

# Focus

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## Will Aviation Pre-emption Cases Soar?

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The Supreme Court's recent opinion in *Wyeth v. Levine*, 2009 DJDAR 3199, has drawn significant attention over the last month. The court's decision lived up to its billing, and effectively defined the future of the federal pre-emption defense in pharmaceutical product liability cases. But industries regulated by the Food and Drug Administration are not the only ones taking note of Supreme Court pre-emption developments. High-stakes litigation arising out of major aviation accidents is another fertile ground for pre-emption arguments.

Federal pre-emption in the field of aviation safety has long been hotly contested, and may be the next pre-emption issue on the Supreme Court's mind. Just as the FDA heavily regulates medical devices and pharmaceutical drugs, so does the Federal Aviation Administration enforce a comprehensive scheme of aviation safety regulations. According to a recent 9th Circuit decision, the Federal Aviation Act of 1958, and regulations promulgated pursuant to it, "establish complete and thorough safety standards for air travel, which are not subject to supplementation by, or variation among, state laws." *Montalvo v. Spirit Airlines*, 508 F.3d 464 (9th Cir. 2007).

In short, "[t]he legislative history underlying the original Act stressed the importance of a single uniform system of regulation, especially with regard to air safety." *French v. Pan Am Express Inc.*, 869 F.2d 1 (1st Cir. 1989). Moreover, Congress' consolidation of control over aviation in one agency indicated its intent to federally pre-empt aviation safety. *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624 (1973). The FAA administrator's express statutory charge to ensure the safety of aircraft, the efficient use of airspace, and the protection of persons on the ground requires a "delicate balance between safety and efficiency. ... The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled." These congressional objectives demand the conclusion that "federal law occupies the entire field of aviation safety."

Although the act directs the FAA to "promote safe flight of civil aircraft in air commerce by prescribing minimum standards required in the interest of safety," this does not mean that states may create different or additional standards. See, e.g., *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), in which the court held that congressional directive to enact "minimum" standards governing tanker design nonetheless "foreclose[s] the imposition of different or more stringent state requirements" where Congress intended federal law to occupy the field; *Abdullah v. American Airlines Inc.*, 181 F.3d 363 (3d Cir. 1999), in which the court found pre-emption by "minimum" federal standards because "the absence of a conflict" between state and federal law is "beside the point" when evaluating field pre-emption; and *Montalvo*, in which the court held that the Federal Aviation Regulations "establish complete and thorough safety standards for interstate and international air transportation that are not subject to supplementation by, or variation

among, states."

Against this backdrop of congressional intent, a majority of circuits have found that federal regulations pre-empt state standards of care with regard to aviation safety.

Therefore, in a majority of jurisdictions, a plaintiff must show that the defendants breached an FAA-mandated regulatory standard of care to recover at all. While a plaintiff's state law remedies are preserved,

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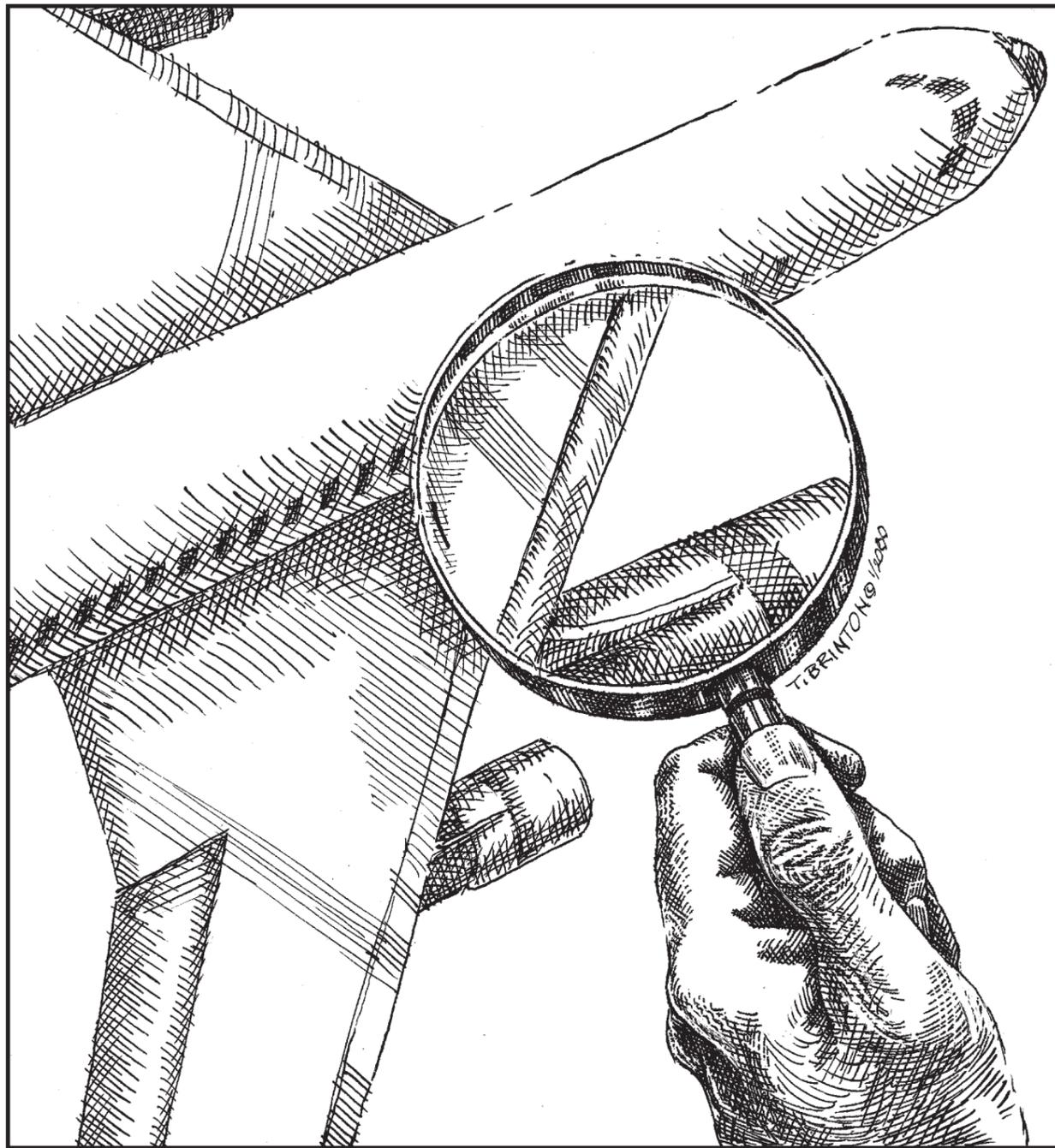
the federal standards of care control the liability determination. Put another way, the claim is transformed into a question of compliance with FAA-mandated safety standards. Thus, in order to determine liability, a court is first required to interpret the meaning and pre-emptive scope of the applicable federal aviation regulations which define the standard of care. Only then is the fact-finder permitted to decide whether any defendant violated the standard of care entitling the plaintiff to recover damages from the defendant.

