

UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 03-1 1042PBS

ROBERT F. CASEY, JR., RITA A. CASEY,
DAVID McCOY, AND AMY McCOY,

Plaintiffs

v.

MICHAEL GOULIAN, EXECUTIVE FLYERS
AVIATION, INC., CENTER OF MASS.
AEROBATICS, LLC, KENT G. CHRISTMAN,
STEVE S. PENNYPACKER, and PETER E. BOCON,

Defendants

MEMORANDUM OF DEFENDANTS, MICHAEL GOULIAN AND
EXECUTIVE FLYERS AVIATION, INC., IN OPPOSITION TO
PLAINTIFFS' MOTION TO VACATE REMOVAL
AND REMAND TO STATE COURT

Now come the defendants, Michael Goulian and Executive Flyers Aviation, Inc., and oppose plaintiffs' "Motion To Vacate Removal and Remand To State Court" on the grounds set forth below.

BACKGROUND

The plaintiffs allege that certain operations of aircraft by the defendants in navigable airspace of the United States were conducted in a manner so as to cause a nuisance to the plaintiffs. More specifically, the plaintiffs characterize the operation of aircraft by defendants using subjective descriptions such as "at very low altitudes," "dives," "buzzes and other violent maneuvers." The plaintiffs, in general qualitative

terms, complain in this action about noise which they perceive from aircraft, the identities, makes and models of which are not specified in the complaint. The plaintiffs, in their memorandum in support of their motion to vacate the removal of this matter to this Court, state that their cause of action is one of nuisance, and therefore, that there is no federal question that would give rise to grounds for removal from state court to federal court under the “well-pleaded complaint” rule. The defendants disagree. The plaintiffs may not evade federal jurisdiction simply by avoiding reference to federal statutes and regulations in the complaint. It is the contention of the defendants that congress has expressly and completely pre-empted regulation of the airspace of the United States with the result that any action alleging wrongful use of the airspace by aircraft operations must be decided in federal court. The “well-pleaded complaint” rule which the plaintiffs rely upon to prohibit removal to federal court is, therefore, defeated by the exceptions of the “artful pleading doctrine” and by “complete preemption” of the sovereignty of airspace in the United States by the United State Government.

ARGUMENT

Congress clearly expresses its intent to completely preempt the control and regulation of airspace in 49 U.S.C. 40103(a) which states, “The United States Government has exclusive sovereignty of airspace in the United States.” Congress reacted to the need for a uniform, national set of operating rules for aircraft, especially with regard to the use of airspace which includes, among other areas, minimum permissible altitudes, airspace use allocation, permissible maneuvers and rules governing them, and noise. Avoiding the confusion of varying state and even municipal courts,

agencies and tribunals setting standards for the use of airspace is the very purpose of this preemption which, if to be effective, must be complete and inviolate.

The Plaintiffs assert in their memorandum that congress has not preempted all of aviation law, therefore there is no complete preemption that would serve as an exception to the “well-pleaded complaint” rule. It is true that in some areas where aviation law overlaps other state-regulated activities, courts have found there to be no preemption. A municipality, for instance, can require a permit and impose limitations on a sightseeing seaplane base on municipal property, despite compliance with federal aviation regulations. SeaAIR NY. Inc. v. City of New York. et al, 250 F.3d 183 (2nd Cir. 2001). The City of Honolulu can, by ordinance, restrict aerial advertising. Skysign International. Inc. v. City and County of Honolulu, No. 99-15974 (9th Cir. 2002). These cases, and others like them are distinguishable, however, because each of their findings rely on principles such as land (or water) use, and regulation of advertising media where states have some residual sovereign rights.

In the case at bar, however, we are dealing squarely and exclusively with the questions of the use of airspace and regulation of noise which, as we shall see, are and must be completely and exclusively preempted by the federal government, with the effect that removal to federal court is proper.

The plaintiffs claim that by framing their complaint only as a nuisance complaint, removal is prohibited by the “well-pleaded complaint” rule because no federal question appears on the face of the complaint. The defendants agree that, as a general matter, federal defenses (e.g. preemption) to state law claims are not grounds for removal because the defense does not confer jurisdiction on the federal court. Burda v. M. Ecker

Co., F2d 434 (7th Cir. 1992). However, a corollary to the “well-pleaded complaint” rule is the “artful pleading doctrine” under which a plaintiff may not frame his action under state law and omit federal questions that are essential to recovery, nor artfully omit facts that indicate federal jurisdiction. Marzuki v. At&T Technologies, 878 F.2nd 203 (7th Cir. 1989); Oglesby v. RCA Corp., 752 F.2d 272 (7th Cir. 1985).

