



1 Additionally, California Association of Air Medical Services, et  
2 al. ("Amici"), subsequently filed a Motion for Leave to File  
3 Brief of *Amicus Curiae* (Docket No. 245) opposing dismissal of  
4 this case.

5 For the following reasons, the Motion to Proceed as *Amicus*  
6 *Curiae* is granted, the Motions to Dismiss for lack of subject  
7 matter jurisdiction are granted, and all remaining Motions are  
8 denied as moot.<sup>1</sup>

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10 **BACKGROUND<sup>2</sup>**

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12 Plaintiff is an air ambulance provider rendering services  
13 within and between California and Nevada. Plaintiff is certified  
14 by the Federal Aviation Administration to operate as an air  
15 carrier and to conduct common carriage operations. Defendants  
16 are: 1) insurance companies providing workers' compensation  
17 insurance within the State of California; and 2) employers who  
18 are self-insured for workers' compensation insurance having  
19 obtained a certificate of consent to self-insure against such  
20 claims.

21 Plaintiff has and continues to provide, on request, air  
22 ambulance services to employees of the Employer Defendants and to  
23 employees of the employers insured by the Insurer Defendants.

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26 <sup>1</sup> Because oral argument will not be of material assistance,  
the Court ordered this matter submitted on the briefing. E.D.  
27 Cal. Local Rule 78-230(h).

28 <sup>2</sup> The following facts are taken, for the most part verbatim,  
from Plaintiff's First Amended Complaint ("FAC").

1 After providing relevant services, Plaintiff sends an invoice to  
2 the appropriate Insurer Defendant or Employer Defendant.

3 In this case, Plaintiff alleges that the Defendants have  
4 paid only a portion of those invoiced amounts. According to  
5 Plaintiff, Defendants have refused to pay the outstanding  
6 balances, claiming that Plaintiff is limited to recovering only  
7 those amounts set forth in California's Official Medical Fee  
8 Schedule for ambulance services ("OMFS"), California Code of  
9 Regulations, title 8, section 9789.80.

10 Thus, Plaintiff filed the instant action seeking to recover  
11 those outstanding balances. According to Plaintiff, Defendants  
12 cannot rely on the OMFS fee limitations because that state law is  
13 preempted by the Federal Aviation Act of 1958, as amended by the  
14 Airline Deregulation Act, 49 U.S.C. § 41713(b)(1) ("FAA/ADA").  
15 As such, Plaintiff has brought causes of action for:

16 1) Declaratory Relief as to whether that state law is preempted;  
17 2) Quantum Meruit; 3) Unjust Enrichment; and 4) Open Book  
18 Account.

19 Plaintiff asserts jurisdiction is proper under 28 U.S.C.  
20 § 1331 because this action allegedly arises under the FAA/ADA.  
21 Defendants disagree and have moved to dismiss for lack of subject  
22 matter jurisdiction. Also pending before this Court are the  
23 above-mentioned Motions to Consolidate, Plaintiff's Motion for  
24 Summary Judgment, and a Motion for Leave to File Brief by  
25 putative *Amici*, each of which is also disposed of pursuant to  
26 this Memorandum and Order.

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1           **1. Plaintiff's Federal Declaratory Relief Claim**

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3           Plaintiff contends that, pursuant to 28 U.S.C. § 1331, this  
4 Court has original jurisdiction over its first cause of action  
5 for declaratory relief, and consequently, has supplemental  
6 jurisdiction over the state law claims. This Court disagrees,  
7 finds jurisdiction over Plaintiff's Declaratory Relief Claim  
8 lacking, and, in turn, finds 28 U.S.C. § 1367 inapplicable.

9           "The district courts shall have original jurisdiction of all  
10 civil actions arising under the Constitution, laws, or treaties  
11 of the United States." 28 U.S.C. § 1331. "Even though state law  
12 creates [Plaintiff's] causes of action, its case might still  
13 'arise under' the laws of the United States if a well-pleaded  
14 complaint established that its right to relief under state law  
15 requires resolution of a substantial question of federal law in  
16 dispute between the parties." Franchise Tax Bd. of the State of  
17 Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1,  
18 13 (1983). Plaintiff asserts that such is the case here.

