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## Aviation Law

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Over the past decade, there has been a tremendous expansion of federal court jurisdiction in aviation cases that has made it increasingly difficult for plaintiffs to file and keep cases in state court.

Aviation cases often involve plaintiffs and defendants from different states or countries and end up in federal court on diversity of jurisdiction grounds. In some cases, however, plaintiffs used various methods to defeat diversity and bring suit in a state court viewed as having more favorable juries and larger damage awards.

Federal jurisdiction, however, is now guaranteed in certain types of cases. In personal injury or death cases arising on international flights, it is now well-established that federal question jurisdiction is established by treaty. In addition, the 2002 Multiparty, Multiforum Trial Jurisdiction Act provides that every major airline disaster case - whether domestic or international - will be heard in federal court.

Defendants have attempted to expand federal court jurisdiction even further by arguing that every aviation case is a "federal question" because, *inter alia*, federal law and regulations completely occupy the field of aviation law. This attempt to expand federal court jurisdiction is related to the ongoing aviation law dispute regarding the extent to which federal law preempts state standards of duty.

Defendants have also argued that all cases against government contractors should be removable to federal court based on the federal officer removal statute. This would provide for federal court jurisdiction in almost every case against manufacturers of military aircraft.

We will address the recent developments related to federal jurisdiction in aviation cases.

### Multiparty, Multiforum Jurisdiction

The Multiparty, Multiforum Trial Jurisdiction Act became effective on Nov. 2, 2002. It grants federal jurisdiction in "multi-state cases." Federal district courts now have original jurisdiction of any civil action that arises from a single accident where at least 75 people died if the defendant resides in one state and a substantial part of the accident took place in another state or location (e.g., foreign country). The "residence" of the defendant is broadly defined to include any state in which a defendant is incorporated or licensed to do business or is doing business. Under the act's "minimal diversity" rule, you end up in federal court even where the defendant is a resident of the state where the accident occurred if it is also a resident of another state.<sup>1</sup> Large aviation defendants, e.g., manufacturers and airlines, do business in many states, which broadens the effect of the provisions. Federal jurisdiction is also present in mass disaster cases "where any two defendants reside in different states (regardless of whether they are also residents of the same State or States), or where substantial parts of the accident took place in different States."<sup>2</sup>

The district court, however, has the authority to abstain from hearing cases where the substantial majority of all plaintiffs are citizens of a single state of which the primary defendants are also citizens and the claims asserted will be governed primarily by the laws of that state. This provision is quite vague, however, and courts have not yet defined its reach. Furthermore, defendants will argue that federal law will govern many aviation liability issues, which would render the limitation section moot.<sup>3</sup>

### 'Pre-Emption' Removal

Defendants have increasingly argued that federal aviation law "pre-empts" all state law and that all aviation claims are therefore federal questions, even if the case at issue is pleaded under state law. Since they involve "federal questions" the claims may be removed to federal court according to the defendants' logic. This would lead, however, to an explosive and unwarranted growth in federal court jurisdiction.

Until relatively recently it was accepted that federal law did not pre-empt aviation state law claims. This was because Federal Aviation Regulations (FAR) only set forth "minimum standards" and state law is able to supplement the standards without conflict. For example, the 1993 U.S. Court of Appeals for the Tenth Circuit decision in *Cleveland v. Piper Aircraft Corp.*<sup>4</sup> held that the FARs did not mandate how a manufacturer should comply with the safety issues in the case, which was whether a Piper Cub airplane had insufficient forward visibility and inadequate safety belts.

Contrary to prior decisions, the 1999 U.S. Court of Appeals for the Third Circuit opinion in *Abdullah v. American Airlines*<sup>5</sup> reached the broad finding that there was "implied federal pre-emption of the entire field of aviation safety."<sup>6</sup> In adopting "field pre-emption," the Third Circuit noted its disagreement with the prior opinions of the U.S. Court of Appeals for the Second, Tenth and Eleventh circuits.

The conflict over pre-emption of state law claims continues and may ultimately need to be resolved by the Supreme Court. In the meantime, however, defendants have used pre-emption arguments to attempt to strip state courts of jurisdiction in aviation cases. This attempt to "federalize" all aviation cases was recently rejected by the U.S. Court of Appeals for the Seventh Circuit in *Bennett v. Southwest Airlines, Co.*<sup>7</sup>

In *Bennett*, aircraft passengers and bystanders brought tort claims against Southwest Airlines after Southwest Airlines Flight 1248 overran the Runway 31C at Chicago Midway International Airport on Dec. 8, 2005. Two suits were filed in state court and removed by defendants on the theory that aviation claims are federal questions because federal law occupies the field of aviation safety and this "completely pre-empts" state law. The defendants abandoned this early argument and the court ruled on whether the fact that federal aviation standards play a major role in the negligence claims at issue provided grounds for federal court jurisdiction.

