AIRCRAFT BUILDERS COUNCIL, INC. LAW REPORT

THE ACCELERATING UNIVERSE OF CYBER RISKS – ARE YOU PROTECTED?
Stephen Tucker
New York

ATTEMPTS TO AVOID *FORUM NON CONVENIENS* REJECTED
Mark R. Irvine, Los Angeles
Aghavni V. Kasparian, Los Angeles

NON-SUCCESSOR LIABILITY WHEN PURCHASING A CORPORATION
Alice Chan
New York

GARA UPDATE: TWO NEW CASES EXPAND THE REACH OF GARA TO USED AIRCRAFT PARTS AND OVERHAUL MANUALS
Christopher S. Hickey
Los Angeles

HAS THE U.S. SUPREME COURT NARROWED PERSONAL JURISDICTION OVER FOREIGN CORPORATIONS?
Stephanie Brie Gonzalez
Los Angeles

THE DEFENSIBILITY OF USING ADVANCED ELECTRONIC DISCOVERY TO STREAMLINE THE ELECTRONIC DISCOVERY PROCESS
Paul N. Bowles, III
New York

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The ABC Underwriters, as part of their comprehensive insurance plan, have requested Fitzpatrick & Hunt, Tucker, Collier, Pagano, Aubert, LLP to prepare periodic reports on topics of interest to the members. Six articles appear in this Law Report relating to various aspects of products liability law.

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TABLE OF CONTENTS

THE ACCELERATING UNIVERSE OF CYBER RISKS— ARE YOU PROTECTED?

By
Stephen Tucker

INTRODUCTION

Our Universe and the cyber-threat universe both seem to be expanding at an accelerated rate largely driven by "dark energy". It is one of the great ironies of the information age that the technologies that empower us to build also empower those who wish to destroy. Recognizing cyber-threats intent on destruction, satellite insurance and their control-related terrestrial infrastructure needs to expand to meet the threat. Recommended defensive and offensive agile actions by operators may well expand the availability, scope and affordability of this coverage by ameliorating some of the risks.

EARLY DAYS

In the early days of Earth orbiting satellites, command protocols and messaging formats were obscure; and ground stations were sizable and physically well protected. Early hacker attacks tended to focus on such things as theft of pay-TV service and stealing Earth mapping data stored on spacecraft. There was even some "piracy" associated with the unauthorized use of satellite transponders.

Early satellites operated in a hardened environment that has been analogized to that of a medieval castle. The high walls and moats filled with water, then burning oil, were enough to keep out intruders.

REASONS FOR THE CURRENT THREAT

Today, the threat environment has evolved and grown largely because of rich connectivity through networking to the outside world, and open sourced (use driven by cost issues) software and hardware. Space segment vulnerabilities seem ultimately driven by the social need for mobility and remote access.

With the advent of flying routers, the use of open TCP/IP and highly switchable satellites operating in clusters in orbit, cyber-threats have increased dramatically in recent years.

The primary risks to the flight segment are denial of service and, even most troubling, the potential loss of satellite assets. Nightmare scenarios include: propellant exhaustion; reaction wheel instabilities causing pointing errors; EEPROM memory rewrite exhaustion; collisions; and even weaponization of satellites.

Defensively Protecting Assets

Fortunately, there is movement towards recognizing the threats and using a variety of tools to defensively protect assets. Those tools include: better ground testing of threat scenarios before launch, enhanced encryption techniques and algorithms, instrumented code to detect threats in orbit (detecting [potentially spoofed] commands that make no logical sense or seem to originate from an unknown source). There also needs to be a shift from an excessive focus on equipment time to failure (hardware has become remarkably reliable) to a broader range of risks, including cyber-threats.

Offensive Measures

Finally, more offensive initiatives are needed to protect satellites. As one fine example, the US government has a number of initiatives underway to protect the integrity of the GPS location sensing abilities of receivers on the ground—subject to relatively easy jamming of its L band signals. First, signal power could be increased from their 12,500 Medium Earth Orbit of the GPS satellites. Additionally, antennas could be improved on satellites and on ground receivers. Another measure could be associated with encoding against jamming. Finally, a very interesting initiative being considered would involve re-transmission of signals from Iridium NEXT's 500-mile Low Earth Orbit.

Lessons Learned from Other Infrastructure by Analogy

Lessons can be learned by looking and by analogy, to experience associated with terrestrial cyber-security already in place for that infrastructure (*e.g.* electric grids). As there, risk events need to be ranked on a continuum ranging from catastrophic to negligible. And the potential frequency of an event needs to be ranked on a continuum starting with frequent, and ranging to impossible. Risks can then be ranked from intolerable, to negligible—with a range of gray areas in between. Available resources could then be assigned for the greatest benefit.

Cyber-Risk Coverage

Traditional CGL insurance policies generally have limitations insofar as covering increasingly prevalent cyber-risks. The reasons for this are generally two-fold: i) traditional wordings are incongruent for cyber-risks since they were not originally contemplated, and ii) exclusion language. Although some assureds have successfully presented cyber-related claims under CGL policies, those claims are almost never successful if there is exclusion for cyber-risk. Specifically tailored cyber-risk policies generally respond to potential losses and liabilities associated with e-commerce automation of business transactions. Cyber-risks can generally be categorized as either "Content Risks" or "Technical Risks".

Liabilities associated with Content Risks are primarily characterized as arising out of the following: negligence; IP; breach of contract; defamation; false advertising or breach of privacy.

Liabilities associated with Technical Risks are associated with, among other things: programming errors; malware attacks; cyber extortion; and deliberate outsider overloading of company websites.

First party losses can result from the likes of business interruption, while third-party losses can result from such things of denial of service.

With an ever expanding universe of cyber-threats sponsored by criminals—and reportedly, sometimes even nation-states—, space-related companies need to protect their bottom line. More insurance coverages are needed for this important communication segment.

CONCLUSION

More care needs to be taken to protect against cyber-threats to satellites in orbit and associated ground infrastructure. Additional, and in some cases expanded, insurance coverage is needed. Conditions of this additional coverage could require certain proactive defenses from the available tool kit; and more needs to be done by operators to go on the offensive against cyber-criminals. Further lessons need to be learned from actions taken regarding cyber-threats to other infrastructure. With these agile efforts, the space segment of our communications infrastructure can continue to thrive.

ATTEMPTS TO AVOID *FORUM NON CONVENIENS* REJECTED

By
Mark R. Irvine
Aghavni V. Kasparian

Lawsuits arising from international air disasters are often filed in the United States. As often, defendants rely on the common-law doctrine of *forum non conveniens* (FNC)—"a supervening venue provision"—to dismiss such cases in favor of litigation in a more suitable, foreign forum. Although FNC is an established doctrine, relative advantages of U.S. procedural and substantive law, not to mention the potential for greater recovery, continue to motivate plaintiffs to challenge application of the doctrine. Litigation arising from two recent air-disaster cases—West Caribbean Airways Flight 708 and the Air France crash over the mid-Atlantic—demonstrates the rejection of such challenges in two different circuits.

General FNC Principles

Courts have discretion to dismiss under the doctrine "when trial in the chosen forum would 'establish ... oppressiveness and vexation to a defendant ... out of all proportion to plaintiff's convenience,' or when the 'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems.'" *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981) (citation omitted). A range of considerations bear on FNC dismissal, "most notably the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in

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a certain locality." *Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 723 (1996).

To prevail on a motion based on FNC, the defendant must show both that (1) an adequate alternative forum is available to the plaintiffs, and (2) the balance of private- and public-interest factors weighs in favor of litigation in the alternative foreign forum.

Typically, an adequate alternative forum exists if the foreign forum has jurisdiction over all of the parties to the action. Merely different, or even less favorable, foreign law does not render a forum inadequate, unless the relief afforded is "so clearly inadequate or unsatisfactory that it [amounts to] no remedy at all." *Piper*, 545 U.S. at 254. A forum is thus adequate even where (1) it lacks "beneficial litigation procedures similar to those available in the federal district courts. . .," *Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974, 982 (2d Cir. 1993) (citation omitted); (2) strict liability is unavailable, *Piper*, 454 U.S. at 255; (3) damages awards may be smaller, *id.*; (4) punitive damages are not available, *De Melo v. Lederle Labs.*, 801 F.2d 1058, 1061 (8th Cir. 1986); or (5) there is no right to jury trial, *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 768 (9th Cir. 1991). Dismissal under the doctrine is often satisfied upon the defendants' concession to jurisdiction in the foreign forum.

The second step in the analysis requires a balancing of the litigants' private interests and the public interests of the forum. *Piper*, 454 U.S. at 242-43. The private interests include the (1) relative ease of access to proof; (2) availability of compulsory process to secure the attendance of unwilling witnesses; (3) the cost of obtaining the attendance of willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious, and

inexpensive. The public interests include the (1) administrative difficulties flowing from court congestion; (2) local interest in having localized controversies resolved at home; (3) interest in having the trial in a forum that is familiar with the law governing the action; (4) avoidance of unnecessary problems in conflicts of law or in the application of foreign law; and (5) unfairness of burdening citizens in an unrelated forum with jury duty.

