Corporation[8] involved claims seeking to recover money that was paid to tenants of the Belaire Manhattan Condominium after a Cirrus aircraft had crashed into the building. The crash allegedly was caused by "certain defects" in the steering controls that prevented proper control of the airplane. Cirrus argued that the insurance companies had not stated a claim upon which relief could be granted, and sought dismissal of the complaint. The Court granted the Cirrus motion, noting that the plaintiffs had not specified "….the actual defective component or the nature of the defect."[9] Accordingly, to satisfy the plausibility requirement set forth in *Twombly* and *Iqbal*, plaintiffs' amended complaint would have to state specific allegations as to the alleged airplane defects.

II. General Aviation Revitalization Act of 1994

As discussed below, there continue to be significant developments related to the application of the General Aviation Revitalization Act of 1994, Pub. L. No 103-298, 108 Stat. 1552 (1994) (codified as amended at 49 U.S.C. § 40201 *et seq.*).

[8] 2010 U.S. Dist. LEXIS 137527 (S.D.N.Y. Dec. 30, 2010).

[9] *Id*. at *6-7.

***Burton v. Twin Commander Aircraft, LLC*, 254 P.3d 778 (Wash. 2011).**

After an airplane crash in Aguascalientes, Mexico that killed seven people and allegedly was caused by a rudder malfunction, Plaintiffs brought wrongful death actions against Twin Commander. Plaintiffs argued that although Twin Commander held the Type Certificate for the accident aircraft, it was not the "manufacturer" of the aircraft and thus not protected by GARA. Twin Commander argued that for GARA purposes, it was the "manufacturer" because it was the successor-in-interest to the Type Certificate even though it did not continue producing the aircraft. The Court concluded that the meaning of "manufacturer" under GARA is a question of law and not fact. In a well reasoned opinion, the Court reversed the Court of Appeals and held that Twin Commander should be considered a "manufacturer" under GARA since it stepped into the shoes of an original manufacturer and assumed all its duties and obligations.[10]

***Crouch v. Teledyne Continental Motors, Inc*., No. 10-00072, 2011 U.S. Dist. LEXIS 67722 (S.D. Ala. June 22, 2011).**

Crouch v. Teledyne Continental Motors[11] addressed claims made as a result of a 1977 Piper PA-32RT-300 Lance II Cherokee single-engine airplane crash in 2006 that allegedly was caused by defects in the housing of a recently overhauled Lycoming IO-540-K1G5D engine and Teledyne Continental Motors, Inc. ("TCM") magneto. The airplane originally was sold in 1978, and the engine was overhauled in April 2005 by John Jewell Aircraft, Inc. Additionally, at the same time the engine was overhauled, the

[10] 254 P.3d 778, 791 (Wash. 2011).

[11] 2011 U.S. Dist. LEXIS 67722 (S.D. Ala. 2011).

TCM magneto was replaced with the same type of magneto—and which had been factory rebuilt by TCM in 2005. Plaintiffs asserted that due to defective design, the mounting flanges on the TCM magneto housing broke as a result of fatigue fractures in the flanges, which caused the Cherokee to lose power and crash. The manufacturer argued that GARA prevents the Plaintiffs from asserting claims based on the alleged defects and that GARA's 18-year rolling provision for new parts should not apply, because the allegedly defective part was replaced with one of materially the same design, and because the fractures were the result of crash impact, and not fatigue. In denying TCM's motion for summary judgment, the Court cited the plain language of GARA's rolling provision and held that the time period for GARA is restarted when an old part is replaced with a new one, and that GARA did not require that a part be newly designed. The Court further held that since a genuine dispute of material fact existed as to the cause of the crash, TCM's motion for summary judgment relating to causation also would be denied.[12]

***Agape Flights, Inc. v. Covington Aircraft Engines, Inc*., No. 09-492, 2011 U.S. Dist. LEXIS 69521 (E.D. Okla. June 28, 2011).**

Agape Flights, Inc. v. Covington Aircraft Engines, Inc.[13] involved claims against an aircraft engine and fuel pump manufacturer as a result of a Cessna Grand Caravan model 208B airplane crash in 2007. In 2007, Agape rented the Pratt & Whitney Canada ("P&WC") PT6A-114A engine, which included a Sundstrand fuel pump, from Covington Aircraft Engines, Inc. Agape asserted that the crash was caused by the fuel pump drive

[12] *Id.* at *15.

[13] 2011 U.S. Dist. LEXIS 69521 (E.D. Okla. June 28, 2011).

shaft splines being severely worn, which allegedly resulted in an in-flight engine power loss. The Court ruled that plaintiff's claims against P&WC and Sundstrand were barred by GARA because both the engine and fuel pump had been sold and delivered to the aircraft manufacturer beyond the 18-year statute of repose. Moreover, although Agape's facts suggested that the drive gear *might* or *should* have been replaced given historical data of wearing of the drive gear splines, the Court held that GARA's rolling provision did not apply since it was Agape's burden to show that the rolling provision should apply. Moreover, plaintiff offered no maintenance record or other similar document which could establish that the fuel pump (or its components) had been replaced within 18 years of the mishap.[14]

***Scott v. MD Helicopters, Inc*., No. 8:09-986-T-33TBM, 2011 U.S. Dist. LEXIS 74778 (M.D. Fla. July 11, 2011).**

Scott v MD Helicopters[15] involved a lawsuit arising from a military OH-6A helicopter crash in 2007 that allegedly was caused by malfunctioning helicopter rotor blades and associated parts. Plaintiff argued that MD Helicopter ("MDHI"), as the type certificate holder, had a duty under the Federal Aviation Regulations to provide instructions and maintenance manuals for continued airworthiness. MDHI filed a motion for summary judgment, which was granted in part and denied in part. As to GARA, the Court held that since maintenance manuals are not considered "parts," claims based on maintenance manuals are not barred by GARA. The Court also held that a genuine issue of material

[14] *Id.* at *19.

[15] 2011 U.S. Dist. LEXIS 74778 (M.D. Fla. July 12, 2011).

fact existed as to the extent of any regulatory duty MDHI owed to provide instructions for continuing airworthiness.[16]

***Garcia v. Wells Fargo Bank Northwest, N.A.*, No. 10-00072, 2011 U.S. DIST. LEXIS 143900 (S.D. Fla. Dec. 14, 2011).**

Garcia v. Wells Fargo[17] is a case that addressed the distinction of parts sellers vice GARA protected parts manufacturers. *Garcia* arises from a Cessna Model 650 Citation III crash in 2008 that killed three people. In 2006, Cessna sold an Actuator Control Unit ("ACU") to the Citation's maintainer, Southern Jet Center, who then installed the part in the mishap aircraft. Plaintiff brought suit against Cessna for negligence and strict liability as the manufacturer, designer, and seller of the Citation and its respective components. Plaintiff claimed that the crash was caused by a malfunctioning ACU, which provides warning to the aircrew when a runaway trim condition exists. According to the plaintiff, the alleged malfunction prevented the pilot from properly responding to an emergency runaway trim condition. Cessna asserted a number of affirmative defenses, including GARA, arguing that the protections of GARA apply since even though Cessna did not manufacture the ACU, the sale of the ACU was incidental to its role as the airplane manufacturer. Cessna further asserted that it had an ongoing duty to provide replacement parts and that the crash was caused by pilot error, and not a mechanical failure. The Court granted plaintiff's motion for partial summary judgment and denied Cessna's motion for summary judgment, holding that GARA is inapplicable where a

[16] *Id.* at *10.

