

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

**COMING SWARMS OF SMALLSATS – SOME LEGAL,  
REGULATORY AND INSURANCE IMPLICATIONS**

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**Aircraft Builders Council, Inc.**

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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. Four articles appear in this Law Report relating to various aspects of products liability law.

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## COMING SWARMS OF SMALLSATS—SOME LEGAL, REGULATORY AND INSURANCE IMPLICATIONS

By  
Stephen Tucker

As Aviation Week recently proclaimed, “Small satellites [“Smallsats”], once in the realm of one-off low-budget science missions and undergraduate engineering classes, have come full circle with the growing realization among hard-pressed, high-end users that the little birds can do the big jobs, too.” The reasons for this popularity are simple: These satellites are inexpensive to build, swarms of them can cover much larger areas than single, large, expensive-to-build satellites, and mission objectives can still be completed even after some in the constellations fail. Smallsats generally range in size from the dimensions of a credit card to the size of a college dormitory refrigerator.

Arguably, the OSCAR satellites (Orbiting Satellites Carrying Amateur Radio) were the first Smallsats—the first one having been launched just a few years after Sputnik. As of today, seventy OSCARs have been launched into orbit—most often for free as a hitchhiking counterweight to help balance a larger satellite during the launch deployment process. Since early days, the OSCARs have been used routinely by radio amateurs chiefly for remote sensing, store and forward data messaging, and as radio repeaters for real time communication.

As a side benefit of the OSCARs, new non-space-proven hardware has been validated—like ones related to solar cell technology, new battery chemistries, and many more.

Lawyers who practice satellite related “Space Law” are often involved in regulatory work, insurance-related activities and advice regarding contracting. The type of work provided regarding Smallsats is largely dependent on whether they are commercially funded (for profit missions), funded by the government or by universities (generally scientific missions benefiting from certain governmental protections and indemnities).

Regarding regulatory work lawyers address, there is an ever changing maze of regulatory compliance required with respect to the launch and operation of satellites in space. In the United States, the venue considered here, many regulatory agencies are involved. Some rules have been slightly relaxed when considering Smallsats, as compared to their bigger brothers.

First, the Federal Communications Commission (“FCC”) issues the station (STA) license governing, among other things, radio frequencies that are permitted to be used. The FCC works in conjunction with the International Telecommunication Union (“ITU”) and the World Administrative Radio Conference (“WARC”), as run by the ITU. Although the ITU has no real enforcement power, it works by reason of the fact that the alternative to compliance would be a world operating in chaos regarding radio frequency assignment. The FCC is also involved with, among other things, space debris assessment—a real danger these days with all of the space junk in low earth orbit.

Second, the Department of State is tasked with regulation of national security issues associated with launches and satellite operation. Primary involvement is through enforcement of International Traffic in Arms Regulations (“ITAR”) and the Export Administration Regulations (“EARs”).

Third, the Department of Commerce, in conjunction with the National Oceanic and Atmospheric Administration (“NOAA”) handles regulations concerning remote sensing satellite capabilities. Generally, satellite capabilities are limited to resolutions of about one meter.

Fourth, the Department of Transportation, through the Federal Aviation Administration Office of Commercial Space Transportation, handles launch regulation regarding, among other things, certain insurance coverages required, certain governmental indemnities allowed, and cross waivers required of all involved concerning liabilities.

Even the United Nations gets involved in regulation from the standpoint of international coordination and the issuance, and interpretation of, certain treaties governing liabilities associated with space operations. 1967, 1972 and 1976 treaties collectively provide for absolute liability for launching nations, but there are fault-based procedures to determine who pays regarding collisions. The only major collision to date occurred in February of 2009 and involved Iridium 33 (weighing about one thousand pounds) vs. Kosmos 2251 (weighing about two thousand pounds) at 495 miles above Siberia. A large debris cloud resulted creating dangers similar to those presented in the movie *Gravity*. Both satellites were launched from Russia, and fault, assessed under the provisions of UN Treaties, could not be determined. It is hard to believe that, in the largeness of space, objects this enormous found a way to collide. However, the real danger of future collisions is more associated with the many thousands of pieces of space junk that exist in orbits up to the 500-mile point.

As a final note on the regulatory subject, some commentators have opined that despite extensive cross-waivers of liability, if your Smallsat were to cause the death of someone, say on the space station, there may be nothing that would prevent the estate of the decedent from suing the Smallsat company for wrongful death—as estates, under certain circumstances, would not be bound by intergovernmental agreements.

Insofar as insurance-related work is concerned, lawyers are involved in representing underwriters, assureds and brokers in devising potential new coverages and then drafting policy language. Many of the policies are manuscripted—in other words, custom drafted to each risk. They are generally either first party liability or third party liability in nature—and can involve satellite launch and life.

Third party liability policy premiums covering, among other things, collisions in space are very inexpensive—a bargain for



the insureds. It is thought that one collision could wipe out many years' worth of premiums in paying a single loss.

Some new insurance policies even address cyber risk covering first party and third party losses—sometimes in the same policy. Insofar as Smallsats are concerned, it is very important to be mindful of avoiding gaps in indemnity availability or insurance coverage—which could result under some Launch Service Agreements (not all are the same) when licensed launch activities are concluded.

When losses do occur, it is important to keep in mind that disputes about coverage can arise. Those disputes are usually resolved through mediation, arbitration or litigation.

Mediation is generally the preferred means. Having highly knowledgeable mediators and experts for both sides of a dispute generally results in the most expeditious resolutions. As a practical matter, technical experts for both sides (collectively) tend to be more interested in the scientific truth of what happened more than in advocacy—which tends to foster speedier resolutions.

Arbitrations can also be effective with arbitrators allowing sensible (but limited) discovery, promptly decided motion practice, and expeditious ultimate case decisions.

The least attractive avenue for dispute resolution is litigation. Discovery there generally drags on too long, motions are decided slowly and case resolutions can take years.

It would seem that a line slip-type approach to coverage for Smallsats (perhaps patterned after the Aircraft Builders Council policy) and mandating mediation and arbitration for potential dispute resolution could make a lot of sense going forward.

With regard to further legal work associated with space, the need for advice concerning prudent contracting is pervasive. Clients are urged to carefully consider important clauses such as

those related to: choice of law, venue selection, arbitration and allocation of fault. And regarding all writings, lawyers can help implement certain prudent drafting practices.

There are many contracts to be reviewed by lawyers in the space context. Some examples might include supplier contracts with satellite manufacturers, contracts involving hosted payloads, contracts providing for parties' rights and obligations associated with station keeping services for satellites that have run out of fuel in geosynchronous orbit. The examples go on and on.

Utah State University now hosts the only large scale conference dedicated exclusively to issues relating to Smallsats. Seeing the many challenges ahead, lawyers are now attending in ever increasing numbers each year. And financiers are also on the scene recognizing that less can be more.

#### CONCLUSION

There is no question that Smallsats are here to stay and are even now being manufactured by some of the aerospace giants. The advances in technology, the economics involved to achieve big scale missions and the developing availability of smaller launch vehicles will only make their numbers increase in the days to come.

**INTO THIN AIR: LEGAL ISSUES AND IMPLICATIONS OF  
THE UNEXPLAINED DISAPPEARANCE OF MALAYSIA  
AIRLINES FLIGHT 370**

By  
Jennifer M. Vagle<sup>1</sup>

**INTRODUCTION**

On March 8, 2014, less than one hour after its takeoff from Kuala Lumpur, Malaysia Airlines Flight 370 ceased all communication with air traffic control, and its transponder went offline. Minutes later, MH370 deviated from its planned route over the Gulf of Thailand and, according to military radar, turned west and then north over the Andaman Sea. An hour after the Boeing 777-200ER—and the 239 people onboard—were scheduled to arrive at Beijing, Malaysia Airlines issued a media statement pronouncing the flight missing. MH370 quickly became the subject of frenzied media reports and public speculation.

Notwithstanding the extensive multinational search and rescue operations that followed, the fate and whereabouts of MH370 remain unknown as of the writing of this article, leaving interested parties with more questions than answers. Amidst the many uncertainties, however, one thing has become clear: the unprecedented disappearance of a commercial airliner during an international flight has captured the attention of people all over the world—including United States plaintiffs' attorneys. Given the prospect of impending litigation, this article considers the legal issues and implications arising from MH370's unexplained disappearance, both with respect to the airline itself, as well as potentially interested product manufacturers.

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<sup>1</sup> Many thanks to Los Angeles summer associate Josephine Groh, Pepperdine University School of Law, for her assistance in preparing this article.

### ON THE RADAR

Not long after vanishing from air traffic control screens, MH370 appeared on the radar of plaintiffs' attorneys across the United States. Within days, lawyers from several U.S. firms descended upon Malaysia and China, soliciting the families of the 227 passengers and 12 crewmembers aboard the missing flight. Other attorneys took to the airwaves to discuss the prospect of MH370 litigation in media appearances on CNN, MSNBC, and Fox News, speculating about what might have occurred,<sup>2</sup> and one firm even filed a petition for discovery against Boeing and Malaysia Airlines—all within weeks of MH370's disappearance.<sup>3</sup>

Not to be deterred by the present lack of evidence,<sup>4</sup> the discovery petition broadly alleged that MH370 “crashed in the Southern Indian Ocean approximately seven hours after it departed” due to “the negligence of unknown individuals and entities in the design, manufacture, ownership, operation, lease, repair and maintenance of the subject Boeing 777-200ER aircraft and its component parts, among possible other causes of this occurrence.”<sup>5</sup> Although the petition was promptly dismissed as exceeding the scope of Illinois' discovery petition procedure, its filing—not to mention the breadth and generality of its allegations—aptly demonstrates the desire of plaintiffs' attorneys to litigate MH370 claims in the United States.

