

OVERVIEW OF PREEMPTION IN AVIATION PRODUCT LIABILITY CASES

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Preemption battles are raging in courts across the country – litigation involving such diverse products as pharmaceutical drugs, medical devices, automobiles, boats and airplanes. With increasing frequency, product defendants are invoking forms of the preemption defense seeking immunity from state law tort claims. In recent years, federal agencies otherwise charged with regulating certain industries and protecting consumers, most notably the Food and Drug Administration (FDA), have pronounced that statutes under their purview have preemptive effects and some agencies have filed amicus briefs supporting preemption arguments of defendants in private party litigation.

The aviation field is certainly no exception. Since every preemption claim must have its genesis in the regulatory statute at issue, the scope of this article will be to examine the history of the Federal Aviation Act (FAA), as well as its amendments, and to provide an overview of the case law supporting both sides of the preemption debate in the area of state law product liability lawsuits.

The Federal Aviation Act of 1958

Congress enacted the Federal Aviation Act of 1958 (the Act) “to establish a new Federal agency with powers adequate to enable it to provide for the safe and efficient use of the navigable airspace by both civil and military operations.”¹ The Supreme Court has held that the Act “contained no clause preempting state regulation.”² This is evidenced by the broad “savings clause” of the Act:

Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Chapter are in addition to such remedies.³

The Airline Deregulation Act of 1978.

Twenty years after its enactment, Congress amended the Act with the Airline Deregulation Act (ADA). This time, Congress *did* include an express preemption provision in the ADA. To keep the states from frustrating the goals of deregulation by establishing economic regulations of their own, the ADA prohibited the states from enacting or enforcing “any law, rule, regulation, standard, or other provision ... relating to rates, routes, or services of any air carrier having authority ... to provide air transportation.”⁴

Since by its very language the express preemption established under the ADA only relates to “rates, routes, or services” of an “air carrier” and has no application to product liability claims or to claims against the general aviation industry, this article will not discuss preemption under the ADA in great detail. Suffice it to say that the vast majority of courts agree that federal preemption of state laws under the ADA “does not displace state tort actions for personal physical injuries or property damage caused by the operation and maintenance of aircraft.”⁵

The General Aviation Revitalization Act of 1994.

Congress did address the general aviation industry and product liability actions in 1994 with the General Aviation Revitalization Act (GARA). Beginning in the late 1980’s, the general aviation industry, suffering from declining sales of aircraft and increased product liability litigation, began loudly crying for tort reform. Consumer groups opposing GARA were successful in greatly limiting the scope of the amendment

to the Act that was passed in 1994. Ultimately, GARA imposed an 18-year statute of repose on civil actions for death or injury or damage to property relating to general aviation aircraft and their component parts.⁶

The legislative history of GARA reflects the limited purpose of the amendment: “In cases where the statute of repose has not expired, state law will continue to govern fully, unfettered by Federal interference.”⁷ Importantly, Congress retained the FAA’s original broad savings clause: “A remedy under this part is in addition to any other remedies provided by law.”⁸

Courts have found that GARA’s legislative history “demonstrates that Congress did not intend to preempt the entire field of aviation safety. In fact, it is strong support of Congress’s intent not to preempt.”⁹ Commentators have concluded that, to the extent there was any doubt whether the Act preempted aviation product liability actions, that was laid to rest with the passage of GARA: “State products liability standards specifically govern product liability actions for aircraft design or manufacturing defects up until the period of repose commences.”¹⁰

The amendments to the FAA, particularly GARA, are important weapons in plaintiffs’ arsenal: if, as defendants claim, Congress really intended to preempt the entire field of aviation in 1958 by passing the Federal Aviation Act (and just failed to make that clear in the original Act), why did it not expressly state that intention 20 years later when it amended the Act with the ADA? Or almost 40 years later when it passed GARA? And why did Congress continue, with each amendment, to keep the broad savings clause found in the Act?