Plaintiffs have chosen to omit all reference to federal statutes, regulations of the Federal Aviation Administration (“FAA”) and of the Environmental Protection Agency (“EPA”) governing aircraft airspace use, aircraft operation, and aircraft noise. We need not argue here whether there exists any state claim for aircraft nuisance, but clearly a state may not, either by its courts or by its agencies, make any rulings on aircraft operation that further restrict aircraft operation or airspace beyond those rules promulgated by the federal government. Justice Douglas in City of Burbank. et al v. Lockheed Air Terminal. Inc., stated firmly, “. . . The FAA, now in conjunction with the EPA, has full control of aircraft noise, pre-empting state and local control . . . ,” and with regard to the use of navigable airspace, “. . . the Administrator of the Federal Aviation Administration (FAA) has been given broad authority to regulate the use of navigable airspace, in order to insure the safety of aircraft and the efficient utilization of such airspace . . . and for the protection of persons and property on the ground. 411 U.S. 624, 633, 639, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973). The Court went on to uphold an injunction against the City of Burbank, California which sought to prohibit the operation of jet aircraft to and from the Holly-Burbank Airport from the hours of 11:00 p.m. to 7:00 a.m. The case is on point because the City of Burbank based its case on noise, claims of what it perceived to be low altitude flying as creating nuisance and disturbance to

residents of the area. The Court's broad holding was that a uniform airspace system can only be accomplished by centralized federal rule.

The relevance of the above argument in favor of removal is two-fold. First, as stated above, a federal question is necessarily inherent in any complaint that alleges low flying, noise or violent maneuvers because those matters are thoroughly and exclusively regulated by the Federal Aviation Regulations in 14 C.F.R. Part 91. The "well-pleaded complaint" rule is effectively negated by the "artful pleading" rule which allows this Court to recognize the underlying federal questions(s) which the plaintiffs omitted in the characterization of their claims, but not in their content.

As stated by the Ninth Circuit, "Although a plaintiff may be the master of his complaint and is free to choose the forum for his action, this principle is not without limitation. A plaintiff will not be allowed to conceal the true nature of a complaint through 'artful pleading.'" Bright v. Bechtel Petroleum. Inc., 780 F.2nd 766, 769 (9th Cir. 1986).

Second, the pervasive preemption as described in Burbank shows application in this case of the "complete preemption" exception or the "field preemption" exception where the areas of noise, airspace and flight rules are so pervasively regulated by the federal government as to render the "well-pleaded complaint" rule inapplicable here.

The federal government has increasingly exerted its exclusive jurisdiction over the acts complained of by the plaintiff in such statutes and rulemakings as The Civil Aeronautics Act of 1938; The Federal Aviation Act of 1958, as amended; the Federal Aviation Regulations, particularly 14 C.F.R. Part 91 containing the General Operating Rules governing, among other things, aircraft minimum safe altitudes, assigning airspace,

and providing for rules for acrobatic operations; the Noise Control Act of 1972 and regulations promulgated under it in 14 C.F.R. Parts 71, 75, 77, 91, 93, 95 and 95; and The Aircraft Safety and Noise Abatement Act of 1979 (49 U.S.C. §~ 47501, et seq.). It can therefore be demonstrated that the control by the federal government over airspace and aircraft noise has been pervasive and complete, as recognized in City of Burbank.

By alleging acts that are preemptively governed by federal law, the plaintiffs do, in fact, present only federal questions, for only federal laws and regulations can govern such activities as flight altitudes, use of airspace and flight maneuvers. Defendants need not demonstrate that Congress has intended to preempt all of aviation law, but only those areas under which plaintiff seeks redress. Plaintiffs limited those areas to noise, altitude and types of flight maneuvers. Preemption “is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.” Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992).

The federal government, through the FAA and the EPA, avoids the chaos that would result by varying aircraft operational and noise rules made by state legislatures and courts by the complete preemption which we ring to this Court’s attention. If the holdings of state decisions required avoiding certain areas or altitudes, it would be impossible for the federal government to prosecute a national airspace plan that has a predictable dispersal of air traffic. For example, if pilots were required to avoid “hot spots” over certain anti-aviation activists’ areas, there would necessarily be an unsafe compression of air traffic around those areas. Similarly, if a state court were to rule that a certain altitude was too low for certain types of aircraft operations, aircraft training

requiring reference to ground maneuvers, as required by the FAA would become difficult. For these and other reasons, the federal government has completely preempted the regulation of airspace and noise, and all of the areas which are the subject of the plaintiffs' complaint are governed by federal law.