19           However, while the facts of this case make for awkward  
20 jurisdictional analysis, this Court disagrees. In a typical case  
21 of this nature, in which one party is asserting preemption as a  
22 basis of federal jurisdiction, a plaintiff claims that a  
23 defendant violated state law and the defendant responds by  
24 raising a preemption defense. In those cases, the plaintiff  
25 typically requests a declaration more specific to the facts  
26 relevant to its underlying claims. For example:

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1 Plaintiff's Complaint asserted that "[t]here was at the  
2 time of the levies alleged above and continues to be an  
3 actual controversy between the parties concerning their  
4 respective legal rights and duties. The Board  
5 [appellant] contends that defendants [CVLT] are  
6 obligated and required by law to pay over to the Board  
7 all amounts held ... in favor of the Board's delinquent  
8 taxpayers. On the other hand, defendants contend that  
9 section 514 of ERISA preempts state law and that the  
10 trustees lack the power to honor the levies made upon  
11 them by the State of California." Franchise Tax Board,  
12 463 U.S. at 6, quoting App. 8-9.

13 Plaintiffs "invoked the Federal Declaratory Judgment  
14 Act for a declaration that the contracts were still 'in  
15 effect and binding upon the parties thereto.'" Skelly  
16 Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671  
17 (1950).

18 It is well-established that the federal courts lack jurisdiction  
19 over such claims.

20 Indeed, "a federal court does not have original jurisdiction  
21 over a case in which the complaint presents a state-law cause of  
22 action, but also asserts that federal law deprives the defendant  
23 of a defense he may raise, or that a federal defense the  
24 defendant may raise is not sufficient to defeat the claim."

25 Franchise Tax Bd., 463 U.S. at 10 (1983), citing Taylor v.  
26 Anderson, 234 U.S. 74, 75-76 (1914); Louisville & Nashville R.  
27 Co. v. Mottley, 211 U.S. 149 (1980); Tennessee v. Union &  
28 Planters' Bank, 152 U.S. 454 (1894). "[A] right or immunity  
created by the Constitution or laws of the United States must be  
an element, and an essential one, of the plaintiff's cause of  
action.'" Id., quoting Gully v. First Nat'l Bank, 299 U.S. 109,  
112 (1936). Moreover, "if, but for the availability of the  
declaratory judgment procedure, the federal claim would arise  
only as a defense to a state created action, jurisdiction is  
lacking.'"

1 Id. at 16, quoting 10A C. Wright, A. Miller & M. Kane, Federal  
2 Practice and Procedure § 2767, at 744-745 (2d ed. 1983).

3 Thus, had Plaintiff gone the traditional route, seeking, for  
4 example, a declaration that Defendants are required by law to pay  
5 in full the amounts invoiced, then the instant jurisdictional  
6 question would not appear to be so complicated. Rather, had  
7 Plaintiff requested a declaration more specific to the instant  
8 facts, Defendants would be expected to defend on the grounds that  
9 the payments already made comport with the California OMFS, at  
10 which time Plaintiff anticipates it would argue that the OMFS is  
11 preempted.

12 At best, such a claim would seek resolution of a federal  
13 question anticipated to be raised as a rebuttal to an expected  
14 defense. Since it is well-established that the anticipation of a  
15 defense is insufficient to establish federal question  
16 jurisdiction, "even if the defense is anticipated in the  
17 plaintiff's complaint, and even if both parties admit that the  
18 defense is the only question truly at issue," Franchise Tax Bd.,  
19 463 U.S. 14, Plaintiff's jurisdictional argument, which is even  
20 more attenuated, must likewise fail. Id. at 10 (the assertion  
21 that "federal law deprives the defendant of a defense he may  
22 raise" is insufficient to invoke federal jurisdiction).

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1 Therefore, in light of the above analysis, and in an attempt  
2 to couch its preemption claim in an offensive posture, Plaintiff  
3 seeks instead a declaration that "California Labor Code Section  
4 5307.1 and the Official Medical Fee Schedule for ambulance  
5 services, California Code of Regulations, title 8, section  
6 9789.70, are preempted by the provisions of the Federal Aviation  
7 Act of 1958, as amended by the Airline Deregulation Act, 49  
8 U.S.C. section 41713(b)(1)." FAC, 14:16-20. Accordingly, by way  
9 of analogy, Plaintiff contends this Court has jurisdiction under  
10 the slightly different rules of Shaw v. Delta Air Lines, Inc.,  
11 463 U.S. 85 (1983), and its progeny.

