The Preemption of Tort and Other Common Causes of Action Against Air, Motor, and Rail Carriers

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I. INTRODUCTION

Among the questions still being answered after 18 years of federal preemption by the Airline Deregulation Act of 1978 (ADA)[1] of state regulation over price, route, and service in the airline industry, and 26 years after the conditional preemption of state laws relating to railway safety by the Federal Railway Safety Act of 1970 (FRSA)[2] are the extent to which and in what circumstances state common law claims have been preempted. Despite the guidance provided by the United States Supreme Court in decisions such as *Morales v. Trans World Airlines*[3] and *American Airlines v. Wolens*[4] in the air carrier area, and *CSX Transportation v. Easterwood*[5] in the rail carrier area, numerous issues still remain concerning the scope of the preemption. Additionally, Congress has, through its application of the ADA preemptive language to state motor carrier regula-

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1. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (Oct. 24, 1978) (codified as amended in scattered sections of 49 U.S.C.).

2. Federal Railway Safety Act of 1970, Pub. L. No. 91-458, Title II, 84 Stat. 971-977 (Oct. 16, 1970) (codified as amended in scattered sections of 45 U.S.C.).

3. Morales v. Trans World Airlines, 112 S.Ct. 2037 (1992).

4. American Airlines v. Wolens, 513 U.S. 219 (1995).

5. CSX Transp. v. Easterwood, 507 U.S. 658 (1993).

tion accomplished by Section 601 of the Federal Aviation Administration Authorization Act of 1994 (FAAAA),[6] transferred to the motor carrier field as well, those same vexing questions with regard to the scope of the preemption. This article will examine the preemption issues as they concern airline-motor and rail tort liability as well as review other recent preemption cases concerning those segments of the transportation industry.

II. The State of Federal Preemption in the Airline Industry

A. Torts

An analysis of the recent *Morales* and *Wolens* decisions by the United States Supreme Court would not necessarily have led to the conclusion that sufficient ambiguity was present in the opinions as to create within months a conflict among the circuit courts of appeals about whether the ADA preemption extends to state tort cases. The Supreme Court, in *Morales*, clearly established the broad scope of the ADA preemption concerning laws relating to rates, routes, or services of any air carrier, in the statutory language that has now been recodified and amended at 49 U.S.C. § 41713.[7] In interpreting similar language in the Employment Retirement Income Security Act of 1974, the Supreme Court noted in *Morales* that "[w]e have said, for example, that the 'breadth of [that provision's] pre-emptive reach is apparent from [its] language,' that it has a 'broad scope,' and an 'expansive sweep,' and that it is 'broadly worded,' 'deliberately expansive,' and 'conspicuous for its breadth.'"[8] (citations omitted).

Morales, however, concerned National Association of Attorneys General (NAAG) guidelines on advertising which, in the court's view, were "obviously" related to rates.[9] The Court denied that it was setting out on a road which would lead to preemption of state laws applied to airlines of such criminal acts as gambling and prostitution. The Court stated that "[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner" to have a preemptive effect.[10]

Further clarification was provided by the Supreme Court's decision in *Wolens*. *Wolens* held preempted under the ADA claims brought pursuant to the Illinois Consumer Fraud and Deceptive Business Practices Act,

6. Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, § 601, 108 Stat. 1604 (1994) (codified as amended at 49 U.S.C. § 14501, by the provisions of the Interstate Commerce Commission Termination Act, Pub. L. 104-88 (1995)).

7. 49 U.S.C. §41713 (1995). This provision formerly appeared at 49 U.S.C. App § 1305(a)(1) (repealed 1994).

8. *Morales*, 112 S. Ct. 2037.

9. *Id.* at 2039.

10. *Id.* at 2040.

but ruled that claims based on common law breach of contract were not preempted. The Court further rejected the notion that the ADA conferred upon the federal courts the business of fashioning a federal common law for breach of contract claims on the subject of airline rates, routes, or services.[11] The Supreme Court emphasized in *Wolens* that "[w]e do not read the ADA's preemption clause, however, to shelter airlines from suits alleging no violation OF STATE-IMPOSED OBLIGATIONS, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings"[12] (emphasis supplied). Concerning contractual liability itself, the Court cautioned that there could be no enlargement of the parties' bargain as a result of state laws or policies not a part of the agreement.

The *Wolens* court did not have before it the issue of preemption of state court liability. However, the majority referenced airline liability for personal injury claims in two footnotes in its decision.[13] It was emphasized that neither the United States as *amicus curiae* nor the petitioner American had urged that personal injury claims would generally be preempted. In partial dissent, Justice Stevens, while agreeing in *Wolens* with the majority's conclusion on the breach of contract claims, dissented as to the conclusion on the state law based consumer fraud claims. He stated: "In my opinion, private tort actions based on common-law negligence or fraud, or on a statutory prohibition against fraud, are not preempted."[14] Two Justices, O'Connor and Thomas, would have held the common law contract claims preempted as well.[15] Justice O'Connor, however, made plain that she would not hold all personal injury claims against airlines preempted, and expressed support for several decisions resting on the notion that particular tort claims did not "relate" to "services" provided by airlines.[16]

Morales and *Wolens* did not possess sufficient clarity, however, to prevent a conflict as to whether state tort claims were preempted under the scope of the ADA preemption. In *Harris v. American Airlines, Inc.*,[17] the court affirmed the district court's dismissal of an action brought by an airline passenger against an airline and another passenger for violation of an Oregon state statute, as well as claims of intentional infliction of emotional distress and negligence, on the ground that the state law claims were preempted under the ADA. The plaintiff in *Harris*, a women pas-

11. *Wolens*, 115 S. Ct. at 825.
12. *Id.* at 824.
13. *Id.* at 825, fn.7, and 827, fn.9.
14. *Id.* at 827.
15. *Id.* at 829.
16. *See id.* at 830.
17. Harris v. American Airlines, Inc., 55 F.3d 1472 (9th Cir. 1995).

senger traveling in first class, had been subjected to racial slurs from a male passenger who had consumed several drinks on the flight and had returned from the galley with a drink even after one flight attendant informed him that he could have no more alcoholic beverages. The *Harris* court analyzed plaintiff's claims pursuant to *Morales* and *Wolens*.[18] It then concluded that the allegations arose from an aspect of airline service, i.e., the provision of drink and the treatment of passengers who become intoxicated. The court further read the "narrow exclusion" to preemption present in *Wolens* as applying only to "private contract terms."[19] Thus the claims were preempted. Dissenting, Judge Norris noted the contrary decisions from the United States Court of Appeals for the Fifth Circuit in *Hodges v. Delta Airlines, Inc.*[20] and *Smith v. America West Airlines, Inc.*[21]

The Fifth Circuit and the Seventh Circuit have, in post-*Wolens* opinions, addressed the issue of tort liability preemption, reaching a different result than did the *Harris* court. In *Hodges* and *Smith*, the Fifth Circuit, sitting *en banc* in two companion cases, found that a state law tort claim brought by a passenger based on alleged negligent operation of an aircraft was not preempted by the ADA. A panel in *Hodges* and its companion case *Smith*, had earlier felt compelled to follow the precedent of an unpublished decision in *Baugh v. Trans World Airlines, Inc.*,[22] finding a tort claim preempted.[23] In *Hodges*, the plaintiff had been injured after a fellow passenger, while opening an overhead bin, dislodged a case of rum, which then fell on the plaintiff, cutting her arm and wrist. In reversing the earlier decision in *Hodges*, the *en banc* decision held that "[f]ederal preemption of state laws, even certain common law actions 'related to services' of an air carrier, does not displace state tort actions for personal physical injuries or property damage caused by the operation

18. The *Harris* tribunal also referenced a pre-*Wolens* decision of the Ninth Circuit in West v. Northwest Airlines, 995 F.2d 148 (9th Cir. 1993), *cert. denied*, 510 U.S. 1111 (1994), in which the court held preempted a claim for punitive damages for over-booking and ruled a claim for compensatory damages under state contract and tort law not preempted.

19. *Harris*, 55 F.3d at 1477.

20. Hodges v. Delta Airlines, Inc., 44 F.3d 334 (5th Cir. 1995) (*en banc*).

21. Smith v. America West Airlines, Inc., 4 F.3d 356 (5th Cir. 1993). Interestingly, the Ninth Circuit decision in *Harris* did not cite another recent pre-*Wolens* ruling of that circuit in Lathigra v. British Airways, PLC, 41 F.3d 535 (9th Cir. 1994). In *Lathigra*, plaintiffs were not notified by *British Airways* that their connecting flight had been cancelled, leaving them stranded in Nairobi, Kenya for five days. Plaintiffs' state law negligence claim in that case was held not preempted by the ADA, on the ground that the complained-of conduct was too tenuous, within the language of *Morales*.

22. Baugh v. Trans World Airlines, Inc., 915 F.2d 693 (5th Cir. 1990).

23. See the initial decision of the Fifth Circuit panel in *Hodges*, 4 F.3d 350 (5th Cir. 1993), and *Smith*, 4 F.3d at 356, in which the judges set forth at length their disagreement with the *Baugh* panel's conclusions and suggested *en banc* review.

and maintenance of aircraft."[24] The court held that whether certain luggage can be placed in overhead bins is a matter pertaining to the safe operation of a flight, not provision of services. *Baugh* was thus explicitly overruled.

Significantly, the court in *Hodges* noted that its general vindication of state tort claims did not extend to all conceivable state court actions. It re-endorsed its prior decision in *O'Carroll v. American Airlines*,[25] in which the court had held state law claims brought by two passengers after they had been removed from a commercial flight for intoxication as preempted. The airline had not breached any safety-related tort duty in that case and, furthermore, an airline's boarding practices involve services. The Fifth Circuit also indicated in *Hodges* that it would disagree with the holding of the pre-*Wolens* Ninth Circuit case of *West v. Northwest Airlines*[26], in which a panel of that court had concluded that state law claims were not preempted in an action where a passenger had been bumped from an over-booked airline flight. The Fifth Circuit was of a mind that the court in the *West* case felt over-booking was dealing with an airline's contract for services.

In the *Hodges* companion case of *Smith*, plaintiffs had been passengers on a flight which was hijacked. The *Smith* plaintiffs claimed that the defendant airline and its employees negligently allowed a "visibly deranged" hijacker to board the aircraft, failed to train its employees and failed to warn passengers. The Fifth Circuit determined that the passengers' claim was grounded in the safety aspects of the flight, involving as it did a charge that the airline had permitted the hijacker to board. It was therefore not preempted, even though the judgment could affect the airline's ticket selling, training, or security practices. The effects on airline fares would be too tenuous to have a preemptive effect, under the *Morales* language, in the *Smith* court's view.

The Seventh Circuit has also visited the issue of ADA preemption scope, in *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*.[27] In *Travel All*, a travel agency and its owner sued an airline for tortious conduct and breach of contract. The Seventh Circuit reversed the district court's dismissal of all counts against the airline on ADA preemption grounds. The court concluded that the breach of contract claims were not preempted, consistent with the *Wolens* precedent. It did not matter that plaintiffs' claims in *Travel All* were based on an airline's bumping prac-

24. *Hodges*, 44 F.3d at 336.

