

### SPECIAL EDITION – PREEMPTION

**GARY C. ROBB**

LETTER FROM THE CHAIR

## A Look Back At Miami

Dear Fellow Aviation Law Section Members:

As I write this, we have just gathered at the AAJ Winter Convention in Miami and it was a tremendous success. In fact, it was a productive and entertaining few days for the Aviation Law Section members in attendance.

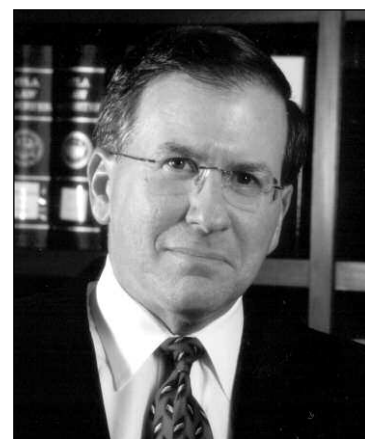
First, our roundtable discussion was very informative. We discussed our legislative priorities, including finding a solution to the preemption dilemma that appears all too often in our cases. In a conversation with AAJ Public Affairs staff, we also touched on issues relating to

DOHSA, GARA, victim' representation at the teardown of reconstruction scenes, and mandatory insurance for pilots and others.

The day before the roundtable, our friends at the Podhurst Orseck Law Firm hosted our Aviation Law Reception at the Casuarina in Miami Beach. Thank you to Victor Diaz and company for providing us with such an entertaining evening.

I am pleased to report that our Annual Convention program has been approved and will be held on Monday, July 16, 2007 in the afternoon.

Our program, "Overcoming



Gary C. Robb

Discovery Obstacles: Getting Your Aviation Case to Trial," will include a panel discussion on "Successful Navigation of the Aircrash Discovery Path,"

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## Plaintiff Thwarts Cessna's Preemption Arguments in *Monroe v. Cessna*

By William Angelly, New York, N.Y.

In the wake of the tort reform movement, field preemption has become particularly attractive to defendants as a potential means for disposing of or significantly limiting broad categories of state law claims. Aviation law has recently been the subject of such attacks.

### FARS OR STATE LAW?

In courts around the country, aircraft and component part manufacturers have been filing motions to dismiss or for summary judgment asserting that the Federal Aviation Regulations (FARs) preempt the entire field of aviation safety. Some motions are based on the argument that the

FARs supplant state law standards of care. Others contend that the mere existence and volume of the FARs evidence Congress' intent to preclude state law tort claims altogether.

Lower courts within the Fifth Circuit recently have faced a

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ENDOWED BY:  
JOHN HOWIE

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with Victor Diaz and [Justin Green](#), and a presentation updating all of us on GARA by Alisa Brodkowitz. We are delighted that the current general counsel of the National Transportation Safety Board, Honorable Gary Halbert, has agreed to address us on the topic of "Interacting with NTSB: A List of Do's and Don'ts."

Finally, continued kudos to our outstanding Newsletter Editor, Alisa Brodkowitz of Seattle. I think you will find the articles topical and practical and I urge you to submit one yourself!

I wish you continued success on all of your aviation cases.

Sincerely yours,

Gary C. Robb

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ext. 613

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[www.exchange.justice.org](http://www.exchange.justice.org)  
E-mail: [exchange@justice.org](mailto:exchange@justice.org)

### 2006-2007 SECTION OFFICERS

#### Chair

**Gary Robb**  
1200 Main St., Ste. 3900  
Kansas City, MO 64105-2117  
Phone: 816/474-8080  
Fax: 816/474-8081  
E-mail: [gcr@robbrobb.com](mailto:gcr@robbrobb.com)

#### Chair-Elect

**Victor Diaz**  
25 West Flagler, Ste. 800  
CITY National Bank Building  
Miami, FL 33130-1720  
Phone: 305/358-2800  
Fax: 305/358-2382  
E-mail: [vdiaz@podhurst.com](mailto:vdiaz@podhurst.com)

#### Vice Chair

**Justin Green**  
100 Park Ave.  
New York, NY 10017-5590  
Phone: 212/687-8181  
Fax: 212/972-9432  
E-mail: [jgreen@kreindler.com](mailto:jgreen@kreindler.com) Secretary-

#### Treasurer

**Daniel Barks**  
2300 Clarendon Blvd., Ste. 306  
Arlington, VA 22201-3367  
Phone: 703/522-7500  
Fax: 703/522-7905  
E-mail: [ddb@va.speiserkrause.com](mailto:ddb@va.speiserkrause.com)

