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Do All Roads Lead to Federal Court in Aviation Cases?

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A key threshold battle in many aviation cases is whether the case will be heard in state or federal court. The plaintiff has the first serve in choosing a state forum, but the defendant may have a clear shot to remove the case to federal court or can try to win the point with a backhand play.

Right or wrong, many plaintiffs' counsel believe that state courts provide litigation advantages such as a more favorable jury pool; a greater chance of obtaining favorable law on a key issue; or, the avoidance of federal court procedures such as the consolidation of all related cases into a single multidistrict litigation. On the other hand, defendants usually want all cases pending from an aviation disaster centralized in one federal forum rather than being forced to deal with multiple state court suits that can substantially increase the risk of an adverse ruling or judgment.

Diversity jurisdiction

Most aviation disasters involve plaintiffs from many different states and countries, and federal courts have jurisdiction under 28 U.S.C. §1332 over cases involving "complete" diversity, where the plaintiff is from a state that is not the home state of any of the defendants.

Even where there is such diversity, however, the plaintiff can remain in a state court by filing suit in a defendant's home state. The relevant federal statute allows removal only where "none of the... defendants is a citizen of the state in which such action is brought."¹

A corporation is a citizen of both its place of incorporation and its principal place of business and, absent some other jurisdictional basis, cannot remove a state court suit brought in one of those two locations. The Supreme Court recently held that a defendant's principal place of business is the location of its headquarters,² resolving a dispute among the circuits whether a company's "nerve center" or the place where it does most of its business would determine corporate citizenship.

The issue is far more complicated for defendants organized as limited liability companies, as several circuit courts have held that an LLC is, like a partnership, deemed to have the citizenship of all of its partners or members, and those partners or members often include one or more additional LLCs (thereby adding to the places of citizenship). The U.S. Court of Appeals for the Third Circuit recently observed that an LLC's citizenship "must be traced through however many layers of partners or members there may be to determine the citizenship of the LLC."³ Thus, it is possible that the citizenship of an individual with an infinitesimal membership share of an LLC can serve to defeat federal jurisdiction on the basis of a lack of diversity. Information regarding an LLC's members, however, is

usually private and there may be no reliable means to determine the entity's full citizenship prior to filing suit.

Aviation plaintiffs have attempted to defeat removal by adding defendants who are citizens of the state where the action is brought or who are citizens of the plaintiff's own home state. Such defendants can include a responsible employee of the airline or manufacturer named in his or her individual capacity, or a company hired by an airline or manufacturer to do part of its work, such as a maintenance company, training school or component part maker.

In response, defendants can raise a "fraudulent joinder" challenge to eliminate the non-diverse party to permit the removal of a state court suit, but there is a high bar to such a challenge: as the U.S. Court of Appeals for the Second Circuit has ruled, "the defendant must demonstrate, by clear and convincing evidence, either that there has been outright fraud committed in the plaintiff's pleadings, or that there is no possibility, based on the pleadings, that a plaintiff can state a cause of action against the non-diverse defendant in state court."⁴

For example, in *Katonah v. USAir*,⁵ 876 F.Supp. 984 (N.D.Ill. 1995), plaintiffs successfully maintained their case in Illinois state court by naming an airline employee at O'Hare Airport in Chicago as a defendant. The employee allegedly did not properly act upon a report of an "errant noise" made by passengers departing a plane that subsequently crashed on its next flight. The court rejected claims of fraudulent joinder and held that since the complaint was sufficient to establish a potential cause of action against the employee the case should be remanded to state court.

Minimal Diversity Jurisdiction

After a series of suits, including *Katonah*, where Boeing was forced to defend claims arising out of the same disaster in federal court and one or more state courts, the manufacturer became the driving force to lobby for legislation that provided near-universal federal court jurisdiction over large aviation disasters. The 2002 Multiparty, Multiforum Trial Jurisdiction Act, which passed through Congress with little debate as part of a Department of Justice appropriations bill, provides for federal jurisdiction where there is "minimal diversity" and at least 75 persons have been killed in a single accident.⁶ Minimal diversity meets the basic requirements of Article III, Section 2 of the U.S. Constitution (which grants the federal courts power to hear controversies between citizens of different states), by providing jurisdiction simply where any adverse parties are citizens of different states (in contrast to the "complete" diversity required under 28 U.S.C. §1332).⁷ The act provides that the district court shall abstain from jurisdiction where the substantial majority of plaintiffs are citizens of a single state and the primary defendants are also citizens of that state.