Federal preemption of state law claims

As previously stated, the only express preemption in the Act, as amended by the ADA, relates to “rates, routes, and services.” Outside of that limited area, defendants must rely upon principles of implied preemption when arguing that state law claims are preempted: (1) field preemption, which recognizes that Congress may enact legislation that is so comprehensive in scope that it occupies an entire field of regulation,¹¹ and (2) conflict preemption, where state law actually conflicts with federal law, either because it would be impossible to comply with both state and federal laws or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹²

It is worth reviewing how the Supreme Court has historically analyzed implied preemption claims. The Court has stated that, although the existence of an express preemption clause (such as the one contained in the ADA) does not “entirely foreclose” any possibility of implied preemption, it does imply – “i.e., supports a reasonable inference – that Congress did not intend to pre-empt other matters...”¹³

In its recent decision in *Bates*, the Supreme Court again expressed its disfavor of finding implied preemption:

Today's decision thus comports with this Court's increasing reluctance to expand federal statutes beyond their terms through doctrines of implied pre-emption. This reluctance reflects that pre-emption analysis is not '[a] freewheeling judicial inquiry into whether a state statute is in tension with federal objectives,' but an inquiry into whether the ordinary meanings of state and federal law conflict.¹⁴

The Court stated that, even if a statute could be interpreted in two different ways – one finding preemption and other not – “we would nevertheless have a duty to accept the reading that disfavors pre-emption.... Because the States are independent sovereigns in

our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action... unless Congress has made such an intention 'clear and manifest.'”¹⁵

Field preemption. Aircraft manufacturers claim that any determination of whether their product is unsafe or defective must be based solely on the Federal Aviation Administration’s (FAA) standards for design and certification of the aircraft; and that such a comprehensive and pervasive scheme of federal regulation proves that Congress intended to preempt the entire field of aviation from state regulation.

There is abundant case law which disagrees with that claim. The seminal case holding that state law product liability claims are *not* preempted is *Cleveland v. Piper Aircraft Corp.*¹⁶ In *Cleveland*, the plaintiff (a pilot) was injured when his airplane crashed. He brought suit against Piper Aircraft, claiming that the design of the plane was the proximate cause of his injuries. Piper argued that because the FAA had approved the design of its plane, that design could not be attacked by common law products claims because the Act impliedly preempted all state law claims by occupying the entire field of airplane safety through its regulations.

Even though the Tenth Circuit did not have the benefit of GARA's clarification (which was passed a year later), it disagreed and concluded that the language of the Act and the ADA revealed that Congress did not intend the Act to preempt state law claims: “the plain language of the Federal Aviation Act suggests that Congress intended that the Act have no general preemptive effect.”¹⁷ The court stated that the savings clause evidences Congress’s intent to preserve state common law personal injury claims following adoption of the Act. The court went on to hold that, even though the aircraft

was designed in compliance with FAA guidelines, the manufacturers could nonetheless be liable for state law products liability claims.¹⁸

A 2006 Texas case, *Monroe v. Cessna Aircraft Co.*,¹⁹ agrees with the reasoning in *Cleveland*, finding that the field of aviation safety is not preempted by the Act, the ADA or GARA. In fact, the court stated that GARA's legislative history "demonstrates that Congress did not intend to preempt the entire field of aviation safety. In fact, it is strong support of Congress's intent not to preempt."²⁰

In response to Cessna's arguments that "the FAA regulations comprehensively govern the field of aviation safety such that they impliedly preempt the standard of care in all state law claims within the field," the *Monroe* court found that the regulations controlling the design and safety of an aircraft "are broad and provide a non exhaustive list of minimum requirements leaving discretion to the manufacturer."²¹ The court held that, although the certification process looks to the safety and design regulations set out by the FAA, it "does not in and of itself constitute a pervasive regulatory scheme evidencing an intent by Congress to preempt the field of aviation safety."²²

After *Monroe*, the aviation case law dealing with preemption was thoroughly reviewed in the wake of an attempt to remove state court lawsuits to federal court under a claim of complete preemption and, after citing the litany of precedent, the district court concluded, "it is the opinion of this Court that the [Act] does not completely preempt state law causes of action for wrongful death or survivor benefits in aviation cases. To the extent Comair relied on FAA preemption as a basis for removal, its reliance was misplaced. This Court does not have subject matter jurisdiction based on complete preemption of wrongful death claims by the FAA."²³

The vast majority of courts have also agreed with the reasoning in *Cleveland*.

