Schnader Aviation Group

# AVIATION HAPPENINGS

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## How Long is that Life Line? Plaintiff Tests Delaware's Savings Statute by Filing Lawsuit Seven Years After Crash

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At least 44 states have statutes providing a "grace period" for re-filing tort actions that have been dismissed on grounds other than the merits after the statute of limitations has expired. Those statutes are commonly referred to as "savings statutes." Plaintiff seeks to test the bounds of Delaware's savings statute in *Cohen v. Continental Motors, Inc*.

On March 31, 2013, a Lancair LC-42 aircraft piloted by Debra O'Neal crashed near Winston-Salem, North Carolina. She and her husband passenger, Dennis O'Neal, perished in the crash. The executor of their estates claims that the subject aircraft lost engine power when a starter adapter plug failed, expelling oil from the crankcase.

The executor sued Continental Motors, Inc. ("CMI") for alleged design defects in the starter adapter plug. According to papers filed in related actions, the executor was aware that CMI is a Delaware corporation with its principal place of business located in Mobile, Alabama. Nevertheless, the executor filed his initial action against CMI in North Carolina state court on March 12, 2015.

CMI contested personal jurisdiction in North Carolina. Because North Carolina is neither its state of incorporation nor home to its principal place of business, and CMI does not otherwise have a continuous presence in North Carolina, it is not subject to general personal jurisdiction there. Furthermore, CMI designed and manufactured the subject engine in Alabama, and sold and shipped it to the Lancair Company in Bend, Oregon, without knowledge that it ultimately would be purchased by the O'Neals in North Carolina. CMI did not have any contact with North Carolina related to the subject engine. Accordingly, CMI argued that the North Carolina court also lacked specific personal jurisdiction over CMI.

The North Carolina court stayed the litigation for almost one year, while one of the other named defendants also contested personal jurisdiction. Before and after that stay, CMI participated only in limited discovery relating to its own personal jurisdiction challenge. Consequently, the North Carolina trial court did not grant CMI's motion to dismiss for lack of personal jurisdiction until March 12, 2020.

The executor filed another action against CMI in the United States District Court for the District of Delaware on April 8, 2020. Because the two-year statute of limitations has expired, he relies on the Delaware savings statute (10 Del. C. § 8118(a)), which provides in material part:

> If in any action duly commenced within the time limited therefor in this chapter . . . the writ is abated, or the action is otherwise avoided or defeated by the death of any party thereto, or for any matter of form . . . a new action may be commenced, for the same cause of action, at any time within 1 year after the abatement or other determination of the original action, or after the reversal of the judgment therein.

CMI has moved to dismiss the Delaware action as untimely. The principal issue is whether the dismissal of the North Carolina action on personal jurisdiction grounds constitutes abatement or defeat "for any matter of form." CMI acknowledges that the Delaware savings statute is remedial and should be construed liberally, but contends there must be limits to its application. One of those limits is where the original lawsuit was "brought with knowledge of the lack of jurisdiction, and in fraud of the statute." CMI argues that the executor's own pleadings, which repeatedly acknowledged CMI is a Delaware corporation with its principal place of business in Alabama, are evidence that he knew North Carolina lacked jurisdiction. To emphasize its point, CMI cites an opinion from the Delaware Supreme Court, which explained, "We do not intend to approve a practice which would make [the savings statute] a refuge for careless and negligent counsel."

The executor opposes the motion on two principal grounds. First, CMI has a significant amount of contact with individuals and entities in North Carolina. He contends he was entitled to discover whether any of those contacts were related to the subject engine and thereby supported the exercise of specific personal jurisdiction. As such, he claims the North Carolina action was not filed fraudulently or with knowledge that jurisdiction was lacking. Second, the executor claims that CMI should not be able to avoid the effect of the Delaware savings statute, because it waited too long to seek a personal jurisdiction ruling in North Carolina and thereby was the cause of the delay.