25. O'Carroll v. American Airlines, 863 F.2d 11 (5th Cir. 1989), *cert. denied*, 490 U.S. 1106 (1989).

26. West v. Northwest Airlines, 995 F.2d 148.

27. Travel All Over the World, Inc. v. Kingdom of Saudi Arabia, 73 F.3d 1423 (7th Cir. 1996).

tices, as the basis of the claim was a privately ordered obligation. Further, alleged defamatory statements made by an airline about a travel agency were not part and parcel of an airline's rates, routes, or services, according to the *Travel All* court, and were thus not preempted.[28] The court specifically adopted the *Hodges* definition of services:

> "Services" generally represent a bargained-for or anticipated provision of labor from one party to another. . . [This] leads to a concern with the contractual arrangement between the airline and the user of the service. Elements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself.[29]

However, the *Travel All* court ruled that the intentional tort claims expressly involving airline "services," such as tortious interference with a contractual relationship, were related to provision of services, and therefore were preempted. As stated by the court, "[u]nder our approach, 'services' include all elements of the air carrier service bargain."[30] At the same time, the *Travel All* panel specifically took issue with the conclusions of the Fifth Circuit, in *Smith*, that an airline's boarding decisions motivated by economic concerns, as opposed to safety concerns, would be preempted.[31] It declared that "[t]he crucial inquiry is the underlying nature of the actions taken rather than the manner in which they are accomplished," and further commented:

> [W]hile *Wolens* protects contract claims that seek to enforce private agreements from preemption, it does not similarly shelter tort claims. The intentional tort claims therefore constitute the 'enactment or enforcement' of a law. Moreover, to the extent that the intentional tort claims are based on Saudi's refusal to transport passengers who had booked their flights through Travel All, such claims 'relate to' Saudi's services and are preempted by the ADA.[32]

In light of *Wolens* and *Morales*, most federal district courts confronted with the issue of whether state tort claims are preempted pursuant to the provisions of the ADA have concluded, as have the Fifth and Seventh Circuits, that such claims are generally not preempted. Still, there is disagreement, even among the district court decisions within given circuits. In the Second Circuit, for example, numerous cases were handed down in the year prior to *Wolens*, all of which held that the Airline Deregulation Act did not preempt state common law tort causes of

28. *Id.* at 1433.

29. *Hodges*, 43 F.3d at 336.

30. *Travel All*, 73 F.3d at 1434.

31. *See* the *Smith* court's attempt at 44 F. 3d 346-47 to reconcile its *en banc* holding with the earlier ruling in *O'Carroll*.

32. *Travel All*, 73 F.3d at 1435.

action. These included *Stagl v. Delta Airlines, Inc.*[33] (a negligence action against an airline arising out of damages sustained by passenger attempting to retrieve luggage from an airline's airport baggage carousel deemed not preempted, although summary judgment granted to airline on basis that it owed no duty for injuries caused to airline's passenger by a third party at the baggage carousel area); *Curley v. American Airlines, Inc.*[34] (an action by a passenger for negligence and false imprisonment against airline, after passenger had been falsely identified by the airline captain as having smoked marijuana in aircraft, held not preempted); *Sedigh v. Delta Airlines, Inc.*[35], (an action against an airline for unlawful imprisonment, assault, intentional infliction of emotional distress, slander, loss of comfort and breach of contract held not preempted, where passenger, after behaving suspiciously, had been detained, although summary judgment granted to airline on the facts of case); *Pittman v. Grayson*[36] (an action for intentional infliction of emotional distress, false imprisonment, and intentional interference with custodial rights, based on airline's alleged role in smuggling plaintiff's daughter out of country held not preempted); and *Rombom v. United Airlines*[37] (an action based on airline's role in having passenger arrested, after passenger had departed the plane, held not preempted).

However, the court in *Rombom* was also unable to conclude that the ADA "never preempts state tort claims."[38] The court held that charges based upon the alleged rude and unprofessional service of airline personnel in an attempt to quiet a passenger were related to service and thus preempted, along with claims arising out of a pilot's decision to return to the gate so that an unruly passenger could be removed. Still another district court in the Second Circuit has also concluded *In re Hijacking of Pan American World Airways, Inc. Aircraft*,[39] that a state common law claim against an airline for false advertisement of heightened security measures, when plaintiffs were then injured or murdered in a hijacking attempt, was deemed preempted, as the personal injuries suffered were based on plaintiffs' reliance on false advertising representations, an element of pricing, as in *Morales*.[40]

Most other post-*Wolens* decisions concerning tort claims have come

33. Stagl v. Delta Airlines, Inc., 849 F. Supp. 179 (E.D. N.Y. 1994).

34. Curley v. American Airlines, Inc., 846 F. Supp. 280 (S.D. N.Y. 1994).

35. Sedigh v. Delta Airlines, Inc., 850 F. Supp. 197 (E.D. N.Y. 1994).

36. Pittman v. Grayson, 869 F. Supp. 1065 (S.D. N.Y. 1994).

37. Rombom v. United Airlines, 867 F. Supp. 214 (S.D. N.Y. 1994).

38. *Id.* at 221.

39. In re Hijacking of Pan American World Airways, Inc. Aircraft, 920 F. Supp. 408 (S.D. N.Y. 1996).

40. *See also*, Vale v. Pan Am Corp., 616 A.2d 523, 526 (A.D. 1992).

down on the side of non-preemption. In *Seals v. Delta Airlines, Inc.*,[41] an action based in contract and negligence because of an airline's failure to provide ground transport between gates at an airport, leading to plaintiff's decision to run down the concourse and her consequent fall, was held not preempted. In *Seals*, the court noted that "[f]rom an analysis of the dicta in *Wolens*, this court can reach but one conclusion, that the Supreme Court does not interpret the ADA preemption clause to extend to personal injury suits against air carriers."[42] At the same time, the court had no difficulty finding that the breach of contract claim had not been preempted.

Other district courts have held similarly, in cases such as *Katonah v. US Air, Inc.*[43] (a negligence action not preempted when alleged acts led to air crash); *Torraco v. American Airlines*[44] (a tort action for personal injuries not preempted, where an airline failed to provide a wheelchair and an attendant to passenger, leading to the passenger's fall); *Rodriguez v. American Airlines, Inc.*[45] (an action for negligence by decedents' estates after an air crash held not preempted); *Diaz Aguasviva v. Iberia Lineas Aereas De Espana*[46] (an action for defamation, false imprisonment, false arrest, assault, and negligence arising out of an airline's failure to inform a passenger of her need for a visa and the airline's subsequent reporting that the passenger in question was an illegal alien, deemed not preempted); and *Moore v. Northwest Airlines, Inc.*[47] (an action for negligence when passenger's wheelchair turned over backwards in the jetbridge while exiting the plane held not preempted).

Decisions from the Ninth Circuit, however, continue to hold tort claims preempted. In *Costa v. American Airlines, Inc.*, a case in which a passenger was injured after a fellow passenger had opened an overhead bin, causing luggage to fall on the plaintiff, the court found the action preempted based on the *Harris* precedent.[48] Also, in *Stone v. Continental Airlines,*[49] a passenger's claim against an airline for assault and battery and breach of duty of reasonable care, after the passenger was punched by a fellow passenger, was held preempted, again based on the authority of *Harris*. Significantly, the court in *Stone* refused to allow the plaintiff to proceed with an implied breach of warranty claim, on the ground that it was merely a re-characterized tort action, which constituted an attempt to

41. Seals v. Delta Airlines, Inc., 924 F. Supp. 854 (E.D. Tenn. 1996).
42. *Id.* at 859.
43. Katonah v. US Air, Inc., 876 F. Supp. 984 (N.D. Ill. 1995).
44. Torraco v. American Airlines, No. 94-C1852, 1996 WL 6560 (N.D. Ill. Jan. 4, 1996).
45. Rodriguez v. American Airlines, Inc., 886 F. Supp. 967 (D. P.R. 1995).
46. Diaz Aguasavia v. Iberia Lineas Aereas De Espana, 902 F. Supp. 314 (D. P.R. 1995).
47. Moore v. Northwest Airlines, Inc., 897 F. Supp. 313 (E.D. Tex. 1995).
48. Costa v. American Airlines, Inc., 892 F. Supp. 237 (C.D. Cal. 1995).
49. Stone v. Continental Airlines, 905 F. Supp. 823 (D. Haw. 1995).

fit within the *Wolens* exception.[50]

Another series of decisions of note on the preemption issue, holding tort but not contract claims preempted, arises out of the First Circuit.[51] In *Chukwu* I, the court found that a claim for breach of contract for refusal to transport was not preempted by the ADA. In *Chukwu* II, a complaint grounded in tort on the airline's failure to prevent a passenger from boarding a flight was held clearly related to an airline service and therefore preempted. In *Chukwu* III, the court held that a breach of contract action was not preempted, but that the contract was not breached as a matter of law, based on the airline's tariff provisions.

B. Other Causes of Action

1. State Employment Laws

An extremely significant line of cases has held state employment laws to be preempted in their application against air carriers. For example, in *Abdu-Brisson v. Delta Airlines, Inc.*[52], former Pan Am pilots hired by Delta in conjunction with Delta's purchase of certain Pan Am assets brought an action against Delta, claiming that the terms and conditions of their employment were in violation of the New York State Human Rights Law and New York City Human Rights Law. The court in *Abdu-Brisson* found that the prescriptive state and local statutes were related to prices or services and, therefore, preempted. The court stated that "[we] agree with Delta that the claims based on the medical benefits and pay scale provisions of plaintiffs' employment contracts are sufficiently related to price and therefore preempted."[53] The court similarly concluded that the order of a pilot seniority list was related to the provision of air carrier services within the meaning of *Morales* and therefore preempted.

A similar conclusion was reached in *Marlow v. AMR Services Corp.*,[54] in which an employee's wrongful termination claims, based on alleged violations of the Hawaii Whistleblowers' Protection Act, were held preempted by the ADA. In that case, the court found that a jetbridge maintenance company was a service under the ADA. Similar results were reached in *Belgard v. United Airlines*,[55] in which claims

50. *See id.* at 826.

51. *See* Chukwu v. Board of Directors Varig Airline, 880 F. Supp. 891 (D. Mass 1995) (*Chukwu* I); Chukwu v. Board of Directors, British Airways, 889 F. Supp. 12 (D. Mass 1995) (*Chukwu* II), and Chukwu v. Board of Directors, British Airways, 915 F. Supp. 454 (D. Mass 1996) (*Chukwu* III).

52. Abdu-Brisson v. Delta Airlines, Inc., 927 F. Supp. 109 (S.D. N.Y. 1996).

53. *Id.* at 112.

