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Federal Officer Removal: Watson Would Fly with FAA Designees

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FEDERAL OFFICER REMOVAL: *WATSON* WOULD FLY WITH FAA DESIGNEES

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I. INTRODUCTION

IN *WATSON v. Philip Morris*,¹ the United States Supreme Court decided whether the Philip Morris Companies, when they marketed Marlboro Lights, qualified as a "person acting under a federal officer" within the meaning of the Federal Officer Removal Statute (FORS).² The thesis of this article is that if any of the Federal Aviation Administration (FAA) designees had been involved in a similar issue, framed within an aviation context, FORS could properly be used to remove the case to federal court.

Aviation manufacturers are confronted with a fifty-state patchwork quilt of tort laws and procedural rules when litigation involves their products. The national and international scope of the aviation industry, the extreme mobility of their products, and jurisdictional rules generally subject aviation manufacturers to being haled into the local courts of any of the fifty states to answer lawsuits, regardless of whether the manufacturer has a physical presence in a given state. The alternative to being a stranger in a state court forum is to seek transfer to the presumably more neutral playing field of the United States District Court. However, the means of moving claims litigation from state court to federal court are limited, and complaints are often

¹ 127 S. Ct. 2301 (2007).

² 28 U.S.C.A. § 1442 (West 2006). Ironically, at the same time Philip Morris urged that it acted as a federal agent for the Federal Trade Commission (FTC), the United States had convinced the United States District Court for the District of Columbia that Philip Morris had engaged in a conspiracy to commit fraud in its marketing of "light" cigarettes in violation of federal racketeering laws. See *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 1 (D.D.C. 2006), *stay denied* 449 F. Supp. 2d 988 (D.D.C. Sept. 28, 2006); *order clarified* by 477 F. Supp. 2d 191 (D.D.C. Mar. 16, 2007).

crafted to thwart any opportunity to remove the case to federal court. This article will discuss the application of FORS, one of the lesser-used and often overlooked statutory vehicles which may enable an aviation manufacturer to remove a complaint filed in state court to federal court.

Federal court jurisdiction over civil litigation is carefully preserved under the federal rules to limit the federal court case load and to preserve constitutional protection of the rights and powers of the individual states.³ Federal jurisdiction over non-criminal matters has traditionally been limited to statutorily or constitutionally reserved jurisdiction (original federal question jurisdiction)⁴ and protection of a foreign state's resident from potential favoritism in another state's court (diversity jurisdiction).⁵ In an era when individuals and companies have an increased national presence, it is not surprising that aviation manufacturers perceive a benefit to having their disputes decided under the uniform federal rules and avoiding even the suggestion of local favoritism present in the state court system.⁶

Individuals or companies operating on a national scale may also seek jurisdiction in federal courts to assure the uniform and informed application of federal doctrines that do not grant federal jurisdiction. In the milieu of aviation law, the government

³ *Aldinger v. Howard*, 427 U.S. 1, 14–15 (1976). In 2005, the Supreme Court explained that “the federal issue will ultimately qualify for a federal forum only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts.” *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 313 (2005).

⁴ 28 U.S.C.A. § 1331 (West 2006).

⁵ 28 U.S.C.A. § 1332 (West 2006).

⁶ See RICHARD H. FALLON ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 6–14 (5th ed. 2003); Kevin M. Clermont & Theodore Eisenberg, *Anti-Plaintiff Bias in the Federal Appellate Courts*, 84 JUDICATURE 128, 134 (2000) (arguing that defendants win appeals in federal circuit courts more frequently than plaintiffs win appeals in federal circuit courts); Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About The Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 581–82 (1998). For a discussion of a congressional proposal to remove more cases from state courts to federal court—one of the most contentious aspects of civil litigation—see *2006 Federal Courts Jurisdiction Clarification Act: Hearing on H.R. 5540 Before the H. Subcomm. on Courts, the Internet & Intellectual Property of the Comm. on the Judiciary*, 109th Cong. 5-88 (2005) (statements of Janet C. Hall, U.S. District Court Judge for the District of Connecticut; Artur D. Hellman, Professor, University of Pittsburgh School of Law; Richard A. Samp, Chief Counsel, Washington Legal Foundation), available at www.commdocs.house.gov/committees/judiciary/hju24607.000/hju24607_0.HTM.

contractor's defense⁷ and the doctrine of implied preemption⁸ serve as examples where the doctrine is based in federal law, but because the doctrine is not infused with federal question jurisdiction, it may be interpreted and applied by state courts as well as federal courts. Federal courts may be more inclined to fully apply doctrines that are federal in origin.

The aviation industry is one of only a few industries where federal governmental regulation is pervasive, detailed, and virtually exclusive.⁹ The FAA Designee Program, whereby the FAA designates individuals and companies in the industry to act on behalf of the FAA, involves thousands of individuals in the private sector authorized by the FAA to perform examination, testing, and inspection functions for the FAA.¹⁰ Congress has recognized that the FAA is a "unique agency being one of the few non-defense government agencies that operates 24 hours a day, 365 days of the year, . . . to carry out its responsibilities for a state-of-the-art industry."¹¹ The GAO has found that designees "perform more than 90 percent of FAA's certification activities, thus greatly leveraging the agency's resources."¹² Indeed, it is difficult to find another federal agency that is authorized by Congress to delegate so much of its statutory powers to the private sector.

This article will provide an in-depth examination of the history and application of FORS, as well as the mechanics of its application, set in the context of the FAA Designee Program, and the role of manufacturers and individuals serving as FAA designees.

⁷ See *Boyle v. United Technologies Corp.*, 487 U.S. 500, 508–09 (1988) and its progeny.

⁸ See *infra* section II.C.3.a.

⁹ In 1973, during a congressional hearing, former Texas Congressman Jack Brooks questioned the ability of the industry to work for the FAA: "Such a procedure [the FAA designee system] is most unique and requires exceptionally critical oversight." See Fed. Aviation Admin., Designation and Designee Background, http://www.faa.gov/about/history/deldes_background (last visited Oct. 15, 2007).

¹⁰ Prof'l Airways Sys. Specialists, AFL-CIO, FAA Must Ensure Better Oversight of Changing Designee Programs, http://www.passnational.org/Public/issues_8.html (last visited Oct. 19, 2007).

¹¹ Aviation Reauthorization Act, Pub. L. No. 104-264, 221 Stat. 3227 (1996).

¹² See UNITED STATES GOV'T ACCOUNTABILITY OFFICE, GAO-05-40, AVIATION SAFETY: FAA NEEDS TO STRENGTHEN THE MANAGEMENT OF ITS DESIGNEE PROGRAMS 12 (2004), available at <http://www.gao.gov/new.items/d0540.pdf>.

II. REMOVAL UNDER 28 U.S.C. § 1442, THE “FEDERAL OFFICER” REMOVAL STATUTE

FORS has long been held to be a jurisdictional grant in and of itself.¹³ As the Supreme Court explained in *Mesa v. California*,¹⁴ it is “a pure jurisdictional statute, seeking to do nothing more than grant district court jurisdiction over cases in which a federal officer is a defendant” and “cannot independently support Article III ‘arising under’ jurisdiction.”¹⁵ Rather, “it is the raising of a federal question in the officer’s removal petition that constitutes the federal law under which the action against the federal officer [or agent] ‘arises’ for Article III purposes.”¹⁶

Removal under § 1442 removes the entire case to the federal court, even if there are other defendants who could not have removed the action.¹⁷ Furthermore, dismissal of the federal officer from a removed case does not divest the district court of jurisdiction unless no personal jurisdiction existed over the officer.¹⁸

The FORS allows the United States, federal agencies and officers, and persons who act under such officers, to remove otherwise non-federal cases based on assertion of a “colorable” federal defense, stating in pertinent part:

(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.¹⁹

¹³ *Smith v. Puett*, 506 F. Supp. 134, 137 (M.D. Tenn. 1980); *Perez v. Rhiddlehoover*, 247 F. Supp. 65, 71 (E.D. La. 1975); *Horne v. Alderhold*, 1 F. Supp. 690, 691 (N.D. Ga. 1932).

¹⁴ 489 U.S. 121 (1989).

¹⁵ *Id.* at 136.

¹⁶ *Id.*

¹⁷ *Dillon v. Miss. Military Dep’t.*, 23 F.3d 915, 918–19 (5th Cir. 1994).

¹⁸ *IMFC Prof’l Servs. of Fla., Inc. v. Latin Am. Home Health, Inc.*, 676 F.2d 152, 159 (5th Cir. 1982).

¹⁹ 28 U.S.C.A. § 1442(a) (West 2006).

A. HISTORY

The nearly 200 year history of FORS was discussed at length by the U.S. Supreme Court in *Willingham v. Morgan*.²⁰ The first provision was derived from an 1815 customs statute to enforce a trade embargo with England despite opposition from the New England States, who did not support the War of 1812.²¹ Federal officials involved in enforcing the customs statute were allowed to remove any suit to the federal court if it arose because of any act done "under color" of the statute.²² The original removal provision was supposed to protect federal officers from hostile state courts.²³ The so-called Force Bill, passed in 1833 due to South Carolina's threats of nullification,²⁴ allowed removal of all suits for acts done under the customs laws.²⁵ The Civil War brought on a new group of removal statutes that were eventually codified into a permanent statute. The statute applied primarily to cases arising out of enforcement of the revenue laws.²⁶ Finally, Congress passed the current provision as part of the Judicial Code of 1948, extending the statute to cover all federal officers.²⁷

The main purpose of § 1442 is to provide a federal forum when a federal official has a defense because of his official duties, so as to allow a trial without threat of local interests or prejudice.²⁸ Another purpose is to allow the validity of the officer's federal defense to be adjudicated in a federal forum.²⁹ Congress intended § 1442 to curb the ability of state courts to subject federal officials to their state subpoena powers³⁰ and to prevent state courts from interfering with the exercise of federal law.³¹ This intention arose from a concern that state govern-

²⁰ 395 U.S. 402 (1969).

²¹ *Id.* at 405.

²² *Id.*

²³ *Id.*

²⁴ *Id.* The Force Bill "sought to protect federal officers engaged in enforcing the revenue laws of the United States from attempts (primarily South Carolina) to nullify the national laws by local statutes." 14C CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3727 (3d ed. 1998 & Supp. 2007).

²⁵ *Willingham*, 395 U.S. at 405.

²⁶ *Id.* at 405-06.

²⁷ *Id.* at 406.

²⁸ *Arizona v. Manypenny*, 451 U.S. 232, 241-42 (1981).

²⁹ *Id.*; see also *Willingham*, 395 U.S. at 407.

³⁰ *Nationwide Investors v. Miller*, 793 F.2d 1044, 1047 (9th Cir. 1986).

³¹ *Williams v. Gen. Elec. Co.*, 418 F. Supp. 2d 610, 614 (M.D. Pa. 2005) (citing *Mesa v. California*, 489 U.S. 121, 126 (1989)).

ments, hostile to duly enacted federal laws, could frustrate implementation of federal law by allowing civil or criminal cases to be brought in state court.³²

B. LIBERAL APPLICATION

Unlike other removal statutes, courts liberally construe FORS because its purpose is to guarantee that the federal courts determine the validity of federal defenses available to federal officers or those acting under them.³³ Indeed, the United States Supreme Court requires district courts to credit the removing defendant's theory of the case, merely requiring that the asserted federal defense be plausible.³⁴

The Supreme Court has repeatedly recognized that one of the most important reasons for removal is to have the validity of the defendant's federal defense tried in federal court.³⁵ To advance this policy, the Supreme Court has rejected a "narrow, grudging interpretation" of the statute³⁶ in analyzing both the "color of office" and the "colorable federal defense" requirements.³⁷ Significantly, in *Durham v. Lockheed Martin Corp.*,³⁸ the Ninth Circuit recognized that the liberal interpretation of the removal statute extends to the timeliness of removal.³⁹ The court said:

But where the timeliness of a federal officer's removal is at issue, we extend section 1442's liberal interpretation to section 1446 Our interpretation of section 1446(b) protects the government's right of removal and encourages plaintiffs to disclose the facts underlying their claims early on. We note that an opposite

³² *Ruffin v. Armco Steel Corp.*, 959 F. Supp. 770, 772 (S.D. Tex. 1997) (quoting *Brown & Williamson Tobacco Corp. v. Wigand*, 913 F. Supp. 530, 533 (W.D. Ky. 1996)).

³³ *Willingham*, 395 U.S. at 406 ("The federal officer removal statute is not 'narrow' or 'limited.'"); *Nationwide Investors*, 793 F.2d at 1046 ("The Supreme Court has explicitly endorsed a broad reading of § 1442 rather than a 'narrow, grudging interpretation.'" (citing *Willingham*, 395 U.S. at 407)).

