

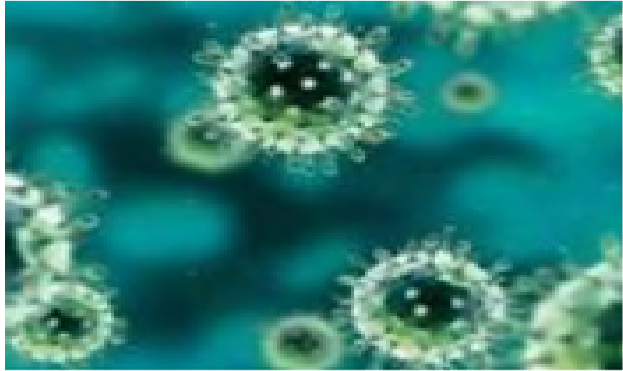


Fox Rothschild LLP  
ATTORNEYS AT LAW

# ***Aviation Law you Missed While Quarantining: Developments in Texas and the 5th Circuit***

Speaker: Tressie E. McKeon  
Partner at Fox Rothschild LLP  
Co-Chair of the Aviation Practice Group

# 2020—A Tough Year



Fox Rothschild LLP  
ATTORNEYS AT LAW

# It started out so well...



**Fox Rothschild** LLP  
ATTORNEYS AT LAW

# The Appellate and Federal Courts Remained Busy



Fox Rothschild <sup>LLP</sup>  
ATTORNEYS AT LAW

# Aircraft Deals Gone Wrong

- Keeping Aviation Litigators busy since...aviation began.



Fox Rothschild LLP  
ATTORNEYS AT LAW

# Opinions Released in 2020—Anti Slapp

- ***AKOE, LLC v. RJ Machine, Inc.***, No. 03-19-00491-CV, 2020 WL 5099960 (Tex. App.—Austin Aug. 26, 2020, no pet.) (mem. op.).
  - Deals with the Texas Citizens Participation Act (TCPA) a/k/a Texas’ “Anti-SLAPP law.”
  - The TCPA is designed to protect people or groups from “SLAPP” lawsuits (Strategic Lawsuits Against Public Participation).
  - In other words, TCPA is designed to protect your First Amendment rights such as free speech, right to petition and right of association.



# Opinions Released in 2020—Anti Slapp

- Facts:
  - AKOE purchased a Lear 60 from RJ Machine in July of 2018.
  - The purchase agreement provided an “as-is” clause and that the aircraft would be sold without a pre-closing inspection.
  - Within months of its purchase, AKOE discovered the aircraft had substantial repair and maintenance issues which “raised concerns over its airworthiness...”



# Anti Slapp cont'd

- In December 2018, AKOE's President sent an email to RJ Machine's President proposing that RJ Machine reimburse AKOE for certain costs related to the Lear based on the maintenance issues.
- In a resounding "No", on Feb. 1, 2019, RJ Machine sued AKOE and Baker (who maintained the Lear) asserting claims for:
  - breach of the contract/Purchase Agreement ("PA")
  - conspiring to tortuously interfere with the PA
  - Declaratory Judgment that:
    - the PA "is valid and enforceable"
    - "RJ Machine is under no obligation" to repair "or cover the cost of any maintenance" of the Lear
    - "RJ Machine owes no obligations to AKOE..."





# Anti Slapp cont'd

- AKOE (Defendant) moved to dismiss RJ Machine's claims under the TCPA asserting that the claims are "*a legal action based on, related to, or in response to AKOE's exercise of the right of free speech or right of association.*"
- The District Court granted the motion to dismiss only as to the tortious interference claim (not breach of contract or declaratory relief).



# Anti Slapp cont'd

- RJ Machine claimed the contract was breached by:
  - (1) having Baker perform a pre-closing inspection (contrary to the contract);
  - (2) violating the “as-is” clause by proposing that RJ Machine reimburse AKOE for discrepancies with the Lear identified after closing; and
  - (3) violating the confidentiality clause by disclosing the Purchase Agreement’s terms to Baker.
- The Austin Court of Appeals reversed the District Court’s order in part and ***dismissed RJ Machine’s claim for breach of contract***



# Anti Slapp cont'd

- The Court found that the TCPA applies to bar RJ Machine's claim for breach of the PA because "communications that result in breaches of contract are protected by and subject to dismissal under the TCPA where they implicate the right of ...association."
- Thus, AKOE successfully (and impressively) got the breach of contract claim relating to the PA dismissed based on the TCPA.