The use of the Kingsley v. Lania case in the plaintiffs' memorandum to argue non-preemption misses this central point. In Kingsley there was an underlying contract theory in that plaintiffs case that had nothing whatever to do with the operation of aircraft or with the use of the National Airspace. Removal, through a preemption defense, was attempted by the defendant under the Airline Deregulation Act of 1978 (Act) in that case. Clearly, this would have been a state contract claims case, but for section 105 of that Act, but there is not necessarily complete preemption of commercial air carrier contracts, as compared with aircraft operation, route assignment and other aspects of air carrier operations which that Act governs.

The distinguishing factor here, however, is that there is complete preemption of aircraft operating rules about which the plaintiffs complain, and there are no private state sanctions. For example, there is no state aviation regulation which states a minimum safe altitude varying from those state in 14 C.F.R. Part 91. The state statute to which the plaintiffs refers in their memorandum (M.G.L. C. 90 §46), enacted in 1939, is a criminal statute which affords the Commonwealth of Massachusetts no authority to regulate in contradiction to the Federal Aviation regulations, and which grants no private remedy or right of recovery.

Similarly, the plaintiffs misplace reliance upon the holdings in Stone v. Frontier Airlines, Inc., 256 F. Supp. 2d 28 (D. Mass. 2002). That case had nothing to do with

airspace or with aircraft operation, rather it was a claim concerning adequacy of medical care and medical equipment on board a commercial carrier aircraft where the plaintiffs there claimed that the aircraft should have had a cardiac defibrillator on board. This Court (Young, C.J.) ruled that the Airline Deregulation Act did not preempt that plaintiff's state law claims which arose from the alleged failure to provide proper medical care to a passenger. Congress is free to completely preempt some areas of aviation law and not others.

For example, the First Circuit has ruled that federal law preempts state regulation of pilot qualification. French v. Pan AM Express, Inc., 869 F.2d 1, 5 (1st Cir.1989). It is of note that in the Stone decision, which plaintiffs site in their memorandum, Judge Young cites City of Burbank, at page 12, as an example of an area of aviation law (noise) that the Supreme Court has found federal law preemption.

As to the plaintiffs' argument that the flights complained of are wholly in Massachusetts, that argument has no bearing on whether or not, or to what degree the federal government has preempted the regulation of airspace, noise and flight operations. The express preemption, as stated above, is of "the airspace of the United States." The federal question here does not rely solely upon principles of Interstate Commerce or of Due Process. Any other finding would deny the FAA jurisdiction over the licensing of pilots and certification of aircraft not leaving the borders of a state, a result we can be confident is not the intent of Congress.

CONCLUSION

There are some areas where the federal government has been found not to have preempted aviation-related claims such as defamation by an airline, certain contracts,

advertising and land and water use. However, there are few areas that are as completely preempted by federal law as are airspace, aircraft operation, and aircraft noise, commensurate with the need for such complete preemption in the interest of furthering aviation safety by having centralized, organized control of aircraft operations.

This complete preemption and pervasive regulation of these aspects of aviation by the federal government serve to provide an exception to the ‘well-pleaded complaint’ rule with the result that the removal of this matter to federal court was proper. Furthermore, the state-law theory of nuisance does not provide viable grounds for a state-only claim since the factual allegations in the complaint are based solely on actions that are covered by federal regulations of which plaintiffs allege no violation. By avoiding allegations of federal aviation regulation violations, plaintiffs are subject to the ‘artful pleading doctrine’ which also results in permitting removal to the federal court.

WHEREFORE, the defendants, Michael Goulian and Executive Flyers Aviation, Inc. respectfully request that the plaintiffs’ Motion to Vacate the Removal be denied.

REQUEST FOR ORAL ARGUMENT

Pursuant to *Local Rule 7.1(D)*, the Defendants request oral argument to assist the Court.

Respectfully submitted,

By their attorney,

Dated: July 7, 2003

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was
Served upon the attorney of record for each other party by first class mail.

Dated: July 7, 2003

Gary M. Arber