

State Courts Can Hear Commercial Aviation Crash Cases: *Bennett v. Southwest* and *In Re Air Crash Disaster at Lexington, Kentucky, August 26, 2007*

WHEN FILING A complaint in the aftermath of a commercial aviation disaster, questions about the proper forum always arise. In addition to deciding in which state the case should be filed, a litigant must explore whether the case can or should be filed in state or federal court. Because federal courts are courts of limited jurisdiction, not all complaints can be filed there.

In the aviation arena, several bases would permit a complaint to be filed in, or removed to, federal court. These include, among others, cases in which diversity jurisdiction under 28 U.S.C. § 1332 is present; the Warsaw or Montreal Conventions are applicable; or the requirements of the Multiparty, Multiforum Jurisdictional Act (28 U.S.C. § 1369) are met. Recently, a new theory was added to that list.

The new theory was as follows: federal question or “arising under” jurisdiction exists over all lawsuits stemming from commercial aviation travel based on two exceptions to the well-pleaded complaint rule—the substantial federal question and complete pre-emption doctrines. Based on the importance of the aviation industry to the national economy and the pervasiveness of both the Federal Aviation Act and federal aviation regulations in the field of airline safety, the tort claims of a victim of a commercial aviation crash necessarily implicated a substantial federal issue and were completely pre-empted by federal law, thereby providing federal courts with “arising under” jurisdiction over those claims and defendants with a basis to remove those claims to federal court.

In two recent decisions—one by the U.S. Court of Appeals for the Seventh Circuit and one by the U.S. District Court for the Eastern District of Kentucky—that theory was “squashed.” *Bennett v. Southwest Airlines Co.*, 484 F.3d 907 (7th Cir. 2007), and *In re Air Crash at Lexington, Kentucky, August 27, 2006*, 486 F. Supp. 2d 640 (E.D. Ky. 2007) (Comair 5191 litigation). Before delving into those cases, a quick review of the case law discussing “arising under” jurisdiction is warranted.

“Arising Under” Jurisdiction

A case arises under federal law within the meaning of § 1331 only when the claim for relief depends in some way on federal law, “unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.” *Vorhees v. Naper Aero Club Inc.*, 272 F.3d 398 (7th Cir. 2001) quoting *Taylor v. Anderson*, 234 U.S. 74, 75–76 (1914). This reasoning is known as the “well-pleaded complaint” rule, which states that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff’s complaint. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Thus, as a general rule, the plaintiff can avoid federal question jurisdiction by pleading exclusively state law claims. *Bastien v. AT&T Wireless Services Inc.*, 205 F.3d 983, 986 (7th Cir. 2000).

Moreover, jurisdiction cannot be sustained on some theory that the plaintiff has not advanced. *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 809, n.6 (1986). For example, a defense that relies on the pre-emptive effect of a federal statute will not provide a basis for removal and, “absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim.” *Beneficial Nat’l Bank v. Anderson*, 531 U.S. 1, 6 (2003).

In both *Bennett* and the Comair 5191 litigation, the defendants first argued that the removal of the plaintiffs’ claims was proper under the “complete pre-emption” exception to the well-pleaded complaint rule. The defendants argued that the plaintiffs’ state law negligence claims were completely pre-empted by federal law (the Federal Aviation Act and accompanying regulations); therefore, the federal district court had jurisdiction over them.²⁰

The power of Congress to pre-empt state law derives from the Supremacy Clause of Article VI of the Constitution. U.S. Const. Art. VI, cl. 2. The “ultimate touchstone” of any pre-emption analysis is the intent of Congress. *Fifth Third Bank ex rel. Trust Office v. CSX Corp.*, 415 F.3d 741, 746 (7th Cir. 2005); *Abdullah v. American Airlines*, 181 F.3d 363, 366 (3rd Cir. 1999). There are three ways in which federal law can pre-empt state and local law: (1) express pre-emption, (2) conflict pre-emption, and (3) field (or complete) pre-emption. *Hoagland v. Town of Clear Lake, Ind.*,

415 F.3d 693, 696 (7th Cir. 2005). In both *Bennett* and the Comair 5191 litigation, the defendants initially relied on the latter theory of pre-emption: field pre-emption.

