Journal of Air Law and Commerce

Volume 62 | Issue 4 Article 2

1997

Vectors to Federal Court: Unique Approaches to Subject Matter Jurisdiction in Aviation Cases

Thad T. Dameris

Michael J. Mucchetti

VECTORS TO FEDERAL COURT: UNIQUE APPROACHES TO SUBJECT MATTER JURISDICTION IN AVIATION CASES

THAD T. DAMERIS*
MICHAEL J. MUCCHETTI**†

TABLE OF CONTENTS

* Thad Dameris is a partner with Vinson & Elkins L.L.P., Houston, Texas. Mr. Dameris is a trial lawyer who practices primarily in aviation product liability and oil and gas-related litigation, representing foreign and domestic clients. He graduated from Southern Methodist University, B.B.A. in 1982, and the University of Texas School of Law, J.D. with honors in 1986.

** Michael Mucchetti is an associate with Vinson & Elkins in the general litigation section. Michael graduated from the University of Texas, B.B.A. in 1987 and J.D. with honors in 1990 (Order of the Barristers and Phi Delta Phi). Michael was the chief note editor for the *Review of Litigation* during law school and clerked for Justice Lloyd Doggett on the Texas Supreme Court during the 1990-91 session.

† This Article is written in the authors' personal capacity and the views herein should not necessarily be attributed to Vinson & Elkins L.L.P. or any of its clients.

I. INTRODUCTION

IF "[T]HE first blow is half the battle,"[1] then the first blow in litigation is selecting the battleground. This Article addresses some unconventional approaches to ensure a federal forum in aviation litigation. Specifically, the Article discusses: (1) federal enclave jurisdiction; (2) jurisdiction based on international comity and foreign relation concerns; (3) treaty jurisdiction under the Texas Wrongful Death Act; (4) pooling and tiering the foreign ownership interests in an entity in order to qualify as a "foreign state" within the Foreign Sovereign Immunities Act; (5) the filing of a third-party action against a foreign state to come within the purview of the Foreign Sovereign Immunities Act; (6) federal preemption under the Warsaw Convention; (7) claims arising under the Death on the High Seas Act; (8) federal preemption under the General Aviation Revitalization Act; and (9) federal preemption of punitive and mental anguish damages under the Airline Deregulation Act. With the exception of the last two categories, all the foregoing bases for subject matter jurisdiction have been upheld in published opinions. Thus, these arguments should assist the aviation litigant to land in federal court.

II. FEDERAL ENCLAVE JURISDICTION

If a suit arises out of acts that occurred on federal property within the United States, federal enclave jurisdiction may exist. Federal enclave jurisdiction derives from Article I, Section 8, Clause 17 of the Constitution. The Constitution provides that Congress shall have the power "[t]o exercise exclusive Legislation in all Cases whatsoever . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings."[2]

---

[1] OLIVER GOLDSMITH, SHE STOOPS TO CONQUER act II.

[2] U.S. CONST. art. I, § 8, cl. 17; *see* Paul v. United States, 371 U.S. 245, 264 (1963) ("[I]f the United States acquires with the 'consent' of the state legislature land within the borders of that State by purchase or condemnation for any of the purposes mentioned in Art. I, § 8, cl. 17, . . . the jurisdiction of the Federal Gov-

When the federal government acquires title to state land with the consent of the state legislature, Congress enjoys the exclusive power to legislate such land.[3] The consent of the state is a prerequisite to extinguishing state power.[4] When a state consensually cedes land to the United States, the state's "sovereignty there over [is] terminated and federal sovereignty [becomes] complete and exclusive. . . ."[5] The purpose of this doctrine is to safeguard federal authority in certain areas from interference by the states.[6] The rationale underlying this doctrine is that any law in a territory over which the federal government has exclusive sovereignty derives its authority and force from the United States and, as such, is federal law.[7] Relying on this doctrine as their premise, federal courts have held that where federal enclave jurisdiction exists, the action is removable.[8]

---

ernment becomes 'exclusive.'"); David E. Engdahl, *Federalism and Energy: State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283, 289 (1976) ("[T]he courts from a very early date construed the language of the article I property clause as conferring exclusive governmental jurisdiction upon the United States."); Carl Strass, Note, *Federal Enclaves—Through the Looking Glass—Darkly*, 15 SYRACUSE L. REV. 754, 755 (1964) (citation omitted) ("Under this [the federal enclave] provision, the federal government has acquired more than 5,000 parcels over which it exercises such exclusive jurisdiction. Over forty are bigger than Washington, D.C. Others are only as big as a single building, such as a post office."); Note, *Federal Areas: The Confusion of a Jurisdictional-Geographical Dichotomy*, 101 U. PA. L. REV. 124, 126 (1952).

> [A] state may reserve powers other than the right to serve process even over lands purchased with consent and may cede jurisdiction over lands acquired for a purpose not specified in Art. I, § 8 of the Constitution. Of course, where no jurisdiction has vested in the United States its status is merely that of a proprietor.

Id. (citation omitted). Note, *Land Under Exclusive Federal Jurisdiction: An Island Within a State*, 58 YALE L.J. 1402, 1402-03 (1949) ("State courts usually dismiss lawsuits when a resident of such an area is a party on the ground that land under exclusive federal jurisdiction is not a part of the state.").

[3] Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525, 538 (1885); *Paul*, 371 U.S. at 264.

[4] *Fort Leavenworth*, 114 U.S. at 538.

[5] Mater v. Holley, 200 F.2d 123, 124 (5th Cir. 1952) (citing Surplus Trading Co. v. Cook, 281 U.S. 647, 652 (1930)) (noting that Georgia had retained concurrent jurisdiction for some state functions); MARLIN M. VOLZ, FEDERAL PRACTICE MANUAL § 7539 (2d ed. 1983) ("An action of negligence growing out of acts occurring on lands within the exclusive jurisdiction of the United States arises under federal law and may therefore be brought in United States district court.") (citing *Mater*, 200 F.2d at 123).

[6] Richard T. Altieri, *Federal Enclaves: The Impact of Exclusive Legislative Jurisdiction Upon Civil Litigation*, 72 MIL. L. REV. 55, 59 (1976).

[7] *Mater*, 200 F.2d at 124.

[8] *Id.* at 123; Willis v. Craig, 555 F.2d 724, 726 n.4 (9th Cir. 1977) ("We have no quarrel with the propriety of enclave jurisdiction in this case . . . even though the

Thus, if an aircraft crashed, was maintained, or refueled on a federal enclave, it may allow an ensuing action to be removed to protect important federal interests. As explained in *Akin v. Big Three Industries, Inc.*,[9] "[t]he Constitutional clause prevents state legislative interference with public lands" and provides a federal forum to prevent "state judicial interference with matters likely to involve substantial federal interests."[10] For example, if an aircraft crashes on a military installation, sensitive issues of national security may be implicated regardless of whether the aircraft is privately owned. Or, if an aircraft is maintained on a federal enclave, but crashes elsewhere, the action might still arise from acts on the enclave sufficient to vest the federal court with jurisdiction.

Such federal jurisdiction arises even though a state court has concurrent jurisdiction. As explained in *Mater v. Holley*,[11] for purposes of federal jurisdiction, it is irrelevant that state courts may enjoy concurrent jurisdiction within the federal enclave because "existing federal jurisdiction is *not affected by concurrent jurisdiction in state courts.*"[12] Moreover, defendants can remove an action on federal enclave grounds even if the federal government is not a party to the litigation.[13]

---

state courts may have concurrent jurisdiction."); Akin v. Big Three Indus., Inc., 851 F. Supp. 819, 822 (E.D. Tex. 1994) ("The result of this holding [that federal enclave jurisdiction is properly involved] is that the case presents a question arising under federal law, 28 U.S.C. § 1331, and is removable under 28 U.S.C. § 1441(a).").

[9] 851 F. Supp. 819 (E.D. Tex. 1994).

[10] *Id.* at 822.

[11] 200 F.2d 123 (5th Cir. 1952).

[12] *Id.* at 125 (emphasis added); *see also* Stevo v. CSX Transp., Inc., 940 F. Supp. 1222, 1224 (N.D. Ill. 1996) ("Clearly, in a majority of jurisdictions, absent a specific statutory language to the contrary, concurrent jurisdiction does not bar removal."); *Akin*, 851 F. Supp. at 822 n.1 ("Plaintiffs' argument that state courts have concurrent jurisdiction over transitory tort actions misses the point. Whether the state court's jurisdiction is concurrent is irrelevant to the issue whether a federal question is presented."); Fung v. Abex Corp., 816 F. Supp. 569, 571 (N.D. Cal. 1992) (following *Willis* and *Mater*). *But see* Pratt v. Kelly, 585 F.2d 692, 697 (4th Cir. 1978) (imposing exclusive jurisdiction requirement); Melendez v. Glastic Corp., No. 2:95CV1112, 1996 U.S. Dist. LEXIS 4537, at *8-9 (E.D. Va. Mar. 7, 1996) (rejecting *Akin* analysis).

