Fighting preemption
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Don't let preemption ground your aviation case

Defendants in aviation lawsuits are pushing the preemption argument hard to get cases removed to federal court or stop them before they leave the gate. Help your case take off by honing your anti-preemption strategy.

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Preemption battles have been raging in litigation involving pharmaceutical drugs, medical devices, automobiles, boats, and many other products. Aviation litigation is no exception.

Products liability suits based on state law tort claims involving unsafe airplanes have been around for decades, but now, in keeping with the growing popularity of this "defense du jour," defendants assert preemption in almost every case. They seek to thwart state law claims by arguing either for removal of the case to federal court or for outright dismissal. But there are ways to prevent these outcomes.

As in other products cases, a defendant in a case involving an aircraft defect may raise federal preemption as a defense, arguing that Congress had either expressly or impliedly preempted the plaintiff's state law claims.

Express preemption is based on the actual language of a federal statute and is found when Congress expresses a clear intent to preempt state law.1 It is well-settled law that the Federal Aviation Act of 1958 did *not* expressly preempt state regulation.2 In fact, the act contains a broad savings clause that states, "A remedy under this law is in addition to any other remedies provided by law."3

In aviation cases, express preemption applies only where the plaintiff's state law claim falls under one of the amendments to the Federal Aviation Act: the Airline Deregulation Act of 1978, which expressly prohibits states from enacting or enforcing "any law, rule, regulation, standard, or other provision . . . related to a price, route, or service of any air carrier having authority . . . to provide air transportation"[4]; or the General Aviation Revitalization Act of 1994 (GARA), which provides an 18-year period of repose on civil actions for death, injury, or damage to property relating to general aviation aircraft and their component parts.[5] Outside of those two exceptions, there is no express preemption of state law aviation claims.

Implied preemption may occur either as "field preemption" or "conflict preemption." Congress's intent to preempt an entire field can be inferred when a scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."[6]

Conflict preemption exists "where 'compliance with both federal and state regulations is a physical impossibility' or where the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[7]

Another common defense tactic in aviation litigation: seeking to remove the case to federal court under the doctrine of "complete preemption" or on the theory that the plaintiff's allegations raise a federal question. Unlike express and implied preemption, complete preemption is not a defense to a state law claim. Instead, it is asserted as a basis for removal on the ground that "the preemptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common law complaint into one stating a federal claim for the purposes of the well-pleaded complaint rule.'"[8]

The U.S. Supreme Court has found complete preemption in only three classes of cases.[9] Most federal courts treat the complete preemption doctrine as a narrow rule, and they rarely extend it beyond the types of cases the Supreme Court has recognized, so it's not much of a threat in aviation cases. But efforts at removal based on other theories have sometimes been successful, so plaintiff attorneys should take special care in crafting pleadings.

Confronting the preemption defense

The defendant in a state tort case alleging that an aircraft was unsafe will probably assert a preemption defense, arguing that the claims are impliedly preempted, most often under the rubric of "field preemption."

The defendant will most likely assert a preemption defense in its initial pleading. If not, and if considerable time elapses before the defense is raised, you may want to consider arguing that it was waived.

Most defendants who raise this defense will eventually file a motion for summary judgment seeking to have the plaintiff's allegations dismissed on grounds that they are preempted because federal regulations mandated the aircraft or component design. But rather than waiting for that development, you could be proactive and file your own dispositive motion seeking to strike the preemption defense.

Be sure that motions related to the defense are defined as dispositive in the pretrial scheduling order and that deadlines for filing and hearing dispositive motions are set well before the trial date. If the procedural rules do not define dispositive motions, simply specify in the pretrial scheduling order that all motions related to preemption defenses shall be treated as dispositive motions.

This helps ensure that the defense will present preemption as a motion for summary judgment, rather than a motion in limine, which is tactically better for the plaintiff. While the substantive response to a motion in limine based on preemption is the same as a response to the motion for summary judgment, the defendant who uses a motion in limine may be seeking to surprise you on the eve of trial and secure an "off the cuff" ruling in its favor during the chaos that usually characterizes an in limine hearing.