# Application of the TCPA is narrowed by the 2019 Amendments

- Do not get too excited yet!
- The TCPA was amended in the 2019 legislative session.
- Those amendments did not apply to the *AKOE* suit, which was filed before the amendments' effective date.
- The amendments drastically limited the application of the TCPA



# Anti Slapp cont'd

Original Definition	Amended Definition
<b>Right of Association</b> is defined as a “communication between individuals who join together to collectively pursue common interests.”	<b>Right of Association</b> means to join together to collectively express, promote, pursue, or defend common interests <i>relating to a governmental proceeding or a matter of public concern.</i> ”

- **“matter of public concern” now defined as “a statement or activity regarding a public official, public figure, or other person who has drawn substantial public attention due to the person’s official acts, fame, notoriety or celebrity; a matter of political, social or other interest to the community, or; a subject of concern to the public.”**
- **“Exercise of the right of free speech”** means a communication made in connection with a matter of public concern.



# Anti Slapp cont'd

- What does all this mean?
  - While the TCPA has been narrowed, it will still be a powerful tool to dispose of suits based on statements or communications.
  - Suits based on any statements or communications should be *immediately* evaluated for whether they could be dismissed under the TCPA.
  - A motion to dismiss under the TCPA must be filed not later than the **60th day after the date of service** of the legal action or the court may extend the time to file a motion under this section on a showing of good cause.



# Aircraft Sales and Tax Litigation

## A Cautionary Tale

- ***HB Aviation, LLC v. Hegar***, No. 03-19-00414-CV, 2020 WL 6811993 (Tex. App.—Austin Nov. 20, 2020, no pet.) (mem. op).
- Facts:
  - HB Aviation purchased a Cessna Citation Excel aircraft in 2009 from James Creech and brought it to Texas, subjecting the purchase to Texas use tax.
  - Jim Creech had a business named Jim Creech Aircraft Services, Inc. which had a tax permit. Creech used this business to buy and sell airplanes.



# Aircraft Sales and Tax Litigation

## A Cautionary Tale, cont'd

- Facts cont'd:
  - In the past, Creech had purchased aircraft, held them for a time, advertised them eventually finding a buyer.
  - In more recent times, he evolved into doing back to back transactions.
  - In the back to back transactions, Creech explained “the title goes from the person I’m buying it from to myself, and then another—another Bill of Sale from me to whoever I’m selling it to. So on paper I’ve got title to the airplane, but I—I never really owned it.”





# Aircraft Sales and Tax Litigation

## A Cautionary Tale, cont'd

- Facts cont'd:
  - On May 6, 2009, Creech signed the Purchase Agreement for the sale of the Cessna Citation Excel to HB Aviation (which was drafted by HB Aviation's attorneys) for \$4,800,000.00
  - On May 20, 2009, Creech purchased the aircraft from Business Aircraft Leasing (a Nashville company) who had just purchased it from HCA Squared, LLC on March 13, 2009.
  - Creech testified that HB Aviation, bought the aircraft by wiring the purchase price to an Oklahoma City escrow company.
    - The escrow company wired “whatever the deal was” to Business Aircraft Leasing. And “the difference between what HP Aviation sent and what [Creech] had it bought for from Business Aircraft Leasing stayed at the escrow company.”
    - The difference between those two amounts—the money remaining in escrow “after the deal is closed”—was wired to Creech.



# Aircraft Sales and Tax Litigation

## A Cautionary Tale, cont'd

- The Aircraft Purchase Agreement representations:
  - “[Creech] represents and warrants that he has good and marketable title to the Aircraft.”
    - However, Creech testified that was wrong—he actually purchased the aircraft May 20, 2009, and not on May 6, 2009, when he signed the Agreement representing that he had title to the aircraft.
    - HB Aviation’s counsel also testified that Creech obtained title to the aircraft on May 20, 2009.



# Aircraft Sales and Tax Litigation

## A Cautionary Tale, cont'd

- APA Representations cont'd:
  - The APA stated that “Seller [Creech] believes that the sale of the Aircraft by Seller to Buyer [HB Aviation] qualifies as an occasional sale for Texas Sales and Use Tax purposes.”
  - “[a]t or prior to closing, Seller [Creech] will execute and deliver to Buyer [HB Aviation] a Texas Comptroller Occasional Sale form.”
  - Section 12 also stated that as the Seller, Creech represented and warranted that the following statements were true and correct:
    - (a) The Seller has not made any sale of a taxable item at retail within the last twelve (12) month period;
    - (b) The Seller has never held itself out as engaging in, nor has engaged, in the business of selling taxable items at retail;
    - (c) The Seller does not and has not ever held a Texas Sales Tax permit or similar permit in any other state; and
    - (d) The Aircraft is not offered for sale or sold in the Seller’s usual course of business.
  - **HB Aviation did not pay use tax on its aircraft purchase.**



