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KEEPING AN EYE ON “PERVERSIVE REGULATION” IN AVIATION
AND ITS EFFECT ON IMPLIED FEDERAL PREEMPTION*By William D. Janicki and Lilian M. Loh*

Earlier this month, the Ninth Circuit issued another opinion regarding the scope of federal preemption in the context of federal aviation regulations. In *National Federation of the Blind v. United Airlines Inc.* (No. 11-16240), the Court held that a class action alleging claims for violation of California’s antidiscrimination laws was preempted by the Air Carrier Access Act (ACAA) and its implementing regulations.

The Ninth Circuit previously held that federal law impliedly preempts state laws that regulate aviation safety standards, and that federal law establishes the standard of care in areas in which the Federal Aviation Administration (FAA) issues pervasive regulations. In *Montalvo*, the plaintiffs alleged the airline failed to warn about the risk of deep vein thrombosis.¹ The Ninth Circuit held the Federal Aviation Act of 1958 (FAAct) and its implementing regulations preempted the field of preflight warnings because the regulations regarding passenger warnings were pervasive, complete, and comprehensive. The plaintiffs’ negligence claim failed because there was no federal requirement to warn of deep vein

thrombosis. In *Martin*, the Ninth Circuit rejected a broad reading of *Montalvo*, and limited the scope of implied field preemption under the FAAct.² The plaintiff in *Martin* alleged that an airplane’s stairs were defectively designed because they had only one hand rail. The Court held that a state law claim would be preempted by the FAAct only if the specific area covered by the claim was the subject of “pervasive” federal regulations. Under that standard, the plaintiff’s claims were not preempted because the only federal regulation regarding stairs provides only that they may not block the emergency exits, and says nothing about hand rails or design features.

The Ninth Circuit later considered whether the ACAA - an amendment to the FAAct that protects disabled travelers from discrimination by air carriers - preempts state law tort claims.³ *Gilstrap* involved claims that the defendant airline failed to provide adequate wheelchair assistance. The Court held that the ACAA could preempt state law standards of care if “pervasive federal regulations” had been issued in the specific area covered by the

¹ *Montalvo v. Spirit Airlines*, 508 F.3d 464 (9th Cir. 2007).

² *Martin ex rel. Heckman v. Midwest Exp. Holdings, Inc.*, 555 F.3d 806 (9th Cir. 2009).

³ See *Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995 (9th Cir. 2013).

state law tort claim. *Gilstrap* further clarified that, in evaluating field preemption, the “pervasive regulation” analysis must be undertaken in connection with each theory of liability. The Court held that ACAA regulations regarding wheelchair assistance were pervasive and preempted the plaintiff’s claims. The plaintiff’s alternative theory of liability based on the airline allegedly exhibiting hostility in response to her request for assistance, however, was not preempted because the regulations were silent regarding how airline agents should interact with passengers.

With that background, the National Federation of the Blind and three individuals filed a class action lawsuit against United, in which they alleged that United’s automatic ticket kiosks were not blind-friendly and violated the California Unruh Civil Rights Act and Disabled Persons Act. Plaintiffs argued, among other things, that the applicable federal regulations in this area were not pervasive.

The district court dismissed the action on federal preemption grounds under both the Airline Deregulation Act (ADA) and the ACAA. The district court found that the claims were expressly preempted by the ADA because kiosks were a “service,” and also that they were impliedly field preempted by the ACAA and its implementing regulations. Before reaching its decision, the district court requested input from the Department of Transportation (DOT), which argued that the plaintiffs’ claims were federally preempted.

At the Ninth Circuit, a three-judge panel affirmed the district court’s dismissal of this class action lawsuit, but only on the grounds of implied field preemption under the ACAA. The Ninth Circuit disagreed that kiosks were a “service” under the ADA, because Congress did not intend “service” to refer to “assistance to passengers in need, or like functions.”

In considering implied field preemption under the ACAA, the Ninth Circuit noted that DOT regulations, codified at 14 C.F.R. Part 382, specify

detailed requirements that airlines must meet to comply with the ACAA. With respect to kiosks, the DOT promulgated an interim regulation in 2008 requiring “equivalent service” if kiosks were inaccessible to disabled persons.⁴ The district court found this regulation sufficiently pervasive to warrant preemption.

Subsequent to oral argument of this case before the Ninth Circuit, the DOT replaced its 2008 interim regulation with a final and much more extensive ruling. The final rule established standards that addressed a wide variety of accessibility, technical, and timing requirements specifically applicable to airport kiosks.⁵ The Ninth Circuit noted that the new regulations were exhaustive, specifically incorporated features for use by the blind, and directly addressed the concerns raised by the lawsuit. The Ninth Circuit found that the new regulation was pervasive and intended to occupy the field of kiosk accessibility. Plaintiffs’ claims, therefore, were preempted by the ACAA and its implementing regulations.

The Ninth Circuit’s recent decision in *National Federation of the Blind* is consistent with its prior rulings that pervasive federal regulation in the area of aviation leads to implied field preemption of state law claims in that area.⁶ When an agency promulgates pervasive regulations pursuant to Congressional authority, the courts may infer preemptive intent. However, the decision in *National Federation of the Blind* does little to clarify what “pervasive regulation” means. The interim kiosk regulation of 2008, unlike the more pervasive regulation in the final rule, contained very little detail or specifics regarding duties owed to passengers under the ACAA, and it is unclear whether the Ninth Circuit would have affirmed the

⁴ See 14 C.F.R. § 382.57 (2008).

⁵ See 14 C.F.R. § 382.57 (2014).

⁶ See generally *Montalvo, Martin, and Gilstrap*.

holding of implied preemption based only on the minimal regulation of 2008.

The measured approach of the Ninth Circuit to federal preemption may also contrast with the broad approach adopted by the Third Circuit.⁷ The *Abdullah* Court adopted a very broad preemption standard for the field of aviation safety in considering whether state law standards of care should apply to claims for injuries sustained due to severe turbulence. The Third Circuit held these claims preempted. Noting that other courts have found that federal law preempts only discrete aspects of aviation safety, the Third Circuit boldly “found that the entire field of aviation safety is federally preempted.”⁸ It remains to be seen whether and to what extent the Third Circuit’s broad approach to federal preemption in the field of aviation safety contrasts with the measured approach applied by the Ninth Circuit with its requirement for “pervasive regulation.” In light of the different treatment of implied preemption claims among the federal circuit courts of appeal, it is essential that litigants be aware of the applicable law when evaluating the viability of an implied preemption defense. ♦

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⁷ See *Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999).

⁸ *Id.* at 375.