Federal Preemption in the Area of Airline Services and Tort-Shopping— The Air Carrier's Dilemma

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INTRODUCTION

Defense strategy in aviation litigation frequently begins with an analysis of whether federal law preempts state law requiring a dismissal of state statutory and common law claims. Federal preemption is the displacement of state common law or statutory causes of action by federal standards. Congressional interest in uniformity is the motivating factor behind preemption.[1] In areas where safety is the primary concern - as in

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1. *See, e.g.*, H.R. Rep. No. 12611, 95th Cong., 2d Sess. 16, reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 3751-52. With respect to airline routes, rates and services, Congress was concerned with the uncertainties and conflicts created by the lack of specific provisions on the jurisdiction of the states and federal government. *Id.* By way of example, Congress recognized that air carriers were required to charge different fares for intrastate and interstate passengers traveling between the same two cities in the same state. *Id.* The states regulated the fares of intrastate passengers (those whose entire journey was between two cities in the same state), and the Civil Aeronautics Board regulated the fares of interstate passengers (those who traveled

the area of airline services - the states must not be permitted to enact or enforce conflicting rules of law. Rather, air carriers must be free to do whatever is necessary to insure the safety of flight, within the confines of federal law, without fear of reprisal suits by disgruntled passengers.

The issue is whether state law merely supplements a federal standard or whether state law is entirely displaced by a federal standard. It is resolved by resort to Congressional intent.[2] Generally, preemption may be (1) express by specific language contained in a particular federal statute;[3] (2) implied by a pervasive regulatory scheme;[4] or (3) applied when state law conflicts with federal law or interferes with Congressional objectives.[5]

The preemption concept is by no means new; it finds its roots in the supremacy clause of Article VI of the United States Constitution.[6] However, in 1978, when Congress enacted the Airline Deregulation Act, adding a federal preemption provision to the Federal Aviation Act, attention was drawn to the issue of preemption, resulting in a plethora of dismissal motions based upon express preemption.

Section 1305(a)(1) of the Federal Aviation Act provides, in pertinent part:

> [N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes or services of any air carrier. . .[7]

Congress intended to prevent conflicts and inconsistent regulations by eliminating state jurisdiction over airline routes, rates or services.[8] The implication is that an air carrier which performs services in accordance

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between the same two cities and then connected to another carrier to complete an out-of-state journey).

To prevent such inconsistent regulations, Congress enacted a preemption provision which provided the federal government with jurisdiction over routes, rates and services of air carriers. *Id.* Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 4(a), 92 Stat. 1708 (1978), *amended by* Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, § 9(u), 98 Stat. 1709 (1984)(codified as amended in 49 U.S.C. § 1305).

2. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

3. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983).

4. Rice, 331 U.S. at 230.

5. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963); Hines v. Davidowitz, 312 U.S. 52, 67-68 (1941).

6. Article VI of the United States Constitution provides:

> The Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

7. 49 U.S.C. § 1305(a)(1).

8. H.R. Rep. No. 12611, 95th Cong., 2d Sess. 16, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 3752. *See supra* note 3.

with federal regulations may not be subject to legal actions based upon state statutes or common law. Some courts, however, have been reluctant to find preemption - either express, implied or by conflict. The courts have focused upon the nature of the state statute or tort instead of the conduct of the carrier, creating a forum for tort-shopping.

For example, the Western District of Tennessee has excluded intentional torts from preemption,[9] and the Ninth Circuit has gone to the extreme of concluding that only state laws which are exclusive to airline services - not state laws which merely have an effect on services - are preempted.[10] As a result, an air carrier's federally-sanctioned conduct is left unprotected so long as the plaintiff provides a proper label for his cause of action. The air carrier's conduct is irrelevant in this analysis. This article discusses the undesirable effects of this misplaced analysis.