#### Newsletter Editor

**Alisa Brodkowitz**  
Stritmatter Kessler Whelan Coluccio  
200 Second Ave., West  
Seattle, WA 98119  
Phone: 206/448-1777  
Fax: 206/728-2131  
Direct: 206/826-8223  
E-mail: [alisab@stritmatter.com](mailto:alisab@stritmatter.com)

#### Immediate Past Chair

**Brian Alexander**  
100 Park Ave.  
New York, NY 10017-5516  
Phone: 212/687-8181  
Fax: 212/972-9432  
E-mail: [balexander@kreindler.com](mailto:balexander@kreindler.com)

#### AAJ Sections Staff

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**ALISA R. BRODKOWITZ**  
**EDITOR'S COMMENT**

## Special Edition – Preemption

We have devoted this edition of the newsletter to the subject of preemption. More and more aircraft and component parts manufacturers cry “preemption” when presented with valid state law claims. We must prepare ourselves to meet and defeat attempts to preempt state law. We must overcome defendants’ efforts to drag us from state court into federal court.

When presented with a preemption argument you should consult the Preemption Document Library on the AAJ Exchange and discuss the issue with colleagues on the aviation list server. We

also hope you find a resource in this special edition newsletter.

[William Angelley](#) at [Kreindler and Kreindler](#) recently defeated Cessna’s attempt to use the doctrine of field preemption to preclude plaintiff’s state law claims. He writes about his case, *Monroe v. Cessna Aircraft Co.*, and the winning opinion. [Orla M. Brady](#), also of Kreindler and Kreindler, presents an overview of the Federal Aviation Act, and its legislative history and amendments. Brenda M. Johnson and Jamie R. Lebovitz of Nurenberg, Paris, Heller & McCarthy, contribute a comprehensive article about



**Alisa R. Brodkowitz**

substantial federal question jurisdiction and removal in aviation cases. Finally, Donna Bowen at Slack and Davis reviews aviation preemption case law.

*Preemption Arguments cont. from Page 1*

number of motions asserting that the FARs impliedly preempt the entire field of aviation safety. One such case is *Monroe v. Cessna Aircraft Co.*, presently pending in the U.S. District Court for the Eastern District of Texas.

In *Monroe*, an instructor and a student pilot hit a bird during a training flight in a Cessna 172S aircraft. The bird caused significant damage to the left wing, altering the plane’s stall speed and flight characteristics. While attempting an emergency landing, the student and instructor were killed when the aircraft stalled at an unexpectedly high speed. The plaintiffs claim that under Texas law, Cessna was negligent and the aircraft was unreasonably dangerous because Cessna failed to include well-known procedures to respond to in-flight structural damage in the 172S aircraft’s Pilot Operating Handbook.

In response, Cessna filed a motion for summary judgment arguing that the FARs, under the doctrine of field preemption, preclude the plaintiffs’ Texas law claims. Cessna urged the court to follow the reasoning of the Third and Sixth Circuits in *Abdullah v. American Airlines*,

*Inc.*<sup>1</sup> and *Greene v. B.F. Goodrich Avionics Systems, Inc.*<sup>2</sup> It also interpreted the Fifth Circuit’s opinion in *Witty v. Delta Air Lines, Inc.*<sup>3</sup> as a prediction that the Fifth Circuit would ultimately align itself with the Third and Sixth Circuits if faced with the field preemption issue.

In a published opinion, the court denied Cessna’s motion, stating, among other things, that after a review of all relevant case law, it found the reasoning of the Tenth and Eleventh Circuits in *Cleveland v. Piper Aircraft Corp.*<sup>4</sup> and *Pub. Health Trust of Dade County, Fla. v. Lake Aircraft, Inc.*<sup>5</sup> to be more sound.<sup>6</sup> *Witty* was found to be inapplicable because the Fifth Circuit expressly limited its holding to the facts of that case and refused to comment on the broader field preemption issue.

### THE GARA EFFECT

The *Monroe* opinion is important for several reasons. First, it offers a concise, yet thorough, analysis of the field preemption issue within the context of the FARs. It is also one of the very few opinions that consider the effect of the General Aviation Revitalization Act (GARA) on this question. Finally, *Monroe* emphasizes that field preemption must be determined by analyzing the specific factual allegations in each case in relation to specific federal reg-

ulations that pertain to those allegations, if any.

