Schnader Aviation Group

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Washington Court of Appeals Reverses Dismissal of Design Defect Claim and Remands for Further Trial

Joseph Tiger, New York
jtiger@schnader.com

This action arose out of the crash of a 1976 Cessna U206F aircraft on takeoff from an airport in Anchorage, Alaska. On takeoff, the plane flew approximately one half mile before crashing into an abandoned building. The crash resulted in serious injuries to Preston Cavner, his wife, one of his sons, and a babysitter, as well as the death of his other son.

Plaintiffs brought suit against the aircraft engine manufacturer, Continental Motors, Inc. ("CMI"), asserting claims design and manufacturing defects, and failure to warn. CMI alleged that the crash was caused entirely by pilot error – i.e., that Cavner overloaded/improperly loaded the plane, failed to properly secure the load, and misused the wing flaps during takeoff. All plaintiffs other than Cavner asserted a cross-claim against him.

The trial court dismissed the design defect claim as preempted by federal law. The parties then tried the manufacturing defect and failure to warn claims against CMI, and the cross-claim against Cavner. The jury found Cavner 100% at fault for the crash, and plaintiffs appealed, seeking a new trial on all claims.

The Court of Appeals of Washington reversed the dismissal of the plaintiffs' design defect claim, and remanded for a trial on whether there was a design defect and, if so, the apportionment of fault between CMI and Cavner. This reversal was based on a Washington Supreme Court decision that had been issued after the trial. In this decision, the Washington Supreme Court held that the Federal Aviation Act and FAA regulations do not preempt design defect claims under Washington's Product Liability Act. Because the law had changed between the time of trial and the appeal, reversal was appropriate. In reaching this conclusion, the Court of Appeals rejected CMI's argument that remand was unnecessary because the jury found Cavner 100% responsible for the accident.

Aviation Group News and Notes

- For the seventh consecutive year, *Chambers and Partners USA* has ranked Schnader's Aviation Group among the top five firms in the country for aviation litigation. Chambers praised the Group for its "capability representing airlines, aerospace manufacturers and insurers in a range of contentious issues." Further noted is the Group's "particular expertise in multijurisdictional cases, military air crashes, cargo claims and civil aviation disasters." The guide also commends the Group's appellate strength on aviation and related insurance matters in state and federal courts across the country. Clients lauded the firm for doing "a superb job."
- **Bob Williams** will moderate the session titled "Trial Tips from the Trenches: Things They Don't Teach You in Law School About Trying Aviation Lawsuits" at the ABA Aviation conference in Washington, DC in October. Bob Williams is a Vice-chair of the Aviation and Space Law General Committee of the ABA.
- **Barry Alexander** will speak on a panel on the topic of cargo liability and insurance issues at the 12th Annual McGill Conference on International Aviation, Liability, Insurance and Finance in Montreal in October.
- **Jonathan Stern** and **Gordon Woodward** were selected for inclusion in the 2019 edition of *Super Lawyers*.

The central holding of this case reversing the design defect claims against CMI evidences the ongoing uncertainty as to the scope of the federal preemption of design defect claims. The decision also addressed a number of other issues, including rejecting the use of Alaska law, rejecting claims of evidentiary errors by the trial court, and affirming the jury's findings of Cavner's negligence as a proximate cause, and for CMI on the failure to warn and manufacturing defect claims. However, these are secondary issues, specific to the case and with little broader significance. By contrast, the ruling that Washington's Product Liability Act applies is significant as it clearly relates to the ongoing questions of federal preemption. Thus, Washington can be considered another state that will be closely watching what the United States Supreme Court does in *Sikkelee v. AVCO Corp*., No. 18-1140 (U.S. filed Mar. 1, 2019). ***Cavner v. Cont'l Motors, Inc.,* 2019 Wash. App. LEXIS 631 (Wash. Ct. App. Mar. 18, 2019).**

Kentucky Court of Appeals Grants Bell Helicopter New Trial Based on Trial Court's Erroneous Rulings on Admissibility of Evidence

