Pulling Back? Courts, Preemption and Products Liability Claims

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Four federal district courts in the Fifth, Eighth and Eleventh circuits and at least two prominent state courts recently held that state law aviation products liability claims were not preempted by federal law. This article explores this potential trend of courts refusing to grant defendants blanket immunity from traditional tort standards of care in this important area of aviation safety.

Implied field preemption, frequently invoked by defendants in aviation product cases, occurs when federal law leaves no room for state regulation, and congressional intent to supersede state law is "clear and manifest."[1] The standard is high because a court must presume that "state and local regulation related to matters of health and safety can normally coexist with federal regulations."[2]

Whether aviation product cases are preempted by federal law is a hotly contested issue that may ultimately need to be resolved by the Supreme Court. The intent of Congress in passing the Federal Aviation Act of 1958 and its subsequent amendments (collectively, the FAAct) lies at the heart of the debate.

Congress passed the FAAct "to promote safety in aviation and thereby protect the lives of persons who travel on board aircraft."[3] The FAAct originally included a broad savings clause that stated: "[n]othing contained in this Act shall in any way abridge or alter remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."[4] The savings clause was later simplified to read: "[a] remedy under this part is in addition to any other remedies provided by law."[5]

Congress amended the FAAct through passage of the Airline Deregulation Act of 1978 (ADA), which included a provision expressly preempting state and local laws "related to a price, route, or service of an air carrier. "[6] Congress further amended the FAAct through passage of the General Aviation Revitalization Act (GARA) in 1994, which imposed an 18-year statute of repose upon civil actions against aircraft manufacturers for injury, death, or property damage.[7]

Today, courts addressing preemption challenges in aviation product cases must navigate a diverse legal patchwork complicated by apparent splits among the U.S. Courts of Appeals. In 1993, the Tenth Circuit in *Cleveland v. Piper Aircraft* ruled that product cases were governed by state law standards of care and not preempted.[8] In 1999, however, the Third Circuit held in *Abdullah v. American Airlines*[9] 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."[10] While *Abdullah* involved an injury suit against a commercial airline, in 2005 the Sixth Circuit applied *Abdullah* to preempt a plaintiff's state-law failure to warn claim in a products liability case arising from a helicopter crash.[11] Yet the same Sixth Circuit panel incongruously applied Kentucky state law liability standards to plaintiff's manufacturing defect claim.[12]

Then in 2010, in *US Airways v. O'Donnell*, the Tenth Circuit retreated from its prior ruling in *Cleveland*, concluding that federal regulation occupies the field of aviation safety to the exclusion of state regulations.[13] Also in 2010, in *Elassaad v. Independence Air*, the Third Circuit limited *Abdullah's* reach by holding that the FAAct did not preempt state law standards of care in the area of safety during passenger disembarkation.[14]

Recent Product Cases

The most recent product cases suggest a significant shift away from the general implied field preemption approach of *Abdullah* and its progeny.

The Texas federal district court decision last year in *Morris v. Cessna Aircraft* is a good example of the judicial restraint that characterizes this recent trend.[15] Plaintiffs in *Morris* were injured in a Cessna aircraft crash and asserted claims under Texas law for products liability based on strict liability, negligence, and

breach of warranty.[16]

Cessna argued that the FAAct preempted the standard of care for plaintiffs' product liability claims and that federal regulatory standards for aircraft design and performance provided the sole benchmark to determine liability. Cessna also suggested that there was a presumption in favor of preemption because "the states have never 'traditionally occupied' the field of air safety regulation."[17] The district court, however, found that the presumption against preemption applied "because state tort law has long been concerned with securing compensation for its citizens who sustain injuries caused by defective products."[18] The court reasoned that the "history of federal regulation over air transportation does not detract from the states' long-standing role in ensuring product safety."[19]

Cessna further contended that the federal government fully occupies the field of aviation safety, particularly in regard to the design certification and operation of aircraft, where the federal interest and oversight is pervasive. The district court rejected this argument, concluding that Supreme Court and Fifth Circuit precedent dictated a field preemption analysis tailored to discrete areas of aviation safety rather than the general analysis applied in *Abdullah*.