[17] 2011 U.S. DIST LEXIS 143900 (S.D. Fla. Dec. 14, 2011).

Defendant is sued in the capacity of a seller, rather than as a manufacturer. The Court reasoned that the legislative intent of GARA was not to make a special exception for airplane manufacturers who then sell replacement parts, but that "[GARA's]…protections begin and end with a Defendant's role as a manufacturer."[18]

***Moore v. Hawker Beechcraft Corp*., No. N09C-12-010, 2011 Del. Super. LEXIS 569 (Del. Super. Ct. Dec. 15, 2011).**

Moore v. Hawker Beechcraft[19] arises from a Beechcraft model 69 Duke aircraft accident in 2007, which allegedly was caused by an asymmetric flap condition. The mishap aircraft was manufactured in 1969 and sold in 1970. According to the plaintiff, the knowing misrepresentation exception to GARA applied because the manufacturer allegedly had knowingly misrepresented, concealed, or withheld required information concerning the flaps from the FAA during the airplane's initial certification. Specifically, the plaintiff asserted that Hawker Beechcraft misled the FAA by incorrectly representing that the flap system was interconnected. Plaintiff also argued that Hawker Beechcraft failed to disclose: (1) that the flap system was prone to disengagement; (2) that the Duke was uncontrollable in a right side split flap condition; and (3) that information on how to cope with an unsafe flap condition in its Pilot's Operating Handbook or Airplane Flight Manual purposefully was omitted. Moreover, plaintiff contended that it was important to have done different or additional flight testing on the flap system. The Court noted that plaintiff's flight testing assertions on the flap system were irrelevant for purposes of a

[18] *Id.* at *9.

[19] 2011 Del. Super. LEXIS 569 (Del. Super. Ct. Dec. 15, 2011).

misrepresentation claim, and that since the plaintiff was not able prove that a new part—a 90 degree flap drive—was added within the 18-year statute of repose, Plaintiff's motion for summary judgment should be denied. Additionally, the Court held that pursuant to GARA's Section (2)(b)(4), the 18-year statute of repose does not apply to actions brought under a written warranty and that an airworthiness certificate does not constitute a written warranty under GARA.[20]

***Nowicki v. Cessna Aircraft Co.*, 69 So. 3d 406 (Fla. Ct. App. 2011).**

In *Nowicki v. Cessna*,[21] strict liability and negligence claims that were brought on behalf of a passenger that was killed in a Cessna Model 414 crash were barred under GARA. The passenger's representative argued that although the airplane had crashed because of insufficient fuel, the actual cause of her spouse's death was a defective passenger seat that had detached from its rails on impact, hitting him in the head. The representative argued that although the manufacturer had manufactured and delivered the plane in 1970 (beyond the period allowed for claims under GARA's statute of repose), the claim should be permitted under GARA's fraud exception. In the representative's view, since the manufacturer allegedly had not disclosed to the FAA an airworthiness directive pertaining to the seat rail and locking mechanism for crew seats, GARA's fraud exception applied to her claim. The Court found that the representative's claims should be barred by the 18-year statute of repose because the airworthiness directive applied to *crew* seats as opposed to *passenger* seats. The Court also held that GARA's fraud

[20] *Id.* at *31.

[21] 69 So. 3d 406 (Fla. Ct. App. 2011).

exception did not apply since the manufacturer had not misrepresented, concealed, or withheld required information concerning the airplane's passenger seats.[22]

***United States Aviation Underwriters, Inc. v. Nabtesco Corp*., No. C10-821Z, 2011 U.S. Dist. LEXIS 46889 (W.D. Wash. Apr. 29, 2011).**

In *U.S. Aviation Underwriters, Inc. v. Nabtesco Corporation*,[23] a Washington federal court barred claims against the manufacturer of an allegedly defective landing gear actuator that had been removed from the Cessna aircraft on which it originally was installed, and then was installed on another aircraft. The actuator initially was manufactured and installed on an aircraft in 1990, then was removed, overhauled, and installed on another aircraft in 2006—which then crashed in 2007. The Court analyzed the effective triggering date under GARA and determined that the 18-year statute of repose had run. According to the Court, the triggering date under GARA is the date from which the component(s) were originally installed (1990), as opposed to when the part was overhauled and later installed. Moreover, the Court emphasized that an overhauled component (vice a new one) does not restart the GARA repose period.[24]

[22] *Id.* at *409.

[23] 2011 U.S. Dist. LEXIS 46889 (W.D. Wash. Apr. 29, 2011).

[24] *Id.* at *11.

***Inmon v. Air Tractor Inc.*, 74 So. 3d 534 (Fla. Ct. App. 2011).**

Plaintiff in *Inmon v. Air Tractor Inc*.[25] sued Air Tractor, the manufacturer of an aircraft that he had been flying and using for crop dusting, when one of the aircraft's wings failed and caused him to crash. The plane had been manufactured in 1982 and was purchased by the plaintiff with no warranty in 1998. Plaintiff alleged that the crash was caused by a defective wing assembly and a defective factory modification kit. The primary issue was whether Air Tractor's design and sale of a new part for the wing in 1993 restarted the GARA or the applicable Florida repose period. To increase the safe life of the airframe, the manufacturer had issued Service Letter 70. Service Letter 70 illustrated how designing a new spar splice with an additional fifth bolt hole further out from the centerline of the aircraft, and installing it on the existing lower wing, would help extend the safe life of the airframe. The Court addressed whether the aircraft manufacturer's design and sale of the new part for the wing assembly in 1993—the five-bolt spar splice—restarted GARA or the applicable Florida 12 year repose period. The Florida Court of Appeals affirmed the earlier decision by the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County, dismissing plaintiff's claims, holding that (1) service bulletins do not constitute new part(s), and (2) even though a new part was installed, it did not replace an original item with a new item, but rather modified the original

[25] 74 So. 3d 534 (Fla. Ct. App. 2011).

design.[26] The Court also found that the plaintiff had failed to demonstrate that the new part actually caused the accident.

***Moyer v. Teledyne Continental Motors, Inc*., 979 A.2d 336 (Pa. Super. Ct. 2009).**

Moyer v. Teledyne Continental Motors, Inc.[27] is a case that arises from a 2003 Beech Bonanza crash that resulted in the deaths of Ronald and Judy Moyer. According to the Plaintiffs, the airplane crash was caused by an engine failure that was the result of a fatigue crack in a repair weld in the crankcase of the Teledyne Continental Motors ("Teledyne") designed and manufactured engine. The crankcase was a weld-repaired replacement that was supplied by a company called DivCo, and then was installed in the accident aircraft by Piedmont Aviation Services ("Piedmont") in 1998. Teledyne also issued maintenance instructions and service bulletins—including multiple service bulletin revisions—which provided inspection criteria for the welding of cracked crankcases, as well as warning against the welding of cracks in certain areas. In a service bulletin issued in 1990 (the guidance used by DivCo in making its weld repair), Teledyne modified prior guidance and advised that the welding of crankcases was an acceptable repair process under certain circumstances.

Plaintiffs argued that Teledyne was responsible for product defects due to crankcase cracks, that the 1990 service bulletin was inherently defective, and that contrary to Teledyne's assertions in its motions for summary judgment, GARA should not apply. Plaintiff contended that the statutory protections of GARA should not be available to

[26] *Id*. at 121.