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<sup>2</sup> See generally Kreindler & Kreindler LLP, “Malaysia Airlines Flight 370: Kreindler Partners Comment in the Media,” at <http://www.kreindler.com/Recent-Developments/Malaysia-Airlines-Flight-370-Kreindler-Partners-Comment-in-the-Media.shtml>.

<sup>3</sup> See *Fatt v. Boeing Co., et al.*, No. 2014-L-003555 (Cir. Ct. of Cook County).

<sup>4</sup> At least one plaintiffs' attorney has publicly admitted that there is “no credible information on the cause at this time.” BUSINESS INSIDER, *There Will Be A Massive Legal Battle Over Malaysia Flight 370*, at <http://www.businessinsider.com/what-may-happen-malaysia-airlines-flight-370-lawsuits-2014-3> (quoting Brian Alexander of Kreindler & Kreindler LLP).

<sup>5</sup> *Fatt v. Boeing Co.*, No. 2014-L-003555, Pet. at ¶¶ 1, 4 (Cook County Cir. Ct., Mar. 28, 2014).

### ISSUES AND IMPLICATIONS

Months after MH370 seemingly vanished into thin air, the events of March 8, 2014 still remain a mystery. Prior to MH370's disappearance, neither the crew nor the onboard communication systems relayed any distress signal. There were no indications of bad weather, nor were any technical problems reported before the aircraft went missing.<sup>6</sup> Despite expansive search and rescue efforts, it remains unknown where the aircraft ultimately impacted, assuming it did in fact crash. Some skeptics continue to challenge this assumption, however, as there has been no confirmed flight debris, and the emergency locator transmitter (ELT)<sup>7</sup> never engaged.

Until and unless the aircraft is found, aviation experts, attorneys, and conspiracy theorists alike can only speculate as to what happened to MH370 due to the striking absence of evidence, both direct and circumstantial. The present dearth of evidence will have significant—and significantly divergent—implications for Malaysia Airlines and product manufacturers in their defense of prospective litigation arising from MH370's disappearance.

#### **A. Malaysia Airlines & the Montreal Convention**

The Montreal Convention (formally, the Convention for the Unification of Certain Rules for International Carriage by Air) is a multilateral treaty governing the liability of commercial airlines

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<sup>6</sup> By comparison, twenty-four automatic messages were transmitted through the Aircraft Communications Addressing and Reporting System (ACARS), including numerous failure reports and warnings, prior to the crash of Air France Flight 447, a 2009 international flight that crashed into the Atlantic Ocean due to an aerodynamic stall.

<sup>7</sup> The ELT, designed to transmit a distress signal, is automatically activated upon impact.

for accidents occurring onboard international flights.<sup>8</sup> Assuming the disappearance of MH370 is found to constitute an “accident,”<sup>9</sup> the Montreal Convention will govern claims against Malaysia Airlines for at least some MH370 passengers<sup>10</sup>—including those on ticketed one-way or return flights between Malaysia (MH370’s place of departure) and China (MH370’s destination), both of which are parties to the Convention.<sup>11</sup> Other liability regimes may apply, however, to passengers with more extensive travel itineraries—namely, any passenger whose point of departure or place of destination<sup>12</sup> were in a country not a party to the Montreal Convention.<sup>13</sup>

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<sup>8</sup> Convention for the Unification of Certain Rules for International Carriage by Air, concluded at Montreal, Canada, May 28, 1999, 2242 U.N.T.S. 309 (hereinafter, “Montreal Convention”). The Montreal Convention was preceded by the Warsaw Convention, the first international treaty to address compensation for victims of airline disasters and airline liability in international air transportation. (See Convention for the Unification of Certain Rules Relating to International Carriage by Air, concluded at Warsaw, Poland, Oct. 12, 1929.)

<sup>9</sup> The Supreme Court defined an “accident” under Montreal’s predecessor, the Warsaw Convention, as an “unexpected or unusual event or happening that is external to the passenger.” (*Air France v. Saks*, 470 U.S. 392, 405 (1985)). Other courts have subsequently applied this definition of “accident” to claims under Montreal. (See, e.g., *Phifer v. Icelandair*, 652 F.3d 1222, 1223-24 (9th Cir. 2011); *White v. Emirates Airlines, Inc.*, 493 Fed. Appx. 526, 529 (5th Cir. 2012); *Campbell v. Air Jamaica Ltd.*, No. 12-14860, 2014 WL 3060747, at \*5 (11th Cir. July 8, 2014).)

<sup>10</sup> By its terms, the Montreal Convention applies only to claims arising from death or injury to passengers—not crew members, whose claims are generally governed by local law. (See Montreal Convention at art. 17.)

<sup>11</sup> Most of the 227 passengers onboard MH370 were citizens of either Malaysia or China. The Montreal Convention will apply to these passengers if they booked tickets for trips intended to begin and end in their home countries.

<sup>12</sup> Regardless of any stopovers, the “place of destination” under Montreal is “the ultimate destination specified by the contract of carriage between the passenger and the carrier, not the endpoint of the outbound leg of the trip.” (*Baah v. Virgin Atl. Airways Ltd.*, 473 F. Supp. 2d 591, 597 (S.D.N.Y. 2007).)

<sup>13</sup> For instance, if the passengers onboard MH370 from Indonesia, Russia, or Taiwan originally departed from or were ultimately en route to their home countries (which are not signatories to the Convention), and MH370 were only one leg of the journey, the Montreal Convention would not apply to their claims.

## **1. Shifted Burden of Proof & Potentially Unlimited Liability**

Where the Montreal Convention applies to an accident resulting in passenger death or injury, the airline will be strictly liable for damages up to 113,100 Special Drawing Rights (SDR) per passenger.<sup>14</sup> Beyond that amount, the burden of proof lies with the airline to establish that the accident was not caused by its negligence, or that the cause was solely attributable to the actions of a third party.<sup>15</sup> With the present lack of evidence as to the cause of MH370's disappearance, Malaysia Airlines may encounter difficulty satisfying its burden, exposing it to liability above the SDR limits.

## **2. Jurisdictional Limitations**

Under the Montreal Convention, claims can be litigated in one of five potential jurisdictions: (1) the carrier's place of domicile; (2) the carrier's principal place of business; (3) the place where the carrier has a place of business through which the ticket was purchased; (4) the place of destination; or (5) the passenger's principal and permanent place of residence (to or from which the carrier operates passenger air transport services).<sup>16</sup> If Malaysia Airlines anticipates an adverse liability determination, it may seek to reduce the risk of excessive exposure by challenging lawsuits filed in unfavorable and improper fora.

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<sup>14</sup> Montreal Convention at art. 21(1). SDR is an international reserve asset, where 113,100 SDR presently converts to roughly \$175,000 USD. Shortly after MH370 disappeared, Malaysia Airlines made initial payments of \$5,000 USD to the families of the passengers to meet their out-of-pocket expenses and, subsequently, made interim "advance payments" of \$50,000 USD per passenger. The final payment amount has yet to be announced. Families unwilling to resolve their claims for the final settlement amount offered by Malaysia Airlines will have two years from the date on which the aircraft ought to have arrived at its destination—that is, March 8, 2016—to file suit under the Montreal Convention. (*Id.* at art. 35.)

<sup>15</sup> *Id.* at art. 21(2).

<sup>16</sup> *Id.* at art. 33.

Because Malaysia Airlines is domiciled and headquartered in Malaysia, and only three passengers were U.S. citizens,<sup>17</sup> Montreal's jurisdictional limitations will likely preclude most plaintiffs from litigating their claims in the United States.<sup>18</sup> In the event the United States is deemed an appropriate jurisdiction for any passenger claims, Malaysia Airlines may nonetheless seek to dismiss the action on the ground of *forum non conveniens* (FNC), a common law doctrine which allows U.S. courts to refuse jurisdiction based on a balancing of factors if there is an adequate alternative forum.<sup>19</sup> Although FNC is often used by aviation defendants to obtain dismissal from the plaintiff-friendly U.S. court system, there is, however, a question as to whether FNC dismissal is appropriate when an international treaty designates the U.S. as a proper forum to bring suit.<sup>20</sup>

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<sup>17</sup> The 227 passengers onboard MH370 came from 15 different nations: Australia, Canada, China, France, Hong Kong, India, Indonesia, Iran, Malaysia, the Netherlands, New Zealand, Russia, Taiwan, Ukraine, and the United States.

<sup>18</sup> Although nationality is not determinative in identifying a passenger's principal and permanent residence at the time of the accident, it may be indicative of a passenger's country of residence. (Montreal Convention at art. 33(3)(b).) Ultimately, however, the jurisdictional determination must be assessed on a passenger-by-passenger basis, as the place where the ticket was purchased, the place of destination, and the passenger's principal and permanent place of residence will vary by individual.

<sup>19</sup> See generally *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). See also *In re Air Crash Over the Mid-Atlantic on June 1, 2009*, 792 F. Supp. 2d 1090, 1094 (N.D. Cal. 2011).

<sup>20</sup> Compare *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009) (Montreal not a bar to FNC dismissal) with *Hosaka v. United Airlines, Inc.*, 305 F.3d 989 (9th Cir. 2002) (Warsaw preempts FNC dismissal).