Field pre-emption occurs when federal law so thoroughly occupies a legislative field as to make it reasonable to infer that Congress left no room for the states to act. *Hoagland*, 415 F.3d at 696. Courts must presume, however, that Congress did not intend to supplant state law, especially in areas traditionally left to the states. *Frank Bros. Inc. v. Wisc. Dep't of Transportation*, 409 F.3d 880, 885 (7th Cir. 2005). It is only where the “pre-emptive force of a statute is so ‘extraordinary’ that it ‘converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.’” *Nelson v. Stewart*, 422 F.3d 463, 466–467 (7th Cir. 2005). In such a case, the state law claim is “considered, from its inception, a federal claim, and therefore arises under federal law.” *Nelson*, 422 F.3d at 467. In other words, the statute occupies an entire field of law so much so that “it is impossible even to frame a claim under state law.” *Ceres Terminals Inc. v. Indus. Com'n of Illinois*, 53 F.3d 183, 185 (7th Cir. 1995). Thus, the federal statute not only pre-empts state law, it also authorizes removal of actions that sought relief only under state law. *Nelson*, 422 F.3d at 467.

By relying on that doctrine, the defendants were facing an uphill battle, because the Supreme Court had found the existence of complete removal pre-emption in only three areas of law—(1) § 301 of the Labor Management Relations Act of 1947, (2) the Employee Retirement Income Security Act of 1975, and (3) the National Bank Act (see *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 7–9 (2003))—and had cautioned courts against extending that doctrine to new frontiers (see *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995)).

In addition to the complete pre-emption argument, the defendants also argued that the plaintiffs' complaints were removable under a second “corollary” to the well-pleaded complaint rule known as the “substantial federal question” doctrine. Even though the plaintiffs had not even cited, much less invoked, any federal statute as the sole basis for their causes of action (normally providing a bar to federal question jurisdiction), the defendants contended that the plaintiffs' claim contained embedded substantial federal issues that only federal courts could consider. Relying on the Supreme Court's decision in *Grable & Sons Metal Products Inc. v. Darue Engineering & Mfg.* 545 U.S. 308 (2005), which re-affirmed a “longstanding” but “less frequently encountered, variety of federal ‘arising under’ jurisdiction” over state law claims that “implicate significant federal issues,” the defendants argued that removal of the plaintiffs' claims was proper.

Even more recently, though, the Court had explained that “it takes more than a federal element to

‘open the “arising under” door,’” and characterized the category of cases that *Grable* exemplifies as “slim.” *Empire Healthchoice Assurance Inc. v. McVeigh*, 126 S. Ct. 2121, 2137 (2006). Thus, the mere presence of a federal element or issue in a state cause of action does not automatically confer federal question jurisdiction (*Merrell Dow*, 478 U.S. at 813); for federal jurisdiction to apply, the cause of action must raise “a contested and substantial federal question.” *Grable*, 125 S. Ct. at 2367.

Bennett v. Southwest

In *Bennett*, the Seventh Circuit rejected the defendants' argument that the plaintiff's claims arose under federal law. The court noted that it had held many times that claims related to air transport may be litigated in state court (*Hoagland v. Clear Lake*, 415 F. 3d 693 (7th Cir. 2005); *Bieneman v. Chicago*, 864 F. 2d 463 (7th Cir. 1988)), and that *Grable* did not change that conclusion. The court found that the fact that some standards of care used in tort litigation come from federal law did not make the tort claim one that involves “arising under” federal law. *Vorbees v. Naper Aero Club Inc.*, 272 F.3d 398 (7th Cir. 2001); *Rogers v. Tyson Foods Inc.*, 308 F.3d 785 (7th Cir. 2002); *Chicago v. Comcast Cable Holdings L.L.C.*, 384 F. 3d 901 (7th Cir. 2004) (federal defenses do not justify removal, even if the federal issue is the only one in dispute).

It should be noted that Chief Justice Easterbrook noted that no court of appeals has held either before or after *Grable* that the national regulation of many aspects of air travel means that a tort claim in the wake of a crash “arises under” federal law. In fact, even *Abdullah v. American Airlines Inc.*, 181 F.3d 363, 375–376 (3d Cir. 1999)—a case upon which the defendants relied to support their removal petitions—strongly implied that “arising under” jurisdiction was unavailable. *Bennett*, 484 F.3d at 912. The *Bennett* court also noted that the Supreme Court thought it significant in *Grable* that only a few quiet-title actions would present federal issues, which enabled the Court to conclude that its decision would not move a whole category of litigation to federal court or upset a balance struck by Congress. If the defendants' position were true, every aviation case could be removable.