The act will usually provide federal jurisdiction in disaster cases involving the large passenger jets manufactured by Boeing, but not in cases, such as the 2009 crash of a Continental Connection Flight 3407 plane on approach to Buffalo Airport, where the threshold number of deaths is not reached.

Federal Treaty Jurisdiction

In death or injury cases arising from international transportation, nearly all claims against airlines are governed by either the Montreal Convention⁸ or the Warsaw Convention.⁹ The conventions are federal treaties, and federal courts have original jurisdiction pursuant to 28 U.S.C. §1331.

There is a continuing conflict among district courts, however, concerning whether an action subject to one of the treaties can only be heard in federal court or whether there is concurrent jurisdiction in the state courts, allowing remand of cases to the state court. New York federal courts have held that the

treaties establish a federal claim that cannot be remanded. In litigation arising from the 2001 American Airlines 587 disaster, for example, the Southern District of New York concluded that "international air travel is so completely preempted that a well-pleaded state-law complaint necessarily becomes a federal claim."¹⁰ By contrast, other federal courts have recently held that the treaties do not completely preempt state law claims and have remanded cases to state court.¹¹

Suits Involving United States

Suits for air traffic control negligence make the United States a frequent defendant, and some foreign sovereigns continue to operate airlines and other aviation entities. There is original federal jurisdiction over any action brought against the United States or a foreign sovereign.

As with any case where the federal court has original jurisdiction, there is supplemental federal jurisdiction "over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."¹² Defendants have successfully invoked supplemental federal jurisdiction over an entire litigation simply by adding a third-party claim against the United States or a foreign sovereign.

In a suit where a foreign sovereign was added as a third-party defendant, the U.S. Court of Appeals for the Seventh Circuit concluded that "where minimal diversity exists between parties, a foreign state may invoke §1441(d) to remove an entire suit" and also that "a third-party foreign state defendant can remove this entire case on the basis of supplementary jurisdiction."¹³

Bankruptcy Jurisdiction

Defendants (or more likely their insurance counsel) have also used federal bankruptcy jurisdiction as a pretext to bring a state court case into federal court. A Texas aircraft manufacturer who went bankrupt shortly after being sued in Texas state court, for example, removed the actions pursuant to bankruptcy jurisdiction to federal court and obtained forum non conveniens' dismissal, even though such dismissal could not have been granted in the state court. The U.S. Court of Appeals for the Fifth Circuit affirmed the dismissal.¹⁴

Federal Preemption

Defendants have repeatedly attempted to eliminate state court jurisdiction entirely by arguing that there is complete federal preemption of aviation claims and, therefore, all aviation cases may be removed to federal court as federal questions. Defendants assert that the Federal Aviation Act (FAA), including its amendment, the Airline Deregulation Act (ADA), creates exclusive federal jurisdiction in aviation cases. The FAA, however, contains a savings clause that provides "[n]othing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."¹⁵

The U.S. Supreme Court has held that the savings clause contemplates that state common law actions and the FAA "coexist" and that the FAA establishes a "no-preemption regime."¹⁶ In American Airlines v. Wolens, 513 U.S. 219, 232 (1995), the Court held that "the ADA permits state-law-based court adjudication" and did not establish exclusive federal jurisdiction because "[t]he ADA contains no hint of such a role for the federal courts..." and Congress retained "the FAA's saving clause...preserving 'the remedies now existing at common law or by statute'...." The Second Circuit recently declared that "we have acknowledged that the FAA does not preempt all state law tort actions" and that "the FAA has a savings clause that specifically preserves these actions."¹⁷

For defendants to prevail on a preemption motion, they must establish that "the only possible basis for subject-matter jurisdiction" is in federal court—in other words, that state courts have no authority to hear aviation cases because of the FAA.¹⁸ The Second Circuit, however, has rejected that argument holding that the FAA does not provide an express or implied cause of action.¹⁹ Apart from the specialized provisions of federal treaties and maritime law, there is no federal cause of action for wrongful death in aviation cases.

Congress, however, did impose an 18-year statute of repose on general aviation product liability claims that "supersedes any State law *to the extent* that such law permits a civil action to be brought after the applicable limitation period."²⁰ This provision demonstrates that state claims not subject to the limitation period are not affected by the statute.

The great weight of authority is against federal jurisdiction based on FAA preemption. Defendants, however, continue to attempt removals on the argument.

