

***AIRCRAFT BUILDERS COUNCIL, INC.
LAW REPORT***

**THE APEX DOCTRINE: PROTECTING A COMPANY'S TOP
EXECUTIVES FROM DISCOVERY HARASSMENT AND ABUSE**

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THE APEX DOCTRINE: PROTECTING A COMPANY'S TOP EXECUTIVES FROM DISCOVERY HARASSMENT AND ABUSE

By: Stephanie B. Gonzalez

In litigation against public and private entities, plaintiffs sometimes employ the tactic of seeking the deposition of a high-ranking or “apex” government official or corporate executive. Although high-ranking executives often have little first-hand knowledge of the facts at issue in the lawsuit, the burden and disruption to the company that these depositions impose can make this a useful method to pressure better settlements. Thankfully, many courts have recognized a duty to protect apex witnesses from the “unwarranted harassment and abuse”¹ these depositions can inflict, and have developed what is known as the “apex doctrine” to ensure that the depositions of apex executives are conducted for legitimate discovery purposes, rather than as a point of leverage against the company.

Although jurisdictions differ slightly in their application of the apex doctrine, the typical procedure is that the party seeking to prevent the deposition of a high-ranking executive must show that the witness is apex to the company and does not possess any “unique or superior” knowledge regarding the litigation. The burden then shifts to the party seeking the deposition to show that the sought-after information cannot be obtained by less intrusive means, such as by deposing lower-level employees or taking a corporate “person most knowledgeable” deposition. Courts applying the apex doctrine require that “efforts to depose high-ranking corporate officials are subject to more exacting scrutiny by the Court than a garden-variety request to take a deposition of a person who may or may not have knowledge relevant to the case.”²

The apex doctrine is not an automatic bar to the deposition of high-level executives, “but rather, it is a protective tool that is selectively employed on a case by case basis when deemed appropriate.”³ The doctrine “presents a fair balance between the right of a plaintiff to conduct discovery in its case within the limits of the rules, and the right of someone at the apex of the hierarchy of a large corporation to avoid being subjected to undue harassment and abuse.”⁴

I. Who is an Apex Witness?

Typically, an apex witness is a high-ranking executive that is instrumental to the company's operation, and whose deposition would impose a great burden on the company. In the private sector, apex witnesses are typically officers such as chief executive officer (CEO)⁵, president, or vice president,⁶ but such status has been extended to a chief operating officer (COO)⁷ and general counsel.⁸ Courts generally consider organizational size, number of employees, number of offices, amount of business concentrated in the region where the

¹ *Liberty Mut. Ins. Co. v. Super. Ct.*, 10 Cal.App.4th 1282 (Cal. Ct. App. 1992).

² *Prosonic Corp. v. Stafford*, 2008 WL 64710, *1 (S.D. Ohio, Jan. 3, 2008).

³ *Oakley, Inc. v. Neff, LLC*, 2015 WL 4479424, *2 (S.D. Cal. July 21, 2015).

⁴ *Monsanto Co. v. May*, 889 S.W.2d 274, 277 (Tex. 1994).

⁵ *In re Continental Airlines, Inc.*, 305 S.W.3d 849 (Tex. App. 2010).

⁶ *Groupon, LLC v. Groupon, Inc.*, 2012 WL 359699, *2 (N.D. Cal. Feb. 2, 2012).

⁷ *Alberto v. Toyota Motor Corp.*, 289 Mich.App. 328, 343 (Mich. Ct. App. 2010)

⁸ *Burns v. Bank of Am.*, 2007 WL 1589437, *3 (S.D.N.Y. June 4, 2007).

executive is employed, and exactly where the executive ranks in the corporate hierarchy.⁹ Other factors can also be considered, depending on the jurisdiction. For instance, in *Minter v. Wells Fargo Bank, N.A.*¹⁰ the court refused to extend apex protection to the CEO of a real estate company who worked a limited schedule because the “rule is intended to protect *busy*, high-level executives.”

In order to establish that a particular executive is an apex witness, a company cannot simply rely on the title of the witness. The company must offer facts showing the instrumental role of the witness in the organization, and the precise type of burden that producing that witness for deposition might inflict. In *Prosonic Corp. v. Stafford*, a federal court in Ohio allowed the deposition of a company’s president to proceed because the company failed to provide information regarding the type of burden that would be imposed if he were taken away from his duties.¹¹ The “bare-bones assertion” that his deposition constituted harassment was found to be insufficient. Similarly, in *Maronda Homes, Inc. v. Progressive Express Insurance Co.*, a federal court in Florida found that the apex doctrine did not apply to a company’s vice president since the defendant provided no evidence of its corporate hierarchy. Absent information indicating where the vice president stood at the company, it was “impossible to say whether [the vice president] is sufficiently senior in the company to be considered an apex witness.”¹²

A minority of courts apply a “you know it when you see it” approach. For example, in *Baine v. General Motors Corp.*, a federal court in Alabama concluded that the vice president of General Motors was an apex witness, and disallowed his deposition.¹³ The court reasoned that his responsibilities as vice president and head of the company’s Buick division were similar to those of other executives that have been afforded protection by other district courts. In *Kelly v. Providence Life and Accident Insurance Co.*, a federal court in Vermont declined to give apex protection to a company’s vice president.¹⁴ Rather than employing a fact intensive approach, the court merely accepted the plaintiff’s contention that the vice president position is hardly the apex of a company.

II. The Apex Doctrine Explained

The “apex doctrine” is based on Rule 26 of the Federal Rules of Civil Procedure, which allows courts to limit the scope of discovery through a protective order to protect “a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”¹⁵ Under the apex doctrine, courts can prevent the deposition of a high-ranking executive where **(1) the witness lacks unique or superior first-hand knowledge of the facts at issue in the case, and**

⁹ *Prosonic Corp.*, 2008 WL 64710 at *2.

¹⁰ 258 F.R.D. 118, 126 (D. Md. 2009).

¹¹ 2008 WL 64710 at *1.

¹² 2015 WL 1565299 (M.D. Fla. Apr. 8, 2015). The court also noted that, in a deposition of the company’s own “person most knowledgeable,” the vice president was identified as the point person for the litigation. Because of this, the court could not have granted him apex protection even if his ranking in the company was sufficiently high to be considered an apex witness.

¹³ 141 F.R.D. 332, 335 (M.D. Ala. 1991).

¹⁴ 695 F.Supp.2d 149 (D. Vt. 2010).

¹⁵ Fed. R. Civ. P. 26.

(2) the party seeking the deposition has not exhausted other less intrusive means of discovery. The majority of jurisdictions in the U.S. recognize and apply the “apex doctrine,” and even courts that have not expressly adopted the doctrine commonly apply a similar test when the depositions of high-ranking executives are challenged.¹⁶

The first case to apply the apex doctrine was *M.A. Porazzi Co. v. Mormaclark*, decided in 1951 in the Southern District of New York.¹⁷ There, the court refused to allow the deposition of the company’s vice president because the information that could be obtained from him was no more than what could be obtained from deposing a lower-level employee. Since then, state courts such as California, Texas and New York¹⁸ have also adopted the doctrine, based largely on federal case law. In fact, Texas state courts have examined this issue in several high-profile cases, preventing the depositions of high-ranking corporate executives such as the CEO of Continental Airlines¹⁹, the Chairman and CEO of Samsung²⁰, and David Miscavige, the leader of the Church of Scientology.²¹

a. Unique or Superior Knowledge

Once it is established that an individual is an “apex witness,” the court must determine if the executive has the requisite “unique or superior” knowledge of the information sought to justify the burden to the company of allowing the deposition to proceed. If such knowledge is lacking, the court will likely issue a protective order preventing the deposition from taking place.

In *In re Continental Airlines, Inc.*—a negligence suit against the airline arising from a plane crash—a Texas state court rejected the plaintiff’s attempt to depose Continental Airlines’ CEO, finding that this executive did not possess any unique or superior knowledge of the events leading up to or during the crash, or how Continental planned to prevent similar crashes in the future. Although the CEO was quoted in the press on these subjects following the crash, the court concluded that none of the information he possessed was unique or superior because he received it from lower-level employees and through executive briefs. Similarly, a Michigan state court blocked the depositions of Toyota’s chairman and CEO, as well as its president and COO, in *Alberto v. Toyota Corp.*, a wrongful death lawsuit arising from alleged unintended acceleration of a Toyota vehicle.²² Although the executives had testified before Congress on

¹⁶ *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 606 (Mo. 2002) (declining to adopt the apex rule but recognizing that top-level employees can obtain protection by showing that other methods of discovery have not been pursued); *Crest Infiniti II, LP v. Swinton*, 174 P.3d 996, 1003-4 (Okla. 2007) (declining to adopt a form of the apex doctrine but recognizing that the underlying policies are applicable in some situations); *Celerity, Inc. v. Ultra Clean Holding, Inc.*, 2007 WL 205067, *3 (N.D. Cal. Jan. 25, 2007) (“Virtually every court that has addressed deposition notices directed at an official at the highest level or ‘apex’ of corporate management has observed that such discovery creates a tremendous potential for abuse or harassment”); *Reif v. CNA*, 248 F.R.D. 448, 451 (E.D. Pa. 2008).

¹⁷ 16 F.R.D. 383 (S.D.N.Y. 1951).

¹⁸ See, *Broadband Commc’ns Inc. v. Home Box Office, Inc.*, 157 A.D.2d 479 (N.Y. App. Div. 1990); *Liberty Mut.*, 10 Cal.App.4th at 1288; *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125 (Tex. 1995).

¹⁹ *In re Continental Airlines, Inc.*, 305 S.W.3d at 849.

²⁰ *In re Alcatel USA, Inc.*, 11 S.W.3d 173 (Tex. 2000).

²¹ *In re David Miscavige*, 436 S.W.3d 430 (Tex. App. 2014).

²² 289 Mich.App. at 343.

issues related to the lawsuit, the court found that they had only *generalized* knowledge of Toyota's unintended acceleration problems and had no unique or superior knowledge of, or role in designing, the vehicle at issue or in implementing manufacturing or testing processes.

On the other hand, where the executive was personally involved in decision-making relevant to the litigation, a deposition of the apex witness has been permitted. In *Travelers Rental Co., Inc. v. Ford Motor Co.*,²³ an antitrust case, a Massachusetts federal court found that four of Ford's corporate executives possessed "unique or superior knowledge," despite claims that they did not personally recall any of the events at issue in the case. The plaintiff showed that they were personally involved in the decision to implement an incentive pricing plan, their motive for doing so was relevant to the claim, and the plaintiff had already tried, without success, to obtain the necessary information through other sources. Similarly, in *In re Bridgestone/Firestone, Inc.*,²⁴ a products liability case concerning alleged defects in various tires, an Indiana federal court upheld an order compelling the deposition of the former chairman of Ford's board of directors. The court reasoned that evidence of his personal knowledge and involvement with the recall of the tires constituted the requisite "unique or superior knowledge" to warrant the apex deposition.

While there is no hard and fast rule about how much knowledge is necessary to qualify as "unique or superior," case law suggests that *some knowledge* is not always sufficient. In *Alcatel*,²⁵ Samsung Electronics was sued for allegedly stealing a competitor's trade secrets. The plaintiff sought to depose the current CEO and the former chairman, arguing that the mere fact that they were the company's highest officers meant they had some knowledge of the issues being litigated, thereby satisfying the knowledge requirement of the apex doctrine. The court disagreed, noting that "[a]llowing apex depositions merely because a high-level corporate official possesses apex-level knowledge would eviscerate the very guidelines established."²⁶ The court explained that although the executives "may have been made aware of information related to the underlying facts of the case via reports prepared by others, the unique or superior personal knowledge requirement cannot be satisfied if based merely on *some knowledge*."²⁷

b. Less Intrusive Means of Discovery

Because a plaintiff can often receive the sought-after information by other, less intrusive means, courts frequently require a showing that the plaintiff has exhausted these alternative methods before allowing an apex deposition. In *Liberty Mutual*, the California Supreme Court articulated a thorough, though not exhaustive, list of what could constitute less intrusive means:

These would include interrogatories directed to the high-level official to explore the state of his or her knowledge or involvement in plaintiff's case; the deposition of lower-level employees with appropriate knowledge and involvement in the subject matter of the litigation; and the organizational deposition of the

²³ 116 F.R.D. 140 (D. Mass. 1987).

²⁴ *In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, 205 F.R.D. 535 (S.D. Ind. 2002).

²⁵ 11 S.W.3d at 174.

²⁶ *Id.* at 177.

