# "Substantial Federal Question" Jurisdiction
## A Survey Of The Current Law

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Defendants in aviation cases have a well-known preference for federal court, and have been aggressive in developing jurisdictional theories to support their goals. A jurisdictional theory favored by defendants, and fast becoming a regular element of their arguments to remove state law actions to federal court, is a relatively obscure one known as "substantial federal question" jurisdiction.

This article will discuss "substantial federal question" jurisdiction and how it has been argued in aviation cases, as well as the federal courts' response to date to defendants' removal efforts.

### THE RULES OF *MERRELL DOW* AND *GRABLE*

Federal question jurisdiction is limited by the U.S. Constitution and by federal statute to "civil actions arising under the Constitution, laws, or treaties of the United States."[1] The outer boundaries of this limitation, however, do not have a bright-line demarcation.

Instead, the Supreme Court has held that in certain limited instances federal courts can exercise federal question jurisdiction over state law claims in which "a well-pleaded complaint establishe[s] that [a plaintiff's] right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties."[2] The doctrine has a long and varied history, but for purposes of understanding its implications for aviation tort cases, only four Supreme Court opinions are of real significance.[3]

The first, *Franchise Tax Bd. v. Construction Laborers Vacation Trust*,[4] decided in 1983, was the Court's first modern attempt to set a standard by which lower courts could determine whether state law claims in which the effects of the ever-widening scope of federal regulation play a role should properly be the subject of federal jurisdiction. In that case, the Court stated that when state law creates the cause of action, "original federal jurisdiction is unavailable unless it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims."[5]

Three years later, the Court revisited the issue in a case involving the intersection of modern federal regulation and state tort law – namely, *Merrell Dow Pharmaceuticals Inc. v. Thompson*.[6] The question presented in *Merrell Dow*, which has obvious significance to aviation litigation, was whether "the incorporation of a federal standard in a state-law private action, when Congress has intended that there not be a federal private action for violations of that federal standard, makes the action one 'arising under the Constitution, laws, or treaties of the United States.'"[7]

In *Merrell Dow*, personal injury claims were brought against the manufacturer of the drug Bendectin in which the plaintiffs alleged (among other things) that the manufacturer's violation of federal drug labeling requirements established under the Federal Food, Drug, and Cosmetic Act (FDCA) created a rebuttable presumption of negligence under Ohio law. In holding that the defendant's removal of these claims to federal court was not authorized under *Franchise Tax*, the Court found the fact that Congress had not provided a federal remedy for violation of the labeling requirements to be "tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction."[8]

Based on what appeared to be a clear holding by the Court in *Merrell Dow*, many lower courts concluded that the lack of a private federal remedy was dispositive of whether a federal question was sufficiently "substantial" to support federal jurisdiction.[9] What many lower courts believed to be a bright-line test, however, apparently was not the actual rule that the Court intended (at least in retrospect) to establish.

In *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*,[10] the Court held that the lack of a federal cause of action was not dispositive of whether a state law action to quiet title in property purchased at a federal tax sale could be removed to federal court.

The quiet title action at issue in *Grable* was commenced in state court by a company whose real property was seized by the Internal Revenue Service (IRS) in order to satisfy a tax delinquency. Federal law does not provide a cause of action to quiet title to property seized by the IRS.

However, the *only* dispositive issue presented in the state law quiet title action was whether the IRS complied with its obligation under federal law to provide appropriate notice of the seizure of the property before the sale. Moreover, the parties' dispute over the type of notice required by the relevant federal statute (28 U.S.C. § 6335) presented an unsettled question of federal law.

On these particular facts, the Supreme Court determined that the dispute over whether the IRS complied with its notice obligations presented a federal law question that was sufficiently substantial to support the exercise of federal subject matter jurisdiction over the state action, despite the fact that Congress had not provided a federal remedy for a violation of the federal notice requirement.