The court in *Morris* was not persuaded that Congress evinced a clear and manifest intent to exclusively occupy the discrete area of aviation safety. In the area of aircraft design and manufacture requirements, the FAAct empowers the FAA to create only "minimum standards," leaving room for the states' traditional role of compensating injuries based on common law products liability standards. For instance, the FAAct sets "minimum standards required in the interest of safety" for aircraft design, construction, and performance, but establishes "regulations and minimum standards" in areas such as aircraft inspection and "other practices, methods, and procedures that the Administrator finds necessary for safety in air commerce."[20] This "minimum standards" language set a floor, not a ceiling.[21] Ultimately, the court concluded that the FAAct does not preempt the field of aircraft safety generally or aircraft design in particular and applied state tort law to the product liability claims.

Johnson v. Avco considered preemption with respect to the design and manufacture of an aircraft engine.[22] The court denied the manufacturer's preemption motion, finding that the relevant federal aviation regulations were not pervasive and only specified the use of durable materials in the engine to minimize the risk of fire. No specific regulations defined the materials to be used in the allegedly defective fuel lines or fuel clamps, aside from a requirement that they be fireproof. The court concluded that in the absence of such regulations there can be no finding that engine fuel lines and clamps were regulated by federal law to the exclusion of state tort safety standards.[23]

Two district court decisions in the Eleventh Circuit relied heavily on Eleventh Circuit preemption precedent in upholding plaintiffs' respective state law product claims. Plaintiffs in *Ballenger v. Sikorsky Aircraft* alleged that the defective design of a Sikorsky helicopter's windshield and throttle caused it to crash in the Gulf of Mexico.[24] Defendant Sikorsky moved for judgment as a matter of law on the pleadings, arguing that Congress intended to centralize air safety authority with the FAA, citing the FAAct and FAR 29.1141, which defines certain rules for throttle controls.[25]

Ballenger followed the Eleventh Circuit ruling in *Public Health Trust of Dade Cty., Fla. v. Lake Aircraft*, which found against preemption in the field of aviation.[26] *Public Health* upheld a plaintiff's state law products liability claims that an aircraft's seat design was defective despite complying with federal design and performance standards, finding it significant that the preemptive scope of the ADA only extended to "airline rates, routes or services."[27] *Ballenger* noted that while the Eleventh Circuit might decide in favor of preemption when next confronted with the issue, the court was bound by *Public Health* and would not forecast the overruling of the precedent on "mere speculation."[28] Accordingly, the court denied defendants' motion.

North v. Precision Airmotive involved a summary judgment motion in a case in which plaintiff alleged that the manufacturer failed to provide adequate warnings and instructions regarding an aircraft engine component.[29] The plaintiff's strict liability and negligence claims were based on state law and alleged industry standards, both of which the defendant argued were preempted by federal law. The district court followed *Public Health* and found that the Supreme Court opinions cited by defendant left open the possibility that the Eleventh Circuit's decision in *Public Health* was correct.[30]

The Texas Court of Appeals in its 2011 decision *de Damian v. Bell Helicopter Textron* applied state tort law in

a helicopter product case and declined to hold that the FAAct impliedly preempts the field of common-law claims.[31] The court was persuaded by cases from the Sixth, Ninth, and Eleventh circuits, which "conflict with *Abdullah*" and held that the FAAct did not preempt defective product claims similar to plaintiff's claim relating to a helicopter's defective windshield.[32]

Lastly, *Er v. Boeing* arose from the 2009 crash of a Boeing 737-800 aircraft operated by Turkish Airlines.[33] The airplane crashed during an attempted approach to Schiphol Airport in Amsterdam. The plaintiffs alleged that a defective radio altimeter supplied incorrect altitude data to the autothrottles, which pulled back the engine power to idle and led to the crash. Plaintiffs' product claims centered on the design, testing, and manufacturing of the aircraft's radio altimeter, autopilot, and autothrottle system.

Boeing moved to dismiss plaintiffs' claims, arguing that plaintiffs failed to allege any violation of a federal regulation and standard, and that any relevant state law standards were preempted. The court rejected Boeing's argument.

Er 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 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 statute of repose, a limited category of products liability claims against manufacturers of a specific class of aircraft in the [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 also refused to follow two Pennsylvania federal district court decisions that extended *Abdullah* to products liability claims. The court characterized the two decisions as a small minority and unpersuasive.[34]

Conclusion

Morris, *Johnson*, *Ballenger*, *North*, *de Damian* and *Er* reflect deference by courts to the traditional police powers of the states in ensuring consumer safety and the presumption that state standards can coexist with federal regulations. They also suggest a stricter adherence to implied field preemption principles, and the exacting requirement of "clear and manifest" congressional intent to supersede state law.