The weight afforded to the plaintiffs' choice of forum is also considered, and some courts evaluate it as a separate factor in the analysis. *See, e.g, Eurofins Pharma US Holdings v. BioAlliance Pharma SA*, 623 F.3d 147, 161 (3d Cir. 2010); *Iragorri v. United Techs. Corp*., 274 F.3d 65, 71-72 (2d Cir. 2001). Considerable deference is usually afforded to an American plaintiff's choice of a U.S. forum, while less deference is afforded to a foreign plaintiff's choice. *Piper*, 545 U.S. at 256.

In the seminal *Piper* case, the Supreme Court affirmed a district-court dismissal of foreign plaintiff claims against U.S. aviation companies based on FNC in favor of litigation in Scotland, where the aircraft crashed. The court determined that Scotland was an available forum, and that the difference in substantive law—strict liability not recognized in Scotland—did not render it an inadequate forum. Furthermore, the balance of factors weighed considerably in favor of dismissal, including the defendants' inability to implead the Scottish aircraft operator.

West Caribbean Flight 708

In litigation arising from the 2005 crash of West Caribbean Flight 708, the Eleventh Circuit Court of Appeals rejected the plaintiffs' attempt to circumvent an FNC dismissal by

invoking the Convention for the Unification of Certain Rules of International Carriage by Air, May 28, 1999 (the Montreal Convention) and purposefully rendering the alternative forum unavailable. *Galbert v. W. Caribbean Airways*, 12-13278, 2013 WL 1866877 (11th Cir. May 6, 2013).

The crash occurred in Venezuela during a flight from Panama to Martinique. The aircraft was owned and operated by West Caribbean Airways, a Columbian corporation, and chartered by Newvac and Go 2 Galaxy, both Florida corporations. There were no U.S. residents or citizens among the passengers or the crew members. All of the passengers were French citizens, with the exception of one Italian.

The plaintiffs sued West Caribbean, Newvac, and Go 2 Galaxy in the Southern District of Florida pursuant to the Montreal Convention. The Montreal Convention governs rights and liabilities between passengers and the carrier in international air travel and limits the jurisdictions where a passenger-plaintiff can bring a suit against a defending carrier to the following forums: (1) the carrier's place of domicile; (2) the carrier's principal place of business; (3) the place of business through which the contract of carriage was made; (4) the place of destination of the carriage; and (5) the principal and permanent residence of the passenger. The plaintiffs in the case had the choice of filing their action in Martinique (destination) or the Southern District of Florida (contracting carrier's domicile).

The plaintiffs' challenge to the FNC motion was twofold. First, the plaintiffs argued that application of the doctrine was inconsistent with their treaty right to select a forum designated under the Montreal Convention, an argument that relied on cases

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interpreting the Montreal Convention's predecessor treaty, the Warsaw Convention. The district court rejected this argument, relying on a Montreal Convention provision that procedural matters are governed by the law of the selected convention forum. Because FNC was a procedural rule of plaintiffs' selected forum, which predated the Montreal Convention, the court dismissed the plaintiffs' claims in favor of litigating in Martinique. The court also based its conclusion on defendants' concession to Martinique's jurisdiction and the lack of any argument by the plaintiffs that Martinique was not an adequate alternative forum. The Eleventh Circuit affirmed the dismissal. *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009).

While the FNC issue was being litigated in Florida, the plaintiffs concurrently filed an action in Martinique, challenging Martinique's jurisdiction under the Montreal Convention. The plaintiffs argued that their election of the Southern District of Florida under the convention precluded alternative forums from exercising jurisdiction over the claims. The French lower courts in Martinique rejected this argument, but the French Supreme Court agreed with the plaintiffs, holding that that French courts lacked jurisdiction.

The plaintiffs then returned to the Southern District of Florida requesting reinstatement of their case, which had been dismissed for FNC five years earlier, arguing that the French Supreme Court's ruling rendered Martinique unavailable as an alternate forum. The district court denied the motion, and the court of appeals affirmed, holding that the circumstances were not "sufficiently extraordinary" to warrant a relief from judgment and that the motion was nothing more than an untimely opposition to

the motion to dismiss on FNC grounds. The court criticized the plaintiffs' failure to raise the unavailability of Martinique in the initial suit, noting it was the very same argument the plaintiffs persistently argued in each of the French courts. *Galbert*, 2013 WL 1866877.

Air France Crash

In *In re Air Crash Over the Mid-Atlantic on June 1, 2009*, 792 F. Supp. 2d 1090, 1093 (N.D. Cal. 2011), the district court ruled that the plaintiffs could not defeat a prior FNC dismissal by refiling the case and omitting the parties necessary to make the alternative forum available.

The case arose from the fatal crash of Air France Flight 447 over the Atlantic Ocean in June 2009 while en route from Brazil to France. Most of the 216 passengers and 12 crew members were French, a substantial number were Brazilian, and most of the remaining passengers were from European countries outside of France. There were only two American passengers. In the initial suit, the representatives of the decedents, including French nationals, brought claims against the French aircraft manufacturer and various component manufacturers-including another French company-and 10 U.S. companies.

The district court initially ruled that the Montreal Convention did not bar the application of the FNC doctrine as to the American passengers' claims, and then dismissed all cases in favor of litigation in France. *In re Air Crash Over Mid-Atl. on June 1, 2009*, 760 F. Supp. 2d 832 (N.D. Cal. 2010). The court determined that France was an adequate alternative forum. The private and public interests weighed considerably in favor of dismissal,

including the fact that all plaintiffs, except the representatives of the two American passengers, were precluded by the Montreal Convention from suing the air carrier in the United States because the United States was not one of the five Montreal Convention forums as to the non-U.S. plaintiffs. In addition, French authorities were conducting the crash investigation and a criminal investigation was proceeding in France. The court directed all of the plaintiffs to file their claims in France.

Instead, several non-French plaintiffs regrouped and refiled their claims in the district court, omitting the French defendants. The plaintiffs argued that dismissal under these circumstances would be improper because the lawsuit as then constituted had no French connection, making France an unavailable forum pursuant to the same French Supreme Court decision relied on by plaintiffs in the *West Caribbean Airways* case. The plaintiffs also asked the court to reconsider the prior FNC dismissal as to all plaintiffs based on the "new" complaint.

The court rejected the argument, ruling that the plaintiffs could not render France unavailable "through unilateral jurisdiction defeating pleading," when (1) a fair reading of the pleadings and common sense showed that French entities were proper defendants; and (2) the plaintiffs already sued French parties and dropped them only after an FNC dismissal. Moreover, the court had not been presented with any new facts that plausibly justified omission of the French defendants, other than defeating the original FNC dismissal order. The court reasoned that because filing a suit in France without all the parties necessary for French jurisdiction would be surely improper, skipping that step and refiling the case in an identical manner in the district court warranted the same result.

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Conclusion

Given perceived advantages of litigating in the United States, plaintiffs will no doubt continue to devise strategies to avoid FNC dismissals. For now, the defense remains an important tool for defendants, despite recent attempts to circumvent the doctrine.

NON-SUCCESSOR LIABILITY WHEN PURCHASING A CORPORATION

By
Alice Chan

The general rule of law is that when a company sells or transfers all its assets to another company, the purchasing company is not responsible for the debts and liabilities of the selling company just because it is the successor company. This has been the general rule in a plethora of products liability cases, and embodied is the principle that a successor company will not be liable for the damages or injuries allegedly caused by a defective product manufactured by a predecessor corporation. A line of recent cases supports this proposition and general principle.[1] Generally, obligations of a predecessor company are not imposed on a successor corporation unless:

1. The successor expressly or impliedly assumes the obligations of the predecessor;
2. The transaction is a de facto merger or consolidation;
3. The successor is a mere continuation of the predecessor;
4. The transaction is a fraudulent effort to avoid liabilities of the predecessor.

The law and courts are balancing the equities in having a successor corporation assume the liabilities of a predecessor corporation, for defects of a product manufactured by the predecessor corporation, of which the successor has no

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1 *DeJesus v. Bertsch, Inc.*, 898 F.Supp.2d 353 (D. Mass 2012); *Floyd Valley Grain, LLC. V. CTB, Inc. et al*., 2013 WL 3458073 (2013); *Hoffeditz v. AM General,* 2011 WL 5880992 (2011); *Pawlyk v. Great Atlantic & Pacific Tea Co.*, 2013 WL 812151 (2013)(personal injury claim arising from alleged premise control by successor and product line exception held inapplicable).

involvement, versus the public policy consideration that if a successor corporation disavows itself of the liabilities of a predecessor corporation there may be no recourse for a plaintiff who is allegedly injured as a result of a defective product manufactured by a predecessor corporation. Holding a successor liable where there is no recourse against a predecessor company insures that the costs of injuries resulting from defective products are borne by the manufacturers that put out such products on the market rather than by the injured person. The rule rests on the proposition that the costs of injury and the loss of time and health may be an overwhelming misfortune to the person injured, and the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.[2]

In examining the elements to consider whether successors are precluded from product liabilities for the acts of their predecessors, the courts review whether:

1. The Successor Expressly or Impliedly Assumes the Obligations of the Predecessor

Whether a successor expressly or impliedly assumes the obligations of the predecessor is usually set forth in the Asset Purchase Agreement. Giving weight to the Asset Purchase Agreement which explicitly disavowed products liability claims arising from the acts of a predecessor corporation, courts have held successor companies not liable for the products liabilities of the predecessor corporation.