The matter appears to be fully briefed and under consideration by the district court. The ruling could have significant implications for defendants. The United States Supreme Court's decision in *Daimler* restricting the exercise of general personal jurisdiction was lauded as means to curb claimants' forum shopping. In its aftermath, however, claimants often filed multiple actions in several different jurisdictions simultaneously before the statute of limitations expired, to hedge against a personal jurisdiction dismissal in their preferred venue. That tactic multiplied costs and proceedings. Should the *Cohen* plaintiff prevail in his use of the Delaware savings statute to assert an action five years after the statute has run, it could herald a new wave of considerations for the defense. Plaintiffs would have less incentive to file simultaneous actions in multiple jurisdictions, but instead, could file them serially. While defendants presumably retain a greater ability to ensure that litigation is brought in a proper venue, the liberal use and extension of savings statutes could present impediments to defending those claims, such as witness memories that become impossibly stale, loss of evidence and attrition of personnel. We will monitor this action and report accordingly. ***Cohen v. Cont'l Motors, Inc.,* No. 15 CVS 1134, 2020 NCBC LEXIS 29 (N.C. Super. Mar. 12, 2020); *refiled as* No. 20-cv-487-LPS (D. Del. April 8, 2012).**

## Appeals Court Holds that Federal Statute Permits Courts to Compel American Witnesses to Appear in Foreign Arbitration

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On March 30, 2020, the United States Court of Appeals for the Fourth Circuit issued its decision in *Servotronics Inc. v. Boeing*, holding that United States courts can compel witnesses to appear in a foreign arbitration under Title 28 of the United States Code §1782 ("Section 1782").

In *Servotronics* the Fourth Circuit decided "whether a party to a private arbitration agreement in the United Kingdom can, under 28 U.S.C. §1782, obtain testimony from residents of South Carolina for use in the arbitration." Section 1782 provides that a party in a legal proceeding before "**a foreign or international tribunal**" may apply to a United States District Court to obtain evidence for use in the non-US proceeding.

Servotronics supplied a component part that Rolls-Royce PLC installed in an engine it manufactured. In January 2016, while testing the engine in a Boeing 787 Dreamliner at a plant in South Carolina, the engine caught fire, which resulted in significant damage to Boeing's aircraft. Rolls-Royce sought indemnification from Servotronics for the $12.8 million it paid to settle Boeing's damages claim. Servotronics refused to indemnify Rolls-Royce.

## Aviation Group News and Notes

- **Denny Shupe** and **Bob Williams** presented the webinar, "Juries and Jury Trials: Is a New Defense Playbook Needed for Insurers and Trial Counsel?" on May 12.
- **Jonathan Stern** and **Stephanie Short** presented the webinar, "The Economic Loss Doctrine: Saving Contract Law from Drowning in a Sea of Tort" on June 10.
- **Barry Alexander** and **Joseph Tiger** published, "COVID-19: A Brief Overview of the Coronavirus Aid, Relief, and Economic Security Act" on March 30.
- **Bob Williams** was awarded the Disaster Relief Ribbon with Valor by the Civil Air Patrol for participation in Air Force approved food and personal protective equipment distribution missions during the pandemic.
- *Chambers and Partners* ranked Schnader's Aviation Group among the top six firms in the U.S. for aviation litigation, and ranked **Denny Shupe** and **Jonathan Stern** individually. In addition, **Barry Alexander, Denny Shupe, Jonathan Stern,** and **Bob Williams** were selected for listing in the *2020 Aviation Expert Guide*.
- *Super Lawyers* named **Richard Barkasy, Bruce Merenstein, Denny Shupe, Ralph Wellington, Keith Whitson, and Bob Williams** to its Pennsylvania list and named **Lee Schmeer** a "Rising Star."
- **David Struwe** was named among "Lawyers on the Fast Track" by *The Legal Intelligencer*.
- **Denny Shupe, Lee Schmeer,** and **Stephanie Short** were noted as "top authors in Aviation & Airlines" in the JD Supra Readers' Choice Awards.

Consequently, Rolls-Royce commenced an arbitration proceeding in the United Kingdom pursuant to the parties' contract. Servotronics filed an ex parte application in the United States District Court for the District of South Carolina pursuant to 28 U.S.C. §1782 to obtain testimony from three Boeing employees residing in South Carolina.

The district court denied the application, concluding that the arbitration between Servotronics and Rolls-Royce was not before "**a foreign or international tribunal**" as required by Section 1782. Servotronics appealed.