³⁴ *United States v. Todd*, 245 F.3d 691, 693 (8th Cir. 2001) ("For a defense to be considered colorable, it need only be plausible; § 1442(a)(1) does not require a court to hold that a defense will be successful before removal is appropriate." (citing *Willingham*, 395 U.S. at 406-07)).

³⁵ *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999) (citing *Willingham*, 395 U.S. at 407).

³⁶ *Id.*

³⁷ *See id.* at 431-32.

³⁸ 445 F.3d 1247 (9th Cir. 2006).

³⁹ *Id.* at 1253; *see also* Don Zupanec, *Federal Officer Removal-Timeliness*, FED. LITIGATOR, June 2006, at 5.

result would encourage gamesmanship and defeat the policies underlying sections 1442 and 1446.⁴⁰

The removing defendant is not required to virtually win the suit before he is entitled to removal.⁴¹ Section 1442 does not require an intense inquiry into the merits of the official's asserted federal defense.⁴² Rather, "for removal to be proper under § 1442," the federal defense alleged "need only be plausible; its ultimate validity is not to be determined at the time of removal."⁴³

The Supreme Court also construes the "acting under" requirement and its causal connection component liberally, and in doing so, the Court has instructed district courts to "credit the [removing defendant's] theory of the case for purposes of both elements of [the] jurisdictional inquiry."⁴⁴ This liberal interpretation is required because "[j]ust as requiring a 'clearly sustainable defense' rather than a colorable defense would defeat the purpose of the removal statute,⁴⁵ so would demanding an airtight case on the merits in order to show the required causal connection."⁴⁶

⁴⁰ *Durham*, 445 F.3d at 1253; but see *Dahl v. R.J. Reynolds Tobacco Co.*, 478 F.3d 965, 968 n.5 (8th Cir. 2007) (declining "invitation" to extend the federal officer removal statute's "liberal interpretation" to the time limits in 28 U.S.C.A. § 1446 (West 2006)).

⁴¹ *Jefferson County*, 527 U.S. at 431 (citing *Willingham v. Morgan*, 395 U.S. 402, 407 (1969)).

⁴² *Jefferson County v. Acker*, 137 F.3d 1314, 1317 (11th Cir. 1998), *rev'd on other grounds*, 527 U.S. 423 (1999). The Supreme Court upheld the portion of the Eleventh Circuit's ruling in *Jefferson County* concerning the proper construction and application of the federal officer removal statute. Compare *Jefferson County*, 527 U.S. at 430–33, with *Jefferson County*, 137 F.3d at 1316–18.

⁴³ *Jefferson County*, 137 F.3d at 1317 (quoting *Magnin v. Teledyne Cont'l Motors*, 91 F.3d 1424, 1427 (11th Cir. 1996)); accord *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 400 (5th Cir. 1998) ("It is important to note that the defendants need not prove the asserted defense, but need only articulate its 'colorable' applicability to the plaintiff's claims."), *cert. denied*, 526 U.S. 1034 (1999); *Williams v. Brantley*, 492 F. Supp. 925, 927–28 (W.D.N.Y. 1980) ("[U]nless the substantive defense raised by the federal officer is completely frivolous, he is entitled to have the merits of such defense decided in a federal court."), *aff'd*, 738 F.2d 419 (2d Cir. 1984).

⁴⁴ *Jefferson County*, 527 U.S. at 432.

⁴⁵ *Willingham*, 395 U.S. at 407.

⁴⁶ *Jefferson County*, 527 U.S. at 432. Accord *Winters*, 149 F.3d at 398 ("[T]he statute's 'color of federal office' requirement is neither 'limited' nor 'narrow,' but should be afforded a broad reading so as not to frustrate the statute's underlying rationale.").

The “color of office” requirement of § 1442 has also been broadly construed.⁴⁷ Courts have held that there need only be a casual connection with official duties that can reasonably be interpreted as an official rather than a purely personal act.⁴⁸

Further, the identification of the specific federal officer under which the person serves is not necessary. For instance, it is sufficient to allege that the designee is selected and serves under the FAA Administrator.⁴⁹ Finally, some courts have held that the broad interpretation of § 1442 mandates that any factual disputes be resolved in favor of federal jurisdiction.⁵⁰

1. *The “Well-Pleaded Complaint” Rule Does Not Apply.*

A defendant who meets the removal requirements under § 1442 may remove the suit to a federal court even when the plaintiff’s pleadings do not raise a federal question.⁵¹ It is irrelevant whether the plaintiff could have initially sued the defendant in federal court under the asserted cause of action.⁵²

FORS is an exception to the well-pleaded complaint rule, which states that an action may be removed from state court to federal court only if a federal district court would have had original jurisdiction.⁵³ FORS vests federal courts with independent

⁴⁷ *Abrams v. Playle*, 414 F. Supp. 634, 636 (D. Guam 1976); *Areskog v. United States*, 396 F. Supp. 834, 838 (D. Conn. 1975) (“In construing the ‘color of office’ requirement for removal under § 1442(a)(1), the *Willingham* court emphasized that the phrase must be broadly construed in order to effectuate the purpose behind the federal officer removal statute.” (citing *Willingham*, 395 U.S. at 407)).

⁴⁸ *Preston v. Edmundson*, 263 F. Supp. 370, 373 (N.D. Okla. 1967); *Perez v. Rhiddlehoover*, 247 F. Supp. 65, 70 (D.C. La. 1965); *Logemann v. Stock*, 81 F. Supp. 337, 339 (D. Neb. 1949).

⁴⁹ *Magnin v. Teldyne Cont’l Motors*, 91 F.3d 1424, 1429 n.1 (11th Cir. 1996) (“Private persons selected to act as designees are Representatives of the Administrator . . .”) (quoting 48 Fed. Reg. 16,176, 16,176 (1983)); see also *AIG Europe (UK) Ltd. v. McDonnell Douglas Corp.*, No. CV 02-8703-GAF, 2003 WL 257702, at *2–3 (C.D. Cal. Jan. 28, 2003) (delegation to aircraft manufacturer under 49 U.S.C. § 44702(d)), cited with approval and distinguished on the facts in *Kaye v. Sw. Airlines Co.*, No. Civ. A. 3:05CV0450-D, 2005 WL 2074327, at *3 n.6 (N.D. Tex. Aug. 29, 2005); but see *Britton v. Rolls Royce Engine Servs.*, No. C 05-01057 SI, 2005 WL 1562855, at *4 (N.D. Cal. June 30, 2005).

⁵⁰ *Louisiana v. Sparks*, 978 F.2d 226, 231–33 (5th Cir. 1992); *Preston v. Tenet Healthsystem Mem’l Med. Ctr., Inc.*, 463 F. Supp. 2d 583, 588 (E.D. La. 2006), *aff’d* Nos. 07-30132, 07-30160, 2007 WL 1217923 (5th Cir. Apr. 25, 2007).

⁵¹ *Alsup v. 3-Day Blinds, Inc.*, 435 F. Supp. 2d 838, 844 (S.D. Ill. 2006) (quoting *Ryan v. Dow Chem. Co.*, 781 F. Supp. 934, 939 (E.D.N.Y. 1992)).

⁵² *Special Prosecutor of N.Y. v. U.S. Attorney for S.D.N.Y.*, 375 F. Supp. 797, 801 (S.D.N.Y. 1974).

⁵³ *Mesa v. California*, 489 U.S. 121, 136 (1989).

jurisdiction over cases involving federal officers, or persons acting under them, despite the non-federal cast of the complaint because "the federal-question element is met if the defense depends on federal law."⁵⁴ The lack of any mention of federal law in the complaint is not controlling, and "[t]hus, further inquiry must be made as to whether the action is one governed by federal law," regardless of artful pleading.⁵⁵

2. An "Absolute" Removal Right

Removal under § 1442 by a federal officer, or someone acting under a federal officer, for an act under color of office is an absolute right; the court does not have discretion.⁵⁶ Removal is permitted even where the federal official's conduct is found to be misconduct, provided that the misconduct was committed under "color of office."⁵⁷ In addition, subject matter jurisdiction is granted to the district court under § 1442.⁵⁸ Claims that would not be independently removable may be heard by the federal court even if the basis for removal jurisdiction is dropped from the proceedings.⁵⁹

C. ELEMENTS

The statute's independent right of removal has three principal elements. First, the defendant must be a federal officer, a federal agency, or a person acting under a federal officer for purposes of the statute.⁶⁰ Second, the suit must be for an act done while acting under "color of such office," which also alleges some causal connection between the defendant's actions under the federal officer or agency direction and the plaintiff's

⁵⁴ *Jefferson County v. Acker*, 527 U.S. 423, 431 (1991); *see also* *Ely Valley Mines v. Hartford Accident & Indem. Co.*, 644 F.2d 1310, 1314 (9th Cir. 1981) (stating that the federal officer removal statute "provides a right of removal independent of [28] U.S.C. § 1441 and . . . is not keyed to the original jurisdiction of the federal district court").

⁵⁵ *Bruan, Gordon & Co. v. Hellmers*, 502 F. Supp. 897, 901 (S.D.N.Y. 1980).

⁵⁶ *Malone v. Longo*, 463 F. Supp. 139, 141 (E.D.N.Y. 1979) (citing *Willingham v. Morgan*, 395 U.S. 402, 406 (1969)); *see also* *United States v. Penney*, 320 F. Supp. 1396, 1397 (D.D.C. 1970).

⁵⁷ *Logemann v. Stock*, 81 F. Supp. 337, 339 (D. Neb. 1949).

⁵⁸ *Falls Riverway Realty, Inc. v. City of Niagara Falls*, 754 F.2d 49, 55 (2d Cir. 1985) (citing *Willingham*, 395 U.S. at 406).

⁵⁹ *Watkins v. Grover*, 508 F.2d 920, 921 (9th Cir. 1974); *see also* *IMFC Prof'l Servs. of Fla., Inc. v. Latin Am. Home Health, Inc.*, 676 F.2d 152, 159 (5th Cir. 1982).

⁶⁰ 28 U.S.C.A. § 1442(a)(1) (West 2006).

claim.⁶¹ Third, the defendant must assert a colorable federal defense.⁶²

1. "Federal Officer" and "Person"

The Dictionary Act⁶³ defines "officer" to include "any person authorized by law to perform the duties of the office," and "person" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals," unless the context indicates otherwise.⁶⁴ An officer is distinguished from other full-time employees of the federal government by the extent of authority he or she may properly exercise.⁶⁵ Courts have also found that a corporation is a "person" entitled to the benefit of removal under § 1442(a)(1).⁶⁶ In cases where a corporation is engaged in activities that may implement a federal policy or directive, courts have indicated that "person" should be construed broadly to include corporations that have acted under federal direction or authority.⁶⁷ Thus, corporate manufacturers can satisfy the first removal requirement.

It follows that delegations to private "persons" do not make them "officers" unless the federal statute creates such tenure,

⁶¹ 28 U.S.C.A. § 1442(a)(1); *Mesa v. California*, 489 U.S. 121, 131–32 (1989).

⁶² *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999); *Mesa*, 489 U.S. at 133; *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 397–400 (5th Cir. 1998); *Magnin v. Teldyne Cont'l Motors*, 91 F.3d 1424, 1427–28 (11th Cir. 1996).

⁶³ 1 U.S.C.A. § 1 (West 2005).

⁶⁴ *Id.*; see also U.S. CONST. art. II, § 2, cl. 2; *Vt. Agency of Nat. Res. v. United States*, 529 U.S. 765, 781 (2000) (Stevens, J., dissenting) ("[W]hen Congress uses that word [person] in federal statutes enforceable by the Federal Government or by a federal agency, it applies to States and state agencies as well as to private individuals and corporations."); *United States v. Hartwell*, 73 U.S. 385, 393 (1868).

⁶⁵ *Freytag v. Comm'r Internal Revenue*, 501 U.S. 868, 881 (1991); *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

⁶⁶ *Winters*, 149 F.3d at 398; *Akin v. Big Three Indus.*, 851 F. Supp. 819, 822–23 (E.D. Tex. 1994); *Pack v. AC & S, Inc.*, 838 F. Supp. 1099, 1102–03 (D. Md. 1993); *Fung v. Abex Corp.*, 816 F. Supp. 569, 572 (N.D. Cal. 1992); *Bahrs v. Hughes Aircraft Co.*, 795 F. Supp. 965, 968–69 (D. Ariz. 1992); *Ryan v. Dow Chem. Co.*, 781 F. Supp. 934, 946–47 (E.D.N.Y. 1992).

⁶⁷ See *Ryan*, 781 F. Supp. at 946–950 (analyzing the use of "person" in § 1442(a)(1)). While the majority of cases and statutes interpreting the term "person" have interpreted the term to include corporations, there are exceptions where the term "person" as used in § 1442 is interpreted to include only natural persons. See *C.H. v. Am. Red Cross*, 684 F. Supp. 1018, 1023–24 (E.D. Mo. 1987); *Gensplit Fin. Corp. v. Foreign Credit Ins. Assoc.*, 616 F. Supp. 1504, 1508–10 (E.D. Wis. 1985).

duration, emoluments and duties as would be associated with a public office. As such, the individual or corporation is not the occupant of a constitutional office, but is, rather, a private party who has been delegated some federal responsibilities.