You can also use depositions to fight a preemption defense. Consider deposing the manufacturer's administrator of its delegation option authority (DOA). The DOA administrator is the manufacturer's employee who is the liaison to the Federal Aviation Administration (FAA) and who possesses certain approval and signatory privileges from the FAA. The administrator will have to concede that federal standards are minimum requirements and are not intended to bar the manufacturer from adopting more stringent design standards. The administrator will also admit that the FAA does not actually certify the aircraft; rather, the manufacturer certifies its own product.[10]

A deposition of the chief engineer or project manager will yield testimony that the federal standards do not dictate a particular design, that they are minimum design standards, and that the manufacturer has complete discretion to design the aircraft or the component as it deems appropriate as long as these minimum standards are met.

Deposing the person in charge of the content of flight manuals is certain to produce testimony that the federal government has placed no restrictions on the manufacturer's ability to provide clear, concise information to the pilot or operator about dangerous conditions or equipment requiring special training in the aircraft. Because few regulations apply to the content of the operating handbook and flight manual, allegations of a marketing defect based on the manufacturer's failure to provide adequate instructions for the safe use of the aircraft are much less susceptible to preemption challenges. Also, bringing a marketing defect claim is often the best way to counter allegations of pilot or operator negligence, since manufacturers are notorious for producing confusing, incomplete, and often contradictory flight manuals.

Aircraft manufacturers claim that any determination of whether their product is unsafe or defective must be based solely on the FAA's standards for aircraft design and certification, and that such a comprehensive, pervasive scheme of federal regulation proves that Congress intended to exempt aviation entirely from state regulation. Abundant case law disagrees with that claim.

Seminal case

The seminal case holding that state law products liability claims are not preempted is *Cleveland ex rel. Cleveland v. Piper Aircraft Corp.*[11] Piper argued that the federal government had occupied the entire field of airplane safety through the Federal Aviation Act and its regulations, and therefore the plaintiff's claims were impliedly preempted. The Tenth Circuit disagreed, holding that even though the aircraft involved was designed in compliance with FAA guidelines, the manufacturer could still be held liable under state products liability law.[12]

The court in a 2006 Texas federal case, *Monroe v. Cessna Aircraft Co.*, used the same reasoning.[13] In response to Cessna's arguments that FAA regulations "comprehensively govern the field of aviation safety such that they impliedly preempt the standard of care in all state law claims within the field," the *Monroe* court found that the regulations controlling aircraft design and safety "are broad and provide a nonexhaustive list of minimum requirements, leaving discretion to the manufacturer."[14]

The court held that, although the certification process looks to the safety and design regulations set out by the FAA, it "does not in and of itself constitute a pervasive regulatory scheme evidencing an intent by Congress to preempt the field of aviation safety."[15]

Like the *Monroe* court, most courts have agreed with *Cleveland*.[16]

In the nearly 50 years since it passed the Federal Aviation Act, Congress has never expressed an intent to deprive airplane crash victims of their right to seek justice. As Supreme Court Justice John Paul Stevens recently stated in another context, "The long history of tort litigation against manufacturers of poisonous substances adds force to the basic presumption against preemption. If Congress had intended to deprive injured parties of a long-available form of compensation, it surely would have expressed that intent more clearly."[17] The same is true for people injured by negligent manufacturers of unsafe airplanes.

Managing the removal risk

Always be aware of the risk of removal when formulating your pleading. The general rule is that a case may not be removed from state court unless it could originally have been filed in federal court.[18] Absent diversity jurisdiction, removal is governed by the "well-pleaded complaint" rule, making the plaintiff "master of the claim" and allowing him or her to "avoid federal jurisdiction by exclusive reliance on state law" on the face of a "properly pleaded complaint."[19]

As the plaintiff attorney, you are the master of your pleading. To best avert removal, keep the pleading as general as possible. Avoid allegations that the defendant's conduct violated specific Federal Aviation Regulations (FARs), and plead only state law causes of action. Even though the defendant's conduct may have violated a federal statute, resist the temptation to cite the statute in your pleading. Defense counsel may well argue that the plaintiff's claims necessarily turn on interpretations of federal regulations, but this only provides a defense to state law claims; it does not make them removable.