# Aircraft Sales and Tax Litigation A Cautionary Tale, cont'd



Fox Rothschild LLP  
ATTORNEYS AT LAW

# Aircraft Sales and Tax Litigation

## A Cautionary Tale, cont'd

- The Texas Comptroller audited HB Aviation for sales and use tax compliance on its purchase of the Aircraft.
  - HB Aviation claimed the occasional-sale exemption. See [Tex. Tax Code § 151.304\(a\)](#).
  - During the audit, HB Aviation presented the Comptroller with a copy of 1) its May 6 Aircraft Purchase Agreement and 2) Creech's signed Statement of Occasional Sale in support of the claimed exemption.
- The Comptroller assessed sales and use tax of 8.25% (\$396,000) on the aircraft purchase, plus a 10% penalty and interest.



# Aircraft Sales and Tax Litigation

## A Cautionary Tale, cont'd

- HB Aviation requested an administrative-redetermination hearing.
- HB Aviation contended that:
  - Creech sold the aircraft in his individual capacity;
  - that neither Creech individually nor HB Aviation had a sales-tax permit; and
  - that neither of them had made any taxable sales in the twelve months preceding the sale of the aircraft.
- The Comptroller affirmed the assessment against HB Aviation.



# Aircraft Sales and Tax Litigation A Cautionary Tale, cont'd

- Then it gets worse:



Fox Rothschild LLP  
ATTORNEYS AT LAW

# Aircraft Sales and Tax Litigation

## A Cautionary Tale, cont'd

- HP Aviation paid the assessed taxes, penalties and interest but filed suit in Travis County District Court.
- The Comptroller filed a counterclaim for fraud seeking a penalty of 50% of the taxes assessed—here \$198,000—plus interest.
- The **District Court** granted the Comptroller's motion for summary judgment and denied HB Aviation's motion for summary judgment, concluding that HB Aviation was not entitled to a tax refund and that it was liable for a \$198,000 fraud penalty.





# Aircraft Sales and Tax Litigation

## A Cautionary Tale, cont'd

- The **Austin Court of Appeals affirmed** the district court's final order denying HB Aviation's claim for a refund of the use tax paid under protest and assessing the fraud penalty.
- With regard to the Occasional Sale Exemption, the Court stated that "[t]he economic reality here is that Creech did not "sell" or pay for the aircraft that HB Aviation purchased" within the meaning of the Tax Code.



# Aircraft Sales and Tax Litigation

## A Cautionary Tale, cont'd

- Austin Court of Appeals findings:
  - With regard to the fraud claim, the Court found that **HP Aviation *knew* when it presented the Purchase Agreement to the Comptroller in 2012 that Creech did not own or hold legal title to the aircraft on May 6, 2009.**
  - The Court further stated that “**HP Aviation *knew* that when selling the aircraft, Creech was acting as a broker in a back-to-back transaction...**as he had done before in transactions as the owner and only employee of Jim Creech Aircraft Services.”
  - The falsity of the representations in the documents presented to the Comptroller during the audit and the redetermination supported the assessed penalty.



# Aircraft Sales and Tax Litigation

## A Cautionary Tale, cont'd

- Instead of just paying the \$396,000 use tax, HP Aviation had to pay:
  - \$396,000 use tax plus a 10% penalty
  - a penalty of 50% of the taxes assessed—here \$198,000—plus interest
  - Presumably their own attorneys' fees



# Aircraft Sales and Tax Litigation

## A Cautionary Tale, cont'd

- Take away:
  - When drafting Aircraft Purchase Agreements take care to ensure that the tax exemption being claimed is legitimate and that the agreement aligns with the true facts of the transaction.
  - Representations in the APA and from the “Seller” in this case were not sufficient to protect the buyer—HP Aviation.



# Removal and Federal Question Jurisdiction

***Tingyao Yan v. US Aviation Grp., LLC***, No. 4:20-CV-793-SDJ, 2020 WL 7631193 (E.D. Tex. Dec. 22, 2020).

- In *Yan*, the Plaintiffs are the parents of a Chinese national student that was enrolled at US Aviation Group’s (“USAG”) civilian flight school based in Denton, Texas. USAG enrolls a significant number of students from China.
- According to Plaintiffs—Yan’s parents—the staff at USAG regularly bullied, abused, and humiliated the school’s Chinese students, including Yan.