The following is a representative, although far from comprehensive, list of cases finding no implied field preemption of plaintiffs' state law product liability claims:

- *Public Health Trust of Dade County, Fla. v. Lake Aircraft, Inc.*²⁴ (Congress, in directing the Secretary of Transportation to promulgate federal aircraft design standards, did not intend to preempt the application of additional design standards arising under state tort law.)
- *Lucia v. Teledyne Continental Motors*²⁵ (There is no federal preemption of state law product liability claims in the 1958 FAA, the 1978 ADA amendments or the 1994 GARA amendments; indeed, Congress' intent *not* to preempt state law became stronger with the passage of the 1978 and 1994 amendments.)
- *Holliday v. Bell Helicopters Textron, Inc.*²⁶ (The savings clause recognizes that the statutory scheme established by the Act is designed merely to complement existing statutory and common law remedies, not supplant them; and preserves those state common law and statutory causes of action without which many injured plaintiffs would receive no redress at all.)
- *Sunbird Air Services, Inc. v. Beech Aircraft Corp.*²⁷ (The regulations promulgated by the FAA are merely minimum safety standards and do not preclude a finding of negligence where a reasonable person would take additional precautions.)
- *Sheesley v. Cessna Aircraft Co.*²⁸ (Congress did not intend the Act to preempt the entire field of aviation safety. By adopting GARA, Congress went to great lengths limiting its preemption of state tort law in a narrow set of circumstances. This would have been unnecessary if Congress had already preempted all state tort actions affecting aviation safety when it adopted the Act.)
- *Elsworth v. Beech Aircraft Corp.*²⁹ (There can be no question as to the intent of Congress to allow the states to apply their own laws in tort actions against aircraft manufacturers for the defective design of airplanes.)

The two circuit decisions supporting the aircraft industry's arguments for field preemption are *Abdullah v. American Airlines, Inc.*,³⁰ and *Greene v. B.F. Goodrich*.³¹ *Abdullah* was not a product liability lawsuit but rather a failure to warn case resulting from personal injuries caused by in-flight turbulence on an American Airlines flight. The

Third Circuit held that “federal law establishes the applicable standards of care in the field of aviation safety, generally, thus preempting the entire field from state and territorial regulation.”³² The *Abdullah* court itself recognized that it was pushing preemption further than other courts had done.³³ A majority of cases decided since *Abdullah* have refused to follow its reasoning.³⁴

In *Greene*, the Sixth Circuit found "field preemption" of plaintiff's failure to warn claims. In extending preemption to apply to a warnings claim in a product liability action, the *Greene* court has ignored well-settled precedent that such claims are neither expressly nor impliedly preempted by either the FAA, the ADA or GARA. Further, the court explicitly relied on the reasoning in *Abdullah*, without even mentioning *Cleveland* or any contrary authority.³⁵

Conflict preemption. Under conflict preemption, state law is preempted when it actually conflicts with federal law. Aircraft manufacturers argue that, because the Federal Aviation Administration has promulgated extensive safety standards and regulations relating to their products, any state law requirements for additional safety measures would necessarily present a conflict, and are thus preempted.

However, it is important to remember that the safety standards and regulations that the industry must follow are merely *minimum standards*. The Act empowers the Secretary of Transportation to establish “such *minimum standards* governing the design ... of aircraft ... as may be required in the interest of safety.”³⁶ Courts have found that no conflict is presented between the minimum standards promulgated by the FAA and state standards: “By designating the standards as minimum, Congress indicated that it did not want to bar states from adopting additional or more stringent standards ... [A]ircraft

manufacturers should not be insulated from liability for a defectively designed product by their compliance with certain minimum standards.”³⁷

Because there is no conflict between the minimum standards promulgated by the FAA and state law tort remedies in product liability actions, there is no "conflict preemption" of plaintiffs' claims. In fact, it is inconceivable that a conflict could ever exist when it can be established that the design standards at issue are minimum standards.