²⁷ *Id.* at 178 (emphasis added).

corporation itself, which will require the corporation to produce for deposition the most qualified officer or employee to testify on its behalf as to the specified matters to be raised at the deposition.²⁸

Although courts are more willing to permit apex depositions when these methods have been exhausted, “[merely] completing some less-intrusive discovery does not trigger an automatic right to depose the apex official.”²⁹ Many courts also require that the less intrusive means be “unsatisfactory, insufficient, or inadequate,”³⁰ or at least that the plaintiff has made “reasonable efforts”³¹ to obtain the information through those less intrusive methods.

In *Mulvey v. Chrysler Corp.*,³² the plaintiffs sued Chrysler for an allegedly defective car design, and sought to depose the company’s chairman of the board. The chairman signed an affidavit professing ignorance of the relevant matters. In considering the vulnerability of such a high-ranking corporate officer, as well as the interest of the plaintiff to refine the relevant information about Chrysler through the discovery process, the court determined both interests would be best served if written interrogatories were propounded first. Then, “if the answers are shown to be *insufficient*, an application for the taking of his testimony by oral deposition may be made.”³³

In *Haggarty v. Wells Fargo Bank, N.A.*,³⁴ a California federal court allowed the deposition of the Vice President/CFO of Wells Fargo *only after* the plaintiff had exhausted less intrusive means of discovery that proved insufficient. The plaintiff first deposed three lower-level employees whom the defendant identified as having the same knowledge as the executive, but there were questions about higher-level decisions that those employees had no ability to answer. Because the plaintiff had demonstrated a good faith and reasonable effort to obtain the information through less intrusive means, the court allowed the Wells Fargo executive to be deposed.

III. How to Protect Apex Witnesses from Deposition

A company should never assume that their most significant, high-ranking officials will receive automatic protection from deposition in a pending lawsuit. Steps must be taken to protect those individuals from exposure to deposition, by, for example, not identifying them in discovery as a source of knowledge or information that can be obtained elsewhere. It is also advisable to investigate and offer alternative means by which the opposing party can acquire the information they wish to obtain, and to be as cooperative and thorough as possible when answering to these less burdensome methods so as to prevent the need for any further inquiry higher up the corporate ladder.

²⁸ *Id.* at 1289.

²⁹ *In re BP Prod. N. Am., Inc.*, 244 S.W.3d 840, 842 n.2 (Tex. 2008).

³⁰ *Crown Cent. Petroleum Corp.*, 904 S.W.2d at 128.

³¹ *In re Continental Airlines, Inc.*, 305 S.W.3d 849; *Celerity, Inc.*, 2007 WL 205067 at *5.

³² 106 F.R.D. 364 (D.R.I. 1985).

³³ *Id.* at 366.

³⁴ 2012 WL 3939320 (N.D. Cal. Aug. 24, 2012).

If the opposing party nevertheless insists on the deposition of a high-level executive with no unique or superior knowledge of the case, this burdensome and harassing litigation tactic can effectively be fought with the apex doctrine. The first step is to offer detailed information to the court about the function of the executive within the company, the executive's place in the hierarchy of management, and the day-to-day tasks of the executive, in an effort to demonstrate that the individual is truly at the company's "apex," and that their deposition would unduly burden the company. The next step is to show the court that the apex witness does not possess "unique or superior knowledge," and that less intrusive means of obtaining the discovery have been made available to the opposing party. Although it can be difficult to predict how a court will rule in such a dispute, generally speaking, the more proactive and forthcoming a company is during the discovery phase of the case, the less likely it is that a court will allow an apex deposition to proceed.

**PREEMPTION POST-SIKKELEE: CONFLICT PREEMPTION MAY BE A
MANUFACTURER’S BEST HOPE FOR SUCCESSFULLY DEFENDING STATE
PRODUCT LIABILITY CLAIMS**

By: Roberto Caruso and Agostino A. Zammiello

Introduction

The Third Circuit’s decision in the *Sikkelee v. Precision Airmotive*¹ case remains an important guidepost for the issue of preemption in aviation – one that continues to exert considerable influence over both state and federal courts given the Third Circuit’s historical persuasive authority on this issue. As a result, understanding the impact of *Sikkelee* and its recent progeny is an important task for aviation product liability defendants seeking to effectively argue preemption under the Federal Aviation Act (“Act”) going forward. *Sikkelee* signaled the reversal of a trend in cases finding that the Act and its regulations preempt the entire field of aviation safety. That trend had made it more difficult for plaintiffs to successfully sue manufacturers and airlines. In *Sikkelee*, the Third Circuit narrowed its broad ruling in *Abdullah v. American Airlines, Inc.*,² where it held that federal law preempts the entire field of aviation safety, and concluded that neither the Act nor the issuance of a type certificate *per se* preempts all aircraft design and manufacturing defect claims arising under state law.³ Although under this recent trend aircraft product liability cases may proceed using a state standard of care, in certain jurisdictions these claims are still subject to traditional principles of conflict preemption, including in connection with the specifications expressly set forth in a given type certificate.⁴ Thus, where the alleged design defect at issue in a case was a design aspect that was expressly incorporated into the type certificate, the Federal Aviation Administration’s (“FAA”) approval of the particular specifications can still thwart a plaintiff’s state product liability claims on conflict preemption grounds.⁵ But as discussed in more detail below, this will only be so if a manufacturer can show that it cannot comply with both federal and state requirements concomitantly.⁶

The Current Trend to Restrict Field Preemption for the Entire Field of Aviation Safety

By now, aviation litigants are familiar with the doctrine of federal preemption, which comes by way of either express or implied preemption.⁷ Because the Federal Aviation Act (“Act”) does not expressly state that it preempts state law, implied preemption, consisting of “field” preemption and “conflict” preemption, has historically been the avenue that aviation defendants use to argue the doctrine’s application.⁸ More specifically, the seminal aviation cases have addressed field preemption, which occurs when the federal scheme or regulation is so

¹ *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 685 (3d Cir. 2016), *cert. denied sub nom. AVCO Corp. v. Sikkelee*, 137 S. Ct. 495, 196 L. Ed. 2d 433 (2016).

² 181 F.3d 363 (3d Cir. 1999).

³ *See Sikkelee*, 822 F.3d at 685.

⁴ *See id.* at 702.

⁵ *Id.* at 702-03.

⁶ *See id.*

⁷ *See id.* at 687-88 (citing *Oneok, Inc. v Learjet, Inc.*, -- U.S. --, 135 S.Ct. 1591 (2015)).

⁸ *See id.*

pervasive that courts will infer that Congress intended to preempt the entire field being regulated.⁹ Additionally, conflict preemption occurs either when compliance with both federal and states law is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress.¹⁰

Currently, there is a split among federal and state courts on the issue of whether the Federal Aviation Act (“Act”) and regulations preempt the entire field of aviation safety. The First, Second, Sixth, and Tenth Circuits have held that the Act preempts the entire field of aviation safety.¹¹ But even courts that have described the entire field of aviation safety as preempted have somewhat restricted the scope of their rulings or only applied it to certain aspects of aviation. The Second Circuit, for instance, has restricted its broad ruling that the entire field of aviation safety is preempted with the following caveat: so long as the state laws at issue do not interfere with federal laws and regulations, they are not preempted.¹² Conversely, the Ninth and Third Circuits have ruled that the Act is not pervasive enough to preempt state product liability claims relating to aviation safety.¹³ The Fifth Circuit has held that the field of passenger safety warnings is field preempted, but has yet to come to a conclusion as to the entire field of aviation.¹⁴ Despite the circuit splits, the Supreme Court has not yet decided this issue. The current trend among both federal and state courts, however, has been to restrict application of the doctrine of entire field preemption in the field of aviation safety as evidenced by the post-*Sikkelee* decisions discussed below.

⁹ *See id.*

¹⁰ *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011).

¹¹ *Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Commission*, 634 F.3d 206 (2d Cir. 2011) (holding that federal law occupies the entire field of aviation safety but explaining that even where an entire field is preempted, if the state laws at issue do not interfere with federal laws and regulations, the state laws are not preempted); *U.S. Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1326 (10th Cir. 2010) (holding that federal regulation occupies the field of aviation safety to the exclusion of state regulations); *Montalvo v. Spirit Airlines*, 508 F.3d 464, 468 (9th Cir.2007) (holding that federal law generally establishes the applicable standards of care in the field of aviation safety); *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 795 (6th Cir. 2005) (holding that federal law establishes the standard of care in failure to warn claim in the field of aviation safety and thus preempts the field from state regulation, but applying state law to claim of defectively manufactured navigational instrument and concluding that plaintiff did not offer sufficient evidence of a manufacturing defect); *French v. Pan Am Express, Inc.*, 869 F.2d 1, 5 (1st Cir. 1989) (“We infer from the Federal Aviation Act an unmistakably clear intent to occupy the field of pilot regulation related to air safety, to the exclusion of state law.”) (“FAA regulations governing pilot qualifications implicitly preempt Rhode Island's state law governing employee drug testing as applied to pilots”); *see, e.g., In re Air Crash Near Clarence Ctr., New York, on Feb. 12, 2009*, 798 F. Supp. 2d 481, 485 (W.D.N.Y. 2011) (holding that the Federal Aviation Act and its accompanying federal regulations preempt state regulation of the air safety field, including state standards of care but that state law causes of action and remedies remain available).

¹² *Goodspeed Airport*, 634 F.3d at 611.

¹³ *See Sikkelee v. Precision Airmotive Corp.*, 82 F.3d 680 (3d Cir. 2016), *cert. denied sub nom. AVCO Corp. v. Sikkelee*, 137 St. Ct. 495 (2016) (holding that the Federal Aviation does not preempt the entire field of aviation safety); *Martin ex rel. Heckman v. Midwest Exp. Holdings, Inc.*, 555 F.3d 806 (9th Cir. 2009) (holding that Federal Aviation Act did not preempt passenger’s state law claim alleging that airplane stairs were defectively designed because pervasive regulations did not exist in that area); *Pub. Health Trust of Dade Cnty., Fla. v. Lake Aircraft, Inc.*, 992 F.2d 291, 292, 295 (11th Cir. 1993) (holding FAA did not preempt passenger's defective seat design claim).

¹⁴ *See Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680 (3d Cir. 2016), *cert. denied sub nom. AVCO Corp. v. Sikkelee*, 137 S. Ct. 495, 196 L. Ed. 2d 433 (2016).

Third Circuit Decision in *Sikkelee*

The Third Circuit’s decision in *Sikkelee* was significant because it was the first to rule on the discrete issue of whether the Act preempts product liability claims arising under state tort law. In *Sikkelee*, a single-propeller aircraft crashed killing the pilot when it lost power due to loose screws holding together the engine’s carburetor.¹⁵ The plaintiff alleged that some of the aftermarket carburetor’s components were defectively designed and suggested that the manufacturer, Lycoming, could have switched the manner in which the carburetors installed in its engines had their two halves fastened by, for example, employing a fuel injection system instead of a carburetor, and using a different gasket and safety lock wire.¹⁶ A third-party aftermarket manufacturer had installed the accident carburetor, which it had manufactured pursuant to a Parts Manufacturer Approval (“PMA”) from the FAA.¹⁷ The FAA had specifically approved the design of the carburetor components the plaintiff alleged were defective.¹⁸ FAA regulations govern the procedures for obtaining a PMA and the duties of PMA holders.¹⁹ The plaintiff argued, however, that the original manufacturer was connected to the accident because federal regulations required the aftermarket manufacturer to follow the type certificate holder’s design when it modified the accident carburetor.²⁰ The Third Circuit found that argument unavailing and held that neither the Act nor the issuance of a type certificate *per se* preempts all aircraft design and manufacturing claims.²¹

Thus, under *Sikkelee*, type certification does not itself establish or satisfy the relevant standard of care for state product liability actions,²² but type certification or FAA documents incorporated by reference into a type certificate may still preempt state product liability claims.²³ Accordingly, the Third Circuit explained that aircraft product liability cases may proceed using a state standard of care subject to traditional principles of conflict preemption, including in connection with the specifications expressly set forth in a given type certificate.²⁴ That is, the FAA’s approval of particular specifications which are incorporated in a type certificate and from which a manufacturer may not normally deviate without violating federal law is still important for a conflict preemption analysis and can lead to dismissal of a state product liability claim on those grounds.²⁵ Because the parties in *Sikkelee* only argued in supplemental submissions whether the alleged design defect at issue there was a design aspect incorporated into the type certificate for the accident engine, the Third Circuit did not reach that issue, but rather remanded

¹⁵ *Sikkelee*, 82 F.3d at 680.

¹⁶ *Id.* at 697.