The GARA was enacted in 1994 as an amendment to the Federal Aviation Act of 1958.<sup>7</sup> Primarily, the GARA is a statute of repose that precludes products liability lawsuits against manufacturers of aircraft or component parts that have been in service for more than 18 years. Thus, the statute essentially offers an express preemption of state statutes of limitations for such lawsuits. Read another way, however, the GARA is a clear acknowledgment by Congress of the continuing viability of state law tort claims against manufacturers for aircraft and parts that have been in service for less than 18 years.

The *Monroe* court agreed with this reading, citing language from the House Report on the GARA that “demonstrates that Congress did not intend to preempt the entire field of aviation,” and which offers “strong support of Congress’ intent not to preempt.”<sup>8</sup> Unlike most opinions addressing field preemption and the FARs, *Monroe* offers an excellent discussion of the GARA as an often-overlooked indicator of congressional intent. Lastly, the *Monroe* court addressed the scope and effect of the specific regulations at issue in

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*Preemption Arguments cont. from Page 3*

the case. Courts and defendants often analyze this aspect of the field preemption analysis incorrectly.

Cessna, as many other defendants do, claimed that the FARs comprehensively govern the field of aviation safety such that they collectively preempt the standard of care in all state law claims within the field. In other words, Cessna argued that field preemption existed simply because there are so many FARs covering so many aspects of aviation. This overly broad and oversimplified approach, however, misses the point that preemption, whether express or implied, must be based on specificity.

In *Monroe*, the FAR at issue concerned the contents of aircraft flight manuals. It was the only one on point, and it was drafted broadly and left a great deal of discretion to the manufacturer. Focusing on the discretionary portion of the regulation, the court found that it plainly demonstrated the "lack of [a] pervasive and precise regulatory scheme" with regard to aircraft manual contents.<sup>9</sup>

Accordingly, the *Monroe* opinion confirms that even though there are literally hundreds of FARs addressing many aspects of aviation from pilot training to general aircraft operations to commercial airline insurance issues, field preemption



can only exist in the narrow avenues where it is clear that Congress intended a specific regulation or set of regulations to govern the particular matter at issue.

The *Monroe* opinion underscores the fact that field preemption is not, as defense counsel often contend, a magic bullet that precludes all state law claims related to aviation safety. The opinion offers an insightful analysis of many well-worn arguments on both sides of the debate and adds new texture by exploring the usually overlooked effect of the GARA. While the Fifth Circuit's views on field preemption within the context of the FARs remain to be seen, *Monroe* will certainly provide that court and others with a cogent and persuasive framework from which to begin.

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Notes:

- 1 181 F.3d 363, 376 (3d Cir.1999).
- 2 409 F.3d 784 (6th Cir. 2005).
- 3 366 F.3d 380 (5th Cir.2004).
- 4 985 F.2d 1438, 1444 (10th Cir.1993).
- 5 992 F.2d 291, 295 (11th Cir.1993).
- 6 *Monroe v. Cessna Aircraft Co.*, 417 F.Supp.2d 824, 835 (E.D. Tex. 2006).
- 7 *General Aviation Revitalization Act*, Pub.L. 103-298 (1994).
- 8 *Monroe*, 417 F. Supp at 832.
- 9 *Id.* at 833.

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*William Angelley, an Aviation Law Section member, represents the Monroe Plaintiffs in this ongoing litigation. Kreindler & Kreindler, LLP, 100 Park Ave., 18th Floor, New York, NY 10017, T: 212/687-8181, [wangelley@kreindler.com](mailto:wangelley@kreindler.com).*

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## Preemption Getting You Down? AAJ's Litigation Group and Document Library Can Help - For Free

The AAJ Preemption Law Litigation Group provides you with the resources you need to combat the "preemption" threat in the civil justice system. The group liaises between the membership, AAJ officials and staff, and other organizations on preemption issues and strategy. The group is educating the membership and the public on the threat of preemption. The group also has a list server for members to exchange ideas on preemption law, and share information about case analysis, experts, and trial techniques. Membership in the Litigation

Group is free to AAJ Regular, Sustaining, Life, and President's Club members

The Preemption Law Litigation Group Document Library was established to allow members to share preemption materials in a secure, online environment. It contains sample briefs, motions, memos, and AAJ Education materials focused on defeating preemption across various practice areas.

The documents are available at no charge to AAJ Regular, Sustaining, Life, and President's Club members who are also members of any AAJ Practice Section.

Join or learn more about the Preemption Law Litigation Group by contacting co-chair Edward Parr at 202/261-6542.