54. Marlow v. AMR Services Corp., 870 F. Supp. 295 (D. Haw. 1994).

55. Belgard v. United Airlines, 857 P.2d 467 (Colo. Ct. App. 1992), *cert. denied*, 50 U.S. 1117 (1993).

brought by pilots under the Colorado Handicap Discrimination Statute were held preempted by the ADA, and *Lewonchuk v. Business Express, Inc.*,[56] in which a wrongful termination action based on the public policy of a state law was held preempted. Also of note is *Fitzpatrick v. Simmons Airline, Inc.*,[57] in which the Michigan Court of Appeals found that the ADA preempted an action under the Michigan Civil Rights Act brought by a baggage handler and aircraft maintenance worker discharged because he was overweight.

2. Common Law Unfair Competition Claims

In *Virgin Atlantic Airways, Ltd. v. British Airways, PLC.*,[58] the court held preempted an action brought by an airline against its competitor, based in part on common law unfair competition claims. As the court stated, "[t]he theory underlying plaintiff's common law claims is that defendant has used sharp practices to lure away customers. That is within the broad meaning of 'rates, routes or services.'"[59] Similarly, unfair competition claims by one airline against another were deemed preempted in two earlier decisions in *Continental Airlines, Inc. v. American Airlines, Inc.*[60] and *Frontier Airlines, Inc. v. United Airlines, Inc.*[61]

3. State Regulation of Ancillary Airline Services

In *Huntleigh Corp. v. Louisiana State Board of Private Security Examiners*,[62] the district court held preempted the provisions of the Louisiana Private Security Regulatory and Licensing Law, which governed registration and training of private security officers performing pre-departure screening at airports. It did not matter that the regulated entity was not itself an air carrier.[63] The regulatory statute affected the service of air carriers with regard to pre-departure screening and, accordingly, would not pass muster. To allow the states to independently prescribe qualification and training standards for either airline employees or their agents in the security area would conflict with a uniform federal scheme.

56. Lewonchuk v. Business Express, Inc., No. CV 940315626 S, 1995 WL 781431 (Conn. Super. Ct. Dec. 15, 1995).

57. Fitzpatrick v. Simmons Airline, Inc., 218 Mich. App. 689 (1996).

58. Virgin Atlantic Airways, Ltd. v. British Airways, PLC, 872 F. Supp. 52 (S.D. N.Y. 1994).

59. *Id.* at 66.

60. Continental Airlines, Inc. v. American Airlines, Inc., 824 F. Supp. 689 (S.D. Tex. 1993).

61. Frontier Airlines, Inc. v. United Airlines, Inc., 758 F. Supp. 1399 (D. Colo. 1989).

62. Huntleigh Corp. v. Louisiana State Board of Private Security Examiners, 906 F. Supp. 357 (M.D. La. 1995).

63. *See* Marlow v. AMR Services Corp., 870 F.Supp. 295, along these same lines.

4. Contract, Conversion and Unjust Enrichment Claims

In two recent cases, plaintiffs seeking refunds of expired federal excise taxes failed on preemption grounds. In *Kaucky v. Southwestern Airlines*,[64] a class of plaintiffs sought refund of federal excise taxes on tickets purchased before January 1, 1996, for travel after December 31, 1995, on preemption grounds. The airline had collected the excise tax on such ticket purchases, prior to expiration of the tax on December 31, 1995. The plaintiffs asserted common law claims for breach of contract and conversion, but such claims were found to relate to the airline's ticket prices and therefore were preempted. A similar conclusion was reached in *Lehman v. US Air Group, Inc.*[65].

5. Rate and Cargo Claims

The courts have also dismissed several recent actions against Federal Express Corporation resulting from rate disputes and cargo loss, based on preemption and the status of Federal Express as an air carrier. In *Musson Theatrical, Inc. v. Federal Express Corp.*,[66] the court determined that no federal jurisdiction existed for a self-styled federal common law claim of fraud and misrepresentation against Federal Express. The court indicated that "[i]t is not the role of federal courts to articulate federal interests—but to enforce the federal interests identified by Congress."[67] Citing *Wolens*, the court noted that the possibility that the ADA left room for a federal common law cause of action against air carriers had been explicitly rejected by the Supreme Court in the case of contract claims. The court believed that the same reasoning applied to fraud claims. As it stated, "[s]tate law fraud claims are preempted because Congress intended DOT to be the sole legal control on possible advertising fraud by air carriers, and a federal common law fraud claim is inappropriate for the same reason."[68] Neither did the existence of the general savings clause in the statute permit federal courts to create federal causes of action. The court in *Musson*, while affirming the district court's decision that there was no federal cause of action for fraud against airlines, at the same time reversed the district court decision to assume jurisdiction over state law claims filed by the plaintiff in a separate state court action, finding those claims preempted as well. The Sixth Circuit cautioned that, given the Supreme Court's language in *Wolens* that the ADA was not

64. Kaucky v. Southwestern Airlines, No. 96-C750, 1996 W.L. 267875 (N.D. Ill. May 17, 1996).

65. Lehman v. US Air Group, Inc., 930 F. Supp. 912 (S.D. N.Y. 1996). *See also* Sigmon v. Southwest Airlines, No. 3: 96-CV-393-H (N.D. Tex. May 23, 1996).

66. Musson Theatrical, Inc. v. Federal Express Corp., 89 F.3d 1244 (6th Cir. 1996).

67. *Id.* at 1250.

68. *Id.* at 1251.

intended to "channel actions into federal court," it would only be appropriate for a state court, or a federal court sitting in diversity, to resolve such state court claims.

A breach of contract suit against an air carrier was also dismissed *in Roberts Distrib., Inc. v. Federal Express Corp.*[69] In *Roberts*, the court found that given the substantial deregulation of domestic air carriers, "[n]o statutory or regulatory foundation exists on which to construct a federal common law governing air carrier-shipper suits."[70] The court again found that the federal courts were not authorized, in the absence of statutory authority, to create federal common law governing contract disputes between interstate air carriers and their customers. In still another action, *Merkel v. Federal Express Corp.*,[71] a cause was remanded to state court for want of federal jurisdiction. A shipper had brought suit against the air carrier in state court for loss of a package. The "complete preemption" doctrine did not justify removal to federal court. The ADA in and of itself did not serve to create removal jurisdiction. Finally, in *Wagman v. Federal Express Corp.*,[72] the ADA was held to preclude a state law claim for misrepresentation based on an air carrier's advertising in an action seeking to recover damages for the late delivery of documents.

C. Conclusions On The Present State Of Air Preemption

Courts continue to look at the air preemption as expansive in scope, in line with the *Morales-Wolens* Supreme Court pronouncements. The preemption of state employment laws in their application against air carriers reinforces the sweeping nature of the ADA. Principles of the ADA preemption include the following: 1) the ADA preemption extends to state-imposed obligations generally, not just those state-imposed obligations contained in economic regulatory statutes; 2) there is no developing federal common law for actions against air carriers; 3) there is no general federal subject matter jurisdiction for actions against air carriers; and 4) the preemption applies not only to air carriers, but also to their agents.

As to whether particular state common law causes of action are preempted, the law is still unsettled. *Morales* referred to actions which are "too tenuous, remote, or peripheral"[73] to be deemed preempted. Although the Ninth Circuit has regarded this exception as a narrow one, other courts continue to rely upon this language to find common-law causes of actions not preempted. Other courts have found the preemption not to apply, as in the *Hodges* and *Smith* decisions, when the com-

69. Roberts Distrib., Inc. v. Federal Express Corp., 917 F. Supp. 630 (S.D. Ind. 1996).
70. *Id.* at 637.
71. Merkel v. Federal Express Corp., 886 F. Supp. 561 (N.D. Miss. 1995).
72. Wagman v. Federal Express Corp., 844 F. Supp. 247 (D. Md. 1994).
73. Morales v. Trans World Airlines, 112 S.Ct. 2037, 2040.

plained of action concerned operation and maintenance of the aircraft, as opposed to provision of services. Exactly what is the provision of services, as opposed to operation or maintenance of an aircraft, will in and of itself be a matter of continued debate, as the Seventh Circuit made plain in *Travel All.*[74]

III. Broad Preemption and the Issue of the Motor Provisions' Constitutionality

The constitutionality of the price-route-service preemption as applied to motor carriers and cloned from the ADA[75] was challenged in the federal courts *in Kelley v. United States,*[76] and the scope of the preemption specifically was made an issue. Petitioners in *Kelley*, which included officials or agencies of four states, the International Brotherhood of Teamsters, and the Coalition Against Federal Preemption of State Motor Carrier Regulation, argued that the sweeping range of the preemption exceeded congressional authority under the Commerce Clause of the U.S. Constitution,[77] and offended the Tenth Amendment.[78]

Petitioners in *Kelley* emphasized that, while Congress' power under the Commerce Clause is plenary, it is not unlimited. For preemption to pass muster under the Commerce Clause, it must meet the two-part test of *Hodel v. Virginia Surface Min. & Recl. Assn.*[79] *Hodel* requires 1) a rational basis for Congress' finding that the activity to be regulated has a substantial effect on interstate commerce; and 2) that the means by which Congress has chosen to regulate be reasonably adapted to a constitutional end.

The *Kelley* petitioners submitted that the scope of Section 601 failed

74. Travel All Over the World, Inc. v. Kingdom of Saudi Arabia, 73 F.3d 1423 (7th Cir. 1996).

75. The ADA, recently recodified at 49 U.S.C. § 41713, allows for continued federal regulation of the airline industry while prohibiting the states from enacting or enforcing laws "relating to rates, routes, or services." As noted in the Conference Report on Section 601, the use of the similar language in Section 601 was intentional. Congress "did not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in Morales v. Trans World Airlines" H.R. Conf. Rep. No. 103-677, at 83 (1994), *reprinted in* 1994 U.S.C.C.A.N. (103 Stat.) 677 at 1755. The Conference Report further stated that "the central purpose of this legislation is to extend to all affected carriers . . . **the identical intrastate preemption** of prices, routes, and services as that originally contained in Section 105(a), 49 U.S.C. App. 1305(a)(1) of the Federal Aviation Act." *Id.* at 83. (emphasis supplied).

76. Kelley v. United States, 69 F.3d 1503 (10th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1566, 134 L.Ed.2d 665 (1996)

77. The Commerce Clause states that "the Congress shall have power to . . . regulate commerce . . . among the several states." U.S. Const., art. I, §8, cl. 3.

78. The Tenth Amendment states that "the powers not delegated to the United States by the Constitution, not prohibited by it to the states, are reserved to the states respectively, or to the people," U.S. Const., amend. X.

79. Hodel v. Virginia Surface Min. & Recl. Assn., 452 U.S. 264 (1981).

both the first and second parts of *Hodel*. Under the first part, Section 601 encompasses activities outside the realm of interstate commerce that Congress may regulate. In many instances, Section 601 preempts purely intrastate activity which has no substantial impact on interstate commerce. Under the second part of the test, they contended that the overbreadth of this legislation makes it impossible to find that the legislative means are REASONABLY ADAPTED to a permissible constitutional end.