In so doing, the Court found three factors to be significant. First, as noted above, the issue of whether notice under 26 U.S.C. § 6335 was sufficient– and indeed what the statute in fact required – was the *sole* legal and factual issue presented in the quiet title action. Second,

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the Court noted that the clear enforceability of federal tax liens is important to the federal government's "strong interest in the 'prompt and certain collection of delinquent taxes.'"[11] Third, "because it will be the rare state title case that raises a contested matter of federal law, federal jurisdiction to resolve genuine disagreement over federal tax title provisions will portend only a microscopic effect on the federal-state division of labor."[12]

*Grable* seems to replace what

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appeared to be a bright-line rule with respect to whether a federal question was sufficiently substantial (i.e., the existence or absence of a federal remedy) with a more open-ended three-pronged approach. Grable, however, is far from a repudiation of *Merrell Dow*.

Instead, the Court took great pains to distinguish the unique facts at issue in *Grable* from the state tort action in *Merrell Dow*, and to reiterate a concern that remains pertinent with respect to aviation cases in particular. Specifically, that allowing the existence of a federal standard to transform a state law tort claim into a federal action would eventually flood the federal courthouses with a wide range of negligence cases: "*[I]f the federal labeling standard without a federal cause of action could get a state claim into federal court, so could any other federal standard without a federal cause of action. And that would have meant a tremendous number of cases.*"[13]

A rule permitting the exercise of federal jurisdiction over state tort claims where federal standards are implicated would entail a significant disruption in the traditional balance between state and federal courts, which in turn warranted giving the absence of a federal remedy for such violations a dispositive role in determining whether Congress intended such actions to be heard in federal court.[14] As the Court stated, "[i]n this situation, no welcome mat [i.e., no federal remedy] meant keep out."[15]

Thus, although some lower courts have interpreted *Grable* as potentially broadening the scope of "substantial question" jurisdiction, it would appear from the opinion itself that the Supreme Court did not consider the opinion to be a departure from earlier law – and especially not from *Merrell Dow*. This conclusion, in turn, is supported by the Supreme Court's most recent opinion dealing with "substantial question" jurisdiction, *Empire Healthchoice Assurance, Inc. v. McVeigh*,[16] where the Court again narrowly described its parameters.

In denying the existence of federal jurisdiction to hear subrogation claims brought by the third-party administrators of health insurance plans operated for the benefit of federal employees, the Court reiterated that "substantial question" jurisdiction extends only to "a special and small category" of claims,[17] and described *Grable* as being "poles apart" from *Empire Healthcare*. Unlike the quiet title action in *Grable*, the reimbursement claim in *Empire Healthcare*, "was triggered, not by the action of any federal department, agency, or service, but by the settlement of a personal injury action launched in state court."[18]

Unlike *Grable*, which presented a pure issue of law that was (a) distinctly federal in nature; (b) dispositive of the claim; and (c) generally applicable to other cases, *Empire Healthcare* presented a claim that was "fact-bound and situation-specific." Finally, the Court found that while the federal government had an interest in benefit issues arising in the federal employment context, this interest was an insufficient basis on which to displace the state courts' jurisdiction and "turn[] into a discrete and costly 'federal case' an insurer's contract-derived claim to be reimbursed from the proceeds of a federal worker's state-court-initiated tort litigation."[19]

### 'SUBSTANTIAL FEDERAL QUESTION' JURISDICTION IN AVIATION CASES

Prior to *Grable*, one could argue that *Merrell Dow* made the issue of "substantial federal question" jurisdiction a simple one in the aviation context, given the

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absence of a federal remedy for the violation of federal aviation regulations.[20] Since *Grable*, the argument against jurisdiction must be made with more precision. However, with one notable exception, district courts have continued to reject the argument that federal regulation of the aviation field is sufficient to support federal jurisdiction over state law tort actions in aviation cases.