In its appeal, Servotronics argued that "an arbitral tribunal is a 'tribunal' in both the legal and everyday sense of the word." Therefore, Section 1782 does not require that a tribunal "be public, state-sponsored, or governmental" as argued by Boeing. However, Boeing contended that the UK arbitration "is a private proceeding arising from a private contract between the parties" and thus, does not qualify as a foreign or international tribunal as required by Section 1782.

The Fourth Circuit disagreed with Boeing and reversed the district court's ruling. In finding that Section 1782 authorizes federal district courts to provide judicial assistance to foreign or international arbitral panels in proceedings abroad, the Fourth Circuit not only focused on the similarities between international arbitrations and arbitrations in the United States, but also the legislative history of the statute. Specifically, the Fourth Circuit gave great weight to the fact that in 1964 Congress "…deleted from the former version of the statute the words 'in any *judicial* proceeding pending in *any court* in a foreign country' and replaced them with the phrase 'in a proceeding in a foreign or international *tribunal*.'"

The Fourth Circuit opined that this amendment provides U.S. assistance in resolving disputes before, not only foreign courts, but also all foreign and international tribunals, including arbitral tribunals in the UK. Accordingly, United States district courts effectively function as "surrogate[s] for a foreign tribunal by taking testimony and statements for use" in foreign proceedings.

The Fourth Circuit's ruling may have wide effects on international arbitration. It may provide a broader range of discovery to litigants accustomed to the more limited discovery available in many civil law jurisdictions. However, it is important to note that Section 1782 does not mandate discovery in the US for international proceedings. It simply provides district courts with the discretion to "manage any assistance that may be provided to a foreign tribunal." ***Servotronics Inc. v. The Boeing Company*, 954 F.3d 209 (4th Cir. 2020).**

## Political Question Doctrine Sinks Case Against Navy Helicopter Maintenance Contractor

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The Texas Court of Appeals, in a case rising from the January 8, 2014 fatal crash of a US Navy MH-53E Sea Dragon helicopter during an ocean minesweeping exercise off the coast of Virginia Beach, VA, affirmed the trial court's dismissal of strict liability, negligence and warranty claims against M1 Support Services ("M1"), a company that performed "phase maintenance" on the helicopter under a contract with the Navy. Plaintiffs sought wrongful death and survival damages under the Death on the High Seas Act and general maritime law. Before the trial court dismissed the claims against it, M1 filed a motion to join the Navy as a "responsible third party" for the accident.

The Navy's crash investigation determined that the crash was caused by issues arising from the use of Kapton wiring on the helicopter that had chafed and deteriorated; the deterioration of the condition of the wiring was not discovered during the maintenance inspections performed by M1. Specifically, the Navy found that an aircraft fire that culminated in the crash "was caused by the ignition of fuel in the aluminum transfer tube which had been breached by the chafing of both the tube and the insulation covering electrical wiring within the aircraft." The investigation found that the helicopter "was in compliance with all required technical directives" and "was in compliance with all special inspections." The investigation also noted that the inspection of internal wiring bundling and other items inside the aircraft for signs of chafing was not specifically required under the applicable Navy procedures and manuals.

Plaintiffs' expert, retired USMC Colonel William Lawrence, offered opinions about the "well known" deficiencies of Kapton wiring, and that M1 should have been looking for deterioration of the Kapton wiring when it performed and signed off phase maintenance inspections. Lawrence stated that proposals to replace Kapton wiring in these models of military helicopters were not implemented by the Navy due to military funding limitations. He also stated that a phase maintenance inspection card was added after the accident for more thorough inspection of wire harnesses, bundles and Kapton wiring in the areas where the fire occurred on the accident helicopter. The Navy's new, post-accident maintenance inspection card provided for the use of additional equipment, increased the time for inspection of wiring from 12 minutes to three hours, and was expanded from four to 26 lines of specific maintenance inspection tasks.

The trial court had found that the Navy: (1) defined the scope of work to be done by M1 in a "Performance Work Statement;" (2) provided M1 with the technical manual which included the phase/ maintenance cards for all of M1's contract maintenance work; (3) set the time frames for the inspections (including for wiring inspection); (4) performed its own quality assurance inspections; (5) supplied all parts that were used in M1's maintenance activities; (6) approved the M1 personnel who provided maintenance services; and (7) recommended the individual (a retired Navy Chief Petty Officer) to be hired as the M1 site lead.