## B. Product Manufacturers

Although some plaintiffs' attorneys suggest they would not initiate litigation against product manufacturers in the absence of evidence of a mechanical or design issue,<sup>21</sup> others may file suit against any party having any contact with the subject aircraft in the hopes of accessing U.S. courts. Like Malaysia Airlines, however, product manufacturers sued in the U.S. can seek dismissal of MH370 litigation in favor of a more appropriate forum. What is more, product manufacturers—who are not subject to a shifted burden of proof—can further seek dismissal on causation grounds. With the present state of the evidence, it is unlikely that prospective plaintiffs can satisfy their burden of pleading and proving claims against product manufacturers.

### 1. Pleading Stage

In Federal Court, a complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>22</sup> The Supreme Court has interpreted this rule to mean that in order to survive a motion to dismiss, the complaint must contain sufficient facts for the court to draw a reasonable inference that the defendant is liable for the alleged misconduct.<sup>23</sup>

Given the limited information available, it will be very difficult to meet this pleading burden, at least while the aircraft remains missing. While certain U.S. state courts have adopted

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<sup>21</sup> See BUSINESS INSIDER, *There Will Be A Massive Legal Battle Over Malaysia Flight 370*, at <http://www.businessinsider.com/what-may-happen-malaysia-airlines-flight-370-lawsuits-2014-3> (“Although we have no credible information on the cause at this time, *if it is determined* that a mechanical or design issue is the cause or a contributing factor to the crash, then claims will likely be brought against the aircraft manufacturer or a component manufacturer here in the United States.”) (quoting Brian Alexander of Kreindler & Kreindler LLP) (emphasis added).

<sup>22</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

<sup>23</sup> See *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); see also *Twombly*, 550 U.S. at 556.

lesser standards, without at least some evidence regarding MH370, plaintiffs should be unable to satisfy this pleading standard as to any product manufacturer.

## 2. Proof Stage

Before MH370, the total disappearance of a commercial airliner during an international flight was an unprecedented occurrence.<sup>24</sup> Although there is no authority addressing this particular situation, legal precedent arising from the disappearance of both private aircraft and maritime vessels offers instructive guidance on the proof issues likely to arise in MH370 litigation.

In *Kelley v. Central National Bank of Richmond*, a Piper aircraft went missing in unfavorable weather conditions during a flight from Florida to Virginia.<sup>25</sup> Although a submerged object was discovered during the ensuing air search (later determined by the court to be the missing plane), inclement weather prevented its recovery.<sup>26</sup> Neither the aircraft nor any debris were ultimately recovered, and the pilot and passenger were presumed dead.<sup>27</sup>

The executor of the passenger's estate filed suit, alleging that the aircraft crashed into the ocean due the pilot's negligence—in particular, "his failure to avoid weather conditions which constituted an unreasonable risk and hazard to his proper and safe operation of the said aircraft."<sup>28</sup> In evaluating the plaintiff's claims, the court first noted that the question of whether the private pilot's

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<sup>24</sup> Although Air France Flight 447 initially went missing over the Atlantic Ocean during a June 1, 2009 international flight from Rio de Janeiro to Paris, major pieces of wreckage were discovered and recovered within a week. The search operation nonetheless continued for several years, as the aircraft's black boxes were not recovered until May 2011.

<sup>25</sup> 345 F. Supp. 737, 738-39 (E.D. Va. 1972). In his final radio communication, the pilot acknowledged receipt of unfavorable current and forecast weather conditions. (*Id.* at 739.)

<sup>26</sup> *Id.* at 739-40.

<sup>27</sup> *Id.* at 739.

<sup>28</sup> *Id.*

taking off and continuing to fly under bad weather conditions constitutes negligence “is debatable to say the least.”<sup>29</sup> Turning next to the question of causation, the court found that the plaintiff failed to satisfy his burden of proof:

Assuming, without finding, that [the pilot] was negligent in taking his plane off under the conditions found to exist, that is not enough. To recover the plaintiff must prove that the claimed negligence caused the aircraft to crash. This he has failed to do. We have no evidence, either direct or circumstantial, as to how or what caused the airplane in question to crash into the ocean . . . . We can only speculate.<sup>30</sup>

Finally, the court observed that the common law doctrine of *res ipsa loquitur*<sup>31</sup> does not apply where there is insufficient evidence to prove the exact or proximate cause of the loss and dismissed the suit.<sup>32</sup>

In *In re Marine Sulphur Queen*, the Second Circuit considered the respective liability of a ship owner and shipbuilder following the disappearance of the *Marine Sulphur Queen* (the *Queen*), a converted T-2 tanker carrying a cargo of molten sulphur, while en route from Texas to Virginia.<sup>33</sup> The vessel never

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<sup>29</sup> *Id.* at 740.

<sup>30</sup> *Id.* at 741. Compare *Solomon v. Warren*, 540 F.2d 777 (5th Cir. 1976) (affirming finding of pilot negligence in operation of missing Cessna, presumed lost at sea, where transcript of final radio communication quoted pilot as reporting fuel gages reading empty and that fuel tank had burned faster than anticipated).

<sup>31</sup> *Res ipsa loquitur* (literally translated as “the thing itself speaks”) permits, under certain circumstances, an inference that the defendant breached its duty of care based on the nature of an accident.

<sup>32</sup> *Id.* (citing *Morrison v. LeTourneau Co.*, 138 F.2d 339 (5th Cir. 1943).)

<sup>33</sup> 460 F.2d 89 (2d Cir. 1972).

transmitted a radio distress signal prior to its disappearance, and despite extensive air, surface, and underwater searches, the hull was never found.<sup>34</sup> Although some evidence was located,<sup>35</sup> investigators ultimately concluded that the Queen and its company were lost at sea due to an unknown and unascertainable cause.<sup>36</sup>

Representatives of the deceased crew members filed wrongful death claims against the ship owner under maritime law,<sup>37</sup> and the shipbuilder was later impleaded as a respondent.<sup>38</sup> At trial, the district court heard evidence and expert testimony regarding the vessel's conversion from an oil tanker to a carrier of molten sulfur, the qualities and dangers of the cargo, and possible causes of the ship's loss.<sup>39</sup> Based upon the evidence, the district court concluded that the Queen was unseaworthy when it departed for its final voyage, and it found both the ship owner and shipbuilder liable to the wrongful death claimants.<sup>40</sup>

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<sup>34</sup> *Id.* at 94.

<sup>35</sup> “[T]here were discovered eight life jackets, five life rings, two name boards, a shirt, a piece of an oar, a storm oil can, a gasoline can, a cone buoy and a foghorn, all of which were marked or identified as belonging to the lost vessel.” (*Id.*)

<sup>36</sup> *Id.* “There was oil on some of the life jackets and life rings, but there were no traces of sulphur on any of the items; nor was there discovered any splintered or scorched debris or other evidence of fire or explosion.” (*Id.*)

<sup>37</sup> *Id.* Specifically, the wrongful death claimants filed suit based upon the maritime doctrine of unseaworthiness, the Jones Act, and the Death on the High Seas Act (DOHSA).

DOHSA establishes a wrongful death cause of action for accidents occurring on the high seas, including both maritime and aviation disasters. (*See* 46 U.S.C. §§ 30301 *et seq.*) Although DOHSA generally limits recovery to pecuniary loss, it was amended in 2000 to allow recovery of damages for the loss of a decedent's care, comfort, and companionship in commercial aviation accidents occurring beyond twelve nautical miles of the United States shoreline. (*See id.* at §§ 30303, 30307.) Defendants in commercial aviation litigation may nonetheless assert DOHSA as an affirmative defense because it precludes recovery of punitive damages. (*See id.* at § 30307(b).)

<sup>38</sup> *In re Marine Sulphur Queen*, 460 F.2d at 94.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 96-97.

On appeal, the Second Circuit quoted the district court's finding that "no one knows how the ship was lost" before observing that "[t]he resolution of the question of liability will, under the circumstances, be determined by the allocation of the burden of proof on the causation issue, the existence of a rebuttable presumption and whether or not that presumption has been met."<sup>41</sup> The Second Circuit then separately analyzed the potential liability of the ship owner and the shipbuilder.

With respect to the ship owner, the Court explained that "when a vessel disappears in expectable weather under otherwise unknown circumstances, proof by the plaintiffs of some element of unseaworthiness will permit the trier of fact to infer that the unseaworthiness was the proximate cause of the loss."<sup>42</sup> The burden of production would then shift to the ship owner to rebut the inference of causation.<sup>43</sup> Turning to the facts of the case, the Second Circuit accepted the district court's finding of unseaworthiness, found that the ship owner failed to produce sufficient evidence to rebut the causation inference, and affirmed the finding that the ship owner was liable to the wrongful death claimants.<sup>44</sup>

With respect to the shipbuilder, however, the Second Circuit reversed the district court's finding of liability.<sup>45</sup> In doing so, the court explained that the shipbuilder "stands in a much different position vis-à-vis the lost seamen than the owner does."<sup>46</sup> Because the wrongful death claimants were not entitled to a permissible

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<sup>41</sup> *Id.* at 98.

<sup>42</sup> *Id.* at 99.

<sup>43</sup> *Id.* at 100.

<sup>44</sup> *Id.* at 97, 100.

<sup>45</sup> *Id.* at 100-102.