¹⁷ *Sikkelee v. AVCO Corp.*, 268 F. Supp. 3d 660 (M.D. Pa. 2017), *on reconsideration*, No. 4:07-CV-00886, 2017 WL 3310953 (M.D. Pa. Aug. 3, 2017).

¹⁸ *Id.* at 697.

¹⁹ *Id.* at 678.

²⁰ *See Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 683 (3d Cir. 2016), *cert. denied sub nom. AVCO Corp. v. Sikkelee*, 137 S. Ct. 495, 196 L. Ed. 2d 433 (2016),

²¹ *Id.* at 685.

²² *Id.* at 702.

²³ *Id.* at 702-03.

²⁴ *Id.*

²⁵ *Id.*

the case with instructions for the district court to perform a new preemption analysis consistent with its holding.²⁶

District Court’s August of 2017 Decision in *Sikkelee* on Remand

Interestingly, on remand, the District Court in *Sikkelee* granted summary judgment to the engine manufacturer, Lycoming, on conflict preemption grounds. The District Court concluded that the plaintiff’s defective design claim under Pennsylvania law was conflict preempted because compliance with Pennsylvania law made it impossible to comply with federal regulations.²⁷ The District Court began its opinion by providing a detailed background of the FAA and the regulations that it imposes.²⁸ It then explained the process of obtaining a “type certificate” for an aircraft and focused on the FAA’s responsibility to find that the aircraft and its components are “properly designed and manufactured, performs properly, and meets the regulations and minimum standards.”²⁹ The Court elaborated on the FAA regulations that require approval by the FAA before a “type certificate” holder can make a “major alteration” or a type design change (both major and minor design changes), while noting that a “minor alteration” does not need FAA approval but requires submission of “approved data.”³⁰ The District Court in *Sikkelee* found that the alleged design defect of the carburetor was expressly incorporated into the type certificate for the Textron Lycoming O-320-DC engine on which the accident carburetor was installed.³¹ In fact, the FAA had explicitly approved the model carburetor on the type certificate data sheet as the only carburetor that could be installed in the subject engine.³²

In determining the issue of preemption, the District Court first compared federal law and Pennsylvania state law. Pennsylvania product liability law imposes on a manufacturer a duty to design its product reasonably safe for the uses which it can foresee.³³ In determining the existence of a design defect, Pennsylvania law employs risk-utility and consumer expectation analyses.³⁴ The sufficiency of the plaintiff’s evidence showing that a product was unreasonably dangerous or not reasonably safe due to its design or manufacture usually will be measured by one of these two analyses.³⁵ Under the risk utility approach, for instance, the court will consider: “the usefulness and desirability of the product to the public”: “whether the risk of danger could have been reduced without affecting either the product’s effectiveness or manufacturing cost”; and “the presence and efficacy of a warning to avoid an unreasonable risk of harm from hidden dangers.”³⁶

²⁶ *Id.* The Supreme Court denied certiorari, but denial of certiorari does not constitute an expression of any opinion on the merits. *Huber v. New Jersey Dep’t of Env’tl. Prot.*, 562 U.S. 1302 (2011).

²⁷ *Sikkelee v. AVCO Corp.*, 268 F. Supp. 3d 660 (M.D. Pa. 2017), *on reconsideration*, No. 4:07-CV-00886, 2017 WL 3310953 (M.D. Pa. Aug. 3, 2017).

²⁸ *See id.* at 665-67.

²⁹ *Id.* at 667-69 (citing 49 U.S.C. § 44704(a)) (internal quotations omitted).

³⁰ *See id.* at 670-674.

³¹ *Id.*

³² *Id.* at 697.

³³ *See id.* at 695

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* (quoting *Mutual Pharm. Co. v. Bartlett*, 570 U.S. 472 (2013)).

Thus, the District Court held that the requirements under Pennsylvania’s product liability law conflicted with FAA regulations requiring approval for any major or minor changes to a part/component’s type design, as well as for any major alteration, i.e., a change that “might appreciably affect weight, balance, structural strength, performance, power plant operation, flight characteristics, or other qualities affecting airworthiness.”³⁷ Simply put, the type certificate would not have allowed Defendant Lycoming to install a different carburetor model, nor could the third-party manufacturer change the carburetor’s inner workings, as suggested by the plaintiff, without approval from the FAA.³⁸ Further, the third-party manufacturer who overhauled the carburetor could not manufacture or sell replacement parts different from the part that was issued a type certificate unless the FAA approved it.³⁹ The plaintiff attempted to argue that the proposed modification was “minor alteration” and thus, did not require FAA approval, but the District Court dismissed this argument because it determined that they would indeed constitute design type changes and all design type changes require FAA approval.⁴⁰

The District Court also went on to rule that Lycoming’s connection to the defective component was too far removed to subject it to liability since the third-party aftermarket manufacturer acted on its own when it overhauled the carburetor on plaintiff’s aircraft.⁴¹ The District Court in *Sikkelee* noted, however, that despite a type certificate, a manufacturer can still be liable for aftermarket work or instructional manuals.⁴² Essentially, the District Court held that because defendant Lycoming could not independently do what Pennsylvania state tort law required of it, Plaintiff’s claims were conflict preempted.⁴³ Thus, under *Sikkelee*, when a manufacturer can show that the design aspect at issue in the litigation was incorporated into the type certificate, that manufacturer may still be able to successfully argue that the type certificate preempts a plaintiff’s state product liability claim if it would be impossible for it to comply with state law without violating federal law.

The plaintiff in *Sikkelee* has filed an appeal from the District Court’s decision on remand and oral argument was held on July 11, 2018.⁴⁴ Given the court’s memorandum opinion thoroughly analyzing the alleged design defect in light of the certification process and regulatory requirements, Pennsylvania product liability law, and the Third Circuit having left open the door to conflict preemption, it seems unlikely that the Third Circuit would reverse the trial court’s decision. Nonetheless, a definitive ruling reversing or affirming the District Court’s decision has not yet ensued.

Recent Decisions Following the Third Circuit’s Ruling in *Sikkelee*

Regardless of whether the District Court’s decision in *Sikkelee* on remand will be affirmed, the ruling in *Sikkelee* holding that the Act and regulations do not preempt the entire

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 699-700.

⁴¹ *Id.* at 665.

⁴² *Id.* at 674 and 715.

⁴³ *Id.* at 696.

⁴⁴ *See id.*

field of aviation safety was already gaining traction. In January of 2017, the Supreme Court of Washington, relying on the Third and Ninth Circuits' rulings in *Sikkelee* and *Martin*⁴⁵, respectively, held that the Federal Aviation Act does not preempt state product liability law.⁴⁶ In *Estate of Becker v. Avco Corp.*, a single-propeller airplane crashed when a carburetor float filled with fuel forced the engines' fuel feed to remain open and ultimately caused the engine to flood and stall out.⁴⁷ The NTSB investigation did not explain what caused the float to leak and fill with fuel, but the plaintiff asserted that a weld applied to the float was imperfect.⁴⁸ The defendant in *Becker* designed and produced the plane's fuel system by contracting with various companies to produce various components for the fuel system, including the carburetor, and assembly of the final product.⁴⁹ The plaintiff, the Estate of one of the deceased passengers, alleged that the company that applied the welding to the float that was incorporated into the plane's fuel system created an unreasonably dangerous condition in the carburetor float, which caused the engine to stall, and resulted in the crash that killed Mr. Becker.⁵⁰

The intermediate court in *Becker* held that state law was impliedly field preempted because federal regulations pervasively regulated the area of the "engine's fuel system."⁵¹ It cited twelve (12) federal regulations, noting that they all focus on "performance and safety standards" for aircraft engines.⁵² Nonetheless, the Washington Supreme Court agreed with the Third Circuit's conclusion that the regulations governing the "engine's fuel system" do not attempt to regulate aircraft manufacture or design in and of itself and thus should not supplant state standards of care.⁵³ Unlike in *Sikkelee*, however, where the District Court noted on remand that the critical inquiry for a preemption analysis is whether a regulated party can unilaterally comply with both state and federal law simultaneously,⁵⁴ in *Becker*, the Supreme Court of Washington focused on a different inquiry. Just like the Ninth Circuit in *Martin*, the court in *Becker* focused on the pervasiveness of the regulations in the specific area at issue there and held that the engine's fuel system regulations are not comprehensive or pervasive enough to show Congress' intent to preempt state law.⁵⁵ They create only "minimum standards" for aviation safety.⁵⁶ The decision in *Becker*, however, was rendered more than six months before the District Court's August of 2017 Decision in *Sikkelee* on remand. Thus, it is not clear the effect, if any, that decision would have had on the Supreme Court of Washington's rationale in *Becker*. Moreover, *Becker* did not address conflict preemption at all.

⁴⁵ *Martin ex rel. Heckman v. Midwest Exp. Holdings, Inc.*, 555 F.3d 806 (9th Cir. 2009) (holding that Federal Aviation Act did not preempt passenger's state law claim, alleging that airplane stairs were defectively designed because pervasive regulations did not exist in that area).

⁴⁶ *Estate of Becker v. Avco Corp.*, 187 Wash. 2d 615, 618 (2017).

⁴⁷ *Id.*

⁴⁸ *Id.* at 619.

⁴⁹ *Id.* at 617.

⁵⁰ *Id.* at 619.

⁵¹ *Id.* at 620.

⁵² *Id.* at 623.

⁵³ *See id.* at 624 (quoting 49 U.S.C. § 44701(a)(1)).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 49 U.S.C. § 44701(a)(1).

But at least one federal district court has followed *Sikkelee* and specifically found that the FAA regulations did not conflict preempt the plaintiff's state product liability claims. Similar to *Becker*, the Southern District of Texas in *Davidson v. Fairchild Controls Corp.*, relied on the Third Circuit in *Sikkelee* and, in an unreported decision, held that state product liability law is not field preempted by FAA regulations.⁵⁷ In this matter, plaintiffs were instructed by their employer to fly an aircraft to verify and locate the source of the smoke and fumes in the cockpit of the aircraft.⁵⁸ The plaintiffs allegedly suffered permanent injuries due to the smoke and fume inhalation, and they filed a complaint against defendant, Fairchild, who manufactured and repaired the allegedly defective air cycle machine.⁵⁹ The District Court concluded that the FAA requirements for aviation do not preempt the field of products liability because the certification system merely sets forth the "baseline requirements" and they "speak to the floor of regulatory compliance."⁶⁰ Although decided prior to the District Court's decision on *Sikkelee* on remand, the court in *Davidson* differed from the *Sikkelee* decision on remand and, in a short and hasty manner, also dismissed conflict preemption stating that "the minimum standards of the federal aviation regulations do not prohibit the design and manufacture of safer aircraft and component parts."⁶¹

Practical Considerations for Defendants Arguing Conflict Preemption Post-*Sikkelee*

Given the current splits among federal and state courts, operators and manufacturers may still be able to argue that the Federal Aviation Act preempts the entire field of aviation safety in some circuits and state courts, but in light of the recent trend of cases adopting the rationale in *Sikkelee*, they are less likely to prevail on entire field preemption grounds in other courts. Moreover, as evidenced by *Becker* and *Davidson*, courts adjudicating product liability claims can also analyze preemption under the Act by examining the pervasiveness of federal regulations in the specific area covered by state tort claims or product liability law and hold that there is no field preemption, without necessarily performing a conflict preemption analysis.

But even in jurisdictions where courts have held that the Act does not preempt the entire field of aviation safety, such as the Ninth and Third Circuits, conflict preemption remains a viable defense despite the rationales in the *Becker* and *Davidson* decisions, which were rendered before the District Court in *Sikkelee* issued its decision finding conflict preemption on remand. To that effect, it is important for a manufacturer to argue that the "minimum standards" argument raised by plaintiffs against preemption, as noted in *Sikkelee* on remand, is a red herring that should not have any bearing on a conflict preemption analysis.

As applied by the District Court in *Sikkelee* on remand, a conflict preemption analysis of a state product liability claim will look at whether the specifications for the complained of design defect were reviewed and approved by the FAA during the type certification process. If the manufacturer is prohibited by FAA regulations from making the design changes about whose

⁵⁷ *Davidson v. Fairchild Controls Corp.*, No. H-15-0827, 2016 WL 5539982, at *8 (S.D.Tex. Sept. 29, 2016).

⁵⁸ *Id.* at *2.

⁵⁹ *Id.* at *1-4.

⁶⁰ *Id.* at *8 (citing *Sikkelee*, 822 F.3d at 694).