[13] *See, e.g., Akin*, 851 F. Supp. at 822 (the action was removable to federal court by General Electric even though the federal government was not a party and GE did not constitute "a federal officer"); OMI Holdings, Inc. v. Howell, 864 F. Supp. 1046, 1048 n.2 (D. Kan. 1994) (in action not involving the federal government as a party, the court noted federal enclave jurisdiction could provide a basis for removal); *Fung*, 816 F. Supp. at 571 (holding removal on federal enclave grounds

The Federal Reservations Act, 16 U.S.C. section 457, may control wrongful death actions arising from acts on a federal enclave. The Act provides that:

> In the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State, such right of action shall exist as though the place were under the jurisdiction of the State within whose exterior boundaries such place may be; and in any action brought to recover on account of injuries sustained in any such place the rights of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be.[14]

The Act's principal purpose was apparently to "make wrongful death statutes . . . applicable to federal enclaves where the common law bar against wrongful death actions still controlled."[15] A suit under 16 U.S.C. section 457 arises under federal law so as to invoke federal jurisdiction under 28 U.S.C. section 1331.[16]

III. INTERNATIONAL COMITY

The more aviation litigation impacts foreign concerns, the greater the likelihood a court will hold that federal question jurisdiction, based on international comity or foreign relations grounds, exists. Federal question jurisdiction exists over civil actions where a federal district court has "original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States . . . ."[17] The law of the United States includes federal common law.[18] Thus, federal question jurisdiction may exist where federal common law governs because such a claim may implicate foreign relations.[19]

---

was proper when plaintiff's personal injury claims arose on naval facility and other federal enclaves).

[14] 16 U.S.C. § 457 (1994).

[15] Burgio v. McDonnell Douglas Inc., 747 F. Supp. 865, 866 (E.D.N.Y. 1990).

[16] *See* Quadrini v. Sikorsky Aircraft Div., 425 F. Supp. 81, 84-85 (D. Conn. 1977) (finding federal enclave jurisdiction existed where wrongful death claims were brought on behalf of marine officers who died in a helicopter crash within a North Carolina federal enclave), *on reconsideration*, 505 F. Supp. 1049 (D. Conn. 1981).

[17] 28 U.S.C. § 1441(b) (1994); 28 U.S.C.A. § 1331 (West 1993) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

[18] Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972).

[19] Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) (federal common law exists in international disputes implicating foreign relations); The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our

Claims that question or challenge foreign relations are also incorporated into federal common law.[20] If aviation litigation affects international relations, this fact will substantially favor removal of the action.[21] The fact that a foreign nation is not a party to the action does not eviscerate the implications that the litigation may have on foreign relations.[22]

In an aviation context, if the aircraft was designed or assembled to satisfy foreign specifications, or under foreign aircraft certification rules, federal jurisdiction may exist if a plaintiff challenges the standards under which the aircraft was designed and assembled.[23]

---

law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.") (citing Hilton v. Guyot, 159 U.S. 113, 163-64 (1895)); Kern v. Jeppesen Sanderson, Inc., 867 F. Supp. 525, 531-32 (S.D. Tex. 1994); Guinto v. Marcos, 654 F. Supp. 276, 278 (S.D. Cal. 1986) ("[T]he plaintiffs are correct in asserting that the 'laws' of the United States as defined in § 1331 include the Common Law . . . and that the Common Law includes within it the 'law of nations.'"); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 112(2) (1987) ("The determination and interpretation of international law present federal questions . . . ."); CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3563 (2d ed. 1984) ("Customary international law should be sufficient for federal-question jurisdiction.").

[20] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964) (holding that the "rules of international law should not be left to diverse and perhaps parochial state interpretations"); Republic of the Philippines v. Marcos, 806 F.2d 344, 352-53 (2d Cir. 1986), *cert. dismissed*, Ancor Holdings N.V. v. Republic of Phillippines, 480 U.S. 942 (1987), *cert. denied*, New York Land Co. v. Republic of Philippines, 481 U.S. 1048 (1987); Enron Corp. v. Phillips Petroleum U.K., Ltd., No. H-96-1210, at 1 (S.D. Tex. Apr. 22, 1996) (denying remand on international relations grounds in dispute that affected U.K. natural resources); Torres v. Southern Peru Copper Corp., No. C-95-495, at 8 (S.D. Tex. Dec. 4, 1995) (denying remand where suit affected Peruvian natural resource development "raised issues of international relations which arise under federal common law"), *aff'd*, No. 96-40203-CV0 (5th Cir. May 19, 1997); *Kern*, 867 F. Supp. at 531-32; Sequihua v. Texaco, Inc., 847 F. Supp. 61, 63 (S.D. Tex. 1994) (denying remand because of foreign relations implications arising from development of Ecuadorean resource); Grynberg Prod. Corp. v. British Gas, P.L.C., 817 F. Supp. 1338, 1365-66 (E.D. Tex. 1993) (denying remand because of foreign relations implications on Kazakhstan resource); *cf.* Aquafaith Shipping, Ltd. v. Jarillas, 963 F.2d 806, 808-09 (5th Cir. 1992) (remanding action where arguments concerning federal common law of foreign relations were foreclosed by the "well-pleaded complaint" rule), *cert. denied*, 506 U.S. 955 (1992).

[21] *See Grynberg*, 817 F. Supp. at 1356.

[22] *Id.*; *Kern*, 867 F. Supp. at 531.

[23] *See* Convention on International Civil Aviation, Apr. 4, 1947, art. 38, 61 Stat. 1180 (recognizing that contracting states may have different practices and standards than that prescribed by the International Civil Aviation Organization).

A discussion of this type of federal question jurisdiction is found in *Kern v. Jeppesen Sanderson, Inc.*[24] *Kern* involved consolidated claims arising from two separate crashes of Airbus aircraft in Katmandu, Nepal. Chief Judge Norman W. Black of the Southern District of Texas held that there was an independent basis of federal question jurisdiction "because Plaintiffs' claims raise questions of foreign relations which are incorporated into federal common law."[25] The foreign interests that sustained federal jurisdiction arose from the foreign government's interest in its own aviation regulations:

> The interest these foreign sovereigns have in regulating their aircraft, airlines and airspace outweighs any interests the United States may have in applying its own air safety regulations to these Defendants. "[E]very State has complete and exclusive sovereignty over the air space above its territory." They also control the standards for safety and airworthiness within their country. Since the interests of foreign countries in this litigation are substantial, there is federal question jurisdiction.[26]

Kern did not hold that it was necessary for the foreign air regulations to insulate the defendant from liability before federal question jurisdiction existed. It merely concluded the foreign interest in its own airspace was so substantial as to create federal question jurisdiction. The expanded but differing notion that foreign laws insulate a defendant from liability and thus provide federal question jurisdiction has been rejected:

> [T]o the extent that defendants seek to pursue a defensive strategy alleging that at least some of their actions should be insulated from liability because those actions were taken in compliance with regulations, programs, and policies of . . . one or more foreign governments, this strategy is insufficient to transform the plaintiffs' claims into federal questions.[27]

IV. TREATY JURISDICTION

In certain situations, federal question jurisdiction may exist where a foreign plaintiff sues under section 71.031 of the Texas Revised Civil Practice and Remedies Code.[28] In relevant part, the Act provides as follows:

---

[24] *Kern*, 867 F. Supp. at 531.

[25] *Id.*

[26] *Id.* at 532 (quoting Convention on International Civil Aviation, *supra* note 23, at art. 1, 38); *see Grynberg*, 817 F. Supp. at 1353-54.

[27] Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1349 (S.D. Tex. 1995).

[28] TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1986).

> (a) An action for damages for the death or personal injury of a citizen . . . of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if: . . .
>
> (3) in the case of a citizen of a foreign country, *the country has equal treaty rights with the United States* on behalf of its citizens.[29]

In other words, where (1) damages for death or personal injury; (2) are sought on behalf of a foreign citizen; (3) for a wrongful act, neglect, or default; (4) causing a death or injury; (5) outside of Texas, then the foreign citizen's country must have "equal treaty rights" with the United States.[30] The requirement that the foreign citizen's country have "equal treaty rights" arguably creates federal question jurisdiction.