David R. Struwe, Philadelphia
dstruwe@schnader.com

In *Bell Helicopter Textron, Inc. v. Dobbs*, the Kentucky Court of Appeals granted Bell Helicopter a new trial on the basis that the trial court had made erroneous rulings on the admissibility of evidence. The action arose out of the crash of an air ambulance helicopter manufactured by Bell Helicopter in 2013, which resulted in the death of the helicopter's three-person flight crew. At trial, the jury found that the helicopter had a manufacturing defect "consisting of a four-inch void … in one of the main rotor blades and that this defect constituted the precipitating event that culminated in the midair breakup of the helicopter."

In support of its allegation that this manufacturing defect caused the crash, the plaintiffs introduced the deposition testimony of a Bell Helicopter quality manager, who answered affirmatively to questions by Plaintiffs' counsel as to whether there had been other Bell Helicopter crashes involving a "void or disband in a Bell main rotor blade." In response to one question, the quality manager answered in a way that could be construed as an admission that the crash in question was caused by a void. As noted by the appellate court, Plaintiffs "emphasized to the jury that Bell Helicopter knew the … crash was caused by a manufacturing void … as evidenced by [the quality manager's] video-taped testimony." The appellate court further noted that "[t]his 'admission' went to the heart of the case – whether a manufacturing defect (void) caused the … crash."

At trial, Bell Helicopter attempted to introduce other portions of the quality manager's deposition testimony, where he clarified that he did not think that the rotor blades of the crashed helicopter had any voids.

The trial judge excluded this portion of the quality manager's deposition testimony, finding "the questions were leading and because … the testimony elicited by Bell Helicopter was contradictory to [the quality manager's] testimony elicited by [plaintiffs] in the same video-taped deposition."

The appellate court found that the trial judge's exclusion of the quality manager's testimony was in error, relying on the Kentucky Rules of Civil Procedure, which provide that "[i]f only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts." The appellate court rejected Plaintiffs' contentions that the questions which elicited the subject testimony were leading, and that the excluded testimony was inadmissible simply because it might contradict other aspects of testimony. In sum, the court found that the exclusion of portions of the deposition testimony was unfairly prejudicial and constitute[d] reversible error."

The appellate court also found that the trial court abused its discretion by allowing plaintiffs to introduce into evidence an unverified answer by Bell Helicopter from a different case that involved a different helicopter crash, as well as a chart documenting voids in other Bell Helicopter rotor blades. The appellate court affirmed, however, the trial court's (1) admission of evidence, including a chart, of prior crashes, (2) exclusion of testimony from Bell Helicopter's expert Dr. Dale Alexander on the basis that he did not have sufficient knowledge to testify as an expert, and (3) admission of testimony from two of Plaintiff's experts. ***Bell Helicopter Textron, Inc. v. Dobbs*, NO. 2018-CA-000049-MR, 2019 Ky. App. Unpub. LEXIS 131 (Ky. Ct. App. Mar. 1, 2019).**

Federal Court Rejects Plaintiff's Novel "Nerve Center" Argument in Unsuccessful Bid to Remand Case to State Court

Robert J. Williams, Pittsburgh & Philadelphia
rwilliams@schnader.com

On September 8, 2017, a helicopter carrying Troy Lee Gentry of the Grammy-award nominated country music group Montgomery Gentry crashed in southern New Jersey while sightseeing a concert venue from the air. Mr. Gentry's widow, a Tennessee citizen, subsequently filed a state-court product liability action in Philadelphia, Pennsylvania captioned *Gentry v. Sikorsky Aircraft Corp*. against several entities alleged to have been responsible for the helicopter's design, manufacture and maintenance. Several defendants promptly removed the case to federal court, which plaintiff challenged via a motion for remand.