The challengers to Section 601 underscored that the power of Congress under the Commerce Clause also has particular limits, where intrastate activities are concerned, as established in *Maryland v. Wirtz*.[80] Congress cannot usurp the authority of states to regulate purely local and intrastate forms of transportation. Local and intrastate activity may be regulated by Congress under the Commerce Clause only "if it exerts a SUBSTANTIAL economic effect on interstate commerce," as established in *Wickard v. Filburn*[81] (emphasis supplied). More recently, the Supreme Court noted that the commerce power . . . "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce."[82] If Congress has exceeded its power under the Commerce Clause, the *Kelley* petitioners maintained, the preemption of state regulation by Section 601 could not be upheld.

The court of appeals in *Kelley*, along with the Justice Department in response, relied substantially upon the Supreme Court's decision in *United States v. Lopez*,[83] in finding that Congress acted within its Commerce Clause authority in enacting Section 601.[84] The Tenth Circuit held that pursuant to *Lopez*, state regulation of intrastate motor carrier activities was an area that Congress could regulate because this area of state regulation substantially affects interstate commerce.[85] The court quoted the Congressional findings, set forth in Section 601(a), along with a portion of the accompanying Conference Report, which asserted that state regulation in this area burdens interstate commerce by causing inefficiencies, increasing costs, reducing competition, inhibiting innovation, and curtailing market expansion.[86] Despite the Petitioners' urging, the Tenth

80. Maryland v. Wirtz, 392 U.S. 183, 196 (1968).

81. Wickard v. Filburn, 317 U.S. 111, 125 (1942).

82. Perez v. United States, 402 U.S. 146, 151 (1971) *quoting* United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942).

83. United States v. Lopez, __ U.S. __, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995).

84. For a discussion on the meaning and effect of *Lopez*, *see Symposium — Reflections on United States v. Lopez*, 94 MICH. L. REV. 533 (1995).

85. Kelley v. United States, 69 F.3d 1503, 1507.

86. *Id.* at 1507-08.

Circuit refused to look beyond these Congressional declarations.

Petitioners contended that the Congressional findings that accompanied Section 601 were shortsighted, oversimplified, and did not deal with the diverse forms of transportation service within its scope. More specifically, they pointed out the findings did not in any way reflect a rationale as to why preemption is needed to extend to every conceivable form of state and local motor regulation that could exist, nor did they indicate how state consumer protection laws, antitrust laws, or Uniform Commercial Codes affected interstate commerce. In this regard, it was argued, Section 601 preempts a myriad of intrastate activities, properly regulated by the states, which have no impact upon interstate commerce, substantial or otherwise.[87] Indeed, the Tenth Circuit's opinion in *Kelley*[88] recognized that there are aspects of intrastate truck transportation which have no effect on interstate commerce, but **failed to apply that rationale in the case of motor carrier preemption**, when it stated "[g]ranted, there are **undoubtedly** various state regulations that affect and pertain **only to purely intrastate motor carrier activities**, and have **little or no effect on interstate commerce**"[89] (emphasis supplied). The preemption opponents provided examples illustrating why, in their view, the regulation of this industry had always been left to the states as well as the extent to which Congress had impermissibly interfered with PURELY intrastate regulation.

It was asserted by the *Kelley* petitioners that the regulation of tow trucks is unquestionably a matter of purely intrastate commerce. Some states, such as Michigan, Kansas and Oklahoma, had regulated tow trucks within the context of their motor carrier regulatory laws, while other jurisdictions, such as New York City, regulated such operations through local ordinances or resolutions. Regardless of the method of regulation, it was all preempted by Section 601 as initially passed. Petitioners asserted that when a tow truck picks up a stranded automobile outside of a city and tows it ten miles to the closest service station, this activity had nothing remotely to do with interstate commerce. Likewise, when the state

87. The regulation of intrastate truck transportation had always been regarded as a matter of state concern. See, for example, those cases which interpreted whether an ICC certificate was being utilized as a subterfuge to avoid intrastate regulation, such as Eichholz v. Public Service Commission of Missouri, 306 U.S. 288 (1939); Service Storage and Transfer Co., Inc. v. Virginia, 359 U.S. 171 (1959); and Leonard Express v. United States, 298 F. Supp. 556 (W.D. Pa. 1969). Prior to 1980, 48 states had in place some form of economic regulation for their motor carrier industry. Seven states, between January 1, 1980 and January 1, 1995, elected to deregulate economically, through the exercise of **state sovereignty**. All 50 states had in effect, through the exercise of **state sovereignty**, laws imposing obligations on their motor carriers as businesses (i.e., loss and damage liability, consumer protection, antitrust, Uniform Commercial Code), at the time that Section 601 became effective.

88. *Kelley,* 69 F.3d at 1508.

89. *Id.* at 1508.

required that tow truck operators be licensed for safety and consumer protection reasons, there was no effect on interstate commerce in petitioners' view. The court of appeals explicitly recognized Congress' overreaching when it acknowledged that "601 may have some unintended effects, such as freeing the reins on intrastate towing and wrecking services . . . ."[90] Congress' late attempt to correct such an error, by expanding the exemption in the ICC Termination Act of 1995, at 49 U.S.C. § 14501, to allow state or local regulation of non-consensual tows failed to cure this situation.[91] It merely highlighted the problem.

The Section 601 opponents stated that regulatory oversight of the collection and disposal of solid waste and recyclables was another area of sole intrastate concern barred by Section 601. While the legislative history of Section 601 indicates that the intention of the House and Senate conferees was not to preempt state regulation of garbage and refuse collection, the statute as enacted made no such exception.[92] Indeed, the Department of Transportation opined that regulation of recyclables was preempted. This was true, despite the states' direct public health and safety interest in closely regulating this industry to ensure that their streets and communities were safe. The transportation of solid waste typically involves movement of only a short distance from point of pickup to destination and, accordingly, makes local garbage collection an intrastate activity. Also, the regulation of saltwater carriers by states such as Oklahoma and Kansas in the transportation of brine from the oil fields to

90. *Id.* at 1509.

91. Congress has allowed states or localities, through the newly revised preemption language in 49 U.S.C. § 14501, to regulate only "non-consent" tows. As stated in the Conference Report, in explaining this term,

> Non-consent tows occur when vehicle owners/operators are unable to give their voluntary consent to the tow. Non-consent tows typically occur in emergency situations and when tows are made from private property. The tow truck provision in this section is designed to allow states and local governments to regulate the price of tows in non-consent cases.

H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. (1995). This does not even come close to addressing the full extent of the regulatory void in this area. If a stranded motorist arranges himself or herself for the towing service, the regulations no longer apply, despite the consumer's total inability to comparison shop while broken down or stuck in a snow drift.

92. Even under the decisions of the then-existing Interstate Commerce Commission, which are not determinative of the issue under state law, it appears that refuse, trash and other waste materials are considered "property" and therefore would be covered by the terms of Section 601. *See* Nuclear Diagnostic Laboratories, Inc., Contract Carrier Application, 131 M.C.C. 578, 1979 WL 11177 (I.C.C.) (1979) ("Property connotes ownership as well as value. Something that is owned can be property notwithstanding its lack of economic value."); *accord* Al Cordeiro d/b/a Cordeiro Trucking - Extension - Contract Carrier Service; No. MC-160678 (Sub 1) 1984 Fed. Carrier Cases, 47,475 (September 1984). Recyclables had repeatedly been recognized by the I.C.C. to be subject to full economic regulation. *See* Transportation of "Waste" Products for Reuse, Ex Parte MC-85, 114 M.C.C. 92 (1971), 120 M.C.C. 597 (1974), and 124 M.C.C. 583 (1976).

disposal sites involves still another purely intrastate activity of a local nature.

Similarly, voiced the *Kelley* petitioners, a sand and gravel operation moving loads from a sand pit to a building site fifteen miles away in the same state did not substantially affect interstate commerce. Neither did operations of a concrete mixer truck or an asphalt rig substantially affect interstate commerce. It was urged that states had a direct interest in controlling the prices charged by such carriers and insuring that a minimal return exists for their service, as this contributed positively to the safety of the public traveling on the roads of a state.

In petitioners' opinion, the extent and diversity of intrastate truck transportation was significant, and there was no rational basis for the conclusion that state regulation of purely intrastate motor carrier activity affected interstate commerce. Such extensive preemption might be defensible in the area of air transportation, since there are relatively few air carriers operating solely in intrastate service. That was not, however, the situation with motor transportation, where there are thousands of motor carriers providing myriad forms of strictly intrastate transportation services to local communities.[93]

Further, under the second part of the *Hodel* test, the preemption foes pointed out that Congressional action must also have a reasonable connection between the regulatory means selected and an end permitted by the Constitution.[94] As Congress purported to be regulating pursuant to the Commerce Clause, the means chosen must result in valid regulation of interstate commerce. The *Kelley* petitioners submitted that the blunderbuss impact of Section 601 clearly was so excessive that it could not be deemed reasonably adapted to Congress' authority under the Commerce Clause.

However, the Tenth Circuit refused to apply strictly the *Morales-Wolens* precedent of the Supreme Court as to the effect of the preemptive language in Section 601, relying instead on assertions by the Department

93. It is important to note that the Airline Deregulation Act ("ADA") involved a different type of preemption scheme in a vastly different industry, with far different implications on intrastate commerce. A federal agency, the Federal Aviation Administration (successor to the Civil Aeronautics Board), was charged with a regulatory role concerning intrastate transportation in the airline industry, a factor not present with Section 601. Only three states (California, Florida, and Texas) regulated intrastate airline transportation when the ADA was enacted, as opposed to the forty-one states that regulated intrastate motor carrier transportation at the time Section 601 was enacted. Furthermore, the intrastate trucking industry has a far more significant impact on state economies than was true of intrastate airline transportation. Finally it is important to recognize that the Supreme Court in *Morales* did not address the constitutionality of the ADA, as the lower court in the Section 601 challenge had implied in footnote 8 at page 21 of its decision in Oklahoma Corporation Commission v. United States, CIV-94-1999-R (W.D. Okla. 1994).

94. Hodel v. Virginia Surface Min. and Recl. Assn., 452 U.S. 264, 276.

of Justice and the U.S. Department of Transportation that Petitioners had somehow exaggerated the scope of the preemption.[95] However, since the language used in Section 601 is the same as the language used to preempt state action in the ADA, the broad scope and nature of the preemption had already been pre-ordained by *Morales* and *Wolens*.