The United States Supreme Court has held that "a case may arise under federal law 'where the vindication of a right under state law necessarily turn[s] on some construction of federal law.'"[31] Under section 71.031, the foreign plaintiff must prove more than the mere existence of a treaty between the United States and plaintiff's country. To satisfy its burden, the plaintiff must prove the existence of specific treaty provisions that assure certain litigation rights, as described in *Dow Chemical Co. v. Alfaro*.[32] In *Alfaro*, the Texas Supreme Court cited an example of the treaty language required to satisfy section 71.031—the

---

[29] *Id.* (emphasis added).

[30] *Id.* One commentator has incorrectly written that the "equal treaty right" requirement has been "deleted in revised legislation." Jordan J. Paust, "Equal Treaty Rights" Under the Texas Open Forum Act, 60 Tex. B. J. 214, 214 (1997). He is mistaken, the provision remains in section 71.031.

[31] Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 808-09 (1986) (quoting Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9 (1983)); *see also* Kidd v. Southwest Airlines Co., 891 F.2d 540, 542 (5th Cir. 1990) (quoting *Franchise Tax Bd.*, 463 U.S. at 8); Hidalgo County Water Control & Improvement Dist. v. Hedrick, 226 F.2d 1, 6 (5th Cir. 1955) (reaffirming ancient rule that a case "arises under" a treaty if its correct decision depends on construction of the treaty), *cert. denied*, 350 U.S. 983 (1956); United States v. Doherty, 615 F. Supp. 755, 757 n.3 (S.D.N.Y. 1985) (holding federal subject matter jurisdiction exists because "[t]he case at bar turns upon the proper construction of a treaty between the United States and a foreign nation"), *aff'd*, 786 F.2d 491 (2d Cir. 1986); Westland Oil Dev. Corp. v. Summit Transp. Co., 481 F. Supp. 15, 18 (S.D. Tex 1979) (suit arises under laws of the United States where it "really and substantially involves a dispute or controversy [of a law's] validity, construction, or effect"), *aff'd*, 614 F.2d 768 (5th Cir. 1980); Chapalain Compagnie v. Standard Oil Co., 467 F. Supp. 181, 185 (N.D. Ill. 1978) ("If the construction or interpretation of a treaty will determine the plaintiff's success, then federal question jurisdiction does in fact exist.").

[32] 786 S.W.2d 674, 675 (Tex. 1990), *cert. denied*, 498 U.S. 1024 (1991). For a discussion of *Alfaro* and the "equal treaty rights" provision, see Richard J. Graving

Treaty of Friendship, Commerce, and Navigation (FCN) from July 10, 1851, between the United States and Costa Rica:

> The citizens of the high contracting parties shall reciprocally receive and enjoy full and perfect protection for their persons and property, and shall have free and open access to the courts of justice in the said countries respectively, for the prosecution and defense of their just rights; and they shall be at liberty to employ, in all cases, the advocates, attorneys, or agents of whatever description, whom they may think proper, and they shall enjoy in this respect the same rights and privileges therein as native citizens.[33]

Thus, section 71.031 requires a court to interpret an FCN or similar treaty to determine if the necessary rights exist.[34] Consequently, an action under subsection 71.031(a)(3) creates federal question jurisdiction because the vindication of plaintiff's claims necessarily turns on the interpretation of a treaty. If, however, the plaintiff alleges that it does not rely upon any treaty, or, if no such treaty exists, the plaintiff lacks standing to sue.[35] In *Kern*, Chief Judge Black adopted this argument.[36] Based on section 71.031, the court found that plaintiffs were either in federal court because such a treaty existed or they lacked standing to

---

& Elizabeth M. Wood, *What are an Alien Plaintiff's "Equal Treaty Rights" Under Texas CPRC 71.031?* (South Texas College of Law Seminar, Jan. 23-24, 1997).

[33] *Alfaro*, 786 S.W.2d at 675 n.2; *see also* Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT'L L.J. 321, 327 (1994) ("In [Friendship, Commerce, and Navigation] treaties, each country promises to afford citizens of the other access to its courts that is the equivalent of access for its own citizens."); Allan R. Stein, *Erie and Court Access*, 100 YALE L.J. 1935, 1935 n.3 (1991) ("There is no legislative history on the meaning of that phrase [equal treaty rights]. The United States does have treaties with numerous countries guaranteeing free access to American courts, although most were entered into well after enactment of the Texas statute.").

[34] When looking to a multilateral agreement to determine if "equal treaty rights" exist, courts should be mindful of the Second Circuit's caution that, "When drafters of international agreements seek to provide equal access to national courts, the long-established practice is to do so *explicitly*." Murray v. British Broadcasting Corp., 81 F.3d 287, 291 (2d Cir. 1996) (emphasis added). Some have questioned whether denying the benefits of a wrongful death statute based solely on the decedent's status would violate the equal protection clause. *See* Ruth Downes, *The Windfall Effect: Damages and the Foreign Plaintiff*, 9 REV. LITIG. 267, 283-93 (1990).

[35] *See, e.g.*, *Alfaro*, 786 S.W.2d at 675 n.2; Owens-Corning Fiberglas Corp. v. Baker, 838 S.W.2d 838, 840 (Tex. App.—Texarkana 1992, no writ).

[36] 867 F. Supp. at 531; *see also* Roman v. Aviateca, S.A., No. H-96-142 (S.D. Tex. May 22, 1996). *Roman* was appealed to the Fifth Circuit, docket number 96-20591. The court heard oral argument on March 5, 1997. An opinion had not been released when this Article was submitted for publication.

sue because there was no such treaty. "If no treaty exists or if Plaintiffs contend they are not relying on a treaty, they lack standing to sue. If there is a treaty, its construction permits removal based on federal question jurisdiction."[37] Because the court concluded that a treaty did exist, it could assert federal subject matter jurisdiction over the plaintiffs' claims.[38]

Whether a plaintiff specifically identifies the bilateral or multilateral agreement granting equal treaty rights in the petition is irrelevant to removal under the artful pleading doctrine.[39] Thus, a defendant should be able to remove the action to federal court even if the petition does not specify the agreement, if any, that grants equal treaty rights.

This basis of jurisdiction, however, has been rejected in at least one published opinion.[40] In *Baker v. Bell Helicopter*, Judge McBryde found that "federal question jurisdiction does not exist for an action brought under a state wrongful death statute, even if, in the course of the trial, the court would be required to construe a treaty."[41] The plaintiff in *Baker* asserted that federal question jurisdiction existed because the equal treaty rights provision of section 71.031 required the court to construe a treaty. The court, however, held that plaintiff's claims were not created by treaty, but rather originated in Texas law.[42] The court concluded that "[t]he existence of equal treaty rights is not in the forefront of the case, but is simply a collateral issue."[43]

As this Article was being finalized for publication, the Fifth Circuit released its opinion in *Torres v. Southern Peru Copper Corp.*[44] The court rejected the contention that section 71.031 confers federal jurisdiction. Of course, even if section 71.031

---

[37] *Kern*, 867 F. Supp. at 531; *see, e.g., Alfaro*, 786 S.W.2d at 675 n.2 (citing *Hidalgo County Water Control & Improvement Dist.*, 226 F.2d at 6).

[38] *Kern*, 867 F.Supp. at 525.

[39] *See Franchise Tax Bd.*, 463 U.S. at 10, 22; Aaron v. National Union Fire Ins. Co., 876 F.2d 1157, 1160-61 (5th Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990); Beers v. North Am. Van Lines, Inc., 836 F.2d 910, 913 (5th Cir. 1988) ("It is axiomatic that a plaintiff may not defeat removal by fraudulent means or by 'artfully' omitting reference to essential federal questions."); Eitmann v. New Orleans Pub. Serv., Inc., 730 F.2d 359, 365 (5th Cir.), *cert. denied*, 469 U.S. 1018 (1984).

[40] Baker v. Bell Helicopter/Textron, Inc., 907 F. Supp. 1007, 1010 (N.D. Tex. 1995).

[41] *Id.* at 1011 (citing Winsor v. United Air Lines, Inc., 159 F. Supp. 856 (D. Del. 1958)).

[42] *Id.*

[43] *Id.*

[44] No. 96-40203 (5th Cir. May 19, 1997).

does not create jurisdiction, a plaintiff must still be prepared to cite the agreement providing for "equal treaty rights" to avoid dismissal in state court.

