Third Parties Don't Make a Crowd under the Federal Officer Removal Statute

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The United States Supreme Court's analysis of the Federal Officer Removal Statute, 28 U.S.C. § 1442, (FORS) in *Watson v. Philip Morris Co., Inc.*, 127 S.Ct. 2301, 2304-2305, 168 L. Ed. 2d 42 (2007), cast attention on a basis for removal of State Court actions to Federal Court that has not been relied upon extensively by the aviation defense bar. *See e.g.* Jonathan M. Sterns, *Federal Officer Removal after Watson v. Philip Morris Cos.: What remains for the Non-Government Defendant?*, In-House Defense Quarterly (Summer 2007); *Watson Would Fly with FAA Designees*, 72 Air L. & Com. 485 (2007). The Federal Aviation Administration (FAA) and its designee system is structured in a fashion that makes FORS removals perfectly appropriate. Nevertheless, the typical aviation case does not find itself properly situated to take advantage of the statute because plaintiffs purposefully plead around the very Federal Aviation Regulations that exist to enhance the degree of safety in the industry. Defense counsel should thus consider options to recast the procedural posture of a case to gain the benefit of a powerful removal opportunity. One such option, is a carefully drafted counterclaim or third-party claim that puts FORS back in play.

Possibilities for Removal

FORS provides in relevant part as follows:

> "(a) A *civil action* or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
> (1) The United States or any agency thereof or 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..."

28 U.S.C. §1442

Under FORS, a case may be removed by a private, non-governmental party on the basis of a colorable federal defense arising out of a duty to enforce federal law, provided that the party establishes that it is a person within the meaning of the act and was acting under the direction of a federal officer. *Magnin v. Teledyne Continental Motors*, 91 F. 3d 1424, 1428 (11th Cir. 1996). FAA designees fit within the foregoing as persons "acting under" an officer of the FAA. *Id.* The conduct of an FAA designee is likewise an act under color of the office of the FAA. *Id.* The FAA designee's conduct in inspecting aircraft and components and executing airworthiness certificates are performed on behalf of the FAA under authority granted and within limits prescribed by the FAA. *Id.* So, if an FAA designee is named and sued for its conduct in improperly certifying an aircraft or pilot, that action will be removable pursuant to FORS because assertions that the designee was acting within the scope of federal duties -- doing what was required by federal law -- will present a colorable federal defense. *Id.* at 1429. Although Airframe and Powerplant mechanics are highly regulated and on occasion perform remarkably similar approval functions in returning aircraft to service, one court has recently determined that FORS does not apply to claims against an A&P. *Vandeventer v. Guimond*, 494 F. Supp. 2d 1255, 1263-67 (D. Kan., July 10, 2007)(finding A&P not acting under an officer of the FAA, but merely participating in a highly regulated industry) reconsideration denied by *Vandeventer v. Guimond*, 2007 U.S. Dist. LEXIS 65989 (D. Kan., Sept. 5, 2007). Government contractors however, do fit within the scope of the statute. *Papapetrou v. Boeing*, 2008 U.S. Dist. LEXIS 14146 (Feb. 25, 2008).

In *Papapetrou*, for example, plaintiffs sued Boeing and other component manufacturing defendants in state court in Cook County, Illinois for injuries resulting from the crash of a Greek army helicopter. Boeing removed the case based on the FORS asserting that it designed and manufactured the helicopter pursuant to a government contract entitling it to the protection of the government contractor defense provided by *Boyle v. United Technologies Corp.*, 487 U.S. 500, 512, 108 S. Ct. 2510, 101 L.Ed. 2d 442 (1988). *Papapetrou,* 2008 U.S. Dist. LEXIS14146, at * 12. The Northern District of Illinois denied the plaintiffs' motion to remand, noting "[r]ather than just complying with regulations, Boeing was acting as a federal contractor to build the Helicopter for

the U.S. Army, which subsequently sold the Helicopter to the Hellenic Army. Boeing was following U.S. Government specifications, including specifications for the rotor blades, hydraulic system and electric system, *i.e.*, the very portions of the Helicopter plaintiffs deem to have been improperly designed and the very portions with respect to which plaintiffs allege Boeing was negligent." *Id.* at 11. A concurrent request to transfer the matter to a federal court in Pennsylvania where the helicopter had been principally designed and manufactured was also granted. *Id.* The foregoing scenario is typical; a defendant removes a state court action to escape the perceived plaintiff-friendly state court judges and juries and then asks the Federal court to transfer or dismiss. Such desire to remove contemplates an effort to apply the FORS in a broader range of aviation cases using appropriately drafted counterclaims or third-party claims.