2. “Acting Under” a Federal Officer.⁶⁸

Some courts have said that removal by a private defendant “acting under” a federal officer must be based on a finding that the acts establishing the core of the plaintiff’s state-law claim were performed pursuant to a federal officer’s “direct orders or under comprehensive and detailed regulations.”⁶⁹ It is not enough to prove that the relevant acts occurred under the general auspices of a federal officer or that the corporation participates in a federally regulated industry.⁷⁰ Others have said that the federal officer is required to have “direct control” over the defendant seeking removal, and that this “is established by showing strong government intervention and the possibility that the defendant will be sued in state court as a result of federal control.”⁷¹

It has been argued that the only “acting under” test appropriate for application under the FORS is not based upon detailed or specific federal regulation or supervision, but is found in the test presented by the United States Solicitor General and under the caselaw he cites in the *amicus curiae* brief that was before the Supreme Court in *Watson v. Philip Morris Companies, Inc.*⁷² The Solicitor General states (1) that the “text, evolution and judicial construction of the [FORS] make clear that it permits removal by private parties only when they act on behalf of or otherwise assist federal officers in carrying out their official duties;” (2) that “limiting private-party removal to persons assisting federal officers in the performance of official duties accords with the purpose of the [FORS];” and (3) that “permitting removal by private parties subjected to detailed and specific federal regula-

⁶⁸ See Kristine Cordier Karnezis, Annotation, *Who Is “Person Acting Under” Officer of United States or Any Agency Thereof for Purposes of Availability of Right to Remove State Action to Federal Court Under 28 U.S.C.A. § 1442(a)(1)*, 166 A.L.R. FED. 297, 297 (2007).

⁶⁹ *Id.*

⁷⁰ *Freiberg v. Swinerton & Walberg Prop. Serv., Inc.*, 245 F. Supp. 2d 1144, 1152 (D. Colo. 2002) (citing *Ryan*, 781 F. Supp. at 947).

⁷¹ *Pack*, 838 F. Supp. at 1103; *accord Fung*, 816 F. Supp. at 572–73.

⁷² See *infra*, text accompanying notes 226–42.

tion would potentially shift into federal court a wide range of traditional state law claims.”⁷³

The Solicitor General’s position is consistent with the Supreme Court’s holding that “it is sufficient for one seeking removal under § 1442(a)(1) to show that his relationship to the parties is derived solely from his official duties.”⁷⁴ The FAA Designee Program fits this test well. As one district court has observed, the statute authorizes the FAA Administrator to delegate the issuance of certificates to a qualified person, or a qualified employee under that person’s supervision, and the Administrator accordingly designated the defendants in that case to serve as FAA representatives by issuing certificates according to the FAA Administrator’s specifications.⁷⁵ Consequently, when a private party assists a federal officer in performing federal duties, as an FAA designee clearly does by statutory delegation, the “acting under” test is satisfied.⁷⁶

⁷³ Brief for the United States as Amicus Curiae Supporting Petitioners at *11, *17, *19, *Watson v. Philip Morris Cos., Inc.*, No. 05-1284, 2007 WL 621847 (Feb. 26, 2007).

⁷⁴ *Willingham v. Morgan*, 395 U.S. 402, 406–07 (1969); *Hazen v. S. Hills Nat’l Bank of Tulsa*, 414 F.2d 778, 779 (10th Cir. 1969).

⁷⁵ *Kaye v. Sw. Airlines Co.*, No. Civ. A. 3:05CV0450-D, 2005 WL 2074327, at *3 n.6 (N.D. Tex. Aug. 29, 2005) (citing *AIG Europe (UK) Ltd. v. McDonnell Douglas Corp.*, No. CV 02-8703-GAF, 2003 WL 257702, at *2 (C.D. Cal. Jan. 28, 2003)); see also *McMahon v. Presidential Airways, Inc.*, 410 F. Supp. 2d 1189, 1196–97 (M.D. Fla. 2006); *Teague v. Bell Helicopter Servs., Inc.*, No. 4:03-CV-004-A, 2003 WL 21135481, at *3–4 (N.D. Tex. Feb. 12, 2003).

⁷⁶ By comparison, note that the “acting under” test under FORS and the “acting for” test under the Federal Tort Claims Act (extending immunity to the private actor), 28 U.S.C. §§ 1346(b), 2401(b) and 2671, are similar, but fundamentally different. In the case of the latter, “employee of the government” is statutorily defined to include “persons acting on behalf of a federal agency in an official capacity.” 28 U.S.C.A. § 2671 (West 2006) (emphasis added). “Official capacity” is, in turn, construed by caselaw as connoting federal officer status. See, e.g., *Leone v. United States*, 910 F.2d 46, 50 (2d Cir. 1990), cert. denied 499 U.S. 905 (1991); *Charlima, Inc. v. United States*, 873 F.2d 1078, 1081 (8th Cir. 1989); Gary W. Allen, *The FAA’s Designee Program: A System Under Pressure*, AIR & SPACE L., Fall 1991, at 4–5; Andrew J. Dilk, *Negligence of Federal Aviation Administration Delegates Under the Federal Tort Claims Act*, 42 J. AIR L. & COM. 575, 597–601 (1976). The United States District Court for the Northern District of Georgia found the United States immune from liability because the designees were performing a discretionary function, an exception to the Federal Tort Claims Act; thus, there was no need to determine whether these DAR’s otherwise implicated the United States for liability purposes. *Berman v. United States*, 572 F. Supp. 1486, 1492–94 (N.D. Ga. 1983).

The defendant must further establish that the suit is “for an act under color of such office.”⁷⁷ In order to satisfy this requirement, the defendant must “show a nexus, a ‘causal connection’ between the charged conduct and asserted official authority.”⁷⁸ In the context of an aviation case, a defendant must also show that there is a “causal connection” linking the exercise of FAA authority to the acts challenged in the plaintiff’s complaint and that, therefore, the plaintiff’s damages and claims of the defendant’s alleged wrongdoing in performing functions of the FAA as a designee are indeed connected.

3. *There Must Be a “Colorable” Federal Defense*

The defendant must also assert a “colorable federal defense.”⁷⁹ The federal defense asserted by the federal officer (or a person acting under a federal officer) need only be plausible; its ultimate merit is not to be determined at the time of removal.⁸⁰ The officer need not conclusively succeed on the merits of his defense prior to removal⁸¹ Also, a defense is considered “federal” if it would not exist in the absence of federal law.⁸²

The Supreme Court has reasoned that it is irrelevant that not all of the questions involved are of a federal nature: “If one [question of Federal character] exist, if there be a single such ingredient in the mass, it is sufficient. That element is decisive upon the subject of jurisdiction.”⁸³ This analysis applies equally to a person or corporation acting on federal officer’s authority or under the “color of office.” There are a number of defenses that have been found to qualify as “colorable federal defenses.”

⁷⁷ 28 U.S.C.A. § 1442(a)(1) (West 2006).

⁷⁸ *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999).

⁷⁹ *Jefferson County*, 527 U.S. at 431; *Mesa v. California*, 489 U.S. 121, 133 (1989); *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 397–400 (5th Cir. 1998); *Magnin v. Teldyne Cont’l Motors*, 91 F.3d 1424, 1427–28 (11th Cir. 1996).

⁸⁰ *Mesa*, 489 U.S. at 129.

⁸¹ *Jefferson County*, 527 U.S. at 431.

⁸² *In re Methyl Tertiary Butyl Ether (MTBE) Prods.*, 364 F. Supp. 2d 329, 335 (S.D.N.Y. 2004); *see also Arnold v. Blue Cross & Blue Shield of Tex.*, 973 F. Supp. 726, 739 n.22 (S.D. Tex. 1997).

⁸³ *Mesa*, 489 U.S. at 129.

a. Preemption

Preemption is a common defense that has been held to qualify as a “colorable federal defense” under § 1442.⁸⁴ Federal preemption arises from the operation of the Supremacy Clause of the United States Constitution.⁸⁵ The legislative history of the 1958 Federal Aviation Act (FA Act),⁸⁶ which, as amended and recodified, remains in force today, demonstrates that federal regulation of *standards* governing civil aviation is exclusive. The Senate Report for the Act stated this specific objective:

[A]viation is unique among transportation industries in its relation to the federal government—it is the only one whose operations are conducted almost wholly within federal jurisdiction, and are subject to little or no regulation by States or local authorities. Thus, the federal government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest.⁸⁷

As the head of the Airways Modernization Board stated in a letter attached to the House Report on the Act, “It is essential that one agency of government, and one agency alone, be responsible for issuing safety regulations if we are to have timely and effective guidelines for safety in aviation.”⁸⁸ Thus, Congress’s consolidation of control of aviation in one agency indicated its intent to federally preempt aviation safety.

In *Burbank v. Lockheed Air Terminal, Inc.*,⁸⁹ the Supreme Court noted that the FA Act “requires a delicate balance between safety and efficiency,”⁹⁰ and further stated, “[t]he interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.”⁹¹

The pervasive *character* of the federal regulatory scheme led the Court to conclude that there was preemption.⁹² Even dis-

⁸⁴ See *Watson v. Philip Morris Cos., Inc.*, 420 F.3d 852, 862 (8th Cir. 2005), *Magnin*, 91 F.3d at 1429.

⁸⁵ See U.S. CONST. art. VI, cl. 2.

⁸⁶ Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (1958) (codified as amended at 49 U.S.C.A. §§ 44101–50105 (West 2007)).

⁸⁷ *City of Burbank v. Lockheed*, 411 U.S. 624, 644 (1973) (citing S. REP. NO. 85–1811, at 5 (1958)).

⁸⁸ H.R. REP. NO. 85-2360 (1958), as reprinted in 1958 U.S.C.C.A.N. 3741, 3761.

⁸⁹ 411 U.S. 624 (1973).

⁹⁰ *Id.* at 638.

⁹¹ *Id.* at 639.

⁹² *Id.* at 633.

senting Justice Rehnquist acknowledged that Congress's intent was sweeping: "The 1958 Act was intended to consolidate in one agency in the Executive Branch the control over aviation The paramount substantive concerns of Congress were to regulate federally *all* aspects of air safety . . . and, once aircraft were in 'flight,' airspace management" ⁹³

The *pervasive* control by the FAA of aviation safety, as articulated in *Burbank*, was recognized by the Supreme Court as recently as 1991. ⁹⁴ Likewise, in *Witty v. Delta Airlines, Inc.*, ⁹⁵ the Fifth Circuit held that the FA Act "not only authorizes, but affirmatively directs the Administrator of the [FAA] to promulgate air safety standards and regulations, including standards and regulations relating to aircraft design, aircraft maintenance, and inspections." ⁹⁶ Ultimately, the court held, "[i]n the pending case, field preemption and conflict preemption are both applicable, because there exists a comprehensive scheme of federal regulation, and the imposition of state standards would conflict with federal law and interfere with federal objectives." ⁹⁷

The Third, Sixth, and Ninth Circuit Courts of Appeal have also held that federal regulation of the field of aviation safety in the United States is so pervasive, and federal interests are so dominant, that federal law occupies the field and preempts it entirely from state regulation. ⁹⁸ Other courts have similarly held that federal law preempts the field of aviation safety. ⁹⁹

⁹³ *Id.* at 644 (Rehnquist, J., dissenting) (emphasis added).

⁹⁴ See *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 614 (1991) (holding that the FIFRA pesticide act was not like "other implicitly pre-empted fields" such as aviation, where the use of aviation can occur "only by federal permission, subject to federal inspection, in the hands of federally certified personnel, and under an intricate system of federal commands." (quoting *Burbank*, 411 U.S. at 634)). Even earlier, the Supreme Court recognized that the federal government "has a substantial interest in regulating aircraft travel and promoting air travel safety." See *Miree v. DeKalb County*, 433 U.S. 23, 31 (1977).

⁹⁵ 366 F.3d 380 (5th Cir. 2004).

⁹⁶ *Id.* at 384.

⁹⁷ *Id.*

⁹⁸ See *Montalvo v. Spirit Airlines*, No. 05-15640, 2007 WL 2874401, at *1, *5-7, *9 (9th Cir. 2007); *Green v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 794-95 (6th Cir. 2005), *cert. denied* 547 U.S. 1003 (2006); *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 371 (3d Cir. 1999).