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# History of Preemption in Aviation

## Where We Have Been and Where We May Be Going

By *Orla M. Brady, New York, N.Y.*

The judicial application of preemption has become increasingly broad and unpredictable. This article addresses the history of aviation regulation and preemption, and the importance of paving the way for (what otherwise will be) the unpredictable future.

### THE ACA, CAA, FAA, AND ADA

The first federal aviation statute was the Air Commerce Act of 1926 (ACA).<sup>1</sup> The ACA provided *inter alia* that the responsibility of regulating aviation commerce belonged to the Secretary of Commerce.<sup>2</sup> The ACA, however, failed to regulate intrastate commerce, leaving such regulation to each state.<sup>3</sup> Problems ensued and Congress took steps to unify aviation regulation throughout.

In 1938, Congress passed the Civil Aeronautics Act (CAA) in response to the inadequacies of the ACA.<sup>4</sup> The CAA created the first federal agency responsible for aviation safety, certification of pilots and aircraft, regulation of aircraft owners, investigation of U.S. aviation accidents, and operation of air traffic control.<sup>5</sup> Approximately 20 years after the CAA was vested with such authority, two serious aviation accidents prompted Congress and the president to reevaluate federal aviation regulation.<sup>6</sup> The Federal Aviation Act (FAA) of 1958 resulted from the reevaluation.

The Federal Aviation Act replaced the CAA and created a newly developed Federal Aviation Administration, which was responsible for flight safety, and left the Civil Aeronautics Board (CAB), as created under the CAA, responsible for the economic regulation of the commercial aviation industry.<sup>7</sup>

Congress later created the Airline Deregulation Act of 1978 (ADA) to promote "an air transportation system which relies on competitive market forces to determine the quality, variety and price of air services."<sup>8</sup> The creation

of the ADA essentially ended the CAB since the ADA provided federal preemption of aviation industry rates, routes and services.<sup>9</sup> The specific section outlining the preemptive effect of 1305(a) of the ADA was repealed in 1994, which is significant in looking at Congressional intent when evaluating preemption, as will be discussed below.

### PREEMPTION THROUGH THE AGES/CASES

The Supremacy Clause of Article IV of the U.S. Constitution provides Congress with the power to preempt state law. Generally, two types of preemption allow federal law to supersede state law: express or implied.

Express preemption is where Congress expressly states the federal law preempts state law. Implied preemption is either field preemption or conflict preemption. Field preemption is where federal law "creates a scheme of federal regulation so pervasive that the only reasonable inference is that it meant to displace the state" law.<sup>10</sup> Conflict preemption is clearly where state and federal law conflict.

The case law addressing preemption is fascinating. Across the country, conflicting case law prevails, possibly as a result of the requirement that courts interpret true congressional intent, the gravamen in determining the preemptive effect of a statute.

In 1993, the Tenth Circuit held that the FAA does not expressly or impliedly preempt plaintiff's state law products liability claim.<sup>11</sup> A pilot was injured when his aircraft struck a vehicle on a runway. He claimed negligent design of the pilot seat.<sup>12</sup> The court looked to the plain language of the FAA, and the ADA, including its preemption clause. It found that Congress intended that the Act have no general preemptive effect and that the ADA's preemption clause



**Orla M. Brady**

was inapplicable.<sup>13</sup>

However, in 1999, the Third Circuit concluded that the FAA implicitly preempts the entire field of air safety.<sup>14</sup> Airline passengers sued an airline for injuries suffered when the aircraft encountered turbulence.<sup>15</sup> The court found that federal law established the aviation industry's standard of care, not state tort law, resulting in preemption of the state-based claims.<sup>16</sup>

In 2002, the California Court of Appeals thoroughly reviewed the history of preemption and held that no federal preemption of a state negligence claim existed against an airline where an item fell from an overhead bin causing injury to a passenger.<sup>17</sup> Acknowledging authority to the contrary, the court found that the plaintiff's claim was unrelated to rates, routes, or services, and thus, the ADA did not prevent plaintiff from proceeding under California Civil Code. The court looked to the language of the 1958 Act and found it "specifically provided that the

*continued on Page 6*

*Preemption History cont. from Page 5*

federal law does not 'in any way abridge or alter the remedies now existing at common law or by statute.'"<sup>18</sup>

In 2005, the Fifth Circuit found that an airline passenger's cause of action for failure to warn against an airline, where a plaintiff/passenger suffered deep vein thrombosis that may not have occurred if the airline warned of sitting in cramped airline seats without moving for extended periods of time, was preempted by the ADA.<sup>19</sup> The Fifth Circuit held that the failure to warn argument conflicted with the federal aviation regulations that outlined which warnings the airline must give to its passengers, and was thus preempted.<sup>20</sup>

