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Does Federal Aviation Act Preempt State Law Product Liability Actions?

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Whether state products liability laws are preempted by the 1958 Federal Aviation Act has been a major issue in aviation law over the past decade. Although a majority of courts have rejected arguments for "field preemption" of state law, the issue remains hotly contested and has become a frontline defense of aviation manufacturers in every case. The consequence of preemption is breathtaking: it would wipe out over six decades of state law jurisprudence defining strict liability and negligence causes of action and could shield manufacturers from liability in most aviation cases.

The recent Supreme Court decision in *Wyeth v. Levine*,[1] however, has shifted the legal landscape against implied field preemption. *Wyeth* rejected arguments made by a drug manufacturer to impose a federal statutory shield to bar the imposition of state products liability standards. The Court held that absent an express preemption clause, courts should not ordinarily infer that Congress intended to overturn state law.

Before and after Congress passed the Federal Aviation Act, state and federal courts routinely applied state law negligence and strict liability standards to impose liability on manufacturers for injuries and deaths caused by defective aircraft and components. In 1999, the Third Circuit decision in *Abdullah v. American Airlines Inc.*,[2] a personal injury claim arising out of an in-flight turbulence incident, made the startling pronouncement that "the entire field of aviation safety" is preempted by federal law.[3]

Defendants seized on *Abdullah's* broad language to argue that the "minimum standards" imposed on manufacturers under the Federal Aviation Act were also intended to overturn state products liability and negligence laws. According to these defendants, the certification procedures for aircraft under the Federal Aviation Act divested states of their sovereign power to impose common law standards of liability, and a product that meets the federal minimum standard for certification cannot be found to be defective or negligently designed.

Of course, every airplane and helicopter made in the United States must be certified by the FAA to meet certain federal minimum standards. Very often the certification is performed by the defendants themselves through their employees to whom the FAA has delegated certification authority. But the Federal Aviation Act and federal regulations do not provide a complete blueprint to build an aircraft. Nor do they set forth basic recognized standards of liability for product defects or negligence.

Indeed, the application of field preemption would gut the key safety objectives of state law to make manufacturers responsible to design and produce reasonably safe products.

The arguments for implied field preemption of tort actions involving the design and manufacture of aviation products run counter to various provisions in the Federal Aviation Act and amendments to that Act:

• In 1958, Congress expressly preserved all state remedies by including a savings clause in the Federal Aviation Act and did not establish a private federal right of action for persons harmed by defective products. Congress neither established nor did it authorize the Federal Aviation Administration to set standards of care; instead, it only authorized the FAA to impose minimum standards.

• In 1978, Congress amended the Federal Aviation Act to include an express preemption clause that precludes states from adopting standards relating to "rates, routes, or services" of an air carrier. The existence of this limited express preemption clause shows that Congress did not intend to preempt all state laws in the aviation field.

• In 1994, Congress enacted the General Aviation Revitalization Act (GARA), which only preempts a limited class of general aviation aircraft placed in service more than 18 years before the injury-producing event. GARA's legislative history demonstrates that Congress was quite aware that courts were applying state law standards to determine whether aviation products were unsafe. Instead of broadly preempting state products liability and negligence standards, Congress only narrowly preempted the operation of state law by imposing the statute of repose.

'Abdullah' Decision

The *Abdullah v, American Airlines* decision gave birth to a number of implied field preemption decisions over the past 10 years. In *Abdullah*, the plaintiffs, passengers on an American Airlines flight from New York to Puerto Rico, sustained injuries when the aircraft encountered severe turbulence. The plaintiffs alleged that the pilot and flight crew were negligent in failing to take reasonable precautions to avoid or warn passengers of turbulent conditions.

The U.S. Court of Appeals for the Third Circuit held that plaintiffs' common law claims of negligence and recklessness were preempted because the Federal Aviation Act and the regulations promulgated under the act occupied the "entire field of aviation safety." The court reasoned that preemption does not flow from the wording of any specific regulation, but is derived from "the overall concept that aircraft may not be operated in a careless or reckless manner." The court concluded "that because of the need for one consistent means of regulating aviation safety, the standard applied in determining if there has been careless or reckless operation of an aircraft, should be federal; state or territorial regulation is preempted."

By its terms, *Abdullah* applies only to aircraft operations. The court's focus on common law claims of negligence and recklessness in the flight crew's operation of a flight demonstrates its inapplicability to cases involving products liability claims. Importantly, *Abdullah* did not consider the intent of Congress, as expressed in GARA, to preserve and not preempt state law product liability claims subject to an 18-year statute of repose.

'Wyeth v. Levine'

Wyeth is the most significant court decision on implied federal preemption in many years. In *Wyeth*, the plaintiff alleged that the label on the drug Phenergan failed to warn against the danger of intravenously administering the drug with an IV-push, which resulted in a patient, who happened to be a musician, developing gangrene and losing her arm.

Having abandoned its implied field preemption argument, which was unsuccessful in the District Court, Wyeth relied solely upon the doctrine of implied conflicts preemption. It argued that because the Food,

Drug, and Cosmetic Act (FDCA) requires the Food and Drug Administration (FDA) to determine that a drug is safe and effective under the conditions set forth in the drug labeling, the FDA "must be presumed to have performed a precise balancing of risks and benefits and to have established a specific labeling standard that leaves no room for different State-law judgments."