[27] 979 A.2d 336 (Pa. Super. Ct. 2009).

Teledyne because (1) it allegedly had publicly misrepresented its internal policy regarding crankcase welds, and (2) the issuance of the 1990 service bulletin restarted the 18-year statute of repose because it should be considered a "part" under GARA.

On May 29, 2007, the trial court granted Teledyne's summary judgment motion under GARA. The trial court held that the 18-year GARA repose period began to run on the original date of sale of the engine, rather than on the date when the allegedly defective service bulletin was issued. The Court further noted that a service bulletin is not considered a part for GARA purposes, and that the misrepresentation exception to GARA was not applicable because there was insufficient evidence to show that Teledyne had misrepresented or withheld required information from the FAA.

The Pennsylvania Superior Court, ultimately in an *en banc* opinion, affirmed the trial court's decision not to apply GARA's rolling provision to the service bulletin as well as the Court's rejection of the misrepresentation claim. In upholding the trial court's granting of summary judgment, the Superior Court pointed out that if the rolling provision of GARA were triggered every time a service bulletin was issued, it would eviscerate GARA's intent. The Court also found that plaintiffs did not present evidence of active obstruction to support a misrepresentation claim under GARA.

On January 25, 2011, the Pennsylvania Supreme Court agreed to hear plaintiffs' appeal from the Superior Court's *en banc* affirmance, limited to one issue as it had been stated by plaintiffs:

> *Did the Supreme Court improperly afford blanket immunity to manufacturers for negligence and strict liability in their written instructions under GARA's rolling provision under the guise of fostering a non-existent federal policy to vindicate rights of manufacturers over those of accident victims?*

On September 27, 2011, the Pennsylvania Supreme Court affirmed the Superior Court's order in a *per curiam* order, advising that the Court was equally divided on this one issue presented, which resulted procedurally in the intermediate appellate court's order being affirmed.

On December 20, 2011, plaintiffs filed a petition for Writ of Certiorari in the Supreme Court of the United States. They asked the U.S. Supreme Court, among other things, to determine: (1) if the lower courts had improperly granted blanket immunity to a general aviation manufacturer for negligence and strict liability in its written instructions under the rolling provision of GARA; and (2) if the lower courts had misinterpreted the GARA knowing misrepresentation exception by applying a heightened, fraud-like standard. As of this writing, the Supreme Court has not yet acted on the petition.

III. Federal Preemption of State Law Related to Product Design

One of the most significant issues in aviation products liability in recent years revolves around the question of whether, and the extent to which, federal law preempts state law standards of care applicable to manufacturers. What appeared to be a relatively dead issue just a few years ago is again showing signs of life. Supreme Court cases have recognized implied preemption in situations where application of state tort law would conflict with specific federal aviation statutes and regulations. Recent Supreme Court

and intermediate appellate court cases may call into question the vitality of prior federal appellate decisions rejecting preemption as to aircraft products liability claims.

***Hart v. Boeing Co*., 2009 U.S. Dist. LEXIS 117766 (D. Colo. Nov. 23, 2009).**

In *Hart v. The Boeing Company,*[28] the United States District Court for the District of Colorado addressed claims arising from a Boeing 737 takeoff accident. On December 20, 2008, Continental Airlines Flight 1404 was departing from Denver International Airport for Houston, Texas. On departure, the 737 veered off the runway and crashed. Plaintiffs asserted claims for negligence and strict liability relating to the design, manufacture, testing, inspection and sale of the 737's directional control and stabilization systems. Specifically, plaintiffs contended that the airplane's directional control mechanisms were designed such that it makes it difficult for pilots to maintain heading during high crosswind takeoffs. Defendant Boeing argued that plaintiffs' claims were preempted by the Federal Aviation Act,[29] and that their failure to allege a violation of a federal duty of care was fatal to their claims. Based on Tenth Circuit precedent, the Court denied Defendant's motion to dismiss. The Court noted that although other jurisdictions had taken "an arguably more nuanced approach to the issue of implied preemption under the [Federal Aviation Act]"[30] the Tenth Circuit in *Cleveland v. Piper*

[28] 2009 U.S. Dist. LEXIS 117766 (D. Colo. Nov. 23, 2009).

[29] 49 U.S.C. § 40101 *et seq.*

[30] 2009 U.S. Dist. LEXIS 117766, at *13.

Aircraft Corp.[31] had set precedent that it was bound to follow. Thus, Boeing's motion for summary judgment on federal preemption grounds was denied.[32]

***Damian v. Bell Helicopter Textron, Inc*., 352 S.W.3d 124 (Tex. Ct. App. 2011).**

In *Damian v. Bell Helicopter Textron, Inc*.,[33] the Court of Appeals of Texas addressed Defendant Bell's contention that plaintiffs' design-defect and negligence claims related to a Bell 407 helicopter crash were preempted by federal law. The crash happened on January 27, 2000, during a short flight from Sona, Panama to Panama City when the Bell 407 helicopter hit a vulture. The large bird penetrated the helicopter's windshield, resulting in a fatal crash. Consequently, plaintiffs' claims against Bell alleged product design defects in the helicopter's windshield and seatbelts. Bell's defense relied on its contention that the Federal Aviation Act and related federal regulations, such as the FAA certification process for helicopters, impliedly preempts common-law claims relating to the field of helicopter design and airworthiness.

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[31] The case involved a state law claim for injuries sustained in a Piper aircraft crash. The plaintiff had removed the pilot's seat form the airplane to install a camera to film the events of the flight. On takeoff, the plane hit a car that was parked on the runway causing the pilot who was flying from the rear seat to hit his head on the camera and to suffer severe injuries. Plaintiff's claim was for the negligent design of an aircraft as it related to inadequate forward visibility from the rear seat, and for the lack of a shoulder harness in the rear seat. The Court concluded that such claims were not impliedly preempted by the Federal Aviation Act. *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir.), *cert denied*, 510 U.S. 908 (1993).

[32] 2009 U.S. Dist. LEXIS 117766, at *13.

[33] 352 S.W.3d 124 (Tex. Ct. App. 2011).

Regarding Bell's field preemption argument, the Court acknowledged that the FAA regulates many aspects of aviation safety, but concluded that there is insufficient evidence, including relating to the certification process, to show that Congress intended to regulate the entire aviation field. Additionally, the Court held that since there are no federal statutes or regulations governing the minimum standards for bird-strike resistance under Part 27 of the Federal Aviation Regulations, Bell's conflict preemption argument failed.[34]

***Pease v. Lycoming Engines*, No. 4:10-00843, 2011 U.S. Dist. LEXIS 145344 (M.D. Pa. Dec. 19, 2011).**

Pease v. Lycoming Engines[35] involved Plaintiffs' design defect claims arising from a Piper PA-32R-301T crash that allegedly was caused by a faulty oil-drain and transfer tube. According to the pleadings, the tube on the oil drain tank failed due to an overhung load and engine vibrations. Plaintiffs asserted that the oil leak caused engine failure due to oil starvation, which ultimately led to the airplane crash.

Regarding Plaintiffs' state law claims, Lycoming contended that the Federal Aviation Act of 1958 preempts state standards of care regarding aviation safety, and that the issuance of a type certificate proves as a matter of law that the engine design had complied with all applicable FAA regulations. Plaintiffs argued that the Federal Aviation Act does not preempt state standards of care regarding aviation safety, and that a type certificate

[34] *Id.* at 17.