⁶¹ *Id.*

omission the plaintiff has complained, without FAA approval, then the claim should be conflict preempted. As previously discussed, FAA approval is required for any major or minor changes to an article's type design, as well as for any major alteration. A major alteration is one that “might appreciably affect weight, balance, structural strength, performance, power plant operation, flight characteristics, or other qualities affecting airworthiness.” In other words, conflict preemption can be established if the manufacturer would be required to change its design or install a different part or component in order to comply with state law while at the same time it could not do so without first obtaining FAA approval. In that sense, it should not matter that the Act establishes minimum standards because in the field of aviation those standards are by design much higher than the standards of care normally required under state product liability law.

Regardless, the District Court’s decision in *Sikkelee* on remand, as it stands, gives manufacturers and operators some measure of hope that, even in specific areas where the regulations are not pervasive, there can still be conflict preemption if a court finds that it is not possible for the defendant to unilaterally comply at the same time with state standards of care in product liability cases without first obtaining FAA approval for manufacturing design changes that according to the regulations would implicate changes in the type certificate.

Unless the Supreme Court grants certiorari and affirmative rules on whether the Act preempts state product liability claims, the decisions in the lower courts will certainly vary and range from findings of field preemption, to findings of conflict preemption, and even findings of no preemption at all. Until then, type certification may still be a manufacturer’s last hope in successfully defending a state product liability claim on preemption grounds in jurisdictions that hold that the Federal Aviation Act does not preempt state product liability claims. Note, however, that the viability of conflict preemption as an effective defense tool can still change if the Third Circuit, on appeal, further narrows the aspect of its holding regarding conflict preemption and reverses the District Court’s 2017 decision on remand.

Conclusion

In the wake of *Sikkelee* and the trend restricting the application of field preemption for the field of aviation safety, manufacturers should shift their focus to the key issues surrounding a strong argument in favor of conflict preemption for their specific products. Tailoring one’s approach to the differing jurisdictions a defendant finds itself in will continue to be an important part of any robust product liability defense until the Supreme Court provides finality on the contours of the preemption doctrine.

**THE GOVERNMENT CONTRACTOR DEFENSE:
USING THE LENGTH AND BREADTH OF THE GOVERNMENT'S
EXPERIENCE WITH A PRODUCT TO SUPPORT IMMUNITY**

By: Christopher S. Hickey

Introduction

The Government Contractor Defense is an affirmative defense providing government contractors with immunity from state-based tort claims in situations where the government itself is immune. It has evolved from the principle that a contractor, acting under the authority and direction of the United States, should be protected by the same sovereign immunity that the government enjoys.

Establishing this defense often turns upon whether the contractor is able to provide sufficient evidence the government approved “reasonably precise specifications” and that the government’s use of discretion in approving the design was detailed and deliberate, “consist[ing] of more than a mere rubber stamp.”¹ This inquiry generally leads courts to focus on the “continuous exchange between the contractor and the government” during the design phase of the product.² Courts have found evidence of a continuous exchange where the relationship between the two parties consisted of interactions such as formal design meetings, the sharing of engineering drawings and specifications, and collaboration in the product’s testing.³

Unfortunately, producing such evidence can be difficult. In many instances, so much time has passed since the parties entered into the contract that evidence of collaboration between the contractor and the government cannot be produced. In other instances, the equipment was designed independently and then later sold to the government, leaving no evidence of a continuous exchange. Fortunately, in several jurisdictions across the United States, courts have found that “the length and breadth of the [government’s] experience” with the product, post-design, may also be used to establish its approval of the relevant design. Evidence establishing the government’s history with a product is typically more readily available than decades old design documents.

Background of Government Contractor Defense

In its 1988 decision in *Boyle*, the United States Supreme Court defined the three-part test which a manufacturer must satisfy to enjoy immunity from state tort suits.⁴ *Boyle* arose from the death of a Marine helicopter pilot after his helicopter crashed off the coast of Virginia. It was alleged that, although the pilot survived the initial crash, he was unable to escape the wreckage due to a defectively designed emergency escape-hatch system. The Supreme Court was faced with deciding whether “a contractor providing military equipment for the Federal Government

¹ *Tozer v. LTV Corp.*, 792 F.2d 403, 408 (4th Cir. 1986).

² *Kleemann v. McDonnell Douglas Corp.*, 890 F.2d 698, 702 (4th Cir. 1989).

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

⁴ *Boyle*, 487 U.S. at 512.

can be held liable under state law for injury caused by a design defect.”⁵ In considering federal pre-emption of state law, the Court reasoned that “a few areas, involving uniquely federal interests, are so committed by the Constitution and the laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed . . . by the courts”⁶ The Court explained that when a “uniquely federal interest” is implicated, such as the procurement of equipment by the United States, pre-emption of state law is appropriate when a “significant conflict” exists between the federal interest and the operation of state law.⁷

The *Boyle* Court determined that holding a military procurement contractor liable under state law for design defects implicates two areas involving “uniquely federal interests”: (1) the United States’ rights and obligations under its contracts and (2) the civil liability of federal officials for actions taken in the course of their duty.⁸ Fearing that the financial burden of state judgments against contractors would ultimately be passed through to the United States itself, by reasoning that contractors would raise their prices to insure against contingent liability, the Court found the existence of a significant conflict between these federal interests and state law.

Although Congress, through the Federal Tort Claims Act (“FTCA”)⁹, authorized the recovery of damages against the United States for harm caused by the negligent or wrongful conduct of government employees, in setting the parameters of the immunity available to government contractors, the *Boyle* Court focused on the “discretionary function”¹⁰ exception to the act. Under the discretionary function, “[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused” is exempted from the FTCA’s consent to suit.¹¹ “[T]he selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision.”¹²

The *Boyle* Court held that it makes little sense to subject a contractor to state tort suits for building aircraft that conform to designs fashioned or approved by a federal official, where the federal official would be entitled to immunity from suits arising out of defects in those designs. The Court formed a three-pronged test, holding that government contractors supplying equipment would be immune from state law claims when: “(1) the United States approved reasonably 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.”¹³ The decision of the *Boyle* Court is predicated on the concern that state law, in certain circumstances, can frustrate an identifiable federal interest or policy requiring that state law be pre-empted.

⁵ *Id.* at 502.

⁶ *Id.* at 504-05 (citation omitted).

⁷ *Id.* at 507.

⁸ *Id.* at 504-05.

⁹ 28 U.S.C. § 1346(b).

¹⁰ 28 U.S.C. § 2680(a).

¹¹ *Id.*

¹² *Boyle*, 487 U.S. at 511.

¹³ *Id.* at 512.

Since 1988, the *Boyle* rationale has been extended to situations beyond the narrow context of military defense contractors in design defect cases. Courts have applied *Boyle* to situations involving products purchased by the government which are also commercially available to the general public¹⁴ and it has been applied to “failure to warn” cases.¹⁵ Additionally, post-*Boyle* courts have almost unanimously adopted the *Boyle* rationale in determining whether the government contractor defense applies to contracts for services.¹⁶

Likewise, courts before and since *Boyle* have taken into account the various ways that a contractor might be able to produce evidence sufficient to satisfy the three-part test of *Boyle*. Courts in several U.S. jurisdictions now recognize that post-design and post-production government use of a product may also be sufficient to show the government approved reasonably precise specifications required by the first prong of *Boyle*. This line of reasoning comes from the Fourth Circuit in *Dowd*.¹⁷

Dowd V. Textron: The Length and Continued Use Argument

Decided in 1986, two years prior to the Supreme Court’s decision in *Boyle*, *Dowd* followed a string of 1980s cases in which courts applied an emerging version of the government contractor defense to design defect cases involving military equipment.¹⁸ *Dowd* arose from the 1981 fatal helicopter crash of two Army pilots conducting a familiarization flight at a U.S. Naval Test Pilot School in Maryland. The plaintiffs alleged that the accident was caused when the helicopter’s 540 rotor system struck and severed the helicopter’s mast, a phenomenon known as “mast bumping.” Mast bumping is caused when the helicopter’s rotor dips at an extreme angle and the hub of the rotor strikes the helicopter’s mast. When mast bumping occurs in flight, it is generally catastrophic because the separation of the rotor from the mast leaves the helicopter unable to fly, and as it did in this case, the separated rotor may cut through the cockpit of the helicopter.

The helicopter’s 540 rotor system was designed independently by the manufacturer in the early 1960s. Soon after, in 1961, it was installed on Army helicopters and was in continuous service on UH-1 and AH-1 helicopters through the 1981 incident. However, both the Army and the manufacturer were already aware of the possibility for inflight mast bumping and at least forty-six instances of mast bumping were reported between 1967 and 1972. The Army addressed this issue by educating its pilots on the phenomenon as well as requesting a redesign of the mast and the rotor from the manufacturer.

In the late 1970s, the manufacturer proposed three rotor system modifications aimed at preventing mast bumping. The Army approved one of the modifications, but by 1981, none of the modifications had been implemented. Several reasons were suggested as to why the Army

¹⁴ See *Kase v. Metalclad Insulation Corp.*, 6 Cal. App. 5th 623 (Cal. Ct. App. 2016).

¹⁵ See *Kerstetter v. Pac. Sci. Co.*, 210 F.3d 431 (5th Cir. 2000).

¹⁶ See *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329 (11th Cir. 2003).

¹⁷ *Dowd*, 792 F.2d at 412.

¹⁸ See *Tozer v. LTV Corp.*, 792 F.2d 403 (4th Cir. 1986); *Tillett v. J.I. Case Co.*, 756 F.2d 591 (7th Cir. 1985); *McKay v. Rockwell Intern. Corp.*, 704 F.2d 444 (9th Cir. 1983).

did not adopt the manufacturer's modifications: they were thought to be ineffective or too costly, or that the excess weight might have interfered with the Army's mission by impairing the helicopter's performance.

The plaintiffs in this case, speaking to the first prong of the government contractor defense, argued that since the rotor system was originally designed in the early 1960s without any participation from the Army, that the government neither set nor approved reasonably detailed specifications. The *Dowd* Court, in response, reasoned that the plaintiffs' argument overlooked a "wealth of subsequent history."¹⁹ The Army had been using the 540 rotor system on its helicopters for twenty years prior to the 1981 accident and the court noted that almost 9,000 helicopters equipped with the rotor system flew during the Vietnam War.

The court observed that the Army was already aware of the rotor system's mast bumping problem and that it prepared reports on the topic and discussed the problem with the manufacturer. In the court's view, the Army may have chosen to continue using the 540 rotor system for any number of reasons, to include the Army's judgment that the equipment had largely accomplished its mission or that over time it had worked well enough. The Army's judgment in this situation, stated the court, "is not up to the jury to second-guess."²⁰ "Nor was it within the power of the contractor to do so [The contractor] cannot modify th[e] design without United States approval."²¹

As previously noted, the 540 rotor system was originally designed independently by the manufacturer with no participation by the Army. Absent the Army's participation, it would be impossible for the manufacturer to provide evidence of the continuous exchange of information and ideas that are often looked to by courts as proof of the government's approval. The *Dowd* Court, however, looked past the fact that the Army did not participate in the original design process and instead looked to evidence of the Army's post-design and post-production involvement with the rotor system's design. When considering whether the government approved of the rotor system's design, the *Dowd* Court reasoned, "[t]he *length and breadth* of the Army's experience with the 540 rotor system - and its decision to *continue using it* - amply establish government approval of the alleged design defects."²² The Army's twenty-year use of the rotor system, including the Army's decision to continue using it after becoming aware of the mast bumping incidents, provided sufficient proof that the government approved reasonably precise specifications.

The Length and Continued Use Argument Has Expanded to Other Federal Circuit Courts of Appeal

The *Boyle* Court adopted much of the Fourth Circuit's test for the government contractor defense. Thus, the door was open for future courts to apply the same length and continued use argument. Today, four circuit courts of appeals and several other jurisdictions across the United

¹⁹ *Dowd*, 792 F.2d at 412.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* (emphasis added). For simplicity's sake, we will refer to this line of reasoning as "the length and continued use" argument.

States recognize the validity of the government's length of experience and continued use when applying the government contactor defense.

a. The Fourth Circuit

Following *Dowd* and *Boyle*, the Fourth Circuit again extended government immunity to a manufacturer who provided evidence that the Navy was aware of potential design defects prior to the plaintiff's accident. In *Ramey*,²³ an aircraft mechanic was injured while attempting to remove an F-18 ejection seat. During the attempted removal of the seat from the cockpit of the aircraft, the mechanic dropped it back into the cockpit, which inadvertently triggered one of the seat's explosive charges. The plaintiff fell from the F-18's wing to the hangar floor, injuring his left leg and foot. The plaintiff alleged that the mishap was the result of a defectively designed drogue firing lever initiator sear assembly and that the manufacturer failed to warn the Navy of the risks in the defective design.