Federal courts have subject matter jurisdiction over actions between citizens of different states, if the amount in controversy exceeds $75,000, exclusive of costs and interest. 28 U.S.C. § 1332. A corporation is a citizen of the state or states where it is incorporated and maintains its principal place of business, or "nerve center," i.e., where its highest level officers direct, control, and coordinate the corporation's activities. *Hertz Corp. v. Friend*, 559 U.S. 77 (2010). Where an action satisfies the diversity of citizenship requirement, the "real and substantial" defendants may remove a state action to federal court, if done unanimously and within applicable time limits. However, an action may not be removed to federal court if any of the parties properly joined and served as defendants is a citizen of the forum state, i.e., the "forum defendant rule." 28 U.S.C. § 1441(b)(2).

Gentry's motion to remand argued that removal violated the forum defendant rule in two ways. First, she named as defendants several entities that were Pennsylvania corporations or were registered as fictitious names in Pennsylvania. Second, she claimed that although the other defendants were not Pennsylvania corporations, they had a physical presence in Pennsylvania that was directly related to manufacture and service of the subject helicopter, and consequently, those defendants' "nerve centers" for purposes of this action were in Pennsylvania.

With respect to Plaintiff's first argument, the Court found that the alleged Pennsylvania corporations no longer had a legally cognizable existence because they had merged with other non-Pennsylvania corporations. As such, they are merely "nominal parties," whose existence is not considered when evaluating the existence of diversity and propriety of removal.

As for Plaintiff's second argument, the Court ruled that the real and substantial defendants in the action were incorporated outside Pennsylvania and had their respective principal places of business or "nerve centers" outside Pennsylvania. The Court rejected plaintiff's argument that the nerve centers for those corporations had shifted to Pennsylvania

because they had Pennsylvania-based activities relating to the subject helicopter, explaining: "Just because a corporation maintains some limited operations in Pennsylvania, it does not follow that the company's principal place of business is also necessarily in Pennsylvania, even if the company is being sued for conduct arising from those Pennsylvania operations." Instead, there can be only one corporate nerve center, which is the same for all actions. Accordingly, Plaintiff's motion to remand the action to state court was denied. ***Gentry v. Sikorsky Aircraft Corp., et al.,* No. 18-1326, (E.D. Pa. Apr. 22, 2019).**

Montreal Convention Action Dismissed by District Court for the Southern District of New York on *Forum Non Conveniens* Grounds

Brandy S. Ringer, Pittsburgh
bringer@schnader.com

In *Santos v. LATAM Airlines Grp. S.A.*, the plaintiff suffered second- and third-degree burns to her body when a LATAM flight attendant allegedly spilled boiling tea on her during a flight from New York to Guayaquil, Ecuador. Plaintiff, a citizen and resident of Ecuador, sued LATAM in the Southern District of New York and LATAM moved to dismiss the action on the ground of *forum non conveniens*.

To determine whether dismissal was proper under the circumstances, the court applied the three-part test articulated by the Second Circuit in *Norex Petroleum Ltd. v. Access Indus., Inc.,* 416 F.3d 146, 153 (2d Cir. 2005).

First, the Court considered the degree of deference that properly should be accorded the plaintiff's choice of forum. In this case, the Court determined that the choice of forum was entitled to only minimal deference based in part on the fact that Plaintiff and the flight attendants reside in Ecuador, Plaintiff's medical treatment was in Ecuador, and "most if not all relevant evidence is located in Ecuador." The Court also noted that Plaintiff's intermittent visits to New York were insufficient to establish that New York provided a convenient forum.

Having determined that Plaintiff's choice of forum was entitled to only minimal deference, the Court examined whether LATAM demonstrated the existence of an adequate alternative forum. The Court concluded that Ecuador was an adequate alternative forum based on LATAM's representations that it would "submit to jurisdiction and accept service of process in Ecuador," and that "Ecuadorian courts have jurisdiction over the dispute pursuant to the Montreal Convention." The Court also expressed unwavering confidence in the competence of Ecuadorian judges to adjudicate Plaintiff's negligence claim, rejecting Plaintiff's position that the Ecuadorian courts were inadequate because of the "substantial restrictions on discovery" and lack of a trial by jury in Ecuador.