2006 produced interesting and significant aviation preemption cases. The District Court of Minnesota found that even though Congress created an aviation regulatory scheme, Congress did not intend the creation of such to demonstrate a congressional intent to federally preempt all state law claims in the aviation industry.<sup>21</sup> In the same case, the court found that the presumption of a federal preemption defense does not make a case removable to federal court.<sup>22</sup>

The District Court of South Dakota has recently thoroughly evaluated many aspects affecting aviation litigation matters, including a thorough discussion on preemption.<sup>23</sup> The plaintiff claimed that the defendant was negligent for failing to include safety procedures for an exhaust failure in its curriculum and by using a training simulator that did not replicate the handling of the specific aircraft involved in the litigation, in part causing the air crash.

The defendant argued that both field preemption and conflict preemption applied to the claim. The defendant claimed field preemption applied because the "expansive regulatory scheme" preempts all state law affecting aviation safety, including the above-mentioned scenario.

The court evaluated the preemption case law and found that Congress did not intend to preempt the field of aviation safety entirely by the Act, denying

defendant's field preemption argument.<sup>24</sup> However, the court agreed with the defendants that conflict preemption was appropriate, in part, because federal regulations addressed emergency procedures in flight training curriculum.<sup>25</sup>

LEGISLATIVE HISTORY OF THE FEDERAL AVIATION ACT of 1958, 145-48(1958).

7 *Supra*, note 1.

8 Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified primarily at 49 U.S.C. app. §§1301-1389 (1988 & Supp. IV 1992).

9 49 U.S.C. app. § 1305(a)(1988) repealed by Pub. L. 103-272, s. 7(b), 108 Stat. 1379 (1994).

10 Sheessley v. Cessna, 2006 WL 1084103, \*18 (SD 2006), citing *Wuebker v. Wilbur-Ellis, Co.*, 418 F.3d

**DID YOU KNOW?**

**AAJ Regulatory Counsel Gerie Voss frequently updates members on federal agencies' attempts to use the rulemaking process to impose preemption, and submits formal comments to the agencies about such proposals.**

*For more information, call 202/965-3500.*

**TIME WILL TELL**

Preemption is a hot topic and one to take seriously. As wisely noted on the AAJ aviation list server, the preemption issue from the plaintiff's perspective must be centralized.<sup>26</sup> The centralization can occur but only through our efforts as interested plaintiff attorneys.

Also, AAJ has a newly formed Preemption Law Litigation Group and document library. Share your preemption briefs and those you receive from defense counsel. One thing we can learn from the history of preemption is that the courts are not unifying their approaches. Plaintiff attorneys can help pave the way through our unified, solid arguments. Remember to share your documents and ideas through the list server or document libraries available through AAJ.

**Notes:**

1 Valetti, Mark, *Preemption of State Law Tort Claims in the Context of Aircraft Manufacturers*, 60 J. Air L. & Com. 699 (Dec-Jan 1994-95), citing The Air Commerce Act of 1926, ch. 344, 44 Stat. 568 (1926) (repealed in 1938).

2 *Id.*

3 *Id.*

4 Civil Aeronautics Act of 1938, Pub. L. No. 706, 52 Stat. 973 (codified as amended at 49 U.S.C.A.N. app. §§ 1301-1542 (1988 & Supp. V 1993)).

5 Pub. L. No. 706, s 601(a), 52 Stat. 973, 1007 (1938).

6 Letter to Congress from President Dwight D.

Eisenhower (June 13, 1958)(as published in Hearing Before a Subcommittee of the Committee on Interstate and Foreign Commerce (report of June 24, 1958)),

883, 886 (8th Cir.2005); *Davenport v. Farmers Ins. Group*, 378 F.3d 839, 842 (8th Cir.2004).

11 *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir. 1993).

12 *Id.*

[13] *Id.*

14 *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 365 (3rd Cir. 1999).

15 *See Id.*

16 *Id.*

17 *Vinnick v. Delta Airlines*, 93 Cal.App.4th 859 (2002).

18 *Vinnick*, at 872.

19 *Witty v. Delta Air Lines, Inc.*, 366 F.2d 380 (5th Cir.2004).