V. THE FOREIGN SOVEREIGN IMMUNITIES ACT: POOLING & TIERING

The Foreign Sovereign Immunities Act (FSIA)[45] is the exclusive basis of jurisdiction in federal and state courts for suits involving foreign states.[46] The threshold question in determining whether the FSIA applies is whether a foreign state is a defendant; however, the FSIA is broader than its name implies. Under the FSIA, agencies or instrumentalities of foreign states may also be considered a "foreign state."[47] Even a corporation may qualify as a "foreign state" because the FSIA defines an "agency or instrumentality of a foreign state" to mean an entity:

> (1) which is a separate legal person, corporate or otherwise, and
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.[48]

The first and third requirements are relatively straight-forward, but the language of the second requirement permits certain entities with an *aggregate* majority of foreign owners to constitute foreign states. Most courts hold that an entity's ownership may be *pooled* and *tiered* to reach the FSIA's foreign-ownership threshold. To attain a majority threshold through "pooling," one includes the direct ownership interest of each foreign state. To attain a majority threshold through "tiering," one includes indirect as well as direct foreign-state ownership in the calculus of the majority threshold.

---

[45] 28 U.S.C. §§ 1330, 1441(d), 1602-1611 (1994).

[46] Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993) (quoting Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 433 (1989)); Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 485 n.5, 488-89 (1983); United States v. Moats, 961 F.2d 1198, 1204-05 (5th Cir. 1992).

[47] 28 U.S.C. § 1603(b) (1994); *Moats*, 961 F.2d at 1204 n.7.

[48] 28 U.S.C. § 1603(b) (1994); *In re* Aircrash Disaster Near Roselawn, Ind., 96 F.3d 932, 937 (7th Cir. 1996) ("Congress expressly contemplated that business entities could qualify as foreign states . . . .").

A. POOLING PERMITTED

Section 1603(b)(2) does not require that a majority of shares be owned by a single foreign state. The majority ownership threshold may be satisfied by several foreign states pooling their ownership interests. For example, if France owns twenty-five percent of *Compagnie A* and Germany owns twenty-six percent, their fifty-one percent pooled interest satisfies section 1603(b)(2). The Fifth Circuit stated in *dicta* that Airbus Industrie qualified as an agency or instrumentality of foreign states under the FSIA by pooling its foreign ownership interest.[49] As the Fifth Circuit noted, courts have consistently approved of multinational pooling under the FSIA:

> We also observe that the district court questioned whether the interests of two or more foreign states could be combined, commenting that "pooling" appears to be foreclosed by the use of the state ("singular") in the FSIA.[50] This reasoning probably should be examined in light of the rules of statutory construction, (for example, 1 U.S.C. section 1 providing that "words importing the singular include and apply to several persons, parties, or things" unless the context indicates otherwise), and in light of the cases in which the pooling issue has been considered.[51]

Pooling was examined exhaustively by the multidistrict litigation (MDL) court in *In re Aircrash Disaster Near Roselawn, Indiana.* The court summarized its conclusions, reasoning:

---

[49] Linton v. Airbus Indus., 30 F.3d 592, 597-98 n.29 (5th Cir.) (recognizing that Airbus, at least facially, "presented a strong factual and legal claim of immunity [under the FSIA]"), *cert. denied*, 115 S. Ct. 639 (1994); *See Kern*, 867 F. Supp. at 531 (allowing pooling and holding that Airbus is a foreign state under the FSIA).

[50] *Linton*, 30 F.3d at 598 n.29 (citing *Linton v. Airbus Indus.*, 794 F. Supp. 650, 652 (S.D. Tex. 1992).

[51] *Id.* (emphasis added). *See* Mangattu v. M/V IBN HAYYAN, 35 F.3d 205, 207 (5th Cir. 1994) (rejecting the argument that the FSIA "requires that 51% or more of Appellee's stock be owned by a single foreign state," and holding that several foreign states can pool their ownership interests); Ratnaswamy v. Air Afrique, No. 95-C-7670, 1996 WL 507267, at *3 (N.D. Ill. Sept. 4, 1996); *In re* Aircrash Disaster Near Roselawn, Ind., 909 F. Supp. 1083, 1090 (N.D. Ill. 1995), *aff'd*, 96 F.3d 932 (7th Cir. 1996); *In re* EAL (Delaware) Corp., No. 93-578-SLR, 1994 WL 828320, at *4 (D. Del. Aug. 3, 1994); Aluminum Distrib., Inc. v. Gulf Aluminum Rolling Mill Co., No. 87-C-6477, 1989 WL 64174, at *2 (N.D. Ill. June 8, 1989); LeDonne v. Gulf Air, Inc., 700 F. Supp. 1400, 1406 (E.D. Va. 1988); Rios v. Marshall, 530 F. Supp. 351, 371 (S.D.N.Y. 1981); International Ass'n of Machinists & Aerospace Workers v. OPEC, 477 F. Supp. 553, 568-69 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); Aboujdid v. Singapore Airlines, Ltd., 18 Av. Cas. (CCH) ¶ 18,059 (N.Y. Sup. Ct. June 11, 1984), *rev'd in part on other grounds*, 494 N.E.2d 1055 (1986).

> We concur with the majority of courts that have permitted the pooling of ownership interests for purposes of determining whether § 1603(b)(2)'s majority ownership requirement is met. In the first place, we find that 1 U.S.C. § 1 permits reading § 1603(b)(2) as referring to majority ownership by "foreign states" rather than simply "a foreign state." Moreover, we find that the wooden reading urged by the plaintiffs would most assuredly frustrate the FSIA's objective of providing "a comprehensive jurisdictional scheme in cases involving foreign states." There is simply no sound policy justification for reading the FSIA to apply to an entity majority owned by one foreign state but not to apply to an entity majority owned by two or more foreign states. The sensitive concerns raised by a federal court's exercise of jurisdiction over a foreign sovereign are no less implicated in the latter context.[52]

But pooling need not necessarily be multinational. At least one federal court has held that a single foreign state can pool its own interests. In *Credit Lyonnais v. Getty Square Associates*,[53] Credit Lyonnais (CL) argued that it satisfied the definition of "foreign state" under 28 U.S.C. section 1603 because

> a majority of its shares are owned by the Republic of France. . . . France owns outright 48.5% of CL's outstanding shares. In addition, . . . France owns 99.97% of SPBI SNC, another French corporation, which has an 8.67% ownership in CL. *After pooling its ownership in CL, . . . France is a 57.17% shareholder.*[54]

The district court noted that "[n]either CL nor this Court has found any direct authority allowing one foreign state to pool its ownership interests in different entities to satisfy the requirements of section 1603(b)(2)."[55] Nevertheless, the court allowed pooling by France alone, holding that "[s]uch a result does not distort the plain meaning of the statute" and concluding that "because France may pool SPBI SNC's shares, a corporation of which France owns 99.97 percent, toward the ownership requirements of section 1603(b), the court has subject matter jurisdiction over this action."[56] As a result, under the rationale

---

[52] *In re Roselawn*, 909 F. Supp. at 1093 (quoting H.R. REP. NO. 1487, 94th Cong., 2d Sess. 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611). The Seventh Circuit affirmed the MDL court's reasoning. *In re* Aircrash Disaster Near Roselawn, Ind., 96 F.3d at 937-38.

[53] 876 F. Supp. 517 (S.D.N.Y. 1995).

[54] *Id.* at 519-20 (emphasis added).

[55] *Id.* at 520.

[56] *Id.*

espoused by *Credit Lyonnais*, pooling is permissible even if only a single foreign state has ownership interests in a pooled entity.

Sometimes, the majority threshold may not be reached by pooling foreign ownership. Jurisdiction may still exist, however, as the FSIA allows tiering.

B. TIERING PERMITTED

Foreign government ownership need not be direct, it may be tiered, and still contribute toward total government ownership. The FSIA provides that an entity is an agency or instrumentality of a foreign state if the majority of its "shares or other ownership interest is owned by a foreign state or a political subdivision thereof."[57] The statute imposes no manner or form requirement for the relevant ownership interest. Specifically, the FSIA is silent as to intermediary entities through which foreign states may choose to own interest in an entity.

Several courts have employed this tiered-ownership calculation, counting the foreign-state ownership interests in the intermediary entity toward the majority ownership of the entity seeking to invoke the FSIA protection.[58]

---

[57] 28 U.S.C. § 1603(b)(2) (1994).