Finally, the Court weighed the private and public interest factors relevant to an FNC analysis. The private interest factors include (1) "the relative ease of access to sources of proof;" (2) "availability of compulsory process to compel unwilling witnesses to appear;" (3) "the cost of procuring the attendance of witnesses willing to appear;" and (4) "'all other practical problems. The public interest factors include (1) "court congestion;" (2) "the relation of the litigation to the chosen forum as opposed to its relation to the proposed alternative forum;" and (3) "the interest in having the dispute adjudicated in a forum that is at home with the ... law that must govern the case."

The Court opined that the private interest factors weighed in favor of dismissal because the parties would "endure substantial time and cost in essentially taking a case that is centered in [a foreign forum] and transporting it to New York." The Court based its decision, in large part, on the fact that the sources of proof, including witnesses and evidence relating to pain and suffering, were located in Ecuador.

The Court also found that the public interest factors weighed in favor of dismissal. In reaching its decision, the court rejected the plaintiff's assertion that New York has a specific interest in the dispute, noting that neither party is domiciled in New York. While recognizing that New York and Ecuador may have "the same general interests in promoting health and safety for its airline-traveling residents and visitors," the Court held that Ecuador had a greater interest in the resolution of the lawsuit because the plaintiff is a citizen of Ecuador. Moreover, foreign, rather than New York, law likely would apply because the Montreal Convention would preempt any state law cause of action, and, even if it did not, a New York choice of law analysis likely would result in the application of New York law.

In light of the foregoing, LATAM's motion to dismiss was granted. ***Santos v. Latam Airlines Grp. S.A.*, 2019 U.S. Dist. LEXIS 65515 (S.D.N.Y. April 17, 2019).**

Supreme Court's Latest Conflict Preemption Case May Provide Aviation Manufacturer Defendants with Another Argument Against State Law Products Claims

Lee C. Schmeer, Philadelphia
lschmeer@schnader.com

The United States Supreme Court recently decided another pharmaceutical case centered on a manufacturer defendant's conflict preemption defense. In *Merck Sharp & Dohme Corp. v. Albrecht*, the Court held that the question of whether the FDA would have approved a change to a drug's warning label is an appropriate question for a judge, not a jury, and that the Third Circuit erred in deeming that inquiry a question of fact.

In *Albrecht*, Plaintiffs' claims relied upon alleged deficiencies in a drug's warning label that Merck had attempted to address in a warning label that previously had been submitted to and rejected by the FDA. Merck claimed that the FDA's informed rejection of the previously proposed label change prevented it from altering the Fosamax warning label to include Plaintiffs' proposed warnings. Plaintiffs responded that the FDA rejected only a specific phrasing of the proposed warning (one that included a warning for a lesser risk without explicitly including femoral fracture), that Merck was free to propose other warnings related to Plaintiffs' claimed injuries, and that the issue of federal agency rejection or its decision-making process is one that is routinely decided by juries.

The Court sided with Merck, and in the process narrowed the definition of "clear evidence," a standard increasingly applied in conflict preemption jurisprudence, to require evidence that the drug manufacturer informed the FDA of the reasoning for the warnings required by state law and that the FDA made an informed decision to reject the new warnings. In his concurring opinion, Justice Alito made his feelings known on the "clear evidence" standard, writing that use of the phrase in a previous decision was little more than a "rhetorical flourish," and not an actual standard of proof. The Supreme Court then remanded the case to the Third Circuit for a determination of whether the respondents' claims are preempted.

This decision further solidifies pharmaceutical cases as the Court's favored medium for shaping the impact of federal regulatory compliance and requirements on state law duties of care. While the Supreme Court's decision may not represent a seismic shift in the law of conflict preemption as it pertains to the typical aviation product defect case – in part because the normal case does not involve extensive communications between the manufacturer and the FAA or the FAA's denial of a proposed alternative design – the Court's holding that a judge can decide the threshold preemption issue by determining the import of a federal agency's decision makes the case significant.

