July 16, 2019

Federal Preemption Under the Federal Aviation Act

In its July 9 decision in *Tweed-New Haven Airport Authority v. Tong*, __ F. 3d. __, 2019, WL 2932588 (2d Cir. 2019), the U.S. Court of Appeals for the Second Circuit affirmed its position that the Federal Aviation Act, 49 U.S.C. § 40101, *et seq*. (the FAAct) impliedly preempts the entire field of air safety. This decision may have a significant impact not only with respect to the issue specifically addressed—airport design—but also with respect to other aspects of air safety, including design defect claims in aviation product liability cases.

Tweed's 5,600-foot-long primary runway—Runway 2/20—is one of the shortest commercial airport runways in the country. Runway length directly impacts the type of planes that can use the runway, as well as weight load and passenger capacity for a given flight. At Runway 2/20's current length, American Airlines—the only commercial airline service at Tweed—is required to leave a certain number of seats unoccupied to safely fly into and out of Tweed. In an effort to expand commercial airline services for the more than one million people in its service area, Tweed sought and obtained approval from the Federal Aviation Administration (FAA) and the state of Connecticut in 2002 to extend Runway 2/20 and to upgrade the airport. But the state changed its position in 2009 and enacted a statute prohibiting expansion of Runway 2/20. General Statutes § 15-120j(c) (the Runway Statute) provides that "Runway 2/20 of the airport shall not exceed the existing paved runway length of five thousand six hundred linear feet."

Tweed filed an action against the state seeking a declaratory judgment that the Runway Statute was invalid because it was preempted by the FAAct, which provides in part that "[t]he United States Government has exclusive sovereignty of airspace of the United States." 49 U.S.C. § 40103(a)(1). After a bench trial, the district court concluded that Tweed lacked standing and, even assuming Tweed could establish standing, the FAAct did not preempt the Runway Statute.

On appeal, the Second Circuit held the FAAct preempted the Runway Statute, and reversed and remanded with instructions to enter judgment in Tweed's favor. *Tweed* affirmed the Second Circuit's position that the FAAct "impliedly preempts 'the entire field of air safety,'" quoting its earlier decision in *Goodspeed Airport LLC v. E. Haddam Inland Wetlands & Watercourses Comm'n*, 634 F.3d 206 (2d Cir. 2011). On the facts present in *Goodspeed*, however, the Second Circuit had concluded that the land use regulations at issue requiring the airport to obtain a permit before cutting trees in protected wetlands near its runway did not fall within the scope of the preempted field of air safety, especially when applied to a small, private airport over which the FAA had limited direct oversight.

Tweed presented more compelling facts for preemption than *Goodspeed*. In *Tweed*, the court concluded the Runway Statute fell within the scope of the preempted field of air safety because runway length has a direct impact on air safety—it dictates the weight load and passenger capacity that can be handled safely on a given flight. In addition, Tweed is classified by the FAA as a commercial service airport, and the Runway Statute's "localized, state-created limitation is incompatible with the FAAct's objective of establishing a 'uniform and exclusive system of federal regulation' in the field of air safety." The court concluded that the Runway Statute interfered with the FAAct in multiple respects, including limiting the number of passengers

that can safely occupy flights leaving Tweed, preventing planes from departing at maximum capacity, restricting the amount of luggage and passengers, and restricting the type of planes that can leave or land at Tweed.

The impact of *Tweed* may extend far beyond airport design. In reaching its conclusion, *Tweed* relied upon language from its earlier summary order in *Fawemimi v. Am. Airlines, Inc.*, 751 F. App'x 16, 19 (2d Cir. 2018), where the court concluded that the scope of federal preemption for air safety included the design and installation of airplane seat back monitors that had been approved previously by the FAA, stating that "[s]tate laws that conflict with the FAA[ct] or sufficiently interfere with federal regulation of air safety are ... preempted."

In *Tweed*, *Fawemimi*, and *Goodspeed*, the Second Circuit has taken a robust view of the implied field preemption created by the FAAct. There currently is a split among the Circuit Courts of Appeals regarding the scope of the preemptive effect of the FAAct with respect to aviation product liability claims. The Sixth Circuit has held that the FAAct and Federal Aviation Regulations preempt any state law failure-to-warn claims in an aviation product liability case. *Greene v. BF Goodrich*, 409 F.3d 784, 787 (6th Cir. 2005). The Third and Eleventh Circuits, however, have rejected arguments that the FAAct impliedly preempts state law product liability claims based upon a narrow definition of the "entire field of aviation safety." *See*, *e.g.*, *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680 (3d Cir. 2016); *Public Health Trust v. Lake Aircraft, Inc.*, 992 F.2d 291, 294–95 (11th Cir. 1993). The Tenth Circuit initially concluded that Congress did not indicate a "'clear and manifest' intent to occupy the field of airplane safety to the exclusion of state common law," and held that aviation product liability claims were not preempted. *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1443–44 (10th Cir. 1993). More recently, in *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1326–27 (10th Cir. 2010), the Tenth Circuit recognized that its analysis in *Cleveland* "has been called into question" by subsequent Supreme Court opinions, and acknowledged that "federal regulation occupies the field of aviation safety to the exclusion of state regulations." *O'Donnell* stopped short of explicitly overturning *Cleveland*, however, limited its holding in *Cleveland* to state tort remedies, and held that state law governing alcohol service on commercial aircraft was preempted where the FAA "promulgated a regulation pursuant to [the Act] specifically addressing airlines' alcoholic beverage services."

Newspapers have reported that the state of Connecticut will not appeal the Second Circuit's decision in *Tweed-New Haven* to the United States Supreme Court. Coincidentally, the Supreme Court may address the issue of whether aviation product liability claims fall within the scope of implied field preemption for the "entire field of aviation safety" in the near future. Following another decision by the Third Circuit Court of Appeals in *Sikkelee v. Precision Airmotive*, 907 F.3d 701 (3rd Cir. 2018), this time rejecting the application of the related principle of conflict preemption, the defendants in *Sikkelee* filed a petition for certiorari to the Supreme Court in March 2019 seeking review of both the implied field preemption and conflict preemption rulings. On June 24, 2019, the Supreme Court invited the Solicitor General to file briefs expressing the views of the United States with respect to these issues. It is expected that the Solicitor General will file his brief this fall, and that the Supreme Court then will decide whether to accept the petition for certiorari.

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