In *Wicksell v. Bombardier Corp.*,[21] the District Court for the Southern District of Florida rejected the argument that FAA regulations and the General Aviation Revitalization Act of 1994 (GARA), 49 U.S.C. § 40101 presented sufficiently substantial issues of federal law to give rise to federal jurisdiction over a state law product liability claim

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arising from an air crash. Likewise, in *McCarty v. Precision Airmotive Corp.*,[22] another Florida district court recently rejected the argument that state law wrongful death and product liability claims arising from an air crash were the proper subject of federal jurisdiction. In *Glorvigen v. Cirrus Design Corp.*,[23] the Minnesota district court came to a similar conclusion regarding wrongful death claims arising from an air crash.[24]

In two opinions arising from the same air crash, one of which was briefed by the authors of this article, the Eastern District of Missouri also held that Grable did not justify the exercise of federal jurisdiction over the resulting state law tort claims,[25] and in *XL Specialty Co. v. Village of Schaumburg*,[26] which involved claims of property damage to an aircraft caused by surface conditions at a municipal airport, the Northern District of Illinois rejected the argument that a substantial federal question was presented by plaintiff's reliance on defendant's alleged failure to comply with a FAA advisory circular as part of its negligence claim.

Since *Grable*, only one district court appears to have held that federal regulations are sufficient to create federal question jurisdiction over state tort claims for personal injury or property damage arising in the aviation context. In *Bennett v. Southwest Airlines Co.*,[27] the Northern District of Illinois denied plaintiffs' motion to remand state law personal injury claims arising from the crash of Southwest Airlines Flight 1248 at Chicago's Midway International Airport and certified the issue for interlocutory appeal. The Seventh Circuit has accepted Bennett and appears to be the first appellate circuit to consider the scope of "substantial federal question" jurisdiction in the aviation context.

In conclusion, the parameters of "substantial federal question" jurisdiction have never been a model of clarity, and the Supreme Court's most recent pronouncements on the matter have carried on this tradition. The Court has, however, been consistent in indicating that substantial federal question jurisdiction should only apply in very limited circumstances.

Redress for injuries arising from aviation-related activities has long been the province of state law and state courts. A rule permitting them to be removed to federal court would easily open the floodgates for many other state law claims in which federal regulations play a role. Based on these considerations, most federal courts have been disinclined to adopt the "substantial federal question" theory of jurisdiction over aviation cases.

Notes:

1. 28 U.S.C. § 1331; see also U.S. Const. art. III, § 2.
2. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983). This form of jurisdiction is distinct from complete preemption, under which all state law claims relating to certain matters in which Congress has indicated that it intends to fully occupy the field – such as labor law or employee benefits – are considered fundamentally federal in nature, regardless of how they have been framed. *See, e.g., Ceres Terminals v. Industrial Commission*, 53 F.3d 183, 185 (7th Cir. 1995) ("if federal law so occupies the field that it is impossible even to frame a claim under state law, then the case arises under federal law.").
3. A detailed analysis of how the Supreme Court's opinions on "substantial question" jurisdiction have developed – and of the varying ways in which lower courts have applied the Court's earlier opinions – is beyond the scope of this article. There are, however, several recent law review articles addressing the topic that are well worth reviewing. These include: Jason Pozner, *The More Things Change, the More They Stay The Same: Grable & Sons v. Darue Engineering Does Not Resolve the Split Over Merrell Dow v. Thompson*, 2 Seton Hall Cir. Rev. 530 (Spring, 2006); Rory Ryan, *Article: No Welcome Mat, No Problem?: Federal-Question Jurisdiction After Grable*, 80 St. John's L. Rev. 621 (Spring, 2006); and Adam P.M. Tarleton, *Recent Development: In Search of the Welcome Mat: The Scope of Statutory Federal Question Jurisdiction after Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 84 N.C.L. Rev. 1394 (May 2006).
4. 463 U.S. 1 (1983).
5. *Id.* at 13.
6. 478 U.S. 804 (1986).
7. *Id.* at 805 (quoting 28 U.S.C. § 1331).
8. *Id.* at 814.
9. *See, e.g., Fournier v. Lufthansa German Airlines*, 9. F. Supp.2d 996, 1001 n. 3 (N.D. Ill. 2002). Other courts, however (perhaps most notably the district courts of the Second Circuit) were open to finding substantial federal questions in the absence of a federal remedy, as is discussed in note 26 below.
10. 545 U.S. 308 (2005).
11. *Id.*, Sec. III.A. (*quoting United States v. Rodgers*, 461 U.S. 677, 709 (1983)).
12. *Id.*
13. *Id.* at 318 (emphasis added).
14. *Id.* at 319.
15. *Id.*
16. 126 S. Ct. 2121, 165 L. Ed.2d 131 (2006).
17. *Id.* at 2136.
18. *Id.*
19. *Empire Healthcare*, at 2137.
20. *Schaeffer v. Cavallero*, 29 F. Supp.2d 184 (S.D.N.Y. 1998) and *Curtin v. Port Auth. of New York*, 183 F. Supp.2d 664 (S.D.N.Y. 2002), appear to be the only pre-*Grable* instances in which district courts adopted the argument that federal regulation of aviation creates a "substantial federal question" in the absence of a federal remedy. Neither, however, was followed by other courts, and the reasoning in these opinions has been the subject of serious criticism. *See, e.g., Alshrafi v. American Airlines, Inc.*, 321 F. Supp.2d 150 (D. Mass. 2004) (expressly declining to follow Schaeffer); *Fournier v. Lufthansa German Airlines*, 191 F. Supp.2d 996, 1001 n. 3 (N.D. Ill. 2002) (noting that *Schaeffer* "cannot be squared with [*Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804 (1986)].").
21. No. 06-61167-CIV-ALTONAGA/Turoff, 2006 U.S. Dist. LEXIS 84865 (S.D. Fla. Oct. 6, 2006).
22. No. 8:06-cv-1391-T-26TBM, 2006 U.S. Dist. LEXIS 65770 (M.D. Fla. Sept. 14, 2006).
23. No. 05-2137, 2006 U.S. Dist. LEXIS 8741, CCH Prod. Liab. Rep. P17,399 (D. Minn. Feb. 16, 2006).
24. In an analysis tracking some of the points that the Supreme Court would make in *Empire Healthcare*, the district court rejected the argument that *Grable* justified removal of the action:

> Although the instant cases implicate FARs, an alleged violation of the regulations will not necessarily resolve the state-law claims. Moreover, while the parties may disagree on the applicability of the FARs, the parties do not contest the meaning of any regulation and point to no federal law that is in dispute. Finally, Congress failed to provide a federal cause of action and failed to preempt state remedies when enacting the FAA – strongly indicating that Congress did not intend to create a substantial federal question over cases implicating the FAA and FARs.

*Glorvingen* at *8-*9.

25. *See Wandel v. American Airlines, Inc.*, No. 4:05 MD 1702, 2005 U.S. Dist. LEXIS 43007 (E.D. Mo. Sept. 28, 2005) and *Sarantino v. American Airlines, Inc.*, No. 4:05 MD 1702, 2005 U.S. Dist. LEXIS 43009 (E.D. Mo. Sept. 29, 2005). Mr. Lebovitz is lead counsel for the plaintiffs in the Missouri state court cases arising from the crash of American Airlines flight 5966 which occurred on October 19, 2004 on approach to Kirksville, Missouri airport. Mr. Lebovitz and Ms. Johnson successfully overcame removal on grounds of federal preemption and fraudulent joinder and obtained a decision remanding these cases from the US District Court for the Eastern Dist of Missouri to the Circuit Court for the City of St. Louis.
26. No. 06 C 2299, 2006 U.S. Dist. LEXIS 53942 (N.D. Ill. July 20, 2006).
27. Nos. 06 C 317, 06 C 318, 06 C 319, 06 C 330, 06 C 331, 06 C 332, 06 C 2202, 06 C 2203, 2006 U.S. Dist. LEXIS 47774 (N.D. Ill. July 13, 2006).

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