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## Aviation Law Emergency Helicopter Safety Crisis, Federal Preemption

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The life-saving flights flown by Emergency Medical Services (EMS) constitute the most dangerous nonmilitary flying activity in the United States. In the last year, nine EMS helicopters crashed, killing 35 people. This continues an alarming trend of EMS helicopter accidents dating back to the early 1990s.<sup>1</sup>

The Federal Aviation Administration (FAA) has failed to properly address this critical public safety problem by properly regulating the EMS industry. Instead, in partnership with the industry, the FAA rejected efforts to mandate clear safety requirements, and issued largely ineffective guidelines.

The FAA has repeatedly sided with the industry by advancing the federal preemption doctrine to defeat the state efforts to address EMS safety. For example, the FAA successfully defeated a Tennessee requirement that EMS helicopters be equipped to fly instrument approaches in restricted visibility, for instance, into darkness, rain, clouds and fog. This was a sensible safety improvement, since inadvertent flight into instrument meteorological conditions is a main cause of EMS crashes. Yet, because of the FAA's efforts, EMS operators in Tennessee and throughout the nation take risks on a daily basis by operating without basic safety equipment.

Federal aviation regulations are minimum safety standards. Courts have long held that companies and individuals may be held to higher safety standards depending on the circumstances. The FAA's efforts to push federal preemption and its unacceptable response to the EMS helicopter safety problem result in lower safety standards. As a result, the EMS safety crisis continues.

### EMS Aviation's Safety Issues

EMS helicopter flights are often made into ad hoc landing zones and in hazardous conditions, including bad weather, high altitude and rough terrain. Night flying and inadvertent flying in "instrument meteorological conditions," where the pilot cannot see enough visual cues outside the aircraft to fly and must rely on instruments, are common on EMS missions. These conditions increase accident rates. Poor visibility induces pilot vertigo and increases the risk of a crash.<sup>2</sup>

Many EMS helicopters are not certified for instrument flight and do not have modern devices - such as night-vision and power-line-detection systems - that mitigate limited visibility in bad weather and darkness.<sup>3</sup>

EMS pilots face intense pressure to complete missions that may be critical to the survival of a patient. Pilots often press on with missions that should be cancelled because of poor flight conditions. Ironically, a 2005 study concluded that most EMS helicopter flights are actually not necessary for a patient's health.<sup>4</sup>

In the nonprofit, hospital-based model of a decade ago, medical centers controlled EMS flights. But the EMS industry now predominantly consists of for-profit companies with large capital investments, including aircraft and equipment purchases or leases, repair and maintenance costs, medical and aviation personnel staffing and crew training. Often, EMS companies are paid based on the number of flights completed, which may put added economic pressure on pilots to complete flights despite unacceptable risks.

### Lack of Government Oversight

Although the FAA has acknowledged the dangers posed by EMS flights, the agency has failed to issue common-sense regulations needed to promote safety. Instead, the FAA has followed the input of the EMS industry and issued largely voluntary and insufficient recommendations on EMS flight crew and management training.<sup>5</sup>

This past June, the FAA issued a fact sheet listing the steps it has taken to respond to the EMS helicopter safety problem. The FAA stated that its focus was on "short-term safety gains that do not require rule making" and forging "a new government and industry partnership . . . ."

The FAA issued recommendations to:

- Encourage risk-management training to flight crews so that they can make more analytical decisions about whether to launch on a mission;
- Provide better training for night operations and responding to inadvertent flights into deteriorating weather conditions;
- Promote technology such as night-vision goggles, terrain awareness and warning systems and radar altimeters; and
- Provide airline-type FAA oversight for operators.

The National Transportation Safety Board (NTSB), the independent agency tasked with investigating aviation accidents, has been sharply critical of the FAA's efforts to respond to the EMS helicopter safety problem. The NTSB considers improving safety of EMS flights as one of the six "Most Wanted Safety Improvements."

Specifically, the NTSB has urgently recommended that the FAA require:

- That all EMS flights with medical personnel on board be required to comply with more stringent commuter aircraft regulations;
- Stringent standards for flight-risk evaluation;
- Formalized dispatch and flight-following procedures including up-to-date weather information; and
- Installation of terrain awareness and warning systems.

The NTSB has described the FAA's response to the NTSB's safety recommendations as "unacceptable."<sup>6</sup>

### Federal Preemption

Not only has the FAA abandoned its duty to mandate safety changes, it has successfully challenged the efforts of states to impose safety requirements, arguing that "federal preemption" prevents states from regulating EMS aviation safety.

Much has been reported on the Bush administration's efforts to promote federal preemption as part of tort reform strategy.<sup>6</sup> Using various methods such as adding federal preemption language into the preamble of regulations and filing "friends of the court" briefs, the Bush administration has advanced federal preemption as a means of achieving tort reform. In practice, federal preemption immunizes business against liability based on state law. In aviation, it also prevents states from improving aviation safety.

In EMS helicopter safety, the Bush administration, on behalf of the FAA, sided with Air Evac EMS Inc., a private company operating EMS helicopters, against the state of Tennessee's Board of Emergency Medical Services (Tennessee Board), which issued rules requiring EMS helicopters operating in Tennessee to have navigational equipment that would enable pilots to fly instrument approaches. Although the FAA recognizes that "inadvertent operation into instrument meteorological conditions" is a primary cause of EMS helicopter accidents, the FAA has not required the EMS industry to provide the equipment needed to assist pilots to fly instrument approaches.