The full impact of *Albrecht* will not be known until the Supreme Court decides whether to grant certiorari in *Sikkelee v. AVCO Corp*., No. 18-1140 (U.S. filed Mar. 1, 2019), an appeal of the Third Circuit's holding that the plaintiffs' claims could not be deemed preempted in the absence of "clear evidence" that the FAA would not have approved the proposed design change. After conferencing on June 20, 2019, the Court requested the views of the Solicitor General. If the Court grants certiorari, the aviation bar should expect concrete guidance in the near future with respect to the viability of the conflict preemption defense in aviation products liability cases. ***Merck Sharp & Dohme Corp. v. Albrecht,* No. 17-290, 2019 U.S. LEXIS 3542 (U.S. May 20, 2019).**

Southern District of California Holds that Assault of Airline Employee is not a Safety Threat in Federal Aviation Act Preemption Analysis

Stephanie A. Short, Pittsburgh
sshort@schnader.com

The Southern District of California recently addressed the scope of two aspects of section 44902 of the Federal Aviation Act ("FAA"), 49 U.S.C. § 44902 ("Section 44902").

In *Cardenas v. American Airlines*, American Airlines canceled Plaintiff's ticket and placed her in "no-go" status after she allegedly approached a customer service manager on the left side, grabbed his arm, spun him around to face her, and accused him of lying to her. The customer service agent then accused Plaintiff of assaulting him and cancelled Plaintiff's reservation. A System Customer Service Manager then placed Plaintiff on a "no-go" list based on the customer service agent's report about Plaintiff's conduct.

Plaintiff sued American Airlines for "wrongful refusal to transport" under Section 44902 and various state law claims. American Airlines sought summary judgment on the basis that, among other things, Section 44902 of the FAA does not create an independent cause of action and Section 44902(b) preempts plaintiff's state law claims.

The court granted American Airlines' motion for summary judgment as to Plaintiff's claim for "wrongful refusal to transport," holding that Section 44902 does not, by itself, create an independent cause of action.

The court rejected, however, American Airlines' argument that Plaintiff's state law claims are preempted by Section 44902(b). Section 44902(b), titled "Permissive refusal," provides that "…an air carrier…may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety." The court determined that there was no contemporaneous evidence that American Airlines' decision to place plaintiff in "no-go" status was due to a safety concern. Rather, the Court determined that Plaintiff was placed in "no-go" status because she shoved the customer service agent, impliedly holding that shoving an airline employee does not necessarily constitute a safety threat and that the airline must demonstrate that a passenger was in fact a safety threat to benefit from FAA preemption.

American Airlines has filed a motion for reconsideration as to the court's FAA preemption decision, which is scheduled to be heard by the court in July. ***Cardenas v. American Airlines, Inc.*, No. 17-cv-2513, 2019 U.S. Dist. LEXIS 57747 (S.D. Cal. April 3, 2019).**

District Court Rules Turkish Airlines' Nationwide Website Does not Subject it to General Personal Jurisdiction in Nevada

Arleigh P. Helfer, Philadelphia
ahelfer@schnader.com

A case with a fact pattern worthy of a law school civil procedure examination, *Schaetzl-Saubert v. Turkish Airlines, Inc*. addresses issues of personal jurisdiction over foreign air carriers.

Plaintiff, a passenger on a Turkish Airlines flight from Munich, Germany to Los Angeles, California, had an unpleasant travel experience. After diversions, numerous delays, missed connecting flights, and other mishaps, including the airline reserving a hotel room for her to share with a married man whom she did not know, she managed only two hours of sleep over multiple days of air travel before finally getting on a flight to Los Angeles.