20 *Id.*

21 *Glorvigen v. Cirrus Design Corp.*, 2006 WL 399419 (D.Minn.2006), citing, *Chapman v. Lab One*, 390 F.3d 620, 630; *Agre v. Rain & Hail LLC*, 196 F.Supp.2d 905, 910-11 (D.Minn.2002); *Smith v. GTE Corp.*, 236 F.3d 1292, 1313 (11th Cir. 2001); *Virgil v. Reorganized MW Co. Inc.*, 156 F.Supp.2d 624, 631 (S.D.Miss.2001).

22 *Glorvigen* at \*5. "To have the requisite preemptive force to provide removal jurisdiction, a federal statute must provide both substantive and remedial provision that supersedes state law". *Id.* at \*6 citation omitted.

"...[F]or the complete preemption doctrine to apply, the federal statute must also provide a remedial provision and clearly indicate that the provision is the exclusive remedy for the alleged harm." *Id.*

23 Sheessley v. Cessna, 2006 WL 1084103, \*19 (SD 2006).

24 *Id.* at 23.

25 *Id.* at 25.

26 See Aviation Law Section List Server entry August 9, 2006 by Mike Slack.

***Orla M. Brady is an Aviation Law Section member. Kreindler & Kreindler, 100 Park Ave., New York, NY 10017, T: 212/687-8181, obrady@kreindler.com.***

# “Substantial Federal Question” Jurisdiction

## A Survey Of The Current Law

By Jamie R. Lebovitz and Brenda M. Johnson, Cleveland, Ohio

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.”<sup>1</sup> 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.”<sup>2</sup> 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.<sup>3</sup>

The first, *Franchise Tax Bd. v. Construction Laborers Vacation Trust*,<sup>4</sup> 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.”<sup>5</sup>

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*.<sup>6</sup> 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.’”<sup>7</sup>

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.”<sup>8</sup>

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.<sup>9</sup> 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*,<sup>10</sup> 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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*Federal Question cont. from Page 7*

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.'"<sup>11</sup> 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."<sup>12</sup>

*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 stan-

dard without a federal cause of action. And that would have meant a tremendous number of cases."<sup>13</sup>

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.<sup>14</sup> As the Court stated, "[i]n this situation, no welcome mat [i.e., no federal remedy] meant keep out."<sup>15</sup>

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*,<sup>16</sup> 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,<sup>17</sup> 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."<sup>18</sup>

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."<sup>19</sup>

#### '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.<sup>20</sup> 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.*,<sup>21</sup> 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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*Federal Question cont. from Page 8*

arising from an air crash. Likewise, in *McCarty v. Precision Airmotive Corp.*,<sup>22</sup> 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.*,<sup>23</sup> the Minnesota district court came to a similar conclusion regarding wrongful death claims arising from an air crash.<sup>24</sup>

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,<sup>25</sup> and in *XL Specialty Co. v. Village of Schaumburg*,<sup>26</sup> 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.*,<sup>27</sup> 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 sub-

stantial 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:

- 28 U.S.C. § 1331; see also U.S. Const. art. III, § 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.");
- 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).
- 463 U.S. 1 (1983).
- Id.* at 13.
- 478 U.S. 804 (1986).
- Id.* at 805 (quoting 28 U.S.C. § 1331).
- Id.* at 814.
- 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.
- 545 U.S. 308 (2005).
- Id.*, Sec. III.A. (quoting *United States v. Rodgers*, 461 U.S. 677, 709 (1983)).
- Id.*
- Id.* at 318 (emphasis added).
- Id.* at 319.

- Id.*
- 126 S. Ct. 2121, 165 L. Ed.2d 131 (2006).
- Id.* at 2136.
- Id.*
- Empire Healthcare*, at 2137.
- 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)].");
- No. 06-61167-CIV-ALTONAGA/Turoff, 2006 U.S. Dist. LEXIS 84865 (S.D. Fla. Oct. 6, 2006).
- No. 8:06-cv-1391-T-26TBM, 2006 U.S. Dist. LEXIS 65770 (M.D. Fla. Sept. 14, 2006).
- No. 05-2137, 2006 U.S. Dist. LEXIS 8741, CCH Prod. Liab. Rep. P17,399 (D. Minn. Feb. 16, 2006).
- 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.
- Glorvigen* at \*8-\*9.
- 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.
- No. 06 C 2299, 2006 U.S. Dist. LEXIS 53942 (N.D. Ill. July 20, 2006).
- 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).