The Seventh Circuit Court ruled that Illinois tort law, not federal law, supplies the claim for relief, noting that aviation suits had been litigated for decades in state court. The court was very careful with its pre-emption analysis:

*Notice how we put this:* The defendants do not contend, nor did the district court find, that resolution of this suit resolves around any particular disputed issue of federal law. For all we can see, everything will depend on a fact-bound question . . . . The meaning of federal statutes and regulations may play little or no role.

The Seventh Circuit rejected the offered argument that "all suits about commercial air travel belong in federal court because the national government is the principal source of rules about safe air transportation and the uniform application of these norms is desirable" noting that it would expand arising-under jurisdiction beyond the scope that the Justices were willing to tolerate.

### Federal Officer Removal

Defendants have argued that the federal officer removal statute<sup>8</sup> allows for removal of cases brought against government contractors. The statute provides for removal of civil actions where the claims are against "officers (or any person acting under the officer) of the United States or any agency thereof." Courts have accepted the argument that a government contractor is acting under the United States when it produces a product for the government and that defendants may remove the cases to federal court where they have a colorable government contractor defense. The Fifth Circuit's decision in *Winters v. Diamond Shamrock Chemical Co.*<sup>9</sup> is an example of these decisions.

In *Winters*, the defendants removed the state-filed action to federal court in the U.S. District Court for the Eastern District of Texas pursuant to the federal officer removal statute. The district court determined that the defendants (1) were "persons" (2) "acting under color of federal authority" when committing the acts that allegedly led to plaintiff's injuries (from exposure to Agent Orange) and (3) had asserted a colorable federal defense.<sup>10</sup> Accordingly, the district court found that federal jurisdiction was present. The Fifth Circuit affirmed.

The Fifth Circuit noted that necessary to federal officer removal "is a finding that the defendants acted pursuant to a federal officer's directions and that a causal nexus exists between the defendants' actions under color of federal office and the plaintiff's claims." The question that must be answered is whether the government "specified the composition of the product at issue so as to supply the causal nexus between the federal officer's directions and the plaintiff's claims." The court noted that the Defense Department issued "detailed and direct orders" to the defendants to supply Agent Orange and that the orders give rise to a federal concern subject to removal under §1442(a)(1).

The Supreme Court recently addressed the federal officer removal statute in *Watson v. Philip Morris Co.*<sup>11</sup> *Watson* was a putative class action that plaintiffs filed in state court against Phillip Morris. Plaintiffs argued that Phillip Morris produced and sold cigarettes designed to deliver more tar and nicotine to smokers than the labels "light" and "lowered tar and nicotine" would suggest. Phillip Morris removed the case to federal court based on the federal officers removal statute.

The Supreme Court held that there was no federal jurisdiction, rejecting Phillip Morris' arguments that the close supervision of the Federal Trade Commission was sufficient for federal jurisdiction pursuant to the federal officer removal statute. The Court distinguished the facts of the case from government contractor cases like *Winters*: "[t]he answer to this question lies in the fact that the private contractor in such cases is helping the

Government to produce an item that it needs. The assistance . . . goes beyond simple compliance with the law and helps officers fulfill other basic governmental tasks."

While the Supreme Court noted the distinction between the facts before it and government contractor cases, it declined to comment on the circumstances that would permit government contractors to remove their cases to federal court pursuant to the federal officer removal statute. Accordingly, it remains an open issue as to what extent such removal will be permitted in government contractor cases.<sup>12</sup>

#### Conclusion

The Fifth Circuit's *Bennett* decision rejected an argument that would have federalized all aviation cases had it been successful and the Supreme Court's *Watson* decision leaves open the question of whether government contractors should be allowed to remove all aviation to federal court. For now, at least some aviation cases will continue to remain in state court.

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#### Endnotes:

1. See, [28 USC §1369](#).
2. *Id.*, §(a).
3. *Id.*, §(b).
4. 985 F2d 1438 (10th Cir. 1993).
5. 181 F3d 363 (3d Cir. 1999).
6. *Id.* at 365.
7. 484 F3d 907 (7th Cir. 2007).
8. 28 USC §1442.
9. 149 F3d 387 (5th Cir. 1998).
10. *Winters*, 901 FSupp at 1198-1203.
11. US, 127 SCt 2301 (2007).
12. The Court also rejected the argument that the FTC's delegation of testing authority to Phillip Morris established federal jurisdiction.