HINGSON AND AN INITIAL APPROACH TO PREEMPTION

The issue of federal preemption in the area of airline services first arose in *Hingson v. Pacific Southwest Airlines*.[11] In Hingson, a blind person who was escorted off the aircraft by police officers when he refused to sit in a bulkhead seat, brought an action for intentional infliction of emotional distress and a claim arising under the California Civil Code which required that handicapped persons be given "full and equal access" to accommodations of all airplanes.[12] The Ninth Circuit held that regulation of air carrier seating policies involved regulation of services within the meaning of § 1305(a)(1) and, accordingly, the plaintiff's claims under the California code were expressly preempted.[13] The court held, however, that the plaintiff's claim for intentional infliction of emotional distress, although arising directly from the carrier's seating policy, was not preempted.[14]

The *Hingson* court cited *Farmer v. United Brotherhood of Carpenters & Joiners of America*[15] to support its holding that the plaintiff's emotional distress claim was not preempted.[16] In *Farmer*, the United States Supreme Court held that the National Labor Relations Act did not preempt the state tort action for intentional infliction of emotional distress arising in connection with alleged employment discrimination because the conduct

9. Williams v. Express Airlines I, Inc., AV. LIT REP. (Andrews) 13153 (W.D. Tenn. Jan. 2, 1991).
10. West v. Northwest Airlines, Inc., 923 F.2d 657 (9th Cir. 1991).
11. 743 F.2d 1408 (9th Cir. 1984).
12. California Civil Code § 54.1.
13. 743 F.2d at 1415-16.
14. *Id.* at 1416.
15. 430 U.S. 290 (1977).
16. Hingson, 743 F.2d at 1416.

was alleged to be outrageous.[17] The Court noted:

> On balance, we cannot conclude that Congress intended to oust state-court jurisdiction over actions for tortious activity such as that alleged in this case. At the same time, we reiterate that concurrent state court jurisdiction cannot be permitted where there is a realistic threat of interference with the federal regulatory scheme. Union discrimination in employment opportunities cannot itself form the underlying "outrageous" conduct on which the state-court tort action is based; to hold otherwise would undermine the pre-emption principle. Nor can threats of such discrimination suffice to sustain state-court jurisdiction. It may well be that the threat, or actuality, of employment discrimination will cause a union member considerable emotional distress and anxiety. But something more is required before concurrent state-court jurisdiction can be permitted. Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.[18]

The *Hingson* court's reliance on *Farmer* is unexplained other than in its citation and parenthetical containing the Supreme Court's holding.[19] Reference to the above quotation from *Farmer* reveals that the Ninth Circuit's reliance is misplaced. Accepting the *Farmer* rationale, the air carrier's seating policy and manner of enforcement of that policy - which was not merely compelled by the plaintiff's refusal to obey the carrier's instructions, but was also in accordance with federal regulations[20] - cannot itself form the basis for the state court tort action.

Yet, this was the sole basis for the plaintiff's claim of extreme or outrageous conduct. Even the Ninth Circuit, in affirming the directed verdict in favor of the air carrier on the ground that the evidence was insufficient to support the plaintiff's claim for emotional distress, recognized that the carrier's employee's conduct could not "plausibly be characterized as either extreme or outrageous."[21] The Supreme Court in *Farmer* could not have meant to permit concurrent state court jurisdiction based upon bare allegations of outrageous conduct. Otherwise, every disgruntled plaintiff could circumvent federal standards by simply labeling the carrier's conduct as "outrageous."

UNIFORM APPLICATION OF PREEMPTION

The *Hingson* court left open the issue of which tort claims constituted

17. Farmer, 430 U.S. 290.
18. *Id.* at 305.
19. Hingson, 743 F.2d at 1416.
20. Section 1511(a) of the Federal Aviation Act provides, in pertinent part:
[A]ny such carrier [may] . . . refuse transportation to a passenger . . . when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight.
49 U.S.C. § 1511(a).
21. Hingson, 743 F.2d at 1416.

an exception to federal preemption. Initially, the courts hardly considered the exception, simply dismissing claims relating to airline services as expressly preempted.