[58] *See, e.g., In re Roselawn*, 96 F.3d at 939-41 (indirect French and Italian government interest included); O'Connell Mach. Co. v. M.V. "Americana," 734 F.2d 115 (2d Cir. 1984) (Italian government controlled the majority of the shares of a ship line through the independent finance arm of a state organization), *cert. denied*, 469 U.S. 1086 (1984); *Credit Lyonnais*, 876 F. Supp. at 519-20 (defining Credit Lyonnais as a foreign state within § 1603 when it was 48.5% outright owned by France and when France owned 99.97% of another French corporation which, in turn, had an 8.67% ownership in Credit Lyonnais, for a total French ownership interest of 57.17%); Trump Taj Mahal Assocs. v. Costruzioni Aeronautiche Giovanni Agusta, S.P.A., 761 F. Supp. 1143 (D.N.J. 1991) (Italian government held majority interest in helicopter manufacturer through several tiers of intermediaries), *aff'd*, 958 F.2d 365 (3d Cir.), *cert. denied*, 506 U.S. 826 (1992); *Aluminum Distrib.*, 1989 WL 64174, at *2 (considering interest owned by government through intermediary in which it had a minority interest); Rutkowski v. Occidental Chem. Corp., No. 83-C-2339, 1988 WL 107342, at *3 (N.D. Ill. Oct. 5, 1988) (holding defendant was foreign state although ownership by Quebec was tiered through two corporations); Keller v. Transportes Aereos Militares Ecuadorianos, 601 F. Supp. 787, 788 (D.D.C. 1985) (finding that defendant was a foreign state when a majority of its shares were owned by an "instrumentality of a foreign state"); Clemente v. Philippine Airlines, 614 F. Supp. 1196, 1197 (S.D.N.Y. 1985) (Philippine government held airline through two intermediary corporations); *cf.* Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico S.A., 727 F.2d 274, 275 (2d Cir. 1984) (finding that Chilean corporation was a "foreign state" for purposes of the FSIA when a controlling interest was owned by the Chilean government).

The Fifth Circuit, in *dicta*, rejected opposition to the tiering approach:

> [T]he resolution of the Airbus Defendants' claim of immunity turns on whether through "tiering" a foreign state's ownership interest can be attributed when that foreign state did not own a majority interest . . . in Airbus. The district court answered this question in the negative.[59] Hence, Germany's interests could not be pooled since Germany failed to own a majority interest in the companies through which Germany held its ownership interest in the Airbus Defendants. The controlling statute, however, erects no explicit bar to the methods by which a foreign state may own an instrumentality, merely requiring that the entity claiming immunity—not its parent—have "a majority of [its] shares or other ownership interest . . . owned by a foreign state or a political subdivision thereof."[60] There is no mention of "voting" or "control" majority, thus equitable or beneficial majority ownership is not expressly prohibited from serving.[61]

More recently, in *Delgado v. Shell Oil Co.*,[62] the court expressly recognized that the FSIA permits tiering:

> Dead Sea has introduced uncontradicted evidence that Israel owns, albeit indirectly, roughly two-thirds of the outstanding shares of Dead Sea. The fact that Israel's ownership interest in Dead Sea is "indirect" because Dead Sea is a wholly-owned subsidiary of an entity in which Israel owns an indirect majority interest is immaterial.[63]

If tiering were not allowed, the results might be absurd. For example, if the chain of intermediate entities is extended, with a foreign sovereign owning 49.9% of each tier, after the second tier, the foreign sovereign would own almost 87.49% of the entity applying for FSIA immunity. After the third tier, the foreign sovereigns would own almost 93.74%. In each case, however, if a court were not allowed to tier, the applying entity would be denied FSIA protection. Paradoxically, if tiering were prohibited, an entity owned almost exclusively by foreign sovereigns would be denied FSIA immunity, while an entity with merely

---

[59] *See Linton*, 794 F. Supp. at 653-54.

[60] 28 U.S.C. § 1603(b)(2) (1994).

[61] *Linton*, 30 F.3d at 598 n.29 (emphasis added); *see also Kern*, 867 F. Supp. at 531 (finding that AI qualified as a foreign sovereign under the FSIA).

[62] 890 F. Supp. 1315 (S.D. Tex. 1995).

[63] *Id.* at 1318 n.5 (citation omitted); *see, e.g.*, Talbot v. Saipem A.G., 835 F. Supp. 352, 353 n.2 (S.D. Tex. 1993) (holding that defendant was a foreign state although it was indirectly owned by Italy's Ministry of the Treasury).

50.01% direct, foreign-sovereign ownership would enjoy such immunity.

The more reasonable inquiry is whether a majority of the ownership interest in the entity seeking FSIA protection would be distributed to foreign sovereigns upon dissolution. The ultimate-ownership test complies with the letter of the FSIA, while avoiding arbitrary, absurd applications of the FSIA. A concern that allowing "pooling" and "tiering" unfairly broadens the class of entities qualifying for immunity overlooks the exceptions to sovereign immunity[64] that still might apply even if section 1603 is satisfied, namely, the "commercial activity" exception.[65]

Some courts, however, have rejected pooling and tiering.[66] But these holdings have been criticized. For example, the MDL court in *Roselawn* had this criticism of *Gates*: "Although the *Gates* court's analysis has an arguable foundation, we believe that its conclusion is inconsistent with the plain language of the Act as well as its legislative history."[67] The *Roselawn* MDL court found that the alleged "literal reading" of the FSIA by *Gates* "is achieved only by nullifying a key definitional provision of the Act and ignoring the House Judiciary Committee's analysis of that definitional provision."[68] The MDL court's criticism of *Gates* was reiterated by the Seventh Circuit on appeal.[69] The Seventh Circuit noted that "[t]he use of 'includes' [in the FSIA] shows Congress' intent to broadly define 'foreign state.'"[70] The court also emphasized that "[c]lose analysis confirms the district court's resolution of the question of 'tiering.' The Act does not expressly require direct ownership, nor does it exclude the form in which France and Italy hold [the defendant company] as an instrumentality."[71]

---

[64] 28 U.S.C. §§ 1605-1607 (1994).

[65] *Id.* § 1605(a)(2); *see* Brown v. Valmet-Appleton, 77 F.3d 860, 862-63 (5th Cir. 1996) (finding company a "foreign state" under § 1603 but not immune under § 1605(a)(2)).

[66] *See* Gates v. Victor Fine Foods, 54 F.3d 1457, 1461-62 (9th Cir.), *cert. denied sub nom.* Fletcher's Fine Foods, Ltd. v. Gates, 116 S. Ct. 187 (1995); Gardiner Stone Hunter Int'l v. Iberia Lineas Aereas de Espana, S.A., 896 F. Supp. 125 (S.D.N.Y. 1995); *In re* Hashim, 188 B.R. 633, 640-41 (D. Ariz. 1995).

[67] *In re Roselawn*, 909 F. Supp. at 1096.

[68] *Id.*

[69] *Id.* at 940-41.

[70] *Id.* at 940.

[71] *Id.* at 941.

Gardiner's rationale may also be suspect. The court in *Gardiner* relies on Judge Kent's opinion in *Linton v. Airbus Industrie.*[72] However, as noted above, the Fifth Circuit criticized Judge Kent's calculation of whether Airbus Industrie's foreign ownership satisfied the FSIA.[73] Initially, the Fifth Circuit's criticism was echoed by the state court. In an unpublished opinion after remand of the case, the state court rejected Judge Kent's analysis, holding that Airbus was a foreign state under the FSIA.[74] But this criticism may have been short lived. The Texas Court of Appeals reversed the district court's finding that Airbus satisfied section 1603(b).[75] The appellate court acknowledged the propriety of pooling, "find[ing] that the pooling of ownership interests between foreign sovereigns where no single state owns more than 50% is acceptable under the FSIA."[76] Furthermore, the appellate court reiterated that "tiering through a *majority owned* intermediary is permissible to determine whether an entity is entitled to foreign state status under the FSIA."[77] But the court was unwilling to allow tiering through non-majority-owned intermediaries, concluding that it would be "incongruous with the language and purpose of the Act to allow *minority* foreign state ownership in a *privately owned* entity to be tiered and pooled to achieve foreign-state status under the FSIA."[78] Airbus has petitioned the Texas Supreme Court to clarify this important issue.[79]

VI. FSIA JURISDICTION THROUGH A THIRD-PARTY ACTION

Even if a defendant cannot qualify as a foreign sovereign under the FSIA, a third-party defendant might. A defendant may sue a third party who is a "foreign sovereign" under the FSIA and this third-party, foreign-sovereign defendant may remove the action to federal court.[80] A court should not concern

---

[72] 794 F. Supp. 650 (S.D. Tex. 1992).