Among other findings, the trial court reached the following conclusions of law: (1) the political question doctrine limits state court review of the federal government's "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force;" (2) M1's maintenance decisions were "de facto" Navy decisions, due to the Navy's plenary control over M1's maintenance activity, and therefore are non-justiciable; (3) even if M1 retained a significant amount of discretion regarding the performance of phase maintenance, plaintiffs' claims still implicated Navy decisions concerning the training and equipping of a military force; and (4) if the lawsuit were to proceed, the court would have to second guess numerous military decisions regarding wiring and maintenance, and potentially to second guess Congressional procurement decisions. As a result, the court concluded that it did not have jurisdiction to hear the case.

On appeal, the appellate court agreed with the trial court's conclusion that it did not have jurisdiction because litigating the case inextricably would involve reviewing military decisions, and also held that the political question doctrine is not limited to application to accidents occurring overseas or in combat zones. Instead, it found that the political question doctrine applied with equal force to this domestic accident, which took place during peace-time training activity off the coast of Virginia. The appellate court also agreed with the trial court that a jury would have been permitted to consider the potential fault of the Navy under federal maritime law. Even absent a formal allocation of fault to the Navy, the Court found that a jury could consider the

Navy's decisions about procurement and maintenance when determining accident causation.

This case illustrates the importance, in defending accident cases brought against civilian military contractors, of examining factual and legal bases not only to support the assertion of the government contractor defense, but also to support non-justiciability arguments for dismissal under the political question doctrine. ***Preston v M1 Support Services, L.P.*, No 02-18-00348, 2020 Tex. App LEXIS 1922 (Tex. App. Mar. 5, 2020)**

## The "Rolling Provision" of the GARA Statute of Repose Not Applicable to Rehauled and Rebuilt Engine Component

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In *Quinn v. Continental Motors, Inc.,* the Delaware federal court analyzed the "rolling provision" of the General Aviation Revitalization Act (49 U.S.C. § 40101) ("GARA") statute of repose and determined that it did not apply to a rehauled and rebuilt component part.

This case arose from the crash of a Piper Saratoga single-engine aircraft which killed both occupants, the pilot and flight instructor. The pilot's family brought an action alleging that the accident was caused by a defect in the design of the magneto. The aircraft was delivered to its first purchaser on November 3, 1980—almost 33 years before the accident, which occurred in 2013. The defendant rebuilt the magneto in 2002 and overhauled it in 2004.

On summary judgment, defendant argued that plaintiffs' claims were barred by GARA, which establishes an 18-year statute of repose for claims against "general aviation aircraft" manufacturers. A "general aviation aircraft" is defined as an aircraft with a maximum seating capacity of fewer than 20 passengers. Since the Piper Saratoga at issue has a six-seat capacity, and the aircraft was delivered almost 33 years before the accident, the Court quickly determined that the statute of repose for the aircraft as a whole had run.

But GARA also includes a "rolling provision" which applies to "**new**" components. Section 2(a)(2) of GARA states that if a "new component, system, subassembly or other part which replaced another component, system, subassembly or other part originally in ... the aircraft" is alleged to have caused the crash, then the statute of repose begins "on the date of completion of the replacement or addition." The plaintiff alleged that the statute of repose did not bar their claims because the rolling provision was applicable to the overhaul and rebuild of the magneto.

The Court began its analysis of the applicability of the rolling provision by commenting that "[t]he question of whether an aircraft part is 'new' is somewhat akin to the ship of Theseus, the planks of which were replaced one by one over the years until none of the original timber remained."

The Court determined that the 2004 overhaul of the magneto did not trigger the rolling provision. The Court explained that if an overhauled part could restart the limitations period, the statute of repose would be effectively eviscerated by the need to repair aircraft parts on a regular basis:

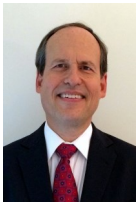
> The 18-year statute of repose would keep restarting due to the actions of third-party repair companies. Manufacturers could never be sure a part was free from liability, no matter how old it was. Congress would not have created a liability shield that would be rendered meaningless by routine maintenance.