In this instance, the manufacturer was able to provide pre-design and post-design evidence that the Navy approved reasonably precise specifications. The manufacturer showed that the Navy issued the original design specifications, that it inspected the seat's components, to include a mock-up of the seat, and that it tested the components. Further, and in line with the second half of *Dowd's* reasoning, the manufacturer provided post-design evidence that the Navy was aware of the associated risks of the design and that it chose to continue using it. Communications between Naval authorities indicated that there were safety concerns with the seat's design, particularly regarding its maintenance and deficiencies in its technical manuals. One commander went so far as to recommend the termination of the seat's current maintenance procedures altogether.

The *Ramey* court explained that there are "two routes by which [a government contractor] may satisfy the first prong of the *Boyle* test."²⁴ (1) The government contractor defense may be permitted to a participating contractor "so long as government approval of a design consists of more than a mere rubber stamp," meaning that there must be evidence of the government's participation in the design process.²⁵ (2) A contractor may satisfy *Boyle's* first prong through length and continued use even though the military had not developed or approved the specifications for the component at issue.²⁶ Here, the *Ramey* Court found that the manufacturer was able to establish the Navy's participation in the design process through both lines of

²³ Although this article's intended focus is the government's length and continued use of a product as evidence to satisfy the first prong of the *Boyle* test, it is important to note that the *Ramey* court eventually used that evidence to satisfy *Boyle's* third prong. *Id.* at 950. The manufacturer provided evidence that the Navy had become aware of possible design defects with the equipment in question and still chose to continue using it. *Id.* The *Ramey* court reasoned that this satisfied *Boyle's* third prong, "the supplier warned the United States about dangers in the use of the equipment known to the supplier but not to the United States," *Boyle*, 487 U.S. at 512, because the manufacturer could not have "apprised the Navy of any material circumstances not already known to it." *Ramey*, 874 F.2d at 951. The *Ramey* court's analysis has two important implications. First, the court recognized that length and continued use evidence can be used to satisfy the first prong of *Boyle*. *Id.* at 950. Second, the court's reasoning here suggests that, at least in the Fourth Circuit, evidence of the government's length and continued use of a product may be used not only to satisfy the first prong of *Boyle* but that it might also be used to satisfy any of the three *Boyle* prongs.

²⁴ *Id.*

²⁵ *Id.* (citation omitted).

²⁶ *Id.*

was able to establish the Navy's participation in the design process through both lines of reasoning. The manufacturer was able to prove, not only that the Navy was involved in a continuous exchange with the manufacturer, but also, as the court took note, that the Navy *continued using the design* after it had become aware of the potential hazards associated with its use.

b. The Second Circuit

In *Lewis v. Babcock Indus., Inc.*, the Second Circuit added to the Fourth Circuit's reasoning by holding that the government contractor defense applies where, after learning of a design defect, the government orders replacement parts identical to those of the defective design.²⁷ *Lewis* arose from a mishap involving the ejection of the self-contained crew module of an Air Force F-111-F jet fighter. The aircraft malfunctioned during flight and the pilot initiated the ejection of the crew module, after which all subsequent actions relative to ejection are supposed to occur automatically until landing. However, one of the module's forward repositioning cables, which connect the parachute to the module, severed, causing the module to land improperly. The pilot suffered spinal injuries and sued the cable manufacturer.

Evidence showed that the Air Force continued to use the cable after it had already become aware of the cable's susceptibility to corrode and snap. Shortly after the first F-111s entered into service, the Air Force made an initial redesign to the aircraft's windshield. As a result of the redesign, the cables were more exposed than had been originally planned and their protective coating was left vulnerable to scrapes and cuts. Over time, the exposed cables began to corrode. The Air Force addressed this problem in maintenance manuals and by making a second redesign, but it continued to utilize the same cable, even ordering replacement cables with the same specifications.

The *Lewis* Court grappled with the question of at what point in time the *Boyle* test should be applied. It turned to the Fourth Circuit's decisions in *Dowd* and *Ramey* for guidance and explained that although the government had previously determined that the manufacturer's cable was susceptible to corrosion, it chose to use identical cables as replacements. In fact, it was one of the replacement cables that failed and caused the subject accident. "[I]t is not [the court's] role to second-guess the Air Force's judgment" to continue using the cable.²⁸ The court held that "when the Government reordered the specific . . . cable, with knowledge of its alleged design defect, the Government approved reasonably precise specifications for that product such that the manufacturer qualifies for the military contractor defense for any defects in the design of that product."²⁹

²⁷ *Lewis v. Babcock Indus., Inc.*, 985 F.2d 83 (2nd Cir. 1993).

²⁸ *Id.* at 89.

²⁹ *Id.*; see *In re Agent Orange Prod. Liab. Litig.*, 517 F.3d 76, 94-95 (2d Cir. 2008) (extending immunity to contractor where the record disclosed that the government explicitly evaluated an alleged design defect and still continued to order replacements). However, *Lewis* expressly refused to address the question of whether a contractor can invoke the military contractor defense "where the Government merely tolerates a defect through continued use of a product in the face of knowledge of a design defect acquired after the design stage ended." *Id.* n.3.

c. The Eleventh Circuit

The Eleventh Circuit is the most recent circuit to adopt the point of view that evidence of the government's length and continued use of a product may satisfy *Boyle's* first prong. *Brinson v. Raytheon Co.* came about as a result of the fatal crash of an Air Force training aircraft and the subsequent design defect claim against the aircraft's manufacturer.³⁰ The single-propeller training craft was designed to mimic the aerodynamic properties of a jet aircraft. This was accomplished through a computer run system of pushrods and bell cranks which automatically adjusted the plane's rudder to emulate the flight of a jet. The plaintiff alleged that the rudder system was defective due to its reliance on Teflon-lined pushrods. The Teflon-lined pushrods, the plaintiff claimed, were vulnerable to failure through use and exposure to humidity. The plaintiff alleged that one of the pushrods fractured during takeoff, which caused the system to fail and led to the crash.

Although the rudder system was originally designed and patented by the manufacturer, the evidence showed that the Air Force reviewed and approved the system's design. Air Force engineers reviewed design documents and drawings and communicated with the manufacturer through status meetings and conferences. Importantly, it was also established that the Air Force was aware of the specific design defect at issue. Prior to the accident, the Air Force issued a Technical Compliance/ Technical Order ("TCTO") requiring the inspection and replacement of the pushrods. The TCTO ordered that the rods be replaced by new, but otherwise identical, Teflon-lined rods. The rods of the subject aircraft were among those replaced in compliance with the TCTO.

Considering the TCTO's pushrod inspection and replacement requirements, the *Brinson* Court agreed with the Second and Fourth Circuits that length and continued use evidence can be used to satisfy the first prong of the *Boyle* test. *Brinson* explained that the military when faced with a potentially failing or defective part, may make a discretionary decision concerning how to address the problem. The court explained, "[w]e do not want to second-guess that judgment through a state law tort suit."³¹

d. The Fifth Circuit

The Fifth Circuit is unique from the above circuits because it has only impliedly recognized the relevance and validity of the government's length and continued use of a product as evidence to satisfy the *Boyle* test. In *Kerstetter*, the Fifth Circuit was tasked with deciding whether the government contractor defense should apply to the manufacturer of an aircraft's pilot restraint system ("PRS").³² *Kerstetter* arose out of the death of a Navy instructor pilot who was inadvertently ejected from his aircraft during a training maneuver when his PRS released without command. The Navy concluded that a possible cause for the ejection was contact between the aircraft's control stick and the PRS rotary buckle. The pilot's family brought suit against the manufacturer, claiming that the PRS was defectively designed.

³⁰ *Brinson v. Raytheon Co.*, 571 F.3d 1348 (11th Cir. 2009).

³¹ *Id.* at 1353.

³² *Kerstetter*, 210 F.3d at 433-34.

Navy and the contractor, which led to the *Kerstetter* Court's determination that the Navy had approved reasonably precise specifications. Additionally, the courts recognized the government length and continued use of the product. The Court noted, "[d]efendants alternatively allege that even if the Navy is found not to have approved the PRS during T-34C design process, it did approve the allegedly defective design at issue far before the accident by subsequent testing and use."³³ In fact, the record showed that the Navy first learned of "uncommanded seat harness release" during engineering meetings ten years prior to the accident. Citing to *Dowd* in a footnote, the *Kerstetter* Court intimated that the engineering meetings were evidence of government approval.³⁴ *Kerstetter* does not affirmatively establish that the Fifth Circuit will consider the government's length and continued use of a product when addressing the government contractor defense, but it has certainly opened the door.³⁵

Federal District Courts and State Courts Recognizing the Length and Continued Use Argument:

There are also other jurisdictions across the United States, to include federal district courts and state courts which have recognized the length and continued use argument when analyzing government contractor defense cases.

In *Haltiwanger v. Unisys Corp.*, the U.S. District Court for the District of Columbia used evidence of the U.S. Postal Service's continued and consistent use of a letter sorting machine to extend government immunity to the machine's manufacturer.³⁶ The Postal Service used the machine for more than 20 years without any problems or objections based on the design process. In finding that the Postal Service's long-term use of the machine constituted approval of reasonably precise specifications under *Boyle*, the court stated: "long-term use of a given design often indicates de facto acceptance of the design and thus constitutes approval for purposes of the *Boyle* test. The continued and consistent use of a product without grievances or modifications implies endorsement of the design and consent as to its production and operation."³⁷

In *Lambert v. B.P. Prods. N. Am., Inc.*, the U.S. District Court for the Southern District of Illinois cited to *Ramey*, *Lewis*, and *Haltiwanger* when it recognized that "the first element under *Boyle* may be established if long-term governmental use of a product is shown."³⁸ The plaintiff, a former military jet engine mechanic, brought a design defect claim against a jet fuel manufacturer, alleging that he developed cancer after being exposed to the fuel. The *Lambert* Court determined that there were strong indicators that the United States approved reasonably

³³ *Id.* at 438.

³⁴ *Id.*

³⁵ When considering whether the Eleventh Circuit would accept the length and continued use argument, the *Brinson* Court noted that the Fifth Circuit, in *Kerstetter*, "apparently also consider[ed] as relevant evidence the fact that the Navy continued to order and use a potentially defective 'crotch strap' notwithstanding the Navy's knowledge of and previous evaluation of potential deficiencies." *Brinson*, 571 F.3d at 1354 n.5.

³⁶ *Haltiwanger v. Unisys Corp.*, 949 F. Supp. 898, 904 (D.D.C. 1996).

³⁷ *Id.*

³⁸ *Lambert v. B.P. Prods. N. Am., Inc.*, No. CIV 04-347-GPM, 2006 WL 924988, at *7 (S.D. Ill. Apr. 6, 2006).

precise specifications where, after being supplied with the jet fuel for at least seven years, it “never rejected or demanded modification of the product.”³⁹

In *Silverstein v. Northrop Grumman Corp.*, the Appellate Division of the Superior Court of New Jersey recognized that *Boyle’s* first prong may be satisfied by the government’s continuous use of a product after it has knowledge of a potential design defect.⁴⁰ In *Silverstein*, a U.S. Postal Service employee sued the manufacturer of his delivery vehicle after it rolled over during a traffic accident, alleging that the vehicle’s defective design rendered it prone to rollovers. After reviewing evidence that the Postal Service had approved of the vehicle’s design through an “on-going dialogue over specifications,” the *Silverstein* Court continued, “[y]et another route may be taken to ascertain whether the first prong of the *Boyle* test is satisfied.”⁴¹ The Court pointed out that the Postal Service purchased more than 150,000 of the delivery vehicles over the course of many years and concluded that “[t]his extensive experience with the vehicle . . . in the face of the USPS’s knowledge that some of the [vehicles] had been involved in rollover accidents, in itself establishes government approval of the alleged design defect.”⁴²

California’s Courts of Appeal have recognized the government’s continued use of a product to satisfy *Boyle*.⁴³ In *Kase v. Metalclad*, a design defect claim was brought against an asbestos broker which supplied asbestos-containing insulation to submarines in the 1970s. After going into a considerable amount of detail regarding the Navy’s knowledge of the effects of asbestos exposure prior to 1970, the Court cited to *In re Agent Orange* and *Dowd* and explained:

[T]his case deals with the procurement of a product that was known to and studied by the Navy for decades and which the Navy knew carried with it serious health risks. Yet, it nevertheless made a decision to use, and to continue using, this asbestos product in its naval vessels until the 1970’s.⁴⁴

Although the *Kase* Court did not explicitly say that it was considering the Navy’s continuous use of asbestos as determinative in establishing *Boyle’s* first prong, it did suggest that such evidence was a factor in its ultimate decision to extend immunity to the supplier.