The *Kelley* petitioners displayed no doubts about the all-encompassing preemption effort of Section 601. The provision preempted state economic regulation of intrastate trucking as contained in state motor carrier economic regulatory acts, of course, but petitioners contended it also preempted state antitrust laws, state consumer protection laws, state laws regarding cargo loss and damage claims, state laws governing the transportation of solid and hazardous waste, and state uniform commercial codes. All of these state laws, they pointed out, relate to a carrier's "price, route or service," and are all "state-imposed obligations." It was also asserted that even state laws regarding safety of motor carrier operations, as opposed to safety of motor vehicles, are in jeopardy as a result of Section 601.[96]

Petitioners argued that the fact that portions of a state's Uniform Commercial Code will be preempted by Section 601 underscored the irrational nature of the legislation.[97] They contended to no avail that the numerous state laws that have been preempted are evidence that Congress has not legislated according to means reasonably connected to a permissible constitutional end.

The Tenth Circuit in *Kelley* did not dispute the general proposition that the preemption had a broad scope. The court did note that the United States did not share petitioners' beliefs with regard to "many of the examples," and that the preemptive effect may not be as far reaching

95. *Kelley*, 69 F.3d at 1508-09.

96. The federal government argued that Section 601, by its very terms, preserves state regulation over motor carrier safety. This argument ignores the perplexing manner in which Congress threw a safety "bone" to the states in Section 601. The states were not given safety regulatory authority over **motor carriers** or **motor carrier operations**; they were only given safety authority over **motor vehicles**, at Section 601(b) and (c). **Motor carrier** authority is limited to insurance requirements alone. Thus, it could be contended that a state retains the ability to oversee the safety of the motor vehicle, but not the motor carrier operations in general. Hours of service, driver qualifications, and drug testing provisions are all put at risk by the intrusiveness of the federal preemption.

97. It must be remembered that the ability conceded in Section 601 to a state to regulate any one of the four state standard transportation practices, such as bills of lading or carrier liability for loss and damage, is directly dependent upon whether a carrier elects to be so regulated. 49 U.S.C. §14501 (c)(3)(B)(ii). Thus, a carrier can choose whether it wishes to be covered by certain of the U.C.C. Article VII provisions, for example, or laws imposing liability as to full value for lost or damaged shipments. One can only speculate as to the number of carriers that would choose to be so regulated, when their competitors were not.

as Petitioners believed.[98] Even given the broad preemptive effect on a "wide range of state regulations,"[99] the court held that: "[a]ssuming the rationality of Congress' findings with respect to the negative impact of state regulations on interstate commerce, what choice did Congress have except to enact a statute that preempts a **fairly broad range** of state economic regulations."[100] The court also noted that it was not up to the courts to second guess Congress on its findings. Further, even conceding that the law may have unintended effects, such effects did not make the law irrational under a Commerce Clause analysis.[101] A **broad preemption, then, did not make for an unconstitutional preemption in the** *Kelley* panel's view.

Only the early returns are in from the Section 601 preemption.[102] One cannot as of yet conclude that the *Kelley* petitioners were correct with regard to their predictions on an all-encompassing preemption. The substantial body of case law under the ADA, however, lends support to the proposition that the motor preemption will be far-reaching, if not all-encompassing.

IV. The First Wave of Motor Carrier Preemption Cases.

Again, only a smattering of cases have reached the decisional stage in applying the ADA precedents to the Section 601 context in the motor carrier field. Those early cases, however, suggest that the broad preemption will apply, as Congress had intended it. A variety of commentators have spotlighted the myriad applications to which preemption may be held to apply. Whether preemption situations are "multiplying like rabbits from a magician's hat,"[103] it remains clear that the preemption "encompasses a myriad of state and local law and regulations which relate to a 'price, route, or service' of an intrastate motor carrier of property."[104]

A series of cases involve an interpretation of the scope of the preemption vis-a-vis tow truck operators. Two of these three cases were

98. *Kelley*, 69 F.3d at 1508.

99. *Id.*

100. *Id.* at 1509 (emphasis added).

101. *Id.*

102. See Part IV, "The First Wave of Motor Carrier Preemption Cases."

103. *See* A.M. Pougiales, *The Brave New World of Federal Preemption of Intrastate Motor Economic Regulation*, 3 Transp. Law. 40, 44 (1994).

104. W.R. Alderson, *Scope of Section 601-Preemption of State Regulation*, 4 Transp. Law. 17, 22 (1995). For a comprehensive review of recent cases involving Section 601, see A.M. Pougiales, *Economic Regulation-What's Left to the States?*, 29th Transp. Law Inst. 34 (1996). *See also*, N.R. Garvin, *State Regulation After Deregulation-Interpreting the Breadth of Federal Preemption Under Section 601*, 28th Transp. Law Inst. 7 (1995), and J. Weiler and W. R. Alderson, *The Scope of Intrastate Preemption from the Motor Carrier Prospective*, 28th Transp. Law Inst. (1995).

commenced in the state of Louisiana. In *Giddens v. City of Shreveport*,[105] the court found that a local city ordinance regulating vehicle towing and the storage of towed vehicles was not preempted by Section 601 as the Interstate Commerce Commission did not have jurisdiction under the Interstate Commerce Act of the towing of an accidentally wrecked or disabled motor vehicle.[106] The court also based its ruling on statements in Congress by Representative Nick J. Rahall (D. W. Va.), that there was no intent to affect motor carriers generally, such as tow truck drivers, by the provisions of Section 601.[107] In the second Louisiana case, *Brumfield Towing Serv., Inc. v. City of Baton Rouge*,[108] the court, again within the context of a motion for preliminary injunction, held that a local ordinance, which required that the City utilize contracts with designated tow truck operators in certain areas of the city, had not been preempted by Section 601, relying upon "policy issues and plain common sense."[109] The court in *Brumfield* relied heavily upon the analysis of the decision in *426 Bloomfield Avenue Corp. v. Newark*.[110]

In *Bloomfield*, the U.S. District Court arrived at the conclusion that the City of Newark ordinance establishing a rotational system for provision of the City's towing and storage needs had not been preempted by Section 601. The court analyzed the issue from the standpoint of congressional intent.[111] The court recognized that it was interpreting a "linguistic morass."[112] In finding that there was no preemption, the court in *Bloomfield* rested its decision upon policy considerations, stating:

> At oral argument, plaintiffs answered this concern by asserting that it is now Congress' responsibility to issue towing regulations. Given the public's vulnerability to corruption and extortion in the context of non-consensual tow-

105. Giddens v. City of Shreveport, 901 F. Supp. 1170 (W.D. La. 1995), *Order Accepting Report and Recommendation of U.S. Magistrate*, 912 F. Supp. 953.

106. *See* 49 U.S.C. § 10526(b)(3) (repealed).

107. *Giddens*, 901 F. Supp. at 1183, Cong. Rec. H. 1830 (daily ed. Sept. 12, 1994) (statement of Rep. Rahall). Rep. Rahall pointed to the initial focus of Section 601, i.e., that of levelling the playing field for package delivery carriers in the aftermath of Federal Express Corp. v. California Public Util. Comm., 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2956 (1996). However, the scope of Section 601's application was drastically enlarged from package delivery carriers only to the entire industry after Congress held a single day's hearing on the preemption provision. The *Giddens* decision was issued in the context of a request for preliminary injunction, and was, in actuality, a determination by the court that plaintiffs, arguing in favor of preemption, had failed to establish a substantial likelihood of prevailing on the merits.

108. Brumfield Towing Serv., Inc. v. City of Baton Rouge, 911 F. Supp. 212 (M.D. La. 1996).

109. *Id.* at 220.

110. 426 Bloomfield Avenue Corp. v. Newark, 904 F. Supp. 364 (D. N.J. 1995).

111. *Id.* at 368.

112. *Id.* at 370. The *Bloomfield* court concluded that, as Congress, in enacting Section 601, had as its initial purpose the leveling of a "competitive playing field among intermodal shippers and truckers," clearly tow trucks were not intended to be included in the broad preemption. *Id.* at 371.

> ing, however, it would be grossly irresponsible for Congress to have preempted all state and local regulation **before adopting its own federal consumer protection scheme which, of course, it has not done**. Plaintiffs have offered no compelling reason why this court should assume that Congress intended such an unfathomable legislative design.
>
> In addition, this case must be approached against the back-drop of alleged monopoly protection and government bribery in the awarding of municipal contracts in Newark's towing industry . . . Here, defendant has a compelling argument that, like similar ordinances nationwide, the Newark ordinance represents a local response to the towing industry's allegedly corrupt history. The responsibility for such corrective measures should be left to the state and municipal governments which are in the best position to address the nuances of their own locality's regulatory needs.[113]

A fair reading of the legislative history of Section 601, however, would yield a contrary result. Congress was plain that it meant all motor carrier services (except motor carriers of household goods) to be included within the preemption. Congress in essence recognized this, by amending the scope of Section 601, through the vehicle of the Interstate Commerce Commission Termination Act ("ICCTA"). Through ICCTA, non-consensual tows were exempted from the preemption.[114]

A federal court decision also has been issued on whether a state law claim for price discrimination can be maintained against a common carrier in violation of state law. In *Carsten v. United Parcel Services, Inc.*,[115] the court found that a claim for price discrimination in violation of a California state statute had been preempted by Section 601. In *Carsten*, plaintiff had alleged that the defendant motor carrier had offered certain preferred shippers secret competitive benefits and discounts which were not available to the plaintiff or other similarly situated shippers within the state of California. In light of Section 601, the court found that no state laws could be applied to regulate and control the prices of a motor carrier. The court rejected out of hand the contention of plaintiff that state laws were no longer preempted, after passage of ICCTA, because ICCTA did not grant the Surface Transportation Board of the United States Department of Transportation jurisdiction over intrastate transportation by motor carriers.[116] The court noted that ICCTA had actually recodified the preemption provision and " . . . clearly reaffirms Congress' intent to

113. *Id.* at 374 (citations omitted) (emphasis added). Accordingly, it was concluded that there was no preemption. Plaintiffs in *Kelley* made the same argument that there could be no field preemption, when Congress had determined not to regulate intrastate transportation itself. This was rejected by the court. *See* Kelley v. United States, 69 F.3d 1503, 1510.

114. *See* note 6, *supra.*

115. Carsten v. United Parcel Service, Inc., No. CIV.S-95-862 WBSJFM, 1996 WL 335421 (E.D. Cal. Mar. 26, 1996).

116. Again, the court refused to find as significant the lack of federal regulation. See note 111.

preempt state laws relating to the prices of motor carriers."[117]

Another case which focuses on a dispute between a shipper and carrier is *Ready Transp., Inc. v. Best Foam Fabricators, Inc.*[118] In *Ready*, a carrier brought a breach of contract action for unpaid freight charges against its shipper in state court. The shipper filed notice of removal, and the carrier responded with a motion for remand to state court. The federal court noted that there was not an issue in the suit as to the lawfulness of the rates which the carrier had charged. The fact that the Interstate Commerce Commission had jurisdiction over the rates of the carrier at the time that the suit was brought did not transform the carrier's cause of action into a suit arising under federal law, either. In other words the carrier's breach of contract action was not explicitly preempted, under a *Wolens* analysis. Also, there was not the "complete preemption" necessary to confer subject matter jurisdiction over such a complaint.

