

# Client Bulletin

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## Peanuts, Pregnancy . . . And Pre-Emption

The Federal Aviation Act (“FAA”) provides in one of its pre-emption provisions that “. . . a State, may not enact or enforce a law, regulation or other provision having the force and effect of law related to a price, route, or service of an air carrier.” This section is known as the Airline Deregulation Act (“ADA”) which amended the FAA in 1978.

This FAA pre-emption provision frequently has been interpreted by U.S. courts, with some courts, notably the Court of Appeals for the Second Circuit in *Air Transport Ass’n of America, Inc. v. Cuomo*, 520 F.3d 281 (2d Cir. 2008) taking an expansive view of the term “service.” The Ninth Circuit Court of Appeals, sitting in California, has construed the term “service” much more narrowly in *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9<sup>th</sup> Cir. 1988).

Two recent decisions, one from the U.S. District Court for the Southern District of New York, which is governed by the Second Circuit’s rule in *Cuomo*, and one from the Ninth Circuit, have expanded the jurisprudence of the pre-emption doctrine.

The more factually interesting of the two decisions is the Southern District’s opinion in *Khan v. American Airlines, Inc.*, \_\_\_ F.Supp. 3d \_\_\_, 2008 WL 5110852 (S.D.N.Y. 2008), where the mother of the infant plaintiff contacted the airline two months before her family’s planned trip on a flight from New York to California to advise that her son had a “severe life threatening anaphylactic allergy to treenuts and to nuts.”

When the family boarded the flight, the plaintiff mother (who was a physician) again reminded the boarding agent about the allergic condition and was allegedly assured that no nuts would be served on the flight. After boarding, the mother learned that while no nuts would be served in the main cabin (where the plaintiffs were apparently

seated), nuts would be served in first class. A verbal disagreement occurred between the flight attendant and the mother, who alleged that she was rudely treated by the flight attendant. Plaintiff continued uneventfully on the flight to California and thereafter sued, alleging intentional infliction of emotional distress.

Defendant moved to dismiss, arguing that the confrontation concerning the peanut policy of the airline related to services provided by the airline and therefore was pre-empted by the ADA. The court focused on what is a “service” under the provisions of the ADA. Adopting the broader interpretation of “service” as announced by the Second Circuit in *Cuomo*, it found that service of onboard amenities such as nuts did not merely include the physical dispensation of the nuts but the necessary communications with passengers regarding those amenities. As a result, the court concluded that statements by airline employees in response to queries about food service fell “comfortably within the broad construal of ‘service’” contemplated by *Cuomo*.

The court further found that plaintiff’s claims that defendant’s agent had treated her rudely and unprofessionally were likewise pre-empted by the ADA. It concluded that, “while the alleged conduct of [defendant’s agent], if true, is far from ideal, it is comfortably within the zone of rude and unprofessional behavior that the [cited] cases have deemed pre-empted.”

A slightly different approach was taken by the Ninth Circuit in *Midwest Express Holdings, Inc. v. Braun*, decided on February 9, 2009, which dealt with implied pre-emption under different sections of the Federal Aviation Act pertaining to claims against aircraft manufacturers. The court evaluated if the FAA safety and design requirements impliedly pre-empted state law claims. In *Midwest Express*, the original plaintiff was a pregnant woman who fell on the airplane’s stairway, injuring herself and her fetus. She sued *Midwest Express*, which settled with her for \$8 million. *Midwest Express* then sued the manufacturer of the

aircraft for indemnity, claiming that the stairs were defectively designed with only one handrail. The manufacturer argued for dismissal on the grounds that the Federal Aviation Act pre-empted the passenger's personal injury claim and hence the indemnity claim as well.

The Ninth Circuit held that the pre-emption doctrine, when applied in the context of the FAA, does not require federal courts to independently develop a standard of care when there are no relevant federal regulations. Instead, it means that when the agency issues pervasive regulations in an area like passenger warnings, the FAA pre-empts all state law claims in that area. Where there is no pervasive regulation or other grounds for pre-emption, the state law standard of care remains applicable. Finding that there were no federal regulations which dealt with the issue of aircraft stairs, any requirement that they be fixed on a regular basis, or that they have one or two handrails, the court found that plaintiff's common law tort claims were not pre-empted and *Midwest Express* was free to assert the claim that the stairs were defective.

The difference between the outcomes in the two cases is that the *Khan* case dealt with express pre-emption under the Airline Deregulation Act section of the FAA, which specifically relates to rates, routes and services, while *Midwest Express* dealt with implied pre-emption under the general safety and design sections of the Federal Aviation Act. *Midwest Express* highlights the increasing reluctance of the courts to find implied pre-emption where the area is not comprehensively covered by federal regulations and where pre-emption would bar routine personal injury claims which have generally been considered, even in the field of aviation law which is pervasively regulated by the FAA, to be within the purview of the state's jurisdiction.

Pre-emption of state law by federal regulations is an evolving field and undoubtedly the last chapter has yet to be written on pre-emption under the various sections of the FAA.



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