In *Anderson v. USAir, Inc.*,[22] a blind person brought an action against an airline for the tort of outrageous conduct, breach of contract and violation of a common law obligation to "provide equal and courteous service to all," arising out of the airline's refusal to seat him next to an emergency exit. The United States District Court for the District of Columbia dismissed the complaint, holding that the state law obligation to give courteous service was expressly preempted by § 1305,[23] and the District of Columbia Circuit affirmed.[24] The court did not consider the application of preemption to the plaintiff's claims of breach of contract and tort of outrage. With respect to these claims, the District of Columbia Circuit simply affirmed the district court's dismissal based upon the plaintiff's failure to present sufficient evidence.[25]

In *O'Carroll v. American Airlines, Inc.*,[26] the Fifth Circuit held that § 1305(a)(1) expressly preempted state law claims for damages by a passenger who was excluded from a flight after creating a disturbance on the aircraft. In *Baugh v. Trans World Airlines, Inc.*,[27] the Fifth Circuit went so far as to find personal injury claims preempted where the injury was allegedly caused by a flight attendant's negligence while acting within the course and scope of her employment.

In *Von Anhalt v. Delta Air Lines, Inc.*,[28] a passenger asserted numerous state law claims against an airline including assault and battery, defamation and negligence, after she was escorted off the aircraft when she refused to allow a flight attendant to stow away her carry-on baggage. The United States District Court for the Southern District of Florida concluded that § 1305(a) "unmistakably manifests the intent of Congress to preempt such state common law tort claims as related to the services of aircrafts and the safety of passengers."[29]

In *Smith v. America West Airlines, Inc.*,[30] the United States District Court for the Southern District of Texas held that § 1305(a)(1) preempts state law claims against a carrier for negligence and gross negligence in allowing a passenger to board and hijack the aircraft.

22. 619 F. Supp. 1191 (D.D.C. 1985), *aff'd*, 818 F.2d 49 (D.C. Cir. 1987).
23. 619 F. Supp. 1191.
24. 818 F.2d 49.
25. *Id.* at 56-57.
26. 863 F.2d 11 (5th Cir. 1989), *cert. denied*, 490 U.S. 1106 (1989).
27. 915 F.2d 693 (5th Cir. 1990).
28. 735 F. Supp. 1030 (S.D. Fla. 1990).
29. *Id.* at 1031.
30. No. H-91-1550 (S.D. Tex. Sept. 3, 1991).

In *Fressie v. Trans World Airlines, Inc.*,[31] a passenger who refused to change his seat was escorted off the aircraft by the Port Authority police. The United States District Court for the District of New Jersey held that § 1305(a)(1) preempts the plaintiff's claims for malicious prosecution, false arrest and punitive damages.[32] The remaining count of breach of contract was then dismissed for lack of subject matter jurisdiction and because the amount in controversy fell short of the statutory requirement for diversity jurisdiction.[33] The *Fressie* case is now pending appeal.

In *Ricci v. American Airlines, Inc.*,[34] a scuffle ensued after two passengers had a dispute about smoking on the aircraft. The plaintiff brought an action against the air carrier for negligence and insult to passenger in the Superior Court of New Jersey. The court granted the carrier's motion for summary judgment, concluding that Congress unmistakably preempted state law.[35]

THE PLAINTIFF'S RECOURSE

The plaintiff's bar, threatened by dismissal based upon preemption, attempts to invoke the savings clause, contained in the Federal Aviation Act, which provides:

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.[36]

This section was taken intact from a predecessor provision of the Civil Aeronautics Act of 1938.[37] In *Hingson*, the Ninth Circuit noted that the legislative history of the Airline Deregulation Act of 1978 does not explain the relationship between the savings clause and the preemption provision.[38] The court concluded that because the Civil Code would involve regulation of the services of an air carrier, the plaintiff's claims were preempted notwithstanding the savings clause.[39] In *O'Carroll*, the Fifth Circuit denied a petition for rehearing based upon the savings clause since the federal preemption provision was enacted well after the savings clause.[40] In *Von Anhalt*, the Southern District of Florida concluded that the savings clause did not conflict with the preemption provision because

