Federal Jurisdiction and the Aviation Case

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The first battle in many air crash cases is over the forum. While diversity jurisdiction compels many aviation cases to be heard in federal court, removal from state court can be blocked if the plaintiff properly names a non-diverse defendant or brings suit in a state court where any defendant is a citizen. In that circumstance, aviation defendants, who generally prefer to litigate in federal court, have aggressively asserted numerous other bases of federal jurisdiction to remove a case from the state court chosen by the plaintiff. This article reviews a series of aviation cases where the removal issue was recently litigated.

Federal Jurisdiction

A series of decisions have considered whether to remand state court aviation tort claims removed by airlines, operators and manufacturers, who claimed that federal aviation laws established federal jurisdiction over aviation accident litigation.

The U.S. Supreme Court has held that while "federal jurisdiction exists only when a federal question is presented on the face of plaintiff's properly pleaded complaint,"[1] there is an exception where "a federal statute wholly displaces the state law cause of action through complete pre-emption."[2] While federal question jurisdiction does not always require a federal cause of action,[3] the exercise of such jurisdiction is "rare"[4] and limited to those situations where the case centers on a substantial, dispositive and controlling issue of federal law.[5]

Bennett v. Southwest Airlines[6] involved death and injury claims filed in Illinois state court arising from the 2005 crash landing of an aircraft at Midway Airport in Chicago. Removal on diversity grounds was blocked because most of the plaintiffs, together with two of the defendants, Boeing (the plane's manufacturer) and the City of Chicago (the airport operator), were Illinois citizens. The defendant airline and manufacturer removed the plaintiffs' claims from Cook County Circuit Court to federal court, claiming that federal aviation statutes and regulations necessarily dominated the litigation and created federal jurisdiction.

The district court denied plaintiff's motion to remand, but on interlocutory appeal the U.S. Court of Appeals for the Seventh Circuit reversed, holding that aviation claims "may be litigated in state court " and the fact " [t]hat some standards of care used in tort litigation come from federal law does not make the tort claim one 'arising under' federal law."[7] *Bennett* observed that in 2002 Congress enacted the Multiparty, Multiforum Trial Jurisdiction Act, which provided federal jurisdiction in aviation and other disaster cases involving 75 or more deaths where minimal diversity was present.[8] The court concluded that the act "makes sense only if transportation disasters are litigated in state court unless they satisfy the new statute's terms ." and that granting federal jurisdiction in all aviation cases would render the act "meaningless."[9]

The 2007 holding in *Bennett* has been followed by district courts around the country.[10] The only case that has held federal aviation law mandates federal jurisdiction is a 2002 decision from the Southern District of New York, *Curtin v. Port Authority*.[11] The plaintiff in *Curtin* was a passenger injured during the emergency evacuation of a Delta flight at LaGuardia Airport. The district court's conclusion that "this action presents a federal question and removal was proper" has never been followed.

International Treaties

A cause of action for death or injury against an air carrier arising from an international flight is generally subject to the 1999 Montreal Treaty. There is no question that the treaty provides a basis for federal

jurisdiction, if alleged by the plaintiffs, but there is a clear split among district courts in various circuits on whether a state law death or injury complaint that comes within the treaty's terms is removable.

Some courts regard the treaty as an exclusive cause of action which mandates federal court jurisdiction.[12] Other courts, however, have held that state law actions remain in force, subject to the defenses set forth in the treaty.[13] New York state courts have routinely handled aviation treaty cases under the Montreal Convention and its predecessor the Warsaw Convention.[14]

The U.S. Supreme Court has held that the provisions of the predecessor Warsaw treaty "provide nothing more than a pass-through, authorizing us to apply the law that would govern in absence of the Warsaw Convention."[15] The Montreal Convention continued this "pass-through" system and in most land-based aviation claims state law continues to govern the essential elements of the damage claim, subject to the treaty's limited set of uniform rules.

Admiralty Jurisdiction

Admiralty jurisdiction also offers the plaintiff a choice of forum: There is jurisdiction in federal court, but state courts have concurrent jurisdiction expressly preserved by the "savings to suitors" provision of 28 U.S.C. 1333.

Admiralty jurisdiction was recently cited as the basis for removal in litigation involving the July 2013 crash of an Asiana Airlines flight 214, a Boeing 777 aircraft, at San Francisco airport. On final approach, the plane's main landing gear struck the top of the airport seawall short of the runway; the airplane then careened out of control before it finally came to rest. Three passengers were killed, and numerous others were injured.