The Court, however, also made clear that the ruling might have been different if the overhaul involved new items. The Court noted that "[i]f the 2004 overhaul had incorporated a new rotor assembly and housing which contained the pole shoes (the parts which, according to Plaintiffs' experts, caused the crash), then the rotor assembly and the housing which contained the pole shoes would be new components, and the rolling provision would apply."

Further, the Court concluded that the 2002 magneto rebuild did not re-start the statute of repose, reasoning that "[p]lainly, a rebuilt part is not the same as a new part" and "I am bound by the literal words of the statute." *Id.* at *7. The Court noted that "[e]ven though federal regulations require rebuilt parts to meet the same tolerances and limits as new parts, that does not transform rebuilt parts into new parts and no one apparently refers to them as such."

In granting summary judgment for the defense, the Court emphasized that "[t]he record contains no evidence that any of the parts of the magneto that are at issue in this case, namely, the rotor assembly, magneto housing, and pole shoes, were new when installed in 2004 or when rebuilt in 2002." *Id.* It is clear from the Court's decision that for the rolling provision to apply to the repair, overhaul or rebuild of an engine component, it must include the

installation of a brand-new part that was also a cause of the claimed damages. ***Quinn v. Continental Motors, Inc.,* No. 15-1005-RGA, 2020 U.S. Dist. LEXIS 49612 (D. Del. March 3, 2020).**



## Service Dog's Exclusion from Flight was not Disability Discrimination

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In *Mapp-Leslie v. Norwegian Airlines*, Chantel Mapp-Leslie—proceeding without counsel—sued Norwegian Airlines for violating the Americans with Disabilities Act by not permitting her to board a flight from New York to London. According to her complaint, Ms. Mapp-Leslie had provided to the carrier all necessary documentation to show that her dog, in fact, was a service animal that she needed to accommodate her disability and that the dog was current in his inoculations. When she arrived at JFK, the carrier told her that its policies had changed and it would no longer carry her dog. Remarkably, "the animal was surrendered to the New York Police Department." Ms. Mapp-Leslie alleged a variety of horrible ills (such as "loss of lungs") caused by Norwegian's refusal to carry her dog.

In dismissing the Complaint, Judge Pamela Chen said that she applied the facial plausibility standard introduced by the Supreme Court in *Bell Atl. Corp. v. Twombly* and *Ashcroft v. Iqbal* while also reading the pro se complaint "with 'special solicitude.'" The complaint was subject to dismissal because, as many courts previously had found, the Americans with Disabilities Act does not apply to airlines or aircraft. Judge Chen's special solicitude came in the form of consideration of several legal theories not advanced by Ms. Mapp-Leslie, including a claim that Norwegian violated the Air Carrier Access Act ("ACAA"). Despite that Ms. Mapp-Leslie had not raised the ACAA, Judge Chen considered the applicability of the ACAA but concluded that there is no private right of action under the ACAA. Judge Chen explained that she was not dismissing with leave to amend because amendment would be futile. She went one step further and wrote that "any appeal of this Order would not be taken in good faith, and therefore in forma pauperis status is denied for purposes of an appeal." ***Mapp-Leslie v. Norwegian Airlines,* No. 19-CV-7142 (PKC), 2020 U.S. Dist. LEXIS 8567 (E.D.N.Y. Jan. 17, 2020).**

## Manufacturer of Airline Seats Not Subject to Personal Jurisdiction or Jurisdictional Discovery in Destination State of Flight on Which Plaintiff Allegedly Sustained Injuries

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The U.S. District Court for the Northern District of Ohio recently held that a company that manufactured the seats in a Spirit Airlines aircraft was not subject to personal jurisdiction in Ohio for a case arising from injuries the plaintiff allegedly suffered during a Spirit flight from Las Vegas to Ohio. The plaintiff claimed that the seat in front of her collapsed before departure while the plane was taxiing to the runway, crushing her foot.