⁹⁹ See *e.g.*, *Witty*, 366 F.3d at 385; *French v. Pan Am Express, Inc.*, 869 F.2d 1, 4 (1st Cir. 1989); *Air Evac EMS, Inc. v. Robinson*, 486 F. Supp. 2d 713, 720 (M.D. Tenn. 2007); *Aldana v. Air E. Airways, Inc.*, 977 F. Supp. 2d 489, 490 (D. Conn. 2007); *Vivas v. Boeing Co.*, 486 F. Supp. 2d 726, 731 (N.D. Ill. 2007); *Duvall v. AVCO Corp.*, No. 4 CV05-1786, 2006 WL 1410794, at *2-3 (M.D. Pa. May 19, 2006); *Deahl v. Air Wis. Airlines Corp.*, No. 03 C 5150, 2003 WL 22843073, at *4

Notably, the argument that one must begin with a “presumption” against preemption, thus defeating the argument for it, is not valid in the case of aviation safety standards. The Supreme Court has explained that “an assumption of non-pre-emption is *not* triggered when the State regulates in an area where there has been a history of significant federal presence.”¹⁰⁰ In light of the foregoing discussion of the pervasiveness and exclusivity of federal regulation in this arena, it is without dispute that the analysis of this issue can not begin with a “presumption” against federal aviation safety preemption.¹⁰¹

When considering the issue of removal under FORS, designees should be entitled to raise the “colorable federal defense” of standard of care preemption, at least to the extent a plaintiff’s claims relate to or assert allegations of manufacturer wrongdoing in carrying out the FAA functions delegated to it as a designee of the FAA Administrator.

b. Other Federal Defenses

i. Official Immunity

The caselaw indicates that the doctrine of official immunity can extend to private parties.¹⁰² “The purpose of . . . official immunity is not to protect an erring official, but to insulate the decision-making process from the harassment of prospective litigation.”¹⁰³ Of course, official immunity is costly, because an injured plaintiff, armed with a meritorious tort claim, is denied

(N.D. Ill. Nov. 26, 2003); *Curtin v. Port Auth. of N.Y.*, 183 F. Supp. 2d 664, 671 (S.D.N.Y. 2002); *Schaeffer v. Cavallero*, 29 F. Supp. 2d 184, 185–86 (S.D.N.Y. 1998). *Authors’ Query*: In cases such as *Vivas*, isn’t there a clearer path to removal under FORS for defendants such as Boeing than under federal question jurisdiction? See also Jeffrey J. Ellis, *The Third Circuit’s Logical Solution to the Unnecessarily Complex Issue of Federal Preemption of Aviation Safety*, AVI. LIT. Q., Spring/Summer 2000, at 31; Thomas N. Tarnay, Comment, *Aircraft Designs Subjected to FAA Special Certification Review—Mitsubishi MU-2 and Beechcraft Bonanza: The Role of the SCR in Aircraft Design Certification and Implications on Federal Preemption*, 62 J. AIR L. & COM. 591, 622 (1996). For a contrary view, see John D. McClune, *There is No Complete, Implied, or Field Federal Preemption of State Law Personal Injury/Wrongful Death Negligence and Product Liability Claims in General Aviation Cases*, 71 J. AIR L. & COM. 717, 718–31 (2006).

¹⁰⁰ *United States v. Locke*, 529 U.S. 89, 90 (2000) (emphasis added).

¹⁰¹ *Id.* at 99–100.

¹⁰² See *Group Health Inc. v. Blue Cross Ass’n*, 739 F. Supp. 921 (S.D.N.Y. 1990); *Reuber v. United States*, 750 F.2d 1039, 1063–64 (D.C. Cir. 1984) (Bork, J., concurring); *Blum v. Campbell*, 355 F. Supp. 1220, 1224 (D. Md. 1972); cf. *Falls Riverway Realty, Inc. v. City of Niagara Falls*, 754 F.2d 49, 57 (2d Cir. 1985).

¹⁰³ *Westfall v. Erwin*, 484 U.S. 292, 295 (1988).

relief "simply because he had the misfortune to be injured by a federal official."¹⁰⁴

To determine if an officer is properly shielded from suit under the circumstances, the Supreme Court uses a "functional" inquiry: immunity attaches to particular official functions, not to particular offices.¹⁰⁵ Federal official immunity extends to discretionary conduct within the scope of a defendant's official duties.¹⁰⁶ This means that the conduct at issue must, first, be "the product of independent judgment,"¹⁰⁷ and, second, "enhance the performance of official function by advancing some legitimate purpose of the office in question."¹⁰⁸ Private actors partaking of official immunity must meet an analogous standard.¹⁰⁹

Private corporate defendants may be deemed federal actors "when they act in such a way as to create an integrated alliance with the government and their conduct therefore is imbued with the power and prestige of government officials."¹¹⁰ For example, national banks operating branches on federal installations have been found to be acting under the authority of the United States and therefore entitled to removal under § 1442(a)(1).¹¹¹

The federal government and its agents rely on private parties to gather information needed to execute governmental functions. When private parties are required to give such information to the government, they are also entitled to the government's official immunity.¹¹²

In the situation under discussion, a defendant may be performing functions of the FAA delegated to it under a specific statutory designation. In performing such functions, the designee will usually be exercising appropriate discretion, within the boundaries of the regulations that the designee and the FAA are

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 295 n.3.

¹⁰⁶ *Id.* at 297-98.

¹⁰⁷ *Id.* at 296.

¹⁰⁸ *Owens v. United States*, 822 F.2d 408, 410 (3d Cir. 1987); *see also Araujo v. Welch*, 742 F.2d 802, 805 (3d Cir. 1984).

¹⁰⁹ *See Murray v. Northrop Grumman Info. Tech., Inc.*, 444 F.3d 169, 175 (2d Cir. 2006); *Bushman v. Seiler*, 755 F.2d 653, 655 (8th Cir. 1985); *Gulati v. Zuckerman*, 723 F. Supp. 353, 358 (E.D. Pa. 1989).

¹¹⁰ *Reuber v. United States*, 750 F.2d 1039, 1057 (D.C. Cir. 1984).

¹¹¹ *Texas ex rel. Falkner v. Nat'l Bank of Commerce*, 290 F.2d 229, 231 & n.1 (5th Cir. 1961), *cert. denied*, 368 U.S. 882 (1961).

¹¹² *Slotten v. Hoffman*, 999 F.2d 333, 335 (8th Cir. 1993); *Backer v. Philco Corp.*, 372 F.2d 771, 773-74 (4th Cir. 1967).

required to follow, which could provide the adequate “colorable federal defense” to support removal under FORS.

ii. Buckman¹¹³ Preemption

Plaintiffs might allege that a manufacturer essentially committed fraud on the FAA by submitting false reports in obtaining a production certificate for an aircraft. The FAA is specifically empowered to deal with such misconduct, both civilly and criminally.¹¹⁴ Further, Congress has specifically provided a private remedy for the FAA Administrator to reconsider the action of a designee.¹¹⁵ Additionally, the FAA has its own procedures to deal with any fraud on the FAA.¹¹⁶

The Supreme Court in *Buckman v. Plaintiffs’ Legal Committee* expressly stated: “Policing fraud against federal agencies is hardly ‘a field which the States have traditionally occupied.’”¹¹⁷ Rather, “the relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law.”¹¹⁸ Therefore, contrary to situations involving concerns of federalism and the primary role of the State in health and safety regulation, “no presumption against preemption arises” when a private plaintiff alleges state law fraud-on-the-government claims.¹¹⁹

In *Buckman*, the Supreme Court held that a plaintiff’s state law “fraud-on-the-FDA” claims conflict with, and are therefore impliedly preempted by, the Food, Drug and Cosmetic Act.¹²⁰

¹¹³ *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341 (2001).

¹¹⁴ See 49 U.S.C.A. § 46106 (West 2004); 49 U.S.C.A. § 46301 (West 2004 & Supp. 2007); 18 U.S.C.A. § 1001 (West 2005 & Supp. 2007).

¹¹⁵ See 49 U.S.C.A. § 44702(d)(3) (West 2004 & Supp. 2007).

¹¹⁶ 18 U.S.C.A. §§ 1001, 1018 (West 2005 & Supp. 2007); 14 C.F.R. § 13.5 (2007) (establishing investigative procedures); 14 C.F.R. §§ 13.101–131 (2007) (establishing formal fact-finding investigation under an order of investigation).

¹¹⁷ *Buckman*, 531 U.S. at 347 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 348.

¹²⁰ *Id.* at 344; accord *Nathan Kimmel, Inc. v. Dow Elanco*, 275 F.3d 1199, 1205 (9th Cir. 2002) (stating that allowing state law fraud-on-the-EPA claims would impede the EPA’s ability to carry out its statutory objectives); *Morgan v. Brush Wellman, Inc.*, 165 F. Supp. 2d 704, 722 (E.D. Tenn. 2001) (holding that under *Buckman*, allowing a state civil law conspiracy claim would conflict with the U.S. Department of Energy’s ability to regulate and set policy consistent with its own judgment); *McCall v. PacifiCare of Cal., Inc.*, 21 P.3d 1189, 1199 n.9 (Cal. 2001) (“To the extent the [plaintiff’s] complaint alleges fraud on the [Health Care

Conflict between state and federal law exists due to federal statutory schemes that amply empower the federal agency to punish and deter fraud against the federal agency.¹²¹ The federal agency uses this power to achieve a delicate balance of statutory objectives, and allowing fraud-on-the-agency claims under state tort law can skew this balance.¹²² This rationale is equally applicable to the FAA.

In addition to the general criminal prohibition on making false statements to the federal government,¹²³ the *Buckman* Court held that “state law fraud-on-the-agency claims inevitably conflict with the FDA’s responsibility to police fraud” consistent with the judgment and goals of the Administration.¹²⁴ The Supreme Court held that, “as a practical matter, complying with the FDA’s detailed regulatory regime in the shadow of the 50 States’ tort regimes will dramatically increase the burdens facing potential applicants—burdens not contemplated by Congress in enacting the [federal acts].”¹²⁵

The *Buckman* Court further found that fraud-on-the-FDA claims would also cause regulated parties to fear that their disclosures to the FDA, although deemed appropriate by the Administration, would later be judged insufficient in state court.¹²⁶ Therefore, those parties would then have an incentive to submit a deluge of information that the Administration neither wants nor needs, resulting in additional burdens on the FDA’s regulatory efforts.¹²⁷

The FAA has the same powers as the FDA to “police fraud consistently with the Administration’s judgment and objectives,”¹²⁸ and to receive complaints from citizens who report wrongdoing and petition the agency to take action.¹²⁹ As a result, the rationale of *Buckman* applies equally well to any claim brought against a designee of the FAA that alleges that misrep-

Financing Administration], defendants may, on remand, assert that it is preempted under the rule in *Buckman*”).

¹²¹ *Buckman*, 531 U.S. at 341.

¹²² *Id.* at 341, 348.

¹²³ 18 U.S.C.A. § 1001 (West 2005 & Supp. 2007).

¹²⁴ *Buckman*, 531 U.S. at 350.

¹²⁵ *Id.*

¹²⁶ *Id.* at 351.

¹²⁷ *Id.*

¹²⁸ Compare *id.* at 350, with *Nw. Airlines, Inc. v. County of Kent, Mich.*, 510 U.S. 355, 367 n.11 (1994).

¹²⁹ Compare *Buckman*, 531 U.S. at 399, with *Nw. Airlines, Inc.*, 510 U.S. at 367 n.11.

resentation or fraud was committed in conducting the certification activity underlying the suit.

Courts have also found *Buckman* applicable in instances where a state statute immunizes a manufacturer from liability *unless* the plaintiff can prove fraud on the federal agency. In *Garcia v. Wyeth-Ayerst Laboratory*,¹³⁰ the Sixth Circuit considered a Michigan law that immunizes a drug manufacturer unless the manufacturer intentionally withheld or misrepresented required information from the FDA.¹³¹ The *Garcia* court held that *Buckman* prohibits a plaintiff from invoking the statutory exception on the basis of *state court* findings of fraud on the FDA.¹³² Accordingly, the Michigan law was preempted to the extent that it permitted a state court to determine whether a drug manufacturer committed fraud on the FDA.¹³³ However, the *Garcia* court continued its analysis and held that a plaintiff could utilize the statutory exception only if the agency itself had determined it was defrauded, stating:

[I]n this setting, it makes abundant sense to allow a State that chooses to incorporate a federal standard into its law of torts to allow that standard to apply when the federal agency itself determines that fraud marred the regulatory-approval process.¹³⁴

Lower courts construing similar statutes have followed the reasoning of *Garcia*, and have likewise held that the principles of *Buckman* preclude allowing a fraud-on-the-agency claim, as well as a claim based on a state immunity statute that requires a plaintiff to prove fraud on the agency.¹³⁵ Such claims place state courts, as fact finders, in the “uncomfortable and difficult position of having to answer the question of what role, if any, the allegedly withheld information would have played” in the agency’s complicated regulation and approval process.¹³⁶ Like the *Garcia* court, these courts have held that plaintiffs can only invoke the “fraud-on-the-agency” exception to a state immunity

¹³⁰ 385 F.3d 961 (6th Cir. 2004).