In *Bates*, the defendant argued, as do defendants in aviation products liability lawsuits, that, if juries were allowed to impose anything beyond the “minimum standards” on the industry, a “crazy-quilt” effect would occur, thus, supposedly, hamstringing the entire industry. The Supreme Court rejected this argument, stating that “[w]e have been pointed to no evidence that such tort suits led to a ‘crazy-quilt’ ... or otherwise created any real hardship for manufacturers;” and, even if juries on occasion reached contrary conclusions, this would not result “in difficulties beyond those regularly experienced by manufacturers of other products that everyday bear the risk of conflicting jury verdicts.”³⁸

Further, the Court in *Sprietsma* emphasized that “uniformity” is not a justification for wiping out state tort laws: “The concern for uniformity does not justify the displacement of state common law remedies that compensate accident victims and their families and that serve the act’s more prominent objective” of promoting safety.³⁹

There have been lawsuits and jury trials over airplane crashes for as many years as airplanes have flown and crashed. In the 48 years since the Act was passed, Congress has never expressed its intent to deprive the victims of unsafe and defective airplanes of their right to seek justice. As Justice Stevens stated in *Bates*: “The long history of tort

litigation against manufacturers of poisonous substances adds force to the basic presumption against pre-emption. If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly.”⁴⁰ The same observation holds true for the manufacturers of unsafe airplanes and components which makes the case for preemption against aviation products much, much weaker than in other realms such as drug and medical device litigation.

Recent Developments in Non-Aviation Cases

Aviation practitioners should be aware of the following recent cases and their potential influence on claims of preemption in product liability suits against aircraft manufacturers.

U.S. Supreme Court

In *Riegel v. Medtronic, Inc.*, 552 U.S. ___ (2008), the U.S. Supreme Court held that the Medical Device Amendments of 1976 (MDA) expressly preempted state law claims asserted by plaintiffs related to a failed catheter. The catheter, a MDA Class III device, had received premarket approval by the FDA. The Court held that the MDA’s preemption clause barred state common-law claims challenging the safety or effectiveness of the medical device marketed in a form that received premarket approval from the FDA. In so holding, the Court concluded that New York’s common-law negligence and strict liability causes of action imposed “requirements” that invoked express preemption provisions of the MDA. The Court noted that the preemptive language and premarket approval requirements for a MDA Class III device were the most stringent of the requirements under the MDA. In *Riegel*, the Court distinguished its prior

decision declining to preempt under the MDA in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996).

Texas Supreme Court

The Texas Supreme Court handed down a significant preemption decision on April 18, 2008, in *Bic Pen Corporation v. Carter*, ___ S.W.3d ___, 2008 WL 1765550 (Tex. 2008). In that case, parents brought suit for a minor child who was severely burned when her brother set fire to her clothes with a *Bic* disposable lighter. The Court held that the plaintiffs' design defect claims were impliedly preempted by regulations adopted by the Consumer Product Safety Commission (CPSC). The Court focused on the performance requirement imposed by the CPSC, which required Bic to demonstrate that *at least* 90% of a test group of 100 children could not operate a test lighter after two five-minute attempts. Even though the particular standard was clearly a minimum or "meet or exceed" standard, the Texas Supreme Court treated the standard as an exhaustive standard and concluded that the performance requirements imposed by the CPSC standard conflicted with the requirements imposed under state law tort remedies. The Court's opinion does not explain how a minimum standard could conflict with state law and the opinion did not address the plaintiffs' argument that their proposed alternative design was utilized in other Bic lighters approved by the CPSC in which the other Bic lighter designs exceeded the CPSC "90%" standard.