Conclusion

To establish immunity from state tort law under the government contractor defense, contractors must first demonstrate that the government approved reasonably precise specifications. When deciding whether the government approved reasonably precise specifications, courts generally first look to evidence of a continuous exchange between the contractor and the government during the design phase of the product. A continuous exchange is found to have existed where the interactions between the government and the contractor consisted of formal design meetings, shared engineering drawings and specifications,

³⁹ *Id.*

⁴⁰ *Silverstein v. Northrop Grumman Corp.*, 367 N.J. Super. 361, 380 (N.J. Super. Ct. App. Div. 2004).

⁴¹ *Id.*

⁴² *Id.*

⁴³ See *Kase*, 6 Cal. App. 5th at 641.

⁴⁴ *Id.*

collaboration in the product's testing, etc. Manufacturers should certainly continue to try to find such interaction to support their claim of immunity. However, manufacturers should now also attempt to demonstrate the government's long and continuous use of the product. This post-design, post-production evidence is recognized by a growing number of courts as a viable alternative to satisfy the first prong of the *Boyle* government contractor defense test.

JURISDICTION-BY-REGISTRATION: MAKING CONSENT THE PRICE OF DOING BUSINESS IN THE STATE

By: David F. Knapp

Everything old is new again. Such is the case of general jurisdiction¹ in the wake of *Daimler AG v. Bauman*². In *Daimler*, the U.S. Supreme Court held that a corporation is subject to general jurisdiction only where it is “at home”—*i.e.*, its state of incorporation or principal place of business.³ This holding dramatically reined in the scope of general jurisdiction. No longer would plaintiffs be able to argue for jurisdiction based on the fact that a corporation was simply doing business in the forum-state.

Or so it was thought. With general jurisdiction severely restricted, plaintiffs have returned to the past—arguing that defendant corporations “consented” to jurisdiction in the forum-state.⁴ The argument is as follows: When a foreign corporation registers to do business in the forum-state and appoints an agent for service of process—as all 50 states require—that corporation has consented to general jurisdiction in the state on any claim wherever arising. This “jurisdiction-by-registration”⁵ theory is deeply rooted in precedent. And it has caused a split among both the federal circuit courts and the state high courts. Left untouched, it threatens to upend the stability provided by *Daimler*, and subject foreign corporations to jurisdiction in every state where they are doing business.

General Jurisdiction: From *Pennoyer* to the Present

The connection between jurisdiction and the forum-state dates back to *Pennoyer v. Neff*.⁶ Decided by the U.S. Supreme Court in 1877, *Pennoyer* limited the reach of jurisdiction over foreign corporations to the territorial boundaries of the state.⁷ *Pennoyer*’s rationale reflected the nineteenth-century view that corporations resided only in their state of incorporation.⁸ Corporate

¹ There are two types of personal jurisdiction: general and specific. General jurisdiction is the power to adjudicate any kind of controversy against a defendant, wherever arising, and whoever the plaintiff. See Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1136 (1966). Specific jurisdiction, on the other hand, is available when the cause of action sued upon arises out of the defendant’s activities within the state. *Id.* This Article focuses solely on general jurisdiction.

² 571 U.S. 117 (2014).

³ *Id.* at 137.

⁴ Charles W. Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. Davis L. Rev. 207, 259-60 (2014) (“Given the constriction of general jurisdiction in [*Daimler*], the natural next step for plaintiffs is to seek other grounds for general jurisdiction, and the most obvious place to look for such consent is in a state registration filing that designates a corporate agent for service of process.”).

⁵ For the sake of brevity, this Article uses the term “jurisdiction-by-registration” to refer to consent jurisdiction based on compliance with a state registration statute.

⁶ 95 U.S. 714 (1877).

⁷ *Id.* at 729; see *id.* at 722 (“[N]o State can exercise direct jurisdiction and authority over persons or property without its territory...[N]o tribunal established by it can extend its process beyond that territory.”).

⁸ See *St. Clair v. Cox*, 106 U.S. 350, 354 (1882) (“[Under *Pennoyer*,] a foreign corporation could not be sued in an action for the recovery of a personal demand outside of the state by which it was chartered...The principle that a corporation must dwell in the place of its creation...prevented the maintenance of personal actions against it [in another sovereignty.]”); see also Kevin D. Benish, *Pennoyer’s Ghost: Consent, Registration Statutes, and General Jurisdiction After Daimler A.G. v. Bauman*, 90 N.Y.U. L. Rev. 1609, 1615-16, 1631-32 (discussing the history of territorial jurisdiction over foreign corporations).

officers, it was thought, did not carry their liabilities with them and thus could not be sued outside the state.⁹ This restrictive view of jurisdiction, however, ultimately proved unworkable. Corporations began to expand commerce beyond their borders. And new methods of communication and transportation led to an “inevitable relaxation of the strict limits on state jurisdiction” over foreign corporations.¹⁰

In response, states developed business registration statutes. These statutes required that foreign corporations appoint an in-state agent for service of process as a condition of conducting business in the state.¹¹ Courts initially upheld these statutes as consistent with due process. To do so, the courts created jurisdictional fictions—like “consent”¹², “presence”¹³, and “doing business”¹⁴—to comply with *Pennoyer*’s rigid territorial model. But these fictions were soon cast aside. Principles of jurisdiction once “appropriate for the age of the ‘horse and buggy’ or even for the age of the ‘iron horse’ could not serve the era of the airplane, the radio, and the telephone.”¹⁵

In stepped *International Shoe v. Washington*.¹⁶ Discarding *Pennoyer*’s territorial approach, the Supreme Court in *International Shoe* announced a jurisdictional framework based on the relationship between the parties, the dispute, and the forum.¹⁷ Specifically, *International Shoe* held that a state could exercise personal jurisdiction over a foreign corporation with “certain minimum contacts [in the forum]...such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”¹⁸ Applying this test, the Court determined that International Shoe—a Delaware company with its principal place of business in Missouri—was amendable to suit in Washington based on its “systematic and continuous” sales contacts with the state.¹⁹

Two subsequent cases, *Perkins v. Benguet Consolidated Mining Co.*²⁰ and *Helicopteros Nacionales de Columbia, S.A. v. Hall*²¹, further refined the general jurisdiction analysis. *Perkins* was a shareholder suit brought in Ohio against Benguet Mining Company, a company

⁹ *Cox*, 106 U.S. at 354 (observing that when a corporate officer traveled outside the state he would not represent the corporation, and that “his functions and his character would not accompany him” there).

¹⁰ *Burnham v. Superior Court*, 495 U.S. 604, 617 (1990) (quoting *Hanson v. Denckla*, 357 U.S. 235, 260, (1958) (Black, J., dissenting)).

¹¹ *Id.*

¹² See *Hess v. Pawloski*, 274 U.S. 352 (1927) (upholding state motor vehicle statute as consistent with due process).

¹³ See *Philadelphia & R. Ry. Co. v. McKibbin*, 243 U.S. 264 (1917) (foreign corporation is amendable to suit if it is present in the state).

¹⁴ See *Barrow S.S. Co. v. Kane*, 170 U.S. 100 (1898) (general jurisdiction over foreign corporation that is “doing business” in the state); *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915 (1917) (same).

¹⁵ Phillip B. Kurland, *The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Courts: From Pennoyer to Denckla*, 25 U. Chi. L. Rev. 569, 573 (1958).

¹⁶ 326 US. 310 (1945).

¹⁷ See *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) (“[In *International Shoe*,] the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the State on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction.”).

¹⁸ *Id.* at 316 (quoting *Miliken v. Meyer*, 311 U.S. 457, 463 (1940)).

¹⁹ *Id.* at 320.

²⁰ 342 U.S. 437 (1952); see *Daimler*, 571 U.S. at 755 (referring to *Perkins* as “the textbook case of general jurisdiction”).

²¹ 466 U.S. 408 (1984).

headquartered in the Philippines that had re-located to Ohio during World War II.²² Applying the test announced in *International Shoe*, the Supreme Court held that Ohio could exercise general jurisdiction over Benguet Mining because the company carried out “continuous and systematic” contacts with the state.²³ *Helicopteros* was a different story. In that case, the survivors of four U.S. citizens brought suit in Texas against Helicol, a Columbian corporation, for damages arising out of a helicopter crash in Peru.²⁴ This time the Court held that Texas did not have general jurisdiction over Helicol given its limited sales and purchasing contacts²⁵ with the state.

While both *Perkins* and *Helicopteros* opined on business registration, in neither case was the issue critical to the holding. In *Perkins*, the Court noted that the corporation did not register to do business in Ohio or appoint an agent for service of process there.²⁶ Likewise, in *Helicopteros*, the Court explained that the corporation never registered to do business or appointed a registered agent in the state of Texas.²⁷ *Perkins* and *Helicopteros* thus left open the possibility that compliance with a state registration statute was still a viable source of obtaining jurisdiction.

That all began to change in 2011 with *Goodyear Dunlop Tires Operations, S.A. v. Brown*.²⁸ *Goodyear* arose from a bus accident in France that killed two 13-year old boys from North Carolina.²⁹ When the boys’ parents sued in North Carolina, the European-based tire manufacturers challenged personal jurisdiction.³⁰ In framing the issue, the U.S. Supreme Court stated that “[a] court may assert general jurisdiction over foreign [] corporations to hear any and all claims against them when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home” there.³¹ Applying this test, the Court concluded that the tire manufacturers are “in no sense at home in North Carolina” and that “[t]heir attenuated connections to the State fall far short of the ‘continuous and systematic general business contacts’ necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State.”³²

²² *Perkins*, 342 U.S. at 438-39.

²³ *Perkins*, 342 U.S. at 443-445. To the extent that Benguet Mining was operating at all, it was in Ohio. During the war, Benguet’s president moved to Ohio, where he kept an office, held meetings, coordinated policy, and maintained the company’s funds in two active bank accounts. *Perkins*, 342 U.S. at 448.

²⁴ *Helicopteros*, 466 U.S. at 410-11.

²⁵ The corporation’s Texas contacts were confined to “sending its chief executive to Houston for a contract-negotiation session, accepting...checks drawn on a Houston bank, purchasing helicopters, equipment, and training services from [a Texas-based helicopter company]..., and sending personnel to [Texas] for training.” *Id.* at 416. “[M]ere purchases, even if occurring at regular intervals,” the Court clarified, “are not enough to warrant a State’s assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions.” *Id.* at 418.

²⁶ *Perkins*, 342 U.S. at 440 n. 2 (“The mining company has neither secured...a license [to transact business in the State] nor designated...an agent [for service.]”).

²⁷ *Helicopteros*, 466 U.S. at 411. Interestingly, counsel for the foreign corporation *conceded* that his client would be subject to jurisdiction had the corporation been registered to do business in Texas. See Oral Argument at 15:1-25 – 16:1-10, *Helicopteros*, 466 U.S. 408 (1984), available at https://www.supremecourt.gov/pdfs/transcripts/1983/82-1127_11-08-1983.pdf.

²⁸ 564 U.S. 915 (2011).

²⁹ *Id.* at 918.

³⁰ *Id.*

³¹ *Id.* at 919 (citing *Int’l Shoe*, 326 U.S. at 317).

³² *Id.* at 929 (quoting *Helicopteros*, 466 U.S. at 416).

The Supreme Court re-affirmed the “at home” standard in *Daimler*. There, a group of Argentinian citizens sued Daimler, a German corporation, in California for injuries arising out of Argentina’s “Dirty War.”³³ Jurisdiction was plead against Daimler’s California-subsiary, a Delaware corporation headquartered in New Jersey that distributed Daimler-manufactured cars in the United States and California.³⁴ The Court confirmed that the proper inquiry under *Goodyear* is where the corporation is “fairly regarded as at home”—*i.e.*, its state of incorporation or principal place of business.³⁵ Applying this test, it held that Daimler was not “at home” in California, noting that “neither Daimler nor [its subsidiary] is incorporated in California, nor does either entity have a principal place of business there.”³⁶

Importantly, the *Daimler* Court rejected the exercise of general jurisdiction over a corporation in every state in which it “engages in a substantial, continuous, and systematic course of business.”³⁷ That test, it held, is “unacceptably grasping.”³⁸ In doing so, the Court stressed that allowing “[s]uch exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants ‘to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.’”³⁹ “A corporation that operates in many places,” the Court explained, “can scarcely be deemed at home in all of them. Otherwise, ‘at home’ would be synonymous with ‘doing business’ tests framed before specific jurisdiction evolved in the United States.”⁴⁰

Business Registration Statutes

All fifty states have business registration statutes.⁴¹ These statutes are designed to place foreign corporations on equal footing with domestic corporations, and to ensure that foreign corporations are accountable for their actions within the state.⁴² All of them require corporations doing business in the state to, at a minimum, register with the Secretary of State and appoint an agent for service of process. Take California, as an example. In order to transact business in California, a foreign corporation must obtain “from the Secretary of State a certificate of qualification” containing, among other things, “[t]he name of an agent upon whom process directed to the corporation may be served within the state.”⁴³ While most statutes are similarly worded, there is some variety. Some state registration statutes provide detailed registration procedures⁴⁴; others impose additional requirements for registered agents.⁴⁵ The statutes also

³³ *Daimler*, 571 U.S. at 120-21.