2. The transaction is a de facto merger or consolidation

A defacto merger occurs when one company absorbs another, retaining the name and corporate identity with the added assets and powers of a merged corporation. A consolidation occurs with the joining of two corporations so that a totally new corporation emerges and the two others cease to exist. Factors

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2 *Dawejko v. Jorgenson Steel Co.*, 290 Pa. Super. 15, 20 (1981).

considered to determine whether a de facto merger or consolidation occurred are if, after the sale, there is a continuation of the enterprise of the seller entity with the same management, personnel, physical location, assets and general business operations; continuity of shareholders such that the sale results in payment for the purchase of the corporation with the successor company's own stock and the predecessor shareholders now hold stock of the successor corporation; the seller ceases operations and dissolves as a result of the sale; and the purchasing corporation assumes obligations of the seller ordinarily necessary for the uninterrupted continued operation of normal business operations of the seller corporation.[3]

3. The successor is a mere continuation of the predecessor

A mere continuation theory is where the successor maintains the same business, with the same employees and managers, doing the same jobs under the same working conditions, production processes, and producing the same product for the same customers.[4]

4. The transaction is a fraudulent effort to avoid liabilities of the predecessor

A fraudulent transaction occurs when the sale or merger is entered to avoid liabilities of the seller/debtor's obligations, i.e., the transfer was without adequate consideration and no provisions were made for creditors of the selling corporation.[5]

For successor liability to be imposed, some states take a more broad approach to allow the courts freedom to impose such liability if it determines at least one of the elements is met.

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3 *DeJesus*, 898 F.Supp.2d at 360.
4 *Id*.
5 *Id*.

PRODUCT LINE EXCEPTION

There is also a product line exception, adopted by some states, in which a successor corporation will be held liable for an alleged defective product causing injury manufactured by a predecessor corporation, if the purchaser acquires a manufacturing business and continues the output of its line of products.[6]. Three elements some courts consider in applying the product line exception are whether the purchaser acquires substantially all of the seller's assets leaving the seller a corporate shell; whether the purchaser holds itself out as a continuation of the seller; and whether the purchaser benefits from the good will of the seller.[7]

In this instance, the purchasing corporation is strictly liable for injuries caused by defects in units of the same product line, even if previously manufactured and distributed by the selling corporation (its predecessor).

Additional factors courts may consider for the product line exception include:

1. whether the virtual destruction of plaintiff's remedies against the original manufacturer is caused by the successor's acquisition of the business;
2. the successor's ability to assume the original manufacturer's risk-spreading role; and
3. the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the predecessor-manufacturer's good will, which is now being enjoyed by the successor in the continued operation of the business.[8]

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6 *Floyd* at *3.
7 *Pawlyk* at *3.
8 *Hoffeditz* at fn 1.

Courts may consider some or all of these factors to impose strict products liability under the product line exception.

In *Hoffeditz*, even though it was established that only a division of a company was purchased and the successor undertook the same manufacturing operations as the seller, the successor was not held strictly liable since the predecessor continued to operate after the sale, and even though the predecessor went bankrupt years later, it was the bankruptcy and not the sale of the company that destroyed plaintiff's remedies against the predecessor. Therefore, the successor was not held liable for the product defect of the predecessor company to the Plaintiffs.

CONCLUSION

Acquisition of companies is a complex process, and liabilities of predecessor companies can be unintentionally acquired, and specifically products liabilities, but such risks can be minimized. Disavowing such liability under a non-successor liability legal analysis is often fact intensive, and in many cases the courts are reviewing whether a company should not be held liable for a plaintiff's injuries and possibly leaving them with no recourse from a predecessor company. The courts will strictly eyeball such an analysis, but non-successor liability can be court-ordered as recent cases hold. In several instances, the fact that there was recourse against the predecessor company by the plaintiff (or if there wasn't, it was not due to the successor's purchase of the predecessor company) was a significant factor in the court's decision to hold that the successor was not liable for the acts and allegedly defective products of the predecessor company. The balance between fairness to the company and fairness to the plaintiff is one the courts try to accomplish. To the extent recourse can be shown to the plaintiff where liability should lie, fairness to the company can be achieved.

GARA UPDATE: TWO NEW CASES EXPAND THE REACH OF GARA TO USED AIRCRAFT PARTS AND OVERHAUL MANUALS

By
Christopher S. Hickey

INTRODUCTION

The General Aviation Revitalization Act ("GARA") is a 1994 statute that established an 18-year statute of repose for civil actions against manufacturers of general aviation aircraft. Since its enactment, GARA has been subjected to numerous attempts by plaintiffs to diminish its scope and efficacy. Typically, plaintiffs attempt to argue that either a particular claim is outside the scope of the GARA defense or that the 18-year "clock" was in some way or the other restarted and thus the time to bring suit had not yet expired. In two recent cases, federal appellate courts addressed two somewhat ambiguous aspects of the statute and clarified the extent of its reach. In the first opinion, from the Ninth Circuit in October 2012, the Court held that GARA is applicable to used aircraft parts and not just new aircraft and new replacement parts. In the second opinion, from the Sixth Circuit in May 2013, the Court determined that claims against defects in overhaul manuals can also be dismissed pursuant to GARA. These opinions demonstrate the continuing strength of the GARA defense and they halted yet two more attempts by plaintiffs to thwart the intent of Congress, expressed when it enacted GARA, to protect aircraft manufacturers from indefinite liability for products that for 18 years are able to demonstrate their quality and safety.

GARA'S HISTORIC BACKGROUND AND PURPOSE

Congress enacted GARA in 1994 in response to a serious and precipitous decline in the manufacture and sale of general aviation aircraft by United States companies, caused in part by the tremendous increase in product liability actions. Statistics reflect

the alarming state of the general aviation industry at that time: yearly sales of general aviation aircraft in the United States fell from 17,811 in 1978, to merely 928 in 1992.[1] Exports showed a similar decline. Two of the "Big Three" general aviation manufacturing companies were closing assembly lines: Cessna ceased manufacturing single-engine aircraft and Piper had filed for bankruptcy. It was estimated that a total of 100,000 jobs had been lost in the general aviation industry.

Congress believed that the collapse was caused, at least in part, by the long "tail" of liability attached to aging aircraft which remained in service for many years, often numerous decades, after the delivery to the initial owner. Yet even with the great age of many aircraft, studies showed that only a fraction of general aviation accidents were the results of design and manufacturing defects. Nonetheless, suits were frequently filed against the original manufacturers of aircraft and component parts. Settlement and litigation costs drove manufacturers out of business. Relief from this long tail of liability, it was believed, would revitalize the industry and result in an increase in jobs, enable manufacturers to spend more on research and development, and enhance manufacturers' ability to compete with foreign companies.[2] Accordingly, GARA was enacted to "limit... the number of lawsuits aircraft manufacturers must defend" while still being "fair to litigants pursuing legitimate tort claims."[3] GARA achieves this balance by providing an "18-year statute of repose for

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1 Scott D. Smith, Note, *The General Aviation Revitalization Act of 1994: The Initial Necessity for, Outright Success of, and Continued Need for the Act to Maintain American General Aviation Predominance Throughout the World,* 34 OKLA. CITY U.L. REV. 75, 108.

2 *See* H.R. Rep. No. 103-525(I), at 1-4 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1638.

3 140 Cong. Rec. H5003 (daily ed. June 27, 1994) (statement of Rep. Mineta).

manufacturers of general aviation component parts."[4] In passing this statute, Congress recognized that:

> after an extended period of time, a product has demonstrated its safety and quality, and that it is not reasonable to hold a manufacturer legally responsible for an accident or injury that occurred after that much time has elapsed.[5]

A) ***The 18-year Limitation Period***

The GARA defense is intended to be limited in scope. It applies only to general aviation aircraft, defined as a civilian aircraft with seating capacity of less than 20 people, and only if the accident occurred—

> (1) after the applicable limitation period [18 years] beginning on—
>
> (A) the date of delivery of the aircraft to its first purchaser or lessee; or
>
> (B) the date of first delivery of the aircraft to a person engaged in the business of selling or leasing such aircraft; or
>
> (2) with respect to any new component, system, subassembly, or other part which replaced another component, system, subassembly, or other part originally in, or which was added to, the aircraft, and which is alleged to have caused such death, injury, or damage, after the applicable limitation period [18 years] beginning on the date of completion of the replacement or addition.[6]

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4 140 Cong. Rec. S3009 (daily ed. Mar. 16, 1994) (statement of Sen. Dodd).
5 140 Cong. Rec. H4999 (daily ed. June 27, 1994) (statement of Rep. Fish).
6 49 U.S.C. § 40101 note, § 2(a).