Even though the CPSC statutory scheme contained a savings clause and there was no basis for express preemption, the Texas Supreme Court adopted language from *Riegel* into its opinion. In holding that implied preemption negated plaintiffs' design-defect

claims, The Texas Supreme Court sided with the Mississippi Supreme Court in *Frith v. Bic Corp.*, 863 So.2d 960 (Miss. 2004) (*en banc*).

While the implications flowing from the *Bic* decision on aviation-related product claims are unknown, the *Bic* decision will no doubt be cited, along with *Riegel*, in preemption motions filed by product defendants in Texas.

¹ H.R.Rep. No. 2360, 85th Cong., 2d Sess.

² *American Airlines v. Wolens*, 513 U.S. 219, 222 (1995); *see also Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 335 (5th Cir. 1995) (“The FAA did not expressly preempt state regulation of intrastate air transportation.”); *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1442-43 (10th Cir. 1993) (“By its very words, the statute leaves in place remedies then existing at common law or by statute.”).

³ 49 U.S.C.A. § 1506.

⁴ 49 U.S.C.A. § 1305(a)(1). Reenacting Title 49 of the U.S. Code in 1994, Congress revised this clause to read: “[A] State ... may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier ...” §41713(b)(1).

⁵ *Hodges*, 44 F.3d at 336. *See, e.g., Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1258 (11th Cir. 2003); *Johnson v. Baylor Univ.*, 214 F.3d 630, 634 (5th Cir. 2000), *cert. denied*, 531 U.S. 1012 (2000); *Duncan v. Northwest Airlines, Inc.*, 208 F.3d 1112, 1115 (9th Cir. 2000); *Charas v. TWA*, 160 F.3d 1259, 1266 (9th Cir. 1998); *Bieneman v. City of Chicago*, 864 F.2d 463, 471-72 (7th Cir. 1998); *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 193 (3d Cir. 1998); *In re September 11 Litigation*, 280 F.Supp.2d 279, 297 (S.D. N.Y. 2003); *Skydive Factory, Inc., v. Maine Aviation Corp.*, 268 F.Supp.2d 61, 64 (D. Me. 2003); *Somes v. United Airlines, Inc.*, 33 F.Supp.2d 78, 87 (D. Mass. 1999); *Trinidad v. American Airlines, Inc.*, 932 F.Supp. 521, 526-27 (S.D. N.Y. 1996); *Moore v. Northwest Airlines, Inc.*, 897 F.Supp. 313, 314 (E.D. Tex. 1995); *O'Hern v. Delta Airlines, Inc.*, 838 F.Supp. 1264, 1267 (N.D. Ill. 1993); *In re Air Disaster*, 819 F.Supp. 1352, 1361 (E.D. Mich. 1993).

⁶ 49 U.S.C.A. § 40101.

⁷ H.R.Rep. No. 103-525, 103d Cong., 2d Sess., pt. 2, at 6-7 (1994).

⁸ 49 U.S.C.A. § 40120(c).

⁹ *Monroe v. Cessna Aircraft Co.*, 417 F.Supp.2d 824, 832 (E.D. Tex. 2006); *see also Sheesley v. Cessna Aircraft Co.*, 2006 WL 1084103 *21 (D. S.D. April 20, 2006) (“Congress’s adoption of GARA to preempt state tort law in this narrow instance indicates its recognition of the continued viability of state tort claims following adoption of the Act.”).

¹⁰ “A ‘Tail’ of Reliability Reform: General Aviation Revitalization Act of 1994,” Timothy S. McAllister, *1995 Symposium on the General Aviation Revitalization Act*, 23 TRANSP. L.J. 301, 315-16.