³⁴ *Id.* at 123-24.

³⁵ *Id.* at 137.

³⁶ *Id.* at 139.

³⁷ *Id.* at 138.

³⁸ *Id.*

³⁹ *Id.* at 139 (quoting *Burger King v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

⁴⁰ *Id.* at 139 n. 20.

⁴¹ Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 *Cardozo L. Rev.* 1343, 1363 n. 109 (cataloging registration statutes from all fifty states); Benish, *supra* note 8, 1647 – 1661 (detailing state-by-state registration statutes).

⁴² Monestier, *supra* note 41, at 1364-65; *see also Daimler*, 571 U.S. at 157-158 (Sotomayor, J., concurring) (discussing the State’s “sovereign prerogative” to hold corporations accountable for their in-state conduct).

⁴³ *See* Cal. Corp. Code § 2105(a) (2017).

⁴⁴ *See, e.g.*, Conn. Gen. Stat. Ann. § 33-902(a) (2017).

⁴⁵ *See, e.g.*, Del. Code Ann. tit. 8 § 132 (a) – (d).

contain penalty provisions—typically, denial of access to courts⁴⁶ or fines⁴⁷—for corporations who fail to comply with these registration requirements.

Courts that have traditionally viewed these statutes as conferring general jurisdiction over a corporation do so under the theory of consent. The theory is straightforward: A corporation, in taking voluntary and proactive steps to register and appoint an agent for service of process under the relevant state statute, has expressly consented to the state’s authority over it.⁴⁸ By consenting, the state can adjudicate claims against the corporation that are unrelated to its presence or activities there.⁴⁹ What makes consent particularly unique, however, is that it is an independent basis for jurisdiction. No due process analysis is required.⁵⁰ By complying with a state’s registration statute, a corporation is voluntarily waiving any protections that the Due Process Clause might otherwise afford.⁵¹

Consent Jurisdiction

Jurisdiction-by-registration has deep historical roots. The doctrine dates back to a trilogy of opinions from nearly a century ago, decided by three iconic jurists. The first is a 1915 case called *Smolnik v. Philadelphia & Reading Coal & Iron Co.*⁵² In *Smolnik*, an injured mine worker brought a tort action against a Pennsylvania mining company, arguing that the company had consented to jurisdiction in New York because it was both registered and had an agent for service of process, as required by New York law.⁵³ Judge Learned Hand upheld the exercise of general jurisdiction over the out-of-state claim.⁵⁴ “[I]n the interests of justice,” he wrote, courts may “impute[] results to the voluntary act of doing business within the foreign state, quite independently of any intent” on behalf of the corporation.⁵⁵ Consequently, “there is no constitutional objection to a state’s exacting a consent from foreign corporations to any jurisdiction which it may please, as a condition of doing business.”⁵⁶

Just one year later, Judge Benjamin Cardozo reached the same result in *Bagdon v. Philadelphia & Reading Coal & Iron Co.*⁵⁷ There, a Pennsylvania resident made an identical jurisdictional argument against the same Pennsylvania mining company—namely, that the company consented to jurisdiction in New York by registering to do business and appointing an agent for service.⁵⁸ Judge Cardozo agreed. Citing *Smolnik*, Judge Cardozo held that New York courts have jurisdiction “when a foreign corporation is engaged in business in New York, and is

⁴⁶ See, e.g., Fla. Stat. Ann. §§ 607.1502 (2018) (door-closing); Ga. Code. Ann. §§ 14-2-1502 (2011) (door-closing).

⁴⁷ See, e.g., Miss. Code Ann. §§ 79-4-15.02 (2013) (\$1000 fine per year); Neb. Rev. Stat. §§ 21-2, 204 (2017) (\$500 fine per day, not to exceed \$10,000 per year).

⁴⁸ Monestier, *supra* note 41, at 1377-78.

⁴⁹ *Id.*

⁵⁰ *Id.*; see also *Merriman v. Crompton Corp.*, 146 P.3d 162, 177 (Kan. 2006) (“[T]he Due Process Clause is not violated when jurisdiction over a foreign corporation is based upon the corporation’s express written consent to jurisdiction under [the state registration statute].”).

⁵¹ Monestier, *supra* note 41, at 1378.

⁵² 222 F. 148 (D.C.N.Y. 1915)

⁵³ *Id.* at 148.

⁵⁴ *Id.* at 151.

⁵⁵ *Id.* at 151.

⁵⁶ *Id.* at 150 – 51.

⁵⁷ 111 N.E. 1075 (N.Y. 1916).

⁵⁸ *Id.* at 1075.

here represented by an officer,” even though “the cause of action has no relation to the business here transacted.”⁵⁹ “[T]here is nothing to the contrary,” he observed, “in the guaranty of due process under the federal Constitution.”⁶⁰

This jurisdiction-by-registration rule was soon accepted by the U.S. Supreme Court in *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining and Milling Co.*⁶¹ In that case, an Arizona company sued its Pennsylvania insurer in Missouri, arguing that the Pennsylvania insurer had consented to jurisdiction in Missouri by complying with the Missouri registration statute—*i.e.*, by obtaining a license to conduct business and appointing an agent for service.⁶² Justice Holmes, like Judges Hand and Cardozo before him, held that the Pennsylvania insurer had consented to jurisdiction by “voluntar[ily]” complying with the Missouri registration statute.⁶³ The “language...and the construction [of the registration statute],” he concluded, “did not deprive the defendant of due process of law even if it took the defendant by surprise[.]”⁶⁴

Smolnik, Bagdon, and Pennsylvania Fire thus stand for the proposition that state registration statutes may be interpreted to uphold general jurisdiction over foreign corporations. Post-*Daimler* cases universally rely on this logic in upholding jurisdiction-by-registration claims.⁶⁵

Divided Courts: Does Business Registration Confer General Jurisdiction?

The federal courts of appeals are intractably divided over whether state business registration statutes confer general jurisdiction over foreign corporations. The Third⁶⁶ and Eighth⁶⁷ Circuits have categorically held that compliance with a state registration statute establishes a foreign corporation’s consent to general jurisdiction. The Second⁶⁸ and Fourth⁶⁹ Circuits hold just the opposite—namely, that jurisdiction-by-registration is a violation of due process. The Seventh⁷⁰ and Eleventh⁷¹ Circuits have implied that mere compliance with a

⁵⁹ *Id.* at 1077.

⁶⁰ *Id.*

⁶¹ 243 U.S. 93 (1917).

⁶² *Id.* at 94-95.

⁶³ *Id.* at 96.

⁶⁴ *Id.* at 95.

⁶⁵ See, e.g., *Otsuka Pharmaceutical Co. v. Mylan Inc.*, 106 F.Supp.3d 456, 470-71 (D.N.J. 2015); *Accorda Therapeutics, Inc. v. Mylan Pharmaceuticals Inc.*, 78 F.Supp.3d 572, 588-592 (D. Del. 2015).

⁶⁶ See *Bane v. Netlink, Inc.*, 925 F.2d 637, 641 (3d Cir. 1991) (holding that compliance with Pennsylvania’s registration statute subjected Netlink to general jurisdiction within the state).

⁶⁷ See *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1199 (8th Cir. 1990) (holding that foreign corporations that appoint an agent for service under Minnesota’s registration statute have consented to general jurisdiction).

⁶⁸ See *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 641 (2016) (“[W]e conclude that the Connecticut business registration statute did not require [the defendant] to consent to general jurisdiction in exchange for the right to do business in the state.”).

⁶⁹ See *Ratliff v. Cooper Labs., Inc.*, 444 F.2d 745, 748 (4th Cir. 1971) (“The principles of due process require a firmer foundation than mere compliance with state domestication statutes.”).

⁷⁰ See *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1245 (7th Cir. 1990) (“Registering to do business...cannot satisfy...standing alone...the demands of due process.”)

⁷¹ See *Consolidated Development Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1293 (11th Cir. 2000) (“The casual presence of a corporate agent in the forum is not enough to subject the corporation to suit where the cause of action is unrelated to the agent’s activities.”).

registration statute does not subject a corporation to general jurisdiction. Finally, the Fifth⁷² and Ninth⁷³ Circuits have staked out a middle position, holding that a state may condition general jurisdiction on a registration statute, even though the statutes at issue in those cases did not measure up. A close look at these cases, and the specific statutory language in each state’s registration statute, helps shed light on the split.

YES—*Bane v. Netlink, Inc.*

The most expansive reading of jurisdiction-by-registration comes from the Third Circuit’s decision in *Bane v. Netlink, Inc.*⁷⁴ Thomas Bane worked as a salesperson for Netlink for three years before he was fired for his age in violation of the Age Discrimination in Employment Act.⁷⁵ Bane sued in Pennsylvania given that Netlink was registered to do business there, in accordance with state law.⁷⁶ Netlink moved to dismiss the suit for lack of jurisdiction, asserting that it was a Delaware corporation headquartered in North Carolina, with no contacts in Pennsylvania.⁷⁷ The Third Circuit held that compliance with Pennsylvania’s registration statute was sufficient to confer general jurisdiction over Netlink.

In reaching this conclusion, the court focused on the precise language in the Pennsylvania statute. The statute, by its terms, provides three bases for the exercise of general jurisdiction: (1) “Incorporation under or qualification as a foreign corporation” in the state, (2) “Consent,” and (3) “The carrying on of a continuous and systematic part of its general business” within the state.⁷⁸ In this way, Pennsylvania is *sui generis*—its registration statute is the only statute in the country that specifically provides that foreign corporations “consent” to general jurisdiction by registering to do business in the state.⁷⁹ Seizing on this language, the Third Circuit held that Netlink’s registration to do business in the state “can be viewed as its consent to be sued” there.⁸⁰ By registering to do business, Netlink “purposefully avail[ed]” itself of the privilege of conducting activities in Pennsylvania, and invoked the benefits and protections of its laws.⁸¹

While *Bane* pre-dates the U.S. Supreme Court’s recent thinking about jurisdiction, other federal courts and state high courts have found that registration statutes are a valid basis for general jurisdiction post-*Daimler*. In two Pennsylvania cases, *Bors v. Johnson & Johnson*⁸² and *Gorton v. Air & Liquid Systems Corp.*⁸³, the courts held that *Daimler* did not eliminate consent to general jurisdiction over a corporation registered to do business in the state.⁸⁴ Two New Jersey

⁷² See *Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 181 (5th Cir. 1992) (“[B]eing qualified to do business...is of no special weight in evaluating general personal jurisdiction.”) (internal citations omitted).

⁷³ See *King v. Am. Family Mut. Ins.*, 632 F.3d 570, 576 n. 6 (9th Cir. 2011) (recognizing that “*Pennsylvania Fire* cannot be squared either with the carefully circumscribed analysis in that case or with the Supreme Court’s later decisions.”).

⁷⁴ 925 F.2d 637 (3d Cir. 1991).

⁷⁵ *Id.* at 638.

⁷⁶ *Id.* at 639.

⁷⁷ *Id.*

⁷⁸ *Id.* at 640 (citing 42 Pa. Cons. Stat. Ann. § 5301 (Purdon 1990)).

⁷⁹ See 42 Pa. Cons. Stat. Ann. § 5301 (2018).

⁸⁰ *Id.* at 641.

⁸¹ *Id.* at 640.

⁸² 208 F.Supp.3d 648, 654-55 (E.D. Pa. 2016).

⁸³ 303 F.3d 278, 297-98 (M.D. Pa. 2018).