In rejecting Wyeth's argument, the court pointed to two actions of Congress evidencing that it had no intent to impliedly preempt state-based tort actions. First, Congress did not provide in the FDCA or any amendment to the statute a federal cause of action for consumers harmed by unsafe or ineffective drugs that violate a federal regulatory standard, signaling a determination that "state rights of action provide appropriate relief for injured consumers." Second, although Congress amended the FDCA to include an express preemption provision precluding tort claims related to defects in medical devices, it declined to enact such a provision barring failure to warn claims for prescription drugs.

The court concluded that Congress' decision to enact a preemption clause limited only to medical devices, "coupled with its certain awareness of the prevalence of state tort litigation [relating to prescription drugs], is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness."

Whether *Abdullah* remains valid law post-*Wyeth* is an open question. The Third Circuit has not returned to the issue of preemption since the Supreme Court handed down *Wyeth*. Recently, in *Er, et al. v. Boeing*,[4] the Circuit Court of Cook County, Ill., relied on *Wyeth* to reject an argument that federal law preempted aviation product liability law. (One of the authors argued the preemption motion in *Er* on behalf of the plaintiffs.)

The 'Er' Decision

Er arises from the Feb. 25, 2009, crash of a Boeing 737-800 aircraft operated by Turkish Airlines as Flight TK-1951. The airplane crashed during an attempted approach to Schiphol Airport in Amsterdam. The plaintiffs allege that the defective design of the airplane caused the autothrottles to reduce power to flight idle because a failed radio altimeter "told" the autothrottles that the airplane was at minus-8 feet rather than the true altitude of 1,950 feet. (The autothrottles are designed to reduce power when the airplane is on the ground.) The autopilot's unexpected reduction of power caused the airplane to stall and crash according to plaintiff's allegations.

Boeing moved to dismiss plaintiffs' lawsuits arguing that plaintiffs had failed to allege any violation of a federal regulation and standard, which it argued must be shown because the Federal Aviation Act preempted any relevant standards found in Illinois products liability or negligence law. The court rejected Boeing's argument.

The *Er* court found that there was "no evidence that Congress had a clear and manifest intent to preempt all State products liability and negligence laws when it enacted the [Federal Aviation] Act." The court held the following:

The fact that Congress did not preempt state common law standards in aviation tort cases is not an oversight. Congress has been fully aware of the aviation industry's antipathy to state-law tort actions against aircraft manufacturers. Congress' response has been measured and restrained. Congress expressly barred, by a statue of repose, a limited category of products liability claims against manufacturers of a specific class of aircraft in the General Aviation Revitalization Act (GARA). This statute, coupled with the inclusion of a "savings clause" in the Act, reveals Congress' intent to preserve the application of traditional tort-law standards in all areas of aviation safety outside the limited scope of its express preemptive amendments.

The court refused to follow two Pennsylvania federal district court decisions that had extended *Abdullah* to products liability claims. The court characterized the two decisions as a small minority and unpersuasive.[5]

The *Er* court followed the narrow view of preemption adopted by the Supreme Court in *Wyeth*. Whether other courts, including the Third Circuit, will reconsider the aviation preemption issue in light of *Wyeth* remains to be seen. While it is possible that the debate over the federal preemption of state product liability law could be on the wane, the Supreme Court may need to decide the issue once and for all.

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Endnotes:

1. 129 S.Ct. 1187, 1199-2000 (2009).

2. 181 F.3d 363 (3d Cir. 1999).

3. *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1084 (9th Cir. 2001) ("[i]t is apparent that Congress was deeply concerned about the enormous product liability costs that our tort system had imposed upon manufacturers of general aviation aircraft…caused by the long tail of liability attached to those aircraft, which could be used for decades after they were first manufactured and sold"); *Blazevska v. Raytheon Aircraft Co.*, 522 F.3d 948, 951 (9th Cir. 2008) (purpose of GARA was to limit the widespread use of state tort-based product liability claims against manufacturers of general aviation aircraft in service more than 18 years); *Robinson v. Hartzell Propeller Inc.*, 454 F.3d 163, 173 (3d Cir. 2006) (same); H.R.Rep. No.103-525, pt. 1, at 1-4 (1994), reprinted in 1994 U.S.C.C.A.N. 1638, 1638-41 (when discussing the evolution of aviation law, the House reported that "[t]he liability of general aviation aircraft manufacturers is governed by tort law….[T]he public's right to sue for damages [in the field of aviation] is ultimately grounded in the experience of the legal system and values of the citizens of a particular State").

4. Slip opinion, case No. 2009 L 013791 (Judge Dennis J. Burke) (Cir. Ct. Cook County, Aug. 18, 2010).

5. Id. at 15 n5., referring to *Landis v. US Airways Inc.*, 2008 WL 728839 (W.D. Pa. 2008); *Duvall v. Avco, Corp.*, 2006 WL 2420794 (M.D. Pa., 2006).