Various plaintiffs brought suits against Boeing in state court in Illinois, where the manufacturer is headquartered. Boeing removed the lawsuits to federal court, arguing that the plane was engaged in a traditional maritime activity, carrying passengers across the ocean, and that the tort occurred at sea. Boeing relied on the ruling in the Belle Harbor[16] litigation before Judge Robert Sweet in the Southern District which applied admiralty law to the 2001 disaster involving an American Airlines aircraft. That plane took off from Kennedy Airport, lost its vertical tail over Jamaica Bay and crashed in Belle Harbor, Queens. *Belle Harbor* concluded that the maritime nexus requirement was satisfied because the catastrophic failure of the plane occurred over navigable waters and it was only fortuitous that the plane crashed on land.

By contrast, the Illinois federal court found that there was no admiralty jurisdiction because the Asiana disaster took place on land:

> At no point before the crash was it inevitable that the plane would crash. For those injured in??Belle Harbor , the tort was consummated at the point when injury was inevitable. The passengers on Flight 214 never faced inevitable injury, and thus their tort was consummated when the airplane struck the terrain. In addition, all of the injuries occurred on the ground after the airplane struck the terrain. There is no basis to say that the tort took effect at any point before the plane struck the seawall. Thus, the tort occurred and "took effect" on land.[17]

Three days before the Illinois court's ruling, the Judicial Panel on Multidistrict Litigation consolidated cases arising out of the Asiana disaster before the San Francisco federal court for pretrial proceedings. One case before the Illinois court was transferred before the remand decision, and the San Francisco federal court is now considering the same remand issue in that case. In addition, a motion for reconsideration is pending before the Illinois court in the remaining cases that were not transferred to San Francisco.

Officer Removal Statute

Aviation manufacturers routinely argue for federal court jurisdiction of tort suits under the Federal Officer Removal Statute, which permits removal of a lawsuit brought against "any person acting under" a federal officer.[18] The Federal Aviation Administration is responsible to certify aircraft to comply with minimum federal safety standards and routinely appoints the employees of private aviation manufacturers as "designated engineering representatives" to assist in the certification process and ease the FAA's workload. Manufacturers urge a broad interpretation of the statute and contend that any tort suit necessarily implicates the work performed by their employees to certify the aircraft.

The U.S. Court of Appeals for the Ninth Circuit held that a plaintiff's aviation tort suit naming a defendant's employee in his capacity as an FAA designee and alleging that the employee wrongfully certified the aircraft and thereby caused the crash was removable.[19] Likewise, in circumstances where a plaintiff has alleged that the negligent certification of an aircraft by the manufacturer's designated FAA representatives caused plaintiff's injuries, removal has been granted.[20]

In cases where the plaintiff has made general negligence and strict liability allegations against an aircraft manufacturer, courts have declined to apply the removal statute.[21] An Alabama district court held that a manufacturer cannot claim removal "simply because they have employees who are designated FAA authorized agents" but that "removal is appropriate only where the FAA representative has been specifically named and the allegations relate to conduct of the FAA representative while acting in the capacity of an FAA representative ."[22]

Class Action Fairness Act

Manufacturers have used the 2005 Class Action Fairness Act to remove groups of aviation cases to federal court. The act extended federal jurisdiction over a "mass action" filed in state court for 100 or more plaintiffs that met minimal diversity requirements. In litigation filed in Illinois state court for plaintiffs killed and injured in a 2008 crash in Sudan, the manufacturer Airbus successfully removed the case on the basis that the complaint presented a "mass action" that sought to try "monetary relief claims of 100 or more persons" jointly.[23] Removal was upheld despite the fact that the plaintiff's attorney had made a mistake by naming several plaintiffs twice, thereby raising the total number of claims over the 100-person threshold necessary for jurisdiction under the statute.[24]

Boeing cited CAFA to remove a series of Illinois state court suits arising out of the crash of a Turkish airliner in the Netherlands in 2009. The removal was filed as a result of a statement made by plaintiffs' counsel in a state court brief (submitted in opposition to a motion for forum non conveniens dismissal) that that one exemplar trial would likely be held to determine Boeing's liability. Boeing claimed that this statement demonstrated that plaintiffs sought the joint trial of over 100 actions subject to the act.