<sup>46</sup> *Id.* at 101.

inference of causation with respect to the shipbuilder,<sup>47</sup> and because “[t]he cause of the disaster which befell the [vessel] was found to be unknown,” the wrongful death claimants could not prove that any fault on the part of the shipbuilder caused the vessel’s loss.<sup>48</sup> Consequently, the Second Circuit dismissed their claims against the shipbuilder.

Any product manufacturer sued in connection with the disappearance of MH370 should—like the defendants in *Kelley* and *In re Marine Sulphur Queen*—argue that the plaintiffs cannot satisfy their burden of proving causation.<sup>49</sup> As with the aircraft in *Kelley* and the ship *In re Marine Sulphur Queen*, MH370 disappeared without any prior reports of distress or indications of trouble. Moreover, as in those cases, no MH370 wreckage has been recovered despite extensive search and rescue operations. Although investigators found some items identified as belonging to the Queen, and the *Kelley* court determined that the submerged object located was the missing plane, the cause of these losses remained unascertainable in the absence of direct or circumstantial evidence of causation. As of the writing of this article, no physical evidence of MH370 has been found, and there remains no credible information on the cause of its disappearance. Consequently, any MH370 claims against product manufacturers should ultimately be dismissed due to the lack of causation evidence, as there is

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<sup>47</sup> “The duty of providing the crew with a seaworthy ship runs only to the owner, and the ship-builder neither employs the crew nor can he control what happens to the ship once she leaves his yard. Therefore, traditional tort concepts apply to the claim against [the shipbuilder] and, contrary to the trial court’s conclusion, neither justice nor logic compel the application against it of the permissible inference rule from the unseaworthiness doctrine.” (*Id.*)

<sup>48</sup> *Id.* at 102.

<sup>49</sup> *See Kelley v. Central Nat’l Bank of Richmond*, 345 F. Supp. 737, 740 (E.D. Va. 1972) (“It is well settled that the burden of proof in aircraft cases is on the plaintiff to prove by a preponderance of the evidence the negligence of the defendant and that such negligence was the proximate cause of the accident.”).

no basis for inferring causation or shifting the burden of proof.<sup>50</sup>

### CONCLUSION

In the event of U.S. litigation arising from the unexplained disappearance of MH370, both Malaysia Airlines and product defendants will likely consider seeking dismissal in favor of a more appropriate forum. Moreover, while MH370 remains missing, and there is no reliable evidence of the cause of its disappearance, product manufacturers can hope to dismiss U.S. litigation by attacking causation—both at the pleading stage, as well as later in the litigation.

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<sup>50</sup> Because Montreal's shifted burden of proof applies only to airlines, traditional tort principles should apply to claims against aviation product manufacturers.

**BIG CHANGES FOR SMALL AIRPLANES:  
HOW THE SMALL AIRPLANE REVITALIZATION ACT  
HOPES TO SAVE AN INDUSTRY**

By  
Paul M. Tyson<sup>1</sup>

INTRODUCTION

On November 27, 2013, President Obama signed the Small Airplane Revitalization Act (SARA) into law. SARA is an effort to help revive the small airplane industry by streamlining FAA certification regulations in an effort to reduce the cost of upgrades to aircraft and avionics. One thing it does not address: liability. This article addresses the history, purpose and language of the bill, as well as some possible implications for litigation as a result of the changes. Because the revisions created by SARA will be voluminous, this article will not detail all the specific changes. It will, however, provide reference to where more detailed information may be found for those interested.

**A. The Problem**

General aviation<sup>2</sup> (GA) plays a major role in the aviation industry and the economy of the United States. A few facts: 90% of the GA aircraft certified by the FAA are small airplanes;<sup>3</sup> there are more than 209,000 GA aircraft based in the U.S. (with more than 360,000 aircraft worldwide); GA annually contributes more than \$150 billion to the U.S. economy; GA employs over

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<sup>1</sup> Many thanks to Los Angeles summer associate Eric Carino, University of San Diego School of Law, for his assistance in preparing this article.

<sup>2</sup> General aviation (GA) is defined as all civil aviation operations other than military and passenger/cargo air transport operations for compensation or hire.

<sup>3</sup> Small Airplane Revitalization Act of 2013, Pub. L. No. 133-53, § 2(2). 127 STAT. 584, (Nov. 27, 2013) [hereinafter SARA], available at <http://www.gpo.gov/fdsys/pkg/PLAW-113publ53/html/PLAW-113publ53.htm>.



1.3 million people; GA accounts for over 25 million flight hours; and GA provides the training for a majority of commercial airline pilots.<sup>4</sup> Yet, the general aviation industry is struggling.

Over the past few decades, GA has seen a steady decline in new pilots, flight activity, and the sale of new aircraft.<sup>5</sup> According to the FAA, between 2010 and 2013, the number of active GA aircraft decreased from over 223,000 to 202,000.<sup>6</sup> The average small airplane in the United States is now 40 years old.<sup>7</sup> In 1980, there were over 827,000 active certified pilots in the U.S., but only 617,000 at the end of 2011.<sup>8</sup> Since 2003, the United States has lost an average of 10,000 active pilots per year, partially due to lack of new small airplanes.<sup>9</sup> The lack of development in GA has also led to a reduction in the number of utilized small airfields, production of GA fuels, and a reduced availability of parts.<sup>10</sup>

The U.S. Congress and many industry experts believe that these challenges are partially the result of the FAA's outdated and overly technical certification processes that drive up the cost of

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<sup>4</sup> General Aviation Manufacturers Association (GAMA), *General Aviation Statistical Databook & 2014 Industry Outlook*, at C2 (2014), available at [http://www.gama.aero/files/2013\\_GAMA\\_Databook-LowRes-02192014.pdf](http://www.gama.aero/files/2013_GAMA_Databook-LowRes-02192014.pdf).

<sup>5</sup> COMM. ON TRANSP. AND INFRASTR., *Fact Sheet: H.R. 1848—Small Airplane Revitalization Act of 2013*, July 15, 2013 [hereinafter H.R. 1848], available at <http://docs.house.gov/meetings/PW/>.

<sup>6</sup> *FAA Aerospace Forecast Fiscal Years 2014-2034* at 55, available at [http://www.faa.gov/about/office\\_org/headquarters\\_offices/apl/aviation\\_forecasts/aerospace\\_forecasts/2014-2034/media/FAA\\_Aerospace\\_Forecasts\\_FY2014-2034.pdf](http://www.faa.gov/about/office_org/headquarters_offices/apl/aviation_forecasts/aerospace_forecasts/2014-2034/media/FAA_Aerospace_Forecasts_FY2014-2034.pdf).

<sup>7</sup> SARA at § 2(6).

<sup>8</sup> Len Assante, *The Changing Face of General Aviation*, GENERAL AVIATION NEWS, Feb. 20, 2014, available at <http://generalaviationnews.com/2014/02/20/the-changing-face-of-general-aviation/>.

<sup>9</sup> SARA at §2(7).

<sup>10</sup> Assante, *supra* note 8.

developing new and maintaining existing aircraft.<sup>11</sup> FAA certification plan acceptance sometimes takes 3-5 months for small planes and over a year for new airplanes or major derivatives.<sup>12</sup> These processes can take even longer while waiting for special conditions, exemptions, Equivalent Level of Safety (ELOS) findings, or because the FAA wants more detailed compliance information on individual sections of the airplane.<sup>13</sup> Currently, the FAA estimates that the development of a new airplane or a derivative may cost from \$1M to \$3M per month and development and certification costs for major changes may cost from \$250K to \$500K per month.<sup>14</sup>

## **B. Purposes of SARA**

In August 2011, the FAA commissioned the “Part 23 Reorganization Aviation Rulemaking Committee” (ARC) to develop recommendations that would streamline 14 C.F.R. 23 (Part 23) and remove regulatory barriers for modifying existing aircraft and bring new, safer small airplane designs and advancements to market.<sup>15</sup> On May 7, 2013, House Resolution 1848 was introduced as the “Small Airplane Revitalization Act”

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<sup>11</sup> COMM. ON TRANSP. AND INFRASTR, *supra*. note 5.

<sup>12</sup> 14 C.F.R. Part 23 Reorganization Aviation Rulemaking Committee to the Federal Aviation Administration, *Recommendations for Increasing the Safety of Small General Aviation Airplanes Certified to 14 CFR Part 23*, June 5, 2013 [hereinafter ARC REPORT]. at 57, available at [http://www.faa.gov/regulations\\_policies/rulemaking/committees/documents/media/Part.23.Reorganization.ARC.FINAL.Report.pdf](http://www.faa.gov/regulations_policies/rulemaking/committees/documents/media/Part.23.Reorganization.ARC.FINAL.Report.pdf).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 55.

<sup>15</sup> *Id.* at vi. F.A.R. Part 23 prescribes FAA airworthiness and safety standards for changes to certificates for GA aircraft.

(SARA). President Obama signed it into law on November 27, 2013. SARA directs the FAA to develop final rules that:

- (1) Establish a regulatory regime for small airplanes that will improve safety and reduce the regulatory cost burden for the FAA and aviation industry;
- (2) Establish broad, outcome-driven safety objectives that will spur innovation and technology adoption;
- (3) Replace the current prescriptive requirements under Part 23 with performance-based regulations; and
- (4) Use consensus standards enacted by the FAA to clarify how the safety objectives of Part 23 may be met using specific designs and technology.<sup>16</sup>

SARA set a deadline of December 15, 2015, for the FAA to issue the final rules.<sup>17</sup>

### C. ARC's Final Report

Because the FAA has not yet issued the final rules, it is uncertain at this time what those rules will ultimately look like. SARA's legislative text is minimal and merely directs the FAA to adopt rules consistent with the ARC's final report.<sup>18</sup> As a result, the ARC's final report is the most instructive source for determining what the new FAA rules will probably look like. The ARC's report is extremely comprehensive<sup>19</sup> and includes detailed "model" regulations and proposed rules.<sup>20</sup> The report proposes: (i) simplified part 23 regulations;<sup>21</sup> (ii) revising the type/production

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<sup>16</sup> SARA at § 3(b).