Even when defendants cannot argue that the plaintiff's pleading invokes federal law, they often argue that the case should be removed based on one of two exceptions to the well-pleaded complaint rule. The first is that the Federal Aviation Act and the FARs "completely preempt" state law claims. As noted above, complete preemption should not apply in the aviation context, but some federal courts continue to confuse complete preemption with field preemption.[20] Nevertheless, as one federal judge recently explained when remanding an aviation case, "the doctrine of complete preemption differs significantly from the federal preemption defense. Complete preemption 'has jurisdictional consequences that distinguish it from preemption asserted only as a defense.'"[21]

The second exception to the well-pleaded complaint rule is the "substantial federal question" doctrine, where the defendant must show that, although the plaintiff's pleading does not state a federal cause of action justifying federal jurisdiction, his or her "right to relief necessarily depends on resolution of a substantial question of federal law."[22]

In determining whether a state law claim raises a "substantial question of federal law"—and therefore is subject to federal-question jurisdiction—the courts generally perform a so-called *Merrell Dow-Grable* analysis, derived from two Supreme Court decisions.[23] Courts performing this analysis in aviation cases of all kinds have almost uniformly determined that plaintiffs' state law claims do not create a substantial federal question sufficient to permit removal.[24]

As one court explained in a case arising from an airplane crash, "[This case] remains a garden-variety state law tort case which does not raise a 'significant' or 'substantial' federal issue mandating resolution by this court. . . . State court judges have been presiding over such cases for decades without disturbing any established balance between federal and state responsibilities."[25]

Also be prepared to fight removal under the Federal Officer Removal Statute (FORS). Although not as common as the federal-question approach, this basis for removal is gaining favor with aviation defense counsel. The statute allows removal of a civil action against "any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office. . . ."[26]

The FAA designates employees of aircraft manufacturers and service companies, as well as private individuals, to perform examination, inspection, and testing services that are necessary for the issuance of type and production certificates.[27] When a person is sued in state court for an act that he or she undertook as a designee, the defendant can seek to remove the case under the FORS.

Defendants typically cite *Magnin v. Teledyne Continental Motors*, which arose after the pilot of a private plane was killed in a crash.[28] The plaintiff sued the engine manufacturer and, individually, the designated manufacturing inspection representative (DMIR), alleging that he proximately caused the fatal crash by certifying the engine as airworthy when it was, in fact, defective.

The court, in denying Magnin's motion to remand, held that "at least part of [the DMIR's] defense is that he acted within the scope of his federal duties, that what he did was required of him by federal law, and that he did all federal law required. That defense raises a federal question, which justifies removal."[29]

The lesson learned from *Magnin* is that the best way to avoid this type of removal is to avoid allegations that could invoke the statute. Any suggestion that the aircraft or a component was improperly certified by the manufacturer under its DOA is likely to provoke a removal motion, with the defendant arguing that it was acting in strict conformity

with the federal regulatory scheme and is entitled to the protections of a federal officer.

Other than *Magnin*, there are few appellate decisions involving this type of removal in the products liability realm—especially in aviation cases. Remand is less certain in a federal-officer removal case than in a federal-question case.

Preemption has become a given in products liability cases—but it doesn't have to throw your aviation case off course. Familiarize yourself with the details of federal law to counter defense arguments and keep your case aloft.