Plaintiff alleged that the experience left her with Generalized Anxiety Disorder, depression, panic attacks, insomnia, and Post-Traumatic Stress Disorder. She sued the airline in federal court in (wait for it) . . . Nevada! She pleaded claims for breach of contract, negligence, and intentional and negligent infliction of emotional distress. The airline moved for judgment on the pleadings, raising several arguments, including a challenge to the court's personal jurisdiction over the airline.

Because Nevada's long-arm statute extends to the limits of due process established by the U.S. Constitution, Plaintiff had to make a prima facie case that the defendant had sufficient contacts with the forum to allow the exercise of jurisdiction without offending notions of fair play and substantial justice. She argued such contacts with Nevada existed because the airline had agreements with partner airlines that travel to Nevada and because the airline's internet website allowed people in Nevada to purchase tickets for flights on the airline. Plaintiff did not argue that there was **specific** personal jurisdiction, as none of the events during her odyssey occurred in Nevada, so her claims did not arise out of any of the airline's contacts with Nevada. Instead, Plaintiff argued that the court had **general** personal jurisdiction over the airline.

The court rejected Plaintiff's contentions, explaining that a non-resident's contacts with the forum must be so "continuous and systematic" as to have made the airline "essentially at home" in Nevada. The court ruled that having an interactive website does not make a defendant essentially at home in the state. Otherwise, any company with an interactive website would be subject to general jurisdiction anywhere someone was able to use the website. The Court similarly held that having arrangements with partner airlines to fly people from cities in the United States to Las Vegas did not make the Turkish corporation essentially at home in Nevada.

While observing in *dicta* that plaintiff's complaint may face other impediments, including issues of claim preemption under the Montreal Convention, which the complaint did not reference, the court dismissed the case without prejudice for lack of personal jurisdiction over the airline. ***Schaetzl-Saubert v. Turkish Airlines, Inc.*, No. 2:17-cv-854, 2018 U.S. Dist. LEXIS 37015 (D. Nev. Mar. 7, 2018)**

Delaware Court Holds that Economic Loss Doctrine Applies to Claim for Damage to Property Itself Even Where Incident also Resulted in Personal Injury or Property Damage to Third-Parties

Jonathan B. Skowron, Pittsburgh
jskowron@schnader.com

In *Lima Delta Company v. Gulfstream Aerospace Corp.*, the owners of a Gulfstream aircraft sued the manufacturer after the crash, alleging claims sounding in negligence, strict liability, fraud, and breach of warranty. The strict liability claim eventually was withdrawn, the fraud claim was dismissed for lack of particularity, and the breach of warranty claim was dismissed due to the statute of limitations. The negligence claim, however, was a bit more complicated.

Plaintiffs asserted that the manufacturer was liable for producing an aircraft with faulty brakes. Gulfstream countered by citing to the economic loss doctrine, which generally operates as a complete bar to recovery if a plaintiff's only damages are "economic losses," a term which includes "monetary loss, cost of repair or replacement, loss of business or employment opportunities, and diminution in value," in addition to injury to a defective product itself. Plaintiffs responded by noting that five people were killed in the crash, and they argued that those deaths were sufficient to render the economic loss doctrine inapplicable.

The Court disagreed, holding that "the focus of the economic loss doctrine analysis is the nature of damages sought." In distinguishing other case law cited by Plaintiffs, the Court noted that Plaintiffs were not seeking any damages for third-party, non-economic harm, and as such, their tort claim was barred by the economic loss doctrine: "The Court finds that the economic loss doctrine bars Plaintiffs' tort claims. Plaintiffs seek only their own economic losses. Damages resulting from personal injury or property damage to non-parties do not exempt application of the doctrine."

