IADC Committee Newsletter

TRANSPORTATION

June 2014

IN THIS ISSUE

Trea Southerland and Kenneth D. Sansom offer insight into two broad-ranging federal statutes that can preempt many state-law claims against corporate defendants in the transportation industry.

A Primer on Preemption Under the Airline Deregulation Act & FAAAA

ABOUT THE AUTHORS



Thomas W. "Trea" Southerland III is Senior Counsel with Federal Express Corporation in Memphis, Tennessee. He handles both domestic and international commercial and cargo claims for the corporation. He is Vice-Chair of Aviation for the IADC's Transportation Committee. He received his B.B.A. from the University of Mississippi and his J.D. from the University of Mississippi School of Law. He can be reached at trea.southerland@fedex.com.



Kenneth D. Sansom is a member of the litigation firm Spotswood Sansom and Sansbury, LLC (www.spotswoodllc.com). The firm has substantial experience in complex litigation involving the Airline Deregulation Act and FAAAA in courts ranging from state and federal trial courts to the Supreme Court of the United States, most recently including American Trucking Ass'ns, Inc. v. City of Los Angeles and Northwest, Inc. v. Ginsberg. He can be reached at ksansom@spotswoodllc.com.

ABOUT THE COMMITTEE

This IADC Committee was formed to combine practices of aviation, rail, maritime with trucking together to serve all members who are involved in the defense of transportation including aviation companies (including air carriers and aviation manufacturers), maritime companies (including offshore energy exploration and production), railroad litigation (including accidents and employee claims) and motor carriers and trucking insurance companies for personal injury claims, property damage claims and cargo claims. The Committee is dedicated to taking advantage of networking and referral opportunities as well as providing substantive knowledge to our members.
Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



Dennis Woods
Vice Chair of Publications and Newsletters
Scheer & Zehnder LLP
(206) 587-8252
dwoods@scheerlaw.com

Although it is difficult to fathom such a concept today, the federal government regulated nearly every economic aspect of the aviation and motor carrier industries as recently as the late 1970s. Among other things, the Civil Aeronautics Board and the Interstate Commerce Commission policed which carriers could enter the airline and motor transportation industries, the prices that they could charge, and the specific routes that they could travel. Congress eventually loosened these constraints in a series of acts beginning in the late 1970s, with the two most important from a preemption perspective being the Airline Deregulation Act of 1978 ("ADA"), which deregulated airlines, and the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), which (despite its name) deregulated the motor transportation industry, including *intra*state transportation. This article briefly examines these two Acts and how their preemption provisions can be effectively used on behalf of corporate clients in the transportation industry.

The ADA and FAAAA are complementary Acts intended to promote efficiency and competition by bringing free-market forces to previously heavily regulated industries. Congress achieved this end through two primary mechanisms. First, through a series of acts, the federal agencies that had regulated the carriers' economic arrangements largely lost the ability to do so. Second, preemption provisions in both the ADA and FAAAA ensured that states would not fill the regulatory void that Congress had created. The ADA's original preemption provision provided that "no State . . . 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 . . . ." Congress used nearly identical language when it later enacted the FAAAA — "rates, routes, or services" became "price, route, or service" — and also changed the ADA's preemption provision to mirror the FAAAA's language. Congress made clear, however, that this change to the ADA was not substantive, and that it intended for past decisions interpreting the ADA to apply to both the ADA and the FAAAA going forward. Since then, the Supreme Court has interpreted the preemption provisions of both Acts *in pari materia*.

Apart from one case interpreting a statutory exception to preemption, the Court has addressed the core preemption provisions of the two Acts six times since 1992. Its decisions have focused primarily on two issues: first, what the First Circuit Court of Appeals has characterized as the "mechanism question" — whether a claim is based on a state "provision having the force and effect of law"; and, second, the "linkage question" — whether a claim is sufficiently "relat[ed] to" a "price, route, or service" of an air or motor carrier. The Court's six decisions are foundational for understanding how ADA or FAAAA preemption might apply in a given case.