[73] *Linton*, 30 F.3d at 598 n.29.

[74] Nos. 92-C-0375, 92-C-0404 (23d Dist. Ct., Brazoria County, Tex. Feb. 9, 1995).

[75] Linton v. Airbus Indus., 934 S.W.2d 754, 759 (Tex. App.—Houston [14th Dist.] 1996, writ requested).

[76] *Id.*

[77] *Id.* at 762 (emphasis added).

[78] *Id.* at 765 (emphasis added).

[79] *See supra* note 75.

[80] *See, e.g.*, Nolan v. Boeing Co., 919 F.2d 1058, 1063-64 (5th Cir. 1990), *cert. denied*, 499 U.S. 962 (1991); *In re Roselawn*, 909 F. Supp. at 1089-90.

itself "with why these parties prefer to be in federal court so long as there is a legitimate basis for jurisdiction."[81]

In most jurisdictions, such a third-party defendant can remove the entire action to federal court.[82] However, not all jurisdictions allow a defendant to remove the entire action.[83] These courts relied on the Supreme Court's opinion in *Finley v. United States*.[84] *Finley*, however, was legislatively overruled by the enactment of 28 U.S.C. section 1367, which expressly provides for pendent-party jurisdiction.[85] Thus, the *Boeing* and *Roselawn* line of authority permitting removal of the entire action is more persuasive.[86]

VII. THE WARSAW CONVENTION

As discussed above, an action arising from a treaty with the United States may support federal court jurisdiction. Likewise, cases arising out of international air transportation are governed by the Warsaw Convention and are within a federal court's original jurisdiction.[87] The courts are divided, however, over

---

[81] *In re Roselawn*, 96 F.3d at 942; *see also* City of Chicago v. Mills, 204 U.S. 321, 330 (1907) (noting that if a suit "is free from fraud or collusion, [a party's] motive in preferring a federal tribunal is immaterial").

[82] *Id.* (finding removal of entire action consistent with congressional intent); *In re* Surinam Airways Holding Co., 974 F.2d 1255, 1259 (11th Cir. 1992) (holding that the underlying claims against the domestic defendant as well as the third-party claims against the foreign defendant may be removed); *Nolan*, 919 F.2d at 1066 (identical holding as *In re Surinam Airways Holding Co.*, 974 F.2d at 1255); Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1098-99 (9th Cir. 1990); Teledyne, Inc. v. Kone Corp., 892 F.2d 1404, 1407-09 (9th Cir. 1989) (holding that 28 U.S.C. § 1441(d) conferred jurisdiction over the entire civil action and not just the claims against the foreign state in a suit naming both foreign and domestic defendants); Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1375-76 (5th Cir. 1980); Lopez del Valle v. Gobierno de la Capital, 855 F. Supp. 34, 36-37 (D. P.R. 1994); Noonan v. Possfund Inv., Ltd., No. 89-2903, 1994 WL 515440, at *2-3 (S.D.N.Y. Sept. 3, 1994); Didi v. Destra Shipping Co., No. 93-1851, 1993 WL 232075 (E.D. La. June 17, 1993).

[83] *See* Schlumberger Indus., Inc. v. National Sur. Corp., 36 F.3d 1274, 1281 (4th Cir. 1994) (holding that 28 U.S.C. § 1330(a) does not confer pendent-party jurisdiction); Alifieris v. American Airlines, Inc., 523 F. Supp. 1189, 1192 (E.D.N.Y. 1981) (holding that only the third-party complaint against the foreign state may be removed and remanding other claims to state court).

[84] 490 U.S. 545 (1989).

[85] *In re Roselawn*, 909 F. Supp. at 1103.

[86] *Id.*; *see also In re Roselawn*, 96 F.3d at 943 n.4 (agreeing with the district court that *Schlumberger* presented a unique situation where the foreign defendant was dismissed before the merits were reached).

[87] *See, e.g., In re* Air Disaster at Lockerbie, Scot. on Dec. 21, 1988, 928 F.2d 1267 (2d Cir. 1991), *cert. denied*, 502 U.S. 920 (1991); Floyd v. Eastern Airlines, Inc.,

whether the Warsaw Convention creates an exclusive cause of action and whether it preempts state law causes of action.[88]

In *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways*,[89] the Fifth Circuit held that the Warsaw Convention creates the cause of action and exclusive remedy against air carriers in article 18 claims.[90] The court stated as follows:

> The essential inquiry is whether the Convention provides the exclusive liability remedy for international air carriers by providing an independent cause of action, thereby preempting state law, or whether it merely limits the amount of recovery for a cause of action otherwise provided by state or federal law. We have not previously addressed this question. We hold today that the Warsaw Convention creates the cause of action and is the exclusive remedy.[91]

The court also concluded that the Warsaw Convention preempts state law "in the areas covered," reasoning that "[a]n obvious major purpose of the Warsaw Convention was to secure uniformity of liability for air carriers. That uniformity has both an international and intranational application. The law of Texas, as it relates to the cause of action, is preempted."[92]

Boehringer's reasoning was followed by the Second Circuit in *Air Disaster at Lockerbie, Scotland v. Pan American World Airways, Inc.*[93] The Second Circuit concluded that "the existence of separate state causes of action conflicts so strongly with the uniform

---

872 F.2d 1462 (11th Cir. 1989), *rev'd on other grounds*, 499 U.S. 530 (1991); Boehringer-Mannheim Diagnostics, Inc. v. Pan Am. World Airways, Inc., 737 F.2d 456 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186 (1985); *In re* Mexico City Aircrash, 708 F.2d 400 (9th Cir. 1983).

[88] *Compare Boehringer-Mannheim*, 737 F.2d at 456 *and In re Air Disaster at Lockerbie*, 928 F.2d at 1267 *with In re* Korean Air Lines Disaster of Sept. 1, 1983, 932 F.2d 1475, 1490-99 (D.C. Cir. 1991) (Mikva, J., dissenting), *cert. denied sub nom.* Dooley v. Korean Air Lines, Ltd., 502 U.S. 994 (1991); and *In re* Aircrash in Bali, Indonesia, 684 F.2d 1301, 1311 n.8 (9th Cir. 1982); 1 LEE S. KREINDLER, AVIATION ACCIDENT LAW § 10.08 (1996) (discussing opinions that have examined whether the Warsaw Convention creates a cause of action).

[89] 737 F.2d 456 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186 (1985).

[90] *Id.* The Fifth Circuit later held that the Warsaw Convention creates the exclusive cause of action and remedy for Article 17 claims. *See* Potter v. Delta Air Lines, Inc., 98 F.3d 881, 887 (5th Cir. 1996) ("[W]e conclude that article 17 of the Warsaw Convention creates the exclusive cause of action and the exclusive remedy for all international transportation of persons performed by aircraft for hire.").

[91] *Boehringer*, 737 F.2d at 458.

[92] *Id.* at 459.

[93] 928 F.2d at 1273-78.

enforcement of the [Warsaw Convention] that [the normal presumption against preemption] is overcome."[94]

Courts are split over whether the Warsaw Convention completely preempts state law claims so as to support removal jurisdiction. While several courts have held that the Warsaw Convention supports federal court jurisdiction,[95] other courts have rejected this argument.[96] Thus, like other bases of jurisdiction discussed in this Article, the existence of subject matter jurisdiction may vary with the forum selected.

VIII. DEATH ON THE HIGH SEAS ACT

The Death on the High Seas Act (DOHSA)[97] provides that:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.[98]

This mandate encompasses tort claims for wrongful death arising from the crash of an aircraft into navigable waters beyond a marine league from the shores of the United States or its territories, including the territorial waters of a foreign country.[99]

---

[94] *Id.* at 1278.

[95] *See, e.g.*, Romano v. British Airways, 943 F. Supp. 623, 626 (N.D. W. Va. 1996); Garcia v. Aerovias de Mexico, S.A., 896 F. Supp. 1216, 1217 (S.D. Fla. 1995); Ajibola v. Sabena Belgium Airline, No. 2479, 1995 WL 552737, at *1-2 (S.D.N.Y. Sept. 15, 1995); Luna v. Compania Panamena de Aviacion, S.A., 851 F. Supp. 826, 831 (S.D. Tex. 1994); Jack v. Trans World Airlines, Inc., 820 F. Supp. 1218, 1226 (N.D. Cal. 1993); Alvarez v. Servicios Aereos de Honduras, S.A., No. H-93-3060, 24 Av. Cas. 17,888, 17,889 (S.D. Tex. Jan. 11, 1994).