This case serves to reinforce the economic loss doctrine in Delaware, making it harder for plaintiffs to recover from manufacturers even where there are third-party injuries or property damage if the plaintiffs themselves suffered only economic harm. ***Lima Delta Co. v. Gulfstream Aerospace Corp.*, No. N14C-02-042 MMJ, 2019 Del. Super. LEXIS 86 (Del. Super. Ct. Feb. 13, 2019).**

Second Circuit Joins the Third Circuit in Approving the Practice of "Snap Removals"

Brittany C. Wakim, Philadelphia
bwakim@schnader.com

Under the Federal Rules of Civil Procedure, a defendant is prohibited from removing a case otherwise removable to federal court on the basis of diversity jurisdiction where it, or any other defendant that has been "properly joined and served", is a citizen of the state where the plaintiff filed the lawsuit (the Forum Defendant Rule). District Courts across the circuits have issued conflicting opinions as to the meaning of the "properly joined and served" requirement.

In what is the second appellate court ruling on this issue (joining the Third Circuit), the Second Circuit, in *Gibbons v. Bristol-Myers Squibb Co*., adopted the plain-meaning approach to the "properly joined and served" provision of the removal statute by holding that the Forum Defendant Rule does not prohibit a defendant from removing a case to federal court on the basis of diversity jurisdiction before the plaintiff formally serves the forum state defendant(s).

In 2015, several plaintiffs sued Bristol-Myers Squibb and Pfizer over the drug Eliquis. The Multidistrict Litigation Panel transferred all of the pending federal cases to the Southern District of New York. Due to the dismissal of several complaints in the Southern District of New York, plaintiffs with pending suits in California federal court (awaiting transfer to the MDL) voluntarily dismissed their suits and refiled in Delaware state court (the defendants' state of incorporation) to take advantage of the Forum Defendant Rule's protections on removal. After learning of the suits but prior to formal service of the complaints, the defendants removed the cases to Delaware federal district court and requested transfer to the MDL in the Southern District of New York. The plaintiffs filed a motion to remand, arguing that this "snap removal" was contrary to the federal rules.

In denying the plaintiffs' motion, the Second Circuit adopted the approach of the Third Circuit, which previously held that the "properly joined and served" language of the Forum Defendant rules is "unambiguous," and allows a defendant to remove a case prior to proper service of the forum defendant. Accordingly, since the defendants in this case "removed each of the Transferred Actions to federal court after the suit was filed in state court but

before any Defendant was served," the removal was proper.

Given the ruling by the Second Circuit, such "snap removals" now are permitted from the state courts within the Second and Third Circuits, which encompass Connecticut, Delaware, New Jersey, New York, Pennsylvania, Vermont, and the Virgin Islands. The Second Circuit's decision also could be a harbinger of how other federal appellate courts might approach this issue. Thus, this decision expands the geographic availability of this potentially valuable but time-limited option for removal on the basis of diversity jurisdiction. ***Gibbons v. Bristol-Myers Squibb Co*., 919 F.3d 699 (2d Cir. 2019).**

Florida Supreme Court Reverses Course and Adopts the Federal Court *Daubert* Standard for the Admissibility of Expert Testimony in State Court

Denny Shupe, Philadelphia
dshupe@schnader.com

In the Winter 2018 edition of this newsletter, I wrote about the October, 2018 decision of the Florida Supreme Court in which it found the state legislature's amendment of the state's Evidence Code to incorporate the federal court expert witness testimony admissibility requirements to be unconstitutional under the Florida state constitution. Since issuing the prior 2018 decision, Florida's Supreme Court has seated three new justices who were appointed by Governor Ron DeSantis.

On May 23, 2019, in a 47-page, 5-2 *per curiam* opinion, the Florida Supreme Court reversed course from a 2017 decision in which it declined to adopt the *Daubert* amendments "due to constitutional concerns." Instead, it exercised its exclusive rulemaking authority under the Florida Constitution to amend the Florida Evidence Code to replace the *Frye* standard for admitting certain expert witness testimony with the *Daubert* standard, the standard for admission of expert testimony now found in Federal Rule of Evidence 702. The Court did this by adopting as procedural rules of evidence the amendments to the State's Evidence Code that the state legislature unsuccessfully had attempted to adopt. In adopting the amendments, the Court stated that it did "not decide, in this rules case, the constitutional or other substantive concerns that have been raised about the amendments. Those issues must be left for a proper case or controversy."