<sup>17</sup> *Id.* at § 3(a).

<sup>18</sup> *Id.* at § 3(b).

<sup>19</sup> For an overview of the ARC's recommendations, see "Executive Summary" ARC REPORT at iv-ix; also "Summary," ARC REPORT at 60.

<sup>20</sup> The ARC Report's Model Regulations can be found at "14 CFR Part 23 Recommended Revision Language," Appendix E, ARC REPORT at 76-114.

<sup>21</sup> "Regulatory Structures Working Group—Recommendations," ARC REPORT at 44.

certification process,<sup>22</sup> and (iii) easing the restrictions on making alterations to existing aircraft.<sup>23</sup> Summarized below are the more salient provisions of the report:

### **I. Re-Write Part 23 Regulations without Technical Specifications<sup>24</sup>**

The ARC sought to retain the enforceable, performance based safety objectives in Part 23 while moving the prescriptive and technology dependent provisions for methods of compliance out of regulatory text and into the FAA accepted consensus standards (e.g., Airworthiness Design Standards).<sup>25</sup> The idea being that the standard for safety should be defined, rather than defining solutions that are assumed to achieve an acceptable level of safety.<sup>26</sup> The ARC recommended defining regulations in a manner independent of aircraft performance level, complexity, or configuration (i.e. the regulations will define what is expected and enforceable, but not “how”).<sup>27</sup> The new requirements will not contain any prescribed technical requirements unless specifically needed to drive the rule’s top-line safety objective.<sup>28</sup>

### **II. Type Certification/ Production Certification<sup>29</sup>**

The ARC recommended standardizing configuration management processes as an alternative to the traditional

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<sup>22</sup> “Type Certification/Production Certification Working Group—Recommendations,” ARC REPORT at 45-48.

<sup>23</sup> “Alterations and Maintenance Working Group—Recommendations,” ARC REPORT 49-53.

<sup>24</sup> See generally “3.1 Regulatory Structure” ARC REPORT at 6-17; “14 CFR Part 23 Recommended Revision Language,” Appendix E, ARC REPORT at 76-114.

<sup>25</sup> ARC REPORT at 9-10.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See generally “3.2 Type Certification/Production Certification,” ARC REPORT at 17-30; “Type Certificate/Production Certificate Report,” Appendix F.1, ARC REPORT at 115-25.

conformity process.<sup>30</sup> The “minor change” process would be standardized through the issuance of guidance material or policy.<sup>31</sup> Certification requirements would be aligned with the complexity of the product being developed and the industry track record of the manufacturer.<sup>32</sup> The use of remote video for test witnessing would be increased so that there is no longer a requirement to have an FAA representative physically present when the test is videotaped.<sup>33</sup> The ARC also recommended promulgation of model Production Manual templates to give startup companies an understanding of the basic requirements for production certification.<sup>34</sup>

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<sup>30</sup> ARC Report at 45-46 (“The current conformity process is very labor intensive and disjointed by the fact that individual Requests For Conformity (RFC) are frequently required for different tests on the same test article. Coordinating these RFCs requires significant manual effort, spreadsheets, or even software for complex aircraft programs. This can be accomplished more quickly and efficiently using an integrated data management system that links the test plan requirements directly to the test article configuration and test schedule.”). See also “Conformity White Paper,” Appendix F.3, ARC REPORT at 131-34.

<sup>31</sup> ARC REPORT at 46 (“The FAA should evaluate the Minor Change Approval process defined in the white paper and issue a policy memo or other statement supporting it as a ‘method acceptable to the FAA.’ Each company can then decide to either stay with the currently approved process or adopt this new one.”). The White Paper is located in Appendix F.4, ARC REPORT at 141-48.

<sup>32</sup> ARC REPORT at 46-47 (“[The ARC] proposes a structure for when an applicant showing only is sufficient considering both the applicant capabilities and risk of improper test conduct/data analysis and the resulting potential impact on safety.”) See also, “TC/PC Applicant Showing Only White Paper,” Appendix F.5, ARC REPORT at 149-57.

<sup>33</sup> ARC REPORT at 47 (“The ARC recommends that new guidance be developed to provide a video witnessing standard that can be referenced by applicants and FAA personnel, and to provide the minimum requirements by which video witnessing can be successfully utilized.”). See also, “Video Only Test Witnessing White Paper,” Appendix F.6, ARC REPORT at 158-63.

<sup>34</sup> ARC’s model “Production Certification Manual” can be found in Appendix F.7, ARC REPORT at 164-210.

### III. Alterations and Maintenance<sup>35</sup>

SARA would reduce regulatory requirements for development and installation of safety related systems and equipment components.<sup>36</sup> The ARC also sought to ensure that operational aircraft continue to comply with applicable rules after the introduction of the new part 23.<sup>37</sup> In order to better regulate preventative maintenance, the ARC would re-write 14 C.F.R. 43 to allow for modification of the FAA's list of authorized preventative maintenance operations without official rule making.<sup>38</sup>

### IV. New Category of Airworthiness

SARA would also create a new category of airworthiness: a primary non-commercial category.<sup>39</sup> This would allow private owners to operate their aircraft in a substantially less burdensome

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<sup>35</sup> See generally “3.3 Alterations and Maintenance,” ARC REPORT at 30-43.

<sup>36</sup> A summary of ARC's recommendations for systems and equipment can be found at “6.1 Facilitation of Systems & Equipment,” ARC REPORT at 49-50. A comprehensive analysis of ARC's systems and equipment recommendations can be found at “Certification of Systems and Equipment,” Appendix G.3, ARC REPORT at 292-307.

<sup>37</sup> A summary of ARC's recommendations for upgrading operational aircraft can be found at “6.2 Critical Information for Alternations & Maintenance,” ARC REPORT at 50-51. A comprehensive analysis of ARC's systems and equipment recommendations can be found at “STCs and Alterations,” Appendix G.2, ARC REPORT at 282-92.

<sup>38</sup> ARC REPORT at 38-39 (“At present, the only means by which the list of authorized preventive maintenance operations can be modified is through [official FAA] rulemaking. There is no allowance for additional authorizations in guidance or by policy, nor is there any allowance for authorization of type- or installation-specific preventive maintenance. This poses a substantial impediment to the safe and effective conduct of an increased variety of PM operations in the field.”); ARC REPORT at 52 (“Part 43 should be changed to include ‘other operations acceptable to the Administrator’ as preventative maintenance under § 43.3(g).”). See also, “Preventative Maintenance,” Appendix G.1, ARC REPORT at 276-81.

<sup>39</sup> See generally “3.3.5 Primary Non-Commercial Category,” ARC REPORT at 39-43; “Primary Non-Commercial Category Proposal,” Appendix G.4, ARC REPORT 308-35.

and costly manner by reducing the level of FAA maintenance and alteration requirements to a level appropriate for a privately owned vehicle.<sup>40</sup> It would apply to fixed wing, non-turbine powered Part 23 aircraft or gliders, that were 20 years or older.<sup>41</sup> An owner may elect to re-designate at anytime.<sup>42</sup> The advantages of this would include the following: (1) aircraft can be maintained by the owner with a repairperson's certificate; (2) replacement or alteration parts need not be PMA/TSO authorized; and (3) owners can alter their aircraft without the requirement for FAA approved data.<sup>43</sup>

#### **D. Possible Impact of SARA on Liability**

Unlike GARA,<sup>44</sup> SARA does not expressly address manufacturer or operator liability. However, there are some tentative changes that may have implications for liability, some of which are discussed below.

##### **I. Preemption**

The ARC's proposed rewrite of Part 23 could impact preemption. Preemption occurs when a federal law "thoroughly occupies" the "legislative field" in question such that the guidance provided by the federal law will set the standard of care that a manufacturer must provide.<sup>45</sup> Congress can expressly write preemption into a law, or preemption can be implied when Congress writes a very extensive or thorough regulatory scheme.<sup>46</sup> Federal Courts typically look to see if there are pervasive federal

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<sup>40</sup> ARC REPORT at 40.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 40-41. This is a non-exhaustive list. For a complete list of Privileges, Limitations, Applications and Requirements see ARC REPORT at 311.

<sup>44</sup> GENERAL AVIATION REVITALIZATION ACT OF 1994 [hereinafter GARA], PL 103-298, August 17, 1994, 108 Stat 1552.

<sup>45</sup> *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 367 (3rd Cir. 1999).