Why there aren't more FORS removals

The relative obscurity of FORS removals in aviation cases can be attributed generally to the artful pleading of plaintiffs counsel. *See, e.g.,* Michael Slack & Donna Bowen, *Don't Let Preemption Ground Your Aviation Case*, Trial (March 1, 2007)("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.") That said, FORS provides a removal basis that should be unaffected by the well-pled complaint rule. *Vandeventer*, 494 F. Supp. 2d at 1263 ("…federal officer removal is an exception to [the well-pleaded complaint rule], as 'suits against federal officers may be removed [when] despite the nonfederal cast of the complaint; the federal-question element is met if the defense depends on federal law.' The main purpose behind this rule is to assure federal officers' ability to litigate official immunity defenses in federal court.")(internal citations omitted). Still, if the plaintiff does not specifically name an individual FAA designee or allege an improper certification as an element of its claim, it becomes difficult to rely on the FORS. *See Swanstrom v. Teledyne Continental Motors, Inc.,* 531 F. Supp. 2d 1325 (S.D. Ala., 2008); *Britton v. Rolls Royce Engine Servs.*, 2005 U.S. Dist. LEXIS 13259, 12-13 (D. Cal. 2005) (*citing Magnin,* 91 F.3d at 1428). As such, defense counsel desiring to be in Federal Court, but otherwise unable to get there, are left to consider asserting third-party or counterclaims that separately present a basis for a FORS removal by the third-party.

As noted, cases distinguishing *Magnin* point to the absence of language in the plaintiffs' complaint naming an individual FAA designee, alleging a defendant acted as an FAA designee, or alleging that a defendant's conduct in issuing airworthiness certificates was a proximate cause of an accident. *Id.* But even where absent from an initial complaint, these very allegations can be alleged in a third-party action or counterclaim. The third-party defendant or counter-defendant will then be positioned to remove based on the FORS. Of course, case by case considerations are necessary, but escaping a state court can be a very important step in resolving a case on reasonable terms. There remain roadblocks to such a course of action, such as whether a third-party defendant will be permitted to remove both the third-party action and the main action.

Removal by Third-Party Defendants

The propriety of removals by a third-party of an entire action, and not just the third-party claim, is a disputed subject. *See e.g. In re Surinam Airways Holding Co.*, 974 F.2d 1255, 1260 (11th Cir. 1992). FORS, however, presents a separate basis for removal that is comparable with the removals of Foreign Sovereigns under 28 U.S.C. §1441(d). In such cases, the Foreign Sovereign is allowed a federal forum to present its available Foreign Sovereign Immunity Act (FSIA) defenses and are typically permitted to remove entire actions even when they are only a third-party defendant. *Id.*; *Nolan v. The Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990); *see also*, *Lie v. The Boeing Company*, 311 F. Supp. 2d 725 (N.D. Ill. 2004). This type of removal is permitted because of the distinction in the language authorizing the removal. The operative language in the FSIA context authorizes removals of an "action" as opposed to "claims." The same "action" language is present in the FORS. 28 U.S.C. § 1442. As the courts in *Nolan* and *In re Surinam* note, Fed. R. Civ. P. 2 "unequivocally establishes that a third-party claim is not a separate action that comprises part of a larger case; rather it is a claim that becomes part and parcel of an existing action." *Nolan,* 919 F.2d at 1066; *In re Surinam,* 974 F.2d at 1260.

Further, it is important to reiterate that the right provided by the FORS "is an incident of federal supremacy, and that one of its purposes was to provide a federal forum for cases where federal officials must raise defenses arising from their official duties." *Willingham*, 395 U.S. at 405. FORS removals are "absolute for conduct performed under color

of federal office, and…the policy favoring removal 'should not be frustrated by a narrow, grudging interpretation of §1442(a)(1).'" *Id*. at 407. "The words 'acting under' are broad, and the federal officer removal statute must be liberally construed." *Papapetrou* 2008 U.S. Dist. LEXIS 14146 at * 9, *citing Watson,* 127 S.Ct. at 2304-2305. The Federal judge may still have discretion to send the main the action back to State Court, but this discretion is not easily exercised if the allegations of the third-party claim are sufficiently intertwined with the main action to make independent resolution undesirable. *See, e.g., In re Surinam*, 974 F.2d at 1259 *citing Nolan*, 919 F.2d at 1065; *Fed. R. Civ. P.* 14(a) ("as the district court recognized in this case, [third-party defendant's] liability on the third-party indemnity and contribution claims is wholly contingent upon plaintiffs' verdicts in the main claims. Thus, in order to protect itself fully, a third-party defendant . . . might be called upon to assert defenses on behalf of any third-party plaintiff who has filed a third-party claim against it.")(internal quotations omitted). Given the foregoing similarities between the authorizing language in the FSIA and FORS removal statutes, it is reassuring to note that at least one court has approved removal of an entire action by a third-party FORS defendant. *See Spencer v. New Orleans Levee Board*, 737 F.2d 435, 437 (5th Cir. 1984) (not in an aviation context).

Conclusion

Watson's refocus on the Federal Officer Removal Statute should counsel aviation defendants to consider their prospects of asserting third-party claims that can make an entire case removable. An initial review of the statutes and cases suggest a FORS removal by a third-party defendant could be effective as to the entire action. Thus, an early third-party action might positively alter the procedural posture of a case otherwise stuck in state court. So remember, third-parties don't make a crowd under FORS.