12 In Shaw, the plaintiffs initiated three actions against  
13 state agencies and officials, seeking declarations that various  
14 state laws were preempted by ERISA. Id. at 92. The Supreme  
15 Court determined its jurisdiction over those claims was proper,  
16 stating, in part, "It is beyond dispute that federal courts have  
17 jurisdiction over suits to enjoin state officials from  
18 interfering with federal rights. A plaintiff who seeks  
19 injunctive relief from state regulation, on the ground that such  
20 regulation is pre-empted by a federal statute which, by virtue of  
21 the Supremacy Clause of the Constitution, must prevail, thus  
22 presents a federal question which the federal courts have  
23 jurisdiction under 28 U.S.C. § 1331 to resolve. This Court, of  
24 course, frequently has resolved pre-emption disputes in a similar  
25 jurisdictional posture." Id. at 96 n.14.

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1 In that same note, the Shaw Court distinguished its  
2 Franchise Tax Board decision, which was rendered that same day,  
3 by pointing out that the Shaw plaintiffs sought a declaration  
4 that state law was preempted, while the Franchise Tax Board  
5 plaintiffs sought a declaration that state law was not preempted.  
6 Id. Relying on the Shaw footnote, Plaintiff makes the analytical  
7 leap to the conclusion that, since Plaintiff in this case seeks a  
8 declaration that state law is preempted, this Court has  
9 jurisdiction. The flaws in this argument are two-fold and inter-  
10 related. First, Plaintiff's requested relief is improper when  
11 directed at the instant Defendants. Second, because Plaintiff  
12 has asserted the instant declaratory relief claim against  
13 improper Defendants, its instant claim does not present a  
14 justiciable case or controversy.

15 Plaintiff is quite correct that the Shaw Court exercised  
16 jurisdiction over an action seeking a declaration that state law  
17 was preempted. However, jurisdiction in Shaw and its progeny was  
18 premised on the Court's power to enjoin state officials from  
19 interfering with federal rights. When a suit is initiated  
20 against a state official to challenge a state law as preempted by  
21 federal law, jurisdiction is proper under Shaw because the  
22 preemption question is one that directly concerns the state's  
23 power to legislate in a manner inconsistent with some federal  
24 mandate. Indeed, "the Supremacy Clause itself provides subject  
25 matter jurisdiction for the federal court."

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1 Harding v. Summit Med. Ctr., 41 Fed. Appx. 83, 85 (9th Cir. 2002)  
2 (unpublished disposition), citing Hydrostorage, Inc., v. N. Cal.  
3 Boilermakers Local Joint Apprenticeship Comm., 891 F.2d 719, 724-  
4 25 (9th Cir. 1989), abrogated on other grounds in Engine Mfrs.  
5 Ass'n v. South Coast Air Quality Mgmt. Dist., 498 F.3d 1031 (9th  
6 Cir. 2007).

7       However, in this case, Plaintiffs have sued only insurers  
8 and self-insured employers. Thus, rather than properly  
9 challenging the State's power to enforce the OMFS, Plaintiffs ask  
10 this Court, in an action against third-parties, to declare that  
11 state law is preempted by federal law. Nevertheless, since none  
12 of the present Defendants have "the ability to enact or enforce  
13 state laws," neither can they interfere with Plaintiff's rights  
14 under the Supremacy Clause.<sup>3</sup> Id. The instant Defendants are  
15 simply the wrong parties against whom to assert such a claim.

16       Viewed from another perspective, Plaintiff's declaratory  
17 relief claim simply does not present the justiciable case or  
18 controversy that is a prerequisite to an assertion of this  
19 Court's jurisdiction. To the contrary, if the Court were to  
20 grant Plaintiff its requested declaratory relief, it would be  
21 required to issue an impermissible advisory opinion.

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26       <sup>3</sup> Though some of the Defendants are local entities or  
27 agencies, they were not sued in their enforcement or legislative  
28 capacities, but, instead, as self-insured employers. Thus, the  
question of whether, under a different set of facts, a suit  
against those entities would be proper is not currently before  
the Court.