Thus, in effect, GARA has two triggering provisions: The first starts the repose "clock" for a new aircraft, and the components that make up that new aircraft, on its initial delivery. The second, commonly referred to as "the rolling provision," starts a fresh repose period for a new replacement component (and only for that specific new component), when it is added to the aircraft or when it replaces an existing component on the aircraft. Since almost every major component of the aircraft will be replaced over its lifetime, the "rolling" aspect of the statute of repose was intended to provide a recourse against the manufacturer of the new component part in the event of a defect in the new part caused an accident many years after the delivery of the original aircraft. Both of the GARA triggering provisions were addressed in two recent cases.

THE NINTH CIRCUIT'S *NABTESCO* DECISION: OLD PARTS IN NEW AIRCRAFT

Last October, in a matter of first impression, the United States Court of Appeals for the Ninth Circuit issued a unanimous opinion affirming a district court's dismissal of an aviation component part manufacturer on the basis of GARA in a matter concerning an accident aircraft that had been in service *less than* the required 18 years but which contained a used component part that had been in service for *more than* 18 years. In its written opinion, the Ninth Circuit cited to the legislative history to demonstrate that Congress (1) intended for the scope of GARA to include used components parts and (2) that the 18-year limitation period for a used part starts upon delivery of that component part to its first purchaser and does not restart simply because the component is later installed as a used part in a newer aircraft.[7]

The case arose in May 2010, when plaintiff United States Aviation Underwriters, Inc. ("USAU") filed a subrogation claim

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[7] *United States Aviation Underwriters v. Nabtesco Corporation*, 697 F.3d 1092 (9th Cir. 2012).

for property damage against Nabtesco Corporation and Nabtesco Aerospace, Inc. (hereinafter, "Nabtesco" or "defendants"). The claimed property damage was to a Cessna 560 business jet aircraft after it experienced a nose landing gear collapse incident on August 17, 2009 at an airport near Long Beach, California. USAU alleged that a defect in the nose landing gear actuator, manufactured by defendants, caused the accident.[8]

The subject actuator (serial number 339) was manufactured in early 1990 and installed as an original part on a 1990 Cessna 550 aircraft which was delivered to its first purchaser on October 30, 1990—**18 years and 9 months** before the accident. At some later date, the now used actuator was removed from the Cessna 550 for an unknown reason, worked on in 2006 by a company in Kansas, and in 2007 was installed on a Cessna 560 jet. It was this Cessna 560 that was subsequently involved in the subject nose landing gear accident on August 17, 2009, and that aircraft was delivered to its first purchaser in December 1991—**17 years and 8 months** before the accident.

Based on the age of the nose landing gear actuator, Nabtesco brought a motion for summary judgment per the 18-year statute of repose established by GARA. The district court granted Nabtesco's motion holding that "when the case involves components that have been removed from one aircraft and installed on another, the relevant aircraft for purposes of GARA's first triggering provision is the aircraft in which the components were originally installed." All claims against Nabtesco were dismissed. USAU timely appealed.

A) ***GARA Applies Equally to New and Used Parts***

The Ninth Circuit affirmed the district court's judgment. In doing so, it analyzed both the text of the statute and its legislative history. The Court first analyzed whether used

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[8] USAU elected not to sue Cessna.

component parts even fall within the scope of the GARA statute. The Ninth Circuit justices concluded that they do. The panel pointed out that although the statute does not specifically mention "used parts," it does state its 18-year limitation period is applicable to "general aviation aircraft and the components, systems, subassemblies, and other parts of such aircraft." The Court concluded that such language applies with "equal force to all component parts of an aircraft ... regardless of whether they were new or used when installed."

B) ***Re-using An Old Part Will Not Restart the Limitation Period***

Next, the Court dealt with the plaintiff's argument that the 18-year limitation period is triggered only by the delivery of the accident aircraft so all used components must necessarily adopt the accident aircraft's limitation period even if that used part is older than the aircraft, itself. As discussed above, the pertinent language from the statute creates two triggering provisions that start the limitation period "clock": (1) delivery of a new aircraft to its first purchaser, or (2) installation of a new component on a used aircraft as a replacement part.

Since the part in question was a used part, plaintiff argued section (2) does not apply as it refers only to "new components." Therefore, the only possible limitation period is the one described in section (1) which begins with the delivery of "the aircraft." This phrase, plaintiff argued, can only mean *the* accident aircraft. Thus, plaintiff asked the Ninth Circuit to rule the GARA defense is never applicable until the accident aircraft, itself, has been in service for greater than 18 years. According to plaintiff's argument, the age of individual components is irrelevant until the accident aircraft itself has been in service for at least 18 years.

The Ninth Circuit disagreed. The Court panel concluded that "the aircraft" did indeed refer to the accident aircraft, as argued by plaintiff. However, the Court also determined the "date of delivery" is not necessarily a single date. Instead, the date of

delivery can encompass different dates for the various component parts of the aircraft depending on when the parts were installed and whether those parts were new or used at the time of installation. In affirming the district court's dismissal of component manufacturer Nabtesco, the Ninth Circuit held:

> where, as here, the damage arises from an allegedly defective used component part, the applicable limitation period commences with the delivery date of the used part to its first purchaser.

The Ninth Circuit supported its holding with reference to the legislative record. The panel pointed out that the chief sponsor of the legislation, Representative Dan Glickman, expressly noted that component parts are bound by the same limitation period as the aircraft on which they were first installed. Rep. Glickman provided an example indistinguishable from the matter before the Court:

> ... a used propeller which has 3 years left on its applicable limitation period would still have only 3 years if installed in its used condition on a different airplane.[9]

This is the first appellate decision to address the slightly ambiguous language in GARA concerning used parts and specifically rule that the 18-year GARA limitation period as to a component part is triggered with the delivery of the aircraft in which that component part was originally installed. The subject part's subsequent removal and reinstallation as a used component in a different aircraft is irrelevant and does not toll or re-start the GARA clock. Given the extent to which component parts can be overhauled and re-used in other aircraft, this ruling is likely to benefit component manufacturers in many future cases.

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[9] 140 Cong. Rec. H5001 (daily ed. June 27, 1994) (statement of Rep. Glickman).

The Sixth Circuit's *Crouch* Decision: An Overhaul Manual Is Not A Replacement Part For The Purposes Of GARA

In another GARA decision from this past year, the United States Court of Appeals for the Sixth Circuit determined that plaintiff's claims against a manufacturer for defects in an overhaul manual are susceptible to a GARA defense and that an overhaul manual is not a replacement part for the purposes of re-starting the GARA 18-year limitation period. In its opinion, the Court determined that since federal regulations require an aircraft manufacturer to provide overhaul instructions, publication of such instructions in an overhaul manual is action taken in "the capacity of a manufacturer" and, thus, are barred by GARA if the subject aircraft is 18 years or older. The Court additionally held that an overhaul manual is not a "part" of the aircraft for which its replacement or modification could re-start the GARA limitations period.[10] In this matter, the Court was addressing the second triggering provision discussed above in Section II.

This case arose from the November 2006 crash of a 1978 Piper Lance II single engine airplane near Bardstown, Kentucky. The aircraft lost engine power at approximately 5000 feet and made a forced landing in a field. Both occupants survived but suffered serious injuries. The NTSB investigation determined the probable cause of the accident to be loss of engine power for undetermined reasons. Plaintiffs' theory for the loss of power was a detached magneto. Plaintiff filed suit against Honeywell and AVCO Corporation, the parent company of Lycoming, who manufactured the engine.[11]

The engine, original to the subject aircraft, was manufactured in 1978. However, the magneto was installed on the

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[10] *Crouch v. Honeywell Int'l*, 720 F.3d 333 (6th Cir. 2013).

[11] The magneto was manufactured by Teledyne Continental Motors, Inc. Plaintiffs sued Teledyne in a separate lawsuit in the Southern District of Alabama.

accident aircraft in 2005 during an engine overhaul performed by a third-party. That overhaul was completed in accordance with an overhaul manual published by Lycoming and last revised by Lycoming four years prior to the accident in 2002.

Since the engine was first put into service more than 18 years prior to the accident, AVCO moved for summary judgment on the basis of GARA. In opposition to the motion, plaintiffs contended that (1) GARA does not apply because AVCO is not being sued in its capacity as a manufacturer but as the *publisher* of the aircraft's overhaul manual, and (2) even if GARA applies, Lycoming's engine overhaul manual was revised in 2002 so the manual represents a new replacement part such that the 18 year limitation period for claims against the manual started in 2002, not 1978.

The district court originally denied AVCO's motion holding (1) the revised overhaul manual is not a "part" so cannot give rise to a new 18-year limitation period pursuant to GARA's "rolling provision," but that (2) because plaintiffs were suing AVCO as a publisher and not a manufacturer, GARA is not actually applicable. AVCO moved for reconsideration of the court's holding that GARA is not applicable and the district court changed its ruling.[12] This time, the court concluded that because AVCO was required by law (the federal aviation regulations) to produce overhaul manuals in conjunction with its manufacturing of aircraft engines, AVCO was "acting in its capacity as a manufacturer" when it published the manual. The court granted AVCO's motion for summary judgment and plaintiffs appealed.