<sup>46</sup> John C. Nettels, Jr. & Jerrick L. Irby, *Standard of Care Preemption in Aviation Litigation: Halting Steps to A Coherent Analysis*, 76 J. Air L. & Com. 327, 331 (2011).

regulations on the topic, and to the extent that there are, the federal regulation will establish the standard of care.<sup>47</sup> The various circuit courts have split on to what extent FAA regulations set the standard of care for aviation safety.<sup>48</sup> Courts frequently conclude that “the FAA and [other] relevant federal regulations establish complete and thorough safety standards for interstate and international air transportation” sufficient to establish “the applicable standards of care in the field of air safety.”<sup>49</sup> Preemption of the standard of care, however, does not preempt other state-based claims, such as negligence or the availability of certain remedies.<sup>50</sup> Still, other courts find that federal standards are a “minimum” and that a common law duty of safety may be owed beyond the FAA regulations.<sup>51</sup>

In its current form, Part 23’s prescriptive, highly technical nature<sup>52</sup> supports an argument that Part 23 should define the standard of care. It is uncertain at this time how the FAA will phrase the new legislation but a rewrite of Part 23 to exclude all technical language from the regulatory text, replacing it with broad language dealing with the “safety intent” of the rule,<sup>53</sup> could undermine the regulation’s preemptive scope. If courts are already struggling with whether or not FAA regulations define the standard of care, then the removal of highly specific and technical language would most likely lead to less findings of preemption. This, in turn, would create more liability because manufacturers might be subject to meeting the standard of care of all 50 states.<sup>54</sup>

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<sup>47</sup> *Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995, 1006 (9th Cir. 2013).

<sup>48</sup> *Nettles*, supra note 47 at 328.

<sup>49</sup> *Abdullah*, 181 F.3d at 367.

<sup>50</sup> *Elassad v. Independence Air, Inc.*, 613 F.3d 119, 125 (3rd Cir. 2010).

<sup>51</sup> *Abdullah*, 181 F.3d at 373-74.

<sup>52</sup> ARC REPORT at 6 (Noting that Part 23 currently incorporates “very specific technical requirements”).

<sup>53</sup> *Id.* at 9-10.

<sup>54</sup> *Buckman Co. v. Plaintiff’s Legal Committee*, 531 U.S. 341, 342 (2001)(“Complying with [a federal agency’s] detailed regulatory regime in the shadow of 50 States’ tort regimes will dramatically increase the burdens facing potential applicants...”).



## II. Videotaped Testing Subject to Discovery and Admission into Evidence

SARA's broad endorsement of videotaped testing in lieu of FAA inspectors being physically present may have discovery and evidentiary implications.<sup>55</sup> Currently, videotapes are considered "photographs" under the Federal Rules of Evidence.<sup>56</sup> As such, videos are subject to the same standards as other evidence for admission (foundation, relevance, etc.) and are routinely admitted into evidence. This includes videos conducted for scientific testing purposes.<sup>57</sup>

It is unknown how the new Part 23 will phrase the requirements for the allowance of videotaped testing. It can be assumed, however, that this increase in flexibility will dramatically increase the amount of testing conducted using videotape. Most likely, Part 23 will have provisions requiring the safe storage and retention of said videos. As a result, these videos will be available for evidence and discovery should there be future litigation. This may not lead to an increase in litigation, but should litigation arise, evidence of this nature may or may not be helpful at trial. This is especially significant considering the powerful impact that videos often have with juries when compared to raw data or an expert's testimony.

### E. Current Status of the Law

The specific new language of Part 23 has not been written. SARA requires implementation of the law no later than December 31, 2015. On July 23, 2014, the FAA's associate administrator for aviation safety testified that the FAA would miss

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<sup>55</sup> *Id.* at 46-47.

<sup>56</sup> FED. R. EVID. 1001, note to para. (2).

<sup>57</sup> E.g., *Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408, 413 (3rd Cir. 2002)(Video of testing on engine seals was properly admitted into evidence).

the December 2015 deadline to issue the final rules.<sup>58</sup> The FAA estimates that the rulemaking will not be complete until 2017, two years after the deadline set by SARA.<sup>59</sup>

#### **A. Monitoring Developments in the Law and Providing Feedback to the Government:**

For those interested in monitoring the development of the changes to Part 23 and providing the FAA with feedback, following its publication, there will be an opportunity to review the changes to Part 23. Federal agencies are required to publish notices of proposed rulemaking in the *Federal Register* so citizens may participate in the Government's decision making process.<sup>60</sup> Notice and comment proceed as follows:

1. A proposed rule published in the *Federal Register* notifies the public of a pending regulation.
2. Any person or organization may comment on it directly, either in writing, or orally at a hearing. Many agencies also accept comments online or via e-mail. The comment period varies, but it usually is 30, 60, or 90 days. For each notice, the *Federal Register* gives detailed instructions on how, when, and where a viewpoint may be expressed. In addition, agencies must list the name and telephone number of a person to contact for further information.
3. When agencies publish final regulations in the *Federal Register*, they must address the significant issues raised in comments and discuss any changes

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<sup>58</sup> Elizabeth A. Tennyson, *Certification Reform Will be Delayed, FAA Tells Congress*, AOPA, July 25, 2014, <http://www.aopa.org/News-and-Video/All-News/2014/July/25/Certification-reform-will-be-delayed-FAA-tells-Congress>.

<sup>59</sup> *Id.*

<sup>60</sup> <http://www.archives.gov/federal-register/the-federal-register/about.html#howcan>.

made in response to them. Agencies also may use the notice and comment process to stay in contact with constituents and to solicit their views on various policy and program issues.<sup>61</sup>

### CONCLUSION

Congress has recognized there are many challenges facing the small airplane industry. Some of the biggest obstacles are the regulations created by the FAA that inhibit innovative changes and the development of more cost-effective and safer technologies. The Small Airplane Revitalization Act seeks to remove some of those obstacles, but questions remain: How effective will SARA be in revitalizing the small airplane industry? How much unnecessary red-tape will remain after revisions to Part 23? Will there be any long-term effects, positive or negative, in regards to liability? With the December 31, 2015, deadline looming, the FAA has already told Congress that it will not be able to meet the required implementation date until 2017, which prompts the question: Will the culture of the FAA allow for this type of sea change? Only time will tell. In the meantime, those in the small airplane industry should familiarize themselves with the recommended changes. Hopefully, this will allow the industry to provide the government with well-informed feedback on the most beneficial ways for the industry to thrive in an efficient regulatory environment without losing the FAA's strong focus on safety.

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<sup>61</sup> *Id.* Comments may be submitted by following the steps outlined here: <https://www.federalregister.gov/blog/2014/07/new-submit-a-formal-comment-feature>.

**MILITARY CONTRACTOR DEFENSES—CASE LAW UPDATE**

By  
Mark R. Irvine  
Brian J. Headman

**INTRODUCTION**

A survey of defenses available to military equipment manufacturers appeared in a previous issue of this law report.<sup>1</sup> This article reports on the development of those defenses through a discussion of recent case law.

**I. Government Contractor Defense**

This federal preemption defense is based on the notion that the same immunity that the government would have against a claim for product liability, had the government produced the product, should extend to a contractor who follows the government's specifications in producing the product. To prevail on the defense, the contractor must show that (1) the government approved reasonably precise specifications for the equipment; (2) the equipment conformed to specification; and (3) the contractor warned the government of dangers known to the contractor but not to the government.<sup>2</sup>

**UPDATE**

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

Our firm was involved in this recent government contractor defense case in which the product defendants prevailed on summary judgment in the District Court, which was affirmed on

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<sup>1</sup> Mark R. Irvine, A Survey Of Available Defenses For Military Equipment Manufacturers, Aircraft Builder's Council Inc. Law Report 23 (Fall 2009).

<sup>2</sup> *Boyle v. United Technologies Corp.*, 487 U.S. 500, 512 (1988).

appeal by the Ninth Circuit in a published opinion. The U.S. Supreme Court denied Plaintiffs' petition for review.

The case arose from a Chinook MH-47E helicopter crash in Afghanistan in 2007, resulting in 8 deaths and injuries to 14 US servicemen. Plaintiffs sued Boeing, Honeywell and Goodrich for alleged defects in the helicopter, engines, and the computerized engine control system—the Full Authority Digital Electronic Control (FADEC)—which included a microcomputer that interfaced the engine with the cockpit controls and regulated fuel flow to the engine (DECU). Plaintiffs alleged that product defects in these components caused one of the engines to flame out, causing the crash.

To prove the defense's first element—that the government approved reasonably precise specifications for the equipment—evidence was submitted showing substantial “back and forth dialogue” between the defendants and the government during the Army's procurement and approval of the aircraft components at issue. Both the District and Ninth Circuit Courts agreed that the defendants met this element by providing Army personnel “with lengthy and detailed design specifications describing” the components, including “diagrams and drawings for engine controls; engine configuration requirements; and tests for the engine's ignition system,” and “complex diagrams and design drawings of the FADEC, a description of fault monitoring procedures for the DECU, algorithms for troubleshooting, and a system for engine fail detection.”<sup>3</sup> The Court emphasized the importance of the “back and forth” collaboration as sufficient to satisfy this first element, stating: “perhaps more importantly, the evidence [established] that the Army carefully scrutinized, tested, and made necessary changes to the FADEC . . . . This type of exchange and scrutiny is sufficient to demonstrate that the government exercised judgment in approving this product's design.”<sup>4</sup>

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<sup>3</sup> *Getz*, 654 F.3d at 861-62.

<sup>4</sup> *Id.* at 863.