In the first case, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), the Supreme Court held that a collective attempt by several states to enforce state consumer protection laws regarding air carriers' advertising disclosures was preempted. In reaching this holding, the Court clarified certain contours of the reach of ADA preemption. First, the Court interpreted the phrase "relating to" in the ADA based on the Court's previous constructions of "related to" in the ERISA statute and, drawing on its ERISA jurisprudence, held that the words "relating to" in the ADA evinced a "broad scope" to preempt state laws "having a connection with or reference to" prices,

routes, and services. Applying this definition, the Court reasoned that the enforcement of the guidelines at issue would result in a "forbidden significant effect" upon prices. Second, the Court rejected the argument that only laws aimed at the transportation industry were preempted, reasoning that interpreting the preemption provision in such a manner would create "an utterly irrational loophole" where "state impairment of the federal scheme [would] be deemed acceptable so long as it is effected by the particularized application of a general statute." Third, the Court flatly rejected the argument that there could be no preemption when state and federal law were consistent, as "[n]othing in the language" of the preemption provision suggested such a requirement. Finally, the Court announced a limitation on the scope of ADA preemption: laws that were too "tenuous, remote, or peripheral" in their effect on a carrier's prices, routes, and services were *not* preempted.

Three years later, the Supreme Court again weighed in on ADA preemption in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). In *Wolens*, the Court held preempted claims by frequent flyers that American Airlines's alteration of its frequent flyer program violated an Illinois consumer protection statute. The Court permitted a breach of contract claim to go forward, however, and announced the principle that the ADA was not intended 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." The majority concluded that the ADA did not preempt "routine" breach of contract claims that did not seek to enforce doctrinal elements rooted in state policy rather than the intent of the contracting parties.

Apart from a single case construing the FAAAA's "safety" exception to preemption, the Supreme Court did not substantially revisit the scope of FAAAA or ADA preemption for over a decade after *Wolens* until it decided *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008). In *Rowe*, the Court concluded that two provisions of Maine law — one required that Maine-licensed tobacco retailers use a delivery service with certain recipient verification features, and the other imputed knowledge to transporters that a package contained tobacco products while simultaneously forbidding delivery of tobacco if either sender or recipient lacked a Maine license — were preempted under the FAAAA when applied to motor carriers. Relying upon the pro-market focus of the deregulatory acts, the Court reasoned that both requirements would "freeze in place and immunize from competition a service-related system that carriers do not (or in the future might not) wish to provide."

There has been a wave of FAAAA cases in the Supreme Court in the past two terms. In *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 133 S. Ct. 2096 (2013), the Court held that Los Angeles's mandatory "concession agreements" with trucking companies at the Port of Los Angeles (a division of the city itself) were preempted. The agreements were contracts between the City and transportation providers at the Port that required, among other things, that companies affix on their trucks a placard listing a phone number for reporting safety concerns and that companies submit a plan listing off-street parking locations for their trucks when not in service. Companies that failed to sign the agreements would be excluded from operating at the Port and subject to criminal penalties. The Court found that the use of criminal penalties —

even if imposed under the guise of a contract — was an example of "classic regulatory authority" that had the "force and effect of law" for FAAAA purposes.

In contrast to its preemption holding in *American Trucking Ass'ns*, the Court concluded in *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769 (2013), that the FAAAA did not preempt various state law claims arising from a towing company's sale of a towed vehicle after the owner failed to claim the car until shortly before a scheduled auction. The Court reasoned that a requirement in the preemption provision of the FAAAA — one not found in the ADA — that a challenged state law relate to the "transportation of property" rendered FAAAA preemption inapplicable because the alleged violation of state law at issue arose from the towing company's sale of the car after the "transportation" of the car by towing had ended. The Court also found that the state law was unrelated to the towing company's "service" for the same reason: the "service" at issue was towing, not the subsequent sale of the car.

