Schnader ATTORNEYS AT LAW
Aviation Group

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Court Dismisses State Law Negligence Claim Against Carrier as Preempted by Montreal Convention

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In a case litigated by Schnader Harrison Segal & Lewis LLP, the United States District Court for the Eastern District of Pennsylvania recently dismissed a state law negligence claim as preempted by the Montreal Convention. In *Raub v. US Airways, Inc*., No. 16-1975 (E.D. Pa.), the plaintiff traveled from Cancun, Mexico to Philadelphia, Pennsylvania aboard a flight that encountered severe turbulence. The plaintiff alleged that her seatbelt failed to restrain her and that, as a result, she was thrown upward out of her seat and struck her head on the overhead compartment.

The plaintiff's complaint against U.S. Airways asserted a state law negligence claim against U.S. Airways, which moved to dismiss the claim as preempted by the Montreal Convention. In her opposition to the motion, the plaintiff conceded that the Montreal Convention governed her suit, but nevertheless argued that the Montreal Convention does not preempt state law and, therefore, she should be permitted to pursue her negligence claim against the airline.

Plaintiff first relied on cases finding that the Montreal Convention does not completely preempt state law claims so as to support removal. Because removal was not at issue, however, these cases were deemed by the court to be irrelevant.

Plaintiff also relied on *Zicherman v. Korean Air Lines Co*., 516 U.S. 217 (1996), and its progeny, which held that "auxiliary issues" not addressed by the Warsaw/Montreal Convention are governed by domestic law. Because the issue of what causes of action are permitted in a Convention case is not an auxiliary issue, however, *Zicherman* also was deemed inapplicable.

The *Raub* Court granted the airline's motion and dismissed plaintiff's state law negligence case.

***Raub v. US Airways, Inc.,* No. 16-1975 (E.D. Pa.)**

Update on *AVCO Corporation v. Sikkelee* and Preemption Under the Federal Aviation Act

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The United States Supreme Court on November 28, 2016 issued its decision denying *certiorari* in *AVCO Corporation v. Sikkelee*, in which petitioner AVCO sought review of the Third Circuit's decision in *Sikkelee v. Precision Airmotive Corporation*, which held that the Federal Aviation Act (the "Act") preempts the "field of aviation safety" with regard to "in-air operations," but does not preempt aircraft products liability claims. 822 F.3d 680 (3d Cir. 2016). The Third Circuit's holding largely parted from the view of the Federal Aviation Administration, which submitted a letter brief to the Third Circuit opining that the Act impliedly preempts the field of aviation safety with respect to substantive standards of safety, that federal standards govern state tort suits, and that ordinary conflict preemption principles govern whether an FAA-issued type certificate preempts a design defect claim.

After the Third Circuit issued its opinion, AVCO Corporation (through its Lycoming Engines division) filed a petition for rehearing by the Third Circuit *en banc*, which the court denied. On September 6, AVCO filed a petition for *writ of certiorari* with the Supreme Court of the United States. After describing Congress's long interest in regulating the aviation industry and describing the FAA certification process, *AVCO* presents three main arguments for granting its petition: (1) the Third Circuit's opinion has deepened an existing circuit split on the scope of field preemption under the Act; (2) the Third Circuit made an "arbitrary" distinction between "in-air operations" and other aspects of aviation safety, misinterpreting the Act and its intention to preempt the entire field; and (3) this is an exceptionally important question that warrants the Supreme Court's review.

Four *amicus* briefs were filed in support of AVCO's petition. The Aircraft Owners and Pilots Association's brief describes the FAA's "pervasive" regulatory scheme and how state-law duties would interfere with that scheme, and also argues that the Third Circuit's distinction between in-air operations and the rest of the aviation safety field is artificial and unsupportable. The General Aviation Manufacturers Association, Inc.'s brief reviews the FAA certification process, notes that conflict preemption analysis alone would not solve the issue of states' differing standards of care, and explains air flight's importance in the United States. The brief for Aerospace Industries Association of America, Inc. discusses Congress's interest in federal aviation safety, the importance of aviation to the United States economy, and the painstaking nature of FAA approval. Finally, the Atlantic Legal Foundation and New England Legal Foundation's brief examines the circuit split and criticizes the Third Circuit's distinction between in-air operations and other aviation safety areas.