# Removal and Federal Question Jurisdiction, cont'd

- Specifically, Plaintiffs allege that USAG
  - “endorsed policies and behaviors that encourage openly targeting, bullying, discriminating against and abusing Chinese students.”
  - Chinese students at USAG are required to follow a “Handbook for Chinese Students,” which “is targeted only at Chinese students” and which “provides for harassment, monetary penalties and immediate expulsion should there be any perceived violation.”
  - “[t]he Handbook contains numerous discriminatory provisions which forbid Chinese students from engaging in such innocuous acts as speaking their native language, using any form of transportation (e.g. car, rideshare or public transportation) or engaging in any extracurricular activities.”
  - “only Chinese students are required by USAG staff to perform demoralizing tasks unrelated to aviation training [such as] spending entire days holding doors open for staff and other students and cleaning floors, planes and bathrooms.”
- Plaintiffs claim that as a result of the school’s abuses and discriminatory policies, Yan took his own life.
- Plaintiff’s claims include negligence, gross negligence, intentional infliction of emotional distress and wrongful death.



# Removal and Federal Question Jurisdiction, cont'd

- USAG removed the case from the 158<sup>th</sup> District Court in Denton, Texas to Federal Court asserting that each of Plaintiff's claims presents a **substantial federal question** giving the Federal Court jurisdiction over the case.
- USAG contended:
  - *each of the complained-of acts were committed in furtherance of USAG's purpose as an aviation academy and thus relate to aviation safety.*
  - the field of aviation safety is preempted by federal statutes and regulations, therefore, the scope and substance of those regulations are the foundation of each of Plaintiffs' claims.



# Removal and Federal Question Jurisdiction, cont'd

- The Court found:
  - Plaintiffs' claims (negligence, gross negligence, intentional infliction of emotional distress and wrongful death) do not "necessarily raise a stated federal issue, actually disputed and substantial."
  - Instead, they are state law tort claims.
  - that none of USAG's cited cases show that aviation safety has been completely preempted by Congress, and the Court is not aware of any such precedent. Thus, complete preemption cannot serve as the basis for removal jurisdiction.
  - while USAG's defense may include that Federal Aviation Regulations require the conduct described in Plaintiffs' complaint, **a defense based on federal preemption may serve as a valid ground for dismissal for failure to state a claim, but it is not a valid ground for depriving Plaintiffs of their choice to litigate their state claims in state court.**





# Personal Jurisdiction

***Pierce v. Aircraft Fin. Corp. LLC***, No. 4:19-CV-01814, 2021 WL 76914 (S.D. Tex. Jan. 8, 2021). (Specific Jurisdiction)

- Facts:
  - Plaintiffs Huw and Jennifer Pierce purchased an aircraft.
  - Martin Ormon referred the Pierces to Steve Bloom to act as broker.
  - The Pierces hired Bloom.
  - ***Bloom, Ormon and Aircraft Finance*** purchased the aircraft through an entity they controlled called Big Horn Exploration.
  - Bloom designed the transaction so that Big Horn Exploration would buy the aircraft and then immediately sell it to the Pierces (Glencove), netting an ***undisclosed flip-profit of \$250,000***.



# Personal Jurisdiction, cont'd

- Facts cont'd:
  - The agreement stated that **Aircraft Finance would receive a one percent origination fee** but didn't disclose the flip-profit.
  - **Bloom was paid \$120,000 commission** but did not disclose the flip profit.
  - Bloom also acted as the appraiser for the aircraft loan, but represented he had no financial interest in the transaction.
  - The undisclosed flip profit of \$250,000 was distributed:
    - **Bloom received \$130,366.34** of the flip profit
    - **Aircraft Finance received \$90,000**
    - **Bloom's attorney received \$30,000**



# Personal Jurisdiction, cont'd

## -Fast forward:

- The Pierces found out about the flip-profit and asked to rescind the transaction.
- Defendants ignored the request
- Plaintiffs filed suit in Texas State Court for:
  - Fraudulent inducement
  - Fraud by Non-Disclosure
  - Conspiracy to perpetrate a fraud
  - Aiding and abetting the tortious conduct of Bloom; and
  - Conspiracy to help Bloom.
- Plaintiffs did not sue Bloom
- Defendants removed the case to federal court and moved to dismiss the claims for lack of personal jurisdiction



# Personal Jurisdiction, cont'd

- Plaintiffs argued:
  - specific jurisdiction exists over Ormon and Aircraft Finance because:
    - Their tort claims arise from intentional misrepresentations and other conduct that Ormon and Aircraft Finance directed toward Texas.
    - Specifically, Plaintiffs allege numerous instances where **Ormon and other Aircraft Finance employees intentionally reached out to the Pierces in Texas through numerous phone calls, text messages, and emails.**
    - The fraud claim arises directly out of those communications.
    - The intentional nature of this conduct and its connection to the tort cause of action is sufficient to establish personal jurisdiction.