**Jamie R. Lebovitz and Brenda M. Johnson,**  
*Nurenberg Paris Heller & McCarthy Co. LPA,*  
1370 Ontario St., Ste 100, Cleveland, Ohio 44113,  
T: 216/621-2300, 800/562-7438, F: 216/771-2242,  
JLebovitz@nphm.com, BJohnson@nphm.com.

# Field Preemption in Aviation Product Cases

By Donna Bowen, Austin, Texas

In virtually every aviation product liability lawsuit, defendants are asking courts to throw out the plaintiff's case on preemption grounds. This article will address the case law as it relates to defendants' claim that the entire field of aviation safety is preempted by the Federal Aviation Act, its legislative history, and the Federal Aviation Regulations.

## "FIELD PREEMPTION" AND CASE LAW

Preemption can be express or implied. It is well settled that the Federal Aviation Act of 1958 did not expressly preempt state regulation.<sup>1</sup> Implied preemption may occur either as "field preemption" or "conflict preemption."

Congress's intent to preempt an entire field can be inferred when a scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."<sup>2</sup> "Conflict preemption" exists where "compliance with both federal and state regulations is a physical impossibility" or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>3</sup>

There is a split in the circuit courts on whether the Federal Aviation Act preempts the field of aviation safety. The Supreme Court has yet to address the issue. The two main cases that support defendants' contention that the field of aviation safety is preempted are from the Third and Sixth Circuits, respectively: *Abdullah v. American Airlines, Inc.*<sup>4</sup> and *Greene v. B.F. Goodrich Avionics Systems, Inc.*<sup>5</sup>

In *Abdullah*, which dealt with personal injuries caused by turbulence on an American Airlines flight and not with product liability claims, the Third Circuit sweepingly held that "federal law establishes the applicable standards of care in the field of air safety, generally, thus preempting the entire field from state and territorial regulation."<sup>6</sup> The *Abdullah* court itself recognized that it was push-



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ing preemption further than other courts: "In coming to our answers to the certified question, we depart from the precedent established by a number of cases which hold that federal law does not preempt any aspect of air safety."<sup>7</sup>

*Greene*, however, dealt with product liability claims, and relying heavily on *Abdullah*, the court found "field preemption" of the plaintiff's failure to warn claim: "We agree with the Third Circuit's reasoning in *Abdullah* that federal law establishes the standards of care in the field of aviation safety and thus preempts the field from state regulation."<sup>8</sup>

Many courts have rejected the reasoning in *Abdullah* and *Greene*, finding the Tenth Circuit's decision in *Cleveland v. Piper Aircraft Corp.*<sup>9</sup> to be more persuasive. In *Cleveland*, the plaintiff sued Piper Aircraft, claiming that the design of the plane was the proximate cause of his injuries. Piper argued that the Federal Aviation Act impliedly preempted all state law claims by occupying the entire field of airplane safety through its regulations.<sup>10</sup> The Tenth Circuit disagreed, finding that "the plain language of the Federal Aviation Act suggests that Congress intended that the Act have no general preemptive effect,"<sup>11</sup> and that

FAA certification "is, by its very nature, a minimum check on safety."<sup>12</sup>

In a 2006 opinion, *Sheesley v. The Cessna Aircraft Co.*,<sup>13</sup> a South Dakota district court said: "The court disagrees with the Third Circuit's conclusion that Congress intended to preempt the field of aviation regulation by adopting the Act... After considering both *Cleveland* and *Abdullah*, this court finds *Cleveland* more persuasive and adopts it here."<sup>14</sup> The *Sheesley* court also rejected *Greene*, stating that "the Sixth Circuit adopted the reasoning of *Abdullah*, without even mentioning *Cleveland* or any contrary authority. The court rejects *Greene* for the same reasons as *Abdullah*."<sup>15</sup>

In another 2006 opinion, *Monroe v. Cessna Aircraft Co.*,<sup>16</sup> out of the Eastern District of Texas, the court reviewed both the *Abdullah* and *Cleveland* decisions at length and found *Cleveland* to be "better reasoned" than *Abdullah*.<sup>17</sup>

The defendants also point to the Fifth Circuit's 2004 opinion in *Witty v. Delta Air Lines, Inc.*<sup>18</sup> as support for their argument that the FAA preempts the entire field of aviation safety. In *Witty*, the plaintiff claimed Delta was negligent for failing to warn passengers about the risks of developing Deep Vein Thrombosis.<sup>19</sup> The Fifth Circuit found that *Witty's* failure to warn claims were preempted because they would actually conflict with warnings that instruct passengers to stay in their seats during flights.<sup>20</sup> The court concluded that "Congress intended to preempt state standards for the warnings that must be given airline passengers."<sup>21</sup>