Sikkelee's opposition to *certiorari* emphasized the FAA's delegation of responsibility to manufacturers' designees and noted that manufacturers are permitted to make certain design changes without FAA approval.

Sikkelee further argued that: (1) there is no circuit split – or at least, none that is implicated here – because no circuit court has held that the scope of field preemption under the Act encompasses general aviation design defect cases; (2) the Third Circuit correctly performed its preemption analysis; and (3) this case is not the proper vehicle to address the scope of federal preemption under the Act.

AVCO's reply brief stresses the great importance of the question before the Court, reiterates that a circuit split does, indeed, exist, and attacks the merits of Sikkelee's substantive arguments.

Unfortunately, the Supreme Court's declination of *certiorari* means that the Third Circuit's decision will stand. This is a disappointing blow to aircraft product manufacturers, which now face potential liability for designs that were approved by the FAA.

***AVCO Corporation v. Sikkelee*, Supreme Court Dkt. No. 16-323.**

California Court Expands Specific Personal Jurisdiction

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Two years ago, the U.S. Supreme Court substantially curtailed forum shopping by limiting general jurisdiction against corporate defendants. (*Daimler AG v. Bauman*, 134 S. Ct. 746 (2014)). The California Supreme Court's recent decision in *Bristol-Meyers Squibb Co. v. Super. Ct.* has the potential to reverse many of the gains from *Daimler*. In *Bristol-Myers Squibb*, 86 California residents and 592 nonresidents alleged adverse consequences from using BMS's drug Plavix.

The plaintiffs asserted two arguments in support of personal jurisdiction. First, they argued that BMS consented to general jurisdiction in California by registering to do business there, an issue the Supreme Court explicitly stated in *Daimler* that it was not addressing. The *Bristol-Myers Squibb* court rejected this argument. Relying on pre-*Daimler* California Court of Appeals opinions, the court held that the "designation of an agent for service of process and qualification to do business in California alone are insufficient to permit general jurisdiction." The court added, "[i]n assessing BMS's California business activities in comparison to the company's business operations 'in their entirety, nationwide,' we find nothing to warrant a conclusion that BMS is at home in California."

The plaintiffs' second argument was that because the nonresidents' claims were similar to those of the resident plaintiffs, personal jurisdiction existed over the non-resident plaintiffs even though they did not purchase or use (and thus were not harmed by) Plavix in California.

A 4-3 majority found that California courts have specific jurisdiction over the claims of the almost 600 out-of-state plaintiffs even though the actions giving rise to their claims occurred entirely outside California. The majority found that because both "the resident and nonresident plaintiffs' claims were based on the same allegedly defective product and the allegedly misleading marketing and promotion of that product, which allegedly caused injuries in and outside the state," there was a substantial connection. Further, "BMS's nationwide marketing, promotion, and distribution of Plavix created a substantial nexus between the nonresident plaintiffs' claims and the company's contacts in California concerning Plavix." In other words, specific jurisdiction applied to BMS because it marketed and distributed Plavix nationwide. Additionally, despite the fact that "there is no claim that Plavix itself was designed and developed in [BMS's California research and laboratory] facilities," the *Bristol-Myers Squibb* court found that these facilities were related to the plaintiffs' claims and this research and development activity connected the nonresident plaintiffs' claims to BMS and California.

As the *Bristol-Myers Squibb* dissent correctly noted, "[s]uch an aggressive assertion of personal jurisdiction is inconsistent with the limits set by due process." BMS filed a petition for *certiorari* with the U.S. Supreme Court on October 7, 2016 seeking review of the California Supreme Court's decision. Product liability defendants and counsel will be following the petition closely to monitor whether the Supreme Court grants the petition. A number of interested parties have already filed *amicus* briefs, and this trend is likely to continue for both sides.