31. No. 89-1910 (D.N.J. Dec. 23, 1991) (appeal pending).
32. *Id.*
33. *Id.*
34. No. L-017597-86 (N.J. Law Div. Feb. 7, 1991).
35. *Id.*
36. 49 U.S.C. § 1506.
37. *See* Klicker v. Northwest Airlines, 563 F.2d 1310, 1314 (9th Cir. 1977); H.R. Rep. No. 2360, 85th Cong., 2d Sess. 18-19, *reprinted in* 1958 U.S. CODE CONG. & AD. NEWS 3741, 3758.
38. Hingson, 743 F.2d at 1416, n.11.
39. *Id.*
40. O'Carroll, 863 F.2d at 13.

it expressly saves state law remedies and not state law claims.[41]

Finding no comfort in the savings clause[42] and faced with the threat of dismissal, the plaintiff's attorney argues that if the state action is preempted, the plaintiff has a private right of action for violation of the Federal Aviation Act. More specifically, arguments are made that the carrier exercised discriminatory treatment pursuant to § 1374(b),[43] failed to "provide safe and adequate service" pursuant to § 1374(a),[44] or abused its discretion pursuant to §§ 1374 and 1511(a).[45]

Some courts considered the private right of action for violations of §§ 1374 and 1511(a) to be the plaintiff's recourse.[46] In *O'Carroll*, the Fifth Circuit recognized an implied cause of action under § 1374 for abuse of discretion by virtue of § 1511.[47] In *Von Anhalt*, the Southern District of Florida relied upon § 1511(a) to conclude that the plaintiff could challenge the reasonableness of the carrier's conduct.[48] Neither the Fifth Circuit nor the Southern District of Florida, however, discussed or considered the repeal of § 1374 and the effect of the repeal on any express or implied private right of action.[49]

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41. Von Anhalt, 735 F. Supp. at 1031.

42. *But cf.* Stewart v. American Airlines, Inc., 776 F. Supp. 1194 (S.D. Tex. 1991) ("to the extent that a claim is not preempted by Section 1305, it is expressly preserved by § 1506"). In *Stewart*, the plaintiff alleged that he was injured when the aircraft malfunctioned. The court held the plaintiff's allegations to be more akin to those arising out of an air crash and, accordingly, not necessarily services within the meaning of § 1305. The court also recognized, however, that state law is preempted where it creates a different standard than that created by the Federal Aviation Act.

43. Prior to its repeal, § 1374(b) of the Federal Aviation Act provided:

> No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever. 49 U.S.C.A. § 1374(b)(West 1976), *repealed by* 49 U.S.C.A. §§ 1551(a)(2)(B) and 1551(a)(4)(C) (West Supp. 1991).

44. Prior to its repeal, § 1374(a) of the Federal Aviation Act required that the airlines maintain a certain level of service, equipment, facilities, rates, fares, charges, classifications, rules, regulations and practices. 49 U.S.C.A. § 1374(a) (West 1976 & Supp. 1991), *repealed by* 49 U.S.C.A. §§ 1551(a)(2)(B) and 1551(a)(4)(C) (West Supp. 1991). Section 1374(a) was repealed, except for the requirement that carriers "provide safe and adequate service." 49 U.S.C. §§ 1551(a)(2)(B), 1551(a)(4)(C).

45. *See supra* note 22.

46. O'Carroll, 863 F.2d at 13; Von Anhalt, 735 F. Supp. at 1031.

47. 863 F.2d at 13.

48. 735 F. Supp. at 1031.