Plaintiffs based one of their arguments on the fact that Goodrich had originally produced the FADEC for the U.K.'s Royal Air Force, and thus should not be entitled to assert a defense that is based on doing work for the U.S. government with respect to an already existing product. The Court found that despite this fact, the U.S. Government nevertheless scrutinized and approved the FADEC specifications as required by the first element of the defense.<sup>5</sup>

The same evidence helped to support the second element of the defense: conformance to specification. The Court held that “the operative test for conformity with the reasonably precise specifications turns on whether ‘the alleged defect . . . exist[ed] independently of the design itself.’”<sup>6</sup> Where there was no evidence of some latent manufacturing defect in the product that went undetected when the government accepted the product, the Court held that the “government’s careful scrutiny and subsequent certification ... provide sufficient proof of conformity.”<sup>7</sup>

As to the third element, warning of dangers, the Court held that the contractors were not required to inform the government about risks of which the Government was already aware.<sup>8</sup> The Court thus rejected Plaintiffs’ argument that Honeywell should have warned about the risk of water ingestion causing the engine to flame out, or that Goodrich should have warned about other FADEC anomalies experienced in other Army helicopters. The government was already aware of those risks.<sup>9</sup>

The Court also separately applied the same three-part test to Plaintiffs’ failure to warn claims, and explained that a contractor must show that the “approved reasonably precise specifications” that the contractor complied with had the effect of

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<sup>5</sup> *Id.* at 863.

<sup>6</sup> *Id.* at 864.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 865-66.

<sup>9</sup> *Id.*

limiting the contractor's ability to comply with a tort law duty to warn.<sup>10</sup> The Court found that the Army's complete control over the helicopter Operator's Manual, including what warnings to include, met the test. Because the Army "considered, reviewed, and determined which warnings to provide, the government's exercise of discretion necessarily "conflicts" with the Contractors' "duty to warn under state law."<sup>11</sup>

***Livingston v. 3M Company, No. CV 12-1220-SVW DTB (C.D. Cal. July 11, 2013)***

This case is notable because Plaintiff, rather than Defendants, moved for summary judgment for a finding that the government contractor defense did *not* apply. The Plaintiff sued contractors who supplied aircraft engines to the Air Force, alleging he was exposed to engine components that contained asbestos while working as an electrician.

Plaintiff argued that defendants could not meet the first requirement of the defense—that the government approved reasonably precise specifications. In response, defendants submitted specifications and declarations, but the District Court found the evidence lacking because it did not reflect whether the government required asbestos. The Court ruled that the evidence "would not enable a rational fact-finder to conclude that the Air Force exercised Judgment concerning the use of the asbestos parts in the . . . engines."

The Court also reached its conclusion by focusing on the "design feature in question"—the asbestos-containing components. Thus, while the Court accepted that the Air Force specified a particular engine which contained asbestos components, this did not "logically imply that the Air Force also required Pratt & Whitney to use asbestos parts in those engines." Even a

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<sup>10</sup> *Id.* at 866-67.

<sup>11</sup> *Id.*

“comprehensive approval of a product’s specifications” will not suffice if there is no evidence that the government “exercised discretion with respect to the specific design feature at issue.”

Plaintiff also argued that the defense did not apply to his failure-to-warn claim, and the Court agreed. Although defendants submitted declarations stating that all warnings were under the Air Force’s “exclusive control,” the Court concluded that no evidence indicated that the Air Force exercised discretion in a manner that limited the defendants’ ability to warn about asbestos, or that the Air Force procedures impeded the defendants from gaining approval for including warnings about asbestos.

Finding no issues of fact to be tried, the District Court granted Plaintiff’s motion for summary judgment as to defendants’ government contractor defense on the design defect and failure to warn claims.

## **II. Combatant Activities Exception to the Federal Tort Claims Act**

The combatant activities exception is based explicitly on 28 U.S.C. § 2680(j), which excepts from the government’s waiver of immunity “[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.”<sup>12</sup> Similar to the government contractor defense, the combatant activity defense applies where state tort law significantly conflicts with federal interests.<sup>13</sup> Federal interests during war have been found to be so great and in such conflict with traditional tort duties of care that the combatant activities exception “casts an immunity net over any claim that arises out of combat activities.”<sup>14</sup>

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<sup>12</sup> *Koohi v. United States*, 976 F.2d 1328, 1330-31 (9<sup>th</sup> Cir. 1992).

<sup>13</sup> *Saleh v. Titan Corp.*, 580 F.3d 1, 6 (D.C. Cir. 2009).

<sup>14</sup> *Id.*; *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1490 (C.D. Cal. 1993) (federal interest even stronger in combat context).



The exception recognizes that “during wartime encounters no duty of reasonable care is owed to those against whom force is directed,”<sup>15</sup> and also protects “federal interests that exist in wartime [which] would be frustrated by allowing state tort suits against government contractors that arise from wartime deaths.”<sup>16</sup>

Although questions remain as to the definition of “combatant activity,” and to the defense’s applicability to private government contractors, the recent cases are trending towards broader application of the defense and greater immunity for government contractors.

#### UPDATE

Although the defense has been applied to equipment manufacturers in the past,<sup>17</sup> the more recent cases addressing the defense have been in the context of government contractors who provide services.

#### ***Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009)**

In *Saleh*, the D.C. Circuit held that the combatant activities exception preempted claims by Iraqi nationals against two American companies that contracted with the U.S. military to provide interrogators and interpreters.<sup>18</sup> Coining the term “battlefield preemption,” the Court observed that “the federal government occupies the field when it comes to warfare, and its interest in combat is always ‘precisely contrary’ to the imposition of a non-federal tort duty.”<sup>19</sup>

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<sup>15</sup> *Koohi*, 976 F.2d at 1337.

<sup>16</sup> *Bentzlin*, 833 F. Supp. at 1492.

<sup>17</sup> *See, e.g. Koohi*, 976 F.2d 1328; *Bentzlin*, 833 F. Supp. 1486; *Flanigan v. Westwind Techs. Inc.*, 648 F. Supp. 2d 994 (W.D. Tenn. 2008).

<sup>18</sup> 580 F.3d at 2.

<sup>19</sup> *Id.* at 7.

Relying on the rationale that “the policies of the combatant activities exception are equally implicated whether the alleged tortfeasor is a soldier or a contractor engaging in combatant activities at the behest of the military and under the military’s control,” the Court established the following test for applying the combatant activities exception to government contractors providing services to the federal government: “During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor’s engagement in such activities shall be preempted.”<sup>20</sup>

The Court concluded that preemption was appropriate because “[t]he contractors’ employees were combined with military personnel for the purpose of performing the interrogations,” and were integrated into the military’s units and essentially functioned as “soldiers in all but name.”<sup>21</sup> By contrast, the Court stated that “performance-based” contracts would not justify preemption, reasoning:

Because performance-based statements of work ‘describe the work in terms of the required results rather than either “how” the work is to be accomplished or the number of hours to be provided,’ . . . by definition, the military could not retain command authority nor operational control over contractors working on that basis and thus tort suits against such contractors would not be preempted under our holding.<sup>22</sup>

Rather, for the defense to apply, the claim must essentially challenge the decisions of the federal government, not the contractor.

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<sup>20</sup> *Id.* at 7-9.

<sup>21</sup> *Id.* at 4 (quoting *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1, 5 (D.D.C. 2007)).

<sup>22</sup> *Id.* at 10.

***Aiello v. Kellogg, Brown & Root Services, Inc., 751 F. Supp. 2d 698 (S.D.N.Y. 2011)***

*Aiello* involved the activities of the same contractor as in *Saleh*, but concerned services performed on a military base without any direct connection to combat activities.<sup>23</sup> Nevertheless, the Court applied the defense and dismissed Plaintiff's claims that Kellogg negligently designed, constructed, and maintained a bathroom on the base.<sup>24</sup> The Court held that:

[T]he design, operation and maintenance of basic life-support facilities at a forward operating base, which served as a refit and re-arming point for soldiers involved in combat and which came under hostile fire, is necessary to and in direct connection with actual hostilities. It is therefore combatant activity.<sup>25</sup>

Because bathrooms are directly related to the health of fighting forces and, therefore, "integral to sustaining combat operations," latrine maintenance was held to be combatant activity.<sup>26</sup> The Court's preemption of claims against Kellogg for providing latrine services likely stands as the greatest expansion of the combatant activities exception to date.

***Harris v. Kellogg Brown & Root Services, Inc., 724 F.3d 458, 480 (3d Cir. 2013)***

In *Harris v. Kellogg, Brown & Root Services, Inc.*, Kellogg again faced claims related to services it provided on a military base. The Plaintiffs claimed that a soldier's death by electrocution while showering at the base was caused by Kellogg's negligent electrical maintenance. Although the Court rejected the defense in this case,

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<sup>23</sup> *Aiello*, 751 F. Supp. 2d 698.

<sup>24</sup> *Id.* at 701.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 714.

the Court's opinion supports broader application of the defense in the future.

The Court adopted the *Saleh* formulation of the combatant activities exception, holding that “[d]uring wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor’s engagement in such activities shall be preempted.”<sup>27</sup> The Court also adopted the Ninth Circuit’s broad definition of “combatant activities,” which includes “not only physical violence, but activities both necessary to and in direct connection with actual hostilities,” and unequivocally stated that “maintaining the electrical systems for a barracks in an active war zone is analogous to supplying ammunition to fighting vessels in a combat area and is certainly necessary to and in direct connection to the hostilities engaged in by the troops living in those barracks.”<sup>28</sup> However, the Court found that because Kellogg’s military contracts and work orders did not prescribe how Kellogg was to perform the work, the military “did not retain command authority over [Kellogg]” as required for the defense to apply under *Saleh*.<sup>29</sup>

This case is notable because it combined the Ninth Circuit’s broad definition of “combatant activity” with the more generous *Saleh* formulation of the combatant activities exception.