A) "Capacity as a Manufacturer"

The Sixth Circuit panel first addressed the issue of whether or not AVCO was sued "in its capacity as a manufacturer"

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[12] Plaintiff did not seek reconsideration regarding the court's ruling that the manual is not a "part."

by plaintiffs with regard to their allegation the overhaul manual is defective. While there is no language in GARA specifically addressing overhaul manuals, the Court found the exception to the operation of the GARA defense found in the statute's §2(b)(1)—misrepresentation of facts to the FAA—to be pertinent. This exception, the Court determined, necessarily recognizes a duty of a manufacturer to disclose to the FAA information affecting airworthiness such as maintenance and overhaul instructions. The Court concluded that if Congress did not view a manufacturer's duty to publish and update aircraft manuals as falling within its capacity as a manufacturer, then there would be no need for Congress to include the §2(b)(1) exception. The Court also found their analysis to be in accord with other jurisdictions.[13] Thus, the Court found no error in the district court's holding that AVCO was sued in its capacity as a manufacturer for the purposes of applying GARA.

B) New Limitation Period

Next, the Court considered when the GARA limitations period is triggered for claims against a *revised* overhaul manual. As previously discussed, GARA's 18-year limitation period is triggered in one of two ways: (1) delivery of a new aircraft to its first purchaser; or (2) installation of a new component on a used aircraft as a replacement part (the "rolling" provision). Plaintiffs argued that each revision of the overhaul manual was sufficiently analogous to a replacement part of the aircraft to trigger a new 18-year limitation period per GARA rolling provision, § 2(a)(2).

Like the Ninth Circuit in its deliberation over the *Nabtesco* matter, the Sixth Circuit recognized that the GARA statute is silent on the specific issue at hand, and there is very little case law on whether an overhaul manual or revised overhaul

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[13] *See Caldwell v. Enstrom Helicopter Corp*., 230 F.3d 1155, 1157 (9th Cir. 2000)(holding a flight manual required by regulation, to be an integral part of an aircraft which, if defective, can subject the aircraft manufacturer to iability).

manual is a "part" within the meaning of GARA § 2(a)(2). Thus, the Court looked to three cases that had discussed other types of manuals. In *Caldwell v. Enstrom Helicopter Corp*, the Ninth Circuit relied on the text of the GARA § 2(a)(2), specifically the words "originally in, or which was added to, the aircraft," in holding that a *flight* manual, because it is required by law to be on board the aircraft, is a "part" within the meaning of the "rolling" provision.[14] Utilizing the same GARA language and similar logic, two appellate decisions that discussed *maintenance* manuals found that such manuals are not a "part" of the aircraft because they were never "originally in" nor "added to" the aircraft.[15] Rather, a maintenance manual is a separate document for the upkeep of the product and not its operation.

The Sixth Circuit determined that an overhaul manual is more akin to a maintenance manual than a flight manual because it too was not "originally in" nor "added to" the aircraft. Thus, the Court affirmed the district court's ruling that "the revised overhaul manual relied on ... is not a replacement part of the aircraft." A revised overhaul manual will, therefore, not trigger a new 18-year limitation period.

CONCLUSION

These two decisions serve to clarify the two triggering provisions of the GARA statute and put to rest two tired arguments plaintiffs have made in their attempts to thwart the purpose of GARA. The Ninth Circuit's *Nabtesco* decision finally confirmed the applicability of GARA to used parts and that the continual re-installation of a used part will not continually re-set that part's GARA limitation period. The GARA limitation period starts only once for each aircraft part. The Sixth Circuit's *Crouch* decision confirmed that overhaul manuals, like maintenance manuals, are

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14 *Caldwell*, 230 F.3d at 1157.

15 *Alter v. Bell Helicopters Textron, Inc*., 944 F. Supp. 531 (S.D. Tex. 1996); and *Colgan Air, Inc. v. Raytheon Aircraft Co.*, 507 F.3d 270, 276-77 (4th Cir. 2007).

covered by GARA but are not a "part" of the aircraft such that a revision might trigger a new 18-year limitation period. The GARA clock for the overhaul and maintenance manuals is the same as the GARA clock for the aircraft with which they were delivered. The plaintiff bar is unlikely to halt their attempts to circumvent GARA but these two recent decisions erected two substantial roadblocks that will serve to protect manufacturers in future cases—just as Congress intended.

HAS THE U.S. SUPREME COURT NARROWED PERSONAL JURISDICTION OVER FOREIGN CORPORATIONS?

By
Stephanie Brie Gonzalez[1]

Until recently, a foreign manufacturing company who sold or distributed its products in the United States was vulnerable to being sued in any state within the U.S. simply because it had placed its products within the "stream of commerce." Under this scheme, targeting a specific market such as New York would not necessarily insulate the company from having to defend itself in Alaska, if somehow its product found its way to Alaska and caused injury there. This vulnerability to suit was especially high in the aviation context because aircraft by their very nature can easily be operated across state lines, and it is unpredictable where the ultimate injury-causing event might take place.

This is the exact issue recently revisited by the U.S. Supreme Court in the case of *J. McIntyre Machinery, Ltd. v. Nicastro* ("*McIntyre*"). There, a British manufacturing company who did not do business in New Jersey, but whose product ended up causing injury in New Jersey, was ordered by a New Jersey court to appear and defend itself in a lawsuit there. The U.S. Supreme Court reversed that ruling, finding that the British company's connection to the state was too attenuated, and that it violated due process for the company to have to defend itself in a New Jersey court. In so holding, the U.S. Supreme Court attempted to clarify decades of uncertainty for foreign product manufactures, and narrow the circumstances under which they can be compelled to defend litigation in the U.S.

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[1] Many thanks to Los Angeles summer associate Daniel Hoffman, Loyola Law School, for his assistance in preparing this article.

This article will analyze whether the recent *McIntyre* decision was successful in protecting foreign corporate defendants, and specifically aviation manufacturers, from the uncertainty of being sued anywhere in the U.S. based on the ultimate (and often unpredictable) destination of their products. This article will also look at another recent U.S. Supreme Court decision, *Goodyear Dunlop Tires, S.A. v. Brown* ("*Goodyear*"), which narrowed the circumstances under which a foreign corporation can be subject to suit in a particular state based solely on its connections in that state, regardless of where the injury-causing event took place.

PERSONAL JURISDICTION—BACKGROUND

Generally speaking, a court in the United States does not have authority to make and enforce judgments against a foreign corporation unless that corporation has consented to be sued in the state where the court sits (e.g., has designated an agent for service of process in that state), or the corporation has sufficient contacts or business within that state. In the absence of consent, there are two situations where courts have deemed a foreign corporation's contacts with the forum state sufficient to assert personal jurisdiction: (1) specific jurisdiction, where the controversy in the lawsuit arises from the defendant's contacts with the forum state (e.g. a machine manufactured by a foreign company and sold to an operator in California causes injury in California); and (2) general jurisdiction, where the foreign corporation is carrying on such a "continuous and systematic" part of its business in the forum state, in the form of bank accounts, offices, etc., that it can be sued in that state regardless of where the injury-causing event took place. Interpretation and application of these categories greatly affect a foreign corporation's exposure to litigation in various forums within the United States.

Specific jurisdiction in particular has been a cloudy and controversial area of law. Until recently, the U.S. Supreme Court had not addressed specific jurisdiction since its 1987 split-decision of *Asahi Metal Industry Co. v. Superior Court* ("*Asahi*").[2] In *Asahi*, one four-Justice opinion outlined an approach based on foreseeability, where specific jurisdiction over a foreign corporation was proper if that corporation placed the product giving rise to a controversy into the "stream of commerce," and it was foreseeable that the product might ultimately reach the forum state.[3] The other four-Justice opinion outlined a more narrow approach, sometimes referred to as the "stream of commerce plus" approach, whereby a corporate defendant would only be subject to jurisdiction if it purposefully directed its actions toward the forum state: "The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state."[4]

SPECIFIC JURISDICTION AND *MCINTYRE*

Because of the differing minority approaches in *Asahi*, the rules and standards for asserting specific jurisdiction over a foreign corporation have long been unclear and open to various approaches by the lower courts. In an attempt to resolve this ambiguity, the Supreme Court recently revisited the issue of specific jurisdiction in *McIntyre*.[5] However, because *McIntyre* was a split-decision which resulted in no majority opinion, specific jurisdiction unfortunately remains an unpredictable aspect of litigation for foreign corporations.