¹³¹ *Id.* at 963–64.

¹³² *Id.* at 966.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Kobar v. Novartis Corp.*, 378 F. Supp. 2d 1166, 1173 (D. Ariz. 2005); *Henderson v. Merck & Co., Inc.*, No. 04-CV-05987-LDD, 2005 WL 2600220, at *11 (E.D. Pa. Oct. 11, 2005).

¹³⁶ *See Kobar*, 378 F. Supp. 2d at 1169–75; *Henderson*, 2005 WL 2600220, at *8–12.

statute if the federal agency itself makes the determination that it was defrauded.¹³⁷

In the context of removal, therefore, if a defendant who is an FAA statutory designee is presented claims of "fraud-on-the-FAA" by a plaintiff, the presence of the *Buckman* preemption doctrine should provide a "colorable federal defense" sufficient to support removal under FORS.

D. SCOPE OF REMOVAL

The federal court's role in a case removed under § 1442 is "similar to that of a federal court sitting in diversity," and, "accordingly, the federal court applies the choice of law rules of the forum state to determine the applicable law."¹³⁸ Removal jurisdiction under § 1442 is purely derivative; if the state court lacks jurisdiction, then the federal court acquires none, even though the federal court might have had jurisdiction over the action if it had been first brought in the federal system.¹³⁹ Conversely, if the state court has jurisdiction of subject matter or person, the federal court will obtain jurisdiction upon removal.¹⁴⁰

The Supreme Court has reasoned that it is not of "any objection that questions are involved which are not all of Federal character."¹⁴¹ If one federal question exists in the case, then it is sufficient for the case to be removed to federal court and for the federal court to exercise subject matter jurisdiction over the case.¹⁴² Where a defendant has a right to remove under § 1442, the entire action is entitled to removal, regardless of the relationship between the removable claim and the non-removable claims.¹⁴³ Courts interpreting § 1442 have overwhelmingly

¹³⁷ *Kobar*, 378 F. Supp. 2d at 1174–75; *Henderson*, 2005 WL 2600220, at *11. Most recently, also following *Garcia*, a Texas court used the *Buckman* preemption doctrine to find that a Texas government-standards presumption statute was preempted. See *Ledbetter v. Merck & Co.*, Nos. 2005-59499, 2005-58543, 2007 WL 1181991 (157th Dist. Ct., Harris County, Tex. Apr. 19, 2007). The Texas statute found to be preempted was Tex. Civ. Prac. & Rem. Code Ann. § 82.007 (Vernon 2005 & Supp. 2006).

¹³⁸ *Winters v. Diamond Shamrock Chem. Co.*, 941 F. Supp. 617, 620 (E.D. Tex. 1996).

¹³⁹ *DeRewal v. United States*, 572 F. Supp. 1124, 1127–28 (E.D. Pa. 1983).

¹⁴⁰ *Id.* at 1130.

¹⁴¹ *Mesa v. California*, 489 U.S. 121, 129 (1989).

¹⁴² *Id.*

¹⁴³ *Nat'l Audubon Soc. v. Dep't of Water & Power of L. A.*, 496 F. Supp. 499, 509 (E.D. Cal. 1980).

found that removal by the federal officer also operates as to non-removing parties charged with joint negligence.¹⁴⁴

III. FEDERAL OFFICER OR AGENT AS APPLIED TO AVIATION CASES

A. THE FAA DESIGNEE PROGRAM

Title 49 § 44702(d) of the United States Code provides that the Administrator of the FAA may delegate to a qualified private person, or to an employee supervised by that person, a matter related to the examination, testing, and inspection necessary to issue a certificate and the issuance of the certificate.¹⁴⁵ The term “private person” means an individual or organization other than a governmental authority.¹⁴⁶ The “private persons” holding these designations are commonly referred to as “representatives of the Administrator” and “designees.”¹⁴⁷ Delegation holders have different rights than certificate holders.¹⁴⁸ A person who holds a delegation holds it at the Administrator’s discretion.¹⁴⁹ By comparison, once a certificate is issued under the power of the Federal Aviation Act,¹⁵⁰ the certificate holder has specific appeal rights external to the Administrator, which include a right to appeal an adverse decision to the National Transportation Safety Board.¹⁵¹ For delegation holders, the Administrator may rescind such appointments, or choose not to

¹⁴⁴ Jones v. Elliott, 94 F. Supp. 567, 568 (E.D. Va. 1950).

¹⁴⁵ The constitutional basis for the statutory power to delegate is the so-called “nondelegation doctrine.” The Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” U.S. CONST. art. I, § 1. From this language, the Supreme Court derived the nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to anyone else, whether another branch of government or to private persons. *Touby v. United States*, 500 U.S. 160, 165 (1991). Non-legislative powers, such as those delegated by the FAA, are not prohibited. *Id.*; see Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 71 (1990); Editorial Board, Note, *The State Courts and Delegation of Public Authority to Private Groups*, 67 HARV. L. REV. 1398, 1398 (1954).

¹⁴⁶ *Alsup v. 3-Day Blinds, Inc.*, 435 F. Supp. 2d 838, 846 (S.D. Ill. 2006). See also *In re Methyl Tertiary Butyl Ether Prods. v. Atl. Richfield*, 488 F.3d 112, 124 (2d Cir. 2007).

¹⁴⁷ 14 C.F.R. § 183.1 (2007).

¹⁴⁸ 14 C.F.R. § 183.15 (2007).

¹⁴⁹ *Lopez v. Fed. Aviation Admin.*, 318 F.3d 242, 243 (D.C. Cir. 2003).

¹⁵⁰ 49 U.S.C.A. § 44702(a) (West 2004 & Supp. 2007).

¹⁵¹ See 49 U.S.C.A. § 44702(d)(2); *Lopez*, 318 F.3d at 242; *Steenholdt v. Fed. Aviation Admin.*, 314 F.3d 633, 637–39 (D.C. Cir. 2003); *Fried v. Hinson*, 78 F.3d 688, 690–92 (D.C. Cir. 1996); *Paster v. Toll*, No. 94-55188, 1995 WL 433817, at *1

renew them, at "any time for any reason the Administrator considers appropriate."¹⁵²

When performing a delegated function, designees are legally distinct from, and act independently of, the organizations that employ them. The maximum fees that designees may charge for services performed under Section 44702(d) are set by the Administrator.¹⁵³

The FAA's management and supervision of the designee system has ensured that the system works well. Based on its decades of experience with the system, the FAA has determined the quality of approvals processed by these designee organizations equals those processed by the FAA. The designee system . . . has become essential to the certification system.¹⁵⁴

The FAA has broad responsibility to regulate all aspects of aviation; some have described FAA oversight as "cradle to the grave" regulation.¹⁵⁵ Congress authorized the FAA to delegate some of its functions to qualified private persons, including matters related to the issuance of certificates.¹⁵⁶ As delegation option authorization (DOA) organizational representatives of the Administrator, certain aircraft manufacturers¹⁵⁷ make the statutory findings otherwise made by the FAA, including findings

(9th Cir. 1995); *Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 974–75 (9th Cir. 1994); 14 C.F.R. § 183.15(d) (2007).

¹⁵² See 49 U.S.C.A. § 44702(d)(2); 14 C.F.R. § 183.15(c)(6) (2007); *Lopez*, 318 F.3d at 242; *Steenholdt*, 314 F.3d at 637–39; *Fried*, 78 F.3d at 692; *Greenwood*, 28 F.3d at 974–75. But note that beginning in 2007, the Vision 100-Century of Aviation Reauthorization Act mandates that the FAA develop and implement a certified design organization program, which would affect some designees currently responsible for approving the design and production of aircraft, aircraft parts, and equipment. Vision 100-Century of Aviation Reauthorization Act, Pub. L. No. 108–176, 117 Stat. 2490, 2531 (2003). Under this program, certain organizational designees that design and produce aircraft parts and equipment would no longer be designees; rather, they would conduct their approval functions under a newly created certificate (Certified Design Organization or CDO). *Id.* As a certificate holder, the CDOs would be subject to more formal processes when FAA grants or revokes a certificate. FAA would develop those processes as part of its plan to implement this program. Establishment of Organization Designation Authorization Procedures, 69 Fed. Reg. 2970, 2973 (Jan. 21, 2004).

¹⁵³ 49 U.S.C.A. § 45304 (West 2004).

¹⁵⁴ 69 Fed. Reg. at 2971.

¹⁵⁵ H.R. REP. NO. 103-525(I), at 2 (1994), as reprinted in 1994 U.S.C.A.N. 1644, 1647.

¹⁵⁶ 49 U.S.C.A. § 44702(d)(1) (West 2004 & Supp. 2007).

¹⁵⁷ DOA holders presently include: The New Piper A (Vero Beach, Fla.); Cessna DOA (Wichita, Kan.); McCauley Propeller (Wichita, Kan.); Raytheon (Wichita, Kan.); Hartzell Propeller (Piqua, Ohio); and the Boeing Company (Seattle, Wash.).

that the type design of the aircraft they produce meets all applicable requirements of the Federal Aviation Regulations that are a prerequisite for the FAA to issue aircraft type and production certificates.¹⁵⁸ The FAA has noted that when designees perform delegated functions, they act independently of and are legally distinct from the entities that employ them, and they act as representatives of the FAA Administrator.¹⁵⁹ The FAA has a long and successful history of using designees to perform delegated functions:

Based on its decades of experience with the system, the FAA has determined the quality of approvals processed by these designee organizations equals those processed by the FAA. The designee system has continually improved procedures and has become essential to the certification system¹⁶⁰ . . . The FAA's designee management system is essential to the FAA's safety management system and the certification procedures within that system. The designee system enables the FAA to meet its safety requirements and responsibilities and provide timely certification services. Delegating FAA authority to designees maximizes FAA participation in certification projects and allows the FAA to focus on critical safety areas.¹⁶¹

Regarding the FAA designee program, the FAA's oversight is detailed and pervasive:

When acting as a representative of the Administrator, these persons or organizations are required to perform in a manner consistent with the policies, guidelines, and directives of the Administrator. When performing a delegated function, designees are legally distinct from and act independent of the organizations that employ them. The authority of these representatives to act comes from an FAA delegation and not a certificate. As provided by statute, the Administrator may at any time and for any reason, suspend or revoke a delegation.¹⁶²

¹⁵⁸ See Delegation Option Authorization Procedures, 14 C.F.R. § 21.231–21.293 (2007).

¹⁵⁹ Establishment of Organization Designation Authorization Program, 70 Fed. Reg. 59,932, 59,933 (Oct. 13, 2005). Congress further provided that a person affected by an action of a designee may apply to the Administrator for a review of that action. 49 U.S.C.A. § 44702(d)(3) (West 2004 & Supp. 2007).

¹⁶⁰ Establishment of Organization Designation Authorization Procedures, 69 Fed. Reg. 2970, 2971 (Jan. 21, 2004).

¹⁶¹ *Id.* at 2972.

¹⁶² Establishment of Organization Designation Authorization Program, 70 Fed. Reg. at 59,933.

To illustrate, the standard Memorandum of Understanding with DOAs, DAsSs, SFAR 36 operators, and ODARs (now being converted to ODA holders) states that these designees "must comply with the same standards, procedures, and interpretations applicable to FAA employees accomplishing similar tasks."¹⁶³

The FAA designee statute states that "subject to regulations, supervision and review the Administrator may prescribe, the Administrator may delegate to a qualified private person, or to an employee under the supervision of that person, a matter related to the examination, testing and inspection necessary to issue an aircraft type certificate."¹⁶⁴ The delegations may include delegations to a manufacturer and to key employees as Authorized Representatives of the Administrator.¹⁶⁵

As mentioned earlier, private organizational or individual designees perform more than ninety percent of all FAA certification activities.¹⁶⁶ As of May 2004, FAA designee programs authorized approximately 13,400 private individuals and 180 organizations to act as representatives of the agency.¹⁶⁷ These designees are currently grouped into eighteen different programs and are overseen by three FAA offices – Flight Standards Service, Aerospace Medicine, and Aircraft Certification Service – all of which are under the Office of the Associate Administrator for Regulation and Certification.¹⁶⁸

¹⁶³ See FED. AVIATION ADMIN., ORDER 8100.15, ORGANIZATION DESIGNATION AUTHORIZATION PROCEDURES app. 1, fig. 14 (2006).

¹⁶⁴ 49 U.S.C.A. § 44702(d)(1) (West 2004 & Supp. 2007).

¹⁶⁵ See Certification Procedures for Products and Parts, 14 C.F.R. §§ 21.183 (2007).

¹⁶⁶ See GOV'T ACCOUNTABILITY OFFICE, *supra* note 12, at 12; see also Establishment of Organization Designation Authorization Procedures, 69 Fed. Reg. at 2972 (citing BOOZ, ALLEN & HAMILTON, CHALLENGE 2000: RECOMMENDATIONS FOR FUTURE AVIATION SAFETY REGULATIONS (1996)).