# Personal Jurisdiction, cont'd

- Aircraft Finance and Ormon relied on *Sangha v Navig8 ShipManagement Private Ltd* to argue that neither has sufficient minimum contacts with Texas to confer specific personal jurisdiction.
  - In *Sangha*, the Fifth Circuit found email communications insufficient to exercise jurisdiction over the defendant in Texas, even though the communications resulted in plaintiff being terminated from his job and removed from his employer's vessel at the Port of Houston.
  - That contact with Texas was, instead, “nothing more than fortuitous.”



# Personal Jurisdiction, cont'd

- Aircraft Finance and Orman also argued:
  1. neither of them is domiciled in Texas, thus making travel to and litigation in Texas “burdensome, inconvenient, and costly” for them.
  2. Texas doesn’t have an interest in adjudicating this dispute because Aircraft Finance doesn’t have a place of business in Texas, Ormon isn’t a Texas resident, and none of the other Defendants are Texas residents or entities.
  3. the interest of Plaintiffs in “obtaining convenient and effective relief” doesn’t require suit to be filed in Texas because they “have been involved in years of litigation in Colorado.”
  4. they argue that “the interests of several states would not be served by adjudicating the case in Texas because there are several states that have a stronger interest in this case.”



# Personal Jurisdiction, cont'd



Fox Rothschild LLP  
ATTORNEYS AT LAW

# Personal Jurisdiction, cont'd

In denying the motion to dismiss, the Court found:

- Ormon and other Aircraft Finance employees intentionally reached out to the Pierces in Texas through numerous phone calls, text messages, and emails.
- The fraud claim arises directly out of those communications.
- The intentional nature of this conduct and its connection to the tort cause of action is sufficient to establish personal jurisdiction.





# Personal Jurisdiction

***Byrd Aviation, Inc. v. Global Aerospace, Inc.***, No. 3:19-CV-01661-G, 2020 WL 291583 (N.D. Tex. Jan. 17, 2020, no pet.) (mem. op.).  
(General Jurisdiction)

- Facts:

- Byrd Aviation, a Tennessee Corp. bought aircraft insurance from Global Aerospace.
- The insurance covered an aircraft that was in Texas when the aircraft was purchased.
- The aircraft disappeared.
- Global denied coverage.
- Byrd filed suit in Texas state court for breach of contract, breach of duty of good faith and fair dealing and violations of the DTPA.



# Personal Jurisdiction, cont'd

- Facts cont'd:
  - Global Aerospace is a Delaware Corp. with its principal place of business in New Jersey.
  - Global removed the suit to federal court and moved to dismiss for lack of personal jurisdiction.



# Personal Jurisdiction, cont'd

- Byrd Aviation argued that the Court had general jurisdiction over Global Aerospace—not specific.
  - Byrd claimed that general jurisdiction over Global existed because Global purposely availed itself of the laws and privileges of Texas by engaging in continuous and systematic activities within Texas.
    - Specifically:
      - (1) Global's regional office in Dallas, Texas, which employs at least five employees,
      - (2) Global is registered and authorized to do business in Texas, and
      - (3) Global registered an agent for service of process in Texas.



# Personal Jurisdiction, cont'd

- The N.D. Texas found:
  - Plaintiff did not make a prima facie case.
  - Global's contacts are not “ ‘continuous and systematic’ enough to render Global ‘at home’ in Texas.”
  - It is “***incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business.***”
  - Even a sister division, arguably a principal place of business, may not be enough to establish general jurisdiction.



# Changes to our Profession in 2020

The legal profession's ability to adapt and remain functional in 2020-2021 has been impressive

- Virtual Depositions
- Virtual Hearings
- Working remotely—sometimes in isolation
- Collaborating with colleagues via telephone or Zoom
- And my personal favorite....



Fox Rothschild LLP  
ATTORNEYS AT LAW

# Wardrobe



Pat yourselves on the back for surviving and adapting!



Fox Rothschild LLP  
ATTORNEYS AT LAW

# We have overcome many challenges:



Fox Rothschild LLP  
ATTORNEYS AT LAW

**Tressie E. McKeon**  
**[tmckeon@foxrothschild.com](mailto:tmckeon@foxrothschild.com)**  
**(214) 231-5726**



**Fox Rothschild** LLP  
ATTORNEYS AT LAW