The four-Justice plurality opinion in *McIntyre*, joined by the most Justices, reasoned that it is a defendant's *actions*, not its *expectations*, which subject it to personal jurisdiction, and that

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2 480 U.S. 102 (1987).
3 *Id.* at 117-21.
4 *Id.* at 112.
5 131 S.Ct. 2780 (2011).

because the British manufacturer, J. McIntyre, did not engage in conduct purposefully directed at New Jersey it could not be compelled to answer suit there.[6] The plurality therefore adopted the more narrow of the two approaches advanced in *Asahi*, or the so-called "stream of commerce plus" approach. However, while two other Justices concurred with the plurality's ultimate holding that jurisdiction over J. McIntyre was improper, they disagreed with the pronouncement of a broadly applicable rule without considering the consequences on modern-day commercial activity (e.g., internet commerce). The three remaining Justices dissented, arguing that a foreign corporation which directs its activities/products at the United States should be subject to suit in any state if it is foreseeable that the product would reach that state (the so-called "stream of commerce" approach from *Asahi*).

a. Lower Courts' Application of McIntyre in the Aviation Context

In the aviation context, lower courts have generally interpreted *McIntyre* as adopting a narrow approach to specific jurisdiction. In *Smith v. Teledyne Continental Motors, Inc., et al.,*[7] a South Carolina federal court expressly interpreted the *McIntyre* opinions, when taken together, as having at least five Justices who upheld the narrow "stream of commerce plus" theory from *Asahi*.[8] The *Smith* case arose from an airplane crash in South Carolina involving an engine manufactured by Delaware corporation, Teledyne. Teledyne had sold at least 400 engines directly to South Carolina purchasers in the ten years prior to the accident. Teledyne advertised in South Carolina through aviation magazines, sold its products there through interactive websites, and it maintained a distributor there for several years. Significantly, Teledyne maintained continuous contractual relationships with service centers at South Carolina airports that required the centers to

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6 *Id.* at 2789.
7 840 F. Supp. 2d 927 (D.S.C. 2012).
8 *Id.* at 930-31.

display the Teledyne logos, perform warranty work on Teledyne products, and actively promote the sale of Teledyne products. Applying the "stream of commerce plus" approach, the court held that Teledyne's contacts with South Carolina were adequately targeted and substantial to assume that Teledyne had invoked the benefits and protections of South Carolina laws.[9] This reasoning and holding are consistent with the plurality opinion of *McIntyre*.

However, several lower courts have continued to find jurisdiction over foreign corporations who did not purposefully direct any activity or products toward the forum state, in contradiction to the narrow holding from *McIntyre*. The Illinois Supreme Court case of *Russell v. SNFA*[10] is an example of such a decision. The issue in *Russell* was personal jurisdiction over French manufacturer SNFA in a case arising out of a helicopter crash in Illinois. SNFA had manufactured and sold tail-rotor bearings to the manufacturer of the subject aircraft, Agusta S.P.A. SNFA generally had a contract with Agusta for integration of these bearings into new aircraft and as replacement parts through Agusta's distributors in the United States and world-wide. Within Illinois specifically, Agusta's distributors had sold nearly 2,200 SNFA-produced parts and five helicopters with SNFA parts over a seven-year period. Unrelated to the *Russell* litigation, SNFA also had an agreement with another company in Illinois for custom aerospace bearings that totaled approximately one million dollars.

Although the Illinois Supreme Court acknowledged that *McIntyre* adopted the narrow "stream of commerce plus" approach from *Asahi*, the court held that specific jurisdiction over SNFA was proper despite the fact that SNFA did not purposefully market or sell the bearings at issue in Illinois.[11] Rather, the court reasoned that the bearings would not have reached the U.S. market without Agusta's distribution, and therefore Agusta's contacts with the state

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9 *Id.* at 934.
10 987 N.E.2d 778 (Ill. 2013).
11 *Id.* at 794-97.

of Illinois were relevant for determining personal jurisdiction over SNFA.[12] The court also found that SNFA's unrelated contract for aerospace bearings was purposefully directed at Illinois. Consequently, despite the court's assertion that it followed the more narrow "stream of commerce plus" approach, its reasoning and holding were more in line with the foreseeability approach from *Asahi,* which was rejected by the majority in *McIntyre*.

The Arizona Court of Appeals also broadly applied *McIntyre*'s narrow holding in *Van Heeswyk v. Jabiru Aircraft Pty., Ltd.*,[13] a wrongful death action against Australian manufacturer Jabiru arising out of an Arizona airplane crash. Jabiru had no offices or employees in Arizona and its products were only sold in the United States via three distributors, none of whom were located in Arizona. Jabiru had entered into a "best efforts" distribution agreement with one of its U.S. distributors, requiring Jabiru to "use its best efforts to promote sales and service of products in the territory and cooperate with [the distributor] to that end."[14] The same year plaintiff purchased the subject Jabiru engine in Arizona, Jabiru's distributors sold at least sixty-one other Jabiru products in Arizona.

Like the Illinois Supreme Court in *Russell*, the Arizona Court of Appeals in *Van Heeswyk* construed *McIntyre*'s approach to specific jurisdiction as the narrow "stream of commerce plus" theory, or "where the defendant can be said to have targeted the forum."[15] However, also like in *Russell*, the Court liberally applied this approach, and concluded that Jabiru's "best efforts" distribution agreement, and the resulting sale of Jabiru products in Arizona by its distributors, was evidence that Jabiru had purposefully directed its activities towards Arizona.[16] The Court

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12 *Id*.
13 276 P.3d 46 (Ariz. Ct. App. 2012).
14 *Id.* at 52.
15 *Id*.
16 *Id.* at 52-53.

expressly rejected the notion that Jabiru can "close its eyes" and "plead ignorance to its products being sold in Arizona as a means of avoiding personal jurisdiction."[17] Again, this reasoning is more in line with the foreseeability approach rejected by the majority of Justices in *McIntyre*.

In sum, the main point of agreement among lower courts in the aftermath of *McIntyre*, is that the Supreme Court has adopted the narrow "stream of commerce plus" theory set forth in *Asahi*, requiring that a corporate defendant purposefully direct the activity or product at issue to the forum state in order to be subject to specific jurisdiction. However, the lower courts continue to differ in their application of this rule, which ultimately has resulted in the continued vulnerability of foreign corporations to suit anywhere in the United States.

GENERAL JURISDICTION AND *GOODYEAR*

In contrast to specific jurisdiction, general jurisdiction has not been an area of great controversy. The law has long required that a corporate defendant have "continuous and systematic" contacts with the forum state in order to be subject to general jurisdiction.[18] The Supreme Court nevertheless recently revisited the issue of general jurisdiction in *Goodyear Dunlop Tires, S.A. v. Brown*,[19] and in fact narrowed the approach significantly to require that general jurisdiction be asserted over a corporate defendant only where it has such systematic contacts with the forum state as to be "essentially at home" in that state.

Goodyear was a wrongful death action brought in North Carolina against Goodyear USA and three Goodyear USA foreign subsidiaries arising out of a bus accident in France. Goodyear USA submitted to jurisdiction in North Carolina, but the three foreign

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17 *Id.* at 51.

18 *See Perkins v. Benguet Consol. Mining Co*., 342 U.S. 437, 445 (1952).

19 131 S.Ct. 2846, 2851 (2011).

subsidiaries moved to dismiss for lack of personal jurisdiction. The subsidiaries manufactured heavy load tires primarily for sale in European and Asian markets, which differed in size and construction from tires ordinarily sold in the U.S. The subsidiaries had no place of business, employees, or bank accounts in North Carolina. They did not design, manufacture, or advertise their products in North Carolina. A percentage of the foreign-manufactured tires were distributed to North Carolina, but the type of tire that was at issue in the bus accident was never distributed to North Carolina. The North Carolina Court of Appeals nevertheless found that the foreign subsidiaries had "continuous and systematic" contacts with the forum state because they placed their tires "in the stream of commerce without any limitation on the extent to which those tires could be sold in North Carolina."[20]

The U.S. Supreme Court unanimously reversed the North Carolina Court of Appeals, and held that the court's "stream of commerce" analysis confused the essential difference between general and specific jurisdiction.[21] The Court clarified that the flow of a manufacturer's products into a forum may bolster an argument for specific jurisdiction, but those contacts do not suffice for general jurisdiction. A court may only assert general jurisdiction over a foreign corporation when its affiliations with the state are so "continuous and systematic" as to render it "essentially at home."[22] Even regularly occurring forum state purchases are not enough to warrant general jurisdiction in a cause of action not related to those transactions.[23] The Court held that the Goodyear USA foreign subsidiaries' attenuated connections with North Carolina were insufficient for general jurisdiction.[24]

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20 *Id.* at 2852 (citing *Brown v. Meter*, 199 N.C. App. 50, 67 (N.C. Ct. App. 2009)).

21 *Id.* at 2851.

22 *Id*.

23 *Id.* at 2856-2859 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984)).

24 *Id.* at 2857.