[35] 2011 U.S. Dist. LEXIS 145344 (M.D. Pa. Dec. 19, 2011).

should not foreclose them from proving that Lycoming violated the applicable FAA regulations.

Lycoming's motion for summary judgment based upon federal preemption grounds was granted with respect to plaintiffs' alleged violation of certain federal regulations, but denied in all other requests.[36] To explain its holding, the Court considered prior preemption cases including; *Abdullah v. American Airlines, Inc*.,[37] *Elassaad v. Independence Air, Inc*.,[38] and *Williamson v. Mazda Motor of America, Inc*.[39] According to the Court, the broad language of *Abdullah* did not permit a restrictive interpretation of the Third Circuit's analysis in *Elassaad,* which slightly narrowed but did not overturn *Abdullah*.[40] Additionally, the Court noted that *Williamson*—a case where state tort law was not preempted by the Federal Motor Vehicle Safety Standard 208, did not affect the validity of *Abdullah*. The Court concluded that federal regulations established the safety standards in the field of aviation safety, and that these standards may not be supplemented or varied by the states.[41] Notably, the Court urged the Third Circuit to

[36] Specifically, Lycoming's Motion for Summary Judgment based upon federal preemption grounds was granted with respect to the alleged violations of 14 C.F.R. §§ 21.3, 23.1013, 33.4, and 33.49.

[37] 181 F.3d 363 (3d Cir. 1999).

[38] 613 F.3d 119 (3d Cir. 2010).

[39]131 S. Ct. 1131 (2011).

[40] In *Elassaad v. Independence Air, Inc*., 613 F. 3d 119 (3d Cir. 2010), the Court held that the field preempted by the Aviation Act was limited to in-air safety and did not encompass supervision of the disembarkation process."

[41] 2011 U.S. Dist. LEXIS at *34-*35

clarify *Abdullah's* application to aviation products liability cases.[42] The Court also commented that the "issue of whether federal law preempts state standards of care in aviation products liability cases deserves individualized consideration based on the specific regulations promulgated by the FAA relating to certification of airplanes and airplane component parts."[43]

***Morris v. Cessna Aircraft Co.*, No. 4:10-00843, 2011 U.S. Dist. LEXIS 137837 (N.D. Tex. Dec. 1, 2011).**

Morris v. Cessna Aircraft Co.[44] arises from a Cessna C208B crash on January 24, 2003 near San Angelo, Texas which injured its two occupants. On January 4, 2005, plaintiffs filed suit asserting, among other things, claims for strict products liability and negligence. Plaintiffs contended that the aircraft was unreasonably dangerous, defective, and not fit for its intended purposes. In its motion for summary judgment, Cessna argued that the Federal Aviation Act of 1958 preempts the Plaintiffs' products liability claims. The Court rejected Cessna's implied field preemption argument, and focused on the Federal Aviation Act's structure and legislative history, as well as the lack of other evidence of clear congressional intent to preempt the field of air safety generally or aircraft design in particular.[45] Noting that the "ultimate touchstone" in a preemption case is congressional

[42] *Id.* at *71-*80; *see also Sikkelee*, 731 F. Supp.2d at 438-439.

[43] *Id.* at *80.

[44] 2011 U.S. Dist. LEXIS 137837 (N.D. Tex. Dec.1, 2011).

[45] The Court noted that there should be a presumption against finding preemption because of the historical backdrop of state law remedies for its citizens who sustain injuries caused by defective products.

intent, *Wyeth v. Levine*[46], the Court found that the Federal Aviation Act does not preempt the common law standard of care applicable to Plaintiffs' products liability claims.[47]

IV. Application of Government Contract Defense

***Getz v. The Boeing Co*., 654 F.3d 852 (9th Cir. 2011).**

In *Getz v. The Boeing Co*.,[48] products liability and duty to warn claims based on an Army MH-47E Chinook helicopter crash in Afghanistan were barred by the government contractor defense. Investigation into the cause of the helicopter crash indicated that one of the Chinook's engines suddenly flamed out. According to this investigation, the flame out was caused either by an unexpected shut-down of the engine controls system—the Full Authority Digital Electronic Control (FADEC) and Digital Electronic Control Unit (DECU), or in the alternative, because the engine ingested a substantial amount of ice. Plaintiffs also claimed that the flameout could have been avoided if the helicopter's ignition system had been equipped with a continuous or automatic relight feature. Plaintiffs asserted design, manufacturing, and failure-to-warn defects against the government contractors who designed and manufactured the helicopter and its component parts. In granting the Defendants' motion for summary judgment under the government contractor defense, the Court relied on the framework in *Boyle v. United Technologies Corporation*[49] and found that the contractors had shown: (1) that the Army approved

[46] 555 U.S. 555 (2009).

[47] *Id.* at *6-7.

[48] 654 F.3d 852 (9th Cir. 2011).

[49] In *Boyle*, the court held that in order to invoke the government contract defense, it is necessary for the contractor to establish that: (1) the United States approved reasonably

reasonably precise specifications for the ignition system and for the design of the FADEC and DECU; (2) that the Chinook Helicopter conformed to the approved specifications for the ignition system and the FADEC and DECU; and (3) that the actual knowledge of risk requirement was met since the Army already was aware of the risk of water-or-ice induced flameout, and government personnel were aware of the potential problem with the FADEC and DECU. The Army, and not the contractors, determined what warnings to provide to operators of the helicopter. Accordingly, the Court concluded that government contractors were not required to warn of dangers that already were known to the United States.[50]

V. Educational Malpractice Doctrine and Duty to Train

There is no question that manufacturers must satisfy various duties to warn related to the use of their products. Recently a court was confronted with the issue of whether a manufacturer also has a duty to train.

Glorvigen v. Cirrus Design Corp., 796 N.W.2d 541 (Minn. Ct. App. 2011).

Glorvigen v. Cirrus Design Corporation[51] involved a product liability action in which plaintiffs alleged that Cirrus—the manufacturer of the SR22 aircraft: (1) failed to fulfill its duty to warn by providing adequate instructions for the safe use of its aircraft; and (2)

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precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *See Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).

[50] *Id.* at 866.

[51] 796 N.W.2d 541 (Minn. Ct. App. 2011).

failed to adequately provide the pilot who had purchased the plane, and who was not instrument rated, with effective training on the use of the autopilot during Cirrus's transitional training program.[52]

On December 9, 2002, the decedent pilot took delivery of the SR-22 and participated in Cirrus's transitional training program. The program consisted of flight and ground instruction, totaling approximately 12.5 and 5.3 hours respectively, and included written and ancillary transition training regarding how to use the autopilot. Although the decedent received some autopilot instruction, the plaintiffs provided evidence allegedly showing that the training did not include one of the listed flight performance tasks, which was to effectively transition from inadvertently-entered Instrument Metrological Conditions (IMC) to Visual Metrological Conditions (VMC).[53] On January 18, 2003, following completion of the transition training, the pilot and a passenger departed from Grand Rapids to St. Cloud, Minnesota in the SR-22. Shortly after takeoff, and unable to maintain VMC, the pilot flew the airplane into the clouds, and shortly after that, allegedly stalled and crashed the airplane.

