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Aircraft

Alien v. Alien: No Diversity Jurisdiction Despite Language of Statute, Court Says

A statutory provision deeming an alien with permanent residence to be a “citizen,” for jurisdictional purposes, of the state in which he or she lives would be unconstitutional if read literally in certain contexts, a federal district court held in a pair of aviation cases Sept. 6 (*Gardiner v. Kelowna Flightcraft Ltd.*, S.D. Ohio, No. 2:10-cv-00947, 9/6/11; *Bastos v. Kelowna Flightcraft Ltd.*, S.D. Ohio, No. 2:10-cv-00946, 9/6/11).

The U.S. Constitution does not extend federal-court jurisdiction to suits between aliens, Judge Edmund A. Sargus Jr. of the U.S. District Court for the Southern District of Ohio wrote, remanding the cases to state court.

In finding “serious constitutional problems” in the plain meaning of the statute when applied to these facts, the court joined the U.S. Court of Appeals for the D.C. Circuit.

The U.S. Courts of Appeals for the Third Circuit and Seventh Circuit, by contrast, interpreted the “deeming provision” to allow an expansion of diversity jurisdiction.

All three cases had aliens on both sides of the dispute but also included a U.S. citizen on one side, unlike the cases before Sargus. The U.S. Court of Appeals for the Sixth Circuit, which encompasses the Southern District of Ohio, has not addressed the interpretation of the deeming provision directly in comparable cases, Sargus noted.

Professor Nicholas Wittner of the Michigan State University School of Law, who has written about jurisdiction, told BNA in an e-mail Sept. 14, “The court’s reading of the legislative history is right on the mark. This is one of those cases where the court’s holding seems counterintuitive to the simple language of the statute, but the intent of Congress manifestly supports

this court’s holding and also the D.C. Circuit’s decision in *Saadeh [v. Farouki]* that permanent resident aliens should be considered as aliens and not citizens for diversity jurisdiction. There is no subject matter jurisdiction when an alien, regardless of status, sues another alien.”

Bahamian, Swiss v. Canadian Firm. Sean Gardiner, whom the court found to be a citizen of the Bahamas, and Urs Anderegg, a citizen of Switzerland, were in a Convair 580 aircraft that crashed in Pickaway County, Ohio, on Sept. 1, 2008, according to the court and the complaints in the case. Both were residents of Florida.

Karen Gardiner, the personal representative of Sean Gardiner’s estate, and Dominique Bastos, the personal representative of Anderegg’s estate, sued Kelowna Flightcraft Ltd., a Canadian company, in separate lawsuits in Ohio state court. They alleged that Kelowna, the type certificate holder, failed to provide the aircraft’s owner with adequate instructions in the maintenance manual, particularly relating to the elevator trim cables, which they alleged were reinstalled in reverse during maintenance before the flight. The plaintiffs asserted claims for strict liability and negligence.

Kelowna removed the cases based on diversity of citizenship. The plaintiffs asked the court to remand the cases, saying it lacked federal subject-matter jurisdiction.

‘Deemed a Citizen of the State.’ A provision in 28 U.S.C. § 1332, the statute vesting federal district courts with jurisdiction based on diversity of citizenship, provides that, for purposes of diversity jurisdiction, “an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.” It also indicates that the legal representative of an estate is considered a citizen of the decedent’s state.

Kelowna argued that Gardiner and Anderegg should be deemed to have been citizens of Florida. Their personal representatives are therefore citizens of Florida,

resulting in cases between Florida plaintiffs and a Canadian defendant, the company said.

But Gardiner and Bastos argued that the deeming provision, which was added in by the Judicial Improvements Act of 1988, goes too far when applied to the facts of their cases, since Article III, § 2 of the U.S. Constitution does not provide for actions between aliens in the federal courts.

The United States entered the cases as an intervenor and supported the plaintiffs' position.

Plain Meaning Poses Problems. Sargus agreed with the plaintiffs. The constitution "does not permit Congress to vest the inferior federal courts with jurisdiction over suits involving only aliens," he wrote. "Therefore, the plain meaning of the deeming provision . . . poses serious constitutional problems."

Unless Congress plainly intends a particular construction, courts construe statutory language to avoid constitutional problems, he said.

Following the reasoning of the D.C. Circuit in *Saadeh v. Farouki*, 107 F. 3d 52 (D.C. Cir. 1997), he said that Congress intended to prevent diversity suits between resident aliens and citizens who lived in the same state, and that one of the purposes of the 1988 legislation was to reduce the federal courts' caseload.

"[T]he legislative history [of the Judicial Improvements Act] supports the interpretation that the deeming

provision was intended by Congress to restrict as opposed to expand diversity jurisdiction in cases involving permanent resident aliens," Sargus wrote. Congress did not clearly intend to expand diversity jurisdiction for resident aliens, he said, declining to apply the deeming provision in the two cases before him.

Edward Reilley Forman and John Spenceley Marshall of Marshall and Morrow LLC in Columbus, Ohio, along with Stephen F. Rosenthal and Steven C. Marks of Podhurst Orseck PA in Miami, represented Karen Gardiner.

Eugene Ray Critchett, who practices in Dublin, Ohio, and Eric M. Ellsley of Ellsley Sobol PL in Plantation, Fla., represented Bastos.

Basil J. Musnuff of Thacker Martinsek LPA in Cleveland; and David P. Herman and Michael G. Shannon of Murray, Morin & Herman PA in Coral Gables, Fla., represented Kelowna.

Karen S. Bloom of the U.S. Department of Justice in Washington, D.C., represented the United States.

BY MARTINA S. BARASH

The Gardiner opinion is available at <http://op.bna.com/pslr.nsf/r?Open=mbah-8lmraa>.

The Bastos opinion is available at <http://op.bna.com/pslr.nsf/r?Open=mbah-8lmrb6>.