While the *Goodyear* decision essentially reaffirmed the Court's general jurisdiction precedent, the additional requirement that a corporate defendant be "essentially at home" in the forum state imposes an even higher bar for asserting general jurisdiction. The aviation cases that have analyzed general jurisdiction in the aftermath of *Goodyear* have affirmed this strict standard. For example, in *Martinez v. Aero Caribbean*,[25] a federal court in California declined to exercise general jurisdiction over French manufacturer Avions de Transport Régional ("ATR"), where ATR's business transactions with a California corporation constituted only one percent of its overall sales and purchases, and where its aircraft were only used in one route within California. The court determined that, although ART was regularly conducting purchases and sales in California and its aircraft were being regularly operated in California, these transactions represented such a small percentage of its overall business that ART could not be considered "essentially at home" in the state.[26]

CONCLUSION

The Supreme Court's decision in *Goodyear* managed to narrow and define the requirements for general jurisdiction, now requiring that a corporate defendant be "essentially at home" in the forum state. As evidenced by the lower court decisions interpreting *Goodyear*, this standard will likely define the high-threshold of general jurisdiction for future defendants.

In contrast, neither the *McIntyre* decision nor the ensuing lower court decisions have been effective in establishing a uniform approach to specific jurisdiction. A finding for or against specific jurisdiction remains relatively subjective based on the approach used by a particular court or state. Furthermore, many questions remain unanswered with respect to specific jurisdiction going forward, and how the notion of "purposefully directed action" will

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25 No. C 11-03194, 2012 WL 1380247 (N.D. Cal. April 20, 2012).

26 *Id.* at 4.

apply to the modern-day reality of internet commerce and marketing. These issues will necessarily move front and center as internet sales become more prominent and ease of communication increasingly allows foreign corporations to conduct business through local ventures.

For the time being, foreign manufacturers who sell products or conduct activities in the United States must remain aware of their exposure to litigation anywhere in the U.S. based on their agreements with domestic distributors and/or internet sales. It would be advisable for foreign manufacturers to limit their own marketing and sales to those states in which they would be comfortable defending a lawsuit, and to instruct their U.S.-based distributors to limit sales in this manner. However, as seen in the aftermath of *McIntyre*, even this may not provide protection from jurisdiction in certain states.

THE DEFENSIBILITY OF USING ADVANCED ELECTRONIC DISCOVERY TO STREAMLINE THE ELECTRONIC DISCOVERY PROCESS

By
Paul N. Bowles III[1]

INTRODUCTION

Electronically stored information ("ESI") has changed the nature of conducting discovery in litigation. No longer are litigants fit to conduct "traditional" discovery involving paper document review and production. Those with more than a few grey hairs may recall the days of counsel camping out in warehouses or conference rooms and reviewing documents, which were measured in terms other than "megabytes", "gigabytes" or "terabytes". The corporate shift from paper to electronic recordkeeping, and the targeted focus of the plaintiff's bar to seek electronic data has opened the flood gates of electronic discovery or "e-discovery." Parties now conduct long, drawn out battles over the relevance of ESI and the tipping point for when e-discovery requests become unduly burdensome on a defendant and its counsel. This rapid change in the discovery landscape presents 21st century problems requiring 21st century solutions. "Advanced Electronic Discovery Technologies" aim to streamline the e-discovery process and eliminate wasteful, collateral discovery battles focused solely on ESI production.

The duties required of litigants during the discovery process now encompass ESI and the use of technology. Using Advanced Electronic Discovery Technologies to satisfy those duties in litigation will be paramount in streamlining the e-discovery process. This article sets forth examples of the types of Advanced

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[1] The invaluable assistance of our New York office summer associate, Richard K. Evans of Columbia Law School, in the preparation of this article, is gratefully acknowledged.

Electronic Discovery Technologies available today, the basic e-discovery duties required of litigants, and how Advanced Electronic Discovery Technologies can help satisfy those duties.

ADVANCED ELECTRONIC DISCOVERY TECHNOLOGIES

Advanced Electronic Discovery Technologies have evolved into tools for (a) "targeted collection" which helps corporate clients collect and cull data for provision to counsel, and (b) "targeted review" which helps counsel further cull and review the data for responsiveness and production. These two aspects of e-discovery are a good starting point for thinking about the advanced technologies and how they work. However, because e-discovery is a fluid process, the line between the two is not always clearly delineated.

Early case assessment technologies are one broad category of Advanced Electronic Discovery Technologies meant to allow litigants to collect and filter data early in a case's life cycle. Used toward the beginning of litigation, they aid counsel and litigants in targeted data collection by identifying relevant custodians and the types of ESI such custodians may possess, and shrinking the necessary dragnet to retrieve such ESI. These technologies also allow litigants to understand how the data is then processed before being placed into an electronic document review program.

Examples of early case assessment technologies include advanced analytics tools such as advanced keyword searching and conceptual search technologies.[2] "Fuzzy search" is a type of keyword searching similar to a basic keyword search, but operating to include more expansive results.[3] Conceptual search technologies are perhaps a more useful advanced analytic for early case assessment and the "targeted collection" phase, in turn preparing for the "targeted review".

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2 See, Tingen, Jacob in *Technologies That Must Not Be Named: Understanding and Implementing Advanced Search Technologies in E-Discovery*, 19 Rich. J.L. & Tech. 2, 35-36 (2012).

3 *Id.*

Conceptual searches focus on ideas or concepts within the data. For example, the use of "document clustering" provides a statistical method of grouping documents with similar content, typically using a number of overlapping words. It uses one or more "seed" documents that are chosen manually, and then clusters other documents with similar words.[4] A similar advanced analytic is "Baysian Classifiers," a probability based method. It focuses on the likelihood of a document being relevant by placing different values on specific words and by using a "training set" of documents to create baseline parameters for relevance. The "training set" can be performed multiple times to improve the accuracy of the method.[5]

Similar to these conceptual searches, and moving toward the "targeted review" phase, predictive coding allows counsel to review and code a "seed set" of documents, then run iterative processes of the coding program to find and code similar documents in a consistent manner.[6] During this iterative process, counsel must always re-sharpen the knife, requiring continued review of additional samples of remaining documents. Counsel will code additional samples and continue running the program to, in turn, predictively code further documents. Done multiple times on multiple samples, this repeated sharpening of the knife ultimately provides accurately coded documents with a significant reduction in workload.

Real-world examples of these tools are now routinely offered by many different e-discovery consulting and processing companies. Competition among these companies has led to a proliferation of technologies in the past few years.[7]

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4 *Id.* at 37; 41-43.

5 *Id.*

6 *Id.*

7 See, for example, the "StoredIQ Analyze Anywhere" by StoredIQ; "Exego" by Planet Data; and "Ontrack Advanceview" by Kroll Ontrack.

DISCOVERY DUTIES

In Federal cases (used as a benchmark), Federal Rule of Civil Procedure 26 provides the foundation for the scope of discovery and a litigant's discovery duties. Significant in its breadth, the most often implicated provisions of Rule 26 with respect to ESI are: Rule 26(b)(2)(B)'s and (C)'s "proportionality test," which allows a party to withhold discoverable materials stored in a manner that "is not reasonably accessible because of undue burden or cost," though the opposing party may file a motion to compel disclosure of such material; and Rule 26(g) which requires that discovery responses are certified as complete. The 2006 amendments to the Federal Rules of Civil Procedure focused on revising relevant discovery provisions related to electronic discovery. Notably, Rules 33 (Interrogatories) and 34 (Requests for Production) specify that ESI is discoverable under their provisions, while Rule 37 "creates a safe-harbor from sanctions for a party who deletes information as part of a routine information management system."[8]

Judge Shira Schiendlin issued multiple opinions related to e-discovery in the seminal *Zublake v. UBS Warburg LLC* lawsuit, which involved a contentious battle over emails stored on, and deleted from, backup tapes. Apart from the basic Rule 26 obligations, Judge Schiendlin's July 20, 2004 opinion delineated another set of recognizable e-discovery duties for litigants and their counsel, dubbed herein as the "Zublake Duties." In the opinion, Judge Schiendlin held that counsel has the following duties with respect to e-discovery: the "duty to monitor" a corporate client's compliance with an initial litigation hold notice; the "duty to locate relevant information," which includes a duty to become fully familiar with a corporate client's document retention policies and data retention architecture; and the "continuing duty to ensure

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[8] See, Borden, Bennett, et al. *Four Years Later—How the 2006 Amendments to the Federal Rules Have Resahped the E-Discovery Landscape and are Revitalizing the Civil Justice System,* 17 Rich. J.L. & Tech. 10, 8 (Spring, 2011).

preservation."[9] This means that attorneys should be well-versed in their clients' electronic documents retention policies, the structure of their networks and paperless files, and other aspects of a client's electronic recordkeeping system.

Taking *Zublake* a step further, another recognizable duty with respect to e-discovery can be deemed the "Duty to be Savvy," derived from the American Bar Association's Model Rules and post-*Zublake* case law involving electronic discovery technologies. ABA Model Rule 1.1, Comment 8, states that attorneys must "keep abreast of changes in law and its practice, *including the benefits and risks associated with relevant technologies*, engage in continuing study and education to comply with all continuing education requirements in which the lawyer is subject."