***Bristol-Myers Squibb Co. v. Super. Ct.*, 377 P.3d 874 (Cal. 2016), Petition for Cert. filed (U.S. Oct. 11, 2016) (No. 16-466).**

Specific Jurisdiction Found Over Out-of-State Defendants Based on Many Individually Insignificant Contacts

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In *Peregrine Falcon LLC v. Piaggio Am., Inc.*, an Idaho federal district court held that it had specific jurisdiction over the manufacturer of an aircraft despite the fact that the aircraft was not delivered, nor did it crash, in Idaho. In a somewhat complex transaction, CBA, a Texas-based company, entered into a contract to purchase a custom-made plane from Piaggio, a Delaware corporation headquartered in Florida.

At the same time, CBA entered a contract with defendant Fast Enterprises, LLC, a New York company headquartered in Colorado, for the sale of the Piaggio-manufactured plane, and assigned the sale to the plaintiff, an Idaho-based trust.

The assignment agreement was governed by Idaho law, and all of the defendants knew that the plaintiff was going to be the ultimate purchaser of the plane.Piaggio experienced manufacturing delays, and arranged flight coverage in and out of Idaho for Fast employees, to arrange pilot selection for those flights, and to locate hangars in Idaho. Eventually, Piaggio delivered the plane to CBA in Kansas, which, in turn, delivered the plane to Fast in Texas, where the plaintiff took delivery of it.

The plane ultimately malfunctioned and crash landed in Illinois.

After finding that Piaggio and CBA were "clearly not" subject to general jurisdiction in Idaho, the Court addressed the issue of specific jurisdiction. The Court held that Piaggo's and CBA's contacts with Idaho "were not random, fortuitous, or attenuated," and, therefore, they were subject to the Court's specific jurisdiction.

In deciding to exercise jurisdiction, the Court weighed heavily that Piaggio entered into the manufacturing contracts knowing that an Idaho company was the ultimate purchaser and had originally agreed to deliver the aircraft in Idaho. Additionally, during the delays, Piaggio worked with CBA to arrange flight coverage for Fast and arranged these flights with an Idaho-based charter company.

Finally, the Court found that both Piaggio and CBA emailed Fast's Idaho-based employees about the sale, and that Piaggio knew the plane was going to be used primarily in Idaho, and received payments for the plane from Idaho.

While each of the above factors in isolation may not have been enough to confer specific jurisdiction over Piaggio, the court found that when taken together they showed that Piaggio purposefully established minimum contacts sufficient to establish jurisdiction.

The takeaway from *Peregrine Falcon* is that, even under the post-*Daimler* and *Goodyear* personal jurisdiction regime, attenuated contacts with a plaintiff's home state can establish specific jurisdiction in a tort and contract case when manufacturers and sellers know that the product will ultimately end up in that state.

Peregrine Falcon LLC v. Piaggio Am., Inc. **(D. Idaho Aug. 24, 2016. 2016 U.S. Dist. LEXIS 115083**

District Court Finds Registering to do Business Sufficient to Support Personal Jurisdiction

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In the wake of the United States Supreme Court's decision in *Daimler AG v. Bauman*, courts continue to face the issue of whether a corporation's registration to do business within a state constitutes consent to general personal jurisdiction. Finding that it does, the Eastern District of Pennsylvania in *Bors v. Johnson & Johnson*, *et al.,* denied a motion to dismiss for lack of personal jurisdiction made by Imerys Talc America, Inc. ("Imerys").

Imerys has only one contact with Pennsylvania – its 2007 decision to register to do business there as a foreign corporation. Imerys has not conducted any transactions in Pennsylvania over the past eleven years nor does it not own or lease any property within the state. Notwithstanding this complete lack of contact with Pennsylvania, Imerys will have to defend this wrongful death and product liability action, over 1,200 analogs of which are being litigated across the country, in Pennsylvania federal court because it chose to register as a foreign corporation.

Imerys argued that although the Supreme Court's decision in *Daimler* did not address the issue of

consent to personal jurisdiction by registration to do business, finding consent by registration would frustrate the underlying rationale of *Daimler* to narrow the scope of personal jurisdiction.

