Alert

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COZEN O'CONNOR

# The Efficacy of Preemption Defenses in Airline COVID-19 Litigation


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Preemption is the first line of defense in virtually every aviation litigation matter. As airlines face the prospect of substantial COVID-19 litigation, it is worth considering which potential preemption defenses could be available to airlines and their potential effectiveness. Given the absence of COVID-19-specific Department of Transportation (DOT) or Federal Aviation Administration (FAA) regulations and public statements from these agencies resisting responsibility in this area, the initial impression would be that traditional implied preemption defenses face an uphill battle in cases involving COVID-19 exposure claims. Express preemption arguments under the Airline Deregulation Act (ADA) may have greater appeal in that courts have generally provided broader interpretations of ADA preemption than they have under the Federal Aviation Act. Regardless, there is no reason to avoid preemption defenses in response to COVID-19 claims, despite some obvious challenges.

## The Challenges of Implied Preemption

Implied preemption, of course, takes two essential forms: (1) conflict preemption and (2) field preemption. In the case of DOT or the FAA, the complete lack of regulations related to onboard exposure make it difficult to conceive of circumstances where the former might apply, though, as mentioned below, regulations from other agencies may help formulate theories in this regard. The larger question relates to field preemption; i.e., whether the federal government has "occupied the field" of regulation related to SARS-CoV-2 exposure. The argument is a narrow one but worth considering.

The FAA itself has strongly resisted the idea that it has responsibilities to regulate airline conduct regarding COVID-19. By letter dated April 14, 2020, to the Air Line Pilots Association, FAA administrator Steve Dickson flatly stated, "… we are not a public health agency. We must look to other U.S. Government agencies for guidance on public and occupational health." Mr. Dickson continued, "airlines are responsible for the occupational health of their workforce." He ultimately suggested that the Department of Health and Human Services (HHS) or the Centers for Disease Control (CDC) has primary responsibility in this area.

While this may seem to resolve the issue on its face, the FAA's own pronouncements regarding the scope of its duties do not always carry great weight with courts. In its 2016 decision in the seminal preemption case *Sikkelee v. Precision Airmotive Corp* (known as *Sikkelee I)*, the Third Circuit considered an FAA letter brief submitted in support of the defendant manufacturers' preemption arguments, wherein the FAA stated that "The [Federal Aviation Act] requires the Department of Transportation through the FAA administrator to impose uniform standards for every facet of air safety …." The Third Circuit rejected the FAA's reasoning, stating: "[t]he weight we accord [its] explanation...depends on its thoroughness, consistency, and persuasiveness." It then went on to analyze why the FAA's letter brief failed that test.

This reasoning could be applied in response to submissions of FAA commentary regarding its COVID-19 responsibilities to demonstrate that the FAA's view of its air safety responsibilities is not consistent and should not, in this instance, be given weight. The FAA's suggestion that it does not have responsibilities related to the health of those aboard aircraft is wholly at odds with its traditional view that it has responsibility for "every facet of air safety."

*Montalvo v. Spirit Airlines* provides an example of how preemption can be addressed in the context of health conditions contracted onboard aircraft. In that case, the Ninth Circuit deemed FAA regulations regarding passenger warnings and aviation safety so "pervasive" so as to evince an intent to "displace *all state law* on the subject of airline safety," thereby preempting a state claim

for failure to warn of risks of deep vein thrombosis from air travel. *Montalvo v. Spirit Airlines*, 508 F.3d 464, 472 (9th Cir. 2007) (emphasis added). Most significantly, the court noted, specific federal regulations govern the warnings and instructions that must be given to airline passengers, and the FAA has published regulations and an advisory circular setting out the oral briefings that must be given to passengers. Where the FAA imposed no requirement that airlines warn passengers about the risk of developing deep vein thrombosis, the plaintiff's negligence claim failed. Unfortunately, since *Montalvo*, the Ninth Circuit has attempted to narrow the scope of field preemption, increasingly adopting the reasoning of other circuits that have recently narrowed the scope of preemption in aviation cases. In the absence of any specific regulations, let alone "pervasive" ones, there remain significant challenges to asserting a preemption defense in a case involving SARS-CoV-2 exposure.