¹¹ *See Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

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- ¹² *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).
- ¹³ *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995).
- ¹⁴ *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 459 (2005) (Thomas, J., concurring in the judgment in part and dissenting in part) (cites omitted).
- ¹⁵ *Id.* at 449.
- ¹⁶ 985 F.2d 1438 (10th Cir. 1993), *cert. denied*, 510 U.S. 908 (1993).
- ¹⁷ *Id.* at 1442.
- ¹⁸ *Id.* at 1445.
- ¹⁹ 417 F.Supp.2d 824 (E.D. Tex. 2006).
- ²⁰ *Id.* at 832.
- ²¹ *Id.* at 833.
- ²² *Id.*
- ²³ *In re Air Crash at Lexington, Kentucky, August 27, 2007*, 486 F. Supp.2d 640 (E.D. Ky 2007)
- ²⁴ 992 F.2d 291 (11th Cir. 1993).
- ²⁵ 173 F.Supp.2d 1253 (S.D. Ala. 2001).
- ²⁶ 747 F.Supp. 1396 (D. Hawaii 1990).
- ²⁷ 789 F.Supp. 360 (D. Kan. 1992).
- ²⁸ 2006 WL 1084103 (D. S.D. April 20, 2006).
- ²⁹ 691 P.2d 630 (Cal. 1984), *cert. denied*, 471 U.S. 1110 (1985).
- ³⁰ 181 F.3d 363 (3d Cir. 1999).
- ³¹ 409 F.3d 784 (6th Cir. 2005), *cert. denied*, 126 S.Ct. 1465 (2006). *See also City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (the Federal Aviation Act and the Noise Control Act preempted state and local control over aircraft noise); *French v. Pan Am Express*, 869 F.2d 1 (1st Cir. 1989) (FAA regulations governing pilot qualifications implicitly preempt Rhode Island's state law governing employee drug testing as applied to pilots); *Curtin v. Port Auth. of New York*, 183 F.Supp.2d 664 (S.D. N.Y. 2002) (passenger's negligence claim relating to evacuation of an airplane was impliedly preempted by the FAA).
- ³² *Abdullah*, 181 F.3d. at 367.

³³ *Id.*

³⁴ See, e.g., *Monroe*, 417 F.Supp.2d at 835; *Vannick v. Delta Airlines, Inc.*, 113 Cal.Rptr.2d 471, 478-79 (2001); *Sakellaris v. Polar Air Cargo, Inc.*, 104 F.Supp.2d 160, 163 (E.D. N.Y. 2000); *Sheesley*, 2006 WL 1084103 *22; *Skidmore v. Delta Air Lines*, 2000 WL 1844675 *3 (N.D. Tex. 2000).

³⁵ The dissent in *Greene* stated: “[O]ur circuit has traditionally shown a proper amount of restraint and caution before finding State and local laws preempted by federal law. Under this regime, I cannot assume that the FAA implicitly preempts any State or common law-imposed duties here... [N]either the appellant nor the majority have proffered any reason why a State’s more stringent duty of care in the failure to warn context could not supplement rather than frustrate the FAA.” *Greene*, 409 F.3d at 798 (Cole, J., concurring in part and dissenting in part).

³⁶ 49 U.S.C.A. § 1421(a)(1) (emphasis added).

³⁷ *Holliday*, 747 F.Supp. at 1400-01; see also *Sunbird Air Services*, 789 F.Supp. at 363-64 (“[R]egulations promulgated by the FAA are merely minimum safety standards and do not preclude a finding of negligence where a reasonable person would take additional precautions.”); *Fisher v. Bell Helicopter Co.*, 403 F.Supp. 1165, 1172 (D.C. 1975) (FAA regulations “must be reinforced and strengthened by courts called on to develop rules of liability and damages.”); *Somes*, 33 F.Supp.2d at 87 (“Minimum requirements, by definition, permit and authorize the party to whom they apply to exceed the minimum.”); *In re Air Crash Disaster at Stapleton Int’l Airport*, 721 F.Supp. 1185, 1188 (D. Colo. 1988) (compliance with FAA regulations does not establish as a matter of law that a party is not liable for traditional tort law remedies).

³⁸ *Bates*, 544 U.S. at 451-52.

³⁹ *Sprietsma v. Mercury Marine*, 537 U.S. 51, 70 (2002). See also *Grier*, 529 U.S. at 871 (“[T]he savings clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while simultaneously providing necessary compensation to victims.”)

⁴⁰ *Bates*, 544 U.S. at 449.