According to the plaintiffs, even though Cirrus provided the Pilot's Operating Handbook and the FAA Approved Airplane Flight Manuals for the SR22, both of which included autopilot system and operation information, Cirrus's alleged failure to sufficiently train

[52] A transitional training program is specialized instruction that can be provided to teach a pilot how to fly a new type of plane. The FAA regulations did not require Cirrus to offer this type of training, but Cirrus provided it as a marketing strategy and included the training cost in the total price of the airplane.

[53] At trial, expert evidence indicated that this type of maneuver would be required by every pilot to obtain a private pilot's license.

the pilot on the autopilot system caused the SR22 crash because of the pilot's inability to escape poor weather.[54] Cirrus argued that although it did have a duty to warn of dangers associated with the SR22, the scope of that duty did not include an obligation to train the pilot to proficiently fly the airplane.

The Court of Appeals agreed with the manufacturer and reversed the trial court's denial of judgment as a matter of law. The Court noted that although plaintiffs had cited aviation cases from other jurisdictions in support of their contentions, the Court distinguished those cases from the current one since they dealt with the sufficiency of written instruction manuals, not training services.[55]

As to plaintiffs' educational malpractice claim, the Court of Appeals relied on prior Minnesota case law in reversing the lower court's denial of judgment n.o.v. The Court cited *Alsides v. Brown Institute, Ltd*.,[56] and *Page v. Klein Tools, Inc.*,[57] to illustrate Minnesota's view that claims of educational-malpractice are barred. In *Alsides v. Brown*, the Court dismissed claims by students which challenged the general quality of the

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[54] The handbook provided detailed instructions regarding how to activate and operate the autopilot. Additionally, at the time of the accident, the pilot had been working towards an FAA instrument rating, but was still restricted to VFR flying.

[55] Plaintiff cited *Driver v. Burlington Aviation, Inc.*, 430 S.E. 2d 476, 480 (N.C. Ct. App. 1993) (alleging that Cessna published an instructional manual [*552] that "promulgated dangerously inadequate information about preventing carburetor icing and wrongfully instructed concerning carburetor icing and the slow-flight characteristics of the aircraft"); and *Berkebile v. Brantly Helicopter Corp*., 311 A.2d 140, 142, 144 (Pa. Super. Ct. 1973) (alleging that the helicopter manufacturer "gave no adequate warnings" in the flight manual or on the cockpit placard "of the need for instantaneous reaction in emergency power failure"), *aff'd*, 337 A.2d 893 (Pa. 1975).

[56] 592 N.W.2d 469, 472 (Minn. Ct. App. 1999).

[57] 610 N.W.2d 900, 906 (Mich. 2000).

education they had received, and noted its refusal to "…engage in a comprehensive review of a myriad of educational and pedagogical factors, as well as administrative policies."[58] In *Page v. Klein Tools, Inc.*, the Court recognized the negative public policy implications in educational-malpractice claims when it said that "[a]llowing individuals…to assert claims of negligent instruction would avoid the practical reality that, in the end, it is the student who is responsible for his knowledge, including the limits of that knowledge."[59]

In finding that plaintiffs' claims were barred under the educational malpractice doctrine, the Court noted that a determination of whether the transition training was ineffective would involve an inquiry into the nuances of the educational process, which is what the educational malpractice bar is meant to avoid.[60]

VI. Federal Courts Jurisdiction and Venue Clarification Act of 2011

The Federal Jurisdiction and Venue Clarification Act of 2011, H. R. 394, P.L. 112-63 (the "Act"), potentially will have a significant impact on new products lawsuits commenced on or after January 6, 2012 in areas such as diversity jurisdiction, removal, and venue. The discussion below addresses some of the Act's highlights.

[58] 592 N.W.2d at 473.

[59] 610 N.W.2d 900, 906 (Mich. 2000).

[60] 592 N.W.2d at 473-74.

Citizenship

The Act clarifies how to determine citizenship for resident aliens, as well as for corporations and insurance companies with significant foreign operations. Section 101 of the Act revises 28 U.S.C. § 1332(a)(2) by applying the complete diversity requirement to some claims involving resident aliens. Under the Act, federal courts cannot exercise jurisdiction over state claims between a citizen of a State and citizens of a foreign state if they are asserted between a citizen of a State and "citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State."[61]

As to corporations and insurance companies involved in direct actions, under Section 102 of the Act, all foreign and domestic corporations will be considered citizens of both their place of incorporation and their principal place of business. The result of this amendment to 28 U.S.C. § 1332(c)(1) will be a denial of diversity jurisdiction when a foreign corporation with its principal place of business in a state sues or is sued by a citizen of the same state, and a citizen of a foreign country sues a U.S. corporation with its principal place of business abroad.

Removal

Prior to the Act, some courts held that in multi-defendant removal cases, each defendant had 30 days after service upon the last-served defendant, while others held that the 30-day period ran from the date of service on the first-served defendant. This conflict

[61] *See* 28 U.S.C. § 1332(a)(2).

among the courts prompted the Act's amendment which now codifies the judicially created "rule of unanimity." In Section 1446(b)(2)(A), the Act now gives each defendant 30 days after service of the initial pleading or summons to file a notice of removal. Furthermore, earlier-served defendants are now permitted to join-in and consent to removal by a later-served defendant, even if the earlier-served defendant did not previously initiate or consent to removal. Finally, the Act also revises the "separate and independent" claim provision for removal of civil actions that include both federal and unrelated state claims. The new provision requires severance and remand of claims that are not within the original or supplemental jurisdiction of the district court.[62]

Venue

Previously, 28 U.S.C. § 1404 allowed transfer to another district or division only when venue and subject matter jurisdiction were proper. The Act amends § 1404 and negates *Hoffman v. Blaski*[63] by permitting district courts to transfer a civil action to any district or division to which all parties have consented, if it is convenient for the parties and witnesses, and provided it is in the interest of justice. The Act also addresses which statute to reference when removing a case to federal court by making clear that the removal statute, and not the venue statute, governs the proper venue for cases removed to federal court. Furthermore, the Act redefines the term "venue" (a geographic specification of the appropriate forum for litigation) from other provisions of federal law which operate as restrictions on subject matter jurisdiction. According to the House

[62] 28 U.S.C. § 1391.

[63] 363 U.S. 335 (1960).

Report, subject matter restrictions differ from venue rules in that they may not be waived by the parties and will not be affected by changes in general venue rules.[64]

VII. Removal of Aviation Products Cases Based on Federal Question Jurisdiction

Manufacturers of aviation products often prefer to defend lawsuits against their clients in federal court rather than in state court. Lawyers representing plaintiffs in these lawsuits have become particularly adept in drafting their complaints so as to avoid removal of the lawsuits to federal court. The discussion below addresses how a defendant-manufacturer's status as an Organizational Designated Airworthiness Representative ("ODAR"), and its employees' status as Designated Engineering Representatives ("DERs") or Designated Manufacturing Inspection Representatives ("DMIRs"), can be used to support removal under 29 U.S.C. § 1442(a)(1), the federal officer removal statute.

Federal Officer Removal Statute

The federal officer removal statute provides in relevant part that:

> A civil action … commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any

[64] 28 U.S.C. § 1390.

> Act of Congress for the apprehension or punishment of criminals or the collection of revenue.