[96] *See, e.g.*, Zinn v. American Jet, S.A., No. CV-96-4251, 1996 U.S. Dist. LEXIS 16331, at *10 (C.D. Cal. Oct. 10, 1996); Campos v. Sociedad Aeronautica de Medellin Consolidad, S.A., 882 F. Supp. 1056, 1059 (S.D. Fla. 1994); Clark v. United Parcel Serv., Inc., 778 F. Supp. 1209, 1210 (S.D. Fla. 1991); Alvarez v. Aerovias Nacionales de Colombia, S.A., 756 F. Supp. 550, 555-56 (S.D. Fla. 1991); Calderon v. Aerovias Nacionales de Colombia, Avianca, Inc., 738 F. Supp. 485 (S.D. Fla. 1990), *appeal dismissed*, 929 F.2d 599 (11th Cir.), *cert. denied*, 502 U.S. 940 (1991).

[97] 46 U.S.C. §§ 761-68 (1994).

[98] 46 U.S.C. § 761 (1994).

[99] Sanchez v. Loffland Bros. Co., 626 F.2d 1228, 1230 n.4 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981); *In re* Air Crash Disaster Near Bombay, India, 531 F. Supp. 1175, 1182-84 (W.D. Wash. 1982).

DOHSA provides the exclusive remedy for deaths on the high seas and preempts state wrongful death statutes.[100]

Courts are split on whether DOHSA claims brought in state court are removable to federal court as federal questions. Several courts have held that DOHSA claims are not removable.[101] Other courts have found that DOHSA claims are removable.[102] But the line of authority supporting removal enjoys limited support. For instance, as noted by the court in *Baker*,[103] *Phillips* (approving DOHSA removal) has been widely criticized or ignored by other courts.[104] Also, although the Fifth Circuit has not decided this matter directly, the court, in *dicta*, recently cited *Filho* (disapproving DOHSA removal) favorably, while failing to mention *Phillips*.[105]

IX. THE GENERAL AVIATION REVITALIZATION ACT

As of January 12, 1997, no published case had addressed whether the General Aviation Revitalization Act of 1994 (GARA) creates federal question jurisdiction by completely preempting state causes of action.[106] GARA provides that no civil action for damages for death or injury arising out of an accident involving a general aviation aircraft may be brought against an aircraft manufacturer or a manufacturer of any component, part, or system of the aircraft more than eighteen years after the date of delivery of the aircraft by the manufacturer to its first pur-

---

100 Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 227 (1986).

101 *See Baker*, 907 F. Supp. at 1010; Zaini v. Shell Oil Co., 853 F. Supp. 960, 965 (S.D. Tex. 1994); De Bello v. Brown & Root, Inc., 809 F. Supp. 482, 485 (E.D. Tex. 1992); Argandona v. Lloyd's Registry of Shipping, 804 F. Supp. 326, 327-28 (S.D. Fla. 1992); Filho v. Pozos Int'l Drilling Servs., Inc., 662 F. Supp. 94, 100 (S.D. Tex. 1987); *see also In re* Medscope Marine Ltd., 972 F.2d 107, 110 n.17 (5th Cir. 1992) (noting in dicta that *Filho* was a "persuasive, well-reasoned, and scholarly opinion concluding that DOHSA cases are nonremovable").

102 Phillips v. Offshore Logistics, 785 F. Supp. 1241, 1242 (S.D. Tex. 1992); Kearney v. Litton Precision Gear, No. 87-8335-KN, 1988 WL 383575, at *1 (C.D. Cal. Mar. 17, 1988).

103 907 F. Supp. at 1010.

104 *See De Bello*, 809 F. Supp. at 486; *Argandona*, 804 F. Supp. at 328.

105 *Medscope Marine*, 972 F.2d at 110 n.17.

106 In *Wright v. Bond-Air, Ltd*, 930 F. Supp. 300 (E.D. Mich. 1996), defendants removed an action to federal court arguing that, because of the application of GARA, "[i]ts state-created cause of action presents a substantial federal question and therfore 'arises under' federal law." *Id.* at 303. The court rejected defendants' argument. *Id.* at 303-05. Defendants, however did "not rely on complete preemption for removal." *Id.* at 302. *See also* Robert F. Hedrick, *A Close and Critical Analysis of the New General Aviation Revitalization Act*, 62 J. AIR LAW & COMM. 385, 415-16 (1996) (discussing preemption and *Wright*).

chaser.[107] Importantly, GARA provides that "[t]his section supersedes any State law to the extent that such law permits a civil action" covered by the Act to be brought after the eighteen-year limitation period.[108] Congress intended the statute to insulate aircraft manufacturers from liability greater than eighteen years after the initial purchase and delivery of the aircraft.[109] President Clinton explained that "[t]he Act establishes an 18-year statute of repose for general aviation aircraft and component parts beyond which the manufacturer will not be liable in lawsuits alleging defective manufacture or design."[110] It may be argued that GARA, and particularly section 2(d), manifests Congress's intent to completely preempt claims against an aircraft or component part manufacturer filed more than eighteen years after delivery to the first purchaser.[111]

The complete preemption doctrine holds that a federal question exists where a federal statute so thoroughly regulates a field that any viable suit in the field is necessarily federal.[112] Under the doctrine of complete preemption, the preemptive power of a federal statute may be "so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim.'"[113] Once a state law issue has been completely preempted by a federal statute, any claim that is based on the state law arises from its inception under federal law.[114]

The complete preemption doctrine applies when a federal statute has eradicated any legitimate or viable state cause of action.[115] "Although a defense, preemption may so forcibly and completely displace state law that the plaintiff's cause of action is wholly federal or nothing at all."[116] The doctrine allows a de-

---

[107] General Aviation Revitalization Act of 1994, 49 U.S.C. § 40101, note §§ 2(a), 3(3) (1994).

[108] *Id.* § 2(d).

[109] H.R. REP. NO. 103-525(I), 103d Cong., 2d Sess. 3 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1638, 1640.

[110] STATEMENT BY PRESIDENT WILLIAM J. CLINTON UPON SIGNING THE GENERAL AVIATION REVITALIZATION ACT OF 1994, 1994 PUB. PAPERS II (Aug. 17, 1994).

[111] Trans World Airlines, Inc. v. Mattox, 897 F.2d 773, 776-83 (5th Cir.), *cert. denied*, 498 U.S. 926 (1990).

[112] Caterpillar, Inc. v. Williams, 482 U.S. 386, 393 (1987).

[113] *Id.* (quoting Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 65 (1987)); *see* Brown v. Crop Hail Management, Inc., 813 F. Supp. 519, 523 (S.D. Tex. 1993).

[114] *Caterpillar*, 482 U.S. at 393.

[115] Carpenter v. Wichita Falls Indep. Sch. Dist., 44 F.3d 362, 366 (5th Cir. 1995).

[116] *Id.*

fendant to remove any case to federal court that falls within the purview of the preempting statute.[117]

However, courts may rely on GARA's legislative history to demonstrate that it does not create federal question jurisdiction through complete preemption. For example, on September 15, 1993, when Representative Dan Glickman of Kansas introduced the General Aviation Revitalization Act of 1993 in the House of Representatives, he noted the limited scope of the proposed legislation: "Unlike my previous legislation seeking product liability reform, the General Aviation Revitalization Act of 1993 does not create a Federal standard of liability or limit the jurisdiction of any State court."[118] In another example, Senator Hatch clarified "what this bill does not do:" "Let me state for the record that *S. 1458 does not* create a Federal standard of liability, *limit the jurisdiction of any State court*, or attempt to change existing State laws regarding joint and several liability, comparative fault, or punitive damages."[119] The House Report took the same narrow view, finding that:

> [T]he legislation may be viewed as a narrow and considered response to the 'perceived' liability crisis in the general aviation industry. Rather than seeking to revise substantially a number of substantive and procedural matters relating to State tort law, as earlier legislative efforts would have done, S. 1458 is limited to creating a statute of repose.[120]

Thus, the Act remains a potential basis for federal jurisdiction, albeit a novel and largely untested one.

---

[117] Baker v. Farmers Elec. Co-op, Inc., 34 F.3d 274, 278 (5th Cir. 1994); 1 GEORGE P. KAZEN, JAMES L. BRANTON, & HARRY REASONER, FEDERAL CIVIL PROCEDURE BEFORE TRIAL—5TH CIRCUIT 53:584 (1996) ("When preemption is complete, it, can provide a sufficient basis for removal to federal court even though preemption is raised as a defense, not withstanding the well-pleaded complaint rule.") (citing Hubbard v. Blue Cross & Blue Shield Ass'n, 42 F.3d 942 (5th Cir. 1995)).