The Eastern District was not persuaded. First, the Court found that Pennsylvania's statute specifically notifies potential registrants that they will be subject to the general jurisdiction of its courts. Accordingly it did not consider any cases where the court analyzed a registration statute that lacked this type of notice. Second, the Court distinguished a court's exercise of general jurisdiction based on consent from the "at home" analysis in *Daimler*, finding that *Daimler* is inapplicable to the issue of whether registration constitutes consent. The Court added, "[w]e do not see a distinction between enforcing a forum selection clause waiving challenges to personal jurisdiction and enforcing a corporation's choice to do business in the Commonwealth."

Notably, the Third Circuit has not yet addressed whether jurisdiction by consent is still valid and courts within the Circuit have reached different results on this issue.

***Bors v. Johnson & Johnson, et al*., 2016 U.S. Dist. LEXIS 128259 (E.D. Pa. Sept. 20, 2016).**

Accident That Occurs While Flying Does Not Create Personal Jurisdiction in New York

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In *Merritt v. Airbus Americas, Inc.,* the plaintiff flight attendant was injured during a flight from Boston to Washington, D.C. when she was struck in the head by a jump seat that retracted when another flight attendant stood up while the plaintiff was attempting to store emergency demonstration equipment. As a result, the plaintiff suffered severe head trauma, a concussion, and permanent brain injury.

Defendant Airbus Americas, Inc., a Delaware corporation with its principal place of business in Virginia, and defendant AAI S.A.S., a French company with a principal place of business in France, are related entities that sell and lease aircrafts and perform services related to repair and maintenance and technical support of aircrafts operating in all 50 states. The plaintiff alleged that these defendants negligently designed and installed the jump seats.

Both defendants filed a motion to dismiss for lack of personal jurisdiction.

In opposition, the plaintiff alleged that the defendants' Internet advertisements in the United States, not specifically New York, were sufficient to support personal jurisdiction. The court found this argument unavailing and stated that advertising is insufficient unless supplemented by business transactions or accompanied by the defendant's permanence and continuity within New York. The court reiterated its former stance that Internet advertisements do not provide an adequate basis for personal jurisdiction.

The plaintiff also alleged that AAI spent billions of dollars within the United States with companies that have offices in New York. The court found this line of reasoning unavailing since "simply having contact with companies that have offices in New York does not subject [the defendant] to jurisdiction in New York."

Finally, the plaintiff alleged that the defendants had knowledge that the aircraft would be operated into and out of airports in the United States, including airports in New York.

The court found that the plaintiff failed to establish a "substantial nexus" between her cause of action and the defendants' alleged contacts with New York. Accordingly, the complaint was dismissed for lack of personal jurisdiction.

Merritt v. Airbus Americas, Inc., **No. 2:15-CV-05937 (E.D.N.Y. Aug 22, 2016). 2016 - U.S. Dist. LEXIS 111572**

Don't Believe the Hype – Part 107 Doesn't Make Drone Operations Easy for Everyone

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The Federal Aviation Administration's regulations for commercial operation of unmanned aircraft systems ("UAS" or "drones") became effective on August 29, 2016. Known as "Part 107," these regulations were expected to put an end to the need for a separate Certificate of Waiver or Authorization, which involved a costly and cumbersome application

process and required a public comment period. Part 107 achieved that objective for some operators, but not all.

Part 107 applies to drones weighing less than 55 lbs, and authorizes a properly certificated remote pilot to operate UAS during daylight hours and within visual line-of-sight. Operations in Class B, C, and D airspace and within the lateral boundaries of Class E airspace are prohibited without prior authorization from Air Traffic Control, and flight over people is prohibited, unless they are direct participants in the operation or otherwise are protected from potential impact with the drone. Many operations fit squarely within those limitations.

The FAA recognized, however, that Part 107 could not anticipate the needs of all UAS operators. Accordingly, Section 107.200(a) of Part 107 expressly authorizes a waiver of various operating limitations "if the Administrator finds that a proposed small UAS operation can safely be conducted under the terms of that waiver." In order to obtain a waiver, the operator must submit to the FAA a written request containing "a complete description of the proposed operation and justification that establishes that the operation can safely be conducted under the terms of [the requested] waiver." 14 C.F.R. §.200(b).