28 U.S.C. § 1442(a)(1).

In practice, a defendant seeking removal under this statute must demonstrate that it is a "person" within the meaning of the statute, that there is a "causal nexus" between its actions taken pursuant to a federal officer's direction and the plaintiff's claims and, finally, that it can assert a colorable federal defense.[65]

It is well-established that a corporate defendant is considered a "person" for purposes of 28 U.S.C. § 1442(a).[66] Therefore, successful removal of an action will depend on the "causal nexus" between the manufacturer's actions in the aircraft certification process and the plaintiff's claims, and the ability to raise a colorable federal defense.

The Federal Aviation Administration's Delegation of Certain Aspects of the Aircraft Certification Process to Manufacturers and their Employees

In defining the powers of the Federal Aviation Administrator, Congress authorized the Administrator to delegate certain of his duties to private individuals. 49 U.S.C. § 44702(d). Specifically, the Federal Aviation Administrator may "delegate to any properly qualified private person … any work, business, or function respecting (1) the examination, inspection and testing necessary to the issuance of certificates …, and (2) the issuance of such certificates in accordance with standards established by [the Administrator]."[67]

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[65] *McMahon v. Presidential Airways, Inc.*, 410 F. Supp.2d 1189, 1196 (M.D. Fla. 2006).

[66] *See, e.g., Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 298 (5th Cir. 1998).

[67] *Id.*

As a result, many aviation manufacturers employ engineers and other personnel who with FAA approval, and under FAA supervision, serve as Designated Engineering Representatives (DERs) and Designated Manufacturing Inspection Representatives (DMIRs). A DER is an engineer who acts "under the general supervision of the [FAA] Administrator" and certifies than an aircraft's (or component's) design meets FAA requirements.[68] A DMIR likewise acts "under the general supervision of the [FAA] Administrator" and is authorized to certify aircraft and components that meet airworthiness requirements.[69]

Finally, ODARs are organizations (rather than individuals) that are appointed by the FAA in accordance with 14 C.F.R. § 183.233, and that possess aeronautical knowledge and experience and meet the qualifications of FAA Order 8100. ODARs act "under the general supervision of the [FAA] Administrator" and perform examination, inspection and testing services related to the issuance of certificates.[70] The DER, DMIR and ODAR process is closely overseen by a supervising FAA office, which approves the training programs, procedures and the individuals themselves who are granted the delegated authority to perform FAA functions.

Obstacles to Federal Officer Removal

Defendants seeking to remove lawsuits to federal court based on allegations implicating the conduct of DERs and DMIRS in the aircraft certification process have encountered

[68] 14 C.F.R. § 183.29.

[69] 14 C.F.R. § 183.31.

[70] 14 C.F.R. § 183.33.

considerable difficulty. Much of this difficulty can be traced to reasoning in the Eleventh Circuit's decision in *Magnin v. Teledyne Continental Motors*.[71] Although the Eleventh Circuit found that removal pursuant to the federal officer removal statute was proper in *Magnin*, it introduced a significant obstacle to future attempts by manufacturers to remove actions under the federal officer removal statute—specifically, the requirement that the DMIR (or DER) be named as an individual defendant. This requirement has allowed plaintiffs to defeat removal by not naming the DMIR or DER as a defendant in their complaints.

Magnin was a wrongful death action brought against an engine manufacturer and its employee, a DMIR.[72] The complaint alleged that the crash underlying the lawsuit was proximately caused by defendants' negligent inspection and wrongful certification of the aircraft's engine as airworthy.[73] Notably, the complaint expressly described the defendant-employee as a DMIR.[74]

For the Eleventh Circuit, the naming of the DMIR as a defendant was critical to its decision. Because the complaint alleged that the DMIR proximately caused the crash by signing an export certificate, and because the certificate was signed only in the DMIR's capacity as an agent of the FAA, there was the requisite "causal nexus." Moreover, the

[71] 91 F.3d 1424 (11th Cir. 1996).

[72] *Id.* at 1426.

[73] *Id.*

[74] *Id.*

defendant-DMIR could raise a colorable federal defense that he acted in compliance with and within the scope of his federal duties.[75]

Plaintiffs' counsel and federal courts alike seized on the Eleventh Circuit's emphasis on the fact that the DMIR was named a defendant in the action to support removal under 28 U.S.C. § 1442(a). The result was a flurry of decisions remanding lawsuits to state court because the DER or DMIR was not named in the plaintiffs' complaint.

By way of example, in *Swanstrom v. Teledyne Continental Motors*, the plaintiffs alleged that the defendant-manufacturer was negligent in its failure to properly inspect the aircraft in a manner to ensure its airworthiness.[76] The defendant-manufacturer sought removal under the federal officer removal statute because its employees had been designated to examine, inspect, test and certify the aircraft for airworthiness. As for its colorable federal defense, the defendant-manufacturer asserted that the aircraft was designed in full compliance with applicable federal safety regulations and standards.[77]

Relying on *Magnin*, the court in *Swanstrom* found that no DER or DMIR specifically was named in the complaint. In remanding the case to state court, the court held that the defendant-manufacturer had not established or even alleged that it had a contract or any relationship with the FAA such that substantial control was exercised over it.[78] Further, the court held that "[i]t is not sufficient for the [] defendants to assert that their acts fall

[75] *Id.* at 1428.

[76] 531 F. Supp.2d 1325, 1328 (S.D. Ala. 2008).

[77] 531 F. Supp.2d at 1328-29.

[78] *Id.* at 1332.

under the general auspices of a federal officer or fall within the purview of participation in a regulated industry."[79]

An identical result—remand to state court—was reached in *Britton v. Rolls-Royce Engine Servs.*, a personal injury action arising out of a helicopter crash.[80] In *Britton*, the defendant-repair center argued that removal was proper because the FAA had designated private individuals, including its own employees, to serve as FAA representatives by certifying that the aircraft and engine maintenance was performed according to FAA specifications.[81] Like the courts in *Magnin* and *Swanstrom*, the court in *Britton* ordered a remand because the complaint did not name any individual defendants and did not expressly allege that defendant's issuance of an airworthiness certificate was a proximate cause of the accident.[82]

The holdings in *Magnin*, *Swanstrom* and *Britton* (among other cases) present substantial obstacles to successful federal officer removal, absent the DER or DMIR being named as a defendant. However, not every court presented with this situation has followed *Magnin*.

Successful Federal Officer Removal Based On Actions of a DER or DMIR

Despite the holdings in *Magnin*, *Swanstrom* and *Britton*, at least one court has found removal pursuant to the federal officer removal statute proper without the DER or DMIR

[79] *Id.*

[80] No. 05-01057, 2005 WL 1562855, *1 (N.D. Cal. June 30, 2005).

[81] *Id.* at *4.