¹⁶⁷ GOV'T ACCOUNTABILITY OFFICE, *supra* note 12, at 6.

¹⁶⁸ Those eighteen programs are: Aviation Medical Examiners (AMEs); Training Center Evaluators; Designated Pilot Examiners (DPEs); Aircrew Program Designees; Designated Airworthiness Representatives (DARs) (maintenance); Designated Mechanic Examiners (DMEs); Designated Parachute Rigger Examiners (DPREs); Designated Aircraft Dispatcher Examiners (DADEs); Designated Flight Engineer Examiners (DFEEs); Computer Testing Designees; Organizational Designated Airworthiness Representatives (ODARs) (maintenance); Special Federal Aviation Regulation No. 36 (SFAR) Repair Stations; Designated Engineering Representatives (DERs); Designated Manufacturing Inspection Representatives (DMIRs); Designated Airworthiness Representatives (DARs) (manufacturing); Organizational Designated Airworthiness Representatives (ODARs) (manufacturing); Designated Alteration Stations (DASs); and Delegation Option Authorizations (DOAs).

The Supreme Court has discussed the FAA certification process with unconditional approval:

By regulation, the Secretary has provided for the appointment of private individuals to serve as designated engineering representatives to assist in the FAA certification process. These representatives are typically employees of aircraft manufacturers who possess detailed knowledge of an aircraft's design based upon their day-to-day involvement in its development. The representatives act as surrogates of the FAA in examining, inspecting, and testing aircraft for purposes of certification. In determining whether an aircraft complies with FAA regulations, they are guided by the same requirements, instructions, and procedures as FAA employees.¹⁶⁹

FORS could certainly be applied to the actions of any of the many FAA designees.¹⁷⁰

As indicated earlier, between 2006 and 2009, the FAA will introduce a new Organization Designation Authorization (ODA) program to phase out DOAs, DASS, SFAR 36 holders, and ODARs. See Establishment of Organization Designation Authorization Program, 70 Fed. Reg. 59,932, 59,933–937 (2005) and changes made in that rulemaking to 14 C.F.R. §§ 21.1–21.477, 121.1–121.1007, 135.1–135.507, 145.1–145.223, 183.1–183.67 (2007) and SFAR 36. In the future, there will be six types of ODA programs, replacing the former four programs, as follows: Type Certification ODA (TC ODA); Production Certificate ODA (PC ODA); Supplemental Type Certification ODA (ST CODA); Technical Standard Order Authorization Holder ODA (TSOA ODA); Major Repair, Alteration, and Airworthiness ODA (MRA ODA); and Parts Manufacturer Approval ODA (PMA ODA). If an organization qualifies for multiple ODA types, it will be issued one ODA letter of designation, assigned one ODA number, and the letter of designation will list each type of ODA and detail the authorized functions for each type.

Note the common thread that runs throughout all of the eighteen, now being transitioned to twenty, programs. In each case a designee is acting pursuant to a federal statutory delegation (49 U.S.C.A. § 44702 (West 2004 & Supp. 2007)) and is performing duties on behalf of, and that are otherwise required by law to be done by, the FAA itself.

¹⁶⁹ *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 807 (1984).

¹⁷⁰ The enabling statutes provide that the Administrator's delegations are "subject to regulations, supervision, and review" that she prescribes. 49 U.S.C.A. §§ 44701(a)(2)(c), 44702(d) (West 2004 & Supp. 2007). In the case of designees, this supervision and oversight include the following regulations and policies: for DERs, Designated Engineering Representatives—14 C.F.R. § 183.29 (2007); FED. AVIATION ADMIN., ORDER 8100.8 (2007); for DARs, Designated Airworthiness Representatives—14 C.F.R. § 183.33 (2007); FED. AVIATION ADMIN., ORDER 8130.33, DESIGNATED AIRWORTHINESS REPRESENTATIVES: AMATEUR-BUILT AND LIGHT-SPORT AIRCRAFT CERTIFICATION FUNCTIONS (2004); for DMIRs, Designated Manufacturing Inspection Representatives—17 C.F.R. § 183.31 (2007); FED. AVIATION ADMIN., ORDER 8100.8C, DESIGNEE MANAGEMENT HANDBOOK (2007); for Designated Manufacturing Inspection Representatives, DMEs, Technical Personnel Examiners—14 C.F.R. § 183.25 (2007); FED. AVIATION ADMIN., ORDER 8610.4K,

Consider the variety and multiplicity of functions FAA designees perform on behalf of the Administrator:

- Airman physicals (AMEs).
- Airman Training and Qualifications (Training Center Evaluators; DPEs; Aircrew Program Designees; DMEs; DPRES; DADEs; DFEEs; and Computer Testing Designees).
- Aircraft Maintenance, Repair, and Alteration (DARs (maintenance); ODARs (maintenance); SFAR 36 Repair Stations; and DASs).
- Aircraft Engineering and Manufacturing (DERs; DMIRs; DARs (manufacturing); ODARS (manufacturing); and DOAs).

Note that most organizational designees perform similar activities as individual designees, but the organization holds the designation rather than the employees who work for the organization. Such employees, who actually perform the delegated activities, are referred to as “authorized representatives.”¹⁷¹

It is not surprising that, given the fact that more than ninety percent of the FAA’s certification functions are performed by designees, there is a “rich” source of removal jurisdiction when their performance is questioned in lawsuits.

B. DESIGNEE CASES INVOLVING § 1442 REMOVAL

There are relatively few aviation cases involving removal under § 1442. Research indicates that the issue of federal officer removal in the context of FAA-delegated authority has been raised in only five cases: one published opinion and four unpublished opinions.

AVIATION MECHANIC EXAMINER HANDBOOK (2006); for DPRES, Technical Personnel Examiners—14 C.F.R. § 183.25 (2007); FED. AVIATION ADMIN., ORDER 8610.5K, PARACHUTE RIGGER EXAMINER HANDBOOK (2006); for DPEs, Pilot Examiners—14 C.F.R. § 183.23 (2007); FED. AVIATION ADMIN., ORDER 8710.3E, DESIGNATED PILOT AND FLIGHT ENGINEER EXAMINER’S HANDBOOK (2006); for DASs, Designated Alteration Station Authorization Procedures—14 C.F.R. §§ 21.431–21.453 (2007); for DOAs, Delegation Option Authorization Procedures—14 C.F.R. §§ 21.231–21.273 (2007); for SFAR 36 repair stations, see FED. AVIATION ADMIN., ORDER 8100.9A, DAS, DOA, AND SFAR AUTHORIZATION PROCEDURES (2005); SFAR 36—see FED. AVIATION ADMIN., SPECIAL FED. REGULATION No. 36,417 (2006). In addition, a Procedure Manual is required for DASs, DOAs and SFAR 36 repair stations: Cessna’s Manual runs over 250 pages. For the 4,000 plus AMEs, they are required to also comply with the FAA’s Guide for Aviation Medical Examiners, also over 250 pages in length.

¹⁷¹ See FED. AVIATION ADMIN., ORDER 8100.9A, DAS, DAR AND SFAR 36 AUTHORIZATION PROCEDURES (2005).

First, in the case of *In re Cessna 208 Series Aircraft Products Litigation*,¹⁷² Cessna removed a case under FORS.¹⁷³ In that case, the removal, which was affirmed by the assigned MDL district court, was predicated upon the FAA's DOA delegation issued to Cessna and the nexus shown between plaintiffs' amended complaints and Cessna's examination and testing of the 208 Caravan for type certification by the FAA.¹⁷⁴

In *Magnin v. Teledyne Continental Motors*,¹⁷⁵ the only case decided on this issue by a circuit court, the pilot of a private plane was killed in a crash.¹⁷⁶ The plaintiff sued the engine manufacturer and, individually, the designated manufacturing inspection representative (DMIR), alleging that he proximately caused the fatal crash by executing an "Export Certificate of Airworthiness" following an inadequate inspection, certifying the engine as airworthy when it was, in fact, defective.¹⁷⁷ In denying plaintiff's motion to remand, the court 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."¹⁷⁸

The importance of meeting the "nexus" requirement under FORS is reflected in *Britton v. Rolls Royce Engine Services*.¹⁷⁹ The court remanded *Britton*, distinguishing *Magnin* by finding that the plaintiffs' complaint did not name any individual defendant authorized by the FAA as a designee, did not identify the defendant arguing against remand, Dallas Airmotive, Inc. (DAI), as an FAA DMIR, and did not expressly allege that DAI's issuance of an airworthiness certificate as a DMIR had anything to do with the accident.¹⁸⁰

¹⁷² No. 05-md-1721-KHV (D. Kan. Jan. 12, 2007).

¹⁷³ See *id.* (order denying Plaintiffs' motion to remand the case to state court) (relating only to Fry v. Cessna Aircraft Co., No. 06-CV-2261-KHV); see also Vandeventer v. Guimond, 494 F.Supp. 2d 1255, 1265-67 (D. Kan. 2007) (affirming the difference between FAA "designees" and certificated airmen).

¹⁷⁴ *Id.* at 1.

¹⁷⁵ 91 F.3d 1424 (11th Cir. 1996).

¹⁷⁶ *Id.* at 1426-27.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1428. For a further discussion of *Magnin* and recent trends in removal jurisdiction in the Eleventh Circuit, see Jay P. Lechner, *Recent Trends in the Eleventh Circuit: Removal Jurisdiction and Procedures in Employment Law Litigation*, 28 NOVA L. REV. 351, 378 (2004).

¹⁷⁹ Britton v. Rolls Royce Engine Servs., No. C 05-01057 SI, 2005 WL 1562855, at *1, *4 (N.D. Cal. June 30, 2006).

¹⁸⁰ *Id.*

Similarly, another district court distinguished *Magnin* and remanded a suit in the Southern District of Florida.¹⁸¹ In *Ceseña v. McDonnell Douglas Helicopter Co.*, the district court held that no federal issue existed despite the argument by McDonnell Douglas that one of its employees functioned as an FAA DER.¹⁸² The case involved the crash of an MD600 television news helicopter in Miami, and McDonnell Douglas cited *Magnin*, arguing that the federal officer removal statute applied because of its employee's status as a DER.¹⁸³ The court disagreed, noting that *Magnin* involved a designee who was named as a party to the lawsuit and, more importantly, had signed an airworthiness certificate shortly before the crash, which the plaintiffs in *Magnin* alleged negligently contributed to the accident.¹⁸⁴ In contrast, the *Ceseña* court noted that the DER was not named and there was no allegation of negligent inspection or certification of the MD600 helicopter, stating:

The manufacture, design and assembly of the helicopter involve Bregger [the DER], if at all, as an MDHC employee wearing his MDHC hat, not his FAA hat. Unlike *Magnin*, the claim against MDHC exists even if Bregger and MDHC fully complied with all FAA regulations The mere fact that during a pre-certification test flight the MD600's rotors experienced contact with the tail boom will not provide a valid causal nexus to support removal.¹⁸⁵

Although McDonnell Douglas' DER acted within the scope of his FAA responsibilities when he certified the rotor/tailboom clearance on the MD600, the suit was not one meeting the "nexus" requirement between the certification of the design and the activity alleged by the plaintiff to have resulted in the accident.¹⁸⁶

On the other hand, in *AIG Europe (UK) Ltd. v. McDonnell Douglas Corp.*, the court, following *Magnin*, found that McDonnell Douglas used some of its employees as FAA designees (DERs) to certify the MD-11, and that there was a causal nexus between the alleged negligent certification and the accident, when plaintiffs

¹⁸¹ *Ceseña v. McDonnell Douglas Helicopter Co.*, No. 00-3161- CIV, at 2-3 (S.D. Fla. Nov. 10, 2000) (order granting Plaintiffs' motion to remand the case to state court).

¹⁸² *Id.* at 3.

¹⁸³ *Id.* at 1-2.

¹⁸⁴ *Id.* at 2-3.

¹⁸⁵ *Id.* at 3.

¹⁸⁶ *Id.* at 3.

alleged that the manufacturer failed to comply with the proper process for certifying the airplane.¹⁸⁷

According to each of these five cases, to justify removal under FORS, the overriding lesson is that there must be a causal link between the plaintiffs' claims of negligence and the conduct of some FAA appointee or designee acting in that capacity. The FAA has described the designation as an "appointment," and the designee as a "representative."¹⁸⁸ Courts have called the FAA designee a "surrogate" of the Administrator,¹⁸⁹ and one Oklahoma court characterized the designee as having been "deputized by [the FAA] to perform official acts."¹⁹⁰ In any case, however, the result is the same: the designee is "acting under" the FAA and when its conduct in doing so is implicated [i.e., alleged to have a causal nexus] in a state action, either civil or criminal, that action may be removed under FORS to a federal tribunal.