Since August 29, 2016, more than 100 applications for waivers of various operating limitations (e.g., daylight, visual line-of-sight, operation from moving vehicle, operation over people, etc.) have been submitted to the FAA, but only 34% of those applications have been granted. Over 900 applications for waiver of the airspace restrictions have been filed, but less than 9% of those applications have been granted. According to the FAA, most of those applications were rejected because they did not include details sufficient to establish that the requested operations could be conducted safely. In many cases, the applicants failed to respond to the FAA's request for additional information.

The FAA has taken significant steps to facilitate drone use and integration into the national airspace system. The denial of an overwhelming majority of the applications for waivers of Part 107's operational and airspace limitations nevertheless demonstrates continuing uncertainty for operators. In fact, the FAA recently announced its intention to release revised operating rules that would allow operations over unprotected and non-participating people (without a waiver). In these dynamic times, UAS operators are wise to monitor the regulations and FAA's website frequently, and to consult with appropriate experts for legal and operational advice.

Helicopter Lessor Invokes Federal Preemption to Escape Liability for State Law Claims

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In *Escobar v. Nevada Helicopter Leasing LLC*, the U.S. District Court for the District of Hawaii recently held that summary judgment was proper for a helicopter lessor facing state law negligence and strict products liability claims arising out of the deaths of the pilot and four passengers, where the lessor retained no actual control over the operational control or maintenance responsibility for a leased Eurocopter EC130 B4 helicopter.

The district court relied upon the preemptive effects of 49 U.S.C. § 44112, which by its plain language shields "owners and lessors of aircraft" from liability "for personal injury, death, and property damages unless the secured party, owner, or lessor was 'in the actual possession or control' of the aircraft," finding no evidence that the lessor "was engaged in any concrete manner with the actual physical possession or the actual operational control of the Subject Helicopter after its delivery."

Important to the court's holding was the legislative history of Section 44112's predecessor statutes and relevant case law. Specifically, as early as 1948, Congress expressed its intent to counter an upswell of state laws holding an aircraft owner liable regardless of the degree to which that owner exerted control over the aircraft. This intent manifested itself in Section 504 of the Civil Aeronautics Act, which was reenacted as the Federal Aviation Act of 1958. When Section 504 was modified in 1959, the Senate Report noted an "extreme shortage of available capital" for aircraft parts and financing, and that the intent of the statute was to expand the protection given to aircraft lessors. The *Escobar* court also noted that federal courts have uniformly held that Section 44112 preempted state law claims, and that only a minority of states have held to the contrary.

The *Escobar* decision is a useful reminder to defense practitioners of a viable route to challenge state law claims when representing owners or lessors who have little-to-no involvement with the operation or maintenance of their leased aircraft.

***Escobar v. Nevada Helicopter Leasing LLC*, No. 13-598, 2016 U.S. Dist. LEXIS 95186 (D. Haw. July 21, 2016).**

Aviation Group News

- Forty Schnader attorneys were selected for inclusion in the 2016 edition of *Super Lawyers*, including Aviation Group members Barry Alexander, Richard Barkasy, Emily Hanlon, Bruce Merenstein, Leo Murphy, Lisa Rodriguez, Ed Sholinsky, Denny Shupe, Jon Stern, Ralph Wellington and Gordon Woodward.
- *Corporate America* named Schnader's Aviation Group as one of the best of Aviation Law – USA.
- Schnader is named a "Recommended" Pennsylvania law firm in the 2017 edition of *Benchmark Litigation*. In addition, Aviation attorneys Denny Shupe and Ralph Wellington were recognized as "Local Litigation Stars."
- 2016 Dispute Resolution Awards recognized Schnader as the Best in Products Liability Litigation - Pennsylvania.
- Barry Alexander was quoted in "I didn't know that was banned on a plane" published in *USA Today.*
- Bill Janicki was quoted in the article "The Industry Reacts to Part 107," published on *Inside Unmanned Systems.*
- Denny Shupe presented at RTI's AViCON 2016 Aviation Insurance Conference on September 28 in Stevensville, Maryland.
- Schnader's Aviation Group was named "Aviation – Law Firm of the Year - USA" by *Lawyer Monthly*'s Legal Awards.

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