Three cases have arisen in the undercharge context, all of which have found that Section 601 preempted state filed rate doctrines and consequently barred adversary proceedings filed after January 1, 1995, Section 601's effective date, despite the fact that the transportation upon which the actions were based had occurred prior to the effective date of the act. In *In re Industrial Freight Sys., Inc.*,[119] the court found that, as the action had been commenced after the effective date of the act, it was based upon state legislation, i.e., a filed rate requirement, that already been preempted by the act. As the case was not pending at the time that the preemption took effect, the court ruled that *Landgraf v. USI Film Products*[120] was inapplicable to the facts of that case. In *In re St. Johnsbury Trucking Company, Inc.*,[121] the federal court, as in the *Industrial Freight* case, found that Section 601 barred intrastate undercharge claims brought after January 1, 1995, but which claims had accrued before that date. The court rejected the carrier's argument that the undercharge claims had become vested upon accrual.[122] Again, the court distinguished *Landgraf*, based on the fact that the *Landgraf* suit had been pending on appeal when the statute in question had been enacted. The court further noted that the plaintiff had been on notice during the congressional debate, as well as during the four month period between the passage of Section 601 and its effective date, as to the prospective consequences of the act. The Court stated that "[t]o claim the benefits of prospective relief under a

117. *Carsten*, 1996 WL 335421 at 4.

118. Ready Transp., Inc. v. Best Foam Fabricators, Inc., 919 F. Supp. 310 (N.D. Ill. 1996).

119. In re Industrial Freight Sys., Inc., 191 B.R. 825, (Bankr. C.D. Cal. 1996).

120. Landgraf v. USI Film Products, 511 U.S. 244 (1994).

121. In re St. Johnsbury Trucking Co., Inc., 199 B.R. 84 (Bankr. S.D. N.Y. 1996).

122. *Id.* at 87-88

protestation of retroactivity strains credulity."[123]

In still another proceeding, *In re Palmer Trucking Comp., Inc.*,[124] the court again determined that preemption had occurred on state undercharge claims brought after the effective date of January 1, 1995. It rejected arguments that Section 601 applied only to actions brought by a state, as well as the argument that it applied only to motor carriers still in operation. In *Palmer*, however, the court utilized a *Landgraf* analysis to conclude that enforcement of the preemption provisions of Section 601 did not constitute retroactive application of a federal statute. The court determined that the purpose of the filed rate doctrine was not to confer a benefit on motor carriers, but to regulate intrastate commerce. As no private rights were conferred by the Massachusetts Rate Statute, the passage of Section 601 " . . . overrode the Commonwealth's statutory scheme prospectively, rather than took away rights from carriers retroactively."[125]

Interestingly, the courts in *Ready*, *Industrial Freight*, *St. Johnsbury*, and *Palmer* all relied upon the *Morales-Wolens* Supreme Court pronouncements in interpreting the scope of Section 601 preemption. This, of course, is in keeping with the plain legislative history of Section 601 that Congress intended to effectuate the same preemption over state regulation of motor carriers as had previously been accomplished for air carriers through the ADA. The next year will determine the extent of Section 601's dragnet effect, as courts reach decisions on claims that a wide variety of local and state regulations are unenforceable against carriers.

V. The State of Federal Preemption in the Railroad Industry

A. Torts

Preemption questions also have been unsettled in the rail area. The issue of preemption of common law negligence actions against railroads under the Federal Railroad Safety Act of 1970 (FRSA), recently recodified at 49 U.S.C. § 20101 *et seq.*[126] and regulations promulgated thereunder, also has prompted conflicting opinions from the United States Circuit Courts of Appeals, as they have interpreted the recent United States Supreme Court opinion in *CSX Transp., Inc., v Easterwood.*[127]

123. *Id.* at 88.

124. In re Palmer Trucking Co., 201 B.R. 9 (Bankr. D. Mass. 1996).

125. *Id.* at 16.

126. *See* 45 U.S.C. § 421 *et seq.* (repealed 1994), where the FRSA was initially codified. The recodification was accomplished by Pub. L. No. 103-272 (July 5, 1994).

127. CSX v. Easterwood, 507 U.S. 658.

These varying opinions are not a complete surprise, given the conditional nature of the preemption in the first instance. The preemptive language in FRSA allows for a continued state role in the safety area, if the Secretary of Transportation has not yet exercised his or her rulemaking authority conferred upon him or her in "all areas of railroad safety."[128] In addition to this rulemaking authority, the Secretary was also directed in FRSA to find solutions to safety problems involving grade crossings.[129] The preemption provision in FRSA states that:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order—
> (1) is necessary to eliminate or reduce an essentially local safety hazard;
> (2) is not incompatible with a law, regulation, or order of the United States Government; and
> (3) does not unreasonably burden interstate commerce.[130]

The Secretary thereafter exercised his rulemaking authority under both FRSA and the Highway Safety Act of 1973.[131]

In *Easterwood*, the high court was confronted with a preemption claim under the safety and grade crossing regulations as applied to a state negligence action in two respects: 1) that of failure to maintain adequate warning devices at a crossing and 2) that of train operation at an excessive speed. The Supreme Court affirmed the Eleventh Circuit's holding that the speed claim was preempted, but the lack of adequate warning devices claim was not. In so ruling, the majority held that the regulations must do more than "relate to" the subject matter, as the use of the word "covering" in the preemptive language of the statute " . . . indicates that preemption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law."[132]

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128. 45 U.S.C. § 431(a).

129. *See* 45 U.S.C. § 433 (repealed 1994). The Secretary, in response to this duty, presented two reports to Congress, ultimately leading to the passage of the Highway Safety Act of 1973, 87 Stat. 282, note following 23 U.S.C. § 130. This legislation made federal funds available to the states for the improvement of grade crossings in exchange for which the states must conduct systematic surveys of railroad crossings in order to identify those needing improvements and further establish a schedule for such projects. Regulations were then promulgated by the Secretary of Transportation imposing conditions for state use of federal grade crossing funds at 23 C.F.R. parts 646, 655, 924, and 1204. Also, *see* recodified 49 U.S.C. § 20134.

130. This is the recodified language at present 49 U.S.C. § 20106 (1996), substantially similar to 49 U.S.C. § 434.

131. See note 2, *supra.*

132. *Easterwood,* 507 U.S. at 664.

The *Easterwood* decision concluded that a framework of state negligence liability could be complementary to the funding process regulations found at 23 C.F.R. Part 924. The federal regulations mandating the steps which must be taken by the states to receive federal funds only "establish the general terms of the bargain between the federal and state governments . . . "[133] Such rules "ha[ve] little to say about the subject matter of negligence law, because, with respect to grade crossing safety, the responsibilities of railroads and the State are, and traditionally have been quite distinct."[134]

Thus, only the regulations which set forth standards for the installation of specific warning devices, in the court's view, preempt state tort law.[135] These rules require that, if federal funds are utilized in the installation of the warning devices, the improvement project must either include an automatic gate, based on the existence of certain conditions,[136] or receive Federal Highway Administration (FHWA) approval. In this case, the Court noted,

> In short, for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The Secretary's regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.[137]

However, the facts did not establish that federal funds had been utilized in *Easterwood* for the installation of warning devices, as they were defined in the regulations.[138] Thus, the negligence grade crossing claim was not preempted.

Concerning the plaintiff's claim that the defendant railroad had been negligent in traveling at an excessive speed; however, preemption did apply. The Secretary, pursuant to his authority under FRSA, had issued comprehensive speed limit rules for all freight and passenger trains according to each class of track over which they travel. It was conceded that the train in question was traveling at less than the speed limit. The state common law claim was accordingly preempted, as it was "'incompatible with' FRSA and the Secretary's regulations."[139] The Court opined that the Secretary clearly had the power under 45 U.S.C. § 434 to preempt state common law.

133. *Id.* at 667.
134. *Id.*
135. *See* 23 C.F.R. § 646.214(b)(3), (4).
136. *See* 23 C.F.R. § 646.214(a)(3).
137. *Easterwood*, 507 U.S. at 671.
138. See the definition for active and passive warning devices at 23 C.F.R. § 646.204 (i), (j).
139. *Easterwood*, 507 U.S. at 675.

The dispute among the circuit courts of appeals concerns the issues as to whether a specific determination by the Secretary is required, when the grade crossing preemption occurs, and, if federal preemption occurs, whether subsequent events can negate that preemption.

On the pro-preemption side, the decision in *Hester v. CSX Transp., Inc.*, is illustrative.[140] The court in *Hester* defined the issue as to whether federal monies "'participated' in the installation of 'warning devices'" at the grade crossing in question.[141] As federal funds had been expended between 1981 and 1983 for the installation of passive warning devices, the preemption applied. It did not matter, in the court's view, whether or not the Secretary of Transportation had made a determination that passive devices were adequate at the specific grade crossing in question, as there is a legal presupposition that the Secretary must have determined that the safety devices installed were adequate in order to have approved and authorized the expenditure in question. As the court stated in footnote eight, "[i]t is the Secretary's authorization that triggers the participation of federal funds."[142] State law negligence claims based on adequate warning were held preempted.

The recent decision in *Armijo v. Atchison, Topeka, and Santa Fe Ry. Co.*[143] is in accord with the decision in *Hester*. The plaintiff in a wrongful death action contended in part that the defendant railroad was negligent in providing passive grade crossing warning devices which were inadequate. In *Armijo*, the court noted the circuit's earlier decision in *Hatfield v. Burlington Northern R.R. Co.*,[144] in which the court had found preemption to have occurred at the time that $619.17 in federal funds had been expended, active warning devices had been selected, and installation of the active warning devices had been scheduled. The court in *Hatfield* had concluded that the federal participation must be significant,[145] the federal financial participation must be more than "casual" in the project itself, the federal financial participation may be non-cash in nature, and the crossing project must be examined broadly from planning to construction completion.[146]

Applying its *Hatfield* principles to the *Armijo* facts, preemption was again deemed to have occurred.[147] In *Armijo*, the Secretary of Transpor-

140. Hester v. CSX Transp., Inc., 61 F.3d 382 (5th Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 815, 133 L. Ed. 2d 760 (1996).

141. *Id.* at 386.

142. *Id.* at 387, fn.8.

143. Armijo v. Atchison, Topeka, and Santa Fe Ry. Co., 87 F.3d 1188 (10th Cir. 1996).

144. Hatfield v. Burlington Northern R.R. Co., 64 F.3d 559 (10th Cir. 1995).

145. Obviously, the *Hatfield* court considered $619.17 to be significant.

146. *See* 64 F.3d at 561.