The Court began by noting that plaintiff had not alleged facts indicating the North Carolina-based seat defendant conducted such significant business in Ohio as to be considered "at home" in that state, meaning the company was not amenable to general jurisdiction. With respect to specific jurisdiction, the Court found plaintiff's claims against the seat company were based solely on her status as an Ohio resident, and had nothing to do with any purposeful conduct the company had directed toward Ohio. The Court was not persuaded by plaintiff's stream of commerce argument because, contrary to plaintiff's assertion, that test requires a defendant do more than simply place a product into the stream of commerce with the knowledge that it could end up in the forum state. Likewise, plaintiff could not bootstrap Spirit's contacts with Ohio (a state into which it routinely operated flights, including the flight at issue) to the seat defendant.

Notably, the Court also denied plaintiff's alternative request to conduct jurisdictional discovery, finding that such discovery was unwarranted because plaintiff could not even make a *prima facie* showing of personal jurisdiction, and could do little more than "speculate" as to what Ohio contacts such discovery would reveal. While the jurisdictional discovery threshold (and willingness to enforce it) certainly varies from court to court, this case serves as a reminder that the mere possibility that a plaintiff *could* discover meaningful contacts should not be enough for courts to permit a months-long jurisdictional fishing expedition. ***Olivia v. Airbus Ams., Inc*., No. 1:19 CV 1701, 2020 U.S. Dist. LEXIS 51368 (N.D. Ohio. Mar. 25, 2020).**

## Federal Court Grants Summary Judgment in Favor of Airline, after Plaintiff Fails to Produce Expert Evidence to Support Alleged Injury Causation

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The United Stated District Court for the Middle District of Louisiana granted summary judgment in favor of Delta Air Lines, Inc. ("Delta") after Plaintiff failed to produce expert evidence to support alleged injury causation.

Plaintiff was a passenger on a Delta flight. As the plane was climbing after takeoff, Plaintiff alleged that the passenger in front of him reclined her seat, which hit Plaintiff in the head and caused Plaintiff to suffer injuries to his "head, neck, right shoulder and arm." Plaintiff sued Delta, alleging claims of negligence under Louisiana state law for failing to ensure that all passengers kept their seat backs in the upright position; failing to ensure that the seat in front of him functioned properly, failing to maintain equipment within its position, and failing to ensure that all cargo on the aircraft was properly stored.

Delta moved for summary judgment, arguing that "(1) Plaintiff cannot meet his burden of proving that Delta breached a duty owed to Plaintiff; and (2) Plaintiff cannot prove that the alleged accident was the medical cause of Plaintiff's alleged injuries."

The Court began by noting that Louisiana's "duty/risk analysis" governed Plaintiff's claim. The Court further noted that Delta's motion required the Court to analyze whether Plaintiff met his burden of proving the breach and the cause-in-fact or medical causation elements.

With respect to the medical causation element, the Court found that Plaintiff failed to meet his burden. While conceding that "[g]enerally … 'soft tissue injuries' to the neck and/or back are conditions that are within common knowledge and do not require expert medical testimony regarding causation," the Court also noted that "when multiple accidents, other possible causes of the injury, and/or other conditions 'cast doubt' on the plaintiff's claims that the injuries were caused by accident at issue, then expert evidence is necessary."

In this case, the Court concluded that the Plaintiff needed to produce expert medical evidence to support claims of injury causation. The Court noted that Plaintiff had allegedly suffered similar injuries prior to those that he claimed in this alleged incident. Indeed, Delta produced expert medical evidence that opined that "Plaintiff's current conditions are 'more likely than not preexisting degenerative conditions caused by normal aging as opposed to the alleged incident.'" After Delta produced its expert evidence, the burden shifted to the Plaintiff to produce evidence to show that a material dispute existed as to causation. Plaintiff failed to produce any expert evidence.

The Court concluded that Plaintiff failed to produce the necessary expert evidence, and that summary judgment in favor of Delta was warranted given Plaintiff's failure. The Court rejected Plaintiff's claims that his medical records satisfied his burden and/or that his failure could be cured by allowing Delta to depose his treating physician. Specifically, the Court held that "a disclosure of medical records alone is insufficient to satisfy the [applicable] standards and that such a deficiency in disclosure is not 'harmless.'" The Court further found that "Plaintiff failed to [not only] follow the Federal Rules of Civil Procedure pertaining to expert witnesses, rendering his treating physicians as fact witnesses only, but … also has not shown which of his treating physicians are qualified to testify to causation and which medical records support [his] position."