[118] 139 CONG. REC. E2183-01 (daily ed. Sept. 15, 1993) (statement of Rep. Glickman).

[119] 139 CONG. REC. S12457-04, S12458 (daily ed. Sept. 23, 1993) (statement of Sen. Hatch) (emphasis added).

[120] H.R. REP. NO. 103-525 (II), 103d Cong., 2d Sess. 1, 6 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1644, 1647; *see also* Timothy S. McAllister, *A "Tail" of Liability Reform: General Aviation Revitalization Act of 1994 and the General Aviation Industry in the United States*, 23 TRANSP. L.J. 301, 310-12 (1995).

X. FEDERAL PREEMPTION OF PUNITIVE AND MENTAL ANGUISH DAMAGES UNDER THE AIRLINE DEREGULATION ACT

The Supreme Court of the United States has explained that the Airline Deregulation Act does not preempt common-law-tort causes of action or state law breach of contract actions against an airline, but rather preempts state-imposed regulation of the rates, routes, or services of air carriers.[121] Recently, however, both state and federal courts have questioned whether claims for punitive damages or mental anguish might differ from the general rule that common-law-tort causes of action are not preempted. For instance, in *Continental Airlines, Inc. v. Kiefer*,[122] the Texas Supreme Court suggested, without deciding, that punitive damages and mental anguish claims might be preempted. The court stated:

> We recognize that with negligence law, and other tort law, there is a greater risk that state policies will be too much involved than there is with contract law [sic], especially in the area of damages. For example, recovery of punitive damages for negligence is, depending on the State involved, essentially unlimited, limited by judicial rule, limited by statute, shared between the plaintiff and the state, or disallowed altogether. One could easily argue that the threat of punitive damages against airlines has a greater regulatory effect than liability for actual damages. Also, recovery of damages for mental anguish may or may not require accompanying physical injury, or aggravated conduct by the defendant, or be subject to other restrictions. . . . Of course, plaintiffs [in this case] may amend their pleadings before trial to claim punitive damages, but we decline to speculate whether such claims would, in these cases or other situations, be preempted by the ADA. . . . [Nevertheless, o]ther tort actions might [impair the deregulation of the ADA], and as we have said, so might recovery in negligence actions for punitive damages or even mental anguish damages.[123]

Some federal courts have explicitly decided the issue, concluding that claims for punitive damages are in fact preempted by the ADA. The Ninth Circuit reached this conclusion in *West v. Northwest Airlines, Inc.*[124] The plaintiff was bumped from an

---

[121] *See, e.g.*, American Airlines, Inc. v. Wolens, 115 S. Ct. 817, 825-26 (1995); *see also* Hodges v. Delta Airlines, Inc., 44 F.3d 334, 336 (5th Cir. 1995).

[122] 920 S.W.2d 274, 282-83 (Tex. 1996).

[123] *Id.*

[124] 995 F.2d 148, 152 (9th Cir. 1993), *cert. denied*, 510 U.S. 1111 (1994).

overbooked flight and subsequently filed claims in state court for breach of the covenant of good faith and fair dealing under Montana law and for unjust discrimination under the Federal Aviation Act (FAA), seeking both compensatory and punitive damages on the state and federal claims. The claims were removed to federal court on the basis of diversity.[125] The district court then granted summary judgment to the defendant, finding that plaintiff's state claim was preempted by the FAA and that his federal claims were untimely.[126] On appeal, the Ninth Circuit held that the state law claim against Northwest for breach of the covenant of good faith and fair dealing was preempted under the ADA only to the extent that it sought punitive damages, but was not preempted to the extent it sought compensatory damages.[127] The court reasoned that:

> Were we to hold that West's state claims are preempted completely by the ADA, we would eviscerate the third option detailed in the regulation. . . . *West's right to pursue punitive damages in his state claims, however, must be limited.* Since punitive damages by their very nature seek to punish the entity against whom they are awarded, such damages awarded in response to bumping resulting from airline overbooking would be contrary to the goals of deregulation. Overbooking and bumping are accepted forms of price competition and reduction in the deregulation period, thus any law or regulation which results in penalizing airlines for these practices is preempted by the FAA.[128]

As a result, the Ninth Circuit remanded the case to the federal district court to resolve the merits of West's state law claims.[129]

Other federal courts have followed the lead of the Ninth Circuit. For example, in *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*,[130] the Seventh Circuit concluded that the ADA preempts claims for punitive damages for breach of contract. The court recognized that:

> [T]he plaintiffs' breach of contract claim also contains a request for punitive damages. *Wolens* noted that "some state-law principles of contract law . . . might well be preempted to the extent they seek to effectuate the State's public policies, rather than the intent of the parties." Rather than merely holding parties to the

---

125 *Id.* at 150.

126 *Id.*

127 *Id.* at 152.

128 *Id.* (emphasis added).

129 *Id.*

130 73 F.3d 1423, 1432 n.8 (7th Cir. 1996).

> terms of a bargain, punitive damages represent an "enlargement or enhancement [of the bargain] based on state laws or policies external to the agreement." Thus, *Wolens* suggests that the claim for punitive damages is preempted by the ADA, provided that it relates to airline rates, routes or services. The breach of contract claim clearly relates to Saudia's failure to provide its services, i.e., transportation, to Travel All's clients in accordance with its agreement with Travel All. *Therefore, we conclude that the ADA preempts the plaintiffs' claim for punitive damages.*[131]

Given the trend among federal courts to conclude that claims for punitive damages are preempted by the ADA, defendants may be able to remove cases to federal court when a plaintiff seeks punitive damages or recovery for mental anguish. However, the Sixth Circuit concluded that there was "no evidence that Congress intended the federal courts to have exclusive subject matter jurisdiction over the preemption defenses to state law claims against air carriers."[132]

If a litigant relies on this argument or another novel approach to sustain subject matter jurisdiction in the district court, but is concerned with maintaining jurisdiction on appellate review, a recent U.S. Supreme Court decision might provide reassurance. In *Caterpillar, Inc. v. Lewis*,[133] the defendant removed the action to federal court on diversity grounds when, in fact, diversity jurisdiction did not exist because of a non-diverse defendant.[134] The plaintiff timely moved for remand, but the district court incorrectly denied the motion to remand.[135] By the time judgment was entered, the non-diverse defendant had been dismissed; thus, when judgment was entered, subject matter jurisdiction existed.[136] On this basis, the Supreme Court allowed the judgment to stand even though the action was improperly removed.[137] A lesson to be drawn from *Caterpillar* is

---

[131] *Id.* (citations omitted) (emphasis added).

[132] Musson Theatrical, Inc. v. Federal Express Corp., 89 F.3d 1244, 1253 (6th Cir. 1996). The Sixth Circuit relied, in part, on the Supreme Court's finding that "the ADA, unlike ERISA, did not intend to 'channel actions into federal court.'" *Id.* (citing *American Airlines*, 115 S. Ct. at 825); *see also* Merkel v. Federal Express Corp., 886 F. Supp. 561, 568 (N.D. Miss. 1995) (holding that preemption under the ADA would not create removal jurisdiction).

[133] 117 S. Ct. 467 (1996).

[134] *Id.* at 470-71.

[135] *Id.* at 471.

[136] *Id.* at 474.

[137] *Id.* at 475-76; *see* Saadeh v. Farouki, 107 F.3d 52, 57 (D.C. Cir. 1997) (declining to apply the "considerations of finality, efficiency and economy" that concerned the court in *Caterpillar* in a non-removal context).

that if one sustains jurisdiction on novel grounds in the district court, one may want to attempt to create diversity jurisdiction (or some other basis of jurisdiction) by the time judgment is entered to prevent a remand or dismissal by the appellate court for lack of jurisdiction. Thanks to this decision, the new subject matter jurisidiction rule is "all's well that ends well."[138]

XI. CONCLUSION

This Article has discussed various approaches that may land an aviation litigant in federal court. The ultimate wisdom of such a strategy should be considered carefully before a party plunges headlong into a frenzied effort to obtain relief in federal court, only to find that such relief may have been both readily available and more expediently obtained in state court. If the first blow is truly half the battle, a party should seriously evaluate its ability to sustain jurisdiction before choosing this battleground.

---

[138] *Id.* at 475.