147. Preemption was found to exist based on the *Hatfield* precedent, despite the fact that the author of *Hatfield*, Judge Ebel, dissented in *Armijo*.

tation had agreed to provide ninety percent of the funding for reflectorized crossbucks on a group of railroad grade crossings in New Mexico, including the crossing in question. At the point of agreement, the warning device came under the control of the Secretary, in the absence of clear evidence to the contrary that the Secretary had determined that "the crossbucks, though desirable, were not adequate in themselves to warn the public of the danger" at the specific crossing at issue.[148] That a diagnostic team subsequently determined that the grade crossing required an active warning system, once funds became available, did not invalidate the federal preemption, as that later decision was still under federal control.[149]

A similar conclusion was reached by the Eighth Circuit in *Elrod v. Burlington Northern R.R. Co.*,[150] albeit with a significant additional condition imposed. As the Court there declared, "[f]ederal funding is the touchstone of preemption in this area because it indicates that the warning devices have been deemed adequate by federal regulators."[151] However, the court in *Elrod* went on to say that it was necessary for the warning devices **to be installed and operating**, citing an earlier decision in the Eighth Circuit *of St. Louis Southwestern Ry. Co. v. Malone Freight Lines, Inc.*[152]. In *Malone*, the FHWA had approved the addition of gates to a crossing, but the accident occurred before the completion of the project. The *Malone* court held that no preemption existed, in the absence of complete installation and operation. As the warning devices in *Elrod* were operational, however, preemption did exist on those facts.

The Eighth Circuit, in its most recent pronouncement in *Kiemele v. Soo Line R.R. Co.*,[153] held to the *Malone-Elrod* line. In *Kiemele*, the court reversed a summary judgment decision in the railroad's favor on a grade crossing negligence claim, in that a question of fact existed as to whether crossbucks installed with federal funds twelve years before the accident in question had lost their reflectivity, thus making them potentially non-operational.

Still another recent case in the *Easterwood* category at the circuit court of appeals level is *Michael v. Norfolk Southern Ry. Co.*[154] The

148. *See Armijo*, 87 F.3d at 1192.

149. Judge Ebel, in dissent, disagreed both with the finding that agreement itself, without the expenditure of funds, triggers preemption, and that the preemption could not be invalidated by subsequent events, i.e., the diagnostic team's later recommendation of automatic gate installation. *See id.* at 1192-93.

150. Elrod v. Burlington Northern R.R. Co., 68 F.3d 241 (8th Cir. 1995).

151. *Id.* at 244.

152. St. Louis Southwestern Ry. Co. v. Malone Freight Lines, Inc., 39 F.3d 864 (8th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1963, 131 L. Ed. 2d 854 (1995).

153. Kiemele v. Soo Line R.R. Co., 93 F.3d 472 (8th Cir. 1996).

154. Michael v. Norfolk Southern Ry. Co., 74 F.3d 271 (11th Cir. 1996).

court agreed that preemption of state tort claims would occur for the federally funded crossing devices, "so long as the railroad complied with the federal regulations."[155] The plaintiffs, however, alleged that the automatic gate arm was shorter than required by federal strictures. The court pronounced that if such were the case, a state tort claim could be maintained for negligent design or construction. Moreover, the court ruled that plaintiffs' claims for negligent maintenance of the crossing and failure to warn the public of its defective nature as a result of the negligent maintenance would not be preempted, under its more narrow reading of *Easterwood*[156].

The leading case finding against preemption is *Shots v. CSX Transp., Inc.*[157] In *Shots*, the Seventh Circuit held that federal financial assistance, standing alone, would not result in preemption. There, Indiana had entered into an agreement with a railroad to install, largely at the federal government's expense, reflectorized crossbucks at 2638 railroad crossings, which agreement was approved by the Secretary. Fourteen years later, an accident occurred resulting in the lawsuit. The court refused to read the agreement to mean that the minimum level warning device, i.e., reflectorized crossbucks, was adequate from a safety standpoint. As the *Shots* court lectured,

> Indeed, it would have been an extraordinary act of irresponsibility for the Secretary of Transportation, by approving the agreement, to preclude tort liability for the railroad's failing to have active warning devices at any of the thousands of crossings covered by the agreement, or otherwise to prevent the state from requiring adequate safety devices at the busiest or most dangerous of these crossings, when no one in the federal government had made a determination that the improvements to be made would bring all the crossings up to a level of safety adequate to satisfy federal requirements.[158]

No specific approval had been made concerning the warning devices at the crossing in that particular case. The *Shots* court thus held against preemption.

Also of note is the later Seventh Circuit decision in *Thiele v. Norfolk & Western Ry. Co.*,[159] in which the court again held against preemption. Although the Secretary in *Thiele* had approved an upgrade, with an automatic crossing guard to be installed at largely federal expense, the construction was underway but not yet completed at the time of the accident. The court held that preemption would not occur "until the warning de-

155. *Id.* at 273.

156. CSX v. Easterwood, 507 U.S. 658.

157. Shots v. CSX Transp., Inc., 38 F.3d 304 (7th Cir. 1994).

158. *Id.* at 309.

159. Thiele v. Norfolk & Western Ry. Co., 68 F.3d 179 (7th Cir. 1995).

vices are installed and fully operational."[160]

Other recent state and federal court decisions reflect this split over the *Easterwood* preemption in grade crossing negligence actions. Again, the majority view appears to favor preemption. Along these lines, the decisions supporting this view include *Cartwright v. Burlington Northern R.R. Co.*[161] (inadequate warning device claim preempted, where device was federally funded, approved, and installed at time of accident); *McDaniel v. Southern Pacific Transp.*[162] (negligence claim based on operation of hazardous crossing deemed preempted where federal funds used to install reflectorized crossbucks over decade prior to accident); *Dallari v. Southern Pacific R.R.*[163] (inadequate warning device claim preempted, where federally funded device was installed and fully operational); *Williams v. CSX Transp., Inc.*[164] (inadequate warning device claim preempted, where federal funds participated in the installation of crossbucks in place at the time of accident); and *Bashir v. National R.R. Passenger Corp.*[165] (inadequate warning device claim preempted, where automatic gates had been installed with significant federal participation).

In two other recent state appellate cases, however, the courts have held against preemption. In *Hamlin v. Norfolk Southern Ry. Co.*,[166] the Alabama Supreme Court relied upon the opinion of the Eleventh Circuit in *Michael*, in holding that the negligence claims were not preempted, avoiding *Easterwood* by treating plaintiffs' actions as based upon negligent maintenance of the crossing and failure to warn the public of the defective nature of the crossing. In *Martin v. Consolidated Rail Corp.*,[167] the court, relying upon *Thiele*, found an inadequate warning device claim not preempted, where a grade crossing at which crossbucks were in place had been approved for an "upgrade" to active warning signals, but the new signals had not yet been installed. There was no discussion by the court, however, of whether federal funds had been expended in the installation of the passive warning devices that were already in place.

Other cases have converted what are in essence inadequate warning claims into negligence causes for failure to maintain properly a crossing, avoiding the preemption issue. For example, in *Sheets v. Norfolk South-*

160. *Id.* at 183. The court ultimately determined that the railroad had no liability in *Thiele*, because of plaintiff's comparative fault.

161. Cartwright v. Burlington Northern R.R. Co., 908 F. Supp. 662 (E.D. Ark. 1995).

162. McDaniel v. Southern Pacific Transp., 932 F. Supp. 163 (N.D. Tex. 1995).

163. Dallari v. Southern Pacific R.R., 923 F. Supp. 1139 (E.D. Ark. 1996).

164. Williams v. CSX Transp. Co., 925 F. Supp. 447 (S.D. Miss. 1996).

165. Bashir v. National R.R. Passenger Corp., 929 F. Supp. 404 (S.D. Fla. 1996).

166. Hamlin v. Norfolk Southern Ry. Co., 1996 Ala. LEXIS 189 (July 12, 1996).

167. Martin v. Consolidated Rail Corp., 667 N.E.2d 219 (Ind. Ct. App. 1996).

ern Ry. Corp.,[168] the court, while acknowledging the *Easterwood* preemption decision, held tort claims not preempted, because they related to negligence to use ordinary care in maintaining a safe railroad crossing. Likewise, in *Mott v. Missouri Pacific R.R. Co.*,[169] the court, confronted with a crossing grade accident, allowed that a claim that unreasonable vegetation blocked the signal's view was proper for jury submission, without discussion of *Easterwood*, except in an excessive speed context.

Even with regard to the *Easterwood* excessive speed preemption, a degree of uncertainty exists. Again, most courts have come down on the side of preemption, consistent with the clear language of *Easterwood*. For example, in *St. Louis Southwestern Ry. Co. v. Pierce*,[170] the court ruled an excessive speed counterclaim based on negligence preempted, when the railroad was operating within federal speed standards, even though it was traveling in excess of its own internal procedures.[171]

However, the *Easterwood* opinion had indicated that while it was preempting claims of excessive speed for trains operating within federal standards, it was leaving open the question of whether preemption occurred for "breach of related tort law duties, such as the duty to slow or stop a train to avoid a specific, individual hazard."[172] Courts have seized upon this language, to allow such related claims to go forward, even while finding excessive speed claims preempted.[173] In *Bukhuyzen v. National Rail Passenger Corp.*, the court, while acknowledging the excessive speed claim preempted, found viable a claim as to whether the train should have slowed based upon snowy weather conditions.[174] In *Mott*, the court allowed into evidence a violation of a town's ordinance as to train speed set 19 miles an hour lower than the federal speed limit, because the ordinance might deal with "an essentially local safety hazard," within the meaning of the language of 45 U.S.C. section 434.

Another recent preemption case of a products liability nature also resulted in a finding of preemption. In *Ouellette v. Union Tank Car*

168. Sheets v. Norfolk Southern Ry. Co., 1996 Ohio App. LEXIS 530 (Ohio Ct. App. Feb. 12, 1996).

169. Mott v. Missouri Pacific R.R. Co., 926 S.W.2d 81 (Mo. Ct. App. 1996).

170. St. Louis Southwestern Ry. Co. v. Pierce, 68 F.3d 276, 278 (8th Cir. 1995).

171. *See similarly*, Michael v. Norfolk Southern Ry. Co., 74 F.3d 271, 274. *See also*, Williams v. CSX Transp. Co., 925 F. Supp. 447, 451-53; Dallari v. Southern Pacific R.R., 923 F. Supp.1139, 1140; Cartwright v. Burlington Northern R.R. Co., 908 F. Supp. 662, 666; Bashir v. National R.R. Passenger Corp., 929 F. Supp. 404, 410; and Herriman v. Conrail, Inc., 883 F. Supp. 303, 306-307 (N.D. Ind. 1995).

172. CSX v. Easterwood, 507 U.S. 658, 675-76 fn.15.

173. *See Michael*, 74 F.3d at 274; *Bashir*,, 929 F. Supp. at 412-413, and Bukhuyzen v. National Rail Passenger Corp., 1996 U.S. Dist. LEXIS 1884 (W.D. Mich. 1996)

174. *See* note 173. The court also found that a fact question existed as to whether the railroad either had a duty or had assumed a duty to sound its whistle at a private grade crossing.

