Federal Officer Jurisdiction: Aviation Manufacturers’ Unique Advantage When Bidding To Remove State Complaints To Federal Court.

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In most lawsuits, aviation product defendants will benefit greatly from being in federal, as opposed to, state court. The potential advantages of a federal forum are well-noted:

- Federal court likely takes away the plaintiff’s “home-court” advantage. That is, if the suit is pending in the plaintiff’s counsel’s home state, and possibly home county, removal to federal court may bring the case to a less comfortable forum for opposing counsel and a more familiar and/or more convenient forum for the average defendant.

- Federal judges receive lifetime appointments, as opposed to state court judges who must periodically face local elections. Thus, they are less susceptible to public opinion and local political considerations.

- Federal court jurors are generally drawn from a more urban geographic area since almost all federal courts sit in major urban areas.

Aviation plaintiff attorneys are not oblivious to these fact. Lawsuits stemming from aviation accidents are almost always filed by plaintiffs in state court and an experienced plaintiff attorney will attempt to structure the complaint so as to avoid providing the defense with a basis for removal to federal court. Thus, removal to federal court can be challenging.

There are currently several avenues into federal court. Federal courts have jurisdiction over, and defendants can remove, disputes between citizens of different states (“diversity” jurisdiction), actions arising under the Constitution, laws, or treaties of the United States (“federal question” jurisdiction) and where the defendant is either an officer of the United States or a person acting under the authority of an officer of the United States (“federal officer removal”). While diversity remains the most common and easiest road into federal court (when available), aviation product manufactures are uniquely situated to take advantage of the federal officer removal statute due to certain of their engineers wearing two hats: a company employee and a Designated Engineering Representative (“DER”) and/or Designated Manufacturing Inspection Representative (“DMIR”). These individuals are employed by the manufacturer but are also, in their capacity as a DER or DMIR, acting under the direction of a federal officer - the Administrator of the Federal Aviation Administration (“FAA”).

The Airworthiness Certification Process

The FAA has developed a multi-tiered certification system to ensure that aircraft comply with the FAA’s technical airworthiness standards, and continue to comply with these standards over the

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1 28 U.S.C. § 1331 (federal-question), § 1332 (diversity) and §1442 (federal officer). There are also other federal statutes that specifically allow federal jurisdiction. See 28 USC §1369 (accidents involving 75 or more deaths).
life of the aircraft. First, the FAA approves the manufacturer’s aircraft design. It signifies its approval by issuing what is called a “type certificate”. The FAA may only issue a type certificate after it reviews the manufacturer’s design and finds that it complies with all applicable FAA airworthiness requirements.

After the FAA issues a type certificate for the aircraft, the manufacturer must obtain a “production certificate”. The FAA will only issue a production certificate if the manufacturer shows it can make aircraft according to the FAA approved design.

Finally, the FAA certifies that each individual aircraft coming off the assembly line conforms to its type certificate and, after inspection, is in a condition for safe operation. Each approved aircraft is given an “airworthiness certificate”. This certificate stays with the individual aircraft during its entire operational history and will be revoked if an aircraft operator is not properly maintain the aircraft.

To help perform all these tasks, the FAA designates employees of the aircraft designer or manufacturer to act as its representatives in issuing these various certificates. See generally Title 14 of the Code of Federal Regulations. DERs are engineers who act “under the general supervision of the Administrator” and certify that an aircraft’s design meets FAA requirements. DMIRs, acting “under the general supervision of the Administrator” may likewise certify that aircraft meet the requirements for airworthiness certificates. When DERs or DMIRs make these certifications, they act not on their employer’s behalf, but on behalf the Administrator of the FAA.

Federal Officer Removal

This dual role of DERs and DMIRs will, in some cases, provide the aviation product manufacturer with a basis of removal of a state law complaint to federal court. Pursuant to the federal officer statute, 28 U.S.C. §1442(a), and the federal case law interpreting that statute, a federal court can exercise jurisdiction if a defendant establishes that:

(1) it is a person within the meaning of the statute;
(2) the plaintiff’s claims are based on conduct by the defendant acting under a federal office;
(3) it has a colorable federal defense; and
(4) there is a causal nexus between the claims and the conduct performed under color of a federal office.