While limited to aviation products liability litigation, these cases nevertheless offer valuable lessons for courts addressing other claims that implicate aviation safety. Courts should not automatically grant defendants blanket immunity from state standards of care. Rather, they should examine the discrete issues in the case and determine whether there is pervasive federal regulation governing the issues before preempting applicable state standards.

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Endnotes:

1. *English v. Gen. Elec.*, 496 U.S. 72, 78-79 (1990). Congress' intent for federal law to occupy a field exclusively "may be inferred from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, or where an Act of Congress touches a field in which the interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Id. at 79.

2. *Hillsborough Cnty. v. Automated Med. Laboratories*, 471 U.S. 707, 718 (1985).

3. *In re Mexico City Aircrash of Oct. 31, 1979*, 708 F.2d 400, 406 (9th Cir. 1983).

4. 49 U.S.C. App. 1506.

5. 49 U.S.C. 40120(c).

6. 49 U.S.C. 41713(b)(1).

7. 49 U.S.C. 40101.

8. *Cleveland v. Piper Aircraft*, 985 F.2d 1438, 1443-44 (10th Cir. 1993) (holding that Congress did not indicate "'a clear and manifest' intent to occupy the field of airplane safety to the exclusion of state common law").

9. *Abdullah v. American Airlines*, 181 F.3d 363 (3d Cir. 1999). Plaintiffs in *Abdullah* were injured as a result of turbulence during a flight, and claimed that the pilot and flight crew negligently failed to avoid the turbulence or warn plaintiffs. Id.

10. Id. at 367. But cf. *Martin v. Midwest Express Holdings*, 555 F.3d 806, 808-12 (9th Cir. 2009) (distinguishing *Abdullah* and holding plaintiff's claims for defective design of aircraft stairs not preempted by FAA).

11. *Greene v. B.F. Goodrich Avionics Sys.*, 409 F.3d 784 (6th Cir. 2005).

12. Id. at 788.

13 *US Airways v. O'Donnell*, 627 F.3d 1318 (10th Cir. 2010).

14. *Elassaad v. Independence Air*, 613 F.3d 119, 131 (3d Cir. 2010). The Third Circuit clarified that its use of the term "aviation safety" in *Abdullah* was limited to "in-air safety." Id. at 127.

15. *Morris v. Cessna Aircraft*, 833 F.Supp.2d 622 (N.D. Tex. 2011).

16. Id. at 626. Plaintiffs' product case was principally focused on the aircraft's capacity to operate in icing conditions, but their complaint generally alleged that defendant Cessna breached duties under common law and federal regulations with respect to the design, manufacture, assembly, inspection, testing, warning, instruction, sale, service, repair and/or maintenance of the aircraft. Id.

17. Id. at 629.

18. Id. at 630.

19. Id. (drawing an analogy to the Supreme Court's holding in *Wyeth v. Levine*, 555 U.S. 555 (2009)).

20. Id. at 633.

21. Id. at 635.

22. *Johnson v. Avco*, 702 F.Supp.2d 1093 (E.D. Mo. 2010).

23. Id. at n. 3.

24. *Ballenger v. Sikorsky Aircraft*, No. 2:09CV72 (MHT), 2011 WL 5245209 (M.D. Ala. Nov. 3, 2011).

25. Id. at *1.

26. Id. at *2 (citing *Pub. Health Trust of Dade Cnty., Fla. v. Lake Aircraft*, 992 F.2d 291 (11th Cir. 1993)).

27. *Pub. Health*, 992 F.2d at 194.

28. *Ballenger*, 2011 WL 5245209, at *2.

29. *North v. Precision Airmotive*, No. 6:08CV2020 (ORL), 2011 WL 679932 (M.D. Fl. Feb. 16, 2011).

30. Id. at *5.

31. *de Damian v. Bell Helicopter Textron*, 353 S.W.3d 124, 136-37 (Tex. App. 2011).

32. Id. at 136-37.

33. *Er v. Boeing*, slip op., Case No. 2009 L013791 (Cir. Ct. Cook County Aug. 18, 2010).

34. Id. at 15 n. 5.