Co.,[175] an action had been brought against a tank car manufacturer, as well as the railroad delivering the car, grounded in the charge that plaintiff's fall from the car was the result of wrongly placed handholds. The action was deemed preempted by the court under regulations issued by the Secretary of Transportation under FRSA. The court commented that "[w]hile federal preemption often means that there is no remedy available to a claimant, in many instances unfortunately this result is necessary to vindicate the intent of Congress."[176] The preemption was applied under FRSA, even though the plaintiff claimed that there had not been compliance by the manufacturer with the federal regulations. As the court further commented, "while these penalty provisions call for Attorney General enforcement action, allowing only minimal per diem sanctions for violations, and do not allow for a private right of action, they do show Congressional intent to regulate the field of railroad safety under one comprehensive statute."[177]

Another recent state court case, *In re New Orleans Train Car Leakage Fire Litig.*, however, found preemption not to apply under the FRSA.[178]. In *Train Car Leakage*, a class action suit was filed after an explosion and fire caused by a leaking railroad car. The class action plaintiffs sought exemplary damages, under a Louisiana state statute allowing such damages for "wanton and reckless disregard for public safety in the storage, handling or transportation of hazardous or toxic substances."[179] Three of the defendants raised a federal preemption claim, including defendants Illinois Central Railroad Company and CSX Transportation, Inc. The court relied upon an earlier decision by the Louisiana Court of Appeal in *Haydel v. Hercules Transp., Inc.*,[180] in reaching its non-preemption conclusion. It found that the Louisiana exemplary damages statute addressed separate and distinct subject matters from FRSA. The court stated,

> The penalty provisions of the FRSA provide for fines and penalties to be paid to the federal government, not to the individual persons injured as a result of the improper storage, handling, or transportation of hazardous materials. Because the fines and penalties of the two provisions have different purposes, we hold that the FRSA does not preempt La. C.C. Art. 2315.3.[181]

The public policy analysis of the Louisiana appellate court in *Train Car*

175. Oullette v. Union Tank Car Co., 902 F. Supp. 5 (D. Mass. 1995).
176. *Id.* at 10.
177. *Id.*
178. In re New Orleans Train Car Leakage Fire Litig., 671 So. 2d 540 (La. Ct. App. 1996).
179. *See* LA. CIV. CODE, art. 2315.3 (repealed 1996).
180. Haydel v. Hercules Transp., Inc., 654 So. 2d 418 (La. Ct. App. 1995).
181. *Train Car Leakage*, 671 So. 2d at 547.

Leakage, thus, is directly contrary to that in the *Union Tank Car Co.* proceeding.

The present state of the *Easterwood* precedent is muddled, at best. Controversies exist with regard to 1) whether a blanket project, covering a large geographic area, qualifies for preemption as a project where the Secretary has actually determined the devices to be installed, as opposed to a determination by the Secretary for a particular project; 2) whether installation must be completed to trigger preemption as contrasted with mere authorization and expenditure of funds; 3) whether conditions subsequent can invalidate an earlier preemption; 4) if conditions subsequent can invalidate an earlier preemption, what are those conditions (i.e., subsequent authorization by the Secretary of upgraded warning devices, non-operational warning devices, changed traffic patterns, the passage of time); and 5) whether, despite preemption, actions can be brought for failure to adequately maintain the approved devices, and/or failure to warn that the approved devices were not being adequately maintained. Similarly, in negligent speed cases, courts have grabbed onto the handhold provided by the Supreme Court's language leaving open questions of preemption concerning related tort law duties to sustain actions for failure to take into account local conditions, such as the weather. It is evident that the ebb and flow of the preemption line will continue, without further guidance from the Supreme Court.

B. Local Ordinances

Several other cases involved the issue of whether state or local ordinances ostensibly governing train operations had been preempted. In *CSX Transp., Inc. v. City of Plymouth*,[182] the Sixth Circuit held preempted by FRSA a municipal ordinance prohibiting trains from obstructing free passage of traffic on the city streets for more than five minutes. The court noted that the exceptions at 49 U.S.C. § 20106 apply only to states and not to local municipalities.[183] The claim of the local municipality that its ordinance did not address safety but rather general welfare was rejected by the court on the broad interpretation of "related to" language, as in *Morales* and *Wolens*. In *Civil City of South Bend v. Conrail*,[184] a district court held not preempted a local ordinance prohibiting audible train warnings at certain railroad crossings. In that case, the court held that the local ordinances were not preempted by provisions of the High-Speed Rail Development Act of 1994,[185] FRSA, or other fed-

182. CSX Transp., Inc. v. City of Plymouth, 86 F.3d 626 (6th Cir. 1996).
183. 49 U.S.C. § 20106 is the present codification of former 45 U.S.C. § 434.
184. Civil City of South Bend v. Conrail, 880 F. Supp. 595 (N.D. Ind. 1995).
185. High Speed Rail Development Act of 1994, Pub. L. No. 103-440, 108 Stat. 4615 (1994).

eral statutes. The court noted that the Secretary of Transportation had been directed to promulgate regulations concerning the sounding of a locomotive horn, but had not yet done so. As the court stated,

> Perhaps Congress can preempt a field simply by invalidating all state and local laws without replacing them with federal laws, but the High-Speed Rail Development Act discloses no such intent. Directing the Secretary of Transportation to preempt a field is not the same as preempting the field; here, Congress has done only the former.[186]

The court conceded that future preemption might very well occur inevitably, but added that "no analysis of preemption involves predicting the future."[187] Finally, in *Wisconsin v. Wisconsin Cent. Transp. Corp.*,[188] the Wisconsin Court of Appeals found preemption to exist against the Wisconsin Conductor Law. The court held that the federal requirements regulating "train operators" in fact covered the traditional conductor job description, and therefore subsumed the field.[189]

C. Employment Relations

Three recent rail cases have addressed preemption issues in an employment law context. In *Peters v. Union Pacific R.R. Co.*,[190] a railroad engineer brought an action for conversion in state court against a railroad for refusing to return his locomotive engineer certificate. The defendant railroad removed the action to federal court, and moved for dismissal of the state law claim on preemption grounds, which dismissal motion was granted. In affirming the lower court's action, the Court of Appeals stated "because Peters' conversion claim is necessarily a challenge to Union Pacific's certification decision, it follows that the claim comes within the scope of the FRSA regulations and is preempted. Congress has expressly preempted state laws affecting railroad safety where the Secretary of Transportation has promulgated regulations."[191] Dismissal of the action had been appropriate by the district court, in that the engineer had failed to exhaust his administrative remedies by filing a review petition with the Federal Railroad Administration. In *Stiffarm v. Burlington R.R. Co.*,[192] the court found a railroad employee's state law claim of intentional infliction of emotional distress preempted. However, the court rested its decision not on the Railway Labor Act, as had the lower

186. *Civil City,* 880 F. Supp. at 600.
187. *Id.*
188. Wisconsin v. Wisconsin Cent. Transp. Corp., 546 N.W.2d 206 (Wis. Ct. App. 1996).
189. *See id.* at 210.
190. Peters v. Union Pacific R.R. Co., 80 F.3d 257 (8th Cir. 1996).
191. *Id.* at 262.
192. Stiffarm v. Burlington R.R. Co., No. 95-35136, 1996 U.S. App. LEXIS 8529 (9th Cir. Apr. 1, 1996).

court, but upon the Federal Employers' Liability Act (FELA). The court ruled that intentional infliction of emotional distress claims fell within the field Congress intended for FELA to occupy. Intentional infliction of emotional distress, in the court's view, was similar to FELA-covered intentional torts such as assault.

In still another case which was brought under FELA, with preemption aspects, the court, in *Miller v. Chicago and Northwestern Transp. Co.*,[193] held that a municipal building code as applied to an open pit at a locomotive repair shop had not been preempted by a Federal Railway Administration policy statement. The court cautioned that a policy statement divesting another federal agency of authority is very different from preemption of state or local laws in an area traditionally regulated by state or local governments. An expert would accordingly be allowed to base his opinion on non-compliance by a railroad with the local ordinance.

D. Shipper - Carrier Disputes

Two other cases addressed rail preemption issues in a shipper-carrier relationship context. In the first case, *Pietro Culotta Grapes v. Southern Pacific Transp. Co.*,[194] a complaint by shippers against defendant rail carriers, based on state law claims for breach of contract, negligence, fraud, negligent misrepresentation and interference with economic advantage was held preempted by the Carmack Amendment. Plaintiffs alleged that 48 rail cars of wine grapes and grape juice were delivered in an untimely fashion and, in some cases, the produce had been damaged. The court rejected the view that plaintiffs' state law claims were based, not upon the actual shipping and delivery of the grapes, but upon the pre-shipment conduct of defendants.[195] The state common law causes of action were held to be inconsistent with the uniformity goal of the Carmack Amendment.

In a second case, a rail carrier brought an action against a city for rail car demurrage charges in *CSX Transp., Inc. v. City of Pensacola*.[196] Among other defenses, the city argued that the railroad's third party beneficiary claim was meritless, because any alleged contract had been preempted by the Federal Bill of Lading Act. However, the court found that demurrage charges could be allocated by contract and accordingly were not preempted.[197]

193. Miller v. Chicago and Northwestern Transp. Co., 925 F. Supp. 583 (N.D. Ill. 1996).
194. Pietro Culotta Grapes, Ltd. v. Southern Pacific Transp. Co., 917 F. Supp. 713 (E.D. Cal. 1996).
195. *Id.*
196. CSX Transp., Inc. v. City of Pensacola, 936 F.Supp. 885 (N.D. Fla. 1995).
197. *Id.*

V. CONCLUSION

It is an understatement that the scope of federal preemption of state laws in both the airline and rail areas continues to be a matter of concern for these industries. The breadth of the preemption occasioned by the Airline Deregulation Act remains a source of controversy in the courts, and this controversy has relevance, not only for the airlines, but also for motor carriers, given the express intention of Congress to effect the same broad preemption through deregulation of price, routes, and service in the motor carrier industry as had previously been accomplished in the air carrier field. Similarly, the preemption issues in the rail carrier area after *Easterwood* are far from settled. The conflicting views expressed by the United States Circuit Courts of Appeals on the extent of preemption under FRSA, as well as preemption under the ADA, will ultimately require resolution by the U.S. Supreme Court, in the (hopefully) not too distant future.[198] No one ever promised that preemption would be accompanied by certainty, however. Certainty can be a scarce commodity, in an area where the law is changing rapidly, on "our impending adventure down the yellow brick road."[199] And, as Robert Frost so aptly observed,

> Most of the change we think we see in life
> Is due to truths being in and out of favor.[200]

The conflicting goals of a need for uniformity of safety and other standards for the nation's transportation companies and the need to compensate victims for perceived wrongs will, in and of itself, create future disputes about the extent of federal preemption, even with additional Supreme Court clarification.

198. The answer, at least, as to "who shall decide when doctors disagree?" is, when applied to lawyers and the U.S. Circuit Courts of Appeal, the U.S. Supreme Court (with apologies to Alexander Pope, *Moral Essays, III*).

199. Pougiales, *supra* note 103 at 44.

200. Robert Frost, *The Black Cottage*, 33.