49. Section 1374 was repealed, except for the requirement of § 1374(a) that carriers "provide safe and adequate service." *See* note 46, *supra*. It is not clear whether or not the O'Carroll incident occurred prior to the effective date of the repeal. However, the Von Anhalt incident clearly occurred after such date. With the repeal came the elimination of any express or implied private right of action under § 1374. Anderson, 818 F.2d at 54; Smith v. America West Airlines,

Except for the requirement that carriers provide "safe and adequate service," § 1374 was repealed by the Airline Deregulation Act of 1978,[50] as amended by the Civil Aeronautics Board Sunset Act of 1984.[51] Prior to the repeal, passengers had a private right of action for discriminatory treatment pursuant to § 1374(b).[52] There was no private right of action under § 1374(a) as it existed prior to the repeal[53] or as it now exists requiring that air carriers "provide safe and adequate service."[54] Accordingly, with the repeal of § 1374(b), there is no longer an express or implied private cause of action under § 1374. Nor is there an implied right of action under § 1374(a) in conjunction with § 1511(a).[55]

In *Salley v. Trans World Airlines, Inc.*,[56] the United States District Court for the Southern District of Louisiana was so concerned with the elimination of a private cause of action under § 1374 that it reconsidered and vacated its earlier decision dismissing the plaintiff's state law claims based upon express preemption. Initially, the court read *O'Carroll* to hold that "no state law claims may be brought in suits complaining of airline services."[57] Concerned that the plaintiffs would have no recourse, the court reinterpreted the *O'Carroll* decision to conclude that § 1305(a)(1) preempts only those state laws which interfere or conflict with federal law.[58] It is clear, however, that in *O'Carroll*, the Fifth Circuit held § 1305(a)(1) to be express preemption, not conflict preemption.[59] The

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Inc., No. H-91-1550 (no private right of action exists under §§ 1374 and 1511); Salley v. Trans World Airlines, Inc., 723 F. Supp. 1164, 1166 (E.D. La. 1989).

50. 49 U.S.C. § 1551(a)(2)(B).

51. 49 U.S.C. § 1551(a)(4)(C).

52. Anderson, 818 F.2d at 54; Hingson, 743 F.2d at 1411-12; Diefenthal v. Civil Aeronautics Board, 681 F.2d 1039, 1050 (5th Cir. 1982), *cert. denied*, 459 U.S. 1107 (1983).

53. Hingson, 743 F.2d at 1414, Diefenthal, 681 F.2d at 1049-50 (applying four-prong test of Cort v. Ash, 422 U.S. 66, 78 (1975)).

54. Anderson, 818 F.2d at 54 (applying four-prong test of Cort v. Ash, 422 U.S. at 78; Smith, No. H-91-1550; Salley, 723 F. Supp. at 1166.

55. In Smith, the court rejected the plaintiff's argument that an implied private right of action exists under §§ 1374(a) and 1511(a) to allege abuse of discretion in permitting a hijacker to board the aircraft. No. H-91-1550. *But see* Von Anhalt, 735 F. Supp. at 1031 (plaintiff may assert a claim under § 1511(a) challenging the reasonableness of the carrier's conduct); *see supra* text accompanying notes 50-51; Salley, 723 F. Supp. at 1166 (court implied a possible private right of action if § 1511(a) applies); *see infra* text accompanying notes 58-61.

56. 723 F. Supp. 1164.

57. *Id.* at 1165.

58. *Id.* at 1166.

59. In O'Carroll, the court discussed the three instances where federal law preempts state law: (1) express preemption, (2) preemption inferred from a pervasive federal regulatory scheme, and (3) preemption where state law conflicts with federal law or interferes with the achievement of congressional objectives. 863 F.2d at 12 (citations omitted). The court concluded that there was "no need to rely upon inference alone as Section 1305 which is entitled Federal Preemption, *expressly* preempts state law." (emphasis added). *Id.* at 13. *See also* Gay v. Carlson, No. 89 Civ. 4757, slip op., (S.D.N.Y. Feb. 22, 1990), where the court, while holding

Salley court's narrow reading of *O'Carroll* is clearly erroneous and at odds with the *Anderson, Baugh, Von Anhalt, Smith, Fressie* and *Ricci* courts' application of the preemption provision.

