Preemption Confliction

Are air carriers immune from tort liability in Texas?

BY J. STEPHEN BARRICK

Anyone who has litigated for or against an airline or air carrier has likely encountered the confusing issue of federal preemption of state law under the Airline Deregulation Act. Adding to the confusion, a lack of clear guidance from the U.S. Supreme Court has led state and federal courts in Texas to evaluate the issue differently. And a recent Supreme Court decision now reveals that the discrepancy between state court and federal court can be determinative.

Under the ADA, air carriers are generally shielded from state regulation. Congress passed the act in 1978 after decades of extensive federal regulation of the airline industry by the now-defunct Civil Aeronautics Board. Congress's aim was to improve competition by promoting reliance on competitive market forces as much as possible.[1] And to prevent states from undermining the goals of deregulation by imposing their own regulations, the ADA broadly provides that no state may "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."[2]

In its seminal ADA preemption case, *Morales, Attorney General Of Texas v. Trans World Airlines, Inc.*, the Supreme Court held that the key phrase "related to" means "reference to" or "connection with" an air carrier's rates, routes, or services.[3] While the scope of preemption is deliberately broad, the court cautioned that laws having "too tenuous, remote, or peripheral" an effect on a carrier's rates, routes, or services are not preempted. The court did not explain what it means for a law to be "too tenuous, remote, or peripheral," but cited as examples state laws prohibiting gambling and prostitution.[4]

The "law, regulation, or other provision having the force and effect of law" in *Morales* was a set of airfare advertising guidelines that, if not followed by an airline, would be deemed an unfair or deceptive act or practice in violation of the states' existing consumer protection statutes. The Supreme Court held that those advertising guidelines were preempted by the ADA because they expressly referenced airfares and had the "forbidden significant effect" on airfares.[5]

Because *Morales* involved what the Supreme Court considered an "obvious" case of ADA preemption, the court's opinion did little to clarify how lower courts should apply the "related to" standard in general and provided little guidance on where courts should draw the line between laws that are preempted and laws that are "too tenuous, remote, or peripheral" to be preempted. This made it difficult for lower courts to consistently apply the standard, particularly with regard to common-law tort claims. After all, airlines are service providers, so *any* claim against an airline has some arguable "reference to" or "connection with" the airline's services.

The U.S. Court of Appeals for the 5th Circuit in 1995 attempted to provide some clarity in *Hodges v. Delta Airlines, Inc.*[6] There, a passenger sued the airline for negligence after she was injured by objects that fell from an overhead storage compartment. The airline argued that the passenger's state-law negligence claim was "related to" the airline's baggage handling services and was therefore preempted. But the 5th Circuit, sitting en banc, found that the carrier's definition of "services" was too broad. For purposes of ADA preemption, the court held, "services" referred only to the bargained-for provision of labor from the airline to the consumer, not the carrier's maintenance and operation of an aircraft.[7] Applying this definition of "services," the 5th Circuit held that the plaintiff's personal injury tort claim did not "expressly reference" the carrier's services and that enforcement of the plaintiff's tort claim would not "significantly affect" the carrier's services. Therefore, the claim was not "related to" the airline's rates, routes, or services and was not preempted.[8]

The following year, in a similar case, the Texas Supreme Court reached the same conclusion but rejected the 5th Circuit's reasoning. In *Continental Airlines, Inc. v. Kiefer,* the court addressed two personal injury claims—one involving a passenger who was injured by luggage that fell from an overhead storage bin (as in *Hodges*) and another involving the airline's failure to provide meet-and-assist services to a passenger with mental illness who wandered away from the terminal and was injured. Rejecting the analysis in *Hodges,* the Texas Supreme Court held that both claims were "clearly" related to the airline's prices and services, noting that tort liability "cannot but have … a significant impact upon the fares [airlines] charge."[9] Nevertheless, the court held that the plaintiffs' negligence claims escaped preemption, but for an entirely different reason: They were not a "law, regulation, or other provision having the force and effect of law," as required for ADA preemption. To reach this conclusion, the Texas Supreme Court embraced reasoning from a 1995 U.S. Supreme Court decision, *American Airlines, Inc. v. Wolens,* holding that simple contract claims generally are not preempted, even when "related to"

an airline's rates, routes, or services, because they merely seek to enforce the self-imposed undertakings of the air carrier and not some external legal duty imposed by state law.[10] Applying the same reasoning to the negligence claims in *Kiefer*, the Texas Supreme Court held that "negligence law is not so policy-laden in imposing liability for personal injuries that suits for damages like those before us are preempted by the ADA."[11]

Although the 5th Circuit and Texas Supreme Court reached the same conclusion on whether personal injury and property damage claims are preempted, their analyses are inverted. Under the ADA, a claim is preempted if it: (a) is a "law, regulation, or other provision having the force and effect of law" and (b) "relates to" the rates, routes, or services of an air carrier. The 5th Circuit held that personal injury claims escaped preemption because they did not "relate to" the carrier's services—the second prong.[12] The Texas Supreme Court expressly rejected this, holding that the claims "clearly" related to the carrier's rates, routes, or services. It instead relied on the first prong, holding that the common-law negligence claims in that case were not a "law, regulation, or other provision having the force and effect of law."[13]

As a practical matter, the differences between these federal and state decisions on ADA preemption were academic because their ultimate conclusions were the same. But a 2014 decision from the U.S. Supreme Court may have changed that.