[82] *Id.* *4.

being named as a defendant. In *Scott v. Lance Aviation, LLC,*[83] a case involving the crash of a military surplus 1968 Hughes OH-6A U.S. Army helicopter, remand after a federal officer removal was denied. Plaintiffs in *Scott* alleged that the defendant-manufacturer (the defendant was the successor to the manufacturer): (i) violated federal law by failing to "support" the helicopter through applicable maintenance and service information and other instructions for "continued airworthiness;" (ii) failed to comply with unspecified Federal Aviation Regulations; and (iii) delivered "unairworthy" component parts. Removal was premised on the defendant-manufacturer acting under the direction of a federal officer and under color of such office.[84]

The court in *Scott* relied on *Magnin* to determine whether the general standards of federal officer removal were met.[85] The court first noted that the plaintiff's allegations regarding "unairworthy" component parts were analogous to the allegations in *Magnin*. Further, and again as in *Magnin*, the allegation regarding improper certification necessarily implicated the manufacturer's employees acting under the general supervision of the FAA Administrator as DERs or DMIRs.[86]

The court also found that the plaintiff's allegations encompassed parts that would have been supplied to the U.S. Army and, at any rate, any part not sold to the Army necessarily would have been certified as airworthy by the manufacturer's employees acting as DERs

[83] 8:09-986-T-33TBM, 2011 U.S. Dist. LEXIS 74778 (M.D. Fla. July 11, 2011).

[84] *Id*. at 2.

[85] *Id.* at 3.

[86] *Id*. at 3-4.

and DMIRs under FAA supervision.[87] Because the defendant-manufacturer could assert a colorable federal defense (that it acted within the scope of its federally imposed duties), the court concluded that "[u]nder these circumstances, the Court finds that the required causal connection exists between federal direction or supervision and [defendant's] alleged conduct." Therefore, although still using the analytical framework from *Magnin*, the court in *Scott* nonetheless found removal proper despite the DER or DMIR not being named a defendant.

Successful Removal Based on the Actions of an ODAR

In *Scrogin v. Rolls-Royce Corp.*, the defendant-manufacturer successfully opposed remand based on the manufacturer's status as a federally-appointed Organizational Designated Airworthiness Representative ("ODAR").[88] *Scrogin* involved the crash of a U.S. Army owned Bell Kiowa Warrior helicopter in an active military zone in Iraq.[89] In support of removal, the defendant-manufacturer asserted that as a federally-appointed ODAR, it has the delegated authority to perform various functions in connection with the issuances of FAA certificates.[90] Defendant Rolls-Roye explained that an FAA employee closely supervises an ODAR to ensure that it is performing its delegated functions in accordance with the FAA Administrator's regulations, policies and procedures.[91]

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[87] *Id.* at 4.

[88] No. 3:10-cv-442, 2010 WL 3547706 (D. Conn. Aug. 16, 2010).

[89] *Id*. at *1.

[90] *Id*. at *4.

[91] *Id*.

The plaintiffs in *Scrogin* made specific allegations in their complaint implicating the manufacturer's actions as an ODAR. Specifically, the complaint alleged that the manufacturer failed to comply with its federally imposed obligations pertaining to airworthiness and continuing airworthiness and that, contrary to unspecified FARs, improperly certified to the FAA and/or military that the allegedly defective component was "airworthy."

In denying the plaintiffs' motion to remand in *Scrogin*, the court found that defendant's "conduct constituted more than compliance with the federal regulations. Defendant assisted the government by manufacturing the engine according to the general federal regulations and the military requirements, and it was subject to monitoring and/or supervision by the federal authorities."[92] The court also found that the necessary "causal nexus" was present because plaintiffs asserted that the defendant failed "to certify properly the accident engine and its component parts. Thus, the allegations arise out of defendant['s] conduct in carrying out its government-delegated duties that were under the supervision of the FAA."[93]

Because the defendant-manufacturer could assert a colorable federal defense (that it complied with federally imposed standards and regulations of the certification process), remand was denied. The allegations in *Scrogin* mirrored those found in *Scott*, where the court also found that removal was proper. The practical lesson from both *Scrogin* and *Scott* is that the language of the complaint will, in many instances, determine whether

[92] *Id*. at *5.

[93] *Id*.

federal officer removal is proper. The removing defendant in *Scrogin* educated the court on the aircraft (or component) certification process through a detailed affidavit submitted by one of its DER employees. In addition to explaining the aircraft certification, the DER's affidavit walked the court through the process of becoming a DER, DMIR and ODAR.

Summarizing, removal of a lawsuit based on the defendant-manufacturer's status as an ODAR, rather than on its employees' status as DERs and DMIRs, allows the removing defendant to avoid the *Magnin* requirement that the specific individual be named as a defendant. As evidenced above, plaintiffs have seized on this requirement and rarely (if ever) name the DER or DMIR and, as a result, typically deny defendants this basis for federal officer removal. A plaintiff, obviously, cannot neglect to name the manufacturer as a defendant to avoid removal and, therefore, the defendant's status as an ODAR will be directly implicated by any allegations concerning the examination, inspection and testing performed in connection with the issuance of certificates.

As a practical matter, a defendant seeking removal must educate the court on the FAA's multi-tiered certification system to ensure that aircraft and their components comply with its federal airworthiness and certification standards. It also is critical that the court understand that the DER, DMIR and ODAR process is closely overseen by a supervising FAA office, which approves the training programs, procedures and the individuals themselves who are granted the delegated authority to perform FAA functions. This can be accomplished through reliance on the applicable FARs, in addition to affidavits or declarations from the DER and DMIR. It is the DER or DMIR who is most

knowledgeable about the certification process and can walk the court through the certification process as well as the process to become a DER or DMIR. It is essential that the court understand both the aircraft certification process as well as the process to become a DER, DMIR or ODAR. As evidenced by the opinion in *Swanstrom*, assertions that a manufacturer's conduct fell under the general auspices of a federal officer generally will not suffice.

VIII. Recent Developments In Electronic Discovery

Electronic discovery, or e-discovery, continues to evolve in ways that will impact the litigation of aviation products liability cases, both substantively and financially. Preservation, which underlies the analysis of spoliation issues surrounding electronic documents, is presently the subject of an intense debate among stakeholders as alternatives are being considered by the Federal Civil Rules Advisory Committee. The use of Rule 502(d) to protect against privilege waiver is becoming virtually indispensable in Federal Court. Judicial recognition of the effectiveness and efficiency of technology-assisted review, or predictive coding, is on the rise. And, the assessment of certain e-discovery costs is now an accepted practice under Federal Rule 54(d) and 28 U.S.C. § 1920.

Preservation Obligation

A short two years ago, Judge Shira Scheindlin followed up her *Zubulake* series of opinions on the obligation to preserve electronic evidence with her decision in *The Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*.[94] In essence, Judge Scheindlin mandated the issuance, implementation and maintenance of a broad written preservation notice (a litigation hold) as soon as a party reasonably anticipates litigation. Failure to do so risks not only the imposition of spoliation sanctions, certainly including monetary sanctions, but also sanctions possibly as severe as an adverse inference or, in the most egregious of circumstances, dismissal.

In the intervening time period, courts have agreed and disagreed with Judge Scheindlin, leading to general conservatism as a result of the level of uncertainty over the true timing and scope of the preservation obligation, and at significant expense. For example, in *Huggins v. Prince George's County*,[95] the Court recognized that "[t]he mere existence of a dispute does not necessarily mean that parties should reasonably anticipate litigation or that the duty to preserve arises."[96] In *Surowiec, v. Capital Title Agency, Inc.*,[97] the Court determined that the obligation to preserve was triggered upon receipt of a letter from a lawyer providing notice of "anticipated claims."[98] However, in *Webb v. Jessamine*

[94] 685 F. Supp. 2d 456 (S.D.N.Y. 2010).

[95] 750 F. Supp. 2d 549 (D. Md. 2010).

[96] *Huggins*, 750 F. Supp. 2d at 560 (quoting *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 509 (D. Md. 2009)).

