"Federal Officer Removal: Why Watson Will Fly with FAA Designees"

Federal Officer Removal is a somewhat neglected vehicle whereby a person acting as a Federal Officer, or acting under a Federal Officer, has standing to remove a suit brought against him in state court to federal court, regardless of lack of diversity or refusal to join by other defendants. Clearly, the 'Federal Officer' status is not in play for non-governmental persons; but, the 'acting under' qualification deserves a closer look, particularly in aviation related cases.

It has been popularly assumed that the 'acting under' qualification for the Federal Officer Removal Statute, 28 USC § 1442(a), (FORS), would require a demonstration of actual, direct and detailed instruction of oversight by a federal officer. Because such circumstances are relatively rare, and the proof of actual, direct and detailed instruction is difficult to muster, the 'acting under' qualification is rarely pleaded, and even more rarely successfully pursued. However, the current judicial atmosphere at the federal Circuit Courts and the US Supreme Court may indicate a new receptiveness to apply the FORS in an expanded arena.

The Supreme Court decided a federal officer removal case, *Watson v Phillip Morris*, _US_, 127 S.Ct. 2301, on June 11, 2007. In that case, Phillip Morris claimed that its compliance with detailed FTC guidelines for marketing of 'light' cigarettes qualified it as having 'acted under' a federal officer, and thus it should be entitled to remove the suit to federal court under FORS. The trial court and the 8th Circuit Court agreed, but the Supreme Court reversed.

Importantly, the Supreme Court clarified that 'acting under' contemplates *"… an effort to assist or to help carry out, the federal superior's duties or tasks …"* and *"…does not include simply complying with the law."* 127 S.Ct. 2301, 2302, 2307 (2007). The Court further found that the mere compliance with federal regulations, no matter how detailed the regulations may be, or how highly supervised or monitored the private firm's activities are, does not rise to the level of 'acting under.'

The good news, from the aviation manufacturer's perspective, is that the Court did gravitate to a definition of what would constitute a relationship considered to be 'acting under', which turns on the concept of 'delegation' of authority to act on behalf of the federal officer. In making this distinction, the Court seems to be following the suggestion made by the Solicitor General on behalf of the United States in its role as *amicus curiae* in support of the *Watson* petitioners. The Solicitor General, in his brief and in oral argument, pointed specifically to the FAA's system of designated and certificated inspectors, DER's, DAR's, DMIR's and DOA's as constituting actual 'delegation' of authority for private individuals to act on behalf of the FAA. Additionally, the Court noted: "*And neither Congress nor federal agencies normally delegate legal authority to private entities without saying that they are doing so.*" *Id.* at 2310. As we know, the statutes and regulations authorizing designation of DER's, DAR's, DMIR's and DOA's expressly state that the designations are made for the purpose of delegating authority to individuals and companies to act on behalf of the Administrator and the Agency.

Thus, even though the Supreme Court rejected the assertion of Federal Officer status for the application of FORS in the *Watson* case, we believe the opinion actually offers strong support for the application of FORS in cases where certification action involving exercise of FAA delegated authority is at issue. This arguably would cover a majority of aviation design and manufacturing activities. ■

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