C. OTHER PROGRAMS ANALOGOUS TO THE FAA DESIGNEE SYSTEM

Transport Canada oversees a system of designees (which are called "delegates") that is substantially smaller than the FAA's and focuses primarily on aircraft design and design modifications.¹⁹¹

In the United States, other federal agencies charge user fees to process applications for approvals or licenses.

For instance, the Federal Drug Administration charges pharmaceutical companies application fees to recover the cost of the

¹⁸⁷ *AIG Europe (UK) Ltd. v. McDonnell Douglas Corp.*, No. CV 02-8703-GAF, 2003 WL 257702, at *2 (C.D. Cal. Jan. 28, 2003).

¹⁸⁸ Fed. Aviation Admin., Application, Selection & Appointment Process, http://www.faa.gov/other_visit/aviation_industry/designees_delegations/asa/ (last visited Oct. 19, 2007).

¹⁸⁹ *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 807 (1984).

¹⁹⁰ See *Brown v. Delta Air Lines, Inc.*, No. Civ-03-8 11-L, 2004 WL 5041257, at *5 (W.D. Okla. Oct. 8, 2004) ("Nor is this a case where defendants were deputized by a federal agency to perform official acts, such as in *Magnin v. Teledyne Continental Motors*.").

¹⁹¹ GOV'T ACCOUNTABILITY OFFICE, *supra* note 12, at 37. Established in the 1980s, Canada's two types of organizational delegates, Design Approval Organizations and Airworthiness Engineering Organizations, are authorized to evaluate and approve technical data to determine compliance with safety requirements. *Id.*

agency's review of new drugs.¹⁹² As another example, U.S. Customs and Border Protection charges fees to brokers—private individuals and companies that are licensed and regulated by the agency to aid importers and exporters in moving merchandise through Customs.¹⁹³

But as far as can be determined, no other federal agency, pursuant to congressional authorization, delegates more than ninety percent of its statutory certification activities to private parties as does the FAA.¹⁹⁴

IV. A "FLIGHT PLAN" TO REMOVAL

A. JOINDER

Removals under § 1442 are an exception to the general removal rule that would require all defendants to join in the removal petition.¹⁹⁵ Congressional policy that allows removal by a federal officer could easily be hindered by joining non-federal defendants unwilling to remove if their consent were required.¹⁹⁶

B. TIMELINESS

If a defendant proceeds to defend the action in state court, he may waive his right to remove to federal court.¹⁹⁷ The waiver must be clear and indicate a specific, positive intent to proceed in state court.¹⁹⁸ Two factors guide the court in determining when there is clear intent and hence when the right to remove has been waived.¹⁹⁹ First, the court must analyze the purpose of the defendant's actions to determine whether they were merely attempting to preserve the status quo or whether they were intending to litigate the merits of the case.²⁰⁰ Second, the court must determine if removal is simply a disguise for the defendant

¹⁹² The user fee program was established by the Prescription Drug User Fee Act of 1992, Pub. L. No. 102-571, 106 Stat. 4491 (codified as amended in 21 U.S.C.A. §§ 379g-379h (West 1999 & Supp. 2007)).

¹⁹³ See GOV'T ACCOUNTABILITY OFFICE, *supra* note 12 at 39.

¹⁹⁴ *Id.* at 3.

¹⁹⁵ *Id.*

¹⁹⁶ *Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1034 (10th Cir. 1998).

¹⁹⁷ *Brown v. Demco, Inc.*, 792 F.2d 478, 481 (5th Cir. 1986).

¹⁹⁸ *Beighley v. FDIC*, 868 F.2d 776, 782 (5th Cir. 1989); *Gore v. Stenson*, 616 F. Supp. 895, 898 (S.D. Tex. 1984).

¹⁹⁹ *Haynes v. Gasoline Marketers, Inc.*, 194 F.R.D. 414, 416 (M.D. Ala. 1999).

²⁰⁰ *Id.*

to appeal an adverse ruling in state court.²⁰¹ “The right of removal is not lost by action in the state court short of proceeding to an adjudication on the merits.”²⁰²

Title 28 § 1446(b) of the United States Code provides an exception to the rule that a notice of removal must be filed within thirty days after receipt of a copy of the initial pleading.²⁰³ The exception applies if the case stated by the initial pleading is not removable, but the defendant subsequently receives an amended pleading, motion, order, or “other paper” in which it may first be ascertained that the case is one which is or has become removable.²⁰⁴ The notice of removal must be filed within thirty days after receipt of the amended pleading, motion, order, or “other paper.”²⁰⁵ This exception serves the dual purposes of preventing defendants from having to speculate whether a case is removable, and to deter plaintiffs from seeking to disguise the true federal character of a claim.²⁰⁶

Where the plaintiff’s pleadings are subject to two reasonable interpretations, one of which would make the case removable and one of which would not, the pleading is ambiguous and the defendant is not required to guess with respect to removability.²⁰⁷ As a result, the thirty-day requirement is tolled.²⁰⁸ Courts have held that a defendant need not remove until it is “unequivocally apparent that the case [is] removable.”²⁰⁹

The Ninth Circuit has held that timeliness of the removal is to be given the same liberal interpretation as the removal statute itself.²¹⁰ “As far as the federal officer is concerned, the case isn’t ‘removable’ until the federal officer ground for removal is disclosed.”²¹¹

²⁰¹ *Id.*; *Jacko v. Thorn Ams., Inc.*, 121 F. Supp. 2d 574, 576 (E.D. Tex. 2000).

²⁰² *Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 428 (5th Cir. 2003); *Beighley*, 868 F.2d at 782; *Ortiz v. Brownsville Indep. Sch. Dist.*, 257 F. Supp. 2d 885, 889 (S.D. Tex. 2003).

²⁰³ 28 U.S.C.A. § 1446(b) (West 2003 & Supp. 2007).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Akin v. Big Three Indus. Inc.*, 851 F. Supp. 819 824 (E.D. Tex. 1994); *see also* *Burks v. Amerada Hess Corp.*, 8 F.3d 301, 305 (5th Cir. 1993).

²⁰⁷ *Akin*, 851 F. Supp. at 825.

²⁰⁸ *Id.*

²⁰⁹ *Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1036 (10th Cir. 1998).

²¹⁰ *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1253 (9th Cir. 2006).

²¹¹ *Id.*; *see also* *Willingham v. Morgan*, 395 U.S. 402, 407 (1969).

C. PROOF

The defendant's removal papers must show that the defendant was an officer of the United States or an agency thereof, or a person acting under such an officer, and that the defendant was "acting under color of such office when he did the act for which he is being sued."²¹² In addition, the defendant removing the case under § 1442 need not show that he is threatened with personal liability where the allegations involve aspects of implementation of an official program and challenged actions were taken under color of office.²¹³

The Supreme Court has noted that in a criminal case, "a more detailed showing might be necessary because of the more compelling state interest in conducting criminal trials in the state courts."²¹⁴ The Court later quoted its language in *Imbler v. Pachtman*²¹⁵ that it "has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law."²¹⁶

D. JUDICIAL REVIEW

In general, an order remanding a removed case back to the state court from which it was removed cannot be reviewed on appeal.²¹⁷ Unless the denial of the motion to remand falls within one of the few situations in which an interlocutory appeal is allowable, a court's decision to deny a party's motion to remand and instead retain jurisdiction of the case is not subject to interlocutory review.²¹⁸

The "substantive decision exception" is an exception to the general rule that remand orders are not subject to appellate review. The exception distinguishes between jurisdictional and substantive aspects of the remand order: The exception applies only if the remand order is based on a substantive decision on the mer-

²¹² *Swan v. Cmty. Relations-Soc. Dev. Comm'n*, 374 F. Supp. 9, 11 (E.D. Wis. 1974).

²¹³ *See Nat'l Ctr. for Hous. Mgm't v. Hous. Auth. of Milwaukee*, 668 F. Supp. 1230, 1231-32 (E.D. Wis. 1987).

²¹⁴ *See Willingham*, 395 U.S. at 409 n.4.

²¹⁵ 424 U.S. 409 (1976).

²¹⁶ *Mesa v. California*, 489 U.S. 121, 133 (1989) (quoting *Imbler*, 424 U.S. at 429).

²¹⁷ 28 U.S.C.A. § 1447(d) (West 2003 & Supp. 2008); *see also* *Powerex Corp v. Reliant Energy Servs. Inc.*, 127 S. Ct. 2411, 2421 (2007).

²¹⁸ *Neal v. Brown*, 980 F.2d 747, 748 (D.C. Cir. 1992); *see also* 16 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 107.44[1][a] (3d ed. 2006).

its of a collateral issue, rather than on subject matter jurisdiction.²¹⁹

Thus, the remand is reviewable if a federal district court remands after making a substantive decision on the merits of an issue, other than subject matter jurisdiction, provided that the court had jurisdiction to examine the merits of that issue, and the substantive decision is conclusive on that issue.²²⁰

V. WATSON—A RECENT DEVELOPMENT MAY CLARIFY THE LAW

Significantly, the newest and most definitive interpretation of FORS comes from the United States Supreme Court. On January 12, 2007, the Court granted two petitions for writs of certiorari in *Watson v. Philip Morris*²²¹ to address the question of “[w]hether a private party doing no more than complying with federal regulation” is entitled to remove a civil action brought in state court under state law to federal court under FORS.²²² In *Watson*, the Eighth Circuit accepted a certification for interlocutory review from a district court in Arkansas and held that the FTC had exercised comprehensive control over Philip Morris’ advertising of light cigarettes and in doing so, Philip Morris was “acting under” officials of the FTC; accordingly, the case, originally filed in state court, was properly removed to federal court under 28 U.S.C. § 1442.²²³

While the facts in this tobacco case occurred in a context other than aviation, two aspects of *Watson* will be very important for aviation practitioners:

²¹⁹ *Niehaus v. Greyhound Lines, Inc.*, 173 F.3d 1207, 1210–11 (9th Cir. 1999); *City of Waco v. United States Fid. & Guar. Co.*, 293 U.S. 140, 142–44 (1934); 16 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 107.44[2][a] (3d ed. 2006).

²²⁰ See *Niehaus*, 173 F.3d at 1211; *United States Fid. & Guar. Co.*, 293 U.S. at 144; 16 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 107.44[2][a][ii] (3d ed. 2006).

²²¹ *Watson v. Philip Morris Cos.*, 127 S. Ct. 1055 (2007); *Watson v. Philip Morris Cos.*, 126 S. Ct. 2315 (2006).

²²² Brief for the United States as Amicus Curiae Supporting Petitioners at *I, *Watson v. Philip Morris Cos.*, No. 05-1284 (Feb. 26, 2007), 2007 WL 621847.

²²³ 420 F.3d 852 (8th Cir. 2005). Every other circuit that has addressed this question has found that tobacco companies do not “act under” the FTC. See *Paldemic v. Altria Corp. Servs.*, 327 F. Supp. 2d 959, 965–68 (E.D. Wis. 2004); *Viriden v. Altria Group, Inc.*, 304 F. Supp. 2d 832, 844–47 (N.D. W. Va. 2004); *Tremblay v. Philip Morris*, 231 F. Supp. 2d 411, 416–19 (D.N.H. 2002).

1. The Eight Circuit found federal preemption to be a "colorable" defense for purposes of Section 1442;²²⁴ and
2. The Eighth Circuit joined the Fifth Circuit in using a "comprehensive control" test for determining when a defendant is "acting under" a federal official for removal purposes.²²⁵

Of special interest, the Office of the Solicitor General (SG) filed its Brief as *amicus curiae* supporting the Petitioners on February 26, 2007.²²⁶ Petitioners and the SG contend that a person is "acting under" a federal officer only when that person assists or acts on behalf of a federal officer in the performance of the officer's official duties.²²⁷ Respondents contend that a person is also "acting under" a federal officer when that person is subject to the federal officer's direction and control.²²⁸

In the SG's brief, the *Magnin* case, involving an FAA DMIR, is given as an example of the proper application of this statute.²²⁹ But more importantly, the SG affirms the premise of this Article, that carrying out an official government function is a *sufficient* basis for removal.²³⁰ This statement fits perfectly in the FAA context of statutory delegations to private persons. While there is also comprehensive "control" in the sense of detailed aviation safety regulations, the overarching principle, at least for purposes of federal officer removal, is that Congress authorized the Administrator to delegate official FAA functions to private persons, and therefore they are, almost as a matter of law, "acting under" the Administrator. Or as the Supreme Court itself said, they are "surrogates" of the FAA.²³¹

The SG's amicus brief in *Watson*, and a review of the cases and materials cited, is an excellent place to begin when considering this removal scenario.

²²⁴ *Watson*, 420 F.3d at 862-63.

²²⁵ *Id.* at 862.

²²⁶ See generally Brief for the United States as Amicus Curiae Supporting Petitioners, *Watson v. Philip Morris Cos.*, No. 05-1284 (Feb. 26, 2007), 2007 WL 621847.