In addition, the *Bennett* court held that “it would upset a conscious legislative choice—not one made in § 1331, perhaps, but surely the one made when 28 U.S.C. § 1369 was enacted in 2002. That statute permits suits in federal court when a single air crash (or other disaster) leads to at least 75 fatalities and minimal diversity is present. Those lines would be rendered meaningless if, as defendants maintain, every aviation case is federal. Section 1369 makes sense only if transportation disasters are litigated in state court unless they satisfy the new Statute's terms.” *Bennett*, 484 F.3d at 911.

Notably, in rejecting the defendants' attempt to remove the case to federal court, the Seventh Circuit seemingly gave a word of warning to future aviation plaintiffs who might want to avoid removal of their claims to federal court: do not file a claim against the government.²² The *Bennett* court noted that no plaintiff was challenging the validity of any federal agency's action or any federal employee's action. The court found that "[i]f they did—for example by suing the United States under the Federal Tort Claims Act on a theory that the air traffic controllers were negligent—then the supplemental jurisdiction would support resolution in federal court of claims against Southwest Airlines, Boeing, and Chicago." *Bennett*, 484 F.3d at 910–911.

This warning was based on the court's reading of *Grable*. According to the *Bennett* court, the Supreme Court in *Grable* had found that the plaintiff's quiet-title action arose under federal law, because "there was *nothing* in it but federal law, with the potential to affect the national government's revenues." *Bennett*, 484 F.3d at 910 (emphasis in the original). Chief Justice Easterbrook and his colleagues believed that the *Grable* Court had ruled the way it did because "a federal forum [was] especially appropriate for contests arising from a federal agency's performance of duties under federal law, *doubly so given the effect on the federal Treasury*." *Bennett*, 484 F.3d at 910 (emphasis added). Even though the *Bennett* court did not cite any specific portion of *Grable* to support that reading—that is, that the potential effect on the national treasury is a factor in determining whether a claim implicates a substantial federal issue—it would appear that plaintiffs who file a complaint in state court run the risk of removal to federal court if they also file a Form 95 claim with the pertinent federal agency.

In Re Air Crash at Lexington, Kentucky, August 26, 2007

Like the defendants in the *Bennett* case, the defendants in the Comair 5191 litigation removed all the cases that had been filed in Kentucky state court, claiming that federal court jurisdiction existed "pursuant to 28 U.S.C. 1331 and 1337 because federal law governs the plaintiff's right to recovery and because the plaintiff's complaint involved allegations that raised a substantial issue of law." And like the defendants in *Bennett*, the Comair 5191 defendants also relied heavily on *Abdullah v. American Airlines Inc.*, 181 F.3d 363 (3d Cir. 1999) and *Greene v. B.F. Goodrich Avionics Systems Inc.*, 409 F.2d 784 (6th Cir. 2005) (which adopted *Abdullah*) to support the removal.

Rejecting the defendants' arguments, the district court remanded the case back to state court. In doing so, the court provided a detailed, exhaustive analysis of pre-emption principles and held that the defendants had failed to meet their burden of showing that the Federal Aviation Act and its regulations provided

the type of pre-emption necessary to give rise to federal court jurisdiction. In addition, the court found that removal jurisdiction was not present under the defendant's substantial federal question theory.

Conclusion

Had these courts found otherwise—that Congress intended to pre-empt the plaintiffs' claims or that the plaintiffs' complaints raise a contested and substantial federal issue—the result would have meant the death knell for commercial aviation cases in state court. In fact, had the defendants' theory been upheld, any case in which the plaintiff relied on a federal statute or regulation to support his or her claim could potentially be removable. By rejecting the defendants' arguments in both *Bennett* and the Comair 5191 litigation, these courts reaffirmed both the notion of a federal judiciary of limited jurisdiction and the power of state courts to consider cases in which federal law plays a role. **TFL**

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Endnotes

²²¹The defendants in *Bennett*, however, abandoned this removal theory on appeal.

²²²A "claim against the [g]overnment" could potentially include not only the filing of a complaint but also the filing of Form 95 as well. During oral argument, both Justice Bauer and Chief Justice Easterbrook asked counsel for the plaintiffs whether any of the plaintiffs had filed Form 95 with the Federal Aviation Administration.