Following closely on the heels of *American Trucking Ass'ns* and *Dan's City*, the Supreme Court recently decided *Northwest, Inc. v. Ginsberg*, No. 12-462, 572 U.S. —, 2014 WL 1301865 (Apr. 2, 2014), which was in substantial part a reiteration of the Court's holding in *Wolens*. The primary issue in *Ginsberg* was whether a claim for breach of the implied contractual covenant of good faith and fair dealing was a "routine" breach-of-contract claim permitted by *Wolens* or a preempted imposition of state public policy. Writing for a unanimous Court, Justice Alito concisely concluded that common-law claims are a "provision having the force and effect of law" and that frequent-flyer programs are "related to" airlines' rates and services because frequent flyers' prices, access to flights, and service categories are affected by the programs. Most importantly, however, the Court held that "the reasoning of *Wolens* neither dooms nor spares all" implied covenant claims, as the inability in certain states to "contract out of the" covenant — or to do so only in certain types of contracts — means that the implied covenant is a "state-imposed obligation" in such circumstances. As a result, "[a] State's implied covenant rules will escape pre-emption only if the law of the relevant State permits an airline to contract around those rules in its frequent flyer program agreement." It is noteworthy that this is exactly the kind of nuanced question of how to discern the difference between impermissible impositions of state policy and permissible self-imposed obligations that Justice O'Connor predicted would arise in a partial dissent in *Wolens* nearly twenty years ago.

To summarize, although the general language of both the FAAAA and ADA leads to some interesting and subtle questions, both Acts provide a potentially wide-ranging defense to intrusive applications of state law into the business operations of the transportation industry. Both Acts are unusually broad in scope, and both Acts have been interpreted to preempt even laws of "general applicability" when such laws have the effect of indirectly regulating transportation companies without directly targeting their activities. Furthermore, the FAAAA applies by its express terms to *intra*state transportation operations. The combination of the broad sweep of the Acts and the Supreme Court's generalized guidance has resulted in divergent lower court decisions on preemption of claims ranging from intentional torts to discrimination to negligence, which makes it difficult to provide categorical conclusions or analysis. Nevertheless, those businesses in

the air and motor transportation industries should carefully consider the possible applicability of preemption defenses under the Acts when faced with claims arising under state law.

PAST COMMITTEE NEWSLETTERS

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

MAY 2014
Admissibility of Traffic Accident Citation in Subsequent Civil Suit For Injury
Mary Anne Mellow, Timothy B. Niedbalski and Katie E. Hellmann

FEBRUARY 2014
Defending Excessive Discovery in Trucking Accident Litigation: The Best Defense is a Good Offense
Curtis L. Ott and James E. Brogdon, III

DECEMBER 2013
Complete Operations--Loading and Unloading: When is the Beginning the Beginning?
Jay Barry Harris and Lee Applebaum

NOVEMBER 2013
Workers' Compensation Bar of Action Applies in Cases of Personal Injury and Death Governed by Canadian Maritime Law
A. William Moreira and Scott R. Campbell

AUGUST 2013
Admissibility of FMCSA's Compliance, Safety, Accountability (CSA)
Ted L. Perryman and Jennifer A. Wood

MAY 2013
The Locomotive Video Stars in Successful Motion for Summary Judgment
Tim Daniels

MARCH 2013
Driving Logs: Can Deficiencies Expose Motor Carriers and Their Drivers to Criminal and Civil Liability?
Mary Anne Mellow and Natalie J. Kussart

FEBRUARY 2013- DOUBLE ISSUE
The MCS-90 Endorsement: Protecting the Public from Motor Carrier Negligence in the Absence of Insurance Coverage
David M. Wilson and Drew Feeley

Keep on Trucking- Deceit, Speculation and Discovery Abuse Result in Exclusion, Sanctions and Dismissal
Michael H. Gladstone and J. Matthew Haynes, Jr.