The *Salley* court's concerns about the plaintiff being left without a cause of action are unwarranted. The airline must provide safe and adequate service,[60] and private parties may pursue administrative remedies.[61] The Department of Transportation or Federal Aviation Administration may bring suit directly against the carrier.[62]

RECENT EROSION OF THE PREEMPTION PRINCIPLES

In *Anderson, O'Carroll, Baugh, Von Anhalt, Smith, Fressie* and *Ricci*, the courts applied the preemption statute uniformly to all state claims relating to, or arising out of, airline services. There was no uncertainty. Where a claim arose out of an accepted airline practice or policy, there could be no state action. Some courts, however, have focused on the *Hingson* exception to provide passengers with the means to evade federal preemption. In adopting that approach, however, the courts have erroneously focused on the nature of the state action instead of the carrier's conduct. Thus, the courts have taken a step backwards.

An example of this misguided analysis is *Williams v. Express Air Lines I, Inc.*[63] In *Williams*, a passenger was denied boarding as a result of the air carrier's policy of prohibiting wheelchair users from flying on its aircraft. The passenger brought an action against the carrier for breach of contract, negligence and false imprisonment. The United States District Court for the Western District of Tennessee concluded that the plaintiff's breach of contract and negligence claims related to the services of the air carrier and were expressly preempted by § 1305.[64] With respect to the plaintiff's claim of false imprisonment, however, the court held that intentional tort claims are not preempted, relying on *Hingson*.[65] The plaintiff alleged that the defendant unlawfully prevented him from board-

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that § 1305 did not preempt state law claims brought between employees of an airline relating to acts performed in the course of their employment, noted:

> An airline is in the business of providing air service to passengers. The issues of to whom to provide that service, and whom to exclude from a flight, clearly are issues relating to . . . services of an air carrier. 49 U.S.C. App. § 1305(a). A state law remedy for a passenger who felt wrongly excluded from a particular flight would contravene the express intent of Congress to ensure that such decisions are governed by federal standards.

60. *See supra* text accompanying notes 52-53.

61. Anderson, 818 F.2d at 55; Smith, No H-91-1550.

62. *Id.*

63. Williams v. Express Airlines I, Inc., AV. LIT REP. (Andrews) 13153 (W.D. Tenn. Jan. 2, 1991).

64. *Id.* at 13155.

65. *Id.* at 13156, n.3.

ing the flight and intentionally permitted that flight to depart without him. The court held that these allegations were sufficient to state a claim of false imprisonment under Tennessee law.[66]

The Western District of Tennessee's holding is irrational and inconsistent with Congressional intent. Seating policies involve the regulation of services within the meaning of section 1305(a)(1), and state claims based upon seating policies are preempted.[67] Carriers may exclude passengers who refuse to follow the carrier's instructions or create a disturbance on the aircraft if, in the carrier's opinion, transportation "might be inimical to safety of flight."[68] Accepting the Tennessee court's rationale, the carrier that is protected from liability for properly carrying out procedures relating to airline services may still be held liable if state law provides the passenger with intentional tort claims based upon the very same protected practice.

As if this inconsistency were not enough, the Ninth Circuit took another bite out of federal preemption. In *West v. Northwest Airlines, Inc.*,[69] a passenger with a valid ticket was denied boarding on an overbooked flight. The passenger brought an action against the carrier for breach of the covenant of good faith and fair dealing under Montana law. The district court granted summary judgment in favor of the carrier on the ground of preemption.