Because the Court granted summary judgment on the basis of Delta's lack of causation argument, the Court found it unnecessary to rule on Delta's lack of breach argument. ***Bordenave v. Delta Air Lines, Inc.,* No. 18-00637, 2020 U.S. Dist. LEXIS 11362 (M.D. La. Jan. 22, 2020).**

## Southern District of West Virginia Remands Case to State Court Due to Lack of Timely Consent by All Defendants

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A recent decision by the United States District Court for the Southern District of West Virginia serves as a reminder of the importance of dotting one's i's and crossing one's t's when removing a case to federal court based on diversity jurisdiction. In *Chau v. Air Cargo Carriers, LLC et al.*, the District Court remanded the case to state court when one defendant – superficially a nominal party – failed to give timely consent to removal. Because the District Court determined that the non-consenting defendant was not so nominal as it first appeared, its lack of timely

consent was fatal to diversity jurisdiction.

On May 5, 2017, a short-haul cargo flight (the "Flight") crashed in West Virginia, killing the captain and first officer. The administratrix of the first officer's estate brought suit in West Virginia state court, alleging: 1) deliberate intent by Air Cargo Carriers, LLC ("ACC"), which operated the aircraft; 2) negligence by United Parcel Services Co. ("UPS"), which contracted ACC to provide cargo services; and 3) fraudulent misrepresentations relating to qualifications against the estate of the captain (the "Estate").

UPS removed the action to the Southern District of West Virginia, asserting both federal question and diversity jurisdiction. The Estate did not consent to removal within 30 days of service of the initial pleading, as required by 28 U.S.C. § 1441, and Plaintiff moved to remand. In an earlier decision, the District Court rejected jurisdiction based on federal question, but left open the question of whether diversity jurisdiction existed.

The District Court has now ruled that the lack of timely consent by the Estate was fatal to diversity jurisdiction. It is a well-established rule that removal based on diversity jurisdiction requires timely consent of all defendants. However, UPS cited to an exception to the rule—a defendant whose inclusion in the case is merely nominal need not consent to removal. Thus, UPS had to show that the Estate was a nominal defendant such that the suit could be resolved without affecting it in any reasonably foreseeable way.

UPS first argued that the Estate was effectively judgment proof. The District Court rejected this argument because the non-existence of assets did not foreclose the Estate having an interest in the outcome. The Court further noted that the claims asserted against the Estate were separate from those asserted against UPS and ACC. Thus, being judgment proof was not sufficient to render the Estate a nominal party.

UPS also argued that the Estate was a nominal defendant because it had immunity under West Virginia's Workers' Compensation Statute. For companies contributing to the state's workers' compensation program, the statute provides that co-employees acting in furtherance of their employers' operations are immune from suit for injury or death except in the context of intentional injury. UPS asserted that, as a co-employee, the Estate had statutory immunity, and thus no interest in the outcome of the suit. The District Court disagreed largely because the allegations against the Estate concerned alleged fraudulent misrepresentations of the captain's qualification made in his employment application. The Flight might have been in furtherance of ACC's interests, but the alleged fraudulent misrepresentations were not – they were for the captain's independent purpose of obtaining employment. As such, the Estate was not entitled to immunity, had an interest in the litigation, and therefore could not be a nominal defendant.

Although the District Court rejected in *dicta* Plaintiff's alternative argument that a technical deficiency in ACC's certification to conduct business in West Virginia precluded application of the Workers' Compensation Statute's immunity provision, this was of no import—the immunity provision was in any event inapplicable. As such, the District Court granted Plaintiff's motion to remand the case to state court.

*Chau* serves as a reminder that defendants seeking to remove a case to federal court based on diversity would do well to ensure strict adherence to the procedural requirements. If at all possible, defendants should quickly take action to obtain consent from all defendants, regardless of how nominal they may appear.

***Chau v. Air Cargo Carriers, LLC,* No. 2:19-cv-00452, 2020 U.S. Dist. LEXIS 22631 (S.D. W. Va. Feb. 10, 2020)**✈

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