1 While "[i]t is clear that a conflict between a state statute and  
2 federal regulations presents a justiciable controversy," National  
3 Labor Relations Bd. v. North Dakota, 504 F. Supp. 2d 750, 754 (D.  
4 N.D. 2007), citing Conference of Fed. Sav. and Loan Ass'ns v.  
5 Stein, 604 F.2d 1256, 1259 (9th Cir. 1979), under the above  
6 analysis, that controversy is capable of federal adjudication, in  
7 other words is ripe, only when the State is a party to the action.  
8 See Harding, 41 Fed. Appx. 83 at 85. Such is not the case here.

9       Instead, the instant preemption question takes root in the  
10 parties' current dispute only through analysis of Plaintiff's  
11 state law claims and then, as discussed above, only by way of a  
12 rebuttal to a defense. Accordingly, any controversy that may  
13 exist under Plaintiff's first cause of action, which serves only  
14 to assert a response to an anticipated defense, is even more  
15 attenuated than it might be directly under an analysis of the  
16 state law claims.

17       Accordingly, when distilled to its essence, resolution of  
18 Plaintiff's declaratory relief claim, at least between the  
19 current parties, would require the Court to issue nothing more  
20 than an advisory opinion as to preemption of the OMFS. It is  
21 well-established that this Court lacks the power to do so. See  
22 MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 126-127 (2007)  
23 (reiterating the requirement that "the dispute be 'definite and  
24 concrete, touching the legal relations of parties having adverse  
25 legal interests'; and that it be 'real and substantial' and  
26 'admi[t] of specific relief through a decree of a conclusive  
27 character, as distinguished from an opinion advising what the law  
28 would be upon a hypothetical state of facts.'"),

1 quoting *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300  
2 U.S. 227, 240-241 (1937). As such, this Court lacks subject  
3 matter jurisdiction over Plaintiff's first cause of action.

4 The Court is not persuaded otherwise by Plaintiff's  
5 observation that this preemption issue, under these facts, would  
6 never arise directly as a defense because the State of California  
7 will likely never institute proceedings to enforce the OMFS  
8 against Plaintiff, and Defendants will likely never be motivated  
9 to pursue coercive claims against Plaintiff, either of which  
10 scenarios could change the jurisdictional analysis. Even  
11 assuming, *arguendo*, that Plaintiff is correct, the boundaries of  
12 this Court's jurisdiction remain unchanged. While Plaintiff  
13 appears to presume that if its argument cannot be raised as a  
14 defense, it must be part and parcel of its affirmative claim for  
15 relief, for jurisdictional purposes, the very unlikelihood that  
16 Plaintiff's argument could even be raised as a defense, let alone  
17 an affirmative claim, renders the possibility of jurisdiction in  
18 this Court even more remote. Accordingly, this Court is not  
19 empowered to entertain Plaintiff's first claim for relief.

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21 **2. Plaintiff's State Law Claims**

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23 Finally, Plaintiff contends that its state law claims,  
24 themselves, arise under federal law. However, as previously  
25 stated, in the context of Plaintiff's state law claims, the  
26 preemption argument will arise, if at all, only as a rebuttal to  
27 an anticipated defense.

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1 Accordingly, this Court also lacks jurisdiction independently  
2 over Plaintiff's state law claims. See Franchise Tax Bd., 463  
3 U.S. at 13-14.

4  
5 **CONCLUSION**

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7 In sum, the *Amici* Motion for Leave to File Brief (Docket  
8 No. 245) is GRANTED. Nevertheless, this Court lacks subject  
9 matter jurisdiction over Plaintiff's First Amended Complaint.  
10 Therefore, Defendants' Motions to Dismiss (Dockets No. 107, 112,  
11 and 182) are GRANTED, and Defendants' Motion to Consolidate  
12 (Docket No. 111) and Plaintiff's Motion for Summary Judgment  
13 (Docket No. 184) are DENIED as moot. All future hearing dates  
14 are ordered vacated and the Clerk of the Court is directed to  
15 close the file.

16 IT IS SO ORDERED.

17 Dated: July 23, 2009

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20 MORRISON C. ENGLAND, JR.  
21 UNITED STATES DISTRICT JUDGE  
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