## Preemption is Consistent with FAA's Safety Responsibilities

Moreover, there are a number of sources that can be cited to support the FAA's traditional role in regulating the health of flight personnel and passengers aboard aircraft. For example, in a 2006 notice in the Federal Register, the FAA published the following: "The FAA has statutory responsibility for promoting safe flight of civil aircraft in air commerce. The scope of this statutory responsibility includes the performance of medical research intended to protect the occupants of aircraft from risks and hazards that are attendant to flight (49 U.S.C. 44701, 44703, 44507). The [FAA] administrator has delegated to the Federal Air Surgeon the responsibility for this research, which is conducted at the Civil Aerospace Medical Institute (CAMI). The medical and crash injury research conducted at CAMI requires collection and analysis of relevant data that the FAA relies upon to establish safety standards for such issues as cabin materials, seat design and strength, and environmental control." Though related to HIPAA, this statement regarding the FAA's responsibilities regarding medical research could certainly be given weight by a court considering the FAA's views of its own responsibilities.

Also helpful was the recent publication by the DOT and FAA in cooperation with HHS of detailed guidelines published in July 2020. These guidelines identify specific guidance on virtually every facet of protecting crew, passengers and the entire aviation workforce from exposure to the virus. Although styled as guidelines, the FAA has made it publicly clear that it expects all airlines to follow federal guidelines generally and that the agency will investigate any non-compliance as necessary. This arguably raises these guidelines to something more than merely optional best practices.

## FAA Health Regulations and OSHA Guidance May Be Helpful

The FAA's reluctance to weigh in on SARS-CoV-2 regulation is also contradicted by the extent to which it actually does regulate crewmember health. Certainly, the FAA regulates what is required to be "fit for duty" as a safety matter. As such, fitness for duty regulation (14 CFR 117.5) and related regulations could be cited to suggest that the FAA has occupied the field when it comes to onboard health and safety.

Finally, the Department of Labor's OSHA website has a page on COVID-19 Control and Prevention that discusses airline workers and employees. The webpage states that "the occupational safety and health of flight crewmembers (i.e., pilot, flight engineer, flight navigator) are under the jurisdiction of the FAA and not covered by OSHA standards while they are on aircraft in operation." This statement may be somewhat helpful in that it was written post-COVID-19, when the CDC had already taken an active role in COVID-19 management. It indicates an inter-agency recognition of FAA's jurisdiction in the area of airline crewmember occupational health and safety, at least with respect to pilots, notwithstanding what the FAA may have said in other contexts. It also suggests that when considering the assertion of federal preemption arguments, some thought should be given to broadening such arguments beyond the FAA to include other federal agencies.

## Express Preemption Under the ADA May Offer Better Alternative

Perhaps a better alternative to traditional FAA implied preemption arguments can be found in express preemption under the ADA. The ADA expressly preempts state regulation "relating to a price, route or services of a an air carrier." 49 U.S.C. 41713(b)(1). Congressional intent to prevent state regulation of prices, routes, and services is clear and any attempt by a state to regulate

airline “services” arguably runs afoul of the express preemption provision of the ADA. Consistent with this, courts have generally viewed the “relating to … services” language broadly, applying it to areas not directly regulated by DOT. Thus, state law claims asserted against airlines related to protecting air crew and passengers from SARS-CoV-2 exposure would arguably impact the services that airlines provide in a way that would impact air carrier services.

## Conclusion

The reality remains that succeeding on a preemption defense in a case involving SARS-CoV-2 exposure will be challenging. Air carriers would benefit significantly if federal agencies provided regulatory guidance on protecting passengers and air crew from exposure. Regardless, preemption remains a critical line of defense for air carriers facing litigation and it remains imperative that the limits of the doctrine continue to be tested when the opportunity arises.

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