

Victory For 'Drone Slayer' Puts State Laws In Spotlight

By William O'Connor, Joanna Simon and Andrew Barr, Morrison & Foerster LLP

Law360, New York (April 20, 2017, 2:26 PM EDT) -- On March 21, 2017, a federal judge in the Western District of Kentucky dismissed a lawsuit brought by a drone pilot, David Boggs, against the "Drone Slayer" William Merideth, a Kentucky man who shot down a drone that he believed was flying over his own property in 2015.

Dismissed on jurisdictional grounds, the ruling leaves open many questions concerning aerial trespass and federal authority.

The Lawsuit

Boggs sued Merideth in federal court in Kentucky seeking a declaratory judgment and money damages after Merideth shot down Boggs' unmanned aircraft with a firearm, earning Merideth the nickname "Drone Slayer." For his part, Merideth contended that Boggs' drone was trespassing on Merideth's property and Boggs was invading Merideth's privacy by allegedly using the drone to watch Merideth's teenage daughter.

In his lawsuit, Boggs asked the court to find that "an unmanned aircraft is an 'aircraft' under federal law" and that when flying in Class G airspace, an unmanned aircraft is "operating in the 'navigable airspace' within the exclusive jurisdiction of the United States."

According to Boggs, because he was operating in navigable airspace, his operation did not violate Merideth's reasonable expectation of privacy, and Merideth was not permitted to shoot Boggs' drone out of the sky.

Boggs asked the court for \$1,500.00 in damages, the amount that Boggs contended his drone was damaged by Merideth.

Merideth moved to dismiss Boggs' complaint, arguing that Boggs' claim for a declaratory judgment did



William O'Connor



Joanna Simon



Andrew Barr

not provide the court with subject matter jurisdiction because Boggs' complaint merely anticipated defenses Merideth could raise under federal law as opposed to asserting any rights arising under federal law.

In response, Boggs argued that he was flying his drone in "sovereign navigable airspace" and therefore "resolution of his claims in federal court" was proper. But the court disagreed with Boggs, finding that it lacked subject matter jurisdiction over Boggs' claims against Merideth.

The Reasoning

Federal courts have only "limited jurisdiction." Under 28 U.S.C. § 1331, the federal courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." To satisfy this requirement, "a federal question must appear on the face of the complaint rather than as part of a defense, even if a federal-law defense is anticipated." *Chase Bank USA N.A. v. City of Cleveland*, 695 F.3d 548, 554 (6th Cir. 2012). "[A] case arises under federal law when federal law creates the cause of action asserted." *Gunn v. Minton*, 133 S. Ct. 1059, 1064 (2013) (citing *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916)).

The Supreme Court has also "identified a 'special and small category' of cases in which arising under jurisdiction still lies," even though only state law claims are being pursued. These are "state-law claims that implicate significant federal issues." *Grable & Sons Metal Prod. Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005).

This type of federal question jurisdiction is often referred to as "Grable" jurisdiction. Boggs argued that the court had Grable jurisdiction over his complaint because it raised airspace concerns that implicated significant federal issues.

Specifically, Boggs argued that his Kentucky state law trespass-to-chattels claim satisfies the requirements for federal question jurisdiction because it "necessarily raises a disputed federal issue" under the Grable standard; that is, "whether Boggs was flying his unmanned aircraft in federal airspace."

Boggs relied on the Federal Aviation Administration's (FAA) definition of "aircraft" ("a[ny] device that is used or intended to be used for flight in the air" 14 C.F.R. § 1) and 49 U.S.C. § 40103, which provides that "[t]he United States Government has exclusive sovereignty of airspace of the United States."

But the court nonetheless found that Boggs' complaint did not meet the Grable standards. Under Grable, jurisdiction exists when "a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 133 S. Ct. at 1065 (citing *Grable*, 545 U.S. at 314). Unfortunately for Boggs, the court held that his complaint did not meet any — much less all — of Grable's requirements.

With regard to whether Boggs' complaint "necessarily raised" a federal issue, the court found that it did not. Instead, the court found that the complaint merely "anticipates a defense of privilege that Merideth

may raise in response to Boggs' trespass of chattels claim — e.g. 'if the unmanned aircraft was flying on Merideth's property, his actions may have been privileged, but if it was flying in federal airspace, they would not.'"

But the court found that "where 'the right to be vindicated is State-created' and the action was 'brought into the federal courts merely because an anticipated defense derived from federal law,'" there is no Grable jurisdiction.

The court similarly dismissed Boggs' arguments concerning the remaining Grable factors:

Actually Disputed. "Nor is the Court persuaded that a federal issue is actually disputed. Although Boggs asserts that he operated his unmanned aircraft on federal, rather than private property, Merideth has not responded to the substance of that argument."

Significance. "Boggs has not persuaded the Court that resolution of the simple issue of whether Boggs' unmanned aircraft was flying on Merideth's property, as opposed to federal property, for the ultimate purpose of determining Merideth's liability for a state law trespass to chattels claim, is significant to the federal system as a whole."

Federal-State Balance. "Using a federal forum to resolve Boggs' garden variety state tort claim is inappropriate, and the appropriate balance of federal and state judicial responsibilities favors dismissal of Boggs' trespass to chattels claim[.]"

The Implications

To those in the drone industry, the question whether a drone flying over private property is permissibly in the navigable airspace or may be trespassing is a significant one. But, as the Drone Slayer case indicates, that alone is apparently insufficient to confer federal question jurisdiction, because it is not clear the issue will significantly impact federal aviation law or the FAA's ability to regulate air safety and navigation.

This ruling will undoubtedly become more important as states and municipalities consider bills that would hold harmless property owners who may damage a drone flying over their private property.

In Oklahoma, for example, State Senator Ralph Shortey, R-Oklahoma City, authored a bill that authorizes anyone who owns property to damage or destroy a drone without being held civilly liable for the damage as long as the drone was within 400 feet of the property. The bill, SB600, is currently making its way through the Oklahoma Senate.

Perhaps the federal courts will find that they have jurisdiction in the context of a preemption challenge to state law bills like that being considered in Oklahoma. Then, maybe, we will begin to get some clarity concerning aerial property rights.

Of course, this doesn't mean that amateur (or professional, for that matter) drone slayers can shoot or otherwise disarm unmanned aircraft without the possibility of facing serious consequences.

As it stands today, it is a federal crime to attempt to destroy or disable an aircraft, including an unmanned aircraft, even if federal prosecutors have yet to enforce that provision against the Drone Slayer. See 18 U.S.C. § 32.

William V. O'Connor is a partner at Morrison & Foerster LLP, with significant experience in aviation, product liability and commercial litigation matters. Joanna Simon is an associate at the firm, representing clients in complex and multidistrict litigation, with an emphasis on aviation and pharmaceutical defense. Andrew Barr is also an associate at the firm, with a practice focused on transportation and product liability matters.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

All Content © 2003-2017, Portfolio Media, Inc.