The concept of field pre-emption of the standard of care in aviation is not to be confused with express pre-emption, where Congress has expressly prohibited any rights that may be conferred by state law. Courts addressing pre-emption in aviation cases clearly recognize a plaintiff's right to recover his or her damages when the claim implicates an aspect of aviation safety regulated by the FAA. A plaintiff's right to recovery, however, is balanced against the congressional interest of uniformity in determining aviation safety standards applied to aircraft manufacturers, airlines and airports. Thus, the plaintiff's remedy is preserved but, the claims are stripped of any elements imposing a state law standard of care, and each and every theory of liability must be viewed through the lens of the FAA's regulatory framework.

On Feb. 9, 2009, the 9th Circuit issued the most recent pronouncement on the scope of federal pre-emption in aviation accident cases, and confirmed that pre-emption under the Federal Aviation Act of 1958 is alive and well, though not unlimited. In *Midwest Express Holdings v. Braun*, 07-55063, the court held that the act impliedly pre-empts all state law aviation tort claims *only* in areas in which the FAA issues "pervasive regulations." In areas without pervasive regulations or other bases for pre-emption, 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 Federal Aviation Act pre-empts the passenger's claims,



the 9th Circuit both followed and refined *Montalvo v. Spirit Airlines*, which had been the court's most definitive opinion addressing Federal Aviation Act pre-emption. *Montalvo* held that the act pre-empts state law claims related to passenger warnings. In *Midwest*, however, the court explained that *Montalvo* does not stand for broad pre-emption 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 pre-emption. Because only one federal regulation relates to airplane stairs, therefore, the court held that the act does not pre-empt the passenger's state law claims in *Midwest*.

The 9th Circuit's holding attempted to reconcile the apparent circuit split over Federal Aviation Act pre-emption in the field of aviation safety. The decision in *Midwest* is the subject of a request for en banc review. If the decision stands, however, the debate about pre-emption involving the

act 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 accidents caused during flight into known icing conditions, such as the recent Continental Connection Flight 3407 accident in Buffalo, N.Y., a manufacturer defendant can point to the FAA's detailed procedures for certification for flight into known 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 pre-emption. 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 may be more difficult to establish. Pre-emption claims in those cases may depend on which party succeeds in defining the relevant "area" of regulation.

Given the Supreme Court's recent receptiveness to pre-emption arguments in *Wyeth* and *Riegel v. Medtronic*, 128 S. Ct. 999 (2008), the issue of aviation pre-emption is a prime candidate for Supreme Court review. Whether it will be *Midwest* or another aviation case remains to be seen. The 9th Circuit's recent decision in the *Midwest* case strikes a delicate balance between the rights of plaintiffs and aviation defendants, but in this ever-changing landscape of federal pre-emption in aviation cases, combined with developments in cases involving other similarly regulated defendants, there is room for further refinement of the concept.

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