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Notes

1. *Hillsborough Co. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712-13 (1985).
2. *See Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 222 (1995).
3. 49 U.S.C.A. §40120 (2000) (originally codified at 49 U.S.C. app. §1506).
4. 49 U.S.C.A. §41713 (2006) (originally codified at 49 U.S.C. app. §1305(a)(1)).
5. 49 U.S.C.A. §40101 n. (2006).
6. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1974), *rev'd sub nom. Rice v. Bd. of Trade*, 331 U.S. 247 (1947)).
7. *Gade v. Nat. Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 98 (1992) (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) and *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), respectively).
8. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987) (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987); *see also Smith v. GTE Corp.*, 236 F.3d 1292, 1313 (11th Cir. 2001) ("[I]t is worth pointing out that complete preemption functions as a narrowly drawn means of assessing federal removal jurisdiction, while ordinary preemption operates to dismiss state claims on the merits and may be invoked in either federal or state court.") (quoting *BLAB T.V. of Mobile, Inc., v. Comcast Cable Communs., Inc.*, 182 F.3d 851, 854-55 (11th Cir. 1999)).
9. Federal labor law, federal pension law, and possessory land claims under state law brought by Indian tribes. *See Beneficial Natl. Bank v. Anderson*, 539 U.S. 1, 8 (2003).
10. *See* Karen Barth Menzies, *Using Discovery to Fight Preemption*, on page 44.
11. 985 F.2d 1438 (10th Cir. 1993), *cert. denied*, 510 U.S. 908 (1993).
12. *Id.* at 1445.
13. 417 F. Supp. 2d 824 (E.D. Tex. 2006).
14. *Id.* at 833.
15. *Id.*
16. *See e.g. Pub. Health Trust of Dade Co. v. Lake Aircraft, Inc.*, 992 F.2d 291 (11th Cir. 1993); *Lucia v. Teledyne Contl. Motors*, 173 F. Supp. 2d 1253 (S.D. Ala. 2001); *Holliday v. Bell Helicopters Textron, Inc.*, 747 F. Supp. 1396 (D. Haw. 1990); *Sunbird Air Servs., Inc. v. Beech Aircraft Corp.*, 789 F. Supp. 360 (D. Kan. 1992); *Sheesley v. Cessna Aircraft Co.*, 2006 WL 1084103 (D.S.D. Apr. 20, 2006); *Elsworth v. Beech Aircraft Corp.*, 691 P.2d 630 (Cal. 1984), *cert. denied*, 471 U.S. 1110 (1985).
17. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).
18. 28 U.S.C.A. §1441 (2000).
19. *Caterpillar, Inc.*, 482 U.S. at 392.

20. *See Bennett v. Southwest Airlines Co.*, 2006 WL 1987821, at *3 (N.D. Ill. July 13, 2006), where the district court, recognizing that "complete preemption of any case containing an aviation component is contrary to established precedent," nevertheless denied the plaintiffs' motion to remand. The court did certify its order for accelerated appeal to the Seventh Circuit.

21. *Glorvigen v. Cirrus Design Corp.*, 2006 WL 399419, at *5 (D. Minn. Feb. 16, 2006) (quoting *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 543-44 (8th Cir. 1996)).

22. *See Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 28 (1983), *superseded by statute as stated in Dept. of Rev. of Iowa v. Inv. Fin. Mgt. Co.*, 831 F.2d 790 (8th Cir. 1987), *cert. denied*, 485 U.S. 1021 (1988).

23. Referring to *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804 (1986) and *Grable & Sons Metal Prods., Inc. v. Darue Engr. & Mfg.*, 545 U.S. 308 (2005).

24. *See e.g. Glorvigen*, 2006 WL 399419; *Yarbrough v. Avco Corp.*, 2006 WL 2946447 (M.D. Tenn. Oct. 10, 2006); *McCarty v. Precision Airmotive Corp.*, 2006 WL 2644921 (M.D. Fla. Sept. 14, 2006); *XL Specialty Co. v. Village of Schaumburg*, 2006 WL 2054386 (N.D. Ill. July 20, 2006).

25. *McCarty*, 2006 WL 2644921, at *2.

26. 28 U.S.C.A. §1442(a)(1) (2000).

27. 49 U.S.C.A. §44702(d) (2000).

28. 91 F.3d 1424 (11th Cir. 1996).

29. *Id.* at 1428.

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