²²⁷ See Brief for Petitioners at *9, *Watson v. Philip Morris Cos.*, No. 05-1284 (Feb. 23, 2007), 2007 WL 579304; Brief for the United States as Amicus Curiae Supporting Petitioners at *7, *Watson v. Philip Morris Cos.*, No. 05-1284 (Feb. 26, 2007), 2007 WL 621847.

²²⁸ See Brief of Respondents at *17, *Watson v. Philip Morris Cos.*, No. 05-1284 (Mar. 30, 2007), 2007 WL 966518.

²²⁹ Brief for the United States as Amicus Curiae Supporting Petitioners at *26, *Watson v. Philip Morris Cos.*, No. 05-1284 (Feb. 26, 2007), 2007 WL 621847.

²³⁰ *Id.* at *17-*19.

²³¹ *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 807 (1984).

The SG argues, in pertinent part, as follows:²³²

A. “The Text, Evolution, And Judicial Construction Of The Federal Officer Removal Statute Make Clear That It Permits Removal By Private Parties Only When They Act On Behalf Of Or Otherwise Assist Federal Officers In Carrying Out Their Official Duties”;²³³

B. “Limiting Private-Party Removal To Persons Assisting Federal Officers In The Performance Of Official Duties Accords With The Purpose Of The Federal Officer Removal Statute”;²³⁴

C. “Permitting Removal By Private Parties Subjected To Detailed And Specific Federal Regulation Would Potentially Shift Into Federal Court A Wide Range Of Traditional State Law Claims”;²³⁵

D. “A Proper Understanding Of The Scope Of The Federal Officer Removal Statute Leaves Ample Room For Removal By Private Parties In Appropriate Cases.”²³⁶

It is at this juncture in the brief that the SG points to cases exhibiting a proper understanding of the scope of the statute and cites the following FAA case as an example:

[A] private citizen delegated authority to inspect aircraft by the Administrator of the Federal Aviation Administration (FAA) acts under a federal officer in conducting such an inspection and issuing a certificate of airworthiness. *Magnin v. Teledyne Cont'l Motors*.²³⁷ That is true regardless of whether the private individual is viewed as performing a law enforcement role or a safety protection role. *The critical point is that the individual acts on behalf of the FAA Administrator in conducting the inspection.*²³⁸

²³² See Brief for the United States as Amicus Curiae Supporting Petitioners at *11, *17, *19, *24, *Watson v. Philip Morris Cos.*, No. 05-1284 (Feb. 26, 2007), 2007 WL 621847.

²³³ *Id.* at *11 (citing *Willingham v. Morgan*, 395 U.S. 402, at 405–06 (1969); *City of Greenwood v. Peacock*, 384 U.S. 808, 814–15 (1966); *Maryland v. Soper*, 270 U.S. 9, 30–31, 35 (1925); *Davis v. South Carolina*, 107 U.S. 597, 600 (1883)).

²³⁴ *Id.* at *17 (citing *Willingham*, 395 U.S. at 406; *Davis*, 107 U.S. at 263).

²³⁵ *Id.* at *19 (citing *Grable & Sons Metal Prods., Inc.*, 545 U.S. 308, 319 (2005); *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830–32 (2002); *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 817 (1986); *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936)).

²³⁶ *Id.* at *24 (citing *Magnin v. Teledyne Cont'l Motors*, 91 F.3d 1424, 1428 (11th Cir. 1996)).

²³⁷ Note that a DOA inspects and issues a certificate of airworthiness, much like the DMIR in that case. Neither issue a type certificate, as explained earlier.

²³⁸ Brief for the United States as Amicus Curiae Supporting Petitioners at *26, *Watson v. Philip Morris Cos.*, No. 05-1284 (Feb. 26, 2007), 2007 WL 621847 (emphasis added).

In contrast to the *Magnin* case, the SG argues that the Circuit Court decision in *Watson* reflects a misapplication of the federal officer removal statute:

Section 1442(a)(1) does not remotely encompass tobacco manufacturers that market their cigarettes as “light,” because in so doing the tobacco companies are not acting on behalf of federal officers or otherwise assisting federal officers in carrying out their duties. Respondent hardly markets “light” cigarettes on the FTC’s behalf; it does so solely in furtherance of its own economic interest Mere compliance with federal law does not transform a private party that is acting solely to further its own economic interests into a party that is acting on behalf of or otherwise assisting federal officers in carrying out their duties.²³⁹

Watson was argued before the Supreme Court on April 25, 2007. The transcript of the oral argument points up the following significant exchanges between the Assistant Solicitor General for the United States and Chief Justice Roberts, as it relates to the status of FAA representatives under FORS:

CHIEF JUSTICE ROBERTS: What about . . . what about USDA food inspection? Isn’t a lot of that delegated to the producers rather than the Government officials?

Mr. GORNSTEIN: The Government . . .

CHIEF JUSTICE ROBERTS: But you still get a Government stamp.

MR. GORNSTEIN: You can have different situations. And I’m not sure about the precise one you’re talking about. But you can have situations and the FAA is one, where the FAA has a statute which says you can delegate to third parties inspecting aircrafts, and the Agency certifies through regulation that this person is inspecting as a representative of the FAA. Now that’s a varied situation. In that kind of situation the person would [be] acting under. But if the person is simply complying with Federal requirements about how to test, that is private behavior, acting on their own behalf, in order to further the marketing of their products.

CHIEF JUSTICE ROBERTS: So if you are a federally certified inspector you are acting under . . .

MR. GORNSTEIN: Certified as a representative of the FAA, yes, you are.²⁴⁰

²³⁹ *Id.* at 26–27.

²⁴⁰ See Transcript of Oral Argument at 21–22, *Watson v. Philip Morris Cos.*, 127 S. Ct. 2301 (2007) (No. 05-1284), available at www.supremecourtus.gov/oral_arguments/argument_transcripts/05-1284.pdf.

Notice how the SG (who cited the *Magnin* case) carefully guides the Chief Justice towards the proper characterization of the FAA function that qualifies for “acting under,” i.e., it is *not* that the designee is a “federally certified inspector” but that he is “certified as a *representative* of the FAA.”²⁴¹ There are hundreds of thousands of certified airmen who perform pre-flight inspections of aircraft but only some 13,000-plus “representatives” of the FAA that are, in the words of the Court, “surrogates” of the FAA Administrator.²⁴²

VI. CONCLUSION

This discussion has attempted to identify the unique aspects of FORS and distinguish it from other avenues of removal jurisdiction. FORS should not be confused or merged with federal question, diversity, or “arising under” jurisdictional issues; rather, FORS stands alone. The following distinctions, therefore, are important in properly identifying a case for removal under FORS, as contrasted with one that only implicates other jurisdictional grounds.

- A defense that only raises a federal question is inadequate to confer federal jurisdiction.²⁴³
- A claim “arising under” Article III of the Constitution confers federal jurisdiction but must be determined by reference to the “well-pleaded complaint . . . unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.”²⁴⁴
- “Arising under” jurisdiction, a less frequently discussed but historic variety of federal jurisdiction, exists when state law claims “necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state responsibilities.”²⁴⁵
- Since *Grable*, the Supreme Court has characterized “arising under” jurisdiction as a “special and small category.”²⁴⁶

²⁴¹ Transcript of Oral Argument, *supra* note 240, at 22 (emphasis added).

²⁴² See *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 807 (1984).

²⁴³ *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 808 (1986).

²⁴⁴ *Franchise Tax Bd. v. Constr. Laborers Vacation Trust Fund for S. Cal.*, 463 U.S. 1, 9–10 (1983).

²⁴⁵ *Grable & Sons Metal Prods., Inc. v. Danue Eng'g & Mfg.*, 545 U.S. 308, 312, 314, 310–15 (2005).

²⁴⁶ *Empire Healthchoice Assoc., Inc. v. McVeigh*, 126 S. Ct. 2121, 2136 (2006).

- In summary, while § 1441(a) permits removing a case from state to federal court if the action could have been filed originally in federal court, where the removal is not based on diversity of citizenship, § 1441(b) is used to remove “arising under” jurisdiction cases. The latter are predicated on the “well-pleaded complaint” doctrine. On the other hand, the Federal Officer Removal Statute (FORS) is a “pure jurisdictional statute” that does nothing more than grant federal district court jurisdiction over cases in which a federal officer is a defendant and “cannot independently support Article III ‘arising under’ jurisdiction.” Rather, “it is the raising of a federal question in the officer’s removal petition that constitutes the federal law under which the action against the federal officer [or agent] ‘arises’ for Art. III purposes.”²⁴⁷
- Thus, § 1442 brings the entire case to the federal court; it does not require the consent of the other defendants, as in diversity cases. It applies to both civil actions and criminal prosecutions. Its primary purpose is to allow the validity of the federal officer’s (or agent’s) defense to be adjudicated in a federal forum. It is given a liberal application. It is not required that the removing defendant win his case before he can have it removed. It does not require the resolution, or even a detailed inquiry into, the merits of the federal defense advanced; rather, the federal defense alleged need only be plausible and its ultimate validity is not to be determined at the time of removal. The “well-pleaded complaint” rule does not apply, and the removal right is “absolute.”

An illustration of a “conflation” of these principles is a recent decision by a federal district court on motions for remand in multiple actions filed as a result of the Comair jet crash at Lexington, Kentucky that resulted in forty-nine fatalities.²⁴⁸ There, the court considered whether there was only a “preemption” defense that, short of complete preemption, required remand; whether the court had original federal question jurisdiction to support removal; or whether, in fact, there was “arising under”

²⁴⁷ *Mesa v. California*, 489 U.S. 121, 136 (1989).

²⁴⁸ See *In re Air Crash at Lexington, Ky.*, Aug. 27, 2006, 486 F. Supp. 2d 640, 642–43 (E.D. Ky. 2007). See also *Bennett v. Sw. Airlines Co.*, 484 F.3d 907, 908 (7th Cir. 2007). Compare the possible result in both of these cases if there had been “minimal diversity” jurisdiction and at least seventy-five fatalities and the cases were removed under the new Multiparty, Multiforum Trial Jurisdiction Act of 2002, Pub. L. No. 107-273, 116 Stat. 1758 (2002) (codified at 28 U.S.C.A. §§ 1369, 1391, 1441, 1697, and 1785 (West 2006)). See Angela J. Rafoth, *Congress and the Multiparty, Multiforum Trial Jurisdiction Act of 2002: Meaningful Reform or a Comedy of Errors*, 54 DUKE L.J. 255, 258–91 (2004).

jurisdiction that required the resolution of a “substantial federal question” like that in *Grable*.²⁴⁹ Finding none of these bases, the motions to remand were granted.²⁵⁰ But consider, if all three elements of FORS’s independent right of removal had been present, as in the case of an FAA designee being sued whose acts complained of were performed in his capacity as a designee, that the court may have been justified in denying remand.

The question presented in *Watson*²⁵¹ is necessarily narrow, but the Court’s decision this term could settle some of the variances among the circuits in the construction of this important statute thereby establishing a clear path to removal for those persons who are delegated or appointed as designees to perform official functions on behalf of the FAA Administrator under the Federal Aviation Act.

GLOSSARY OF ACRONYMS

AME	Aviation Medical Examiner
CDO	Certified Design Organization
DADE	Designated Aircraft Dispatcher Examiner
DAR	Designated Airworthiness Representative
DAS	Designated Alteration Station
DER	Designated Engineering Representative
DFEE	Designated Flight Engineer Examiner
DME	Designated Mechanic Examiner
DMIR	Designated Manufacturing Inspection Representative
DOA	Delegation Option Authorization
DPE	Designation Pilot Examiner
DPRE	Designated Parachute Rigger Examiner
FAA	Federal Aviation Administration
FDA	Food and Drug Administration
FIFRA	Federal Insecticide, Fungicide, and Rodenticide Act
FORS	Federal Officer Removal Statute (28 U.S.C. § 1442)
FTC	Federal Trade Commission

²⁴⁹ *In re Air Crash at Lexington, Ky.*, Aug. 27, 2006, 486 F. Supp. 2d at 646–48.

²⁵⁰ *Id.*

²⁵¹ For a further analysis of *Watson* to the oral argument stage, see Cornell University Law School, Legal Information Institute Bulletin: *Watson v. Philip Morris Companies, Inc.* (05-1284), <http://www.law.cornell.edu/supct/cert/05-1284.html> (last visited Oct. 16, 2007).

GAO	General Accounting Office
MRA ODA	Major Repair, Alteration, and Airworthiness ODA
ODA	Organization Designation Authorization
ODAR	Organizational Designated Airworthiness Representative
PC ODA	Production Certificate ODA
PMA ODA	Parts Manufacturer Approval ODA
SRAR No. 36	Special Federal Aviation Regulation No. 36
SG	The Solicitor General of the United States
STC ODA	Supplemental Type Certification ODA
TSOA ODA	Technical Standard Order Authorization Holder ODA
TC ODA	Type Certification ODA

Comments