The *Witty* holding is not nearly as broad as defendants claim and, in fact, the Fifth Circuit stated, "we note our intent to decide this case narrowly by addressing the precise issues before us."<sup>22</sup> Further, in *Monroe*, decided two years after *Witty*, the court made clear that the Fifth Circuit has not held that the field of aviation safety is preempted: "[N]either the field of aviation safety nor negligence and strict product liability

claims against aircraft manufacturers are impliedly preempted by federal law in the Fifth Circuit.<sup>23</sup>

#### "IMPLIED PREEMPTION" AND THE SUPREME COURT

The U.S. Supreme Court denied certiorari in *Greene*, indicating that it does not, at present, intend to address the split in the circuit courts on implied preemption in the aviation arena. With no definitive answer, the lower courts are left to analyze the Court's most recent preemption decisions in other areas. Those decisions show an increasing reluctance to find implied preemption unless a direct conflict between federal and state law exists.

In its 2005 decision in *Bates v. Dow Agrosciences LLC*,<sup>24</sup> dealing with implied preemption under FIFRA, the Federal Insecticide, Fungicide, and Rodenticide Act, the Court revived the "presumption against preemption," stating 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." In a separate opinion in *Bates*, Justice Clarence Thomas, joined by Justice Antonin Scalia, expressed "increasing reluctance" at 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.<sup>25</sup>

Further, 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."<sup>26</sup>

The Court also addressed one of defendants' favorite arguments: the "crazy-quilt" effect. The herbicide manufacturer in *Bates* argued, as do defendants in aviation product 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."<sup>27</sup>

In conclusion, the majority of case law rejects defendants' contention that the entire field of aviation safety is preempted. Further, recent Supreme Court decisions, although not addressing the Federal Aviation Act, indicate that unless there is a direct conflict between state and federal law, the "presumption against preemption" will defeat defendants' "field preemption" defense.

#### Notes:

1. See *American Airlines v. Wolens*, 513 U.S. 219, 222 (1995) (the Federal Aviation Act of 1958 "contained no clause preempting state regulation").
2. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).
3. *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992).
4. 181 F.3d 363 (3rd Cir. 1999).
5. 409 F.3d 784 (6th Cir. 2005), cert. denied, 126 S.Ct. 1465 (2006).
6. *Abdullah*, 181 F.3d at 367.
7. *Id.* at 368.
8. *Greene*, 409 F.3d at 795.
9. 985 F.2d 1438 (10th Cir. 1993), cert. denied, 510 U.S. 908 (1993).
10. *Id.* at 1441.
11. *Id.* at 1442.
12. *Id.* at 1446.
13. 2006 WL 1084103 (D.S.D. April 20, 2006).
14. *Id.* at \*22.
15. *Id.*
16. 417 F.Supp.2d 824 (E.D. Tex. 2006).
17. *Id.* at 835. See also, e.g., *Vinnick v. Delta Airlines, Inc.*, 113 Cal.Rptr.2d 471, 478-79 (2001) (finding *Abdullah* to be "unpersuasive and contrary to controlling California authority" and stating that *Abdullah* "does not seem to represent the prevailing view on the preemptive effect of the 1958 Act."); *Sakellaridis v. Polar Air Cargo*, 104 F.Supp.2d 160, 163 (E.D.N.Y. 2000) ("[T]he defendant's reliance on *Abdullah* is irrelevant. The court of appeals for the Second Circuit has held that the FAA does not preempt state common law claims."); *Skidmore v. Delta Air Lines, Inc.*, 2000 WL 1844675, \*3 (N.D. Tex. 2000) (finding the Third Circuit's "novel suggestion that the federal standard of care should be applied in state personal injury actions" to be contrary to Fifth Circuit law).
18. 366 F.3d 380 (5th Cir. 2004).
19. *Id.* at 381.
20. *Id.* at 384.
21. *Id.* at 383.
22. *Id.* at 384.
23. *Monroe*, 417 F.Supp.2d at 836.
24. 544 U.S. 431 (2005).
25. *Id.* at 459 (Thomas, J., concurring in the judgment in part and dissenting in part) (cites omitted).
26. *Bates*, 544 U.S. at 449.
27. *Bates*, 544 U.S. at 451-52.

*Donna Bowen, Slack & Davis, 2705 Bee Caves Rd., #220, Austin, TX 78746-5684, T: 512/795-8686, dbowen@slackdavis.com.*

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