[97] 790 F. Supp. 2d 997 (D. Ariz. 2011).

[98] *Id*. at 1005.

County Fiscal Court,[99] the Court determined that the filing of procedural incident reports did not trigger the obligation to preserve because "[d]istrict courts have consistently looked for communication, whether it be written or verbal, by the plaintiff threatening to initiate litigation or announcing litigation against a defendant as the point at which a defendant has a duty to preserve relevant evidence."[100] The import of the trigger and scope of the preservation obligation is illustrated in *Pippins v. KPMG LLP*,[101] wherein KPMG was obligated to incur millions of dollars of expense to preserve the hard drives of some 2,500 former employees, with no consideration of proportionality – the relationship between e-discovery costs and the monetary value of the litigation. Conversely, in *Rimkus Consulting Group, Inc. v. Cammarata*,[102] Judge Lee Rosenthal expressly engrafted a proportionality analysis onto the evaluation of the scope of preservation, which was echoed to some extent by Judge Paul Grimm in the seminal case of *Victor Stanley, In. v. Creatvie Pipe, Inc.*[103]

In an effort to deal with the uncertainty surrounding ESI preservation, the Advisory Committee is currently considering various proposals for modifying the Federal Rules to address, inter alia, trigger and scope, with due consideration for the proportionality

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[99] 2011 U.S. Dist. LEXIS 93136 (E.D. Ky. Aug. 19, 2011).

[100] *Id.* at *19.

[101] 2011 U.S. Dist. LEXIS 116427 (S.D.N.Y. Oct. 7, 2011).

[102] 688 F. Supp. 2d 598 (S.D. Tex. 2010).

[103] 2010 U.S. Dist. LEXIS 93644 (D. Md. 2010).

concerns contemplated by the Federal Rules. The Committee is considering whether the Federal Rules should specify the point in time at which the preservation obligation arises, or continue the current common law rule that ESI must be preserved when a party reasonably anticipates litigation. Alternative triggers include the receipt of a written request or notice to preserve; the service of a complaint, subpoena, claim notice or similar formal legal document; actual notice of the commencement of formal proceedings; or steps taken in preparation for asserting a claim or defense. With respect to scope, the Committee is considering drafting the rules with as much specificity as possible. Topics addressed under a revised rule could include the subject matter of the information to be preserved; the relevant time period; the obligation to act reasonably under the circumstances; the types and sources of data to be preserved; the format of preserved data; and potential limitations on the types of data and number of custodians to be searched. These issues and others were addressed at a mini-conference held by the Advisory Committee in Dallas in September of 2010. Not surprisingly, there was little agreement among the participants representing various stakeholders, including large corporate defendants as well as the plaintiffs' bar.

Privilege Review and Preservation

Once ESI must be reviewed and produced, the proper application of Federal Rule of Evidence 502(d) can effectively preserve both the attorney-client and attorney work product privileges, with minimal review. Indeed, by drafting a thorough electronic discovery procedure and memorializing that process in a court order issued pursuant to Rule 502(d), litigants can minimize privilege review obligations, while nearly eliminating the potential for waiver resulting from disclosure during the production process. And,

pursuant to Rule 502, the privilege protection extends to any other Federal or State proceeding.

Pursuant to 502(d), "[a] Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other Federal or State proceeding."[104] These protections apply regardless of whether the disclosure was inadvertent, and regardless of the care taken by the disclosing party.[105] In order to properly invoke the protections of Rule 502(d), any agreement between counsel concerning the management of ESI should be incorporated by the Court into a Rule 502(d) Order. The agreement, however, must be comprehensive, in order to avoid having a reviewing Court interpose 502(b) considerations of reasonableness and inadvertence into the production of privileged material consistent with a 502(d) Order. Thus, any review process should be fully delineated and precisely followed. The agreement should explicitly state that even an inadvertent disclosure does not waive privilege, pursuant to Rule 502(d), and further, that the parties agree that the proposed process satisfies the obligations of Rule 502(b) as well. Counsel also should include a specific procedure for managing the assertion of privilege claims after information is produced, as well as a claw-back procedure setting forth the process for sequestration, review, and return or destruction of privileged documents if they are identified during the litigation.

[104] Fed. R. Evid. 502(d).

[105] Fed. R. Evid. 502(d) Advisory Committee Notes.

The reach of a properly implemented Rule 502(d) Order is extensive. Properly implemented, it can insulate a party from waiver of the attorney-client and attorney work product privileges in a pending litigation, as well as in any other federal or state proceeding. It can also be used to protect third-parties producing information in the litigation, such as respondents to a subpoena. This can be accomplished by ensuring that a Rule 502(d) Order is in place to protect disclosure, or otherwise seeking a protective order pursuant to Rule 502(d) to obtain the full protections of the rule.

Predictive Coding

A Rule 502(d) Order is particularly useful when machine or technology-assisted review (otherwise known as predictive coding) will be used to cull down the large set of collected ESI into something much smaller, and which may or may not be reviewed independently during discovery. Predictive coding contemplates the review of a relatively small subset of collected documents to identify which are relevant to the litigation, and which are not relevant. The software leverages that initial coding, using linguistic-based algorithms, to classify the balance of the collected documents as relevant or not relevant. Studies have shown that predictive coding software meets or exceeds the ability of human reviewers to locate responsive documents and to segregate them from non-responsive documents. The result is a much quicker and more accurate identification

of the documents relevant to the litigation than could ever be accomplished by human review of the massive amounts of electronic data being collected for modern litigation.

Although there are no judicial opinions directly advocating or adopting predictive coding as a means of identifying responsive documents during litigation, judicial approval is quickly expanding. In his October 2011 article in Law Technology News, *Search, Forward: Time for Computer Assisted Coding*, United States Magistrate Judge Andrew Peck of the Southern District of New York advocated the merits of replacing massive human review and keyword searching with predictive coding. Judge Peck contrasted the failures of historical approaches to electronic discovery with the capabilities of modern predictive coding. He noted that the science behind the "black box" (the algorithm) is less important in defending the use of predictive coding than a statistical demonstration that the process works, *i.e.*, most of the relevant documents were located. Most importantly, in noting that there were no judicial opinions on which counsel could rely to implement predictive coding, Judge Peck observed that until there is a judicial opinion approving (or even critiquing) the use of predictive coding, counsel will just have to rely on his article as a sign of judicial approval.

Cost Recovery

Whatever approach is taken to managing electronic discovery, it is clear that at least some of the costs associated with electronic discovery are recoverable by the prevailing party under Federal Rule 54(d) and 28 U.S.C. § 1920. In *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*,[106] Judge McVerry assessed in excess of $350,000 of

[106] 2011 U.S. Dist. LEXIS 48847 (W.D. Pa. May 6, 2011).

electronic discovery costs in favor of the prevailing party. Recognizing that, while only those costs that are specifically identified in 28 U.S.C. § 1920 could be taxed to the losing parties, § 1920(4) included fees for exemplification and the costs of making copies of any materials where the materials are necessarily obtained for use in the case. The Court undertook an extensive review of case law on taxing of electronic discovery costs, and concluded that the steps the third-party vendor performed appeared to be the electronic equivalents of exemplification and copying. Although Courts since then have attempted to parse recoverable from non-recoverable electronic discovery costs through the strict application of Section 1920(4), it is clear that some segment of electronic discovery costs are properly recoverable under Rule 54(d).