***In re KBR, Inc., Burn Pit Litigation, 744 F.3d 326 (4th Cir. 2014)***

In *Burn Pit Litigation*, the Fourth Circuit Court analyzed the application of the combatant activities exception to the claims of American soldiers, veterans, and former contractor employees who alleged injuries resulting from exposure to emissions from open burn pits and to contaminated water at military bases in Iraq

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<sup>27</sup> *Harris*, 724 F.3d at 480.

<sup>28</sup> *Id.* at 481 (quoting *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948)).

<sup>29</sup> *Id.*

and Afghanistan.<sup>30</sup> Ultimately, the Court remanded the case for further discovery, but in doing so, the Court followed the Third Circuit’s lead in *Harris* and adopted both the *Saleh* formulation of the combatant activities exception and the Ninth Circuit’s definition of “combatant activity.”<sup>31</sup> This case, in combination with the *Harris* holding, seemingly clears a path for the broader application of the defense in the future—one which will likely benefit government contractors operating in combat zones around the globe.

*Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702 (D. Md. 2010) and *Al Shimari v. CACI Premier Tech., Inc.*, 657 F. Supp. 2d 700 (E.D. Va. 2009)

*Al-Quraishi v. Nakhla* and *Al Shimari v. CACI Premier Tech., Inc.*, rejected the defense in cases involving government contractors that provided interrogators and interpreters for the United States military in Iraq. The decisions are directly at odds with *Saleh*, and were both eventually reversed on separate interlocutory appeals which were then consolidated and dismissed on an en banc hearing by the Fourth Circuit.<sup>32</sup> Nevertheless, the opinions demonstrate what can result when a district court prefers a more narrow definition of “combatant activity.”

In *Al Shimari v. CACI Premier Tech., Inc.*, the court held that “merely being an ‘important incident of war’ does not make something a combatant activity.”<sup>33</sup> Instead, the Court limited its definition to “the *actual engaging in the exercise of physical force*.”<sup>34</sup> The Court chose this more limited definition because it

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<sup>30</sup> *Burn Pit Litig.*, 744 F.3d at 351.

<sup>31</sup> *Id.* at 349-351.

<sup>32</sup> *Al Shimari v. CACI Int’l, Inc.*, 679 F.3d 205 (4th Cir. 2012) (holding the district courts’ decisions were not subject to interlocutory appeal and therefore dismissing the appeals).

<sup>33</sup> 657 F. Supp. 2d at 720.

<sup>34</sup> *Id.* (quoting *Skeels v. United States*, 72 F. Supp. 372, 374 (W.D.La.1947)) (original emphasis).

believed that providing services to support a war effort does not equate to conducting combatant activities.<sup>35</sup> The Court in *Al-Quraishi v. Nakhla* also criticized the *Saleh* opinion as an overly broad application of immunity to government contractors.<sup>36</sup> The Court rejected *Saleh* and held that “using the combatant activities test as a basis for government contractor immunity goes against the teaching of *Boyle* and the principles of preemption.”<sup>37</sup>

Although the Fourth Circuit appeals which reversed these decisions were eventually dismissed, the decisions are not likely to hold much weight. They are directly adverse to the majority trend applying the combatant activities exception, and following, at least in part, the direction of *Saleh* and the Ninth Circuit’s definition of “combatant activity.”

### III. Political Question Doctrine

The political question doctrine is a potential ground for the dismissal of a case where the claim or defense presents questions that are “in their nature political, or which are, by the constitution and laws, submitted to the executive . . . .”<sup>38</sup> The United States Supreme Court has held that, in order for courts to have subject matter jurisdiction over a controversy, the claim must be justiciable. Claims which give rise to questions that are “political” are not justiciable because they are deemed to be outside of the judicial branch’s power, and thus must be dismissed.<sup>39</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> 728 F. Supp. 2d at 740.

<sup>37</sup> *Id.*

<sup>38</sup> *Marbury v. Madison*, 5 U.S. 137, 170 (1803).

<sup>39</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962).

UPDATE***Harris v. Kellogg Brown & Root Services, Inc.*, 724 F.3d 458, 480  
(3d Cir. 2013)**

In addition to the *Harris* Court’s analysis regarding the combatant activities exception discussed above, the Third Circuit also examined that suit’s justiciability under the political question doctrine. In that regard, the Court held that Kellogg Brown & Root Services, Inc.’s (KBR’s) cause-in-fact defense did not implicate any non-justiciable issues because that defense only required proof “that the military (rather than KBR) installed or performed faulty maintenance . . . that fixing the electrified showers was beyond the scope of KBR’s contract, or that no work order was ever submitted that would have required [fixing the faulty equipment] or given KBR reason to notice that it should be [fixed].”<sup>40</sup> All of those disputes, according to the Court, were “simply about who did what, and whether KBR could have performed the work it failed to do under the contract.”<sup>41</sup>

On the other hand, KBR’s proximate-cause defense would require the evaluation of strategic military decisions and therefore be non-justiciable if the governing law used a proportional-liability system which assigns liability by the degree of fault.<sup>42</sup> “In such a system, there is simply no way to determine damages without evaluating military decisions . . . [and] the respective degrees of fault as between a military contractor . . . and the military without evaluating the decisions made by each.”<sup>43</sup> Conversely, under a joint-and-several liability system, “calculation of damages does not require evaluating strategic military decision because the plaintiffs are free to obtain the entirety of their relief from KBR.”<sup>44</sup>

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<sup>40</sup> *Harris*, 724 F.3d at 473.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 474-75.

<sup>43</sup> *Id.* at 474.

<sup>44</sup> *Id.*

The Court thereafter remanded the case for a proper determination of the controlling state law, including instructions to the District Court that, if a proportional-liability system was deemed to control, “it should not dismiss the case, [but] [i]nstead, it should foreclose the plaintiffs from obtaining the types of damages that are assigned using proportional liability but allow the plaintiffs to proceed on any damages claim that does not implicate proportional liability (such as nominal damages, if available).”<sup>45</sup>

After *Harris*, a defendant’s successful use of the political question doctrine may hinge on the liability system in place under the controlling law of the case.<sup>46</sup>

#### **IV. State Secrets Doctrine**

Under the state secrets doctrine, the government has the privilege to refuse to disclose information related to secrets of the United States. The doctrine can be used solely as an evidentiary privilege, or as a dismissal tool where a state secret is central to the litigation. Either way, the U.S. Government must first assert the privilege over the subject evidence or information.

#### UPDATE

#### ***General Dynamics Corporation v. United States, 131 S. Ct. 1900, 1901, 179 L. Ed. 2d 957 (2011)***

This United States Supreme Court case dealt with the state secrets doctrine in the context of a contract dispute between the United States government and General Dynamics, who contracted with the U.S. Navy to develop stealth aircraft for a total of \$4.8 billion. The Government claimed that General Dynamics defaulted on the deal and sought repayment of approximately

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<sup>45</sup> *Id.* at 475.

<sup>46</sup> See also, *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 340 (4th Cir. 2014) (expressly adopting the *Harris* Court’s approach to the political question doctrine).



\$1.35 billion. In response, General Dynamics asserted a defense of “superior knowledge”—that is, that its default was justified because the Government failed to share its superior knowledge about how to design and manufacture stealth aircraft. Assertion of this defense, however, required disclosure of classified military secrets during discovery, and thus ultimately led to the termination of discovery proceedings and dismissal of General Dynamics’ “prima facie valid affirmative defense” by the Court of Federal Claims. General Dynamics appealed and the U.S. Supreme Court granted certiorari.

The Supreme Court analogized the contract dispute to past suits based on covert espionage agreements, which the Court historically dealt with by leaving the parties to such agreements “where we found them the day they filed suit.”<sup>47</sup> The Court reasoned that it would be unrealistic to separate General Dynamics’ defense from the Government’s claim because “it is claims and defenses together that establish the justification, or lack of justification, for judicial relief.”<sup>48</sup> “[W]hen public policy precludes judicial intervention for the one it should

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<sup>47</sup> *Gen. Dynamics Corp.*, 131 S. Ct. at 1906.

<sup>48</sup> *Id.* at 1907.

preclude judicial intervention for the other as well.”<sup>49</sup> Thus, the court held that “[w]here liability depends upon the validity of a plausible superior-knowledge defense, and when full litigation of that defense would inevitably lead to the disclosure of state secrets . . . neither party can obtain judicial relief.”<sup>50</sup>

This case demonstrates the usefulness of the state secrets doctrine as a dismissal tool for defendants. With this holding, the Supreme Court has made clear that if a defendant’s defense inevitably involves the disclosure of state secret information, the case may properly be dismissed.

#### **V. State Secret Protection Act**

The proposed State Secret Protection Act of 2009 discussed in a previous issue of this law report,<sup>51</sup> was never enacted. In October 2013, an amended version of that Bill—H.R. 3332—was introduced in the House of Representatives and has since been referred by the House Judiciary to the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations for consideration. It again remains to be seen if this revised proposed legislation will be enacted.

#### **CONCLUSION**

The defenses outlined in this article have continued importance as the United States and its contractors remain active in conflict zones around the world. Because of this sustained military activity, an increase in litigation involving these defenses can be expected. The recent appellate level activity surrounding the combatant activities exception exemplifies this expectation. Government contractors should be able to build on the solid footing established by the recent cases applying the combatant activities exception and work to broaden these defenses in the years to come.

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Mark R. Irvine, A Survey Of Available Defenses For Military Equipment Manufacturers, Aircraft Builder’s Council Inc. Law Report 23 (Fall 2009).