On appeal, the Ninth Circuit agreed with the trial court that the plaintiff's claim for punitive damages was preempted, but reversed and remanded the case to the district court to determine if the plaintiff had a meritorious claim for compensatory damages under Montana law.[70] In reaching that result the court first held that § 1305(a)(1) does not expressly preempt the plaintiff's state law claim.[71] While the court recognized that "services" include boarding policies,[72] it held that the preemption provision does not apply to all state laws that affect airline services.[73] The court observed:

> Instead, we find that Section 1305(a)(1) preempts claims only when the underlying statute or regulation itself relates to airline services, regardless of whether the claim arises from a factual setting involving airline services. Thus, state laws that merely have an *effect* on airline services are not preempted.[74]

66. *Id.* at 13156.
67. Hingson, 743 F.2d at 1415.
68. 49 U.S.C. § 1511(a); *see supra* note 22.
69. 923 F.2d 657 (9th Cir. 1991).
70. *Id.*
71. *Id.* at 660.
72. *Id.* at 660.
73. *Id.*
74. *Id.* at 660 (emphasis in original).

The United States Supreme Court decided the same issue, albeit in the context of ERISA's preemption provision, in *Shaw v. Delta Airlines, Inc.*[75] There, the Court held that Congress used the words "relate to" in their broad sense, noting, "[w]e must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning."[76] Based upon the "plain language of [the section], the structure of the Act, and its legislative history,"[77] the Court concluded that the preemption provision applied to laws which were not specifically designed to effect employee benefits.[78] In a footnote, however, the court noted, "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan."[79] The Court refused to draw the line.[80]

The Fifth Circuit also considered the impact of state legislation on the Federal Aviation Act in *Trans World Airlines, Inc. v. Mattox*.[81] In concluding that State deceptive practices law was preempted by federal law insofar as it applied to advertising airline rates, the Fifth Circuit held, "[a]lthough the state laws against deceptive advertising are not aimed specifically at airlines, and clearly do not attempt to set rates, the conclusion is inescapable that such laws do relate to rates when applied to airline fare advertising."[82]

In *West*, however, the Ninth Circuit relied on *Air Transport Ass'n v. P.U.C.*,[83] a case involving an airline trade association's challenge of a regulation prohibiting telephone customers from surreptitiously overhearing or recording conversations. In that case, the court held that the regulation was not preempted because the type of telephone operation was not peculiar to airlines. Further, the court could find no evidence that Congress intended to preempt state regulation of utilities when they affected airlines.[84]

The *West* court found its analysis consistent with *Hingson*, noting that *Hingson's* emotional distress claim involved the airline's services. However, the underlying law, the tort of intentional infliction of emotional dis-

75. 463 U.S. 85 (1983).
76. *Id.* at 97-98.
77. *Id.* at 100.
78. *Id.* at 95-100.
79. *Id.* at 100, n.21.
80. *Id.*
81. 897 F.2d 773 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 307 (1990).
82. *Id.* at 783.
83. 833 F.2d 200 (9th Cir. 1987), *cert. denied*, 487 U.S. 1236 (1988).
84. *Id.* at 207. *See also* People of State of New York *ex rel* Abrams v. Trans World Airlines, Inc., 728 F. Supp. 162 (S.D.N.Y. 1989) (the preemption provision did not preempt New York's enforcement of its laws governing deceptive advertising).

tress, was not addressed exclusively to airline services.[85]

The Ninth Circuit also rejected any claim of implied preemption. Here, the court held that retention of the savings clause demonstrated Congressional intent not to preempt all common law remedies.[86] Finally, the court held that there was no conflict preemption since airline overbooking regulations contemplate that customers choose between liquidated damages or state common law remedies.[87]

The *West* decision is puzzling. A passenger cannot bring an action for failure to provide "full and equal access" to accommodations of airplanes, but can bring an action for breach of the covenant of good faith and fair dealing. The focus is on the label of the cause of action and not on the carrier's conduct.

Ironically, the Ninth Circuit held that the plaintiff's claim for punitive damages was preempted since federal regulations contemplate overbooking as an acceptable practice and, accordingly, "any scheme that *punishes* the practice would be inconsistent with applicable federal law."[88] If federal regulations permit carriers to overbook flights, then any and all state actions arising out of overbooking must be preempted. The preemption provision is not limited to claims for punitive damages but applies to all state laws relating to airline services.