⁸⁴ An appellate court in Pennsylvania recently relied on both *Bors* and *Gorton* to hold that a defendant-corporation was subject to general jurisdiction based on consent, even though it had not registered to do business in the state

cases, *Senju Pharmaceutical Co. v. Metrics, Inc.*⁸⁵ and *Otsuka Pharmaceutical Co. v. Mylan Inc.*⁸⁶, likewise held that non-resident corporations were subject to general jurisdiction in the state because they registered to do business there and appointed an agent for service of process. The states of Delaware⁸⁷, Iowa⁸⁸, Minnesota⁸⁹, Nebraska⁹⁰, New Mexico⁹¹, and Tennessee⁹² also have established precedent on the books, allowing corporations to be sued based on compliance with the state's registration statute. These cases make clear that foreign corporations will continue to be subject to jurisdiction-by-registration in numerous courts around the country.

NO—*Brown v. Lockheed Martin Corp.*

As of now, the majority of courts have rejected jurisdiction-by-registration as a violation of due process. The Second Circuit's decision in *Brown v. Lockheed Martin Corp.*⁹³ is a paradigmatic example. *Brown* involved a personal injury suit brought by the estate of an Air Force airplane mechanic against Lockheed Martin.⁹⁴ The decedent suffered injuries from asbestos exposure while working at various air bases around Europe and the United States, but

until after the events that gave rise to the suit. *See Webb-Benjamin, LLC v. International Rug Group, LLC*, ___ A.3d ___, 2018 WL 3153602, *1 – *4 (Pa. Super. Ct. June 28, 2018).

⁸⁵ 96 F.Supp.3d 428, 436-37 (D.N.J. 2015).

⁸⁶ 106 F.Supp.3d 456, 470-71 (D.N.J. 2015).

⁸⁷ *See Accorda Therapeutics, Inc. v. Mylan Pharmaceuticals Inc.*, 78 F.Supp.3d 572, 588-592 (D. Del. 2015) (holding that a West Virginia corporation consented to general jurisdiction by complying with Delaware's business registration statute). *But see Genuine Parts Co. v. Cepec*, 137 A.3d 123, 142-43 (Del. 2016) (Delaware's registration statute "can be given a sensible reading by construing it as requiring a foreign corporation to allow service of process to be made upon it in a convenient way in proper cases, but *not* as a consent to general jurisdiction.") (emphasis added).

⁸⁸ *See Spanier v. American Pop Corn Co.*, 15-4071, 2016 WL 1465400, *3 – *4 (N.D. Iowa April 14, 2016) (concluding that two companies had consented to jurisdiction in Iowa in light of the fact that both maintained registered agents for service of process there).

⁸⁹ *See Rykoff-Sexton, Inc. v. American Appraisal Assoc., Inc.*, 469 N.W.2d 88, 90 (Minn. 1991) ("Once the defendant has appointed an agent for service of process located in the state...personal jurisdiction pursuant to the consent of the defendant does not invoke constitutional or long arm statutory analysis"); *Ally Bank v. Lenox Financial Mortgage Corp.*, 16-2387, 2017 WL 830391, *2 – *3 (D. Minn. March 2, 2017) ("The court need not assess Lenox's contacts with the State...because Lenox consented by registering an agent to receive service of process in Minnesota. [*Knowlton*, 900 F.2d at 1199]...*Daimler*...is inapplicable here. The *Daimler* court addressed the limits of general jurisdiction over a foreign corporation, not the limits of a defendant's capacity to consent to personal jurisdiction.").

⁹⁰ *See Mittelstadt v. Rouzer*, 328 N.W.2d 467, 469 (Neb. 1982) ("By designating an agent upon whom process may be served within this state, a defendant has consented to the jurisdiction in personam by the proper court."). Post-*Daimler* cases have not retreated from this view. *See, e.g., Consolidated Infrastructure Group, Inc. v. USIC, LLC*, 16-472, 2017 WL 2222917, *7 (D. Neb. May 18, 2017) ("One of the most solidly established ways of giving such consent [under the long-arm statute] is to designate an agent for service of process within the State [of Nebraska].").

⁹¹ *See Werner v. Wal-Mart Stores, Inc.*, 861 P.2d 270, 273 (N.M. Ct. App. 1993) (interpreting New Mexico's registration statute as upholding general jurisdiction against any foreign corporation with a registered agent in the state, but refusing to make a ruling on the due process issue).

⁹² Historically, Tennessee courts have allowed consent jurisdiction over foreign corporations based on their compliance with the state's registration statute. *See, e.g., Davenport v. State Farm Mutual Automobile Insurance Co.*, 756 S.W.2d 678, 679 (Tenn. 1988). Yet recent cases have limited the statute's reach to domestic corporations only. *See Ratledge v. Norfolk Southern Ry. Co.*, 958 F.Supp.2d 827, 838 (Tenn. 2013) ("[The statute] has no application to foreign corporations that have qualified to do business and designated a registered agent, in Tennessee.").

⁹³ 814 F.3d 619 (2016).

⁹⁴ *Id.* at 622.

not in Connecticut.⁹⁵ His estate nevertheless sued Lockheed in Connecticut, arguing that Lockheed consented to jurisdiction in the state by registering to do business and appointing an agent for service of process there.⁹⁶ Lockheed, for its part, contended that this assertion of general jurisdiction violated due process.⁹⁷ The Second Circuit dismissed the case for want of jurisdiction.

The court analyzed the Connecticut statute, which provides, in relevant part, that “[t]he registered agent of a foreign corporation authorized to transact business in this state is the corporation’s agent for service of process, notice or demand required or permitted by law to be served on the foreign corporation.”⁹⁸ This statute, the court explained, does not “contain express language alerting the potential registrant that by complying with the statute and appointing an agent it would be agreeing to submit to the general jurisdiction of the state courts.”⁹⁹ The phrase “required or permitted by law”, it continued, suggests some limitation under law—namely, “constitutional due process limitations.”¹⁰⁰ This phrase also differentiated the Connecticut statute from other state statutes “that have been definitively construed to convey a foreign corporation’s consent to general jurisdiction.”¹⁰¹

The Second Circuit also dismissed older Supreme Court cases that permitted jurisdiction-by-registration. Those cases, it held, “cannot be divorced from the outdated jurisprudential assumptions of [their] era.”¹⁰² Jurisdiction based on “‘consent’ has yielded to the doctrinal refinement reflected in *Goodyear* and *Daimler* and the [Supreme] Court’s 21st century approach to general . . . jurisdiction in light of expectations created by the continuing expansion of interstate and global business.”¹⁰³ If mere registration and the appointment of an in-state agent were enough for general jurisdiction, the court quipped, then “*Daimler*’s ruling would be robbed of meaning by a back-door thief.”¹⁰⁴

This position appears to be the majority view. According to one survey, as many as 38 states have held that consent jurisdiction based on compliance with a business registration statute

⁹⁵ *Id.* at 623.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 633.

⁹⁹ *Id.* at 636.

¹⁰⁰ *Id.* at 636-37.

¹⁰¹ *Id.* at 637. As an example, the court cited to the Pennsylvania registration statute, which expressly provides that “qualification as a foreign corporation” under state law is a “sufficient basis . . . to enable [Pennsylvania] . . . to exercise general personal jurisdiction.” *Id.* (citing *Bane*, 925 F.2d at 640).

¹⁰² *Id.* at 639.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 640. Another recent aviation case reached the same result. See *Kyowa Seni, Co., Ltd. v. ANA Aircraft Technics, Co., Ltd.*, Case No. 650589-2017, 2018 WL 3321410 (Sup. Ct. July 05, 2018). In that case, Kyowa, a Japanese seat cover manufacturer, sued ANA, a Japanese airline, to recover damages for fraud. Kyowa argued that New York had general jurisdiction over ANA given that it was registered to do business and had appointed an agent for service of process in the state. *Id.* at *3. The court disagreed. Because ANA is incorporated and headquartered in Japan, the court explained, it is not “essentially at home” in New York. *Id.* at *4. Moreover, “ANA’s simple registration in New York is an insufficient ground for this Court to exercise general jurisdiction over them.” *Id.* (citing *Brown*, 814 F.3d at 640). The court thus concluded that New York’s registration statute does not confer consent jurisdiction over a foreign corporation.

violates due process.¹⁰⁵ Two excellent opinions from the Delaware and Missouri Supreme Courts have recently recognized as much.¹⁰⁶ All of that said, counting up states is an inexact science. Not every jurisdiction has weighed in post-*Daimler*. And plaintiffs are winning new victories every day.¹⁰⁷ Until the U.S. Supreme Court steps in, the conflict over jurisdiction-by-registration will continue to persist.

Defendant’s Counterarguments: Jurisdiction-By-Registration is Unconstitutional

Defendants in aviation cases have two strong arguments against the theory of jurisdiction-by-registration.

First, jurisdiction-by-registration is inconsistent with modern notions of due process. *Daimler* limited the reach of general jurisdiction to places where corporations are “at home”—*i.e.*, their state of incorporation or principal place of business.¹⁰⁸ *Pennsylvania Fire* and its progeny, however, are far more expansive. Those cases hold that by merely registering to do business and appointing an agent for service of process, a foreign corporation can be liable in that state for any claim wherever arising. That conception of jurisdiction, as the *Daimler* court observed, is “unacceptably grasping.”¹⁰⁹ Under *Daimler*, a defendant is “at home” in at most two states; under a theory of jurisdiction-by-registration, a defendant would be “at home” in all fifty. Simply put: “[A] broad inference of consent based on registration would allow national corporations to be sued in every state, rendering *Daimler* pointless.”¹¹⁰

Second, jurisdiction-by-registration imposes an unconstitutional condition. It is well-settled that a state may not require a corporation “as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution.”¹¹¹ Yet that is precisely what state business registration statutes do. A defendant that registers to do business in a state does not voluntarily consent to jurisdiction; to the contrary, the defendant is forced to either comply with the state’s registration requirements or refrain from

¹⁰⁵ See James Beck, *50 State Survey On General Jurisdiction Through Consent By Registration To Do Business: Putting Bauman And Baseball Back Together*, Drug And Device Law Blog, available at <https://www.druganddevicelawblog.com/2017/12/quasi-guest-post-50-state-survey-on-general-jurisdiction-through-consent-by-registration-to-do-business-putting-bauman-and-baseball-back-together.html> (last visited on August 27, 2018).

¹⁰⁶ *Genuine Parts Co. v. Cepec*, 137 A.3d 123 (Del. 2016); *State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41 (Mo. 2017).

¹⁰⁷ See, e.g., *Webb-Benjamin*, ___ A.3d ___, 2018 WL 3153602, at *1 – *4 (upholding jurisdiction over foreign corporation based solely on registration to do business in Pennsylvania); *Brieno v. Paccar, Inc.*, 17-867, 2018 WL 3675234, at *1 (D.N.M. August 2, 2018) (distinguishing *Daimler*, and finding general jurisdiction over out-of-state defendant based on compliance with state registration statute).

¹⁰⁸ *Daimler*, 571 U.S. at 137.

¹⁰⁹ *Daimler*, 571 U.S. at 138. While the *Daimler* court did not expressly address consent, it observed that cases pre-dating *International Shoe*’s due process framework “should not attract heavy reliance today.” *Daimler*, 571 U.S. at 138 n. 18. The best reading of this dictum is that it embraces *Smolnik*, *Bagdon*, and *Pennsylvania Fire*—all of which were “decided in the era dominated by *Pennoyer*’s territorial thinking.” *Id.*

¹¹⁰ *Dolan*, 512 S.W.3d at 51; accord *BNSF Ry. Co. v. Tyrell*, 137 S.Ct. 1549, 1559 (2017) (“[I]n-state business...does not suffice to permit the assertion of general jurisdiction over claims...that are unrelated to any activity occurring in [the state].”).

¹¹¹ *Koontz v. St. John’s River Water Management Dist.*, 570 U.S. 595, 607 (2013) (quoting *Southern Pacific Co. v. Denton*, 146 U.S. 202, 207 (1892)).

doing business there altogether. That is a false choice. Simply “[c]alling registration consent does not actually make it [so.]”¹¹²

Conclusion

In the end, the law gives with one hand and takes away with the other. While the U.S. Supreme Court severely circumscribed the scope of general jurisdiction in *Daimler*, plaintiffs have consistently won victories based on jurisdiction-by-registration. Until the Court resolves this issue, federal courts and state high courts will remain hopelessly divided.

In the meantime, defendants in aviation cases have strong arguments on their side. Interpreting business registration statutes as conferring general jurisdiction over foreign corporations contravenes *Daimler*'s clear holding, and is both a violation of due process and unconstitutionally coercive.

¹¹² Monestier, *supra* note 41, at 1379.



Aircraft Builders Council, Inc.