Federal courts have embraced this approach in certain instances. For example, in the *In re Delta/Airtran Baggage Fee Antitrust Litigation*, counsel was sanctioned for a failure to conduct a reasonable inquiry into the full scope of e-mails responsive to plaintiffs' discovery requests and, in turn, certifying that the document production was complete when it was not.[10] *In re Delta* involved a contentious battle over (not surprisingly) allegedly missing emails contained on hard drives and back-up tapes. The Court found that, despite counsel's representations, Delta had not "substantially justified its failure to ensure the [hard drives] were run through" its ESI processing program and searched for responsive data.[11] The court also found that counsel had failed to appropriately justify why it had not searched for email back-up tapes in the Delta Information Technology Department's evidence locker.[12] Thus, counsel's arguable lack of savvy and unfamiliarity with Delta's information technology structure led to the

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9 *Zublake v. UBS Warburg LLC*, 229 F.R.D. 244, 431-433 (S.D.N.Y. 2004).

10 See, *In re Delta/Airtran Baggage Fee Antitrust Litigation*, 846 F. Supp. 2d 1335 (N.D. Ga. 2012).

11 *Id.* at 1350-51.

12 *Id.* at 1351.

inadvertently late production of responsive emails, and ultimately: sanctions.

Given the obligations that these newfound e-discovery duties place on litigants and their counsel, all parties should be capable of understanding electronic document retention policies, industry-standard electronic document processing and review programs, the electronic data gathering process, and most importantly—how the use of technology relates to satisfying the party's obligations in discovery. Litigants would be well-served to understand and utilize Advanced Electronic Discovery Technologies, while making sure to do so in a defensible manner.

SATISFYING DISCOVERY DUTIES BY USING TECHNOLOGY

A) Meeting Rule 26's Basic ESI Duties and the Zublake Duties

At the outset, whether a plaintiff should be entitled to expansive e-discovery invokes Rule 26's "proportionality test," which requires the Court to weigh the burden of the requested discovery with its likely benefit considering the needs of the case, amount in controversy, resources of the litigants and court, importance of the issues to the suit, and importance of the requested discovery to resolving such issues. Judge Schiendlin's May 13, 2003 *Zublake* opinion provides that disputes regarding the burden of producing ESI requires an initial three-step analysis centered around shifting e-discovery costs between parties.

First, it is necessary to thoroughly understand your client's computer system. For data kept in accessible format, the producing party bears the cost of producing the data. Courts "should only consider cost-shifting where data is relatively inaccessible, such as backup tapes."[13]

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[13] See *Zublake v. UBS Warburg LLC*, 217 F.R.D. 309, 324 (S.D.N.Y. 2003).

Second, because the cost-shifting is so fact-intensive, it "is necessary to determine what data may be found on the inaccessible media."[14]

Third, and finally, in conducting the cost-shifting analysis, the Court should apply a seven-factor test, weighing the factors in order from most to least important. Judge Schiendlin's seven-factor test for determining whether cost-shifting, and in turn whether something is "unduly burdensome," is as follows:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.[15]

Judge Schiendlin's July 2004 opinion also provides ample guidance on meeting the "Zublake Duties." For example, in meeting the duty to monitor litigation hold compliance, Judge Schiendlin instructs that "proper communication between a party and her lawyer will ensure (1) that all relevant information (or at least all sources of relevant information) is discovered, (2) that relevant information is retained on a continuing basis; and (3) that relevant non-privileged material is produced to the opposing

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14 *Id.*
15 *Id.*

party.[16] In meeting the duty to locate relevant information and "become fully familiar" with a client's technologies, counsel should speak with "information technology personnel, who can explain system-wide backup procedures and the actual...implementation of the firm's recycling policy," along with speaking with "key players" in the litigation.[17] Notably "counsel must take affirmative steps to monitor compliance [with the litigation hold] so that all sources of discoverable information are identified and searched."[18] Lastly, in meeting the "continuing duty to ensure preservation," counsel should instruct all employees to produce electronic copies of their relevant active files" and "must also make sure that all backup media which the party is required to retain is identified and stored in a safe place."[19]

B) Meeting the "Duty to be Savvy" by Using Advanced Electronic Discovery Technologies

The implementation of Advanced Electronic Discovery Technologies may, no doubt, go a long way in meeting both the "Zublake Duties" and the "Duty to be Savvy." However, use of the technologies will not suffice unless courts are willing to accept them as defensible methods of conducting e-discovery in litigation.

General guidelines for the defensibility of Advanced Electronic Discovery Technologies are most clearly set forth in the *Moore v. Publicis Groupe* case, where the Southern District of New York's Magistrate Judge Andrew Peck embraced the use of Advanced Discovery Technologies to satisfy counsel's discovery duties.[20]

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16 *Zublake* 229 F.R.D. 422, 432

17 *Id.*

18 *Id.*

19 *Id.* at 434.

20 See *Moore v. Publicis Groupe*, 287 F.R.D. 182 (S.D.N.Y. 2012).

For tools such as conceptual searches, document clustering, and predictive coding, statistical analysis and sampling is paramount to their defensibility. A common industry standard is a 95% confidence rate with 2% deviation, as courts typically find this to be an acceptable statistical sampling benchmark. For example, in *Moore*, the parties were engaged in a discovery dispute over the production of voluminous ESI.[21] The court held several status conferences to aid the parties in hashing out their differences and determining what would be a reasonable solution. The plaintiffs had not "taken issue with the use of predictive coding or, frankly, with the confidence levels that [defendant] proposed."[22] "Rather, plaintiffs took issue with [defendant's] proposal that after the computer was fully trained and the results generated, [defendant] wanted to only review and produce the top 40,000 documents, which it estimated would cost $200,000."[23] Judge Peck rejected such proposal as a "pig in a poke," explaining that "where the line will be drawn as to review and production is going to depend on what the statistics show for the results, since proportionality requires consideration of results, as well as costs."[24] Thereafter, "the parties agreed to use a 95% confidence level (plus or minus two percent) to create a random sample of the entire email collection; that sample...will be reviewed to determine relevant (and not relevant) documents for a 'seed set' to use to train the predictive coding software."[25] The parties then also used a mix of agreed keywords, "concept groups (*i.e.* issue tags)" and "judgmental sampling" to hone the accuracy of iterative reviews for training the predictive coding technology.[26]

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21 *Id.* at 185.
22 *Id.*
23 *Id.*
24 *Id.*
25 *Id* at 186.
26 *Id.* at 186-187.

Judge Peck also noted that a journal article he had authored stated that "the best approach to the use of computer-assisted coding is to follow the Sedona Cooperation Proclamation model."[27] Namely, this requires advising "opposing counsel that you plan to use computer-assisted coding and seek agreement; if you cannot, consider whether to abandon predictive coding for that case or go to the court for advanced approval."[28]

Similar to Judge Peck, other courts have found adherence to the Sedona Conference's Best Practices to be persuasive in satisfying discovery duties while using advanced technologies. For example, in *Victor Satanley v. Creative Pipe, Inc.*, the parties quarreled over whether certain privileged documentation was produced "inadvertently" by an advanced technology and thus allowed to be "clawed-back."[29] There, Judge Paul Grimm found that using Advanced Electronic Discovery Technologies "for the purpose of identifying and withholding privileged or work-product protected information from production" requires the "utmost care," and that "the party selecting the methodology must be prepared to explain the rationale for the method chosen to the court, demonstrate that it is appropriate for the task, and show that it was properly implemented.[30]

Judge Grimm highlighted several Sedona Conference best practice points for the use of such technologies, including: that the chosen method is highly dependent on the specific legal context for its employ; that parties should perform due diligence before selecting a vendor's product or service; that parties should recognize that using such technologies does not guarantee that all responsive documents will be identified in large data collection, and differing methods may produce differing results; that parties should make a good faith attempt to collaborate on the use of

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27 *Id.* at 184.

28 *Id.*

29 See, *Victor Stanley v. Creative Pipe, Inc.*, 250 F.R.D. 251 (D. Md. 2008).

30 *Id.* at 262.

particular search and information retrieval methods, tools and protocols; and that parties should expect that their choice of search methodology will need to be explained, either formally or informally, in subsequent legal contexts (including depositions, evidentiary proceedings, and trials).[31] Coupling the use of these principles with statistical analysis and Judge Schiendlin's *Zublake* guidance would, no doubt, go a long way in satisfying a litigant's e-discovery duties by ensuring that the "utmost care" has been taken in implementing Advanced Electronic Discovery Technologies, and that a party will be prepared to explain the rationale and implementation of such technology.

CONCLUSION

Litigants must ultimately ask whether the use of Advanced Electronic Discovery Technologies actually advances the ball in litigation or whether it poses too many risks to justify using in the circumstances. The short answer is that appropriate technologies should be used in appropriate circumstances. Use of the appropriate Advanced Electronic Discovery Technologies throughout both the "targeted collection" and "targeted review" phases of discovery may provide a significant cost and time savings for conducting e-discovery. Following Judge Schiendlin's, Judge Peck's and Judge Grimm's guidance along the way will ensure that litigants meet their obligations while streamlining the discovery process. Litigants and Judges are ultimately recognizing that using these Advanced Electronic Discovery Technologies will, in the long run, make the e-discovery process more reasonable.

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[31] *Victor Stanley* at 261-262, citing *The Sedona Conference Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery*, 8 Sedona Conf. J. 189, 194-95.