As I previously discussed in my 2018 article, *Frye* and *Daubert* are competing methods utilized by trial judges to determine the reliability of expert testimony before allowing it to be admitted into evidence. Under the *Frye* rule, as the Florida Supreme Court explained in 2018, "the results of mechanical or scientific testing are not admissible unless the testing has developed or improved to the point where experts in the field widely share the view that the results are scientifically reliable as accurate." This often is referred to as the "general acceptance" standard for admissibility.

In contrast, the *Daubert* standard (as incorporated into Federal Rule of Evidence 702), applies to the admission or exclusion of a much broader range of possible expert testimony. Under the Evidence Code amendment replacing the *Frye* standard with the *Daubert* standard, "If scientific, technical, or other special-ized knowledge will assist the trier of fact in under-standing the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify about it in the form of an opinion or otherwise, if: (1) The testimony is based upon sufficient facts or data; (2) The testimony is the product of reliable principles and methods; and (3) The witness has applied the principles and methods reliably to the facts of the case."

In this most recent decision to procedurally adopt the evidence rules change, the Florida Supreme Court determined that the change would "create consistency between the state and federal courts with respect to the admissibility of expert testimony and will promote fairness and predictability in the legal system, as well as help lessen forum shopping." While the Court's *per curiam* opinion only was 6 pages long, there were 41 pages of concurring and dissenting opinions.

One of the dissenting justices stated that "in my view *Frye* is the superior standard for determining the reliability of expert testimony…." and "the *Daubert* amendments create a significant risk of usurping the jury's role by authorizing judges to exclude from consideration the legitimate but competing opinion testimony of experts."

According to media reports, the response of the Florida business community to this decision was swift and favorable. For example, the Florida Chamber of Commerce stated that the decision would end Florida's reign as a "judicial hellhole." Another representative of the Chamber stated that "[t]his is an important step forward in improving Florida's legal

climate, and providing predictability in the courtroom, stability for job creators and greater economic prosperity for Floridians." ***In Re: Amendments to the Florida Evidence Code*, No. SC 19-107, 2019 Fla. LEXIS 818 (Fla. May 23, 2019).** ✈

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OUR AVIATION TEAM

Robert J. Williams *Partner*
Chair

Richard A. Barkasy *Partner*

Arleigh P. Helfer III *Associate*

Bruce P. Merenstein *Partner*

Leo J. Murphy *Counsel*

Daniel M. Pereira *Associate*

Brandy S. Ringer *Associate*

Lisa J. Rodriguez *Partner*

Carl J. Schaerf *Partner*

Lee C. Schmeer *Associate*

Stephen J. Shapiro *Partner*

Edward J. Sholinsky *Partner*

Stephanie A. Short *Associate*

Barry S. Alexander *Partner*
Vice Chair

J. Denny Shupe *Partner*

Jonathan B. Skowron *Associate*

Jonathan M. Stern *Counsel*

David R. Struwe *Associate*

Matthew S. Tamasco *Partner*

Courtney Devon Taylor *Partner*

Joseph Tiger *Associate*

Brittany C. Wakim *Associate*

Ralph G. Wellington *Partner*

Keith E. Whitson *Partner*

Gordon S. Woodward *Partner*

Philadelphia Office
1600 Market Street, Suite 3600
Philadelphia, PA 19103

Pittsburgh Office
Fifth Avenue Place
120 Fifth Avenue, Suite 2700
Pittsburgh, PA 15222

New Jersey Office
Woodland Falls Corporate Park
220 Lake Drive East, Suite 200
Cherry Hill, NJ 08002

San Francisco Office
650 California Street, 19th Floor
San Francisco, CA 94108

Washington, D.C. Office
1750 K Street, N.W., Suite 1200
Washington, DC 20006

New York Office
140 Broadway, Suite 3100
New York, NY 10005

Delaware Office
824 N. Market Street, Suite 800
Wilmington, DE 19801