To put it simply, air carriers must not be held liable for federally sanctioned conduct regardless of the label attached to the state cause of action or the nature of the damages claimed. Any other result is illogical and at odds with the concept of uniformity which is the cornerstone of the preemption doctrine.

CONCLUSION

The courts have undermined the preemption principle, reducing it to a nullity. Passengers bringing actions arising out of airline services need only identify their claims to fall within the *Williams* or *West* exceptions. Imagine the passenger who creates a disturbance on an aircraft when he is asked to change his seat for safety reasons. The sole interest of the carrier is the safety of flight and passengers. Imagine, however, that the passenger refuses to change his seat, delaying the flight and causing an uproar. Left with no alternative, the carrier requests that local authorities escort the passenger off the aircraft. The passenger has no state cause of action regarding the carrier's seating policy or his removal from the aircraft.

85. West, 923 F.2d at 660.
86. *Id.* at 661.
87. *Id.*
88. *Id.* at 661 (emphasis in original).

However, if the passenger calls his cause of action intentional infliction of emotional distress, false imprisonment, or the like, he can take discovery and litigate the matter until the court rules, as a matter of law, that the carrier's conduct was not outrageous. Court and attorney time, resources and expenses will be wasted only to discover that the passenger has no claim. Had the initial focus been on the carrier's conduct instead of the label of the passenger's cause of action, the passenger's entire complaint would have been preempted.

If, on the other hand, the court allows the case to proceed and a jury finds the carrier liable, the carrier has no basis on which to model its future conduct. Does it change its safety policy? Does it make exceptions for those passengers who demand seating arrangements which conflict with the carrier's policies? Or does it merely hope that the result of the next case will be different?

The carrier must not be faced with this dilemma. Uniform preemption of state claims relating to airlines services is the only way to promote safety.

Until the courts agree to focus on the carrier's conduct, as clearly intended by Congress, air carriers will continue to be left in the "Catch 22." They may be held liable for doing that which is accepted, sanctioned and, sometimes, required by federal regulations.

AUTHORS' NOTE

After the article was authored, the United States Supreme Court recognized the folly of the *West* rationale. In *Morales v. Trans World Airlines, Inc.*,[89] the Supreme Court rejected the precise argument adopted in *West*—albeit in the context of airline rates—as "an utterly irrational loophole (there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute)."[90] It is in light of the Supreme Court's decision in *Morales* that certiorari was granted in *West*, the judgment was vacated and the case was remanded to the Ninth Circuit.[91]

The Supreme Court in *Morales* also rejected the misplaced reliance

89. 112 S. Ct. 2031 (1992).

90. *Id.* at 2038.

A superb example of the "irrational loophole" is contained in Abou-Jaoude v. British Airways, 281 Cal. Rptr. 150 (Cal. App. 2 Dist. 1991). Abou-Jauode was a discrimination case. The California court relied on West to conclude that a state statute which regulated the services of common carriers and prohibited the discriminatory conduct of which plaintiff complained was expressly preempted, but another state statute which prohibited discrimination generally and applied to all business establishments was not. The ruling permits passenger-plaintiffs who cannot rely on the applicable state law, that is, law that expressly applies to the services of carriers, to search for other state law, which may not necessarily apply but will not be preempted.

91. 112 S. Ct. 2986 (1992); 112 S. Ct. 2932 (1992).

on the savings clause of the Federal Aviation Act,[92] which provides:

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law, or by statute, but the provisions of this chapter are in addition to such remedies.[93]

The court noted, "a general 'remedies' saving clause cannot be allowed to supersede the specific substantive pre-emption provision. . . ."[94]

Morales is a step in the right direction. It remains to be seen, however, what other loopholes the courts will create to avoid preemption.

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92. 112 S. Ct. at 2037.
93. 49 U.S.C. § 1506 (1992).
94. *Morales*, 112 S. Ct. at 2037.