Class Action Fairness Act

Where a claim involves more than 100 death and injury cases, the Class Action Fairness Act (CAFA) can be invoked to establish federal jurisdiction under certain circumstances. Despite its title, CAFA does not only apply to class actions—it can also apply to "mass actions" and potentially can apply to aviation disaster cases where plaintiffs propose a consolidated trial.

CAFA has been codified in 28 U.S.C. §1332. Section 1332(d)(11)(B)(i) defines a "mass action" as "any civil action...in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact."

In *Anderson v. Bayer Corp.*, 610 F.3d 390 (7th Cir. 2010), the defendants removed several cases initiated by "separate, mostly identical" complaints, none of which had more than 100 plaintiffs and urged the federal court to treat the separate suits as a single civil action.²¹ The district court and the Seventh Circuit rejected the defendants' request to treat the individual cases in the aggregate. The courts held that in enacting CAFA's "mass action" provision, Congress recognized that certain cases that otherwise qualified for "mass action" treatment if filed together should not get that treatment "because of the way in which the plaintiffs chose to structure their claims."²²

Aviation cases are not filed as class actions and are not fairly considered mass torts. Each case has substantial differences as each case has its own unique damages that prohibit "class" or "mass" treatment, and each plaintiff files his or her own independent suit.

There is, however, a potential federal jurisdictional trap contained in CAFA—and an important lesson to be learned about how CAFA jurisdiction can come into play in aviation cases. If plaintiffs make a formal proposal for a single liability trial of all claims, defendants may have an opening to remove cases to federal court by arguing that the proposal triggers federal CAFA jurisdiction.

Conclusion

There is no general provision for federal jurisdiction or a federal cause of action in all aviation accidents. Removal to federal court is only available where there is complete diversity among the plaintiff and the defendants, provided that the suit is not filed in a place where one of the defendants is a citizen, or where there is minimal diversity if more than 75 persons were killed in the subject crash. Federal jurisdiction may also be available where a death or injury occurs on an international flight subject to the Warsaw or Montreal treaties or where the United States or a foreign sovereign is named as a defendant.

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Endnotes:

1. 28 U.S.C. §1441(b).
2. Hertz Corp. v. Friend, 559 U.S.—, 130 S.Ct. 1181 (2010).
3. Zambelli Fireworks Mfg. Co. v. Wood, 592 F.3d 412, 420 (3d Cir. 2010) (internal citation omitted).
4. Pampillonia v. RJR Nabisco Inc., 138 F.3d 158, 161 (2d Cir. 1998).
5. 876 F.Supp. 984 (N.D.Ill. 1995).
6. See 28 U.S.C. §1369.
7. 28 U.S.C. §1369(c)(1).
8. Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, ICAO Doc. 8740, reprinted in S. Treaty Doc. No. 106-45, 1999 WL33292734 (2000).
9. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934); see also Eastern Airlines Inc. v. Floyd, 499 U.S. 530, 535 (1991). The Montreal Convention has superseded the Warsaw Convention in international air travel between states that have ratified the Montreal Convention. The Warsaw Convention continues to govern claims where the relevant states have not yet signed and/or ratified the Montreal Convention.
10. Degeorge v. Am. Airlines, 2002 U.S. Dist. LEXIS 19836 *10 (SDNY 2002).
11. Cosgrove-Goodman v. UAL Corp., 2010 U.S. Dist. LEXIS 54825 (N.D.Ill.2010).
12. 28 U.S.C. §1367(a).
13. In re Air Crash Disaster Near Roselawn, 96 F.3d 932, 942-43 (7th Cir. 1996).
14. Baumgart v. Fairchild Aircraft Corp., 981 F.2d 824 (5th Cir. 1993).
15. 49 U.S.C. §1506 (current version at 49 U.S.C. §40120 (c)).
16. Nader v. Allegheny Airlines, 426 U.S. 290, 299-300 (1976); Morales v. TWA, 504 U.S. 374, 385 (1992).
17. Air Transp. Ass'n of Am. Inc. v. Cuomo, 520 F.3d 218, 221 (2d Cir. 2008), citing In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975, 635 F.2d 67, 75 (2d Cir. 1980).
18. Sullivan v. Am. Airlines Inc., 424 F.3d 267, 274 (2d Cir. 2005).
19. Air Transp. Ass'n of Am. Inc. v. Cuomo, 520 F.3d 218, 221 (2d Cir. 2008).
20. 49 U.S.C. §40101 Note, Section 2(d)(emphasis added).
21. 610 F.3d at 393.
22. Id.