Air Evac argued that Tennessee's EMS Board's rules were preempted by express and implied field preemption.<sup>7</sup> The FAA backed Air Evac's arguments, but went one step further, arguing that conflict preemption also precluded the Tennessee Board's rules.<sup>8</sup>

In pertinent part, the FAA argued that the entire field of aviation safety was preempted by federal law and that states are unable to regulate anything related to safety. The district court agreed. In so doing, the court followed a very broad ruling from the U.S. Court of Appeals for the Sixth Circuit in *Greene v. B.F. Goodrich Avionics*, 409 F.3d 784 (6th Cir. 2005). The district court accordingly struck down the Tennessee EMS Board's rules. Air Evac and other EMS operators may now operate in Tennessee (and elsewhere) without instrument flight equipment that the Tennessee Board determined was necessary for safety.

The district court's decision followed a trend that started in 1999 when the Third Circuit issued its decision in *Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999). In *Abdullah*, the Third Circuit found that Congress intended that the 1958 Federal Aviation Act would preempt the entire field of aviation safety. The Third Circuit's decision was in stark contrast to 40 years of settled law and practice which recognized that the federal regulations are only a "minimum standard" and that there was no federal preemption where the state had clear regulations or the finding of a jury regarding the duty, which did not conflict with the minimum standards. See *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir. 1993).

### Conclusion

Federal preemption turns the federal "minimum" safety standards into the only standards with which the industry need comply. We have seen how the government's failure to properly regulate real estate loans and the trading of mortgage-backed securities undermined our economy. Failure to properly regulate aviation safety is another serious problem that endangers passengers and flight crews.

The failure of the FAA to properly regulate the EMS helicopter industry coupled with the tag team efforts of that industry and the FAA to prevent states from imposing rules designed to make EMS helicopter operations safer, are urgent matters that we hope new administration will address. The NTSB is right to call the FAA's response to the safety concern "unacceptable."

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### Endnotes:

1. Alan Levin & Robert Davis, "Surge in Crashes Scars Air Ambulance Industry," USA TODAY, July 18, 2005, at A1. The Helicopter Association International (HAI) reported 127 helicopter emergency service crashes between January 1991 and

August 2005; 49 were fatal, with 128 deaths. See HELICOPTER ASS'N INT'L, WHITE PAPER, IMPROVING SAFETY IN HELICOPTER EMERGENCY MEDICAL SERVICE (HEMS) OPERATIONS 3 (August 2005), available at [www.rotor.com/news/hemswhitpaper.pdf](http://www.rotor.com/news/hemswhitpaper.pdf) (last visited Dec. 22, 2005); see also Andy Pasztor, "NTSB to Detail Safety Suggestions for Air Ambulances," WALL ST. J., May 9, 2005, at A4; Andy Pasztor, "NTSB to Push for Safety Upgrade of Emergency Medical Helicopters," WALL ST. J., May 9, 2005, at A4.

2. The FAA states that the main causes of the accidents between 1998 and 2004 "were controlled flight into terrain (CFIT), inadvertent operation into instrument flight conditions and pilot spatial disorientation/lack of situation awareness in night operations." EMS Helicopter Safety Fact Sheet, June 30, 2008, [www.faa.gov/news/fact\\_sheets/news\\_sheets/news\\_story.cfm?newsid=6763](http://www.faa.gov/news/fact_sheets/news_sheets/news_story.cfm?newsid=6763).

3. Currently, EMS flights may begin, without passengers, under Federal Aviation Regulations (FAR) Part 91 rules, which allow flight even if weather conditions are not good enough for passenger-carrying commercial operations (governed by FAR part 135 rules). Once a patient is collected, the mission becomes an FAR Part 135 flight, which has stricter standards. 14 C.F.R. pt. 91 (2005); 14 C.F.R. pt. 135 (2005).

4. Bryan E. Bledsoe, et al., "Helicopter Transport for Trauma Patients: A Meta Analysis," 9 PREHOSPITAL EMERGENCY CARE (forthcoming Jan.-Mar. 2006).

5. See Fed. Aviation Admin., "Air Ambulance Operations and Procedures," Bull. No. HBAT 98-01 (Jan. 15, 1998), in FLIGHT STANDARDS HANDBOOK BULL.: AIR TRANSPORTATION app. 3 (Dec. 10, 2005); Fed. Aviation Admin., Notice No. N8000.301, Operational Risk Assessment Programs for Helicopter Emergency Services (Aug. 1, 2005), available at [www.faa.gov/library/manuals/examiners\\_inspectors/8000/media/N8000-301.doc](http://www.faa.gov/library/manuals/examiners_inspectors/8000/media/N8000-301.doc); Fed. Aviation Admin., Notice No. N8000.293, Helicopter Emergency Medical Services Operations (Jan. 28, 2005), available at [www.faa.gov/library/manuals/examiners\\_inspectors/8000/media/N8000\\_293.pdf](http://www.faa.gov/library/manuals/examiners_inspectors/8000/media/N8000_293.pdf).

6. See "NTSB Most Wanted Safety Improvements, Aviation Issue Areas," [www.nts.gov/recs/mostwanted/aviation\\_issues.html](http://www.nts.gov/recs/mostwanted/aviation_issues.html).

7. See *Air Evac EMS Inc. v. Robinson*, - F.Supp.2d -, 2007 WL 1345450 \*8 (M.D. Tenn. May 7, 2007).

8. *Id.* The FAA argued that its certification of Air Evac's operation as an air ambulance operator without requiring the equipment and in fact disallowing flight in instrument conditions conflicted with the Tennessee rules.