The Seventh Circuit rejected Boeing's arguments, holding that its removal attempt was premature; the court observed that "[i]t would be odd to think that plaintiffs could not make a telling response to a motion for dismissal of a suit on the ground of forum non conveniens without thereby having forfeited their chosen forum; by arguing against dismissal, they would be arguing for it."[25]

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Endnotes:

1. *Caterpillar v. Williams*, 482 U.S. 386, 392 (1987).

2. *Ben. Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003).

3. *Grable & Sons v. Darue Engineering*, 545 U.S. 308 (2005).

4. Id. at 315.

5. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699, 701 (2006).

6. 484 F.3d 907 (7th Cir. 2007).

7. Id. at 912.

8. Id. at 911; 28 U.S.C. 1369.

9. 484 F.3d at 912.

10. *Yellen v. Teledne Cont'l Motors*, 832 F.Supp.2d 490, 500 (E.D. Pa. 2011); *West v. A&S Helicopters*, 751 F.Supp.2d 1104, 1108-09 (W.D. Mo. 2010); *O.S. v. Hageland Aviation Servs*., 609 F.Supp.2d 889, 894 (D. Alaska 2008).

11. 183 F.Supp.2d 664 (S.D.N.Y. 2002).

12. *In re Air Crash at Lexington, Kentucky*, 501 F.Supp.2d 902 (C.D.Ky. 2007) (action governed by Montreal treaty was properly removed to federal court); *Jones v. USA 3000 Airlines*, 2009 U.S. Dist. LEXIS 9049 (E.D. Mo. Feb. 9, 2009)("Because the Convention completely preempts plaintiff's cause of action, federal subject matter jurisdiction exists and remand is inappropriate.").

13. *Oganesyan v. Am. Airlines Cargo*, 2013 U.S. Dist. LEXIS 169841 (C.D. Cal. 2013) ("The Montreal Convention does not convert a claim into one arising under federal law simply because it preempts certain elements of the claim."); *Jensen v. Virgin Atlantic*, 2013 U.S. Dist. LEXIS 42080 (N.D. Ca. 2013) ("removal under the Montreal Convention based upon the complete preemption doctrine was improper"); *Narkiewicz--Laine v. Scandinavian Airlines Sys.*, 587 F.Supp.2d 888, 890 (N.D. Ill. 2008) ("Because the conditions and limits of the Montreal Convention are defenses to the state-law claims raised by plaintiff, they do not provide a basis for federal-question subject matter jurisdiction").

14. See, e.g., *Rosman v. Trans World Airlines*, 34 N.Y.2d 385 (1974) (Warsaw Convention personal injury claims); *Zamora v. Air France*, 20 Misc.3d 142(A) (1st Dept. 2008)(Montreal Convention baggage claim); see *Certain Underwriters at Lloyd's London v. Art Crating*, 2013 U.S. Dist. LEXIS 183306 (E.D.N.Y. Dec. 16, 2013) ("The esteemed courts of the State of New York are not unfamiliar with interpreting the Montreal Convention.").

15. *Zicherman v. Korean Air Lines Co*., 516 U.S. 217, 229 (U.S. 1996).

16. *In re Air Crash at Belle Harbor*, 2006 U.S. Dist. LEXIS 27387 (S.D.N.Y. 2006).

17. *Yang v. Boeing*, 2013 U.S. Dist. LEXIS 175699 (N.D. Ill. 2013).

18. 28 U.S.C. 1442(a)(1).

19. *Magnin v. Teledyne Cont'l Motors*, 91 F.3d 1424 (11th Cir. 1996).

20. *Scrogin v. Rolls-Royce*, 2010 WL 3547706 (D. Conn Aug. 16, 2010); *AIG Europe (UK) v. McDonnell Douglas*, 2003 WL 257702 (C.D. Cal. Jan. 28, 2003).

21. *O'Brien v. Cessna Aircraft*, 2010 U.S. Dist. LEXIS 126896, 33-34 (D. Neb. 2010); *Swanstrom v. Teledyne Con't Motors*, 531 F.Supp.2d 1325, 1333 (S.D. Ala. 2008); *Britton v. Rolls Royce Engine Servs.*, 2005 U.S. Dist. LEXIS 13259 (N.D. Cal. 2005).

22. *Swanstrom*, 531 F.Supp.2d at 1333.

23. 28 U.S.C. 1332(d)(11)(B)(i).

24. *Altoum v. Airbus S.A.S.*, 2010 WL 3700819 (N.D.Ill. 2010).

25. *Koral v. Boeing*, 628 F.3d 945, 947 (7th Cir. 2011).