In *Northwest, Inc. v. Ginsberg*, the Supreme Court considered whether a claim for breach of the implied duty of good faith and fair dealing implied in contracts under Minnesota law was preempted by the ADA. In its opinion, the court considered and rejected the argument that common-law claims are exempt from preemption, holding, categorically, that a state common-law claim is an "other provision having the force and effect of law" and is therefore within the preemptive scope of the statute.[14]

The Texas Supreme Court's decision in *Kiefer* conflicts with this holding. *Kiefer* held that common-law personal injury and property damage claims are not an application of state law for purposes of ADA preemption, while *Ginsberg* held that state common law—which obviously would include common-law negligence—is an "other provision having the force and effect of law" for purposes of ADA preemption. *Ginsberg* has implicitly overruled this part of *Kiefer*.

The effect of *Ginsberg* could be dramatic in Texas because *Kiefer* held that common-law personal injury and property damage claims against air carriers are "related to" the carrier's rates. If, as the court held, such claims are "related to" the carrier's rates, and if, as *Ginsberg* held, such claims are also an "other provision having the force and effect of law," then the conclusion is inescapable that such common-law tort claims are *always preempted*.

To make matters worse, the tension between *Kiefer* and *Ginsberg* sets up a federal-state divide in Texas. Unlike the Texas Supreme Court, the 5th Circuit did not rely on a finding that the claims were not an application of state law. Instead, the 5th Circuit held that such claims are not "related to" the carrier's services. The end result is that in federal court the claims are not preempted under *Hodges*, but the identical claims in state court are likely preempted under *Kiefer* and *Ginsberg*.

Most courts across the country (including, ostensibly, those in Texas) hold that personal injury and property damage tort claims are not preempted. But, until the Texas Supreme Court either clarifies or overrules *Kiefer*, a strong argument can be made that the very same claims in Texas state court are preempted as a matter of law.

In fact, this argument can be extended to include all tort claims against air carriers because *Kiefer* appears to hold that tort claims always significantly impact the fares charged by airlines and, therefore, are always "related to" the carrier's rates.[15] And, in fact, in the 20 years since the *Kiefer* decision, it appears that no state appellate court in Texas has found that a tort claim against an air carrier survived preemption.[16]

The practical takeaway from this is that plaintiffs seeking to bring state-law claims against air carriers would be wise to avoid state court and seek a federal forum when possible. And, conversely, air carriers should think twice before removing state common-law tort cases to federal court. Ironically, Texas state courts are more likely to find that the claims are preempted by federal law. **TBJ**

NOTES

1. *Nw., Inc. v. Ginsberg*, 134 U.S. 1422, 1428 (2014); 49 U.S.C. § 40101(a)(6).
2. 49 U.S.C. § 41713(b)(1); *Ginsberg*, 134 S.Ct. at 1430.
3. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). The court borrowed this interpretation from its ERISA preemption jurisprudence construing a similar phrase in the ERISA statute. *See id.* (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)).
4. *Id.* at 390.
5. *Id.* at 387-89. Based on this analysis, most federal circuit courts hold that a law or claim is "related to" a carrier's rates, routes, or services if it "expressly references" or "significant[ly] effects" carrier rates, routes, or services. *See Gary v. Air Group, Inc.*, 397 F.3d 183, 186 (3d Cir. 2005); *Branche v. AirTran Airways, Inc.*, 342 F.3d 1248, 1255 (11th Cir. 2003); *United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323, 335 (1st Cir. 2003); *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 609 (7th Cir. 2000).
6. 44 F.3d 334 (5th Cir. 1995) (en banc).
7. *Id.* at 336-37. The same day, the 5th Circuit issued another en banc decision further clarifying that the "services" must also pertain to the "economic or contractual aspects" of the bargain. *See Smith v. America West Airlines, Inc.*, 44 F.3d 344, 347 (5th Cir. 1995) (en banc).
8. *Hodges*, 44 F.3d at 340.
9. *Cont'l Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 281, 283-84 (Tex. 1996).
10. *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 228-29 (1995).
11. *Kiefer*, 920 S.W.2d at 281-82. The Texas Supreme Court's analysis was evidently the first of its kind. As Justice Sandra Day O'Connor noted in her concurring and dissenting opinion in *Wolens*: "Many cases decided since *Morales* have allowed personal injury claims to proceed, even though *none has said that a State is not 'enforcing' its 'law' when it imposes tort liability on an airline*. In those cases, courts have found the particular tort claims at issue not to 'relate' to airline 'services,' much as we suggested in *Morales* that state laws against gambling and prostitution would be too tenuously related to airline services to be preempted." *Wolens*, 513 U.S. at 242 (O'Connor, J., concurring in part and dissenting in part) (emphasis added).
12. *Hodges*, 44 F.3d at 340.
13. *Kiefer*, 920 S.W.2d at 281-83.
14. *Ginsberg*, 134 S.Ct. at 1429-30. The 1st Circuit recently elaborated: "The Supreme Court has made it pellucid that state common-law causes of action are provisions that have the force and effect of law for purposes of ADA preemption." *Tobin v. Fed. Express Corp.*, 775 F.3d 448, 453 (1st Cir. 2014).
15. *See Kiefer*, 920 S.W.2d at 281.
16. Most recently, the 1st Court of Appeals in Houston reversed a state common-law fraud judgment against DHL Express based on DHL's alleged fraudulent inducement of a commercial reseller agreement, holding that the claim was preempted by the ADA (and by a similar preemption clause in the Federal Aviation Administration Authorization Act relating to motor carriers). *See DHL Express (USA), Inc. v. Falcon Express Int'l, Inc.*, 408 S.W.3d 406, 417 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

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