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***Midwest v. Braun*: The Ninth Circuit's Recent Opinion on Federal Aviation Act Preemption**

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On February 9, 2009, the Ninth Circuit confirmed that preemption under the Federal Aviation Act of 1958 (FAA) is alive and well, though not unlimited. In *Midwest Express Holdings v. Braun*, Case No. 07-55063, the court held that the FAA impliedly preempts all state-law aviation tort claims *only* in areas in which the Federal Aviation Administration issues “pervasive regulations.” In areas without pervasive regulations or other bases for preemption, state standards of care apply.

Midwest involved personal injury claims by a passenger who fell from an airplane's stairs. The passenger sued the airline and the airplane's manufacturer, claiming that the stairs were defectively designed.

In analyzing whether the FAA preempts the passenger's claims, the Ninth Circuit both followed and refined *Montalvo v. Spirit Airlines*, which had been the court's most definitive opinion addressing FAA preemption. *Montalvo* held that the FAA preempts state-law claims related to passenger warnings. In *Midwest*, however, the court explained that *Montalvo* does not stand for broad preemption of all state-law aviation personal injury claims. Neither does *Montalvo* allow courts to use expert testimony to establish federal standards of care in areas without pervasive regulations. Instead, the court interpreted *Montalvo* to preclude only claims in pervasively regulated areas. State standards of care apply in all other areas, absent other grounds for preemption. Because only one federal regulation relates to airplane stairs, the court held that the FAA does not preempt the passenger's state-law claims in *Midwest*.

The Ninth Circuit's holding attempted to reconcile the apparent circuit split over FAA preemption in the field of aviation safety. In the wake of *Midwest*, the debate about FAA preemption most likely will shift to how to define “pervasive regulations.” Courts will also have to undertake case-by-case analyses of whether pervasive federal regulations were violated.

For example, in a case involving allegations of flight into known icing conditions, a manufacturer defendant can point to the Federal Aviation Administration's detailed procedures for certification for flight into known or forecast icing conditions. These procedures require that a manufacturer perform an extensive engineering analysis to show the adequacy of the ice protection systems. The manufacturer must also perform flight tests to demonstrate that the airplane is capable of operating safely in various precisely defined types of icing conditions. In cases involving icing, therefore, a defendant would have a strong argument that these certification requirements are sufficiently pervasive to support federal preemption. The court would then evaluate whether the accident aircraft complied with these certification regulations. In areas less closely regulated, such as the design of airstairs, pervasiveness will be more difficult to establish. Preemption claims in those cases may depend upon which party succeeds in defining the relevant “area” of regulation.

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