The first three required elements for federal officer removal jurisdiction are typically easy to satisfy. First, most jurisdictions have held that a corporation qualifies as a “person” for purposes of the federal officer removal statute.

Second, it is well-established that DERs and DMIRs act under a federal officer in the performance of their certification duties. A recent U.S. Supreme Court case, Watson v. Phillip Morris Companies, Inc., explained that a private entity is considered “acting under” the authority of a federal officer for the purposes of removal when it is involved in “an effort to assist, or help carry out, the
duties or tasks of the federal superior” or where “in the absence of a contract with a private firm, the Government itself would have had to perform.” That certainly describes the work of DERs and DMIRs. As early as 1984, in United States v. S.A. Empresa de Viacao Rio Grandense (Varig Airlines), the U.S Supreme Court has stated “the Secretary has provided for the appointment of private individuals to serve as designated engineering representatives to assist in the FAA certification process.” (emphasis added). Other federal courts have reached the same conclusion. In Magnin v. Teledyne Continental Motors, the 11th Circuit stated that a “DMIR is an authorized agent of the FAA. In creating the office of Federal Aviation Administration and defining the power and duties of that office, Congress authorized the Administrator to delegate some of those duties.”

A colorable federal defense, the third requirement, is one that is based on a federal right and is plausible. In construing the colorable federal defense requirement, the Supreme Court has routinely rejected a narrow interpretation of the term. Instead, recognizing that one of the very reasons for removal is to have a the validity’ of a federal defense tried in federal court. As the Magnin court explained, the “scope of our inquiry here is only whether [defendant] has advanced a colorable federal defense… , not whether his defense will be successful.”

In the context of the work of DERs and DMIRs, an aircraft product manufacturer has a defense that the subject aircraft was certified as airworthy by the FAA and complied with all applicable codes, standards, and regulations of the United States and agencies thereof at the time it was delivered by the manufacturer. A number of federal courts have noted that whether DERs and/or DMIRs acted within the scope of their federal duties, did what was required of them by federal law, and did all federal law required raises an issue of federal law which justifies removal.

The fourth requirement, the causal nexus requirement, is the most difficult for defendants to demonstrate. A court’s acceptance of federal officer jurisdiction is appropriate if the court determines that plaintiff’s allegations are at least partly directed at the defendant manufacturer’s DERs and/or DMIRs. That is, plaintiffs allegations must relate to the duties delegated by the FAA to the DERs and/or DMIRs. Without specific allegations against them or the work they perform (ie: certification), the courts typically find no causal nexus between plaintiff’s claims and the work performed by the federal officer. Thus, the presence in the complaint of specific allegations against either a DER or DMIR, or that defendant was negligent in the “certification” of the subject aircraft will typically suffice for removal purposes.

Even if plaintiffs artfully craft their complaints to avoid using the word “certification” in their complaint, their allegations may so strongly allude to the certification process that a federal court would be within its discretion to accept jurisdiction. Particularly in light of the fact that the U.S. Supreme Court made it clear in the Watson case that “the federal officer removal statute is not narrow or limited” and must be “liberally construed.” Nonetheless, the recent case law trend has been that where there are no specific allegations regarding negligent certification or negligence on the part of a DER or DMIR, the federal courts do not accept federal officer jurisdiction.

In light of the aviation product manufacturer’s unique role in assisting the FAA in the certification of aircraft and aircraft parts, defendants should review all state court complaints with an eye toward removal on the basis of federal officer jurisdiction. Given the multi-factor test required
by federal court, removal on this basis will always be challenging. However, the advantages of a federal forum cannot be overstated – nor can the ability of some plaintiffs counsel to thwart other possible avenues into federal court. Thus, for the aviation product manufacturer, federal officer jurisdiction may represent not only the best hope for federal jurisdiction but, in some cases, the only hope.